

STATEMENT OF PURPOSE AND NEED

Introduction and Background

Under the Federal Aviation Act of 1958, the basic means of regulating and licensing air carriers to perform air transportation is the certification procedure. That Procedure specifically contemplates and, indeed, requires extensive and time-consuming investigation by the Civil Aeronautics Board into all matters pertaining to the authorization, modification, suspension and deletion of air transportation.

In keeping with the Congressional determination that the public interest is best served by primary reliance on the certification procedure, the Board's power to grant exemptions from the normal requirement of certification is very limited in scope. Thus, the present language of section 416 (b) of the Act precludes the Board from acting to grant an exemption unless it can find that the operations of the applicant air carrier are so limited in extent or affected by unusual circumstances that enforcement of the certification procedures would be an "undue burden" on the carrier and not in the public interest.

The Board has often acknowledged that its exemption power is severely restricted. A representative expression of the Board's own view of the scope of its power may be found throughout the history of its decisions. See, e.g., the Standard Air Lines Exemption Request, 9 CAB 583, 584-85 (1948), in which

the Board noted that:

"The legislative history of section 416(b) of the Act indicates that its primary purpose is to provide relief for the irregular and sporadic operations of the so-called fixed-base operators and for the carriers engaging in unusual or limited operations. There is nothing in the Act or its legislative history to justify the Board in bypassing or ignoring the certification provisions of section 401 of the Act by authorizing extensive new operations which, although involving some experimental characteristics, are neither unusual as to circumstances nor limited in extent."

The courts have consistently upheld the Board's restrictive interpretation of its power (and, on occasion, have reversed its attempts to extend its boundaries), noting that the primary tool under the Act is certification, with exemptions to be granted "sparingly". See, e.g., Island Airlines, Inc. v. CAB, 363 F.2d 120, 125 (9th Cir. 1966). See also, e.g., Utah Agencies v. CAB, 504 F.2d 1232 (10th Cir. 1975); ALPA Int'l v. CAB, 458 F.2d 846 (D.C. Cir. 1972); Kodiak Airways, Inc. v. CAB, 447 F. 2d 341 (D.C. Cir. 1971)

The difficulty arises out of the increasingly complex and time-consuming nature of the certification process, and the recurring impossibility of making an urgent and otherwise meritorious request for relief "fit" within the reach of the expeditious, but restricted, exemption power. That collision has

resulted in the periodic frustration of the Board's ability to discharge its primary statutory mandate -- the duty to foster and encourage the development of a sound and responsive air transportation system.

Nowhere has this frustration of purpose been more evident than in the area of domestic all-cargo operations. If a single point of agreement has emerged from all of the various proposals to reform or modify air transport regulation, and from the months of hearings with respect to those proposals, it is that the regulation and promotion of all-cargo services has been a dismal failure.

The uncontradicted evidence of record shows that the development of domestic all-cargo services has been severely stunted by a combination of inappropriate regulation and by carrier and regulatory neglect. Domestic all-cargo air services have been consistently and substantially unprofitable, resulting in their steady decline in availability during the past decade. Clearly, the neglect of those services has been a direct function of the preoccupation of regulatory and carrier management with the predominant passenger services which account for in excess of 90% of air transport revenues. The serious decline of all-cargo air service is particularly regrettable in light of the vital and unique role which that service performs for the Nation's economy, the delivery of life-giving health services, and in response to the needs of the national defense.

To a certain extent, as noted, the Board's ability to redress this unsatisfactory state of affairs has been hampered by restrictions on its power to act. Thus, in specific instances, the statutory limitations upon the Board's exemption power have deprived the Board of an appropriate degree of regulatory flexibility to take prompt action, or to grant prompt relief, warranted by considerations of the public interest but beyond the apparent scope of the Board's authority under Section 416(b), solely because of the size of the operation for which exemption relief was required.

