

STUDENT COMMENT

THE RULEMAKING PROCEDURE OF THE CIVIL AERONAUTICS BOARD: THE BLOCKED SPACE SERVICE PROBLEM

The Civil Aeronautics Board (hereinafter referred to as the Board or as the CAB) is charged with the economic regulation of the air transport industry.¹ Freight transportation is an increasingly important part of this industry, and the major carriers have invested large sums in freight operations.² A 1964 Board action³ excluding many carriers from offering blocked space freight service⁴ has resulted in litigation which has importance not only for the air transport industry, but, because of the nature of the questions raised, for all industries subject to intensive regulation by federal agencies. It is the purpose of this note to examine and comment upon this litigation.

I. BACKGROUND

In 1962 Congress passed Public Law 87-528,⁵ amending the Federal Aviation Act,⁶ and providing that all air carriers might engage in charter flights under appropriate Board regulation without regard to restrictions contained in their certificates of public convenience and necessity.⁷ On November 13, 1962, the Board issued a notice of proposed rulemaking to determine what, if any, modification should be made to section 207 of the Board's economic regulations⁸ due to Public Law 87-528. After preliminary investigation, the Board, on January 23, 1964, issued a new notice of proposed rulemaking entitled "Charter Trips and Special Services; Statements of General Policy."⁹

¹ Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. §§ 1301-542 (1964).

² See Brief for Petitioner, p. 5, *American Airlines, Inc. v. CAB*, petition for cert. filed, 35 U.S.L. Week 3037 (U.S. June 6, 1966) (No. 304).

³ 29 Fed. Reg. 11589 (1964).

⁴ The Board defined "blocked space service" as follows:

"Blocked space service" means the carriage of property in all-cargo aircraft at wholesale rates pursuant to an effective tariff stating a rate applicable only when the user reserves and agrees to pay for a specified amount of space or lift on a regularly recurring basis for a period of not less than 60 days.

¹⁴ C.F.R. § 399.37(a)(2) (1966).

⁵ 76 Stat. 143 (1962).

⁶ 72 Stat. 731 (1958), as amended, 49 U.S.C. §§ 1301-542 (1964).

⁷ This amendment in effect reversed Board decisions which had held that carriers not certificated to carry persons could not engage in charter passenger flights. See *Charter Flight Tariff Investigation*, 15 C.A.B. 921 (1952), *aff'd sub nom. Flying Tiger Line, Inc. v. CAB*, 204 F.2d 404 (D.C. Cir. 1953). At the end of World War II, these carriers attempted to take advantage of the anticipated growth in demand for air freight transportation. See generally *Air Freight Case*, 10 C.A.B. 572 (1949); *Domestic Cargo-Mail Serv. Case*, 36 C.A.B. 344 (1962).

⁸ 14 C.F.R. § 207 (1966). Section 207 regulates charter trips and special services.

⁹ 29 Fed. Reg. 1476 (1964).

In this statement the Board first proposed to distinguish two classes of carriers: all-cargo carriers and combination carriers.¹⁰ The Board proposed different rules with respect to charter flights for the all-cargo carriers than for the combination carriers.¹¹ The Board also proposed the following statement of policy:

It is the policy of the Board to permit the all-cargo carriers to sell blocked space at wholesale rates to such combination carriers as may choose to do so to provide service between the certificated points of the combination carrier involved.¹²

Several combination carriers, including petitioners in the principal case, filed written responses to this proposed rulemaking. On June 22, 1964, the Board issued a supplemental notice to the proposed rulemaking within which was the following:

Included in these questions [for oral argument] is the proposal advanced by certain all-cargo carriers to extend the applicability of the proposed policy on the sale of blocked space by such carriers to include sales to air freight forwarders and other large volume shippers, as well as to combination carriers.¹³

The combination carriers (hereinafter designated as American)¹⁴ were given an opportunity to respond to this question on oral argument.

Shortly thereafter, Slick Corporation, an all-cargo carrier, filed a tariff with the Board which incorporated blocked space service. American objected to the Slick tariff and filed defensive tariffs.¹⁵ The Board suspended all the tariffs incorporating blocked space pending an investigation to determine the lawfulness of such tariffs.¹⁶ On August 7, 1964, the Board issued Policy State-

¹⁰ Combination carriers are those carriers holding certificates of public convenience and necessity authorizing the transportation of persons, property, and mail. All-cargo carriers are those carriers whose certificates authorize only the transportation of property and mail.

