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A PRELIMINARY APPRAISAL OF MERGER CONTROL UNDER THE AIRLINE DEREGULATION ACT OF 1978

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SINCE THE passage of the Airline Deregulation Act of 1978 (Act),¹ five proposals for airline mergers or acquisitions of control have been considered by the Civil Aeronautics Board (the Board). Of these, three have been formally approved and two have been terminated by action of the applicants after tentative Board disapproval. A sixth such proposal has received the blessing of an administrative law judge and awaits decision by the Board.² Although the evidence presently available is not as extensive as could be desired—in particular, it would have been enlightening to have a full, formal exposition of the Board's reasoning in at least one decision disapproving a merger or acquisition—the record is adequate

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¹ Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending 49 U.S.C. §§ 1301-1504 (1976)). Section 1378 amends section 408 of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1504 (amended 1978). This section governs economic regulation of air carrier mergers and other airline control relationships.

² Since this article was completed, the Board has announced its approval of one additional merger proposal (Tiger International-Seaboard World Airlines, Inc., Acquisition Case, CAB Docket No. 33,712, approval of which was announced by CAB Press Release 80-91, May 8, 1980) and its tentative approval of another (Application of Republic Airlines, Inc. for Approval of the Acquisition of Hughes Air Corporation d/b/a Hughes Airwest, CAB Docket No. 38,086, tentative approval of which was announced by CAB Press Release 80-95, May 16, 1980). In neither case does the Board propose to issue a formal opinion detailing the rationale of its action. In Tiger-Seaboard, the Board will merely affirm the decision of the administrative law judge without endorsing his reasoning; in Republic-Airwest, the Board tentatively decided to approve the merger without the benefit of an evidentiary hearing.

to provide a basis for a preliminary appraisal of the economic implications of the deregulation Act's new merger provision. This paper will deal specifically with the economic aspects of merger regulation. With a few brief exceptions, it will not address other aspects, such as broader "public interest" considerations, the imposition of protective labor conditions, or the granting of immunity from prosecution under the general antitrust laws. Before discussing the individual cases, it will be useful to set forth briefly the background and content of the new criteria by which mergers and acquisitions are judged and to point out how they differ from the criteria of the original provision in the Federal Aviation Act.

MERGER CRITERIA, OLD AND NEW

Under the old law, a proposed airline merger, consolidation or acquisition of control was to be approved by the Board unless it found that the transaction would "not be consistent with the public interest," subject to the proviso that no transaction was to be approved "which would result in a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party" to the transaction.³ Apart from this narrow "monopoly" proviso in section 408 of the Act, the discretion granted to the agency was constrained only by the requirement that in determining what is consistent with the public interest it consider, "among other things," the list of factors contained in section 102 of the Act.⁴ "Competition" was mentioned in this list but was not accorded any determinate weight among a host of other considerations including the maintenance of "sound economic conditions."⁵ Board-approved transactions received automatic immunity from prosecution under the antitrust laws.

The actual administration of merger control under the old régime

³ 49 U.S.C. § 1378 (Federal Aviation Act of 1958, amended 1978). This act also contained a second proviso which limited the Board's power to approve acquisitions involving air carriers and surface carriers. *Id.* This provision is omitted in the amended version. 49 U.S.C. § 1378 (Supp. II 1978).

⁴ 49 U.S.C. § 1378 (Supp. II 1978).

⁵ 49 U.S.C. § 1378 (amended 1978). Section 102 of the Federal Aviation Act was amended by the Airline Deregulation Act to reflect the new intent of Congress that the industry should become more competitive. 49 U.S.C. § 1301 (Supp. II 1978).

was summarized recently by a CAB administrative law judge as follows:

Parties to merger proceedings customarily introduced into the record wide-ranging evidence as to the "good" and "bad" effects of a proposed merger. On the "good" side of the ledger would be placed evidence of such matters as cost saving, service improvements, subsidy reduction, financial strengthening of smaller carriers vis-à-vis large carriers, and other procompetitive aspects. On the "bad" side would be placed evidence of anti-competitive effects, diversion of traffic from other carriers, lack of route "fit", disruption of the Board's route policies for particular areas, and the like. Faced with this array of evidence, the Board customarily engaged in a weighing of the pros and cons of the proposed transaction. . . . The Board considered it necessary to judge the reasonableness of the consideration paid for the acquired properties and the fairness of the stock-exchange ratios involved. Customarily, the Board's merger review included inquiry into the transaction's probable impact upon employees of the carriers.

While acknowledging from time to time that national antitrust policy was an important public interest consideration, the Board also took the position that it was "not an antitrust court" and that "concepts and specific criteria developed by the courts in interpreting the provisions of the Clayton Act in the context of free market conditions are not necessarily determinative of whether a proposed action meets . . . the overall public interest considerations deemed relevant by the framers of the Federal Aviation Act. . . ." Under this interpretation of the prior law, the Board's antitrust resolve was erratic; and with the broad discretion afforded by the "public interest" test, antitrust policy was often ignored (citations omitted). . . .⁶

The new law, by contrast, provides much more explicitly for the employment of traditional antitrust criteria. The "public interest" test is retained, but also provided is that the Board may not grant approval if it finds that either of two additional tests, the "antitrust tests," will not be passed. The first of these, the "Sherman Act test," requires that approval be denied to any transaction which

⁶ North Central-Southern Merger Case, CAB Docket No. 33,136 at 21-23 (February 9, 1979) (decision of the administrative law judge). Judge Saunders' excellent introductory discussion also contains a systematic comparison of the texts of the old and new merger provisions which should be very useful to readers desiring more complete details in this regard. *Id.* at 33. For a history of merger regulation under the old law, see Keyes, *Notes on the History of Federal Regulation of Airline Mergers*, 37 J. AIR L. & COM. 357 (1971) [hereinafter cited as Keyes].

"would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States." The second, the "Clayton Act test," requires disapproval of any transaction

the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.⁷

The new law further provides that the burden of proving the anticompetitive effects shall be borne by "the party challenging the transaction," and that the "proponents of the transaction shall bear the burden of proving that it meets the significant transportation conveniences and needs of the public and that such conveniences and needs may not be satisfied by a less anticompetitive alternative."⁸

Antitrust immunity is not automatically conferred on transactions approved by the Board. The Board may grant such immunity, but only after finding that it is required in the public interest, and only "to the extent necessary to enable [the proponents] to proceed with the transaction specifically approved by the Board . . . and those transactions necessarily contemplated"⁹ by its order of approval. The new decisional rule is slated to survive the gradual narrowing of the Board's regulatory jurisdiction and the eventual demise of the agency as provided in the Deregulation Act. The Board's authority over mergers and similar intercarrier transactions is to be transferred to the Department of Justice on January 1, 1983, in the field of domestic and overseas air transportation and on January 1, 1985, in the international field.¹¹ However, there is

⁷ 49 U.S.C. § 1378(b)(1)(A) (Supp. II 1978).

⁸ *Id.* § 1378(b)(1)(B).

⁹ *Id.* § 1378(b)(1).

¹⁰ 49 U.S.C. § 1384 (Supp. II 1978).

¹¹ The Airline Deregulation Act, containing a new Title XVI (Sunset Pro-

no provision for any change in the *content* of the authority; therefore, the criterion of judgment will remain unaltered.