A recent example of this deficiency is provided by the Board's denial of an application by Federal Express Corporation, a new all-cargo carrier specializing in the transportation of small-package traffic, for exemption authority which would have permitted Federal Express to avoid significant waste and inefficiency resulting from severe capacity strains arising out of the burgeoning demand for its unduplicated package express services.

The relief requested by Federal Express was for grant of a temporary exemption to permit the operation of five large aircraft, as a supplement to the carrier's basic small-aircraft fleet, to accommodate the growing demand which had saturated all available lift capacity. Grant of the application would have permitted savings of up to \$8.7 million in annual costs, and

over 4 million gallons of scarce jet fuel, while enhancing the efficiency and reliability of a new and valuable air service.

In its December 1975 Order denying the application of Federal Express for DC-9-15 authority, the CAB indicated clearly that it felt legally barred from granting Federal Express the requested exemption relief because of the scope of the carrier's operation.

Although the Board invited Federal Express to pursue the certification process, and promised to give "prompt and careful consideration" to such an application, the fact remains that the "solution" offered no remedy at all for the urgent capacity strains and waste presently burdening the Federal Express operation. At best, the certification process would assure the prolongation of those strains by not less than two years.

The Board stated clearly that it had no intent "to discourage the entry or growth of new cargo carriers or to impede the introduction of innovative services in the air transportation system". It must be recognized, however, that notwithstanding the Board's intent, the unavoidable effect of its decision does impede the efficient conduct of Federal Express' highly innovative small-package service.

The essence of the proposed Bill is to provide a solution to the anomaly created by a statutory exemption power which is so limited as to leave the Board with no discretion or legal authority to avoid an unintended and undesirable result, adverse to the very public interest which the Board is bound to promote.

Summary of Bill

The attached draft Bill amends the Board's exemption power by adding a new proviso to the present standards for grant of an exemption. That new proviso would enable the Board to grant an exemption from the normal certification requirement so as to permit the conduct of all-cargo operations in interstate air transportation, pending consideration of an application for the initial certification of such operations, upon a finding that the grant of such exemption is compatible with the public interest.

In essence, the draft Bill provides for a limited expansion of the Board's present exemption power to give the agency greater flexibility of action in the area most critically in need of regulatory relief. It is important to note that the Board's expanded power is expressly tied to operations which are the subject of an application for initial certification, thus clearly reflecting an intent to continue the basic statutory reliance upon certification as the principal means of licensing air transportation ventures.

Moreover, the limitation of the broadened exemption power to all-cargo operations, and the further limitation to the circumstance of an initial application for certification only, serves two objectives. First, it limits the potential impact of the exercise of the new power upon the established pattern of authorizations in the industry to a level having a de minimus potential for harm or disruption of predominant passenger services. Second, the limitation to initial certification applications is addressed to relieving the unique and critical impact of unavoidable regulatory delay on those new applicants which -- unlike the established carriers -- must attempt to provide efficient service and remain financially viable without adequate operating authority, absent the possibility of interim exemption relief.

The modest expansion of the Board's exemption power as proposed will enable the Board to act expeditiously to foster and promote needed new all-cargo air transportation services, whose development would be impeded or destroyed by the delays inherent in the normal certification process, pending the orderly pursuit of that process.

A BILL

To amend the Federal Aviation Act of 1958, as amended, to broaden the power of the Civil Aeronautics Board to grant relief by exemption in certain cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that:

SEC. 1. Except as otherwise specified, wherever in this Act an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Federal Aviation Act of 1958, as amended.

SEC. 2. Section 416(b)(1) is amended by adding the following at the end thereof:

"Provided, however, that nothing in this section shall prevent the Board from granting an exemption from the requirements of this title so as to authorize the conduct of all-cargo operations in interstate air transportation, pending consideration of an application for initial certification pursuant to Section 401, if the Board finds that the issuance of such exemption is in the public interest."

SEC. 3. Section 101 is amended by renumbering paragraphs (11) through (38) thereof as paragraphs (12) through (39) and by inserting after paragraph (10) the following new paragraph:

"(11) 'All-cargo air transportation' means air transportation of property, or of property and mail, only."