¹¹ The Board proposed that the off-route charters of combination carriers be limited to 2% of their on-route revenue plane miles per year, and that no more than one-third of such charters take place in any consecutive three-month period. All-cargo carriers were to be permitted unlimited off-route charter flights within the area of their certificated operations. (The area of certificated operations would be either domestic or foreign service depending upon the carrier.)

¹² 29 Fed. Reg. 1479 (1964). This proposal involved a pooling arrangement. The combination carriers would be allowed to reserve space on flights of the all-cargo carriers and could use that space to transport freight that they might otherwise have had to ship on their own all-cargo aircraft.

¹³ 29 Fed. Reg. 8121 (1964). This extension is significant in that the proposal no longer merely involves prospective pooling arrangements among carriers.

¹⁴ American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc. were the combination carriers who pursued the litigation through the courts.

¹⁵ A "tariff" is a schedule of rates for the transportation of goods. It is open for public inspection, and the rates stated are those currently charged by the carrier publishing the tariff. A defensive tariff is a tariff similar to the filed tariff of a competitor. The purpose of the defensive filing is to permit competition on even terms in the event the competitor's tariff becomes effective.

¹⁶ Federal Aviation Act of 1958 § 1002(g), 72 Stat. 790, 49 U.S.C. § 1482(g) (1964).

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ment 24,¹⁷ stating that it would be the policy of the Board to permit only all-cargo carriers to offer blocked space service. At the same time the Board lifted its suspension of the Slick tariff, but continued the investigation.¹⁸ On August 11, 1964, the Board summarily rejected the blocked space tariffs offered by the combination carriers because their tariffs were inconsistent with the Board's regulations, that is, inconsistent with Policy Statement 24.¹⁹ The combination carriers appealed to the United States Court of Appeals for the District of Columbia Circuit.

II. THE LITIGATION TO DATE

Before a three-judge panel of the court of appeals, American argued that the Board had improperly revoked outstanding authority which American had under its certificate of public convenience and necessity.²⁰ This argument may be summarized as follows. When the Board lifted its suspension of the Slick blocked space tariff, it admitted that Slick had authority to file such a tariff. Since the certificates of Slick and American are identical insofar as they provide authority to transport property and mail, the subsequent summary rejection of the American blocked space tariff effected a revocation of American's authority to file such a tariff. This action was taken without providing American with the adjudicatory (adversary) hearing²¹ required by the FAA²² for the modification of existing certificates, and was therefore invalid. American also argued that the Board, in discriminating between Slick and American, had violated the fundamental ratemaking principle of affording competitors equal opportunities.

The Board relied on its broad powers to regulate the air transport industry, citing section 416 of the FAA²³ as authority for distinguishing all-cargo from combination carriers, and contended that Policy Statement 24 was properly within the scope of rulemaking as defined by the Administrative Procedure Act;²⁴ therefore the Board was not required to hold an adjudicatory hearing. In addition, the Board stated that American had been accorded more than minimum opportunities to respond to the proposed rulemaking. The court's decision²⁵ was 2-1 in favor of American, and the Board petitioned for a rehearing en banc. The petition was granted and the case came before the full court of appeals.

In a 5-3 decision, the court of appeals upheld the Board.²⁶ The court

¹⁷ 29 Fed. Reg. 11589 (1964).

¹⁸ CAB Order E-21160, August 7, 1964.

¹⁹ 29 Fed. Reg. 11729 (1964).

²⁰ *American Airlines, Inc. v. CAB*, 17 Ad. L. Dec. 2d 161, 164 (D.C. Cir. 1965). This authority exists by virtue of certificates issued under the statutory "grandfather" provision. Civil Aeronautics Act of 1938, § 401(e)(1), 52 Stat. 988.

²¹ The principal difference between rulemaking and an adjudicatory hearing is that in the latter, American would be entitled to cross-examine opposing witnesses. In addition, American would have been informed from the outset of the purpose of the proceedings.

²² 72 Stat. 756 (1958), 49 U.S.C. § 1371(g) (1964).

²³ 72 Stat. 771 (1958), 49 U.S.C. § 1386 (1964).

²⁴ 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001(c) (1964).

²⁵ *Supra* note 20.

²⁶ *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966) (en banc).

held that the Board has power to pass the regulation, was not required to hold an adjudicatory hearing, and correctly followed APA rulemaking procedures. General notions of fairness, the court ruled, do not require that American be given any fuller hearings by the Board. The dissent argued that the Board's action was a modification of American's certificate authority, and therefore American was entitled to an adjudicatory hearing. In addition, the dissent indirectly questioned the Board's power to adopt the regulation.