The range of discretion enjoyed by the Board under the new law appears to be much narrower than before. With the introduction of the second or "Clayton Act test," Congress apparently intended to increase the scope of the new antitrust provisions, thereby compelling the Board to conform more closely to accepted general antitrust principles and to give more attention to possible anti-competitive effects than it has in the past. Indeed, there is a good deal of evidence in the legislative history that the statute was so intended. For example, the Conference Report accompanying the bill which became the Airline Deregulation Act of 1978 contains the following statement:

The foundation of the new airline legislation is that it is in the public interest to allow the airline industry to be governed by the forces of the marketplace. Consistent with that promise, mergers of air carriers should be governed by the same standards that are applied to mergers of other firms.¹²

The report accompanying the predecessor Senate bill declared that the "fundamental objection" to the existing section 408 was that it permitted the Board "to approve mergers without undertaking the comprehensive competitive analysis required by the anti-trust laws of similar transactions." Thus, the report continues,

the Board has tended to regard the merger as a tool for insuring the financial well-being of an economically ailing air carrier. As a result, analyses of Board merger cases show that the CAB has not analyzed the possibility that merging carriers would be potential as well as actual competitors and has not required carriers to demonstrate that they attempted to find less anticompetitive partners.¹³

visions) of the Federal Aviation Act, provides for transfer of merger control to the Department of Justice, 49 U.S.C. § 1551 (Supp. II 1978).

¹² H.R. REP. NO. 1779, 95th Cong., 2d Sess. 73 (1978). In the Congressional debates immediately preceding the passage of the Airline Deregulation Act, comment on the new provision similarly emphasized that it was intended to insure adherence to antitrust principles. The members who spoke on this subject were at this time especially concerned that the Board's policies be *no more pro-competitive* than those prescribed by the general antitrust laws; however, it appears that this unusual emphasis was a result of the Board's reported reaction to one or more current merger proposals. See Vol. 134 CONG. REC. H. 13446-47, S. 18796-800 (daily ed., Oct. 14, 1978).

¹³ S. REP. NO. 631, 95th Cong., 2d Sess. 79 (1978). The discussion closely

On the other hand, the inclusion of the qualifying clause allowing approval of transactions with overriding public gains seems to require at a minimum that more attention be given to merger-related benefits than would be appropriate under the general antitrust laws. The recorded history of the legislation does not appear to justify going beyond this minimal interpretation. The entire new merger criteria, including the qualifying clause, were supported early in 1975 by representatives of the Ford Administration in hearings before the Senate Subcommittee on Administrative Practice and Procedure¹⁴ and later that year were incorporated in the Administration-sponsored bill providing for other far-reaching changes in the Federal Aviation Act.¹⁵ Subsequent proposals that the general antitrust laws be applied in the airline field, such as the Cannon-Kennedy "Air Transportation Regulatory Reform Act of 1977,"¹⁶ were opposed by the Board, the Department of Transportation, and other parties,¹⁷ but supported by the Department of Justice to which jurisdiction would have been transferred.¹⁸ The official opponents concentrated on peripheral issues such as the

parallels a statement made by the then Assistant Attorney General in charge of Antitrust before the Senate Commerce Committee in 1976, in support of the Ford Administration's general airline regulatory reform legislation. *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Sen. Comm. on Commerce*, 94th Cong., 2d Sess. 333 (1976). This statement was in turn an expansion of a view expressed by the Deputy Assistant Attorney General in charge of Antitrust before the "Kennedy Subcommittee" in March, 1975. *Oversight of CAB Prac. & Proc.: Hearings Before the Subcomm. on Admin. Prac. and Proc. of the Sen. Comm. on the Judiciary*, 94th Cong., 1st Sess. 1746-47 (1975). [hereinafter cited as *CAB Oversight Hearings*].

¹⁴ See *CAB Oversight Hearings*, *supra* note 13.

¹⁵ S. 2551, 94th Cong., 1st Sess. (1975).

¹⁶ S. 689, 95th Cong., 1st Sess. (1977).

¹⁷ The Secretary of Transportation opposed transfer of jurisdiction to the Justice Department, but supported a "stronger merger standard" to be administered by the Board. *Regulatory Reform in Air Transp.: Hearings Before the Subcomm. on Aviation of the Senate Comm. of Commerce, Science, and Transp.*, 95th Cong., 1st Sess. 1346 (1977). The Chairman of the CAB warned that "legitimate air transportation considerations might be subordinated to more orthodox antitrust factors in circumstances in which the reviewing agency may have little incentive to expedite its air transport case load in view of its broader responsibilities," and noted that the power to impose labor protective conditions would "presumably be abolished." *Id.* at 171. Some airline management and labor union representatives expressed opposition. *Id.* at 1485, 928-29, 1281, 1287; the president of United Air Lines suggested continuation of Board jurisdiction under a merger standard similar to, but not identical with, the Bank Merger Act criterion. *Id.* at 439.

¹⁸ *Id.* at 1388, 1390.

need to protect airline employees affected by mergers and procedural delays which might result if jurisdiction were transferred; they failed to concentrate on developing substantive arguments in support of special treatment of mergers in the airline field. The subsequent Congressional reports and debates appear to be equally devoid of substantive reasoning.¹⁹

In economic terms, the new criteria seem to promise an opportunity for the administering agency to judge each individual proposal on the basis of its probable detriments and benefits. Instead of being principally guided by an essentially undefined notion of "public interest" which could justify approval of mergers regardless of competitive and other considerations relating to economic efficiency, the agency is directed to devote major attention to weighing against each other two specific kinds of effects: the public detriment caused by lessening of competition and the public benefit embodied in "transportation conveniences and needs." The overall goal of maximizing net benefits is served by the statutory requirement that, to be admitted to the positive side of the scale, benefits must not be attainable by a "reasonably available alternative having materially less anticompetitive effects."²⁰ A second prescribed condition provides that a questionable balance shall be treated as a defeat for the proposal, since approval requires a definite finding that the detriments are outweighed.²¹ This requirement is not so readily justified but seems to offer no great threat to a

¹⁹ For example, the House report on S. 2493, H.R. REP. NO. 1779, 95th Cong., 2d Sess. 73 (1978), contains a rather extensive discussion of the content of the Bank Merger Act criterion and the major aspects of its interpretation by the courts but does not explain why the airline industry is singled out for special treatment. The argument for the original proposal of the qualifying clause (which may have little or no relevance to the final legislation) was summarized by a Ford Administration spokesman as follows: "In short, strict antitrust policy may sometimes conflict with sound transportation policy. . . . Under strict antitrust analysis if a proposed merger affected ten markets with beneficial impact in nine and anticompetitive results in one, the merger would be denied despite the significant transportation benefits." *CAB Oversight Hearings*, *supra* note 13, at 2154. Given the apparently intended nine-to-one ratio of benefits to detriments, it is difficult to say how "strict antitrust policy" as here interpreted would be suitable for *any* industry; on the other hand, if it is suitable for industry in general, it is difficult to see why it is not suitable for air transportation. Special treatment remains unexplained.

²⁰ 49 U.S.C. § 1378(b)(1)(B) (Supp II 1978).

²¹ *Id.*

generally reliable weighing process. The actual significance of this condition will be touched on in the concluding section.

Cases passed upon by the Board to date have been judged primarily by application of the second antitrust test or "Clayton Act test"; the "Sherman Act test" has not been at issue. The following discussion of these cases will be concerned with determining the extent to which the use of the new criteria seem to be fulfilling its substantive promise of judgment on the economic merits of each individual transaction. However, this discussion will also suggest some tentative conclusions regarding fulfillment of the apparent legislative intent to limit the range of administrative discretion and to bring more attention to bear on the possible public benefits of the proposed transactions than would be thought appropriate under the general antitrust laws.

