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Power of Civil Aeronautics Board to Specify Airport in Certificate Proceeding

JUDICIAL AND REGULATORY DECISIONS

POWER OF CIVIL AERONAUTICS BOARD TO SPECIFY AIRPORT IN CERTIFICATE PROCEEDING

THE QUESTION of the power of the Civil Aeronautics Board to specify initially the airport to be used by a newly certificated air carrier was not presented for judicial determination until the recent case of *City of Dallas* v. *Civil Aeronautics Board.*[1] There the Court of Appeals for the District of Columbia found such designation to be consistent with the economic regulatory powers conferred upon the Board by the Civil Aeronautics Act.[2]

Central Airlines applied for renewal of its temporary certificate of convenience and necessity; at the same time it applied for a route extension including service separately to the cities of Forth Worth and Dallas, Texas. In making application, Central included a "catch-all" clause[3] which, under authority of the *State Airlines Case,*[4] allows the Board to deviate from consideration solely of the points specifically applied for by name, and permits the application to be considered instead as being for whatever service in the general area the Board may find required by the public interest.

The City of Dallas intervened in the hearings held by the Board and presented evidence relating to the traffic potentials of the proposed route. In these proceedings the issue of the proper airports to be used in providing the prospective services was not raised. At the conclusion of the hearings on the extension application, the Board issued Central a Certificate of Public Convenience and Necessity under Section 401 (d)(i) of the Civil Aeronautics Act,[5] which provides:

> The Board shall issue a certificate authorizing the whole *or any part* of the application. . . . (Emphasis added.)

In accordance with Section 401 (f) of the Act,[6] the Board's order specified the points to be served,[7] and concluded that the terminal point of Dallas-Fort Worth, Texas was to be served through Amon Carter Air Field. Amon Carter, also known as Fort Worth International Airport, is a new airport development, located midway between Fort Worth and Dallas, approximately 18 miles from the center of Dallas.

The City of Dallas, and the Dallas Chamber of Commerce objected to the order, believing that their city could best be served through Love Field, which is 7 miles from Dallas and is currently undergoing a $10 million modernization program. Review of the Board's order was sought in the degree permissible under Section 1006 of the Civil Aeronautics Act[8] and

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[1] C.C.H. Aviation Law Rep. 17,381 (D.C. Cir. May 20, 1954), *cert. den.* 75 S. Ct. 295 (Jan. 10, 1955).

[2] 52 Stat. 973 (1938), 49 U.S.C. Chap. 9 (1952).

[3] These clauses follow the specific route requests and generally apply for authority also to serve such other routes in the area as the Board may conclude that the public convenience and necessity requires.

[4] Civil Aeronautics Board v. State Airlines, 338 U.S. 572 (1950).

[5] 52 Stat. 987 (1938), 49 U.S.C. §481(d)(1) (1952). This subsection is set out in full in note 18 *infra.*

[6] 52 Stat. 988 (1938), 49 U.S.C. §481(f) (1952).

[7] Central Renewal Proceeding, Order E-7595, July 31, 1953.

[8] "(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be

Section 10 of the Administrative Procedure Act,[9] maintaining that the Board lacked statutory authority to designate airports to be used, and that proper notice of the scope of the inquiry had not been given.

Section 401 (f) of the Act[10] limits the authority of the Board by providing:

> No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require.

If airports are facilities for performing authorized transportation, as Dallas claimed, the designation of an airport would be invalid as a "term, condition, or limitation" under this provision. On the other hand, such a decision may be regarded as merely an exercise of the Board's affirmative power to authorize the transportation to be rendered, and as such is not precluded by Section 401 (f).

Section 1 of the Act[11] defines the critical terms. It provides:

> (7) *"Air Navigation Facility"* means any facility used in, available for use in, or designed for use in, aid of air navigation, *including landing areas*, lights, and any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing or take-off of aircraft.
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> (8) *"Airport" means a landing area* used regularly by aircraft for receiving or discharging passengers or cargo. . . . (Emphasis added.)

Thus, reading subsections (7) and (8) together, an airport is a landing area, which in turn is an air navigation facility. Disregarding for the moment the consideration of exactly what is the "authorized transportation" allegedly being subjected to a "term, condition or limitation," attention can be directed to whether the defined term "air navigation facility" is included in the undefined term "facilities" used in Section 401 (f). The context of the Act suggests that Congress did not define the general term "facilities," but rather only the particular term "air navigation facility," which does not appear in the portion of the Act providing for economic regulation, but which is found in the provisions regulating safety matters connected therewith. The general term "facilities," appearing in Title IV, and particularly Section 401 (f), does not appear to have been formally defined. Indeed, that this word may be used in several different contexts is indicated by the definition subsection (22), which contains both "airports" and "facilities," not used synonymously:

> (22) *"Landing Area"* means any locality, either of land or water, *including airports* and intermediate landing fields . . . *whether or not facilities are provided* for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo. . . . (Emphasis added.)