The court quickly disposed of two major issues in the case: whether the Board has the authority to effectuate its blocked space policy, and whether, in formulating the policy, the Board correctly followed rulemaking procedures. This lack of emphasis is unwarranted, for these issues are not open and shut, and if the court is incorrect on these questions there is little point in deciding that American was not entitled to an adjudicatory hearing.

The FAA provides two distinct functions from which the Board may derive authority for its blocked space policy: the rate-regulating function, and the licensing function.²⁷ Since blocked space tariffs, like ordinary tariffs, are simply a schedule of rates for the transportation of goods, and since the Board chose to implement its policy through the rejection of tariffs, the Board's blocked space policy may properly be viewed as an exercise of its rate-regulating function.

Section 403 of the FAA²⁸ requires carriers to file tariffs with the Board and to observe these tariffs in their operations. The Board is permitted to reject tariffs that do not comply with Board regulations prescribing the contents, form, and manner of filing and publishing tariffs.²⁹ Section 1002(d)³⁰ permits the Board to prescribe replacement rates and fares if the Board finds, after appropriate hearings, that the rates or fares charged by a carrier are "or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial"³¹ Section 1002(g)³² permits the Board to suspend proposed tariff changes for a limited period, "and after hearing . . . the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate [or] . . . fare . . . had become effective."³³ In the absence of any Board action, or, following the period of suspension if the Board has taken no further action, any tariff filed with the Board will be effective.³⁴

Thus, the Board has limited power to regulate rates. The FAA permits

²⁷ In order to operate in the air transport industry carriers are required to obtain a certificate from the Board. The certificate will indicate the routes over which the carrier may operate, whether the carrier may carry passengers in addition to cargo and mail, and any other limitations on operating authority which the Board finds to be required by the public interest. Actions with respect to issuing or amending certificates comprise the Board's licensing function. A separate function, the rate-regulating function, is comprised of Board powers over the regulation of tariffs.

²⁸ 72 Stat. 758 (1958), as amended, 49 U.S.C. § 1373 (1964).

²⁹ *Ibid.*

³⁰ 72 Stat. 789 (1958), 49 U.S.C. § 1482(d) (1964).

³¹ *Ibid.*

³² 72 Stat. 790 (1958), 49 U.S.C. § 1482(g) (1964).

³³ *Ibid.*

³⁴ *Ibid.*

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the Board only two rate-regulating remedies: rejection, and prescription of replacement rates. Rejection is limited to tariffs not filed in accordance with the procedures prescribed by the Board. Prescription of a replacement rate, rather than rejection, is the Board's remedy for any tariff which the Board may find to violate the standards of section 1002(d).³⁵ Neither of these remedies provides a basis for the implementation of the Board's blocked space policy. The Board rejected the American tariff not for inadequacies in filing procedure but for inconsistency with the Board's Policy Statement, a basis for rejection not authorized by the FAA. Neither did the Board's findings in adopting the Policy Statement constitute findings that an American blocked space tariff would violate the standards of section 1002(d).³⁶ It is submitted that the Board could not make such findings with respect to a combination carrier and still permit an all-cargo carrier to offer the service, for the standards of section 1002(d)³⁷ look to the effects of a given tariff upon the users of the service, effects which will not vary depending upon whether the carrier offering the service is all-cargo or combination. As an exercise of its rate-regulating function, the Board's blocked space policy is without statutory support.

If, then, the Board is to find a basis for its blocked space policy, it must do so in terms of its licensing function. Section 401(e)(1) of the FAA³⁸ provides that "there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require."³⁹ Section 401(g) permits the Board to amend or modify any certificate "if the public convenience and necessity so require," but this amending may only be done "after notice and hearings."⁴⁰ These powers would comprehend amendments to carriers' certificates excluding carriers from offering blocked space service. But it is only if the Board has properly classified the carriers that classification can be the basis for determining which carriers' certificates shall be modified.

The Board's authority to classify carriers derives from section 416(a) of the FAA,⁴¹ which requires that classifications be just, reasonable, and consistent with the other provisions of the FAA. It further requires classifications to be founded on differences in the nature of the services performed by the carriers so classified. By the terms of their certificates, Slick and American were obligated to provide identical cargo services.⁴² The nonexistence of any difference between the two carriers' cargo services means that the Board's classification lacks a fundamental element of the statutory requirement. The general powers and duties given to the Board by section 204⁴³ do not obviate the necessity to observe the requirements of other sections of the FAA, for

³⁵ 72 Stat. 789 (1958), 49 U.S.C. § 1482(d) (1964).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ 72 Stat. 755 (1958), as amended, 49 U.S.C. § 1371(e)(1) (1964).

