Journal of Air Law and Commerce

Volume 22 | Issue 2 Article 2

1955

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SINCE the close of World War II, a bitter controversy has raged on the role of new entrants into air transportation. Both sides have, on occasions, viewed the controversy as a melodrama. This is not, however, the forum for hissing the villain. While the authors do not pretend to be without passion in this controversy,[1] they will try to discuss the problem from the standpoint of the underlying legal and economic principles involved.

The cause of the controversy may be summed up in a few key facts. Since the passage of the Civil Aeronautics Act in 1938, a small subsidized industry with commercial revenues of $31,000,000 has grown into a large profitable business with revenues of over one and a quarter billion dollars. In this seventeen-year period, though the industry has grown forty times, it has been largely preserved to the grandfather carriers, i.e., those carriers who obtained their basic operating rights under Section 401 (e) of the Act by "grandfather" rights. In 1954, the grandfather carriers produced 96% of the commercial revenue of the entire industry. Thirteen new local service carriers have been certificated and are still in business, but their routes are largely non-competitive with domestic trunks and their revenues amount to only 2.3% of the industry's commercial revenues. Four new all-freight carriers still survive but their certificates are limited to the freight business and their revenues amount to only 1.3% of total industry revenues. The passenger trunkline business, accounting for 86% of all commercial revenues, has been exclusively preserved to the grandfather carriers.[2]

[1] Both of the authors have represented the North American Airlines group which is engaged in a major effort to obtain trunkline certificates.

[2] For the year ended June 30, 1938, total non-mail revenues of all carriers were $31,341,000. For the year ended September 30, 1954, total non-mail revenues were $1,248,899,000 of which $28,667,000 were earned by local service carriers and $16,610,000 by all freight carriers. In addition, miscellaneous new operations such as the helicopter carriers, Resort and Trans-Pacific, had non-mail revenues of $4,900,000. Passenger revenues amounted to $1,117,253,000. Of this amount $32,000,000 was earned by local service, helicopter and territorial operations.

In the domestic trunkline field, the Board's policy has been to provide additional competition by extending the routes of the grandfather carriers and excluding all new carriers. While the Board has built up the routes of the smaller trunklines, the disproportionate share of the traffic carried by the Big Four carriers at the time of the passage of the Act (American, Eastern, TWA and United) has continued and their share of the market has increased since 1946. In 1954, these four carriers flew 73.6% of the domestic trunkline revenue passenger miles.[3]

The analysis here is limited to domestic trunkline transportation. The essential issue is whether as a matter of law and economics under the conditions that prevail in air transportation, the Board has been justified in its policy of meeting domestic transportation requirements primarily by expanding the routes of the grandfather carriers. This article is not concerned with the special problems of local service air transportation. Moreover, because they are subsidized, the problems of foreign air carriers differ in degree from the domestic operators.

Our conclusion is that the Board's route policies to date have been too restrictive and that the complete exclusion of new carriers from certificated domestic passenger trunkline air transportation is contrary to the objectives of the Act. We are not suggesting complete freedom of entry in air transportation. Nor are we suggesting that the Board should authorize any particular route to any carrier. Our concern is with the overall policy. The application of that policy must depend on the particular facts in the particular case.

The Provisions of the Civil Aeronautics Act

The passage of the Act was of course a recognition that air transportation is a business affected with the public interest, particularly from the standpoint of national defense. This has no direct relevance on the question of the extent to which entry should be controlled. Many businesses of equal public and national defense importance, such as aircraft manufacturing, have no restriction on entry. The cases which authorize states to regulate businesses affected with the public interest do not imply that all businesses affected with the public interest are public utilities.[4] They merely say that if the business is affected with the public interest, there is a constitutional right to regulate them.

The fact that a certificate of public convenience and necessity is required does not in itself determine that entry should be restricted according to any particular standards. The Federal Communications Act requires certificates, but in *Federal Communications Commission*

[3] In 1938 the Big Four flew 82.67% of the trunkline revenue passenger miles. This declined to 66.46% in 1946 and then increased to 73.6% in 1954.

[4] Munn v. Illinois 94 U.S. 113 (1877); Wolf Packing Company v. Court of Industrial Relations 262 U.S. 522 (1923); see Aviation Study Prepared for Committee on Interstate and Foreign Commerce, S. Doc. No. 163, 83d Congress, 2nd Sess. p. 48.

v. *Sanders Bros.*, 309 U.S. 470, 474 (1940), the Supreme Court stated that "the Act recognizes that the field of broadcasting is one of free competition." The Natural Gas Act also requires a certificate but expressly provides that this provision "shall not be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company." These statutes are, of course, different from the Civil Aeronautics Act.[5] They do make it clear that the requirement of a certificate in itself does not measure the degree of restriction on entry.[6]

Differences From Traditional Public Utility Statutes

It is true, of course, that the structure of the Civil Aeronautics Act has much in common with that of the traditional gas and electrical utilities. Carriers are obliged to render service and to charge reasonable rates. Exit from the business as well as entry is controlled. These provisions indicate that Congress did not intend complete freedom of entry in air transportation. They do not, however, provide much of a guide in measuring the extent of competition that should be permitted. Certainly they do not imply complete exclusion of any carriers from any segment of the air transportation industry.

There are vital differences between this Act and the traditional public utility statutes, particularly on the question of entry of new carriers. Traditional public utility statutes do not have promotional or developmental objectives. They give no recognition to competition as being in the public interest Their essential purpose is to protect the consumer by control of rates. A reading of the legislative history shows that Congress in passing the Civil Aeronautics Act recognized that it was dealing with a dynamic young industry quite different from

[5] In interpreting the Federal Communications Act, the Court was unquestionably influenced by the fact that broadcasters were not subject to common carrier obligations, such as a duty to provide services at reasonable rates. In Panhandle Eastern Pipe Line Co. v. FPC, 169 F. 2nd 881, 884 (D.C. Cir.), cert. denied, 335 U.S. 854 (1948): "nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply." See discussion of this point in Schwartz, Legal Restriction of Competition in Regulated Industries, 67 Harvard Law Review 436 (1954).

[6] Nor are the high safety standards essential to aviation relevant to this discussion. The argument is often made that if entry were not controlled the economic pressure on small undercapitalized operations would lead them to cut corners on safety. But we are not suggesting complete freedom of entry. In our view abandonment of the exclusionary policy of the Board and more liberal entry standards would not dilute but would strengthen the economic health of the industry. Moreover, historically, there has been no correlation between the economic soundness of an air carrier and its safety record. Despite a thin operation margin and high subsidy local service carriers and small trunks like Colonial have a better safety record than the Big Four. Other industries where safety is equally important have combined safety regulations with a policy of complete freedom of entry *e.g.*, manufacture of serums and vaccines, dispensing of prescriptions by drug stores, carrying and freezing of fruits and vegetables, meat processing and distribution.

the traditional stable public utilities. The contrast has been recently summarized as follows:[7]

> "Air transportation in 1938 was one of those extremely dynamic situations for which public utility regulation, in its traditional form, would have been totally inappropriate. Congress sensed this and wisely refrained from imposing public utility regulation on this young and rapidly developing industry. On the contrary it provided a promotional form of regulation. Subsequent events have confirmed the wisdom of this decision, for air transport has proven to be extraordinarily dynamic in every major respect—organization, capacity, market coverage, volume of business, equipment, service, rates and operating efficiency.
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> "These differences between public utility and air transport regulation are basic and very real. Air transport is not a legalized private monopoly, and the regulation is not public utility regulation. Whether it will eventually become so remains to be determined. The pressure for legitimization of private monopoly is strong among the dominant firms; but competition, though restricted, is potentially viable, and both the economic and technological situations are fluid. It is thus theoretically possible to avoid the evil of legalized private monopoly in this industry."