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considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so." 52 Stat. 1024 (1938), 49 U.S.C. §646(e) (1952).

[9] "(e) Scope of Review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by either party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243 (1946), 5 U.S.C. §1009 (1952).

[10] 52 Stat. 988 (1938), 49 U.S.C. §481(f) (1952).

[11] 52 Stat. 977 (1938), 49 U.S.C. §401 (1952).

It is thus difficult under these circumstances to determine exactly what Congress meant by "facilities" in Section 401 (f). However, the economic regulatory provisions, read with subsection (22) of Section 1, do not appear susceptible of the interpretation that "facilities" include airports.[12] Thus, on this basis alone, it would appear that the action of the Board in designating the airport to be used is not prohibited by the statute.[13]

Moreover, the "facilities" question may well be insignificant. The first sentence of Section 401 (f), *supra*,[14] defines the "authorized transportation and service" protected from any "facilities" restriction. It reads:

> Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. . . .

Accordingly, if the designation of an airport merely describes the points to be served by the transportation and service authorized, it is immaterial whether or not an airport is a facility. A number of previous uncontested certifications by the Board have designated specific airports rather than to cities as "points,"[15] and if a similar process is to be approved, designa-

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[12] For instance, section 404(a) of the Act provides that "it shall be the duty of every air carrier to provide and furnish . . . transportation as authorized by its certificate . . . (and) to provide safe and adequate service, equipment, *and facilities* in connection with such transportation . . ." If "facilities" were held to include airports for purposes of section 401(f), it would follow the same interpretation would be given the word as it appears in section 404(a), also found under Title IV of the Act. A carrier would then be under a strict duty to provide safe and adequate airports. No authority can be found for the proposition that air carriers should be required to provide their own airports. Further, section 406(a) also uses the term "facilities" as a factor in determining the amount of mail subsidy payments. If carriers were to provide airports, the cost of such would be borne by the increased mail subsidy payments. However, the Federal Airport Act, 60 Stat. 170 (1946), 49 U.S.C. §1101 (1952), provides a different scheme for dispensing federal aid in the development of airports, under an Administrator of Civil Aeronautics. It is unlikely that Congress intended to provide two distinct airport development aid programs.

[13] The "facilities" issue was ignored by Judge Prettyman in his *City of Dallas* case dissent, implying that he concurred in the majority opinion that the contention was without merit. See note 24 *infra*.

[14] 52 Stat. 988 (1938), 49 U.S.C. §481(f) (1952).

[15] At least thirty cases of airports or landing areas being designated as points or included in designations of points in certificates issued by the Board may be found. One instance will illustrate. Texas-Oklahoma Case, 7 C.A.B. 481, 539-40 (1947), includes Sherman-Denison, Texas (to be served through Perin Field), Arkansas City-Winfield, Kansas (to be served through the Winfield Airport), Midland-Odessa (to be served through the Midland Army Airfield), Cisco-Eastland-Ranger (to be served through the Eastland Municipal Airport), Mission-McAllen-Edinburg (to be served through Moore Field), and McCamey-Sheffield (to be served through the McCamey Airport). The *Texas-Oklahoma* case, *supra*, was similar to the Central Renewal Proceeding, Order E-7595, July 31, 1953, from which this dispute arose, since Central Airlines received its original authority to operate as part of the Texas-Oklahoma proceeding, and of necessity the territory, economics, and considerations of the public interest were similar in both cases. For other airport designations see Alaska Route Modification Case, Order E-7460, March 23, 1953; Indiana-Ohio Local Service Case, Order E-7184, February 20, 1953; Texas Local Service Case, Order E-5908, December 3, 1951; Trans-Texas Certificate Renewal Case, 12 C.A.B. 606, 639 (1951); Chicago Helicopter Case, 9 C.A.B. 687, 694 (1948); Middle Atlantic Case, 9 C.A.B. 131, 179-80 (1948); Great Lakes Area Case, 8 C.A.B. 360, 403, 442 (1947); Los Angeles Helicopter Case, 8 C.A.B. 92, 99 (1947); Air Commuting-New York City Area Service, 8 C.A.B. 1, 7 (1947); Alaska Air Transport Investigation, 3 C.A.B. 804, 893-4 (1942); Pan American Airways Transatlantic Operations, 1 C.A.A. 118, 135 (1939).

tion of Amon Carter may be regarded as authorizing service to "the terminal point Amon Carter Air Field (which serves Dallas-Fort Worth, Texas)." However it must be recalled that in none of the previous similar situations was the question of statutory power to make such designation presented to a court for judicial determination, and in none does it appear that more than one airport was in fact under consideration.