³⁹ *Ibid.*

⁴⁰ 72 Stat. 756 (1958), 49 U.S.C. § 1371(g) (1964).

⁴¹ 72 Stat. 771 (1958), 49 U.S.C. § 1386(a) (1964).

⁴² Federal Aviation Act of 1958 § 404, 72 Stat. 760, 49 U.S.C. § 1374 (1964).

⁴³ 72 Stat. 743 (1958), 49 U.S.C. § 1324 (1964).

section 204 explicitly requires the Board to act "pursuant to and consistent with the provisions of this chapter"

The court disposed of the problems so far raised in the following passage:

That competitors in a regulated industry should be treated similarly in rate rulings in order to preserve competition is not denied. But that is not to say that reasonable distinctions between groups of competitors are impermissible, and that different services and rates may not then be authorized for the different groups or classes. Congress made a broad delegation of power to the Board, in § 416(a) of the Act . . . , to "establish such just and reasonable classifications or groups of air carriers . . . as the nature of the services performed by such air carriers shall require."

Petitioners have made no presentation that the Board's distinction between combination carriers and all-cargo carriers is meaningless or without rational foundation. Congress has given the Board not only a wide regulatory authority, but a specific promotional function to initiate proposals for the purpose of expanding efficient civil aviation transport; the power to classify carriers and service; and the power to issue implementing rules and regulations. This combination of powers, together with the underlying findings and conclusions, suffices to sustain the regulation on the merits, assuming no procedural bar.⁴⁴ (Footnotes omitted.)

As authority for this holding the court cited *United States v. Storer Broadcasting Co.*⁴⁵ and *NBC v. United States*.⁴⁶ Neither of these cases support the result reached by the court. In *Storer*, the Federal Communications Commission determined that ownership by one party of more than a fixed number of stations was not in the public interest. In *NBC*, the Federal Communications Commission proscribed certain chain broadcasting arrangements. Neither case involved ratemaking, and in both cases the regulations determined standards to be applied to *future* license applications or license renewals, unlike the Board's policy which affects *existing* licenses.

The court drew support for its holding from American's failure to attack the Board's classification as "meaningless or without rational foundation."⁴⁷ It is not surprising that American did not choose to so attack the Board's classification, for the test proposed by the court bears little relation to the actual statutory test for classification. Under the FAA, a classification must be just and reasonable and based on the nature of the services performed by the carriers.⁴⁸

The other major issue inadequately treated by the court is the issue of whether the Board correctly followed rulemaking procedures. The court stated that "the procedure followed by the Board admittedly complies fully with the requirements for rule making established in section 4 of the

⁴⁴ 359 F.2d at 627-28.

⁴⁵ 351 U.S. 192 (1956).

⁴⁶ 319 U.S. 190 (1943).

⁴⁷ 359 F.2d at 627.

⁴⁸ Federal Aviation Act of 1958 § 416(a), 72 Stat. 771, 49 U.S.C. § 1386(a) (1964).

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Administrative Procedure Act"⁴⁹ Section 4 of the APA⁵⁰ does set out the requirements for rulemaking: general notice must be given and this notice must include reference to the authority under which the rule is proposed, and must state either the terms or substance of the proposed rule or a description of the subjects and issues involved. After notice, an opportunity must be afforded interested parties to participate in the rulemaking through the submission of written data or arguments, with or without the opportunity to make oral presentations. These requirements do not usually apply to policy statements, but once the Board gave Policy Statement 24 a substantive effect by basing a tariff rejection on failure to comply with its terms, the character of the Policy Statement changed; it became a substantive regulation to which the foregoing requirements do apply.

The first notice from the Board concerned possible modification of charter flight regulations and did not mention either policy or regulations affecting tariffs over certificated routes. The second notice proposed that a distinction be made between all-cargo and combination carriers only for the purpose of regulating charter flights, and that the Board adopt a policy favoring the sale of blocked space by all-cargo carriers to combination carriers. This notice carried no implication that the combination carriers might be deprived of authority to issue blocked space tariffs. The combination carriers did respond in writing to these proposals, but since the exclusionary nature of the Board's ultimate policy was not yet apparent, neither the Board nor the court can argue that this constituted the opportunity for comment contemplated by the APA.⁵¹

It was not until the Board issued a supplemental notice to the proposed rulemaking that any exclusionary aspect of the proposed blocked space policy could be discerned. The Board stated that it would like to hear oral argument on the question of extending blocked space service by all-cargo carriers to air freight forwarders and other large volume shippers. Since this question did not concern sale of blocked space by combination carriers, the latent exclusionary nature of the Board's policy could only be noted by inference. Although the combination carriers had opportunity to respond on oral argument, they did not have opportunity to file written comments, and they were limited to oblique attacks upon the exclusionary policy, since prior to its adoption the final form of the policy was never presented for public comment. The procedure followed by the Board raises a substantial question whether American has "been accorded a hearing conforming to and surpassing the minimum required for rule making,"⁵² as was held by the court.

