



10-1-1971

Role of the Civil Aeronautics Board in the Development of the Domestic Air Carrier Route System

Whitney Gilliland

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Whitney Gilliland, *Role of the Civil Aeronautics Board in the Development of the Domestic Air Carrier Route System*, 47 Notre Dame L. Rev. 32 (1971).

Available at: <http://scholarship.law.nd.edu/ndlr/vol47/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE ROLE OF THE CIVIL AERONAUTICS BOARD IN THE DEVELOPMENT OF THE DOMESTIC AIR CARRIER ROUTE SYSTEM

Whitney Gilliland*

I. Introduction

The major contributors to the development of the system of interstate air transportation routes which serve this country may be generally divided into four categories: (1) Those who have provided the vehicles, *i.e.*, the inventors and manufacturers; (2) the airlines; (3) the public, who demand and use the services; and (4) the government regulators. This article is addressed to the involvement of that system and to the activities of the Civil Aeronautics Board in two of its several functions. These are (1) formal route licensing and (2) mergers.¹ I will allude to some cases not dealing specifically with these two subjects because they relate to a line of decisions.

The Civil Aeronautics Board is to a great degree master of its own calendar.² From the time of its organization shortly after the passage of the Civil Aeronautics Act³ in 1938, it has exercised substantial control over its docket and has consolidated pending applications⁴ and set them for hearing⁵ largely in accord with its appraisal as to the relative order of public need, rather than to take them up

* Vice-Chairman, Civil Aeronautics Board.

1 More than a modicum of scheduled route service is now carried on without benefit of formal route licensing. The authors of the statute which governs the Board included in it an "escape valve" for use in special situations. This is the exemption statute (Federal Aviation Act of 1958 § 416(b). 72 Stat. 771, 49 U.S.C. 1386) which authorizes the Board to exempt air carriers from formal licensing and other requirements if it finds that enforcement would be an undue burden on the carriers "by reason of the limited extent of, or unusual circumstances affecting the operations of such air carrier . . . and is not in the public interest."

Some scheduled services are performed with benefit of such exemptions. Conspicuous among them are those provided by carriers defined in the Board's air taxi regulations (C.A.B., Economic Regulations, Part 298) as "commuter air carriers" and performed by aircraft weighing less than 12,500 pounds and officially classified as small aircraft.

These operations were at one time of very limited extent but in recent years the class has grown rapidly, and indeed precariously for there have been no limitations on entry, business failures have been frequent, and there being no requirements to continue services, or assurances of quality, dependability in many instances has been lacking. On the other hand some of these carriers have succeeded in gaining and in deserving very good reputations.

According to E. H. Pickering, *FLIGHT MAGAZINE*, Dec. 1969, 29, the number of aircraft then in scheduled services by 168 commuter carriers was 887. This appears to be on the order of three times that of the entire air carrier industry in 1938, the year the Board was established, which is shown by the 1940 C.A.B. Annual Report 50 to have been 253.

Furthermore, the aircraft are comparable in capacity, and superior in speed, safety, and comfort. Executive Airlines (based at Boston) alone projected 1970 traffic at 404,857 passengers (Part 298, *Weight Limitation Investigation*, Dkt. 21761, *Executive Airlines*, Exhibit 135), which is undoubtedly more than boarded by any single carrier in 1938 (1940 C.A.B. Annual Report 39). The Board has sometimes granted exemptions for use of larger aircraft in special situations (cf. *Catalina and Alcan, Exemptions*, 39 C.A.B. 851, 852 (1963)), *Interstate Airmotive, Exemption*, 36 C.A.B. 864, 865 (1962). Means for achieving greater stability in this segment of the industry are now under consideration by the Congress (S. 796).

2 Northwest Airlines, Inc. v. C.A.B., 303 F.2d 395, 400 (D.C. Cir. 1962).

3 Now Federal Aviation Act of 1958, 72 Stat. 731, as amend., 49 U.S.C. 1301 *et seq.*

4 C.A.B., P. R., §§ 302.1, 302.12, 302.915.

5 C.A.B., P. R., § 302.24.

methodically in order of filing.⁶ There are many reasons for this policy which will not be considered here, but through its exercise the Board has given some guidance to events, and applicants have usually acquiesced. As will hereinafter be shown, the Board has tended to be more generous with awards in good economic weather. Undoubtedly, applicants are influenced by that same weather and are more acquisitive, competitive and inclined to seek new grants when it is fair. Conversely they tend to huddle together and seek mergers when it is stormy.⁷

The scope of route licensing⁸ and merger cases⁹ is determined by the Board and the issues are heard¹⁰ and initially decided by a hearing examiner¹¹ in formal adversary proceedings,¹² conducted in accordance with the Administrative Procedure Act.¹³ Decisions are subject to discretionary review by the Board,¹⁴ which may affirm, reverse, or remand in whole or in part,¹⁵ amend and/or issue its own decision.¹⁶

II. The Beginnings

By about the mid-1920's a number of venturesome persons were operating airlines of sorts, most of them unrelated, making the best use they could of the vehicles then available, which were small, slow, short range, and open cockpit. The embryo industry was given a great boost by Congressional passage of the Kelly Act of 1925¹⁷ which spoke in terms of airmail transportation contracts to be let to private operators. The industry was given another great boost by the introduction into service of the fully enclosed Ford all metal monoplanes, soon refined into the celebrated trimotor "Tin Goose" which was capable of carrying eleven passengers, cruised at 145 miles per hour, and was followed by improved aircraft of other manufacture.¹⁸ In 1926 scheduled passenger air services generated about 1.2 million revenue passenger miles.¹⁹ By 1928 traffic had grown to 11 million revenue passenger miles.²⁰

The potentials of the industry for commercial development received a third

6 "It is the Board and not the applicant which, in a realistic sense, controls the initiation of licensing proceedings." Jones, *Licensing of Domestic Air Transportation*, 30 J. AIR L. & COM. 134 (1964).

7 In recent testimony before the Senate Aviation Committee, Robert Six, President of Continental Airlines, said the Big Four and PanAm always cry "Merge" when business gets bad. "It is, of course, a delightful solution for them. It gets rid of the worrisome pressure from smaller carriers which are always proposing innovation in fares or service and which have the embarrassing habit of attaining higher aircraft utilization and lower unit costs." William V. Henzley, Editorial Director, AIRLINES MANAGEMENT MAGAZINE, Address to National Airlines Management Club, Mar. 2, 1971.

8 Federal Aviation Act of 1958 § 401, 72 Stat. 754, as amend. by 76 Stat. 143, 49 U.S.C. 1371.

9 Federal Aviation Act of 1958 § 408, 72 Stat. 767, as amend. by 74 Stat. 901, 49 U.S.C. 1378.

10 C.A.B. P. R. §§ 302.12, 302.13, 302.915.

11 C.A.B., P. R. § 302.27.

12 *Ibid.*

13 5 U.S.C. 551, *et seq.*

14 C.A.B., P. R. § 302.28.

15 C.A.B., P. R. § 302.36.

16 *Ibid.*

17 Air Mail Act of 1925. (43 Stat. 805.)

18 G. LOENING, *THE AIR ROAD WILL WIDEN* 4 *et seq.*

19 C.A.B. HANDBOOK OF AIRLINE STATISTICS, Part II, tit. 15 at 23 (1969).

20 *Ibid.*

boost when, in 1930, the Postmaster General's statutory base was expanded by the Congress to include authority to require use of passenger aircraft to transport the mail, and to extend and consolidate the existing contract routes.²¹ The then Postmaster General, Walter Folger Brown, was dissatisfied with the short-haul characteristics of the system then evolving and which necessitated many transfers from carrier to carrier. Accordingly, he addressed his efforts to the extension and consolidation of routes and in so doing laid a foundation for the long-haul system which serves this country today.

There were charges, nevertheless, whether merited or not, of disregard for principles of competitive bidding. In February 1934, the new Postmaster General cancelled the contracts and the task of carrying the mail was assigned to the Army. The Army proved to be ill prepared; service was unpredictable; accidents were frequent; deaths occurred; and eventually a clamor broke out.