While the propriety of designating the airport to be used as a part of and incidental to authorization of service has not been challenged in the courts previously, a close analogy may be drawn from interpretation of the Motor Carrier Act, which contains a provision strikingly similar to Section 401 (f).[16] In *Crescent Express Lines* v. *United States*,[17] the Supreme Court upheld the validity of a restriction in a motor carrier certificate which limited the *transportation authorized.* In that case, the Court held that while the Interstate Commerce Commission could not limit the addition of motor vehicles of an authorized type, it could specify, in its authorization of transportation, that only those vehicles carrying not more than six passengers were to be used. There is no apparent reason why a similar interpretation should not be given the corresponding provisions of the Civil Aeronautics Act, which was patterned substantially after the earlier regulatory statutes. Furthermore, it is most likely that if Congress had meant that only cities were to be designated in describing authorized transportation, it would have so provided in the Act, rather than merely referring to "points." Adopting this interpretation of the Act, then, the Board, in specifying Amon Carter Air Field, was merely describing the transportation and service thereby authorized, and could do so whether or not an airport is a facility.

Apparently the only substantive limitation on the power of the Board to specify the points to be served and the service to be provided under Section 401 (d) of the Civil Aeronautics Act is contained in that section itself, where the Board is required to find that "such transportation is required by the public convenience and necessity. . . ."[18] Section 2 (f) of the Act provides that the encouragement and development of civil aeronautics is to be considered as being in the public interest.[19] Further, the Board is empowered to fix the rates at which individual carriers are compensated for carrying air mail.[20] In so doing, the Board administers a subsidy, since it is authorized within wide bounds of discretion to fix the

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[16] "(a) Any Certificate issued under section 206 or 207 *shall specify the service to be rendered* . . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms and conditions as the public convenience and necessity may from time to time require . . .*Provided however; That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment or facilities* over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Emphasis added.) 49 Stat. 552 (1935), 49 U.S.C. §308 (1952).

[17] 320 U.S. 401 (1943).

[18] 52 Stat. 987 (1938), 49 U.S.C. §481(d)(1) (1952). "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

[19] 52 Stat. 980 (1938), 49 U.S.C. §402(f) (1952).

[20] 52 Stat. 998 (1938), 49 U.S.C. §486(a) (1952).

rates "in the public interest."[21] As a part of its program of fostering the development of civil aeronautics by using its mail pay power, the Board, following the cessation of hostilities in 1945, began certifying "feeder services" on an experimental basis as an attempt to extend the benefits of air transportation to the less heavily populated areas of the country.[22]

Central Airlines is such a carrier, its marginal operation being maintained only by virtue of large mail subsidy payments. In considering the service finally certificated in Order E-7595, the Board came to the conclusion that the traffic potential of Dallas and Fort Worth could be adequately served through use of Amon Carter Air Field alone, thus reducing Central's operating costs and consequently the mail subsidy payments required. Having determined such one-airport service to the two cities to be in the public interest, the Board sought to assure that both cities would in fact be served adequately. To effect this end, two possible courses were available. First, the designation of Amon Carter Air Field could be, and in fact was, made a part of the authorized service. In the alternative, the Board could have designated service to the point Dallas-Fort Worth, as it has on at least two prior occasions,[23] and left determination of the airport to be used to a subsequent "airport notice" proceeding.[24] By use of the latter, there would have been no question of lack of notice of the scope of the proceeding, and all the various considerations constituting the public interest consequently could have been presented by those concerned.

The earlier certification by the Board of service to Tampa-St. Petersburg, Florida, and their acquiescence in the conduct of the service through two airports[25] suggests that the Board can be expected to give more weight to the convenience factor of separate airports under applications by less heavily subsidized carriers for routes similar to that sought in the *Dallas* case. On the other hand, airport designation in many cases can be expected

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[21] "In fixing and determining fair and reasonable rates of compensation under this section, the Board . . . may fix different rates for different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, the need of each air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." 52 Stat. 998 (1938), 49 U.S.C. §486(a) (1952).