The only issue discussed in any detail by the appellate court is whether the Board was required to hold an adjudicatory hearing before effectuating its policy. American argued that the Board's action was a modification of its certificate, and therefore, under section 401(g) of the FAA,⁵³ an adjudicatory hearing was mandatory. The court held that an adjudicatory hearing was not

⁴⁹ 359 F.2d at 626.

⁵⁰ 60 Stat. 238 (1946), 5 U.S.C. § 1003 (1964).

⁵¹ *Ibid.*

⁵² 359 F.2d at 634.

⁵³ 72 Stat. 756 (1958), 49 U.S.C. § 1371(g) (1964).

required, without ever determining or stating whether it considered the Board's action to be a modification of American's certificate. The court avoided this determination by positing what amounts to alternative reasons for its holding.

The first approach taken by the court is that the *Storer* doctrine obviates the necessity for an adjudicatory hearing. In *Storer*,⁵⁴ the Federal Communications Commission adopted a rule limiting the number of television, AM radio, and FM radio station licenses that might be held by any one person. *Storer*, who already held the maximum number of station licenses, applied for an additional license. The Federal Communications Act required that license applicants receive an adjudicatory hearing before their applications might be denied.⁵⁵ The Supreme Court held that it was permissible for the FCC to formulate a rule which establishes standards for applicants and to summarily reject any application which does not meet these standards, and therefore *Storer* was not entitled to an adjudicatory hearing. The holding in *Storer* has become the *Storer* doctrine, and was reaffirmed by the Supreme Court in *FPC v. Texaco, Inc.*⁵⁶ There the Court upheld a summary rejection by the Federal Power Commission of a certificate application which contained pricing contracts previously categorized by the FPC as impermissible. The Court noted that rulemaking may be used to particularize statutory standards.

The circuit court applied *Storer* to the facts of the present case, but did not indicate what standards the Board had particularized by Policy Statement 24. Since rejection of a tariff is never an appropriate remedy unless the tariff violates the Board's procedural regulations under section 403,⁵⁷ and since Policy Statement 24 is not an addition to those regulations, it is difficult to see how *Storer* can permit the Board to reject a tariff. *Storer* would permit the Board to particularize the statutory standards of section 1002(d)⁵⁸ and thereby obviate the necessity for a hearing in a rate replacement action, but the Board did not treat its action as a rate replacement action. The *Storer* doctrine can support the Board's action only if Policy Statement 24 particularizes the statutory standards which the Board will apply in selecting carriers to offer blocked space service. Thus, the *Storer* doctrine cannot apply unless the Board's action is a modification of American's certificate.

The cases so far decided under the *Storer* doctrine have not concerned modification of existing certificates, only initial applications. Unless the congressional policy reflected in the grant of adjudicatory hearings to carriers in modification proceedings is comparable to the policy underlying the grant of adjudicatory hearings to license applicants, *Storer* should not apply automatically. Rather, some attempt should be made to justify the extension of the doctrine in terms of such a different congressional policy, or *Storer* should not apply at all. Although the court disposed of the distinction between

⁵⁴ Supra note 45.

⁵⁵ 48 Stat. 1085 (1934).

⁵⁶ 377 U.S. 33 (1964).

⁵⁷ Federal Aviation Act of 1958 § 403, 72 Stat. 158, as amended, 49 U.S.C. § 1373 (1964).

⁵⁸ 72 Stat. 789 (1958), 49 U.S.C. § 1482(d) (1964).

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modifications and initial applications as "fortuitous circumstances,"⁵⁹ it implicitly recognized the validity of the argument in the following passage:

[The *Storer* doctrine] rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.⁶⁰

If, indeed, the congressional requirement for adjudicatory hearings in modification proceedings is clear and specific, then the *Storer* doctrine should not apply.