The differences between ordinary public utility statutes and the Civil Aeronautics Act have been consistently recognized by the Board. Thus, in *TWA, North-South California Service,* 4 CAB 373 (1944), the Board states:[7a]

> "Two fundamental policies are established by the Act: one directed to the achievement of regulatory control over those who render the public service of air transportation; the other seeking the maximum of sound development of the industry in the public interest. The first protects the public in its use of air transportation services and an example of such protection is found in the provisions of the Act which require air carriers to furnish adequate service. The second involves a promotional rather than a regulatory function, and undertakes to foster and encourage the maximum development of air transportation. In some instances this calls for something more than mere attainment of adequate service under protective regulation; it demands improvement and achievement through developmental pioneering. *The full development and technological improvement of air transportation can not be gained by regulation alone; to achieve improvement an incentive is necessary and under the Act that incentive should flow in part from competition between air carriers.*" (pp. 374, 375) (Italics supplied)

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[7] Adams, The Structure of American Industry, 1954, Chapter XII, Air Transportation, Horace M. Gray, (pp. 448-449).

[7a] See also *Air Freight Case,* 10 CAB 572 (1949) where the Board stated: ". . . This characteristic of the statutory scheme serves to distinguish the Civil Aeronautics Board from judicial tribunals and even from many regulatory bodies. Thus the Civil Aeronautics Board, in addition to regulatory functions which are concerned with the protection of the users of a public service, has been entrusted by the Congress with a major promotional and developmental responsibility—the encouragement and development of a national system of air transportation which will be adequate to the needs of commerce, the postal service, and the national defense." (p. 588). This conclusion was supported by the court on appeal. American Airlines v. CAB 192F. 2d 417 (C.A.D.C., 1951).

The Civil Aeronautics Act was modeled, not so much after electric and gas utility statutes, as after the Motor Carrier Act.[8] The Motor Carrier Reports show that hundreds of new motor carriers have been granted certificates. This is particularly significant because the legislative history of the Act shows Congress actually relied on the fact that the ICC had permitted these new carriers into the business in importing the certificate language of the Motor Carrier Act into the Civil Aeronautics Act.[9]

In both the Motor Carrier Act and the Civil Aeronautics Act, there is substantial recognition that Congress intended that competition should be a matter of guiding policy in the administration of the Act. The existence in the Civil Aeronautics Act of such provisions as Section 408 (Approval of Consolidation, Mergers and Acquisitions of Control), Section 409a (Interlocking Relationship), and Section 411 (Unfair Competition), indicates that Congress intended as far as possible that the Act be administered in a manner which gave full recognition to the economic benefits of competition. Moreover, the Supreme Court has recognized that competition is in the public interest as a matter of Congressional policy even when the statement of policy in the Transportation Act of 1940 made no reference to it.[10] And the national policy expressed in the antitrust laws would, in the absence of express statutory authority to the contrary, require the Board to construe the statute as relying on competition to secure the best service at the lowest possible price.[11] As the Board stated in *Braniff Air, Houston-Memphis-Louisville Route,* 2 CAB 353 (1940):

> "That healthy competition is presumed to be beneficial to the public may be inferred from various Congressional expressions. It represents the economic philosophy underlying the antitrust act." (p. 386)

The "Competition" Provision of the Act

The provision which distinguishes the Civil Aeronautics Act from other regulatory statutes is Section 2 (d) which expressly provides that "competition to the extent necessary to assure the sound development of air transportation" is in the public interest and in accordance with the public convenience and necessity. Early in its history, the Board recognized the force of this provision. In *American Export Air. Trans-Atlantic Service,* 2 CAB 16 (1940), the Board stated:

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[8] The Board recognized this in Acquisition of Marquette by TWA-Supplemental Opinion, 2 CAB 409 (1940) where it stated: "Since the Acts are parallel in their general scope, purposes and terms, it is apparent that Congress intended that the Act, each in its own field, should have like interpretation, application and effect." (p. 412).

[9] This is discussed more fully, *infra.*

[10] McLean Trucking Company v. U.S., 321 U.S. 67, 86 (1944).

[11] U.S. v. Northern Securities Company, 193 U.S. 197 (1904). See the excellent analysis of this doctrine in the brief of the City of Denver, Denver Service Case, CAB Docket No. 1841, pp. 19 and 20.

> "Certainly, the declaration of policy contained in section 2 differentiates the Act in many important respects from the usual form of public utility regulatory statutes. Particularly is the Act differentiated from the Motor Carrier Act, 1935, . . . by reason of the provision of section 2 that 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' is one of the factors which the Board must take into consideration as being in accordance with the public convenience and necessity. This provision has no counterpart in the Motor Carrier Act of 1935." (p. 30)

As far as entry is concerned, the passage of the Civil Aeronautics Act established that Congress believed that an expert agency should decide the extent of competition in the industry. Specifically, Congress instructed the Board that there should be competition in such amount as would "assure the sound development" of the industry. It did *not* decide to what extent competition was necessary or advisable. It did *not* decide that air transportation was a "natural monopoly." It did *not* decide that there should be either more or less competition than in other industries.

The Influence of Subsidy on Entry

Historically the most important statutory provision influencing Board decisions in route cases was not the competitive provision in the statute but the obligation of the Board under Section 406 to fix mail payments which subsidize the operation of carriers certificated for the carriage of mail. When the Board decides a certificate case, it must always recognize that the new competition if successful might increase the mail pay requirements of existing carriers and would require the Board to pay more subsidy. Since the Board has been subjected to considerable Congressional criticism for its subsidy payments, it is inclined to take few chances on increasing subsidy. Thus an applicant must seek a certificate from an agency which may have to pay subsidy bills if it becomes a successful competitor.

It is this provision, more than any other, that is at the root of the Board opinions restricting competition and denying any competition from new carriers. However justified this was at the time of the passage of the Act, however justified it still may be in the case of local service carriers or international carriers, there can be little question that the domestic trunkline industry has today outgrown the need for subsidy. Route extensions could certainly eliminate the small subsidy that is now paid to trunkline carriers. And there is no justification denying the traveling public the benefits of new competitive service merely because some day there may be a recession which might require increased subsidy. No other industry of comparable size and strength is protected against this contingency. Postwar American business has been, on the whole, characterized by substantial investment and expan-

sion and rigorous competition. It has not been guided by fear of recession. The Board's policy should not be an exception.[12]

The Legislative History of the Act

The legislative history indicates Congress intended that the air transportation business should not be reserved for the grandfather carriers.[13] During the course of the early hearings there developed opposition to requiring certificates.[14] The proponents of the bill met this opposition by stating that new carriers would have every opportunity to get in the business. Thus, Colonel Gorrell, then President of the Air Transport Association, testified as follows:

> "We feel that the enactment of H.R. 5234 will bring in a number of new companies and there will be additional air line service."[15]

Later on Colonel Gorrell emphasized that a certificates segment could not be construed as restricting new entrants because historically the Commission had been "most liberal where new interests sought to enter the field."[16] Of particular importance in the legislative history was the reliance of the Committee on the fact that the language of the Act was modeled after the Motor Carrier Act and that the Interstate Commerce Commission had not frozen entry into the motor carrier business.[17]

During debates, both Senator Truman and Senator Copeland[18] stressed numerous provisions in the Act as evidencing a policy in favor

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[12] The cost to the government because of increased mail pay has been mentioned in virtually every route proceeding, beginning in the earliest case, see *e.g.*, Northwest Air, Duluth-Twin City Operations, 1 CAA 573, 578 (1940); National Air, *et al.;* Daytona-Beach-Jacksonville Op., 1 CAA, 612 at 617 (1940). In Middle Atlantic Area Case, 9 CAB 131 (1948) the Board denied an application of a new carrier, stating: "The Board presently has on file applications for increases in the rates of mail pay of carriers in the Middle Atlantic area, and we cannot blind ourselves to the fiscal potentialities inherent in the inauguration of a service which would require elaborate route promotional endeavors. Any operation which competitively affects the operation of a carrier like PCA or TWA within a given area naturally affects the over-all financial condition of that carrier, and we cannot, at this point in the history of the development of commercial aviation in this country, risk the diversional effect, systemwise, which we feel sure would ensue if Atlantic were certificated for extensive service in the Middle Atlantic area." (p. 183). The Board, in one major case, denied competitive service, specifically on the ground of possible recession. Southern Service to the West Case, 12 CAB 519, 533 (1951). Its position here is akin to that of Mr. Avery of Montgomery Ward but not typical of American business generally.