Accordingly, another turnabout took place and the task of carrying the airmail was returned to the private sector. This time it was done with the utmost care that competitive bidding principles be meticulously observed, and very shortly all domestic airmail was contracted for anew under the quickly adopted Air Mail Act of 1934.²² Competitive bidding indeed occurred and, as it turned out, was so intensive that numerous contracts were let well below the cost of services. This was too much and by 1937 the economics of the industry was in shambles.²³

Meanwhile, however, quality of aircraft had continued to improve. In 1933, the Boeing 247, ten-passenger monoplane was introduced.²⁴ It cruised at 155 miles per hour and had a range of about 500 miles. This was quickly followed by the DC-2²⁵ which seated 14 passengers, cruised at about 175 miles per hour, and could fly New York-Chicago nonstop. Then came the ten-passenger Lockheed Electra,²⁶ and soon the DC-3,²⁷ the most famous of all aircraft, which carried 21 passengers, cruised at 180 miles per hour, and had a maximum stage length of about 1200 miles. By 1935 traffic had increased to an annual rate of nearly 200 times the 1926 figures.²⁸

III. The Act

In 1937, it was obvious to the Congress that the economics of the air transportation industry was nearing a state of collapse,²⁹ and that if it was to be saved, strong action was required. Operational capability and public demand were

21 Act of Apr. 29, 1930. (46 Stat. 260.) See Westwood and Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword*, 42 NOTRE DAME LAWYER 309 (1967).

22 48 Stat. 933.

23 "Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense." S. Rep. No. 1661, 75th Cong. 3d Sess., 2.

24 C.A.B. HANDBOOK OF AIRLINE STATISTICS 485 (1969).

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 1939 C.A.A. ANNUAL REPORT 51.

29 "... Drawing upon the anticompetitive spirit of the thirties and the condemnation of 'destructive' or 'cutthroat' competition and 'disorderly' or 'chaotic' economic development, the

apparent, however, and offered promise of future benefits of great proportions. Accordingly, the Congress set about writing a comprehensive regulatory statute, modeled in part on the Motor Carrier Act of 1935.³⁰ The product was the Civil Aeronautics Act of 1938.

The major economic provisions remain essentially unchanged today as they appear in the Federal Aviation Act of 1958, as amended.³¹ Provisions for mail pay, both in compensation for services (service mail pay) and as an aid to development (subsidy) were carried into the Act.³² The course of the subsequently separated subsidy component as a percentage of revenues has been generally downward, and has long since disappeared as far as the larger carriers are concerned. It now remains primarily as a nominal, but at least temporarily needed, contribution to the earnings of the local service carriers.³³

The new Act admonished the Board to direct attention to the development of an air transportation system. Section 102 (then section 2) of the Act contains the Declaration of Policy,³⁴ wherein it is stated:

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . .

In a similar vein the Declaration directed attention to the fostering of "sound economic conditions" (subsection (b)), "The promotion of adequate,

1938 legislation was prompted in large part by the specter of insolvency and the expressed need to restore credit to a faltering industry." Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ABA ANTITRUST SECTION 307 (1961).

30 Motor Carrier Act, 49 Stat. 543, 49 U.S.C. 301, *et seq.*

31 Federal Aviation Act of 1958, *supra* note 3.

32 In present text: Federal Aviation Act of 1958 § 406. (72 Stat. 763, as amend. by 76 Stat. 145, 80 Stat. 942, 49 U.S.C. 1376).

33 1969 C.A.B. ANNUAL REPORT 30.

34 "DECLARATION OF POLICY: THE BOARD. Sec. 102. In the exercise and performance of its power and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity: (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers; (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; (e) The promotion of safety in air commerce; and (f) The promotion, encouragement, and development of civil aeronautics." Federal Aviation Act of 1958 § 102.

economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices," (subsection (c)) and "The promotion, encouragement, and development of civil aeronautics," (subsection (f)).

There is another subsection which is the focal point for this article. Mindful of the recent turbulent experiences pertaining to freedom of competition, the Congress established a central theme for the Act. The theme is that of limited competition. It was manifested in many ways, but most significantly by including in the Declaration of Policy a measure of the extent to which competition was to be considered as being in the public interest.³⁵ This is subsection (d) and the language is as follows:

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . .

The language is directed at all activities of the Board.³⁶

Several persons who had contributed to the emergence of the statute were among the first members appointed to the Board or held top positions in the new organization.³⁷ Accordingly, early decisions often made mention of the signifi-

³⁵ The definition included in the draft prepared by the Interdepartmental Committee which played a key role in the process leading to adoption was as follows: "In the exercise and performance of its powers and duties under this Act, the Board shall consider the public interest to require . . . (b) The preservation and encouragement of competition among persons operating airlines to the extent necessary to assure the sound development of air transportation; . . ." See Westwood and Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword*, 42 NOTRE DAME LAWYER 309, 368 (1967). It will be observed that in the definition finally adopted the words "preservation and encouragement" and "among persons operating airlines," do not appear.

³⁶ The Board has possibly been more restrictive in its views as to the extent of the competition to be required in some areas than in others. Price competition may be one of them. A leading case concerning price competition is that of *Trans World Air. Siesta Sleeper-Seat Service*, 27 C.A.B. 788, 794, 795 (1958). TWA, for competitive reasons, had filed a tariff proposing to provide sleeper seats in transcontinental services at standard first-class fares. These fares were challenged by other carriers as unjust and unreasonable. The Board struck them down and in the course of the opinion said the following:

. . . This kind of competition — competition in giving away more luxurious seating — may suit the immediate objective of a given carrier in attempting to divert existing traffic, but it is just the kind of destructive competition that the Act was designed to prevent.

. . . Practices decided upon by carrier management can have far-reaching effects on other carriers and on the public, and because of this (among other reasons) Congress established the Board to regulate the airline industry — not to be a disinterested observer — and forbid practices which, under the standards laid down by Congress, are detrimental to the public interest. . . .

There can be no question as to the Board's power to forbid fare practices which are uneconomical from an industrywide standpoint. The legislative history of the Act clearly shows that when Congress passed the Civil Aeronautics Act of 1938, one of the basic evils it intended to dispel was uneconomical competitive rate practices which had produced chaos in the industry and had shaken the faith of the investing public. Thus, the very purpose of the Act was to provide for regulation of competition between airlines by an independent agency, not by the free forces of the market place. And in performing its regulatory duties, since at least the first freight rate investigation in 1948, the Board has not deviated from the interpretation that the public-interest provisions of section 2 (now Sec. 102) of the Act are applicable to fare and rate proceedings.

Cf. Domestic Passenger Fare Investigation, Dkt. 21866, Orders 71-4-48, 71-4-54, 71-4-58, 71-4-59, 71-4-60 (1971).

³⁷ See Westwood and Bennett, *History of the Civil Aeronautics Act of 1938 and Afterword*,

cance of the central theme of the Act. Thus, in *Acquisition of Western A. E. by United A. L.*, it is stated:

... Reference to both the legislative history and to the text of the act demonstrates the congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the Nation against the evils of unrestrained competition on the one hand, and the consequences of monopolistic control on the other. In attaining this objective the act seeks a state of *competition among air carriers to the extent required by the sound development of the industry*. . . .³⁸

Such provisions are not common in regulatory statutes. What this amounted to was an effort to introduce some competitive vitality into conventionally monopolistic public utility concepts.³⁹ Carriers seeking routes were required to obtain certificates of public convenience and necessity and to meet the public convenience and necessity tests⁴⁰ of the Declaration of Policy.⁴¹ The Board was

42 NOTRE DAME LAWYER 309, 315, 327, 329 (1967). Edward P. Warner, a first Member of the Board had been a Member of The Federal Aviation Commission appointed pursuant to the Air Mail Act of 1934 which submitted recommendations for legislation. Harlee Branch, the first Vice Chairman, had, as Assistant Postmaster General, been a Member of the Interdepartmental Drafting Committee, and Clinton M. Hester, the first Administrator, had been spokesman for that group before the committees of Congress.

38 *Acquisition of Western A. E. by United Air Lines*, 1 C.A.A. 739, 749, 750 (1940).

39 "The Act was . . . premised in part on the 'natural monopoly' theory underlying conventional public utility regulation, the commercial aviation industry being analogized to other transportation and utility industries." Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ABA ANTITRUST SECTION 307 (1961).

40 Federal Aviation Act of 1958.

Sec. 401. (72 Stat. 754, as amend. by 76 Stat. 143, 82 Stat. 867, 49 U.S.C. 1371).