American argued that the Supreme Court, in *CAB v. Delta Air Lines, Inc.*,⁶¹ recognized a strong congressional desire to provide "security of certificate," and this indicated that the purpose of providing air carriers with adjudicatory hearings in modification proceedings was not the same as the purpose in application proceedings, where Congress was motivated simply by a desire to be fair to all applicants. The court, however, did not read *Delta* as indicating such a different purpose. The court said:

Since the Supreme Court gave no indication in *Delta* that it intended to depart from the *Storer* doctrine, we see no basis for reading *Delta* as implying that the mere fact that licenses will be affected renders general rule making an impermissible means of agency action governing all carriers, or an appropriate general class of carriers.⁶²

This is an inadequate dismissal of American's *Delta* contentions. That the Supreme Court gave no indication in *Delta* that it intended to depart from the *Storer* doctrine is not surprising, for the issues involved in *Delta* were not *Storer* issues.

In *Delta*, the Board had issued a certificate to one carrier permitting limited competition with a local carrier over certain routes as part of the certificated authority. This permission was granted subject to reconsideration by the Board. Before the Board's reconsideration, the certificate originally granted became effective. The Board then sought to modify the certificate by striking the permission to compete with the local carrier. Even though the record upon which the certificate had been granted was still fresh, the Supreme Court ruled that the Board must hold an adjudicatory hearing before modifying the outstanding certificate. This ruling was governed in part by the Court's awareness that "Congress was vitally concerned with what has been called 'security of route'—i.e., providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible."⁶³

⁵⁹ 359 F.2d at 629.

⁶⁰ *Ibid.*

⁶¹ 367 U.S. 316 (1961).

⁶² 359 F.2d at 631.

⁶³ 367 U.S. at 324.

Delta did not involve the formulation of a rule which particularized industry-wide standards, but the modification of certificated authority based on a record and findings recently made; yet an adjudicatory hearing was required.

The circuit court stated in the *American* case that "security of certificate" is not disrupted since the Board's policy applies equally to all combination carriers. This assertion overlooks the fact that, as far as freight service is concerned, Slick and American are direct competitors, and it matters little to American that other combination carriers are similarly affected by the Board's policy. It is submitted that the congressional policy recognized by the Supreme Court in *Delta* indicates a larger purpose in the granting of adjudicatory hearings to carriers in modification proceedings than in applications. Since the stake a license holder has in the continuation of his license will usually be greater than the stake an applicant for a license has in the possibility or probability of being granted the license, the congressional policy favoring protection of investment will be disserved by applying *Storer* to certificate modification proceedings.

In the instant case, the court's alternative reason for holding that an adjudicatory hearing was not required is set out in the following passage:

The regulation under discussion [Policy Statement 24], being an "agency statement of general * * * applicability and future effect designed to implement * * * or prescribe law or policy," plainly satisfies the definition of "rule" in § 2(c) of the APA, as well as general understanding. There is therefore a presumptive procedural validity for the rulemaking procedure prescribed in § 4 of the APA, unless countermanded by a different Congressional mandate.⁶⁴

This reasoning is founded on a misreading of section 2 of the APA.⁶⁵ Under section 2, adjudication is agency action other than rulemaking but including licensing. This indicates that although Congress recognized that both licensing and rulemaking are of future effect and may prescribe law or policy, Congress distinguished licensing from rulemaking and required licensing to be accompanied by adjudicatory procedures. It is submitted that since the Board's action could be effective only if American's license were modified in an appropriate adjudicatory proceeding, the action taken had to be APA "licensing" and not, as the court held, APA "rule making."

⁶⁴ 359 F.2d at 630.

⁶⁵ 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001 (1964). The pertinent portion of this section is set out below:

(c) **RULE AND RULE MAKING.**—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . . "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) **ORDER AND ADJUDICATION.**—"Order" means the whole or any part of the final disposition . . . of any agency in any matter other than rule making but including licensing.

(e) **LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate . . . or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

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The court offered no support for its holding except to point out that the alternative "results in even more rigorous procedural requirements than apply to initial licensing."⁶⁶ This statement, paradoxically, lends support to the contention that Congress was following a stronger policy in providing hearings for certificate modification than in providing hearings for certificate applications.

Underlying the court's refusal to require adjudicatory hearings in the present case is a policy favoring administrative flexibility. The court does not wish to force upon an agency time-consuming procedures which are unsuited for the resolution of questions before it. Flexibility in administrative procedures is certainly important, but it should not be achieved at the expense of clearly articulated congressional requirements.

The dissent did not concern itself with the issues of whether the Board has power to effectuate its blocked space policy, or whether the Board correctly followed rulemaking procedures. The dissent stated that the Board's action is discriminatory, suggested that the Board may not have had the power to so act, and largely confined its discussion to the applicability of the *Storer* doctrine.