THE CASES

By far the most extensive exposition of the Board's views on merger policy under the new Act is contained in its consolidated October 1979 decision, *Texas International-National Acquisition Case, Pan American-Acquisition of Control and Merger with National*.²² This case approved the acquisition of National Airlines by Texas International Airlines [such portion of the case to be referred to as *Texas International-National*] and the acquisition of and merger with National Airlines by Pan American World Airways [such portion of the case to be referred to as *Pan American-National*]. This approval was contrary to the prior recommendations of an administrative law judge.²³ In each case, the Board's decision was based on a finding that the transaction as approved would result in no substantial lessening of competition. As will be noted, approval in *Pan American-National* was subject to a condition excepting transfer of one of the affected routes.

Texas International-National

From an economist's point of view, the outstanding feature of

²² *Texas International-National Acquisition Case, Pan American Acquisition of Control and Merger with National*, CAB Docket Nos. 33,112, 33,283, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165 (October 24, 1979).

²³ *Texas International-National Acquisition Case, Pan American Acquisition of Control and Merger with National*, CAB Docket Nos. 33,112, 33,283 (April 5, 1979) (decision of administrative law judge).

this decision is its relatively realistic appraisal of the significance of market shares and concentration ratios in judging the probable effects of the proposed transactions on competition, both actual and potential. The "market share" of any firm is defined as the percentage of total sales in any given market which is accounted for by the sales of that firm. "Concentration ratios" generally refer to the percentage of total sales in any given market accounted for by a certain number of the largest sellers. Thus, a "four-firm concentration ratio of eighty percent" occurs in any market when the four firms with the largest amount of sales in that market account for eighty percent of the total sales in that market.

The more orthodox approach to the problem is exemplified in the arguments relied upon by the administrative law judge. In the Houston-New Orleans market served by both Texas International and National, the judge added the existing market shares of the two carriers, calculated the shares of the market accounted for by the largest and two largest carriers, respectively, after the shares of the two carriers were combined, and compared the results with market shares which previously had been held "presumptively" unlawful by the United States Supreme Court in *United States v. Philadelphia National Bank*.²⁴ To the proponents' contention that persistence of other competitors in the market would offset anti-competitive effects, the judge replied that the merged carrier's share of the market was likely to increase despite these competitors' efforts.²⁵ The proponents also argued that anticompetitive consequences would be prevented by new entry, now made easy by the loosening of regulatory control. The judge countered by noting the possibility of short-run use of monopoly power and by referring to administrative and judicial decisions denying that potential competition can adequately compensate for the elimination of actual competition.²⁶ With respect to the many city-pair markets in which Texas International and National appeared to be potential com-

²⁴ 374 U.S. 321 (1963); Texas International-National Acquisition Case, Pan American Acquisition of Control and Merger with National, CAB Docket Nos. 33,112, 33,283 (April 5, 1979) (decision of administrative law judge).

²⁵ Texas International-National Acquisition Case, Pan American Acquisition of Control and Merger with National, CAB Docket Nos. 33,112 33,283 at 67-68 (April 5, 1979) (decision of administrative law judge).

²⁶ *Id.* at 69-70. Direct evidence intended to show the likelihood of actual new entry was held to be unpersuasive.

petitors, the judge, following judicial precedent, relied on concentration ratios as indicators of whether or not the markets in question were already adequately competitive, and also relied on judicial precedent in defining the specific percentage shares sufficient to show that a given market is "concentrated."²⁷

The Board, on the other hand, emphasized the inadequacy of market share as an indicator of the effectiveness of competition in airline markets, largely on the ground that, in the absence of special conditions inhibiting new competition, potential competition could be expected to assure satisfactory economic performance. In a general introductory statement relating to its decision not to "rely heavily on market share data," the Board explained:

Airline markets are nearly always concentrated by traditional antitrust standards, yet most are competitive in performance. The use of market share data has not been found particularly helpful in establishing the probable competitive performance of individual city-pair markets, and one must look at other factors to assess the competitive impact of changes in market structure. Those factors include direct constraints on airport entry (such as slot or gate shortages or impediments imposed in response to environmental problems), the potential that an apparently dominant position at a given airport or city might create an entry barrier, or that dominance (or "shared dominance") at numerous hubs within a region could inhibit entry into markets within that area, or that a pattern of similar market shares over a network of routes could create a potential for tacit collusion.²⁸

Analyzing the impact of the *Texas International-National* acquisition in the Houston-New Orleans market, the Board found that, despite the resulting concentration ratios, the transaction "would not lead to a probable anticompetitive effect" because of the "significant number of competing carriers," the fact that new entry had "recently been accomplished by a relatively small firm," the possibility that "price competition may be contributing to a substantial shake-up in market shares," and the existence of "other carriers with a ready ability to enter."²⁹

²⁷ *Id.* at 72.

²⁸ *Texas International-National Acquisition Case*, Pan American Acquisition of Control of, and Merger with National, CAB Docket Nos. 33,112, 33,283, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165, at 12 (October 24, 1979).

²⁹ *Id.* at 6. *See also id.* at 18-19.

With regard to markets in which the prospective merger participants were potential competitors, the Board again pointed out that concentration ratios were misleading. In general, it asserted, such ratios are significant only as "proxies" for "probable noncompetitive performance."³⁰ In the airline industry where "it is relatively easy for a new firm to enter any given city-pair," the ratios are not reliable proxies.³¹ Thus, "[b]arriers to entry must be analyzed before any reliable hypothesis on competitive performance can be made."³² On the basis of its recent experience with multiple permissive entry awards under the Deregulation Act, which resulted in new entry into over 130 domestic markets (some by more than one carrier) and on the basis of its extensive past experience in evaluating "start-up" costs, the Board concluded that non-regulatory entry barriers are as a rule insignificant in individual airline markets.³³ The Board conceded that special conditions, such as "a lack of other credible entrants or . . . specific airport or other external deficiencies in National's markets that an independent [Texas International] might be uniquely qualified to overcome,"³⁴ could result in difficulties should the carriers merge. Hence an examination of each of the affected markets was undertaken and the Board discovered "no convincing demonstration that entry [was] particularly constrained or that there [was] an insufficient number of other potential entrants so as to establish any special need for a continued presence" of either of the carriers.³⁵ Factors considered here included the presence of Texas International facilities at one or both ends of a route, the number of other carriers actually serving the market or possessing facilities at either end, the size of these other carriers' systems in the Southern Tier region and their enplanements at the principal terminal (Houston), and the possibility that Texas International might have a special ability to overcome the environmental restraints at the San Diego airport.³⁶

The Board's realistic appreciation of the weakness of market

³⁰ *Id.* at 6.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 28-29.

³⁴ *Id.* at 29-30.

³⁵ *Id.* at 7.