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation. . . . (b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require. . . . (c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible. . . . (d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied. (2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provision of this Act and the rules, regulations, and requirements of the Board hereunder. (3) In the case of an application for a certificate to engage in supplemental air transportation, the Board may issue a certificate, to any applicant not holding a certificate under paragraph (1) or (2) of this subsection, authorizing the whole or any part thereof, and for such periods, as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform the transportation covered by the application and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder. Any certificate issued pursuant to this paragraph shall contain such limitations as the Board shall find necessary to assure that the service rendered pursuant thereto will be limited to supplemental air transportation as defined in this Act. . . . (e) (1) Each certificate issued under this

authorized to attach such reasonable terms, conditions, or limitations as the public interest may require,⁴² and to subsequently modify, suspend, or revoke under designated circumstances.⁴³

The Board was forbidden, however, to restrict the right of a certificated scheduled route carrier to add to or change schedules, equipment, accommodations, or facilities as the development of the business and the demands of the public so required.⁴⁴ On the other hand, it was given authority to require adequate services.⁴⁵

IV. Formal Route Licensing

The First Annual Report to the Congress shows the total system to then comprise 36,533 route miles.⁴⁶ There were eighteen carriers,⁴⁷ 253 aircraft,⁴⁸ and on the average about thirteen seats per aircraft.⁴⁹

The Act then contained a grandfather provision which, in addition to directing certifications covering nine routes for which appropriations had been made,⁵⁰ authorized issuance of a route to any air carrier which made application within 120 days upon showing that it had operated continuously from May 14, 1938, and that its services were adequate and efficient. That was the starting point and the process of validating routes occupied a great deal of attention in the early period. But there were many new applications,⁵¹ and although

section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and 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. . . . (4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; . . . (g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

41 " . . . in the light of these standards it was not the congressional intent that the air transportation system should be 'frozen' to its present pattern. . . . It is equally apparent that Congress intended the Authority to exercise a firm control over the expansion of . . . routes in order to prevent the scramble . . . which might occur under a 'laissez faire' policy. Congress, in defining the problem, clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices, such as the opening of nonproductive routes, and other uneconomic results which characterized the development of other modes of transportation prior to their governmental regulation." *Northwest Air., Duluth-Twin Cities Operation*, 1 C.A.A., 573, 577 (1940).

42 Federal Aviation Act of 1958 § 401(e)(1), *supra* note 40.

43 Federal Aviation Act of 1958 § 401(g), *supra* note 40.

44 Federal Aviation Act of 1958 § 401(e)(4), *supra* note 40.

45 Federal Aviation Act of 1958 § 404, 72 Stat. 760, 49 U.S.C. 1374.

46 1939 C.A.A. ANNUAL REPORT 19.

47 1940 C.A.A. ANNUAL REPORT 52.

48 *Id.* at 50.

49 *Id.*

50 C.A.A. FIRST ANNUAL REPORT 19.

51 *Id.*

processing was interrupted during the war, the system reached 58,646 route miles in 1944.⁵²

The young industry was deeply affected by the war. Not only were new aircraft hard to come by but many were drawn off for military use.⁵³ Demand for new services, however, grew rapidly, and the manufacturing industry, expanded for the war effort, developed great capability for research, design, and mass production which has well served the progress of air transportation to this day.⁵⁴ Furthermore, large numbers of people received training in the armed services which qualified them for subsequent careers in commercial aviation.

To be found below is a table⁵⁵ which shows total number of aircraft, average seats per aircraft, changes in route miles by percentages, aircraft revenue miles, growth in passenger miles by percentages, passenger load factors, and rate of return on total investment in domestic scheduled air transportation, for each year from the close of the war through 1969. Examination of the table seems to indicate a relationship between capacity and/or frequency and/or route increases

52 1944 C.A.B. ANNUAL REPORT 1.

53 1968 C.A.B. ANNUAL REPORT 104.

54 *Id.*

55

Selected Statistics for the Domestic Operations of the
Passenger/Cargo Certificated Route Air Carriers:

Calendar Year	No. of Aircraft ¹	Average seats	Percent increase routes ²	Plane miles (000)	Percent growth passenger miles	Passenger load factor	Rate of return
1944	299	19.1	15.8	138,630	33.3	89.4	N.A.
1945	432	19.7	7.2	208,914	54.4	88.2	N.A.
1946	708	25.3	37.3	309,558	76.9	78.7	N.A.
1947	895	29.9	40.5	324,660	2.7	65.2	-4.70
1948	1,016	32.4	7.3	342,403	-1.8	57.6	2.53
1949	1,045	34.7	5.8	358,079	12.9	57.8	5.21
1950	1,170	37.1	11.0	382,837	18.6	61.2	11.43
1951	1,207	39.1	0.1	426,363	31.9	67.8	13.56
1952	1,386	42.2	2.2	480,924	18.6	65.5	13.56
1953	1,387	45.6	1.8	539,820	17.8	63.4	11.17
1954	1,423	49.6	1.0	565,358	13.6	62.4	10.44
1955	1,448	51.5	9.4	639,973	18.2	63.3	11.44
1956	1,542	52.1	10.2	708,430	12.8	63.3	9.36
1957	1,735	53.7	0.6	808,649	13.3	60.8	4.46
1958	1,801	55.5	4.5	794,213	0.0	59.4	6.25
1959	1,874	58.7	5.9	851,575	15.5	60.5	6.99
1960	1,881	65.4	9.3	829,483	4.3	58.5	2.92
1961	2,034	72.9	7.7	802,382	1.7	55.4	1.24
1962	1,948	79.4	2.0	833,304	8.2	52.6	4.26
1963	1,903	83.4	-1.4	896,722	14.4	53.2	4.16
1964	1,894	86.1	0.3	968,229	14.8	54.8	9.44
1965	1,971	89.2	0.1	1,098,916	17.5	54.7	11.75
1966	2,082	91.2	-0.9	1,189,479	16.8	57.9	10.28
1967	2,266	94.4	9.8	1,473,414	24.6	56.5	8.21 ³
1968	2,406	100.8	3.5	1,727,469	15.9	52.4	4.93 ³
1969	2,610	112.2	25.0	1,662,883	9.3	49.9	3.88 ³

¹ Includes fleets of all certified route air carriers

² Domestic trunk and Local Service carriers only.

³ Rate of return on adjusted investment.

Total aircraft fleet size for the years 1944 through 1956 is at June 30, the year 1957 at May 15, and the year 1959 at Mar. 30

Compiled from C.A.B. ANNUAL REPORTS, C.A.B. HANDBOOK OF AIR. STAT., C.A.B. FORMS 41 and internal reports.

on the one hand, and profitability on the other.⁵⁶ The table likewise seems to show a relationship to the recession of 1960-61, and perhaps to those of 1957-58, and 1966-67. However, the economic course of the industry was constant through the recession of 1953-54.

Following the war and freed from its restrictions the number and dimensions of aircraft grew rapidly. The Board renewed attention to the route system and, as shown by the table, in 1946 increased it by 37.3 percent and in 1947 by 40.5 percent. In 1948 the number of aircraft reached 1,016 and average capacity 32.4 seats. Four engines, pressurized cabins, and the nose wheel were becoming the norm.⁵⁷

No longer supported by the stimulation of the war effort, traffic did not respond at first. In 1948 the rate of growth fell to a negative 1.8 percent and the industry rate of return amounted to but 2.53 percent. But in the next year, responsive to improved services, traffic began a course of growth which has continued through most years since. That fact, undoubtedly aided by more conservative policies in system and fleet expansions, and soon stimulated by the traffic demands connected with the Korean War, returned the industry to profitability.

In the initial route structures the number of communities eligible for services was limited and the routes were restricted and situated at random. The grants of 1946 and 1947 were much needed but a great deal of realignment and combination of route segments, including authority to overfly junction points, remained to be done.⁵⁸ As aircraft increased in capacity and range and traffic

56 There are, of course, many other factors which affect profitability, some very directly, such as fare levels and structure, airport charges, congestion, accelerating capital requirements, tight money, and hijacking.

Changes in route miles as reflected in the table show the final results of cases docketed and processed by the Board sometime earlier. It should also be noted that there is a considerable time interval between a manufacturer's planning stage and the availability of new aircraft, and likewise a respectable interval between a carrier's decision to acquire new type aircraft and their actual delivery.

57 1968 C.A.B. ANNUAL REPORT 105.

58 In the early 1940's the Board turned attention to smaller communities not located along the existing routes of what have become known as trunk carriers. The plan put into effect was that of a system of feeder airlines. It was contemplated that routes be established between the stronger communities of a feeder area, and that intermediate communities be served on each flight between terminals. Thus, it would be possible to have access to points where trunk services would be available.

The Board was aware that subsidy would be required for some time, and the early cases forecast commercial revenues on the order of but 20 to 25 percent of operating expenses. Section 406 of the Act authorizes payments to carriers engaged in transporting the mail. There are two components, (1) payment for services, (2) subsidy, which requires a finding of need to supplement other revenues.

In 1944 the advent of any air services was welcomed with joy. But there came a time when the small city businessman began to observe that his big city competitor could make a considerable journey, transact business, and return home the same day. This the small city businessman could not do. In order to accommodate him and for other reasons, including reduction in subsidy, the Board embarked on a policy similar to that it was following in extending the routes and eliminating the restrictions of the trunks.

From humble beginnings these carriers have grown strongly, provide very good services, and, although their proportion of total traffic remains small, in 1969 each of the present nine boarded more passengers than the entire industry did in 1938. Proportion of commercial revenues increased to 93 percent of operating expenses.