The dissent contended that the Board's action was a modification of American's outstanding certificate, and made three points in finding *Storer* not applicable to the case: (1) the *Storer* doctrine cases dealt with agencies other than the CAB; (2) the cases all involved initial applications for licenses; and (3) the regulations in the cases were nondiscriminatory, as opposed to the Board's regulation in the present case. These attempts to distinguish *Storer* are not convincing, because the dissent did not invoke the crucial test, namely, whether the congressional policy underlying the grant of an adjudicatory hearing is comparable from one situation to another.

Storer should not apply to the instant case, the dissent argued, because the Board's policy does not apply "across the board" to all carriers, as it did in *Storer* and *Texaco*. This argument is invalid if the Board properly classified the carriers, for the Board's policy would then apply "across the board" to all combination carriers.

The dissent contended that an adjudicatory hearing was the proper procedure for the resolution of the issues presented in this case:

While the question whether reduced rate "blocked space" service may be offered by *any* carrier might well be appropriate for rulemaking, the selection of particular carriers to provide such service is clearly the sort of question which can be resolved properly and fairly only in an adjudicatory proceeding. Once the Board had decided that it should not allow every freight carrier to offer such service, it was faced with the problem of picking and choosing among competing, mutually exclusive applications. *Cf. Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 . . . (1945).⁶⁷

⁶⁶ 359 F.2d at 630-31.

⁶⁷ *Id.* at 637.

III. IMPLICATIONS OF THE DECISION—REVIEW BY THE SUPREME COURT

American and the other combination carriers have petitioned the Supreme Court for a writ of certiorari.⁶⁸ The Supreme Court has not yet acted on the petition.

The petition brings before the Supreme Court issues of basic importance to many federal agencies and the industries which they regulate. The authority given the CAB to regulate the air transport industry is analogous to the authority of the FCC over the broadcasting industry,⁶⁹ of the FPC over natural gas and power companies,⁷⁰ and of the ICC over surface transportation.⁷¹ These agencies have broadly similar duties to license or issue certificates,⁷² and have authority to prescribe rates and otherwise regulate the tariffs of licensees.⁷³

The court of appeals decision greatly expands the powers of the CAB. The conclusion that the Board has power to effectuate its blocked space policy denies that section 1002 of the FAA⁷⁴ places any limits on the Board. This is contra to past practice and obviates the statutory scheme for rate-regulating which Congress has adopted, with minor variations, for regulatory agencies. This scheme may be summarized as follows: the participants in the industry are free, within broad limits, to establish competitively their own rates; they are, however, required to file tariffs with the agency, and in filing they are required to observe appropriate agency regulations concerning manner of filing; once they have filed a tariff they are required to follow it. The agency may investigate tariffs that are in effect and, if it finds them to be unfair or prejudicial, may prescribe a replacement rate which will meet the

⁶⁸ 35 U.S.L. Week 3037 (U.S. June 6, 1966) (No. 304).

⁶⁹ See Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609 (1964).

⁷⁰ See Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791-828c (1964); Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717a-w (1964).

⁷¹ See Interstate Commerce Act Part I, 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1-27 (1964); Interstate Commerce Act Part II, added by 49 Stat. 543 (1935), as amended, 49 U.S.C. §§ 301-27 (1964); Interstate Commerce Act Part III, added by 54 Stat. 929 (1940), as amended, 49 U.S.C. §§ 901-23 (1964), as amended, 49 U.S.C. § 912a (Supp. I, 1965).

⁷² Compare Federal Aviation Act of 1958, 72 Stat. 754, as amended, 49 U.S.C. § 1371 (1964), with Communications Act of 1934, 48 Stat. 1075, as amended, 47 U.S.C. §§ 214, 307-12, 316 (1964), and Federal Power Act, 41 Stat. 1065 (1920), as amended, 16 U.S.C. §§ 797-804, 806 (1964), and Natural Gas Act, 52 Stat. 824 (1938), as amended, 15 U.S.C. §§ 717b, f (1964), and Interstate Commerce Act Part I, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 (1964), and Interstate Commerce Act Part II, 49 Stat. 544 (1935), as amended, 49 U.S.C. §§ 303, 306-12 (1964), and Interstate Commerce Act Part III, 54 Stat. 941 (1940), as amended, 49 U.S.C. §§ 909-13 (1964), as amended, 49 U.S.C. § 912a (Supp. I, 1965).