[13] The discussion here summarizes a memorandum on the legislative history submitted by Senator O'Mahoney when counsel for North American Air Lines in Hearings, Senate Small Business Subcommittee, 83rd Congress, 1st Session, p. 283.

[14] Hearings on H.R. 5234 and H.R. 4652, pp. 123-124, 147, 149, 150, 249, 255, 259, 260; Hearings on S. 2 and S. 1760, 75th Cong., 1st Sess. (1937), pp. 77, 85-9, 96, 98, 118, 150. See also Report of Federal Aviation Commission, 74th Cong., 1st Sess., Sen. Doc. 15 (1935).

[15] Hearings on H.R. 5234 and H.R. 4652 (1937), p. 75; see also p. 112, 113.

[16] Hearings on H.R. 5234 and H.R. 4652, p. 344; Hearings on S. 2 and S. 1760, p. 503.

[17] Hearings on S. 2 and S. 1760 (1937), pp. 305-308.

[18] Debates on S. 3845, 83 Cong. Record, Part 6, p. 6726, 75th Cong., 3rd Sess. (1938).

of competition. On the floor of the Senate, Senator King of Utah demanded flat assurances that the bill would not freeze new companies out of the business, stating:

> ". . . If the purpose of the bill is to 'freeze' certain contracts, or certain activities of a number of companies or organizations, and to give them rights in perpetuity to the exclusion of others; if the bill erects bars to protect those who now have contracts or now have established air lines and to prevent other persons or other corporations from obtaining franchises and rights to operate airplanes, I would hesitate to vote for the bill.
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> ". . . If it authorizes their activities to the exclusion of others who may desire to enter this great field, then I think there should be some amendments that would fully protect the public and protect those who are interested in the development of this great art."[19]

Senator Truman assured Senator King that no such eventualities could come to pass under the Act, as it was drafted.[20] After this necessary assurance the Act was passed.

The legislative history thus indicates that the committees were alert to the possibility that the Act might be used to prevent new entrants into the business. The industry met this by both assurance and argument that enacting the bill would "bring in a number of new companies" and that similar certificate provision under the Motor Carrier Act had always been interpreted in a "most liberal manner" as far as new entrants were concerned. It was only after these assurances that the bill was passed.[21]

The Decisions of the Civil Aeronautics Board

It is not possible to analyze the Board cases and derive an integrated body of principles which set forth the standards for judging new route applications. These vagaries are in part due to differences in conditions in the industry and to changing membership on the Board. They are also due to the fact that the Board has not established standards in this difficult field but has decided each case on an *ad hoc* basis and has based its decision on subjective judgments which are often not articulated in its opinions.

The lack of standards has had unfortunate results. It is not only that lawyers are deprived of the comfort of firm precedents. Irrevocable principles are neither possible nor desirable. But clearer and more consistent general standards would have enabled the Board to plan the development of air transportation more rationally and better accom-

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[19] Debate on S. 3845, 83 Cong. Record, Part 1, p. 6851, 75th Cong., 3d Sess. (1938).

[20] Remarks of Senator Truman, Debate on S. 3845, 83 Cong. Record, Part 6, p. 6852, 75th Cong., 3d Sess. (1938).

[21] The Board has recognized the Congressional intention to permit new entrants. In its Report to the Senate Small Business Committee on November 24, 1952, entitled "The Role of Competition in Commercial Air Transportation," the Board stated, "The upshot of the Congressional policy embodied in the Act was not to prohibit the entry of new companies into the air transportation field."

plish the objectives of the Act.[22] It is hard to believe that a careful attention to overall standards could not have avoided at least two of the serious results which have flown from the Board's route decisions.

1. That in seventeen years with a forty-fold growth in traffic, no new entrants have been permitted in domestic trunkline passenger transportation.

2. That with this growth and with revenues increasing at the rate of 100 million dollars a year, four trunkline carriers are still subsidized.

The Board's Decisions Favoring Competition

The language of the Board's decisions have, with a reasonable amount of consistency, recognized that the competitive provisions of Section 2 to set the Act apart from traditional public utility statutes. The Board has summarized its interpretation as follows:[23]

> ". . . At the time the Act was passed in 1938 the domestic air transportation system had already assumed a strongly competitive character. Congress had been told by the Federal Aviation Commission, whose report of January 1935 was before it at the time the Act was under consideration, that the 'high quality of American air transport had been due in large part to the competitive spirit that had existed throughout its development.' Far from abandoning the principle of competition, Congress in the Act expressly directed the Board to consider 'competition to the extent necessary to assure the sound development of an air transportation system' as being in the public interest. The policy thus stated, however, is not one of unlimited competition, nor of introducing competition over every route. The legislative history and the test of the Act demonstrate the purpose of Congress to safeguard the industry equally against the evils of unrestrained competition on the one hand and the consequences of monopolistic control on the other." (p. 374)

In a recent case[24] the Board reaffirmed this basic interpretation, stating:

> "We need not detail the advantages of competition nor to prove them again in each case. An objective reading of the Civil Aeronautics Act leaves no doubt that the lawmakers considered competition to be a desirable objective—which should be established whenever it is economically feasible and will contribute to the development of a sound national air transportation system. The Civil Aeronautics Board '. . . has consistently recognized the Congressional policy contained in the Act favoring sound and healthy competition . . .' . . . ." (p. 20)

Because of this competitive objective, the Board has held that the reservation of expansion in traffic to existing carriers would be contrary to the policy of the Act and has ruled that the adequacy of service by

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[22] Certainly the considerable objective cost and traffic data make it possible to develop firmer standards and would have served as a means of narrowing issues, reducing the extraordinary size of exhibits and shortening Board procedures.

[23] TWA, North-South California Case, 4 CAB 373 (1944).

[24] Reopened Southern Service to the West Case, ONE-8466, June 29, 1954; see also cases cited in Footnote 25.

existing carriers is not a bar to new authorizations.[25] It has stated that since the Act "implies the desirability of competition . . . when [it] will be neither destructive nor uneconomical . . ." and since "competition in itself presents an incentive to improved service and technological development there would be a strong, although not conclusive presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost."[26] The Board has never specifically repudiated this presumption though in some cases it has considerably diluted its applicability.[27]

The Board's statements in favor of competitive air transportation have not been based solely on the existence of the specific statutory language. In a series of cases, the Board has recognized that competition has an inherent value in providing a stimulus which economic regulation alone cannot provide. It invites comparison as to equipment, costs, personnel, methods of operation and solicitation of traffic which tend to assure the proper development of an air transportation system.[28] In the *Hawaiian Case,* 7 CAB 83 (1946) the Board stated:

> ". . . The greatest gain from competition, whether actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business, including the rendering of better service to the customer and to the Nation and affording the Government a comparative yardstick by which the performance of the carriers may be measured. . . ." (pp. 103-4)

The Board has expressly recognized that the incentives of competition will produce additional traffic and revenues, will increase efficiency and will reduce costs. In the recent *Trans-Pacific Renewal Case,*[29] the Board concluded:

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[25] American Export Air Trans-Atlantic Service, 2 CAB 11, 32 (1940); All American Aviation, Inc., 2 CAB 133, 145, 146 (1940); TWA-North-South California Case, 4 CAB 313, 375 (1944); Milwaukee-Chicago-New York Restriction Case, 11 CAB 310, 330 (1950); Northeast Air, et al., Boston Service, 4 CAB 686, 689, 690 (1944); Hawaiian Case, 7 CAB 83, 103 (1946). In some early cases the Board had listed some general considerations in certificate cases which listed the issue of whether the service can or will be served by existing carriers. United A.L. Red Bluff Operations, 1 CAA 778, 780, 1940; Eastern A.L. St. Louis-Nashville-Muscle Shoals Op., 1 CAA 792, 795 (1940); Mid-Continental Air, 2 CAB 63, 66 (1949); Trans Southern Air, et al. Amarillo-Oklahoma City Op., 2 CAB 250, 254 (1940); Northwest Air, et al., Additional Service to Canada, 2 CAB 627, 632. These cases were dealing with route applications over their routes where traffic did not warrant competitive service. This doctrine had not been applied in cases involving heavy traffic segments. In these segments the doctrine announced above has controlled the Board's decisions. But see Southern Service to the West Case, 12 CAB 518 (1951); Trans-Continental Coach Case, 14 CAB 720 (1951) discussed *infra.*

[26] TWA, North-South California Case, 4 CAB 373, 375; see also Northeast Air., et al. Boston Service, 4 CAB 686, 689 (1944).

[27] See, e.g., Southern Service to the West Case, 12 CAB 518 (1951), discussed *infra.*

[28] American Export Air., Trans Atlantic Service, 2 CAB 16, 32 (1940); TWA, North-South California Case, 4 CAB 373, 375; Hawaiian Case, 7 CAB 83, 103 (1946); Milwaukee-Chicago-New York Restriction Case, 11 CAB 310, 330 (1950); Colonial Air, et al. Atlantic Seaboard Case, 4 CAB 552, 555 (1944); Air Freight Case, 10 CAB 572, 588 (1949); Reopened N.Y.-Balboa Through Service Proceeding, ONE 9109-10, November 23, 1954.

[29] Trans-Pacific Renewal Case, ONE 8929, Feb. 8, 1955, p. 7.

". . . It seems clear that the incentives of competition will produce additional traffic, and hence revenues, to support the routes. Also, the spur of competition will serve to force each carrier to increase efficiency and thereby reduce costs. Benefits of this kind are impossible to measure precisely, and to translate into dollars. They are, nonetheless, real and significant." (p. 17)

Indeed, the Board has gone so far as to state that the competitive spirit was responsible for the position of pre-eminence of the domestic air transportation system.[30]

The Barriers to Competition from New Entrants

These principles strongly favor competition both legally and practically. They would seem to dictate a Board policy which would provide for new competition from new carriers. Indeed, it could be urged that competition from new carriers would provide a better standard of comparison and would sharpen the competitive stimulus, which would lead to greater revenue development and to cost reduction. The Board was influenced by these considerations in certificating new all-freight carriers.[31] But as far as passenger trunk routes are concerned, these principles have been but the tune used in a game of musical chairs where existing carriers have changed position and new carriers can't get in the game.

An analysis of the cases indicates that the Board has applied different rules in assessing the value of competition from new carriers. In one of its early cases, the Board stated that there was no inherent desirability in certificating new carriers in the industry.[32] Moreover, the Board has preferred existing carriers over new applicants because it has found that existing carriers have a superior operating experience, a capacity to tie the new routes into old routes which will lead to better overall service and can offer more vigorous competition.[33] To do so it has had to apply a different doctrine in those cases where it has awarded a route to a smaller carrier though a larger carrier would have provided better service.[34]

These barriers were difficult enough but in the period 1949-1951, the Board issued a series of major cases which indicated a new attitude

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[30] In Colonial Air, et al. Atlantic Seaboard Case, 4 CAB 552 (1944), the Board stated: ". . . That the domestic air transportation system of this country 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." (p. 555)

[31] Air Freight Case, 10 CAB 572 (1949).

[32] Additional Service to Atlanta and Birmingham, 2 CAB 447, at 480 (1941).

[33] Additional Service to Atlanta and Birmingham, 2 CAB 447 at 449 (1941); Trans-Southern Air, et al., 2 CAB 250, 271 (1940); Additional Service to Puerto Rico Case, 12 CAB 430, 431 (1951); Eastern A.L. et al. Great Lakes-Florida Case, 6 CAB 429, 439 (1945).

[34] See, e.g., Western A.L., et al. Denver-Los Angeles Service, 6 CAB 199, 210, 212 (1944); Kansas City Service Case, 4 CAB 1, 18 (1942); National Air, Miami-Key West Service, 4 CAB 546, 548 (1944); Mid Continent Air, et al. Kansas City-New Orleans, 6 CAB 253, 262 (1945); North Central Case, 8 CAB 477, 479 (1947).

towards competition and hostility to competition from new carriers. These cases were influenced by two factors:

1. The 1947-1949 recession in the industry had subjected the Board to considerable Congressional and industry criticism, an investigation by the RFC and by Congress and to substantial subsidy demands from trunkline carriers. The *Southern Service to the West Case* (12 CAB 518 (1951)) characterizes the Board's reaction to these factors. It is certainly influenced by a feeling that the Board should take no chances in authorizing too much competitive service and that air transportation was afflicted with delicate economic health. Needless to say, the patient survived and the healthy growth and profits since that time have been reflected in a changed Board attitude.

2. The Board had been subjected to considerable harassment in the post-war period by irregular carriers seeking entry into the business. Many of these carriers, frustrated by the length of Board proceedings, and by the hostility of the Board to applications from new carriers, had violated the Board's regulations and directed a vigorous political campaign against the Board itself. The irritation of the Board is reflected in the *Trans-Continental Coach Case,* discussed *infra.*

The Southern Service to the West Case

The *Southern Service to the West Case* has had a long and turbulent history.[35] Its importance here is that the original opinion served as a vehicle for an expression of new Board policy towards competition. In denying all applications for route extensions, the Board sets forth its new view on the competitive provisions as follows:

> "This is no mandate to seek competition merely for the sake of having competition. It is a recognition by the Congress that the provision of competitive service is subject, like all other aspects of the air transport business, to the paramount necessity that the system be developed on a sound economic basis. . . . The attainment of an economically sound airline industry should be a paramount and underlying criterion established by the Congress for its development and regulation. . . ." (p. 532)

After pointing out that the "spirit of competition" in one part of the industry would spread to routes with no direct competition, the Board concluded:

> "Undoubtedly, where it appears on the record of a particular case that an air carrier is failing to attain the high standards of public service contemplated by the Civil Aeronautics Act, and where only provision for an economic competitive service would contribute effectively to the assurance of such standards, a case is made for competition. . . ." (p. 533)

The Board went even further. Even though times were good, the Board should take no chances on competition because economic storms might again arise. It then concluded:

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[35] Southern Service to the West Case, 12 CAB 518 (1951), Supp. Opinion, 14 CAB 310 (1951), Supp. Opinion, 15 CAB 94 (1952), Reopened Southern Service to the West Case, ONE 7988, December 22, 1953, Supp. Opinion on reconsideration, ONE 8466, June 29, 1954.

". . . We would be less helpful if, at this time, we did not express our considered opinion that further route expansion in our domestic trunk-line network would present problems of serious difficulty in view of the conditions which presently and during the postwar period have existed in this industry. Certainly the task of proving public convenience and necessity in satisfying the statutory requirements would place *a difficult, if not insurmountable, burden upon the air carriers which would undertake to sponsor further route extensions of any substantial character. . . .*" (p. 534) (Italics supplied)

As pointed out in the dissent of Member Lee, the opinion was clearly inconsistent with prior cases. Previously, the Board had determined that the phrase "competition for competition's sake is meaningless."[36] Previously, there had been a presumption in favor of competition. Previously, adequate service was no bar to new competition where the traffic warranted it. Previously, the Board had recognized that competition contributed to the proper development of air transportation and presumably to a sound industry.