Among the cases contributing to the growth of this class of carriers have been: Local, Feeder, and Pick-Up Air Service, 6 C.A.B. 1 (1944); Rocky Mountain States Air Service, 6 C.A.B. 695 (1946); Seven States Area Investigation, 28 C.A.B. 680 (1958), 29 C.A.B. 102 (1959); Ozark Airlines Route Realignment Investigation, Dkt. 16606 (1969); Southern Air-

grew, the advantages of the long-haul single-carrier, a single plane, and of non-stop services, and of the thrust to quality and efficiency provided by competition, became more and more apparent. Consequently when public demand was most evident, the process of revision and expansion moved forward, albeit at a varying pace.⁵⁹ Peaks in the rate of new grants were reached in 1950, 1956, 1960, and 1969.

During the late 1940's the DC-4's began to be supplemented by the DC-6's,⁶⁰ and in the early 1950's by the DC-6B's.⁶¹ In 1957 and 1958 the DC-7's and Lockheed L-1649A's were introduced.⁶² These aircraft could fly transcontinentally nonstop. They were closely followed by the faster turbo-prop Lockheed Electras,⁶³ and soon thereafter by the still faster turbo jets,⁶⁴ most of them manufactured by Boeing or Douglas, which, as they progressed from model to model became larger and larger. The growth in average number of seats per aircraft in 1960 and 1961, and quite recently in 1969, was startling: By 1968 a single aircraft, a stretched DC-8, was capable of producing more annual available seat miles than the entire industry did thirty years earlier.⁶⁵ Moreover, the total number of aircraft had multiplied by ten.

The Board has sometimes been criticized for inconsistency.⁶⁶ Undoubtedly some of this is deserved. It is also undoubtedly true in some areas of Board responsibility that rigid adherence through thick and thin to guidelines contrived at any particular point in time may include elements of danger, unless founded upon the most thorough and objective analysis of industry experience, supported by prophetic vision, and fortified by much good luck. As shown in the accompanying chart⁶⁷ the economic course of the industry is not constant. It follows crests and valleys. The first crest is identifiable with the war years when traffic was heavy in comparison to the facilities available. Thereafter the course descended to a low in 1947, thence upward to another crest in 1950, which

ways, Inc., Route Realignment Investigation, Dkt. 18610 (1969); Central Route 81 Case, Dkt. 16196 (1969); Allegheny Airlines Route 97 Investigation, Dkt. 17436 (1969).

There is another very small class of carriers certified to perform scheduled services by helicopter in and about certain large cities. Their economic fortunes have not been good and where services are being performed, they are presently nominal. Orders E-20214, E-22963, and E-23714.

59 Among the conspicuous contributors have been: The Denver Service Case, 22 C.A.B. 1178 (1955); New York-Chicago Service Case, 22 C.A.B. 973 (1955); New York-Chicago Service (Northwest Restriction), 23 C.A.B. 943 (1956); Southwest-Northeast Service Case, 23 C.A.B. 42 (1956); New York-Florida Case, 24 C.A.B. 94 (1956); Florida-Texas Service Case, 24 C.A.B. 308 (1956); Great Lakes-Southeast Service Case, 28 C.A.B. 897 (1959); St. Louis-Southeast Service Case, 32 C.A.B. 43 (1960); Southern Transcontinental Service Case, 33 C.A.B. 701 (1961); Gulf States-Midwest Points Service Investigation, Dkt. 17726 (1969); Reopened Pacific Northwest-Southwest Service Investigation, Dkt. 15459 (1969); Southern Tier Competitive Nonstop Investigation, Dkt. 18257 (1969); Transpacific Route Investigation Case, Dkt. 16242 (1969) (in which several new routes between the Mainland and Hawaii were awarded).

60 1948 C.A.B. ANNUAL REPORT 60.

61 1952 C.A.B. ANNUAL REPORT 61.

62 1958 C.A.B. ANNUAL REPORT 50.

63 1959 C.A.B. ANNUAL REPORT 58.

64 1960 C.A.B. ANNUAL REPORT 66.

65 1968 C.A.B. ANNUAL REPORT 103.

66 "There would seem to be but three readings of Sec. 2(d) (now Sec. 102(d) Federal Aviation Act), in any way meriting consideration; as we shall see, the Board, at various times, has employed them all, and perhaps others as well. . . ." H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES — THE NEED FOR BETTER DEFINITION OF STANDARDS* 77 (1962).

67 *Supra* note 55.

continued through 1956. Following that the course was generally downward to a low in 1961, then upward to the crest of 1964 which lasted through 1966. Hopefully we are now beginning to recover from the third and deepest downward turn.⁶⁸ It seems worthwhile to take a brief look at some of the cases decided in the course of the expansion program, and at various stages of the economic ups and downs.

In the early case of *Eastern A. L. et al., Washington Service*,⁶⁹ decided in 1943, when load factors had neared an all-time high and wherein routes were added between Washington and the cities of St. Louis, Toledo, and Dayton, the Board in optimistic tone said this:

The end of the present world conflict should see unprecedented . . . increase in volume of both passengers and property carried by air. With this increase . . . we do not believe that the intervenors are justified in their fears that the authorization of the proposed routes will jeopardize the financial stability of existing carriers. . . .

Thus, while the proposed routes will probably divert some revenues . . . at the inception of the service, we think that any adverse effects will be temporary only and will be offset by the general increase in air travel and other factors discussed hereinbefore. . . .

In 1944, in the same economic climate, the Board decided *Colonial Air. et al., Atlantic Seaboard Op.*,⁷⁰ awarding new routes between Jacksonville and New York and in the course of its opinion, among other things, said:

. . . Section 2 . . . directs the Board . . . to consider, among other things, "competition to the extent necessary to assure the sound development of an air transportation system. . . ." This provision . . . leaves to the discretion of the Board the determination of whether competition in a particular area is necessary to assure the sound development of an appropriate . . . system. In exercising this discretion it is the Board's duty to protect the . . . industry against the evils of unrestrained competition on the one hand, and the adverse consequences of monopolistic control on the other.

It is generally recognized that . . . regulation alone cannot be relied upon to take the place of the stimulus which competition provides in the advancement of techniques and service. . . . Competition invites comparison as to equipment, cost, personnel, organization, methods of operation, solicitation and handling of traffic, and the like, all of which tend to insure the development of an air transportation system. . . . That the . . . system . . . has reached its present position of preeminence is in large part due to the competitive spirit which has existed throughout its development. The continued maintenance of that position as well as the further development of the industry demands the encouragement of free initiative and enterprise subject only to the condition that the competitive services shall not be wasteful.

68 "Of the eleven domestic trunklines plus Pan American, only five operated profitably in 1970." Address of Floyd D. Hall, Chief Executive Officer, Eastern Airlines, Aviation/Space Writers Assoc., New York City, Feb. 24, 1971.

69 *Eastern Air Lines, Washington Service*, 4 C.A.B. 325, 350 (1943).

70 *Colonial Air Lines, Atlantic Seaboard Operations*, 4 C.A.B. 552, 554, 555 (1944).

. . . [T]here is a strong, although not conclusive, presumption in favor of competition on any route which offers sufficient traffic to support competing services without unreasonable increase of total operating cost. . . .

In the two years following the *Colonial* decision the number of aircraft in service increased by 150 percent, capacity by 20 percent, route miles by nearly 45 percent, plane miles by over 150 percent, and although traffic increased by more than 130 percent, load factors fell and by 1947 the rate of return was well into the red. In denying a new competitive San Francisco-Seattle route in the *West Coast Case*,⁷¹ decided in 1946, the Board spoke in a new tone:

. . . It would be most ill-advised, we believe, in the face of the many uncertainties of the present period of transition, to expose a carrier, whose financial strength is showing a marked tendency to decline, to additional impairment in the form of competition by a new service for which the record shows no public need and which, if authorized, will further weaken the one carrier without strengthening the other.

The Board frequently considers applications for new services in which the potential revenues are substantially insufficient to cover costs. Although certain to be favored by the communities immediately affected, such a grant may not be consistent with the public interest. Thus, if required to operate in a market which will not carry its own weight, a carrier must subsidize the services from other markets. Accordingly, there will be an upward pressure on fares in those markets. Furthermore, in many cases the new services will cause a diversion of revenues from competing carriers, with a resultant upward pressure on fares over their routes. As the air transportation system continued to expand and new grants became more and more competitive, such considerations tended to draw increased attention.