³⁶ *Id.* at 31.

share as an index of probable anticompetitive effect and its recognition of the importance of other factors, such as entry conditions and relative competitive capabilities of the firms concerned, as determinants of this effect represent highly welcome departures from the orthodoxy of the past. Nevertheless, it must be said that the enumeration of these factors and the qualitative evaluation of their role in the particular markets involved appears to fall short of making a compelling case that the proposed acquisition would have little or no substantial anticompetitive consequences. Even in the Houston-New Orleans market, where there were several trunkline incumbents and a vigorous new entrant on a "turn-around" basis,³⁷ it is surely reasonable to believe that an independent National would have continued to be a strong competitor for a considerable period of time. The existence of any strong competitor is, generally speaking, a positive factor in assuring that tacit collusion does not develop among the incumbents. Moreover, the influence of potential competition cannot be evaluated without some reliable estimate of the timing of its initiation and the development of its full impact. In the "potential competition markets," there was persuasive direct evidence that in the absence of the merger new competition would in fact have been initiated by one of the participants and vigorously pursued.³⁸ Whatever the situation of the other potential entrants and their special capabilities, it is difficult to maintain that the participant's entry probably would have been of negligible value to consumers. In general, to realize the fallibility of market shares and concentration ratios is merely a first step toward the evaluation of anticompetitive consequences, and a genuine evaluation would require an attempt to predict the magnitude and timing of such effects.

The Board, however, concluded that the second antitrust test had been successfully passed; therefore, there was no occasion to consider the matter of "transportation conveniences and needs."³⁹

³⁷ *Id.* at 18-19.

³⁸ See *Texas International-National Acquisition Case*, Pan American Acquisition of Control of, and Merger with National, CAB Docket Nos. 33,112, 33,283 at 61-64 (April 5, 1979) (decision of the administrative law judge).

³⁹ The administrative law judge has found that Texas International's argument purporting to show that the merger would result in "improved service and cost savings" was "nothing more than a claim," with "no evidentiary support at all." *Id.* at 82. Estimates of cost saving had not even been attempted, and

The first antitrust test was not at issue in the proceeding, and various suggested "public interest" factors, including the possibility of a long period of "cross-ownership" without actual merger of the parties, the question of continued United States citizenship on the part of Texas International (in view of foreign ownership of some of its securities), the possible encouragement of a "merger wave" among other United States airlines, the general preferability of internal expansion to growth by combination, and certain alleged violations of section 408 by Texas International, were held not to warrant disapproval.⁴⁰

Pan American-National

In deciding upon the Pan American-National proposal, the Board also rejected an orthodox market share analysis which had been relied on by the administrative law judge. The domestic markets at issue in this proceeding were those actually served by National in which Pan American was regarded as a potential competitor. The Board's reasoning with respect to these markets was essentially the same as that adopted in connection with the *Texas International-National* proposal and the factual context was also essentially similar. There was persuasive evidence that if the merger was disapproved Pan American would have mounted a strong independent initiative in these markets.⁴¹ In spite of this evidence, the Board found no probability of substantial lessening of competition in any of these markets because a number of other carriers were already operating in them or were favorably situated to enter, because extensive new route awards were affecting these markets, and because experience, equipment, and route systems were already possessed by potential new entrants as well as incumbent competitors.⁴²

there was "no evidence concerning how [Texas International] would operate a combined [Texas International]-National system." *Id.* at 82-83.

⁴⁰ Texas International-National Acquisition Case, Pan American Acquisition of Control of and Merger with National, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165 at 61-64 (Oct. 24, 1979).

⁴¹ *Id.* at 55-56. It is stated that "Pan American entered several of these markets in conjunction with international service after the close of the hearing." *Id.* at 55, n. 138. See also Texas International - National Acquisition Case, Pan American - Acquisition of Control of and Merger with National, CAB Docket Nos. 33,112, 33,283 at 112-13 (Apr. 5, 1979) (decision of the administrative law judge).

⁴² Texas International-National Acquisition Case, Pan American Acquisi-

Pan American and National were in actual competition in the United States-Western Europe market and in several specific sub-markets included therein. For all affected markets except United States-London, the Board concluded that the elimination of National would not substantially lessen competition. This conclusion was made on the basis of arguments paralleling those employed regarding Houston-New Orleans in the *Texas International-National* context and on the basis of the openness of these markets to new competition. With respect to the United States-Western Europe market, the decision generally characterized the situation as follows:

Competitive conditions in the United States-Western Europe market have changed markedly in recent months, and we believe that as a result the reduction by one of the number of United States scheduled carriers will have little impact on competition. Over the past few years the United States government has promoted and encouraged liberalized entry in international aviation. The results of this effort are now being seen in the form of bilateral agreements with some European nations which permit United States carriers, unrestricted in number, to fly to virtually any major point (city) in those nations.⁴³

Focusing attention on "areas in Western Europe . . . served by National and where the effects on competition would be felt as a result of the merger," the Board observed that most of these points were in countries which were covered by agreements providing for multiple designations,⁴⁴ which several United States airlines had already been authorized to serve, and concluded that "the level of competition in those markets (specifically, Amsterdam, Frankfurt, Zurich, and Paris) [would] not be diminished as a result of the merger."⁴⁵ Foreign carriers—those of West German, Belgian, and Dutch nationality—had also been granted broad authority to serve United States-European routes, and could be expected to provide additional competition. Lower fares and increasing traffic

tion of Control of the Merger with National, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165 at 56-57 (Oct. 24, 1979).

⁴³ *Id.* at 37.

⁴⁴ *Id.* at 39. The term "multiple designation" or "multiple entry" is used to characterize the entry provisions in bilateral airline agreements which place no restrictions on the number of U.S. carriers which may serve points in the other party's territory. *Id.* at n. 78.

⁴⁵ *Id.* at 39-40.

in the transatlantic market were cited as evidence of "more competitive" behavior in the recent past.⁴⁶ Conceding that the merger would "result in the loss of one United States carrier" in the four continental European cities served by National, the Board found that "liberalized entry and recent route awards for foreign and United States carriers [were] sufficient to compensate for the loss of competition occasioned by the merger."⁴⁷

Approval of the merger was granted subject to the condition that National's Miami-London authority not be transferred to Pan American; the selection of a carrier to operate this route was to be the subject of a new proceeding.⁴⁸ Without this condition, the Board found, the proposed merger would have resulted in a substantial reduction in competition in the United States-London submarket of the United States-Western Europe market. Since it had already recognized the latter market as a significant unit throughout which competition existed to a significant extent, the Board was obliged to explain its simultaneous acceptance of United States-London as a significant submarket,⁴⁹ with an implied degree of immunity from competition with services from the United States to other European gateways. The explanation cited the indisputable fact that a large proportion of United States-Western Europe travellers do choose the London gateway, and the equally undoubted superiority of London over other British destination cities in airport facilities and "the attractions of a well known cosmopolitan center. . . ."⁵⁰

These facts alone would not, of course, have been sufficient to show that a significantly large United States-London submarket really did exist. An obvious minimum requirement of useful market (or submarket) definition is that competition within the market

⁴⁶ *Id.* at 40-41.

⁴⁷ *Id.* at 42.

⁴⁸ Miami-London Case, CAB Docket No. 36,764. Pending carrier selection, Pan American was authorized by exemption to serve the Miami-London route.

⁴⁹ Since the Board's analysis does not attribute an equivalent anticompetitive impact to a given percentage share in a submarket as in the market which contained it, the idea of a significant submarket is in this context not necessarily illogical. See generally Keyes, *Proposals for the Control of Conglomerate Mergers*, 34 S. ECON. J. 67, 80-82 (1967).

⁵⁰ Texas International-National Acquisition Case, Pan American Acquisition of Control of and Merger with National, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165 at 46 (Oct. 24, 1979).