In sharp contrast this opinion establishes an almost irrebuttable presumption against competition. Competitive service will only be authorized as a last resort. Competition is a dangerous poison which might be safely administered in small doses but in larger doses would will the patient. This doctrine, of course, runs contrary, not only to prior Board opinions, but to the American business experience which Congress certainly had in mind in passing the Civil Aeronautics Act. If competition is antagonistic to the proper development of the economic health of an industry, then the remarkable development of the American economy under essentially competitive conditions is unexplainable.

In this opinion for all practical purposes, the Board read the competitive language out of the statute. It closed the door not only to new carriers, but to extension of the grandfather carriers. It froze the route pattern. Certainly, never has a dynamic industry been threatened with such a strait-jacket. The fact that since the decision only four years ago traffic has more than doubled, indicates that the Board's lack of confidence in its development was unwarranted.[37]

The decision can best be chaacterized as a maverick based on a delayed reaction to the 1947-1949 recession. Generally the Board cases since that time take a less extreme position.[38] Its main significance is

[36] Northeastern Air, et al. Boston Service, 4 CAB 686, 690 (1944).

[37] In 1950 domestic trunklines flew 7,766,000,000 revenue passenger miles. By 1954 this had increased to 16,234,600,000 revenue passenger miles. As late as December 1953, the Board repeated the doctrine in Reopened Southern Service to the West Case, ONE 7988, December 12, 1953, but has since reconsidered.

[38] Salt Lake City-Rapid City Extension, E-6831, September 25, 1952; Reopened Southern Service to the West Case, E-8466, June 25, 1954, p. 21; Trans-Pacific Renewal Case, ONE 8929, Feb. 8, 1955. Perhaps the most significant fact is that the Board has instituted four major domestic trunkline proceedings to determine if there is a need for new service: New York-Chicago Service Case (Docket No. 986), Denver Service Case, (Docket No. 1841), SW-NE Case (Docket No. 2355) and the New York-Florida Proceedings, (Docket No. 3051).

that it represented the dominant Board attitude at the time the many applications for trunkline passenger service by new carriers were being considered.

The Transcontinental Coach-Type Service Case

The major effort of new passenger carriers to obtain domestic trunkline certificates was the *Transcontinental Coach-Type Service Case,* 14 CAB 720 (1951). It was decided at a time when the Board's irritation over the activities of irregular carriers was mounting and at a time when the policy of the *Southern Service to the West Case* was still dominant.[39] While commending the applicants before it, the Board opened its opinions by stating that the "air is charged with controversial bitterness, widely circulated propaganda and misinformation towards the broader issues of low fare transportation." The opinion was designed to set the record straight and reads more like a lawyer's brief than the considered opinion of a dispassionate quasi-judicial body.

The important thing is that the Board in at least three particulars decided the case on principles it had previously rejected.

First, the Board based its decision in part on the following finding:

> ". . . It is our conclusion, therefore, that the existing carriers are fully capable of providing the scheduled regular and frequent air-coach services needed between the points which they are already serving, and that they have the necessary resources and facilities to insure the future growth and development of such low-fare services." (p. 725)

Compare this language with principle in the *TWA, North-South California Case,* 4 CAB 373, (1944) where the Board stated:

> "In considering the extent to which competition is necessary to assure the sound development of an air transportation system, therefore, *its justification does not depend upon the inability or unwillingness of an existing carrier to render adequate service. . . . Otherwise, no competition would ever be authorized for there is no limit to the extent to which an existing carrier could expand to meet increased demand. . . .*" (p. 375) (Italics supplied)

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[39] The irritation had been expressed as early as 1949 in the Hawaiian Territorial Service Case, 10 CAB 62 (1949), where the Board stated that a violator of a Board regulation "would find himself in a certificate proceeding burdened with a disadvantage which under ordinary circumstances would be inimical if not fatal to his case." The opinion is characterized by the following language which went far beyond legal principles which had been accepted by the Supreme Court:

a. The Board stated that the WOKO Case, 329 U.S. 211 (1946), held that "the weight to be given such evidence (evidence of violations) is a matter entirely within the discretion of the Board." The WOKO Case stated that the case was "hard law" but that "we cannot say that the Commission is required as a matter of law to grant a license" or that its refusal is "arbitrary and capricious."

b. The Board stated that any violation of certificate requirements "strikes at the heart of the Civil Aeronautics Act." This implies that a denial of a certificate is to be used as a sanction to enforce Board regulations. The Act provides no such penalty.

c. The Board stated that "it did not intend to reward wrongdoers by granting certificates." Under the Act certificates are not a reward for good conduct. They are to be granted if the application meets specific statutory tests. The inference is that the Board is engaged in moral evaluations unrelated to the specific requirements of the certificate provisions. The Board has no such authority.

Thus the Board, which had previously held in at least six cases[40] that the ability or willingness of existing carriers to render adequate service did not bar additional certification, rejected that traditional doctrine in denying the application of new coach carriers—a doctrine it had reaffirmed only sixteen months earlier in the *Milwaukee-Chicago-New York Restriction Case,* 11 CAB 310 (1950). Moreover the opinion indicates that the Board was not satisfied with coach development by the certificated carriers.

Second, after finding that the development of coach service was a "major objective" but that the limited proportion of certificated air coach business "was due to the fact that until recently the available types of aircraft and conditions of operation did not favor a full development by them of this business" the Board concluded as follows:

> ". . . We shall expect, and require, certificated carriers to expand and develop air-coach services, subject to appropriate Board regulation and, where necessary to accomplish that end, *we will exercise our statutory power to compel the required reductions.* (Civil Aeronautics Act of 1938, sections 404 and 1002)" (p. 726, italics supplied).

The Board, which had previously recognized with consistency that regulation cannot take the place of the stimulus of competition, rejected that principle in deciding the application of new coach carriers in the *Transcontinental Coach-Type Service Case.* The traditional Board attitude was set forth in *Colonial Air, et al. Atlantic Seaboard, Op.* 4 CAB 552 (1944) [41] as follows:

> "The Act has clothed the Board with full power and machinery by which it may require the performance of safe and adequate service. However, a service which is just adequate, as that term is used in the Act, will not provide the public with the full advantages which should be expected from the most modern form of transportation nor will it encourage the development contemplated by the Congress. *The improvements which flow from a competitive service cannot be obtained by administrative fiat. . . .*" (p. 555) (Italics supplied)

The Board has stated that it has "relied principally on carrier competition to achieve those economies and improvements in service" which are necessary to attain the statutory objectives. (*Reopened New York-Balboa Through Service Case,* ONE 9109-10, November 23, 1954.) The opinion here recognizes that coach is a "major objective." Yet it proposes to attain that objective, not through competition, but by

[40] All American Aviation, Inc., 2 CAB 133, 145-6 (1940); American Export Air., Trans Atlantic Service, 2 CAB 16, 32 (1940); TWA, North-South California Case, 4 CAB 373, 375; Milwaukee-Chicago-New York Restriction Case, 11 CAB 310, 330 (1950); Northeast Air, et al., Boston Service, 4 CAB 686, 689, 690 (1944); Hawaiian Case, 7 CAB 83, 103 (1946). But see Southern Service to the West Case, 12 CAB 518, 533 (1951) discussed *supra.*

[41] See also TWA, North-South California Case, 4 CAB 373, 375 (1944); North-East Air. et al. North Atlantic Routes, 6 CAB 319, 326 (1945). In prior cases, the Board had mentioned that it might use its compulsory service power to compel adequate connecting service, (National Air, et al. Daytona Beach-Jacksonville Op., 1 CAA 404, 417 (1940)) or where only schedule a day was provided between the small towns. Continental A.L. et al., Texas Air Service, 4 CAB 215, 239 (1944). But it had never used this power.

reliance on "administrative fiat"—a method which it had previously found unacceptable.