By 1950, apparently influenced by burgeoning traffic and greater restraint in route grants and in capacity increases, load factors began to rise and the industry entered upon an unparalleled seven-year period of profitability. But in 1951 the Board had not yet forgotten the recent experience when, in denying applications in the *Southern Service to the West Case*,⁷² it said the following:

It is important to keep in mind the fact that it is not necessary to establish a competitive service upon every segment of our air transportation system to assure the benefits of competition. The Congress recognized this truth when it directed the Board to adhere to a policy of competition only "to the extent necessary to assure the sound development" of the air transportation system. . . .

. . .

. . . A business, to be sound, must be able to weather the economic storms as well as avail itself of the opportunities of the prosperous periods. It would be short-sighted indeed were we to organize our air transport route system on the assumption that conditions . . . will always be favorable. We

71 *West Coast Case*, 6 G.A.B. 961, 972 (1946).

72 *Southern Service to the West Case*, 12 C.A.B. 518, 533, 534 (1951).

know from the experience of the last 4 years that air transportation can pass with surprising abruptness from relatively sound conditions to conditions of grave crisis, even when the circumstances of the general economy are favorable. In formulating policies and reaching decisions . . . we take the chance of committing fatal error if we close our eyes to the warning lessons of this experience.

. . . Our aim and that of the carriers must always be to provide the public with the benefits of safe and modern air transportation at the lowest rates and fares that can be economically provided. The most effective means of achieving this objective is the development of an air route pattern which will enable the individual carriers to enjoy the highest load factors. The creation of uneconomic, duplicating services will not encourage the development of such load factors.

By 1955, however, memories of "the last four years" had dimmed and, in authorizing new services in the *Southwest-Northeast Service Case*⁷³ the Board returned to its initial optimism and stated:

. . . Fundamental to the Act is the provision that the Board shall regard as in the public interest "Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to . . ." our relevant factors . . . the Board has . . . authorized . . . along with the other relevant factors . . . the Board has . . . authorized . . . expansion . . . in such a manner as to bring more and more competitive service to more and more communities. . . . the Board has not been guided by the negative concept of determining first whether the existing services met minimum standards of legal adequacy. Rather the Board has been influenced, in accordance with its statutory mandate, by the concept that competitive service holds the greatest prospect for vigorous development of our national air transport system with the fullest improvements in service and technological developments. . . .

In 1956 the Board issued the first in a series of opinions pertaining to the fortunes of Northeast Airlines. Four will here receive attention. They chance to coincide with two hills and two valleys on the industry's development chart.

In that year, 1956, the Board added a third carrier in the East Coast-Florida market, and Northeast Airlines, regarded as in need of strengthening, was selected and granted a temporary certificate. In the preceding five-year period traffic had more than tripled, was estimated to reach three million in the year of decision, and thereafter to grow at an annual rate of 15 percent. The Board said:

. . . Moreover, as we have on a number of occasions pointed out, the Congress in adopting the Civil Aeronautics Act, clearly considered competition to hold the greatest prospect for vigorous development of our national air route system with the fullest improvements in service and technological developments. . . .⁷⁴

Again events did not turn out as forecast. Industry load factors fell and by 1961 rate of return had dropped to 1 percent. In this changed climate the Board

73 *Southwest-Northeast Service Case*, 22 C.A.B. 52, 60 (1955).

74 *New York-Florida Case*, 24 C.A.B. 94, 99 (1956).

addressed the question of renewing Northeast's certificate. Its 1963 opinion included the following:

... the Board ... anticipated that the diversionary impact ... would be substantially offset by future traffic growth. The growth has not occurred. ...

...

The unsuccessful nature of Northeast's operations to date, the lack of any substantial evidence that it will become successful in the future, the failure of the expected east coast-Florida traffic growth to materialize, the fact that Eastern and National can meet the present needs of the market, and the opportunity ... to aid in the rehabilitation of Eastern, persuade us that the public convenience and necessity do not require the present authorization of a third ... carrier. ...⁷⁵

Northeast appealed to the U. S. Court of Appeals for the First Circuit which set aside the order and remanded the case.⁷⁶ The Board thereafter issued a second opinion.⁷⁷ The First Circuit again remanded⁷⁸ whereupon the Board determined to reopen the decision for a complete review, and returned the case to the examiner.

Meanwhile the circumstances of the industry again improved, traffic grew, load factors grew, rate of return reached 12 percent, and the air transportation system was proceeding along its third crest. The examiner's decision, which became the final decision of the Board, was issued on December 8, 1966, and in it he said:

... there is now fully established a vindication of the conclusions reached in 1956. ... The ... factors that dictated ... denial of ... renewal, viz., the failure of the traffic to develop as forecast ... the drastically deteriorated financial position of Northeast ... and the uncertain status of Eastern, do not now persist. On the contrary, there is now established an overall picture conforming to that which was visualized. ...⁷⁹

The fourth in this series of opinions was issued by a Board examiner in 1970 in the *Northwest-Northeast Merger Case*. It was another time of trouble. In a decision recommending approval of the merger the examiner spoke of Northeast's situation in part as follows:

... Its operations as a whole have been consistently unprofitable; in fact, except for 1966 when the carrier showed a slight profit, Northeast has had an unbroken history of operating losses over the past ten years. ...⁸⁰

75 New York-Florida Renewal Case, 38 C.A.B. 680, 690 (1963).

76 Northeast Airlines, Inc. v. C.A.B., 331 F.2d 579 (1964).

77 New York-Florida Renewal Case, 41 C.A.B. 404 (1964).

78 Northeast Airlines, Inc. v. C.A.B., 345 F.2d 484 (1965).

79 Reopened New York-Florida Renewal Case, I.D. of Examiner William J. Madden, Dkt. 12285 68, 69 (Nov. 1966).

80 Northwest-Northeast Merger Case, Rec. D of Examiner Robert L. Park, Dkt. 21819 (Aug. 1970). The Board's decision affirming in pertinent part issued December 31, 1970.

Thus it appears that the Board has, over the years, been optimistic in tone, and relaxed on the question of need for restraint in competition, when the circumstances of the industry are good, but, on the contrary, when the industry falls on less fortunate days, the tone changes and need for restraint on competition gains emphasis. It has been said that the Board, by increases in route grants in times of good industry earnings, has often contributed to an economic downturn. If this is true it may also be said that the Board, by exercising caution in times of poor industry earnings, has often contributed to an upturn.

By 1970 the total domestic system operated by fixed-wing air carriers had been expanded to 404,250 route miles or more than eleven times its 1938 proportions, albeit 89.53 percent of the traffic now moved in competitive markets.⁸¹ A total of 698 communities received service. There were thirty-four carriers.⁸² Several of the original eighteen had merged, but many new ones, particularly of the class known as local service or regional carriers, had been added to the system. Total number of aircraft had increased by about ten times, capacity per aircraft by about ten times, speed by nearly four times, range by three times, and passenger miles by 175 times. Instead of the DC-3's, the new planes in contemplation were enormous wide-bodied jets by Boeing, Douglas, and Lockheed. Quite remarkably, fares remained at about the same level.⁸³ Thus, in view of the extraordinary improvements in convenience and efficiency, air transportation is one of the very best bargains to be had.

V. Mergers

From the standpoint of convenience to a traveler, be that traveler a person or a box, long distance transportation, with very few exceptions, is performed most efficiently by a single carrier.⁸⁴ Accordingly, there is a constant interest on the part of the public, the air carriers, and the Board, in facilitating the potentials for such services.

Sometimes this can best be accomplished by mergers. A merger is likely to result in lower costs and thus be conducive to lower fares. In contrast, extending routes by new grants of authority will ordinarily not result in so great a number of through services as do combinations of existing systems, and may, in the present advanced state of route development, result in more carriers on some segments than the markets can readily absorb, thereby provoking an upward thrust on fares.

Carriers seem most likely to be attracted to mergers when earnings are down and cost savings urgent. Thus ten domestic mergers have been approved

⁸¹ 1970 C.A.B. COMPETITION STUDIES, tit. 5.

⁸² 1970 C.A.B. ANNUAL REPORT 106.

⁸³ Average yield per passenger mile of the domestic trunks in 1938 was 5.50 cents. In 1970 it was 5.78 cents. 1970 C.A.B. ANNUAL REPORT 114.