[22] See, *e.g.*, Rocky Mountain States Air Service, 6 C.A.B. 695 (1946); West Coast Case, 6 C.A.B. 961 (1946); New England Case, 7 C.A.B. 27 (1946).

[23] See, *e.g.*, American Airlines, Inc.—Temporary Certificate of Public Convenience and Necessity, 3 C.A.B. 415 (1942); Latin American Air Service Case, 6 C.A.B. 857 (1946).

[24] "Airport authorization—(a) Airport Notice. If the holder of a certificate desires to serve regularly a point named in such certificate through the use of any airport not then regularly used by such holder, such holder shall file with the Board written notice of its intention to do so. . . .The use of such airport may be inaugurated 30 days after the filing of such notice, unless the Board notifies the holder within said 30-day period that it appears to the Board that such use may adversely affect the public interest. . . ." 14 Code Fed. Regs. §238.3(c)(1) (1949).

Judge Prettyman based his dissent in the *City of Dallas* case on this provision. Central was serving both Dallas and Fort Worth through separate airports on other route segments, with the Dallas service being through Love Field. Thus, thought Judge Prettyman, if any service was to be operated to Dallas by Central Airlines throuh an "airport not then regularly used by such holder," *e.g.*, Amon Carter Air Field, Dallas would be entitled to the benefit of an airport notice proceeding. Judge Prettyman did not extend his dissent to the court's holding on the principal issue of the power of the Board to designating an airport in authorizing a service.

[25] Florida Trunk Line Case, 11 C.A.B. 943, 953-54 (1950).

to lower the subsidy required, preserving the newly-certificated route from the fate of other marginal operations which have had certificate renewal denied because of the need for excessive subsidy payments.[26]

Further consideration should be given to the possible applications of this power in future cases. The Board has authority (with the approval of the Supreme Court as expressed in *Civil Aeronautics Board* v. *State Airlines*),[27] under "catch-all" clauses,[28] to grant certificate service to any combination of points within an area, whether specifically applied for by the carrier or not, when the applicant is found fit, able and willing to perform the prospective service in the public interest.[29] It follows that whenever in the future it can be anticipated that more than one airport might be proposed on a subsequent airport hearing, the Board may eliminate the need for the later proceeding by designating the airport to be used, as it has already done on a limited basis in the past.[30] The result of such action will be a reduction of the number of proceedings because all phases of a proposed service will be considered in one hearing.

Of more potential significance is the possible exercise of the power to designate airports in conjunction with the power granted the Board by Section 401 (h) of the Civil Aeronautics Act[31] to alter any certificate of convenience and necessity. In cases which were not brought for judicial review, the Board, under authority of this section, has altered certificates without application for such alteration by the certificated carrier.[32] The Board early limited its discretion in this type of proceeding by announcing that such changes will not be made when they amount to the creation of a new route or a change in the character of a system.[33] Such self-restraint, however, would be slight comfort if the Board should decide that service previously authorized to a point designated as a city should be altered or amended to substitute a point designated as an airport, which was different from the airport formerly used. A person seeking judicial review of such action would face the serious obstacle of the reluctance of the courts to supersede the judgment of specialized administrative agencies, based on due hearing and the public interest.[34] Indeed, Section 1006 (e) of the Civil Aeronautics Act,[35] read with Section 10 (e) of the Administrative

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[26] See, *e.g.*, Florida Airways Certificate Extension, 10 C.A.B. 93 (1949).

[27] 338 U.S. 572 (1950).

[28] See note 3 *supra*.

[29] 52 Stat. 987 (1938), 49 U.S.C. §481(d)(1) (1952). This provision is fully set out in note 18 *supra*.

[30] See note 15 *supra*.

[31] "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate. . . ." 52 Stat. 987 (1938), 49 U.S.C. §481(h) (1952).

[32] *E.g.*, Eastern Airlines—Temporary Service to Huntsville, 3 C.A.B. 305 (1942) (initiative of C.A.B.); Pennsylvania-Central Airlines—Temporary Service to Elizabeth City, 3 C.A.B. 370 (1942) (initiative of city).

[33] "We are of the opinion that this section of the Act [401(h), set out in note 41 *supra*] does authorize the Board to add new points or services to the certificate of a carrier on the Board's own initiative and without application by, and the consent of, the carrier; but this authority does not include the addition of new service which would be so extensive as to amount to a new air transportation route, or of such a kind as to substantially change the character of a carrier's system." Panagra Terminal Investigation, 4 C.A.B. 670, 673 (1944).

[34] *C.f.* Civil Aeronautics Board v. State Airlines, 338 U.S. 572 (1950).