(or submarket) can be shown to be more effective in promoting or protecting the interests of consumers than competition from the outside, otherwise there would be no justification for attributing special "antitrust" significance to intramarket (or intrasubmarket) concentration. Therefore, to demonstrate the existence of a significantly large United States-London submarket, it would have been necessary to show that a large number of United States-originated passengers not only preferred London to other gateways, but were in fact so devoted to this preference that they were subject to an unacceptable degree of exploitation *because of a deficiency in the amount of competition between the United States as a whole and the London gateway*, regardless of the fact that United States passengers destined for Western Europe, of which the United States-London travellers made up almost half, had been found to be adequately protected from exploitation because of the overall level of competition between this country and various Western European destinations.

Given this finding, it was evident that not *all* of the United States-London travellers were crucially dependent upon or addicted to services specifically directed to the London gateway; in fact, it would appear highly likely that some considerable proportion of the United States-London traffic would be more attractive and more protected from exploitation by a given bargain fare from a nearby United States point to, for example, Amsterdam, than by a bargain service from a distant United States gateway to London. At the very least, availability of the Amsterdam alternative would strictly limit the opportunity of the airlines serving London to maintain high prices or poor service. It does not appear that this problem of market definition was adequately dealt with by the Board. All or most of the United States-London passengers were apparently counted as being within the affected submarket;⁵¹ beyond this, it was merely noted that services to London from alter-

⁵¹ *Id.* at 45-46. "[T]he large numbers of U.S. passengers who choose London as a first (or only) destination distinguishes London from other European points [A] United States-London submarket is justified . . . on the basis of its size and commercial importance" *Id.* A footnote appended here notes that "[i]n 1978, about 1.4 million U.S. passengers deplaned at London," and that this number "represents two-thirds of all U.S. passengers who deplaned at London, Brussels, Amsterdam, Frankfurt and Paris in 1978." *Id.* at 46, n. 118.

native United States gateways actually did compete for some unspecified portion of the traffic.

Having thus "defined" a unified submarket insulated from the competition of services to alternative European gateways, the Board pointed out that the number of direct United States-London competitors was strictly limited under the Bermuda II⁵² bilateral agreement between the United States and the United Kingdom, so that new entrants could not be expected to compensate for the loss of existing competition. In finding that the elimination of one relatively minor carrier among the many⁵³ serving the submarket would substantially lessen competition, the Board did not commit itself to a market share analysis, to a general endorsement of the maintenance of any minimum number of carriers per market, or to a general presumption against the elimination of any one competitor. It relied instead upon circumstances peculiar to the United States-London service; namely, the particular effectiveness of carrier diversity on this route as illustrated by reference to very recent history, and the need to preserve an opportunity for the entry of a "new low-fare competitor."⁵⁴ In sum, by means of ingenious market definition and reliance on a unique historical background, the Board was able to single out for special treatment a potentially troublesome aspect of the proposed merger⁵⁵ and at the same time was able to avoid the adoption of any general principle which might have proved awkward in a different factual context.

To complete the argument for denying approval of the transfer of the Miami-London route to Pan American, the Board found

⁵² Air Services Agreement Between the United States and the United Kingdom of Great Britain and Northern Ireland, July 23, 1977. T.I.A.S. 8641, 28 U.S.T. 5367.

⁵³ Scheduled airlines serving the United States-London market included Pan American, Trans World Airlines, Braniff, Delta, National, Laker, and British Airways. Charter service was provided by other carriers, but is not included within the relevant definition of the market. Texas International-National Acquisition Case, Pan American Acquisition of Control of and Merger with National, Docket Nos. 79-12-163, 79-12-164, 79-12-165 at 47-54 (October 24, 1979).

⁵⁴ *Id.* at 50-51.

⁵⁵ *Id.* at 1 (separate statement of Chairman Cohen and member Schaffer). "In any case, our decision (and this is true for member Bailey as well) is based on the belief that approval of the Pan Am acquisition with a transfer of Miami-London authority would be anticompetitive and *we do not think a federal court would have permitted the merger to proceed if this market imperfection could not have been corrected.*" (Emphasis supplied) *Id.*

that this "transaction would not meet significant transportation conveniences and needs of the public."⁵⁶ In view of the negative conclusion regarding lessening of competition in other markets, the question of transportation conveniences and needs was not further discussed in this decision. Unlike Texas International, Pan American had developed this aspect of the case for the merger at some length, the major point being that the merger was needed to enable the carrier "to acquire a suitable domestic system" without which it would "no longer be a viable competitor" in the current "competitive international aviation environment."⁵⁷ According to the airline's spokesmen, the proposed merger was the "only feasible way" for it to acquire such a feeder system "at a reasonable cost and in sufficient time."⁵⁸ This line of argument had proved unconvincing to the administrative law judge, who concluded that Pan American was perfectly capable of building up a domestic feeder system on a phased entry basis and would indeed do so if the merger did not go forward.⁵⁹ He did find that the transaction would bring about "service benefits in the form of single-carrier service" and that "in one domestic market there would be improved competitive service."⁶⁰ These benefits he found to be "minor," and not significant enough to outweigh the merger's anticompetitive effects.

In addition to two general "public interest" arguments already disposed of in connection with Texas International-National, i.e., the possible encouragement of a "merger wave" and the arguable general preferability of internal expansion to growth by acquisition, the Board rejected an additional "public interest" contention aimed at the Pan American-National merger, namely, the judge's suggestion that it would contravene the present national policy of promoting greater competition in international air transportation. Here the Board reiterated its finding that the merger, as conditioned would not substantially lessen competition, and stated its opinion that if the elimination of one United States-flag carrier in multiple-designation markets were to be regarded as "in and of itself anti-

⁵⁶ *Id.* at 51.

⁵⁷ Texas International - National Acquisition Case, Pan American Acquisition of Control of and Merger with National, CAB Docket Nos. 33,112, 33,283, at 115 (April 5, 1979) (decision of administrative law judge).

⁵⁸ *Id.*

⁵⁹ *Id.* at 118-19, 121-22.

⁶⁰ *Id.* at 124-125.

competitive," the result would be to "block all mergers involving international carriers despite the fact that new entrants would not be restrained."⁶¹

North Central-Southern

The Board's only other affirmative decision⁶² to date under the new section 408 throws relatively little light on its interpretation of the section or the economic issues it involves. In the *North Central-Southern Merger Case (North Central-Southern)*, the prospective partners were two local service carriers which served no common city-pair markets but which were alleged to be potential competitors on several routes. As in the two cases already discussed, the Board found no probability of any lessening of competition. In this decision, however, the supporting reasoning was not disclosed; it was merely stated that "no party has offered any convincing evidence or argument that the combination of North Central and Southern would fail under any of the alternative interpretations"⁶³ of the law. The conclusion of the administrative law judge was adopted, but with the disclaimer that the Board's decision not to issue its own opinion did "not necessarily constitute an endorsement of the rationale"⁶⁴ set forth by the judge. Again, the question of "transportation conveniences and needs" did not arise.

If one accepts the Board's assertion that none of the public parties to the proceeding, including the Board's Bureau of Consumer Protection and the Department of Justice, and only one of the private parties found any anticompetitive effects whatsoever,⁶⁵ it is difficult to find fault with the Board's conclusion. However, it may be useful to note that this conclusion seems to be almost impossible to reconcile with the facts cited by the Board itself only nine months before the decision was served.⁶⁶ Moreover, it should

⁶¹ Texas International - National Acquisition Case, Pan American Acquisition of Control of and Merger with National, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165, at 6 (Oct. 24, 1979).