⁸⁴ Pacific Northwest-Southwest Service Investigation, Dkt. 15459, I.D. Examiner Ross I. Newmann (June 1966); Southern Transcontinental Service Case, 33 C.A.B. 701, 878, 879 (1961); Erie-Detroit Service Case, 24 C.A.B. 523,556 (1956); Delta-Chicago and Southern Merger Case, 16 C.A.B. 647, 690 (1952); Great Lakes Area Case, 8 C.A.B. 360, 375 (1947); Delta Air Lines Service to Atlanta and Birmingham, 2 C.A.B. 447, 479 (1941).

since the beginning of the present downturn,⁸⁵ four more are pending,⁸⁶ and others appear on the horizon, albeit not all mergers approved subject to certain conditions have been consummated.⁸⁷ Nevertheless, carriers are wary of mergers for many reasons, including the uncertainties that persist among employees and in the business community during the substantial periods required for processing.⁸⁸

They are also wary because of the formidability of the proceedings. The applicable statutory provision is Section 408.⁸⁹ That section, in addition to forbidding approval where found to transgress the public interest, also forbids it under the terms of a proviso directed at any merger which creates a monopoly

85 American Airlines and Trans Caribbean Airways, Dkt. 21828, Order 70-12-161; North-west-Northeast Merger Agreement, Dkt. 21819, Orders 70-12-162 and 163; Allegheny-Lake Central Merger Case, Dkt. 19151, Order E-26967; Bonanza-Pacific West Coast Merger Case, Dkt. 18996, Orders E-26625 and 26626; Frontier Airlines, Inc.-Central Airlines, Inc. Merger, Dkt. 18517, Order E-25626; Alaska-Alaska Coastal Merger Case, Dkt. 18408, Orders E-26548 and 26549; Northern Consolidated-Wien Alaska Merger, Dkt. 18305, Orders E-26349 and 26350; Alaska-Cordova Merger Case, Dkt. 18293, Order E-26083; Western-Pacific Northern Merger, Dkt. 17951, Order E-25240; Eastern-Mackey Merger Case, Dkt. 16367, Orders E-24427 and 24428.

86 Caribbean-Atlantic Airlines, Inc.-Eastern Airlines, Inc. Acquisition Case, Dkt. 22690; American-Western Merger Agreement, Dkt. 22916; Delta Air Lines, Inc.-Northeast Airlines, Inc., Dkt. 23315; Allegheny Airlines, Inc. and Mohawk Airlines, Inc., Dkt. 23371.

87 Northwest-Northeast Merger Agreement, Dkt. 21819.

88 "... as a general premise, mergers are disruptive of effort, morale, and service and should be entered rarely and only on an affirmative basis, i.e., where the two companies involved can combine their strengths to improve their service, balance sheets and personal opportunities, and increase their competitive position. Mergers should not be defensive in a public service industry. They are not a panacea to be turned to when the growth rate softens." William V. Henzey, Editorial Dir., AIRLINE MANAGEMENT MAG., Address to National Airlines Management Club, Mar. 2, 1971, 7.

89 Federal Aviation Act of 1958 § 408. In pertinent part this section is as follows:

(a) It shall be unlawful unless approved by order of the Board as provided in this section — (1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships; (2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier; (3) For any air carrier of person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier; (4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics; (5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest; (6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or (7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection. **POWER OF BOARD** — (b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Board shall not approve any consolidation,

and thereby restrains competition. Although the Board has approved many mergers and rejected others, it has generally predicated its decisions on the public interest.⁹⁰ Nevertheless, the terms of the proviso must be coped with and more will hereinafter be said concerning it. The public interest has been regarded as influenced by another section of the statute (Section 414) which exempts any person affected by any order made under Section 408 from the operations of the antitrust laws.⁹¹ This section grants similar exemptions to persons affected by orders made under Section 412 pertaining to intercarrier and other agreements.⁹² For this and other reasons many cases arising under Section 412 are related to the line of decision in cases arising under Section 408. The public interest tests of Section 102 apply to both sections. There is another section which should be here noted (411) which deals with deceptive practices and unfair methods of competition.⁹³

In *Pan American-Matson-Inter-Island Contract*, a Section 412 case decided in 1942 with the continued participation of persons associated with the drafting of the statute, appears language similar to that of the early route cases. The Board quoted from *Acquisition of Western Air, supra*, a merger case, and stated in part as follows:

The Board has previously pointed out that the term "public interest"

merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: . . .

90 *American Airlines, Control of Mid-Continent Airlines*, 7 C.A.B. 365 (1946); *Acquisition of Western A.E. by United Airlines*, 1 C.A.A. 739 (1940); See also *Northwest Airlines, Inc. v. C.A.B.* 303 F.2d 395 (1962); *The United-Capital Merger Case, supra* (wherein monopoly and antitrust considerations are discussed solely in connection with the proviso).

91 Section 414, provides:

Any person affected by any order under Section 408, 409, or 412 of this Act shall be, and is hereby relieved from the operations of the "antitrust laws" . . . and all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. There is a related provision, Sec. 7 of the Clayton Act, 15 U.S.C. 18. Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board . . . under any statutory provision vesting such power in such . . . Board.

92 Federal Aviation Act of 1958 § 412:

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements. . . . (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; . . .

93 Section 411 authorizes the Board, if it considers such action to be in the public interest, to investigate and determine whether any air carrier, or ticket agent, has, or is, engaged in unfair or deceptive practices or unfair methods of competition. The Board is required to support such a determination by cease and desist action and a violation may be brought before the courts.

as used in the Act "is not a mere general reference to public welfare, but has a direct relation to fixed statutory objectives." Thus, section 2 (*now 102*) of the Act directs the Board to consider certain specific objectives as being in the public interest. . . .⁹⁴

The Board did not begin its line of decision giving emphasis to the antitrust laws until some years thereafter, but when it did the doctrine then announced was destined to fame, and to be uncritically followed in many cases. This was the "*Local Cartage*" doctrine. It emerged in the field of air cargo.

In the early years, as has been shown, the most sought after source of revenue was that derived from the transportation of mail. At the time of the passage of the Act this constituted 37 percent of overall receipts.⁹⁵ Thereafter it dwindled, not in gross amount but as a percentage of revenues, and before the end of the first ten-year period had fallen below 8 percent of total receipts.⁹⁶ The present figure is on the order of 2.9 percent.⁹⁷ Mail's early status as a percentage participant has been in substantial part replaced by that of air freight.

The first Board Annual Report in which freight is identifiable as a separate statistical item is that for 1946, where a year's freight traffic was listed at a little less than 5½ million ton-miles.⁹⁸ By 1948 the Board had begun to show a marked interest in this category and that year's report⁹⁹ stated:

The largest growth . . . occurred in the carriage of cargo, and the special problems presented . . . have assumed increasing importance. . . .

. . . In 1941 . . . cargo ton-miles came to less than 4 percent of passenger ton-miles; in 1945, the proportion reached 7 percent. In 1946 and 1947, respectively, the percentage . . . rose to approximately 10 and 20 percent, and it is probable that the proportion will reach 30 percent for 1948.

The Board was mistaken and air cargo hasn't yet reached 30 percent,¹⁰⁰ but, paced by the enormous growth in passenger traffic, it has attained a volume several hundred times that first reported.¹⁰¹ Indeed there are three route carriers performing domestic services whose authority is limited to cargo.¹⁰²

The value of air to cargo is speed, which is lost if pickup and delivery are not prompt. The economics are delicate for loads include many small separately originated and separately destined shipments.

In 1947, a number of air carriers, with Board approval, jointly established a cartage agent, Air Cargo, Inc., to perform pickup and delivery services.¹⁰³ A little later they submitted a further agreement which included a provision not to

94 Pan American-Matson-Inter-Island Contract, 3 C.A.B. 540, 545 (1942).

95 1948 C.A.B. ANNUAL REPORT 58.

96 *Id.*

97 C.A.B. AIR CARRIER FINAL STATISTICS (1969).

98 1946 C.A.B. ANNUAL REPORT 38.

99 1948 C.A.B. ANNUAL REPORT 17.

100 The present figure is on the order of 16.3 percent. 1970 C.A.B. ANNUAL REPORT 96.

101 In fiscal year 1970 the figure was 1,236,704,000 ton miles. *Id.* at 95.

102 Airlift International, Flying Tiger Lines, Seaboard World Airways.

103 C.A.B. Agreement 1041 (Dec. 31, 1947). Air Cargo, Inc. Agreement and Petitions, 9 C.A.B. 468 (1948).

advance cartage charges to independent truckers in some markets. Reasons given were—savings in clerical and accounting expenses, elimination of improper or illegal practices by the independent truckers, and improvement of the carriers' own pickup and delivery services. This was the *Local Cartage Agreement Case*¹⁰⁴ and reached decision in 1952. In denying approval the Board concluded as follows:

... Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.