That this language was also a remarkable triumph of faith over fact is illustrated by the whimsical comedy of manners that followed shortly thereafter in the *General Fare Investigation,* (Docket No. 5509). Three months after the *Transcontinental Coach Type Service Case,* with profits at record levels, the certificated carriers filed for fare increases of a dollar per ticket and elimination of the round-trip discount. The Board actually permitted the one dollar increase but suspended the provision eliminating the round-trip discount. It instituted a *General Fare Investigation* to see if fare levels were too high. (ONE 6305, April 9, 1952.) The investigation was soon dismissed despite vigorous dissents by Members Lee and Adams and an informal "study" instituted. (ONE 7376, May 14, 1953.) The "study" has been dormant ever since. The ineffectual results of the *General Fare Investigation* indicate that the Board was generally right in relying on competition rather than "administrative fiat" to attain its objectives. The brave bold language of the *Transcontinental Coach Type Service Case* was a puff of smoke and nothing more.

Third, the Board, contrary to its practice in previous cases, rejected the application *in toto* without any consideration of whether granting a particular portion of a particular application by one carrier might be justified. The Board stated that it was influenced in large part by the fact that the applications of the coach carriers sought authority for extensive operations which might have required a radical change in the route pattern and might have occasioned substantial diversion from existing carriers. These considerations could support a denial of most of the applications under traditional Board principles. But as Member Adams pointed out in his dissent, there appears to be no justification for failure of the Board to even *consider* some limited authorization by new carriers of coach service in this case. This is particularly true because the opinion clearly reveals that the Board recognized that the certificated carriers had not provided adequate coach service.

In prior cases the Board had meticulously examined the facts on diversion of each application. It had considered the effect of granting part of what a carrier had asked. Here the Board adopts an all or nothing approach. It dismisses the application on general economic considerations without weighing specific facts. It makes no analysis of a partial grant under the statutory standards. Yet in every other case, the Board had made a detailed analysis of individual applications and parts of applications. It is hard to escape the conclusion that the decision was influenced in part by Board irritation over the irregular carriers and that the opinion is based on general ideological grounds rather than on the merits of particular applications.

In any event at the time the Board was deciding the major request for trunkline authority for new carriers, it was governed by principles contrary to those it had previously employed. There is plenty of

language in Board decisions which should logically favor the admission of new carriers. The cases make it clear, however, that the Board's decisions have not been governed by consistent principles on the question of competition.

The Case for Entry of New Carriers

The ultimate test of the Board's policy is not what it says but what it does. The Board has substantially extended the competition among the grandfather carriers. But it has severely limited competition from new carriers. The ultimate fact is that at the end of seventeen years in an industry that has grown 4000%, only 4% of the commercial revenue was earned by new carriers. New carriers have been completely barred from trunkline passenger transportation.

The nub of the controversy is whether or not competition by extension of the grandfather carriers is enough. Would the public interest be better served if the Board also authorized competition from new carriers?

It is not possible to prove factually that a policy of admitting new carriers would have built a better air transportation system. No one really knows what would have happened had there been some entry of new carriers. In part, therefore, the case for new carriers is based on a burden of proof. The American economy has attained its great strength by permitting new operators with new ideas to compete in the market. The success of this tradition places a heavy burden of proof on those who would deny access to the market. The full benefits of competition cannot be realized if it is restricted over an extended period of time to a limited number of operators who happened to be in business at a particular time. This is a general argument based on a presumption. But basic decisions are more often than not based on presumptions not capable of precise proof. And this presumption has the support of years of economic history.

The extent of that burden is amplified by the great growth of a new industry and the rigidity of the policy of exclusion. This is an industry that has increased 40 times since 1938. Yet 96% of the business is controlled by the original grandfather carriers. However justified a policy of controlled entry, this policy has been all control and no entry. The tremendous growth that has taken place puts a heavy burden of proof on those who would advocate complete reservation of this growth to the grandfather carriers. As a legal, economic and moral matter such a policy would have to be justified by overwhelming evidence that it is in the public interest. There is nothing in the history of American business or of air transportation that indicates that this burden of proof has been met.

Indeed, there is substantial evidence in the history of air transportation itself that competition from new carriers will substantially improve the quality of air service. In the post-war period, the certificated industry was faced with some competition from non-scheduled

carriers operating pursuant to exemption orders in both the passenger and freight business. In many instances, these carriers violated the Board regulations prohibiting regularly scheduled operations. The freight carriers early obtained legal authority to conduct regular operations. The passenger carriers[42] operating under a legal cloud, were harrassed by enforcement actions, crowded into second-class airport facilities, accused of unsafe operations, and, facing a passenger acceptance handicap because they were not certificated, did not carry a substantial portion of the business.[43] But in both the freight and passenger business, the impact of these carriers showed what new competition could do to fare levels.

The Board has issued an authoritative statement on the effects of new competition in the freight field. In a report to a Senate Committee, on *The Role of Competition in Commercial Air Transportation,*[44] the Board stated:

> "There is no escaping the fact that the cargo rate reductions which brought about the air-freight-rate investigation were prompted in large part by competitive considerations, and it would be unreasonable to conclude other than that this competition played a major role in speeding the advent of flights carrying cargo only and in the institution of such flights on all major cargo runs." (p. 38)

The competitive impact of this new competition is also apparent in the passenger field. During World War II air transportation had experienced a substantial boom in traffic. Concurrently service deteriorated and costs increased. Subsequent to the war, the service deterioration plus a series of accidents culminating in the grounding of major new aircraft types led to a traffic slump. Because of the high cost levels, the traffic declines led to substantial operating losses. To meet these losses, the certificated carriers raised passenger fare three times in eighteen months and sought increases in subsidy payments. The fare increases stunted traffic growth.

There is no reason to think that the non-scheduled carriers were immunized from the slump in air travel. However, they met the problem in another way—by increasing seating density and lowering fares. The lower fares stimulated traffic and many of them had profitable operations. This was the start of the air coach business.

On the record there can be no question that the grandfather carriers were reluctant converts to air coach. Capital did start some coach flights in the latter part of 1948 but this service was limited to inconvenient nightime coach. In 1948 coach amounted to less than 1/10 of

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[42] On May 5, 1947, the Board adopted Reg. 292.5 which authorized these carriers to conduct regularly scheduled operations during the pendancy of the Air Freight Case. Some of the carriers were subsequently certificated in the Air Freight Case, 10 CAB 572 (1944).

[43] In 1953, non-certificated carriers flew 918,000,000 revenue passenger miles, or 7% of the 14,369,000,000 flown by domestic trunklines.

[44] Report of the Civil Aeronautics Board submitted to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, November 24, 1952.

1% of the certificated business. In 1949 it amounted to only 4%. It was only in 1950 that any volume of daylight coach was offered.

As late as May 1949, Mr. C. R. Smith, President of American Airlines, testified before the Johnson Committee as follows:[45]

> ". . . We do not believe that we can presently engage in the coach service and provide the standard of service reasonably required without consequent loss and without, perhaps, getting our organization back into the subsidy situation. . . ." (p. 77)

Mr. Patterson, President of United, was even more reluctant to engage in the business. He stated:

> ". . . If we had a little margin to work on we could experiment with coach, we could experiment with many things, but we *just cannot afford to take the chance* where we may effect, or create, greater losses than are staring us in the face right now." (Italics supplied.)

In these same hearings the representatives of the non-certificated industry told the committee that there was a great mass market for profitable low fare coach operations.[46]

It is no answer to say that the non-certificated carriers offered coach only between the long-haul high density markets. The certificated carriers could have done the same thing. In fact, their operations were so confined and it was not until 1953 that there was a limited extension of certificated coach to less dense markets.