⁶² North Central-Southern Merger Case, CAB Docket Nos. 33,136, 34,430, CAB Order Nos. 79-6-7, 79-6-8 (May 15, 1979).

⁶³ *Id.* at 4.

⁶⁴ *Id.* at 2 n. 5.

⁶⁵ *Id.* at 4.

⁶⁶ Texas International - National Acquisition Case, Pan American Acquisition of Control of and Merger with National, and Enforcement Investigation, CAB Docket No. 33,112, CAB Order No. 78-8-150 at 9 (August 25, 1978).

not be overlooked that the "uncontroverted" evidence adduced by the parties to demonstrate the improbability of new competition on the "bridge" routes connecting the two systems consists of a recital of possible commercial deterrents, such as the "thinness" of the markets, and the self-serving statements of the applicants concerning their plans for expansion in the immediate future.⁶⁷

Continental-Western

Of the two applications "tentatively" disapproved by the Board, one was a proposed merger between Continental and Western Air Lines, the *Continental-Western Merger Case (Continental-Western)*.⁶⁸ The application had been recommended for approval by an administrative law judge largely because he believed that the anticompetitive effects of the transaction would be outweighed by the fare reductions promised by the applicants.⁶⁹ The judge's careful market-by-market analysis of probable effects on competition⁷⁰ compares favorably with the traditional abstract computation of before-and-after market shares. Also, his refusal to take at face value the applicants' predictions of cost reductions seems to be well supported by past experience, although it cannot be said that a convincing case was made for his conclusion that the most likely effect of the merger on unit costs was no change one way or the other.⁷¹ Nevertheless, the decision contains no evidence of any serious attempt to evaluate the probable benefits to passengers which could result from the proposed fare reductions or to estimate the countervailing effect of the anticompetitive consequences.

"[A]s to the North Central-Southern merger, these two carriers appear to be likely potential entrants into each other's markets and route systems. Geographically these carriers are standing on the edge of each other's systems. Indeed, as a result of recent grants of new operating authority, each is now extending its route system into the primary region saved by the other Also, as a result of our advocacy of liberalized market entry, both are now seeking authority in 40 common city-pair markets. We also note that both Southern and North Central now serve Chicago, Detroit and New York . . . [and] that the predominant aircraft operated by both carriers is the DC-9." *Id.*

⁶⁷ North Central - Southern Merger Case, CAB Docket No. 33,136 at 68-71 (decision of the administrative law judge) (Feb. 9, 1979).

⁶⁸ Continental-Western Merger Case, CAB Order No. 79-9-185, CAB Docket No. 33,465 (Sept. 27, 1979).

⁶⁹ Continental-Western Merger Case, CAB Docket No. 33,465 at 131 (May 24, 1979) (decision of the administrative law judge).

⁷⁰ *Id.* at 19-20, 33-72.

⁷¹ *Id.* at 114-15.

Therefore, the judge's conclusion on the relative "weight" of these considerations⁷² is unconvincing.

The merger project was abandoned by Continental shortly after the Board announced its tentative disapproval and publicly instructed its staff to prepare an appropriate decision. No formal opinion was ever issued by the Board. However, its findings and conclusions were summarized in an order dismissing the merger application and denying Western's motion for the issuance of a written opinion.⁷³ The conclusion that the merger might result in a substantial lessening of competition was based on findings that the carriers were "both aggressive competitors,"⁷⁴ that they were actually competing with each other in twelve city-pair markets and were potential competitors in many others, most of which were in the West, and that in some of these markets "especially those with constraints on entry imposed by airport rules or limitations, the elimination of actual or potential competition is a serious problem."⁷⁵ In these particular markets, the Board's "important concerns about competition" were not "mitigated or . . . eliminated by the presence of a sufficient number of other actual and potential competitors who should provide the necessary market discipline."⁷⁶ In addition, it was found that the combination "would cause a substantial increase in the number of markets, again primarily in the West, in which the merged carrier and United Air Lines would be the principal, if not the only, effective competitors,"⁷⁷ and thus would create "an unduly high risk of tacit cooperation or mutual accommodation between the two carriers at a time when air fares still appear to be above competitive levels."⁷⁸ Here again, the Board's concerns were "heightened" by evidence that the response of new entrants to "noncompetitive price/service offerings by incumbents" would be made more difficult by entry barriers, since "not all western airports had immediate additional capacity for new entrants and . . . others were subject to environmental con-

⁷² *Id.* at 124-25.

⁷³ Continental-Western Merger Case, CAB Order No. 79-9-185 (Sept. 27, 1979).

⁷⁴ *Id.* at 1-2.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

straints.”⁷⁹ The passage just summarized was followed by dictum, the relationship of which to future policy does not seem wholly clear. The Board indicated that its judgment might have been different if the level and pattern of airline pricing had been more satisfactory. It also stated that the arrival of this desirable state of affairs, currently in process of materialization, might be delayed by approval of the *Continental-Western* merger.⁸⁰

The applicants' allegations concerning benefits to result from the merger were adjudged to be unsupported by the record.⁸¹ The promised lower fares “would not necessarily result unless the Board were to place controls on the fares of the merged carrier,”⁸² an action which would be contrary to established policy. Some of the promised additional long-haul service had already been initiated, in some cases by one of the would-be partners. Promises of increased service to small communities were unenforceable, and in any case their enforcement would be contrary to public policy.⁸³ The evidence did not indicate “that the merged carrier would be a stronger competitor or that it would be in a better position to challenge the largest carriers.”⁸⁴ Additionally, there was no consideration of the carriers' claim with regard to cost reductions.

Unlike the judge, the Board did not claim that its judgment had

⁷⁹ *Id.*

⁸⁰ From the consumer's standpoint, fares in these markets may already be too high or unnecessarily discriminatory. In the recent past fares in all domestic markets were determined by regulatory policies that often discouraged efficiency and price-cutting. The Airline Deregulation Act of 1978 permanently changed these policies by calling for open entry and wide fare flexibility. However, there is little reason to believe that competitive discipline has as yet fully or even substantially eliminated the inefficiencies of the past. The possible persistence of noncompetitive fares naturally increases our desire for open competition and heightens our concern with any intercarrier arrangement that has a substantial probability of delaying its arrival.

Id. at 2-3.

⁸¹ *Id.* Continental-Western Merger Case, C.A.B. Order No. 79-9-185 at 3 (Sept. 27, 1979).

⁸² *Id.*

⁸³ *Id.* “To the extent that any serious threat of loss of essential air service might be involved, the Federal Aviation Act, as amended in 1978, provides for specific federal subsidy—and impliedly disavows reliance on cross-subsidizing smaller community service through super-competitive profits in competitively restricted markets.” *Id.*

⁸⁴ *Id.*

been arrived at by weighing prospective benefits against prospective detriments. Thus, it was under no obligation to evaluate either for the purpose of this comparison. The agency did, of course, have to find that the detriments were "substantial," but some estimate of their quantity and duration would have been useful to the applicants if they were to undertake to prove that the benefits outweighed the detriments, for example, on appeal. In the present instance, this particular point was not at issue since the Board was not rendering a binding decision on the merits of the case. For the same reason, the opinion presumably does not carry the precedent-establishing force that such a binding decision would have had, so that a precise statement of the Board's position would not have been useful for providing reliable guidance for possible future applicants.⁸⁵ The problem of evaluating detriments will be discussed in the concluding section.