This proposition, which appears to conflict with the statutory "Declaration of Policy,"¹⁰⁵ for "unless" and "to the extent necessary" are certainly not the same things, was reached without citation of authority.¹⁰⁶ No mention was made of the Declaration of Policy. The reasoning was wrapped up in two sentences:

... The approval of an agreement under section 412 exempts the agreement from the operation of the antitrust laws by virtue of section 414. While this exemption demonstrates the Board's power to approve agreements which otherwise would violate the antitrust laws, it also imposes upon the Board, in determining the effect on the public interest of agreements for which approval is sought, the duty to evaluate such agreements in the light of antitrust policy and principles.¹⁰⁷

Separated from the conclusion, these two sentences find some support in *McLean Trucking Co. v. U. S.*¹⁰⁸ which had been previously cited in Section 412 cases for the proposition that the antitrust laws were to be taken into account.¹⁰⁹ *McLean* was a case involving the merger of seven interstate motor carriers approved by the Interstate Commerce Commission pursuant to the authority of Section 5 of the Interstate Commerce Act.¹¹⁰ The lower court affirmed and the Supreme Court affirmed. Subsection 5(11) of the Act exempts approved transactions from the antitrust laws in similar fashion to Section 414 of the Federal Aviation Act, and, the National Transportation Policy which governs the Commission,¹¹¹ is in many respects similar to the Declaration of Policy which governs the Board. But unlike the Federal Aviation Act, it includes no definition of the extent to which competition is to be taken into account in evaluating the public interest.¹¹²

104 *Local Cartage Agreement Case*, 15 C.A.B. 850, 853 (1952).

105 Federal Aviation Act of 1958 § 102(d).

106 "... any effort to delineate CAB policy is fraught with danger, simply because the Board is noted for its propensity to alter its attitude frequently and for its ability to obscure the grounds for its action. ..." Barber, *Airline Mergers, Monopoly and the CAB*, 28 J. AIR. L. & COM. 209 (1962).

107 *Local Cartage Agreement Case*, 15 C.A.B. 850, 852, 853 (1952).

108 *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

109 *Air Cargo, Inc., Agreements and Petitions*, 9 C.A.B. 468, 470 (1948); *Air Freight Tariff Agreement Case*, 14 C.A.B. 424, 425 (1951).

110 54 Stat. 898, 905, 49 U.S.C. 5.

111 54 Stat. 898, 49 U.S.C. 1.

112 If support is to be found in *McLean* for the Cartage doctrine it would seem necessary to locate it in language of the opinion excerpted as follows:

It is clear that Justice Douglas, who dissented, did not regard *McLean* as supporting such a conclusion as that subsequently announced in the *Cartage* case for he, among other things, said:

... I agree that the Commission is not to measure motor vehicle consolidations by the standards of the anti-trust acts. ... But I think a proper construction of the Act requires the Commission to give greater weight to the principles of competition than it apparently has done here.

... The occasions for the exercise of the administrative authority to grant exemptions from the anti-trust laws should be closely confined to those where the transportation need is clear.¹¹³

Thus to the extent that the *Cartage* doctrine is connected with *McLean* it appears to emanate from the dissent rather than the decision.¹¹⁴ Any support in either is subject to the infirmity of the difference in the statutes.¹¹⁵ Pertinent to the evaluation of such differences is the following from the court's opinion in *McLean*:

... in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance *depending on the extent to which Congress indicates a desire to have those policies leavened or implemented* in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned.¹¹⁶

... the Commission is not to measure proposals ... by the standards of the anti-trust laws. Congress ... presumably took into account the fact that the business affected is subject to strict regulation. ... Congress ... neither has made the ... laws wholly inapplicable ... nor has authorized the Commission ... to ignore this policy. Congress recognized that ... consolidating ... would result in some diminution of competition and might result in the creation of monopolies. To prevent the latter effect and to make certain that the former was permitted only where appropriate to further the national transportation policy, it placed in the Commission power to control such developments. ... The fact that the carriers ... may obtain immunity from prosecution ... in no sense relieves the ... duty, as an administrative matter, to consider the effect ... on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy. (Emphasis supplied.) In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition ... and consider them *along with* the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. (Emphasis supplied.)

McLean Trucking v. United States, 321 U.S. 67, 85-87 (1944).

¹¹³ *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944). (Douglas, J., dissenting at 92-94).

¹¹⁴ See Note, *Merger in the Domestic Air Transport Industry*, 48 VA. L. REV. 1437 (1962).

¹¹⁵ See Hale and Hale, *Competition or Control: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962), where the authors state:

A vital difference between air and motor carriage, however, does exist in the Civil Aeronautics Board's authority over service and rates. The CAB can compel the rendering of services, profitable or otherwise, and has power to fix maximum as well as minimum rates. As a consequence, there is no room for application of the antitrust laws to the airlines. Enforcement of such legislation would merely impede the regulation of the industry by the CAB.

¹¹⁶ *McLean Trucking Co. v. United States*, 321 U.S. 67, 80 (1944) (emphasis added).

In *Butler Aviation Company v. C.A.B.*,¹¹⁷ decided in 1968, the Second Circuit Court of Appeals declined review of the Board's approval of the acquisition of a fixed base operator by a scheduled carrier. The opinion, by Judge Friendly, expressed the view that the Board "has properly concluded in the light of the immunity from the antitrust laws conferred by Section 414, that it must consider anticompetitive effects less extreme than those limited by the proviso¹¹⁸ in determining whether transactions will be 'consistent with the public interest' as defined in Section 102,¹¹⁹ . . ." Thus, the Board is to apply tests relating to competition, among other things, and must approve "if, but only if, it finds that the disadvantage of any curtailment in competition to be outweighed by the advantages of improved service."¹²⁰ This decision provides an interesting contrast with *Cartage*, which would have the Board deny "unless." It plugs in smoothly enough to Section 102 from which it gets its energy, and it is consistent with *McLean*.

Justice Douglas, who had dissented in *McLean*, was the author of the Supreme Court's opinion in *Pan American Airways v. U. S.*¹²¹ decided in 1963. This was a civil suit brought by the United States under the terms of the Sherman Act charging restraint of trade, i.e., agreements between carriers for limitation of routes and division of territories. The Court held that the Board and not the courts had primary jurisdiction of the matter, that the Federal Aviation Act was the pertinent statute, and among other things said:

. . . That regime has its special standard of the "public interest" as defined by Congress. The standards to be applied by the Board in enforcing the Act are broadly stated in § 2. (*Now Section 102, Federal Aviation Act.*)

. . .

The "present and future needs" of our foreign and domestic commerce, regulations that foster "sound economic conditions," the promotion of service

117 *Butler Aviation Co. v. C.A.B.* 389 F.2d 517 (2nd Cir. 1968).

118 First proviso of § 408(b), *supra* note 89, discussed hereinafter.

119 The court cited *American Airlines, Control of Mid-Continent Airlines*, 7 C.A.B. 365 (1946). In this case the Board said:

These underlying circumstances of size and competitive position are critical factors in measuring the application now before us against the standards of public interest set forth in section 2 (now Section 102) of the Act, in particular, the injunctions to promote sound economic conditions in air transportation (subsection (b)) and to consider in the public interest competition to the extent necessary to assure the sound development of an air transportation system properly adapted to our needs (subsection (d)).

7 C.A.B. at 378.

120 Concerning the scope of the exemption coverage of Section 414 the court later said in the *Butler* opinion: "We read section 414 . . . as declaring that in the areas there delimited the public interest demands that if a transaction has survived examination by the . . . agency, antitrust peace shall prevail. . . . Congress — had it considered the matter — might well have wished to guard agencies against a subconscious temptation to neglect through assessment of anticompetitive considerations on the basis that the transaction would remain open to later attack by the Attorney General or in a private suit — remedies too slow and doubtful in these areas of particular public concern. . . ." *Butler* was followed in *National Aviation Trades Association, C.A.B.*, 420 F.2d 209 (D.C. Cir. 1969) involving an operating lease of a public airport by a scheduled carrier, wherein the court said: ". . . This duty arises from the explanation of the 'public interest' standard set forth in section 102(d) of the Act, . . . and presumably from the inclusion of this same term in section 408. . . ." By per curiam order in *Conroy Aviation Corporation v. C.A.B.*, (D.C. Cir. 1970), which was not an acquisition but an exemption case arising under Section 416(b) the court said concerning antitrust contentions: ". . . The Board must examine antitrust factors and explicate its reasons for its ruling so that this court may review the basis for the determination. . . ."

121 *Pan American World Airways v. United States*, 371 U.S. 296 (1963).

free of "unfair or destructive competitive practices," regulations that produce the proper degree of "competition"—each of these is pertinent to the problems arising under Section 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 (*Section 102, Federal Aviation Act*) were held to be antitrust violations. . . .¹²²

In evaluating mergers, and unlike the 412 agreement situations, it may be necessary for the Board to consider the effect on competition in two ways. As has been shown Section 408(b) first states that the Board shall approve unless it finds that the merger will not be consistent with the public interest or that the conditions of the section will not be fulfilled. This calls for evaluation under Section 102 and, depending on the facts, the Board can find that prospective competition is adequate or that none is required. A following condition, however, is that of the "first proviso," which prohibits approval of a merger "which would result in creating a monopoly and thereby restrain competition. . . ." If the merger passes the first test it must nevertheless be subjected to the latter one.