The Board has recognized the role of outside competitive influence in developing low-fare coach service. In a report to a Senate Committee, on *The Role of Competition in Commercial Air Transportation,*[47] the Board stated:

> "The irregular carriers, by operating in markets, under conditions, and at times when high-density seating could be realized and, consequently, lower fares charged, helped to bring about the development of low-fare coach services of the type that have accounted for the largest portion of the recent growth in domestic passenger business of all air carriers. *Such low-fare coach services have served as a competitive stimulus to the certificated carriers in the low-cost field, and, together with the coach services of the certificated carriers, have induced many persons to travel by air who would not have utilized air services at the higher standard fares.*" (p. 30) (Italics supplied)

The fact and the lesson are clear. The fact is that coach service, the most important development in air transportation since the passage of the Act, was not developed by the grandfather carriers. The lesson is that the proper development of air transportation suffers when it is protected from competition from new carriers with new and different

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[45] Air-Line Industry Investigation, Hearings Before the Committee on Interstate and Foreign Commerce, United States Senate, 81st Congress pp. 756, 757. (1949)

[46] Airline Industry Investigation, Hearings before Committee on Interstate and Foreign Commerce on S. Res. 81st Cong., 1st Sess. 260 (1949). See testimony of Mr. Fishgrund testifying as an official of Standard Airlines, Inc.

[47] Report of the Civil Aeronautics Board submitted to the Subcommittee on Monopoly of the Select Committee on Small Business, United States Senate, November 24, 1952.

ideas. The concept of developing mass travel by increasing seating density and lowering fares is not so unique as to strain the imagination. But it was the non-certificated carriers that did it first.

The need for new competition is more than a matter of historic record. It is a current fact. Today first class fares yield in the neighborhood of 6 cents a mile and coach fares in the neighborhood of 4.2 cents a mile. This compares with 3.1 cents for coach service by non-certificated carriers.[48] At the same time profit margins are high.[49] Yet the Air Transport Association has repeatedly urged that higher fares are necessary and the Annual Reports of many carriers emphasize the same thing. The abortive history of the *General Fare Investigation* demonstrates that passenger rate regulation cannot be relied upon to control rate levels. When competition is limited, fare levels and profit levels tend to become too high. In an industry like air transportation which has economic characteristics closely akin to fully competitive business it is better to rely primarily on competition to control fare levels. In an industry with few carriers and a highly organized trade association, competition cannot be fully effective in controlling fare levels under a policy of excluding new competitors.

The Arguments Against Entry By New Carriers

There are certain facts on which there need be no disagreement. The first is that air transportation has experienced a dynamic and rapid improvement with a policy of restricted entry. Second, it is clear that there has been a substantial increase in competition among the grandfather carriers. As of today, important segments involving service to major cities such as Dallas, Atlanta, Kansas City, and Denver are without competitive service but the Board has pending proceedings which will enable it to remedy these deficiencies. Finally, it is clear that the Board has, through route extensions, built up some small carriers like National into important factors in the industry.

None of these facts are conclusive on the issue of entry by new carriers. The achievements of air transportation may have occurred in spite of, rather than because of, the Board's entry policy. The extension of competition among the older carriers does not establish that the public interest would not be better served by new competition from new carriers. And the extension of small carriers, however laudable, is not mutually exclusive of a policy of admitting new carriers into the business.

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[48] The yield of 3.1 cents is derived by dividing the combined 1954 passenger revenue of the "North American" carriers (Hemisphere, Trans-National, Trans-American, Twentieth Century and Unit Export) of $10,058,841 by the 329,476,000 revenue passenger miles.

[49] Quarterly Financial Report, U.S. Manufacturing Corporation 1953, Federal Trade Commission and Securities Exchange Commission. In 1953, domestic trunklines had profits on sales of 5.5% compared to only 4.3% of the 23 manufacturing industries studied. Only three of the 23 manufacturing industries had higher returns on sales. Later data is not available on the manufacturing industries.

Indeed, these very facts can be urged to support the need for competition from new carriers. The growth of air transportation and its current strength is one of the very reasons why entry by new carriers would involve no impairment of the operation of the older carriers. Moreover, the small disjointed National Airlines of 1938 could not stand competition. The pleasingly plump National Airlines of today may be the better for it.

There are certain standard arguments that are used as justification for denying entry of new carriers.

1. That airlines are public utilities and should not be subject to new competition.
2. That new carriers cannot be admitted without destroying the balance service pattern of existing carriers of serving both profitable and less profitable stations.
3. That the Board has a prior obligation to build up the smaller certificated carriers particularly those that are subsidized before it admits new carriers.

The Public Utility Argument

The legal differences between the Civil Aeronautics Act and traditional utility statutes have been previously discussed. This section is devoted to discussing the economic difference between traditional utility industries and air transportation.

It would seem clear beyond question that the Board and the certificated industry have recognized that this industry has substantially different economic characteristics than a traditional public utility, such as an electrical utility. The Air Transport Association has repeatedly emphasized the great expansion of competition among the grandfather carriers.[50] Such competitive service would hardly be authorized among electric utilities. It seems to follow that if the industries' economic characteristics warrant competition among grandfather carriers, they also warrant competition between grandfather carriers and new carriers. Certainly it cannot be urged that this is a competitive business when praising the development of competition among grandfather carriers but a public utility when questions of competition from new carriers is involved.

While the action of the Board would seem to dispose of this public utility argument, it is still pertinent to point out the great differences between the economic characteristics of traditional public utilities and air transportation. Traditionally, entry has been severely restricted only in industries where competition hasn't worked and has historically led to monopoly. Public utilities are characterized by high fixed investment, costs which decrease sharply with increases in volume or size, a low proportion of cash costs, and a relatively stable market.[51] Air

[50] See statement of S. G. Tipton, General Counsel, Air Transport Associates of America in Hearings before Committee on Interstate and Foreign Commerce, U.S. Senate, 83d Congress, 2d Session or S. 2647, p. 239.

[51] See e.g., Jones and Bigham, Principles of Public Utility Economics (1939) pp. 62-68; Thompson and Smith, Public Utility Economics, (1941), pp. 75-98; Barnes, The Economics of Public Utility Regulation (1941), pp. 42-43, 168-169.

transportation has none of these characteristics. Its basic economic characteristics are closely akin to an industry where historically competition has been deemed to serve the public interest best.

The Small Town Argument

This argument is that existing carriers should be preferred because they will provide a balanced pattern of transportation serving both the lucrative long-haul high traffic points and the leaner short-haul low traffic points.[52] New carriers, it is urged, seek to serve only the good points. Granting their route applications would destroy a balanced pattern of service to large and small towns.

This argument is probably made more often than any other to support restriction of air transportation to existing carriers. Yet on the whole it has been subject to very little factual or logical analysis. It has largely been accepted as self-evident. For these reasons we are discussing it below in terms of four basic propositions.

First, there is no warrant for the conclusion that existing carriers possess a moral superiority because they serve some small towns. Historically, these carriers requested and obtained authority to serve small towns at a time when they were subsidized to provide the service. And when carriers are no longer subsidized, they proceeded with traditional business motives to petition the Board to abandon service at many small towns. There is nothing wrong with this. But there is no warrant for the conclusion that a certificate vaccinates a carrier against greed.

Moreover, the applications of new carriers do not necessarily reflect a desire to choose the easy path. They had no practical choice but to seek authorization to serve the larger cities. A Board that has never certificated a new carrier trunkline service to a large town is certainly not going to certificate it to a small town. The only cities where these carriers had any possibility of success under Board policy were the larger cities.