Eastern-National

In *Application of Eastern Airlines, Inc. for Approval of Acquisition of Control of National Airlines, Inc. (Eastern-National)*, the application of Eastern Air Lines for authority to acquire control of National was dismissed, without a formal opinion on the merits, in accordance with a motion made by Eastern shortly after the Board had announced a tentative decision to disapprove the application and after it had ordered preparation of an appropriate order.⁸⁶ The administrative law judge had recommended disapproval because the transaction would have caused "substantial lessening of actual competition in the New York-Florida, Washington-Florida, New York-Washington, and intra-Florida mar-

⁸⁵ In justifying its refusal to issue a formal opinion, the Board disavowed any intention of establishing policy in a statement which would not be subject to judicial review, although in the public ("Sunshine") meeting where the tentative disapproval of the Continental-Western merger was announced it had not hesitated to issue "guidelines" which appeared to have just that effect. See *Pan American Gets National Majority*, AV. WEEK & SPACE TECH., July 30, 1979 at 22-23 for a general account of these "guidelines". On this point, the Board declared that it had not intended to adopt a method of establishing policy which did not seem "legally sound," and issued a warning that "parties who act on the basis of sunshine discussions do so at their own risk." Continental-Western Merger Case, CAB Order No. 79-8-185 at 7 (Sept. 27, 1979).

⁸⁶ Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., CAB Docket No. 34,226. CAB Order No. 79-12-74 (Dec. 17, 1979) (dismissing the application).

kets."⁸⁷ The anticompetitive effects were adjudged *prima facie* substantial on the basis of traditional market share criteria,⁸⁸ and the cumulative effect of several entry barriers, including "a short-term unavailability of efficient aircraft, limitation of air space at slot-restricted airports which [were] important to some of the markets involved . . . , marketing advantages of an Eastern/National combination, and some slight economies of scale,"⁸⁹ was found to be sufficiently important to show that entry into the enumerated markets was "not easy enough to rebut the *prima facie* case."⁹⁰ The judge accepted Eastern's argument that the merged carrier would have lower costs and provide better service than the separate airlines,⁹¹ but did not feel obligated to undertake a serious evaluation of these claimed benefits because Eastern itself did not choose to "rely on the overriding transportation defense."⁹²

In its order dismissing the application, the Board set forth the following explanation of its decision to disapprove the application: "A majority of the Board believed that a substantial reduction in competition was a likely result of approval. Our findings were keyed to the specific problems of competition involving airports that are operating under capacity restraints."⁹³ The press release issued at the time of the announcement of tentative disapproval indicated that the New York-Florida and Washington-Florida markets were "[o]f particular concern," and that "slot-controlled airports like New York's LaGuardia and Washington National" were considered to be a source of "problems" for would-be new competitors.⁹⁴ As these statements show, the Board's view was in some respects similar to that of the judge; however, it would be inappropriate to conclude that the Board would have endorsed the judge's opinion as a whole.

⁸⁷ Application of Eastern Airlines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., CAB Docket No. 34,226, at 62 (June 4, 1979) (initial decision of the administrative law judge).

⁸⁸ *Id.* at 33-36.

⁸⁹ *Id.* at 51.

⁹⁰ *Id.*

⁹¹ *Id.* at 14-15.

⁹² *Id.* at 21.

⁹³ Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., CAB Order No. 79-12-74 at 2 (Dec. 17, 1979).

⁹⁴ CAB Press Release No. 79-219 at 1 (Sept. 27, 1979).

CONCLUSION

Viewed in light of this short and rather sketchy record, do the new criteria seem to be fulfilling their apparent promise of judgment of individual merger proposals on the basis of their economic merits? There has been no case in which the Board has actually felt compelled to compare substantial anticompetitive effects with admitted cost savings or product improvements and come out with a net result.⁹⁵ The three positive decisions reflected findings of no substantial lessening of competition. In the one informal negative decision where both sorts of effect were mentioned as relevant (*Continental-Western*), the claims of benefit were found to be unsupported by the record. With one side of the scale declared empty there is obviously no need for a balancing process.

There has also been no case in which an attempt has been made to evaluate anticompetitive effects, although the positive decisions rest on findings that these effects are not "substantial" and the negative (informal) decisions rest on contrary findings. As has been suggested above, such an evaluation will assume particular importance if applicants undertake to bear the burden of proving that anticompetitive effects are outweighed by benefits, and this situation has not yet arisen. In any formal decision, however, such an evaluation would have the very desirable result of providing a definite precedent for the guidance of those who might be contemplating proposal of other mergers. At any rate, it is quite clear that if there is to be a genuine comparison of economic costs and benefits there must be a common denominator in terms of which both positive and negative factors are expressed. Hence, measurement of anticompetitive effects in terms of probable cost to consumers is a necessary element in the calculation. Does experience under the new law provide any evidence on the possibility or probability that a useful technique of evaluation will be developed?

⁹⁵ Only one of the decisions of the administrative law judges, *Continental-Western*, was represented as depending upon a genuine weighing process. As has been noted, the representation was not convincing. The sixth proposal submitted under the Airline Deregulation Act, although not yet passed on by the Board, has been recommended for approval by an administrative law judge. Again, there was no weighing; the proposal was found not to entail any substantial lessening of competition, so that it was "unnecessary to reach the 'convenience and needs' issue." Tiger International-Seaboard World Airlines, Inc. Acquisition Case, CAB Docket No. 33,712 at 61 (Jan. 15, 1980) (decision of the administrative law judge).

A *sine qua non* of such a development is the abandonment of the orthodox dogma which measures the "substantiality" of the anticompetitive impact of a merger by reference to the share of total sales in any market which would be accounted for by the combined firm created by the transaction, or accords to market share a preponderant role in determining "substantiality."⁹⁶ Therefore, the Board's awareness of the theoretical and practical weakness of the market share criterion and its avoidance of using this criterion to measure anticompetitive effects must be counted as an important step in the right direction. As has been noted, the discussion of this point in connection with the *Texas International-National* and *Pan American-National* proposals is notable for its realistic treatment of this much-misused criterion. Because there is no reliable correlation between market share or concentration ratio and the magnitude of probable harm to consumers, it is impossible in principle to translate these percentages into any form which would be directly comparable to an estimate of the value of cost savings or product improvements. Moreover, as the Board has recognized, any useful technique for evaluating the effects of individual transactions must rely on an analysis of the particular circumstances in the affected market rather than the mechanical application of a general theory of "market power" which purports to supply critical percentages applicable to all markets interchangeably.

On the other hand, it cannot be said that the Board has advanced very far in developing an interpretation of the statutory "substantial lessening of competition" standard which would provide a conceptual guide for an appropriate estimate of detrimental public consequences. Thus, though the agency has recognized the importance of non-commercial entry barriers⁹⁷ in determining the effectiveness of potential competition and hence the anticompetitive impact of eliminating actual competition, there seems to have been no recognition of the fact that these barriers vary greatly in im-

⁹⁶ For example, where a given percentage share is regarded as establishing a rebuttable presumption that there is a "substantial lessening of competition."