In one of the very early merger cases,¹²³ the Board appointed Dean Roscoe Pound of the Harvard Law School to act as a special examiner. Pound, who favored approval, expressed the view that the language of the Declaration of Policy was the proper guide to the meaning of "competition" as used in the proviso. In his unreported initial decision he put it this way:

The proviso in Section 408(b) as to the effect in restraining competition and the clause in Section 2 (*now section 102*) defining the policy of the Act should be construed together so as to give 408(b) a meaning consonant with what the statute itself declares to be its purpose. . . . The statute does not announce a policy of competition at all events and in every possible way. It is competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of commerce, of the postal service, and of the national defense, which is to be regarded. . . .

In reversing the Board did not reach this question but nevertheless predicated its denial solely on the public interest standards of Section 102.¹²⁴ Its first effort at interpreting the proviso was made in a companion case, *United A. L.—Western A. E., Interchange of Equipment*, decided the same day, wherein the Board in part said:

. . . restraint of competition is a factor, insofar as the application of the proviso is concerned, only if it results from that degree . . . which the Authority (*now Board*) decides constitutes a monopoly of air transportation.¹²⁵

"Restraint of competition or jeopardy to another air carrier is not enough to

122 *Id.* at 308-09.

123 Acquisition of Western A.E. by United Airlines, 1 C.A.A. 739 (1940).

124 *Id.*

125 *United Airlines-Western A.E., Interchange of Equipment*, 1 C.A.A. 723, 724 (1940).

trigger the proviso unless brought about by the creation of a monopoly; *per contra*, the creation of a monopoly is not enough unless it would restrain competition or jeopardize a nonparty air carrier."¹²⁶ The Board in practice has looked closely at cause and effect and has not tended to expand upon the proviso by construction. Thus it was not applied in a case where "the consolidated operator will continue to receive real competition,"¹²⁷ in another where "the company . . . will not be able to control air transportation generally in that region, . . . the available traffic has not supported parallel services in the past, and there are no existing facts or reasons in the record indicating a traffic potential which would warrant such services in the future,"¹²⁸ in another involving a number of markets but there was only one "instance of significance in which competition will be removed" and "it appears that additional services will result,"¹²⁹ and in another, a similar case, where it was "evident that a reduction from two carriers to one will have only a slight impact on the traveling public."¹³⁰

In looking at cause and effect in the *United-Capital Merger Case* in 1961,¹³¹ involving the elimination of competition in several markets, some of them large, and in which it granted approval, the Board borrowed the failing business doctrine of *International Shoe*,¹³² a case which arose under the Clayton Act, decided by the United States Supreme Court in 1930. In affirming, the Court of Appeals for the District of Columbia Circuit, speaking through Judge Prettyman, had, among other things, the following to say:

. . . The proviso was clearly aimed, in both language and intent, at mergers which would *create* monopoly. The merger in the matter at bar did not create or tend to create monopoly. Indeed it probably, as the Board found, forestalled or at least cushioned a monopolistic development. There were a few segments of the total routes in which only one carrier was left (including four major "markets"), but these were minor in the whole picture. An erstwhile hearty competitor in a vast area was about to collapse and pass from the picture. Had this happened, the field would have been left to the remaining operators, thus with less competition and closer to monopoly. As it was, the merger brought a new and hearty competitor into the area. Those already there had more competition and thus less monopoly than they had theretofore had. We agree with the Board that this proviso of Section 408 had little to do with this problem. . . .

Counsel argue this point in terms of the "failing business doctrine" and the *International Shoe* case. We think we need not try to fit this problem as we have it, into ready-made doctrinaire styles or sizes; the matter is clear enough on the face of the facts and the statute without intermediate measurements.¹³³

126 *Butler Aviation Co. v. C.A.B.*, 389 F.2d 517, 519 (2nd Cir. 1968).

127 *Wien Alaska Airways, Acquisition Mirow Air Service*, 3 C.A.B. 207, 213 (1941).

128 *Marine Airways, Alaska Air Transport Consolidation*, 3 C.A.B. 315, 319 (1942).

129 *Braniff Airlines-Mid-Continent Merger Case*, 15 C.A.B. 708, 734, 735 (1952).

130 *Allegheny-Lake Central Merger Case*, Dkt. 19151, I.D. 40 (April, 1968).

131 *United-Capital Merger Case*, 33 C.A.B. 307, 308, 309 (1961).

132 *International Shoe Co. v. F.T.C.*, 280 U.S. 291 (1930); *cf. American-Trans Caribbean Merger Case*, Dkt. 21828 (1970); *Aloha-Hawaiian Merger Case*, Dkt. 22435, I.D. Examiner Milton H. Shapiro (Feb., 1971).

133 *Northwest Airlines, Inc. v. C.A.B.*, 303 F.2d 395, 401-02 (D.C. Cir. 1962).

VI. Conclusion

In reviewing the thirty-two years of route development under the Act, and in the background of its origins, it undoubtedly appears that the Board has wandered to some extent in its certification policy, and that in matters of mergers and acquisitions of control it may have assumed procedural and decisional burdens differing from and more formidable than those contemplated by the authors of the Act, and potentially tolerant of results not anticipated in their planning.

As to certification it is to be observed that if the Board had consistently followed its policy expressions made in stormy weather, a route system adequate to serve the public would not have developed. On the other hand, if it had consistently followed those expressions made in fair weather a system beyond the capacity of the economy to support would likely have evolved. Hence a policy pronouncement at any reading of the economic barometer and intended for permanent use is to be regarded with caution, albeit, if successfully accomplished, such a pronouncement might itself be conducive to a more constant economic climate. As to the *Cartage* doctrine there may be doubt as to the extent that ultimate results in cases have in fact been affected, for similar results are ordinarily possible under the less cumbersome statutory standard of "competition to the extent necessary." Furthermore, although the doctrine may tend to perpetuate economic uneasiness, it does not tend to introduce it.

The act of balancing between too little competition on the one hand, and too much on the other, results in a much different state of affairs, and certainly, from the standpoint of the regulators, a much more complex state of affairs than would exist either under regulated monopoly or unregulated competition. The principle of limited competition is entirely adequate, however, to afford many of the benefits and avoid many of the detriments of both systems. Competition, for example, is entirely adequate to provide a constant thrust to the carriers to seek ways and means to improve services. The manufacturers in turn understand this very well and seek ways and means to take advantage of it. They know that whenever they produce a new type aircraft that is superior to its predecessors in economy, comfort, safety, and speed that carriers will buy it, some of them to attain competitive advantage and others to maintain competitive position. Furthermore, because limits are placed upon the extent of competition, they can have some confidence in the integrity of the industry and in its ability to pay for its purchases and to support its services.¹³⁴

Carriers and manufacturers have performed accordingly and the nature of the service now available to the public bears but remote resemblance to that prevailing when the scheme was introduced. Undoubtedly the long distances

134 One author has stated:

... [I]t is reasonably fair to say that the Congressional decision of 1938 amounted to a determination that a new agency of five men, vested with sweeping authority, should see to it that an infant transport industry, of more than passing importance to our military power, should be spared the evils of overbuilding, wasteful competitive warfare, bankruptcies, rate discrimination, and business piracy which, in surface transportation, had concerned Congress for many years before it took remedial action.

Westwood, *Choice of the Air Carrier for New Air Transport Routes*, 16 GEO. WASH. L. REV. 2 (1947).

between cities and the strength of the economy would have had a positive effect on the quality of equipment and services in any event. But it would be interesting to speculate on the type of aircraft and methods of operation which might be in use if this thrust had not been provided by the federal regulatory statutes. They would hardly have been the same. This also is true as to air transportation elsewhere for most of the fine aircraft in use all over the world were manufactured in this country and designed initially to exploit its markets.

Under this scheme an air transportation system has evolved which for operational efficiency, extent and quality of services, economy and reasonable fare levels, is of unparalleled excellence. It is a splendid system and, despite its present difficulties which have proved to be cyclical, it splendidly serves the public interest. In 1969 the air carriers' share, measured in passenger miles, of commercial intercity transportation in this country, amounted to 240 percent of that performed in 1938 by all modes—rail, bus, water, and air—combined.¹³⁵ Even after allowing for a population increase of 55.5 percent, the public's welcome to the quality of its air transportation system is evident.

135 1939 I.C.C. ANNUAL REPORT 17; C.A.B. AIR CARRIER TRAFFIC STATISTICS (1969).