It cannot be assumed that new large city service would be an easy path to high profit operations. These are the segments where compe-

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[52] Air transportation has only one-seventh the investment in relation to sales of public utilities. This is shown by the following table:

	Investment as a Percent of Revenues
Electric Utilities	324.4%
Domestic Trunklines	44.8%
Manufacturing Industries	40.9%

From an investment ratio standpoint, air transportation is closely akin to a normal manufacturing industry not to a public utility. Moreover, in air transportation costs do not decrease sharply with expansion of volume. Indeed, Western and Continental, which are the third and fourth smallest carriers in the domestic trunkline industry, have costs per available ton mile which are lower than TWA and Northwest, which are among the largest carriers in the industry. In air transportation cash costs are 81.1% of total costs as compared to only 60.7% for electric utilities. Civil Aeronautics Board, Recurrent Report of Financial Data, 1953, and Quarterly Report of Air Carrier Operating Factors, December 1953. Federal Power Commission, Statistics of Electric Utilities, 1953. Federal Trade Commission and Security Exchange Commission.

tition is the most intensive. The experience of Northeast on its Boston-New York operation, or Capital on the New York-Atlanta operation should serve as a warning against the easy conclusion that there is pie in the sky between the big cities. A new carrier would sever these markets against competitive operations by existing carriers well established in the markets and with a substantial edge in equipment and capital resources. Heavy traffic will be offset by intense competition.

Second, this argument precludes all new entry into the trunkline business. Since at small cities now served by one trunkline, there is no likelihood of the Board finding a justification for competitive trunkline service, a new carrier has no opportunity to secure the small town authorization necessary for the balanced kind of pattern contemplated by the argument. Thus the argument leads logically to the conclusion that no new service by new carriers can ever be authorized. This is certainly not the statutory intent.

Third, the proportion of small town service has been decreasing and is not sufficient to warrant a policy of complete exclusion of new carriers. For over four years the Board's policy has been to suspend service at small trunkline points and to turn them over to feeders. At the same time traffic at these points has grown and the proportion of service to small towns has declined. The following table[53] shows the change in proportions of revenue passenger miles at small and large stations.

	1941	1947	1954
Stations with under 775 passengers per month	6.1%	1.6%	.8%
Stations with over 5,500 passengers per month	35.4%	72.9%	86.7%

Where the overall picture of certificated trunkline operations to small towns is examined on the basis of current facts, it does not appear to be imposing enough to justify a policy of complete exclusion of new carriers. It has been rendered obsolete by the growth of air transport.

Fourth, there is no evidence that the certification of new carriers would jeopardize existing service to small towns. For the most part the applications of new carriers seek service competitive with the Big Four. Not only are these carriers rendering a smaller proportion of small town service but their large traffic volume and their extremely profitable operating position makes it clear that small town service would not be impaired.

Even with the smaller carriers, there appears to be little question that small town service is not jeopardized. This is true for a number of reasons:

(a) The applications of new carriers do not as a general rule seek to compete in the major markets of the smaller carriers. The proportion of their traffic subject to diversion is generally small because they are not generally operating in the markets sought by new applicants.

[53] CAB Air Traffic Surveys, March 1941, 1947, 1954.

(b) With traffic increasing rapidly, diversion by a new carrier is soon offset by growth.[54]

(c) Many of these carriers, such as Capital, Delta, National and Western have experienced substantial growth and have operating margins comparable to the Big Four. Bigness is not synonymous with soundness. All of these carriers have managed to acquire and finance substantial fleets of new modern equipment on the basis of the strength of their operating position over existing routes.

(d) While some small town service may not be as profitable as large town service, there is no evidence that indicates substantial losses at these stations. In fact, the ten smallest stations of four medium sized trunks had revenues averaging 281% of station expenses.[55] While this does not show that the stations are profitable, it does indicate that claims of heavy losses at small towns should be viewed with some skepticism. The more logical conclusion is merely that these towns do not contribute as much to the profitable operation of the company as the large towns.

This is not to say that for some carriers such as Northeast the small station problem is not a serious one. In these situations the issue is whether the objective of the Act will be better realized by building up their route systems through new authorizations or by awarding some routes to new carriers. This question depends on the facts of a particular case. What is clear is that small station service should not be a complete bar in all cases to certification of new carriers.

Our basic conclusion is that since the doctrine leads to complete exclusion of new carriers for all time, there is a heavy burden of proof on those who would use it to bar all new entry. An analysis of the facts supports the proposition that this burden has not been met. Overall the problem has decreased as the industry has grown and today only an insignificant portion of the total traffic is small town traffic. Moreover, it seems clear that certification of new carriers will not impair existing small town service. For those carriers with a serious small town business the essential question is whether it is in the public interest to build up those carriers by route extensions or to award routes to new carriers. This is discussed, *infra.*

The Small Carrier Argument

This argument is that the Board's policy of exclusion of new carriers from trunkline transportation is justified because the Board should give priority to building up the position of smaller carriers and providing a better traffic balance among carriers.

The argument would be more persuasive if the Board had such a policy. The fact is that while the smaller carriers have been expanded,

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[54] Since 1938 domestic trunkline revenue passenger miles increased at the rate of 25.5% a year. Since 1948 the growth rate has been 19.6% a year.

[55] The computation is for Braniff, Capital, Delta, and National, as shown on the Form 41s for the third quarter of 1954.

they have not been able to hold their own traffic-wise as compared to the Big Four since 1946. Between 1946 and 1954, their share of all trunklines, outside of the Big Four, declined from 33.5% to 26.4% of total revenue passenger miles. If the policy of building up small carriers has not been dominant in the seventeen years since the passage of the Act, there is no reason why it should be resurrected for the purpose of keeping new carriers out of the industry.

Carried to its logical conclusion, this argument would also ban any extensions to the Big Four. This has not been the Board policy. The Board has in many cases concluded that while building up small carriers is one objective of the Act, it is offset by other public interest considerations which support additional authorization for bigger carriers.[56] This same comparative principle is applicable to the applications of new carriers seeking certificates in preference to smaller certificated carriers.

There is no question that *one* of the Board's objectives should be the improvement of the position of the smaller carriers, particularly those that are still subsidized. With the industry growing at the rate of $100,000,000, the Board could well build up the small carriers *and* certificate operations by new carriers. Moreover, the statutory objective is broader than the welfare of the few small carriers[57] which still pose a serious problem. Its objective is to build a sound air transportation system which will best serve the interests of the travelling public and the national defense. While the Board's decision must depend on the facts in a particular case, in many situations the statutory objectives will best be served by the certification of a new carrier which will provide better service and by bringing new competition to the industry improve its overall competitive tone.

CONCLUSION

Air transportation is big business today. It is among the country's fastest growing industries. Yet it has been regulated as if it were a small unstable industry. After seventeen years of controlled entry it would be neither practical nor legal to abandon all restrictions on entry. But there appears to be no question that the regulation of entry has been unjustifiably restrictive. In particular a policy which completely excluded all new carriers for seventeen years from the most important and significant area of air transportation is unwarranted.

Certainly, this country has never before witnessed a situation where for seventeen years a fast growing dynamic industry has been completely reserved to a few companies by legal barriers to entry. Such an extreme policy is contrary to our whole economic history. It is contrary

[56] See e.g. Northwest Air et al., Chicago-Milwaukee-New York 6 CAB 217, 224 (1944). Eastern A.L. et al., Great Lakes-Florida Case, 6 CAB 429 (1944).

[57] In 1954 there were four domestic trunkline carriers, Braniff, Colonial, Continental and Northeast, which required subsidy of $37,000,000. In that same year, non-mail revenues increased by $98,000,000, or 26 times the amount of the subsidy.

to the Act, its legislative history and to the language of the Board cases. The arguments in its favor are largely unanalyzed cliques not justified factually. Logically these arguments support some restrictions on entry but they do not justify complete exclusion. The Act should not be used to protect the grandfather carriers from competition but to promote its developmental objectives.

The achievements of the certificated industry have been great. It is no derogation of these achievements to say that they would have been greater if the industry had had the benefits of competition from new carriers.