⁹⁷ "Commercial" entry barriers are those which are rooted in the supply or demand characteristics of the industry's product, for example, high initial investment requirements or larger marketing expenditures needed to establish "market identity." "Non-commercial" entry barriers may result from regulation or from other constraints such as the limited capacity of an airport.

pact from market to market, not only because of intermarket differences in the importance of competition from outside the market boundaries (i.e., the competition of substitutes),⁹⁸ but because of differences in the expected duration of the various non-commercial barriers. The special importance attributed to the Bermuda II United States-London entry restrictions in *Pan American-National*, to shortages of gate space, environmental constraints, and slot restrictions at certain airports in *Continental-Western*, and to airport slot controls in *Eastern-National* suggests a tendency to attribute automatically a "substantial" effect to the elimination of competition in any market affected by non-commercial restrictions. In fact, it may well be that all of these restraints can and will be overcome in a relatively short period of time.⁹⁹ The effect of extinguishing competition in a market with non-commercial entry barriers is not necessarily very large, nor is the effect of extinguishing competition in a market without non-commercial entry barriers necessarily negligible, even in the airline industry.¹⁰⁰

Again, the problem of evaluating the effects of probable new competition between would-be merger participants if approval is not granted cannot be sidestepped merely by limiting the analysis to a very short-term point of view, e.g., by pointing out the "thinness" of present patronage on the affected routes or the present existence of non-commercial entry barriers which may be subject to modernization or elimination in the foreseeable future.¹⁰¹ More-

⁹⁸ See text accompanying notes 48-60 *supra*. (discussions of the Board's treatment of the Miami-London route in the *Pan American-National* case). The competition of a product's substitutes is one important determinant of the elasticity of demand for the product itself, and hence is an important source of protection of consumers from "monopolistic exploitation," including that resulting from anticompetitive mergers.

⁹⁹ In the case of the United States-London market, for example, possibilities for entry were greatly increased by a new bilateral agreement arrived at by the United States and the United Kingdom in March, 1980. In this case, the Board was able to reverse its former decision and allow Pan American to continue to serve the Miami-London route, as it had been doing under a temporary authorization. *Miami-London Tentatively Given to Pan Am*, AV. WEEK & SPACE TECH., April 14, 1980 at 24-25.

¹⁰⁰ For example, there is always a time-lag before new competition is in place. Some non-commercial barriers, such as airport space limitations, are not overcome once for all but may be expected to recur as total traffic expands. The available potential competitor may be less efficient or innovative than the former actual competitor.

¹⁰¹ See note 63, 67 *supra* and accompanying text.

over, the presence of other actual and potential competitors, however capable, does not automatically cancel out the effects of this particular element in the total anticompetitive impact of any given proposal.¹⁰² The painfully evident difficulty of assigning any plausible value to these factors unfortunately does not make them irrelevant or negligible in fact.¹⁰³

To observe that no satisfactory method of estimating the probable detrimental effect of a proposed merger has been devised is by no means to imply any criticism of the performance of the Board. On the contrary, the Board deserves to be commended for recognizing the complexity of the problem and for calling attention to the simplistic nature of the orthodox approach. As suggested above, the Board is subject to legitimate criticism for ignoring or minimizing the impact of certain undoubtedly significant determinants of overall anticompetitive effect, and for representing as definitive the results of an incomplete and therefore unrealistic analysis. Obviously, however, it is not appropriate to offer criticism for failure to perform an inherently impossible task. As the Board's own analysis has helped to demonstrate, the factors involved appear to be so numerous and variable from case to case, and their combined probable result at various times in the future so difficult to predict, that even a serious and sustained attempt at measurement would in all probability produce an estimate with an unacceptably high degree of unreliability.

If this is indeed the case, then the promise apparently held out by the statute of a cost-benefit judgment of individual merger proposals is and must remain a false one. If an economically acceptable method of dealing with mergers is ever to be devised, it will not involve case-by-case comparison of benefits and detriments. Even if a satisfactory method were devised for producing a realistic estimate of the beneficial consequences of a proposed merger—and experience indicates that this would require a much more sophisticated, painstaking, and skeptical approach than has

¹⁰² See notes 42-40 *supra* and accompanying text.

¹⁰³ The Board may have been tempted to assume the contrary. According to a press account of the "Sunshine" meeting at which "merger guidelines" were announced, "[t]he CAB generally rejected the idea of potential competition as a barrier to mergers, saying it is too speculative." *Pan Am Gets National Majority*, *AV. WEEK & SPACE TECH.*, July 30, 1979 at 23. See note 67 *supra*.

been the rule in the past¹⁰⁴—there would be no way to compare it with the unquantified anticompetitive effect. For the same reason, the present language of the statute loads the dice against the merger proponents. Since the law in effect places upon the proponents the burden of proving that the prospective benefits outweigh the anticompetitive effects, they are faced with the need to demonstrate what is essentially undemonstrable. This consideration may well help to explain why none of the merger proponents so far seem to have attempted to develop and pursue a very extensive or persuasive case based on product improvements and cost reductions.¹⁰⁵ If the judgment on the basis of competitive effects is in all likelihood destined to determine the verdict, it may reasonably be concluded that efforts expended on proof of countervailing benefits stand a good chance of being wasted.¹⁰⁶

Regarding the two elements of apparent legislative intent identified at the beginning of the discussion, experience under the statute suggests certain tentative conclusions. First, as has just been indicated, the attention devoted to the beneficial consequences of proposed mergers by regulators and proponents has been slight, and there seems to be no reason to expect that this situation will change. Second, the Board still enjoys a very wide range of discretion in administering the law. Although “public interest” considerations cannot, under the new law, be adduced to justify permitting transactions not satisfying the antitrust tests, a finding of “substantial lessening of competition” has been held to depend upon a multiplicity of factors which vary in relative impact from market to market and whose effects do not appear to be susceptible of objec-

¹⁰⁴ See generally Keyes, *supra* note 4.

¹⁰⁵ Pan American's case for its acquisition of National was to an important extent based on “transportation convenience and needs,” but as has been indicated, its argument centered upon the issue of its future “viability”—a variant of the “failing company” doctrine, which is really an aspect of the analysis of possible anticompetitive effects. See notes 56-57 *supra* and accompanying text.

¹⁰⁶ According to the testimony of the Department of Justice in *Texas International-National, Pan American-National*, “[s]ince the enactment of the *Bank Merger Act* in 1966 no bank merger has prevailed on the benefits test where the merger has been found to be anticompetitive.” *Texas International-National Acquisition Case*, Pan American Acquisition of Control of and Merger with National, CAB Docket Nos. 33,112, 33,283 at 81-82 (April 5, 1979) (decision of the administrative law judge). This historical evidence may have served further to discourage serious attempts to demonstrate cost reduction or product improvements.

tive evaluation. Being therefore free to adopt its own appraisal of their combined impact, the Board can make a plausible case for or against "substantiality" in virtually any set of circumstances. Given the practical impossibility of demonstrating that "conveniences and benefits" outweigh those anticompetitive effects, the agency's conclusion on "substantiality" is of decisive importance. Its discretion is therefore practically unconfined.

When the enforcement of section 408 in the domestic sphere is turned over to the Department of Justice in January, 1983, there may be a substantial change in the administrative interpretation of the law. Traditional antitrust doctrines may well be more strictly adhered to; for example, the orthodox practice of according very great significance to market shares and concentration ratios may be followed, and the Board's more realistic approach to these matters accordingly may be abandoned. Merger proposals such as *Texas International-National* and *Pan American-National* may be therefore less likely to succeed. In this sense, the discretion of the administrative agency may become more circumscribed. However, the historical record does not seem to provide any reason to suppose that attention to potential cost reductions or product improvements will increase. Finally, there seems to be little hope that the principles followed by the new enforcers will be any more defensible in economic terms than have those which have apparently guided the Board.