⁷³ Compare Federal Aviation Act of 1958, 72 Stat. 758, as amended, 49 U.S.C. §§ 1373, 1374, 1482 (1964), with Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. §§ 201-05 (1964), and Federal Power Act, 49 Stat. 851 (1935), 16 U.S.C. §§ 824d, e (1964), and Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U.S.C. §§ 717c, d (1964), and Interstate Commerce Act Part I, 24 Stat. 379 (1887), as amended, 49 U.S.C. §§ 1(4), (5), 15(1), (3), (6), (7) (1964), and Interstate Commerce Act Part II, 49 Stat. 558 (1935), as amended, 49 U.S.C. §§ 316-18 (1964), and Interstate Commerce Act Part III, 54 Stat. 934 (1940), as amended, 49 U.S.C. §§ 905-07 (1964).

⁷⁴ 72 Stat. 788 (1958), 49 U.S.C. § 1482 (1964).

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standards for rates. When a carrier files a change in tariff, the agency may suspend the new tariff and hold hearings to determine if the change violates the rate standards. Under this scheme the agency must either allow the new tariff to become effective, or make a finding that the change violates governing standards.⁷⁵

The court of appeals decision also permits agencies to modify existing certificate authority without holding an adjudicatory hearing if the modification is the result of rulemaking and has general effect either for the entire industry or for a properly distinguishable section of the industry. Such a result is good if, and only if, some test can be established to determine what constitutes a properly distinguishable section of an industry for these purposes. The court recognizes no limitation on the power to classify except that the classification must be meaningful, or based on rational foundations. Where the effect of the classification will be to modify certificates or to realign competition a stricter requirement is essential.

Application of the *Storer* doctrine to certificate modifications should be limited by the principle enunciated in *Ashbacker Radio Corp. v. FCC*.⁷⁶ Whenever an agency is faced with picking and choosing among competitors, adjudicatory hearings are most appropriate, and should still be required. This is as true in limiting certificate authority as in deciding whether to issue it initially. The concept of "security of certificate" would be effectively destroyed unless the authority of agencies to modify certificates is limited by this procedural requirement. Otherwise agencies will be limited only by their ability to discover "meaningful" systems of classification within the industry being regulated. For example, the CAB might deny combination carriers the authority to carry cargo in all-cargo aircraft, limiting their authority to carry freight to excess capacity in passenger aircraft. Under the court of appeals decision this could be accomplished without adjudicatory hearings.

Finally, the decision in the instant case weakens the procedural safeguards of the rulemaking process, since important agency action is allowed to become effective without providing for explicit notice of the subject matter of the proposed rule or for public notice of the proposed rule's contents. The Board's final policy on blocked space was never presented until it became effective. Interested parties were deprived of full opportunity to comment on the exclusionary nature of the ultimate policy. All-cargo carriers do not serve all the markets served by combination carriers. Lack of full public notice, therefore, meant that potential shippers in those areas were unable to oppose the formulation of a policy which would deprive them of attractive air freight rates for large volume shipment on a regular basis.

The decision of the court of appeals is fundamentally unsound. The court ignored the basic question of the Board's rate-regulating function, an analysis of which leads to the conclusion that the Board could not implement blocked space tariffs on an exclusionary basis. The court glosses over the

⁷⁵ *Mississippi River Fuel Corp. v. FPC*, 202 F.2d 899 (3d Cir. 1953), petition for cert. dismissed, 345 U.S. 988 (1953).

⁷⁶ 326 U.S. 327 (1945). The *Ashbacker* principle is that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333.

question of the Board's power to classify carriers. It did not examine the procedures followed by the Board in issuing Policy Statement 24, and it misread section 2 of the APA. The court extended the *Storer* doctrine to include certificate modification proceedings without examining the policy underlying the grant of adjudicatory hearings in such proceedings and, therefore, did not recognize that it *was* extending the doctrine. Because it did not recognize that the *Storer* doctrine was being extended, the court did not articulate what limits it would place on the power of agencies to modify certificates without holding adjudicatory hearings.

The dissent does not adequately present the opposing argument to the court's *Storer* position, but it does question the appropriateness of rulemaking for deciding the issues raised by the present case. Neither opinion fastens on the rate-regulating questions and so this fundamental question is almost obscured.

It is to be hoped that the Supreme Court will grant American's petition for certiorari, because the questions involved are of basic importance to the administrative process. Even if the Board does have power to adopt its exclusionary blocked space policy, there are important grounds for reversal in the failure of the Board to observe rulemaking procedures. If the *Storer* doctrine is to be extended, some limitations are necessary. Where the effect of the modification is to grant authority to one or more of all carriers able and willing to offer the service, the *Ashbacher* principle offers a sound basis for limitation. In this way the flexibility of rulemaking will be incorporated into the safeguards of adjudication which are so vital to carriers with large investments in their certificated operations.

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