[35] 52 Stat. 1024 (1938), 49 U.S.C. §646(e) (1952), set out in note 8 *supra*.

Procedure Act,[36] makes factual determinations of the Board final for all practical purposes, even though the Courts of Appeals will consider the whole record in deciding whether the finding of fact is supported by "substantial evidence."[37]

The *City of Dallas* case has joined the *State Airlines* case in recognizing a scope of proceedings before the Civil Aeronautics Board which may well be much too broad for the effective presentation of evidence. Various airport interests within a geographic area are now placed upon notice of the scope of proceedings in the same broad general manner as are applicants for operating certificates. The omnibus notice process is attempted to be justified as furthering the public interest, irrespective of "how an individual proposal would benefit the applicant (or the airport). . . ."[38] Whether the public interest is really best served in this manner is a question which may be open to substantial doubt, for certainly it is not a procedure conducive to the development of all relevant facts in the minimum possible time. It now appears that all possible interested parties must present all possible relevant evidence on all subjects conceivably worthy of consideration, or else be held to have waived the right to be heard.

This rather confused procedure perhaps suggests that either Congress, by legislative action, or the Civil Aeronautics Board itself, by rules of procedure, should provide a new hearing sequence, establishing in separate stages (1) the determination of the points to which service is to be authorized, (2) the particular carrier-applicant to be awarded certification, and (3) the airport to be used. It has been noted that the Board has the statutory power to designate the airport to be used. With the existence of this power, there is little quarrel, for it is plain that there are public interest features in the choice of an airport, particularly when the above noted subsidy administration function of the Board is considered. However, all parties should be afforded the most complete hearing possible and should be advised of the particular issue under consideration. It would seem that the public interest in hearings would best be safeguarded by replacing the present procedure with the suggested three-stage sequence of particularized hearings. Applied to the facts of the *City of Dallas* case, the Board would have received applications for new routes in the area and decided what service was required.[39] Evidence would then have been heard regarding the ability and willingness of the various applicants to perform the service.[40] Finally, the certificated airline would have filed notice of the airports through which it intended to provide the service. At that time evidence would have been taken on the relative merits of Amon Carter Air Field as

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[36] 60 Stat. 243 (1946), 5 U.S.C. §1009 (1952). See note 9 *supra*.

[37] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). Although the findings of the Board will be scrutinized, it canot be expected that the Board will be reversed without a very clear showing of error. Economic regulation of transportation is a complex matter, involving the analysis of voluminous evidence followed by the application of expert judgment, which function Congress has seen fit to vest in the Board. For an example of the reluctance of the judiciary to undertake review of such cases, see Justice Brandeis's concurring opinion in St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1935).

[38] Southeastern States Case, 8 C.A.B. 716, 722 (1947), quoted in Civil Aeronautics Board v. State Airlines, 338 U.S. 572, 580 (1950).

[39] At this stage, traffic potentials would be weighed against the operating costs with respect to the various possible points considered for service. The result, in the principal case, would have been to decide to serve Dallas and Fort Worth as a single point.

[40] This stage of the proposed procedure would obviate the most objectionable aspect of the *State Airlines* case, and would provide a definite route to which the various carrier-applicants might direct themselves in their respective efforts to demonstrate their particular fitness to provide the service.

compared with Love Field, and the Board would have made its decision, free from any charge that the scope of the hearing was not made clear to all interested parties. The suggested procedure would enable the public interest to be served more expeditiously by removing the need to take evidence in an unwieldy manner as each city, airport, and carrier attempts to avoid omitting some matter which it later appears the Civil Aeronautics Board had under consideration from the beginning of the proceeding.[41]

[41] It must be recognized that the suggested hearing sequence is not without disadvantageous aspects. For instance, it is not always possible to delineate the various considerations bearing upon administration of the Civil Aeronautics Act. In the City of Dallas case, the determination to serve both Dallas and Fort Worth as a single point was no doubt substantially affected by estimates based upon the traffic generating potential of the area through use of Amon Carter. Yet, that Love Field would have provided approximately the same traffic if designated by the Board as the one airport to be used is indicated by the vigor with which Dallas prosecuted its appeal. This suggests that although in the first-suggested stage the Board would have to appraise some airport considerations in determining the points to which service would be feasible economically, such might involve less than deciding upon a specific airport at that stage, when each of two possible airfields could provide the necessary facilities, which indeed is the only case in which a controversy might be expected. The disadvantage of overlapping consideration of similar issues upon successive hearings appears to be well offset by the advantages derived through better notice and more particularized areas of inquiry.