

1941

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Neil G. Melone

Recommended Citation

Neil G. Melone, *Controlled Competition: Three Years of the Civil Aeronautics Act*, 12 J. AIR L. & COM. 318 (1941)

<https://scholar.smu.edu/jalc/vol12/iss4/2>

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CONTROLLED COMPETITION: THREE YEARS OF THE CIVIL AERONAUTICS ACT†

NEIL G. MELONE*

INTRODUCTION

The Civil Aeronautics Act of 1938 was an attempt to remedy a situation in the air transport industry which was characterized as "chaotic" by the Committee on Interstate and Foreign Commerce.¹

From 1930 to 1934, the entire aviation industry had been dominated by three holding companies.² As a result of the so-called "spoils conferences" called by Postmaster General Brown in 1930, certain of these groups had secured the bulk of the government's airmail payments. Investigations by the Black Committee had revealed the alleged details of the "spoils conferences" and the extent of the interlocking relationships.³ On the basis of the testimony, Postmaster General Farley had cancelled the contracts in 1934 without notice or hearing.⁴ The experiment of mail flying by army pilots had proved disastrous, and remedy was sought in the Air Mail Act of 1934.⁵

Mail contracts were to be awarded after competitive bidding, and routes designated by the Postmaster General.⁶ The Act required the air transport companies to divorce themselves from manufactur-

†Adapted from Thesis submitted to Professor Hart in Seminar on Federal Administration at Harvard Law School.

*Member of Minnesota Bar.

1. H.R. Rep. No. 2254, 75th Cong., 3rd Sess. (1938) 2. For an excellent history of the industry prior to 1938, see Hamstra, *Two Decades—Federal Aero-Regulation in Perspective* (1941) 12 JOURNAL OF AIR LAW 106-133.

2. United Aircraft and Transport Corporation, North American Aviation Co., and Aviation Corporation.

3. Hearings before Special Committee on Investigation of Air Mail and Ocean Mail Contracts, 73rd Cong., 2nd Sess. (1933-34), parts 1-9.

For charts portraying the extent of interlocking directorates and stock control of air transport companies in 1934, see 78 Cong. Rec. 4977 (1934).

4. The controversies raised by this action now present very live issues in the pending suits by the United Air Lines Companies in the Court of Claims. The three companies seek to recover \$3,110,555 for mail carried during January and part of February, 1934, plus anticipated mail pay the plaintiffs would have received had they been permitted to complete their contracts. The government counterclaimed to the extent of \$23,409,953, alleging illegal and collusive combinations to prevent the making of bids at the "spoils conference." Reference was made to Commissioner Richard H. Akers, who filed his report on July 14, 1941. The Commissioner made extensive findings of fact, concluding that the plaintiffs' contracts were secured through open competitive bidding, and that there was insufficient evidence to substantiate the government's claim of fraud, collusion, or conspiracy.

5. 48 Stat. 933 (1934). Actually the remedy was sought under an earlier act, 17 Stat. 314, 39 U.S.C. 432 (1872). Routes were readvertised under that Act on March 30, 1934; the Air Mail Act of 1934 was not approved until June 12, 1934.

6. Secs. 3, 4, and 5.

ing interests in order to secure these subsidies.⁷ It prohibited mail contractors competing in parallel routes from merging or from entering into agreements which might result in common control or ownership.⁸ A measure of economic regulatory power was divided between the Post Office,⁹ the Interstate Commerce Commission,¹⁰ and the Department of Commerce.¹¹

The Act soon proved itself no more than a stopgap, for the Big Three were reincarnated in the Big Four:¹² the personnel remained substantially the same, and most of the routes were retained; the same interests continued to hold the field, under different names.¹³ Moreover, the undesirability and injustice of competitive bidding for mail contracts soon made itself apparent. While virtually no competition had existed in the industry prior to 1934, the system of bidding for routes gave rise to disastrous rate wars between competing lines.¹⁴ The larger lines would bid a ridiculously low price in order to buy the route, while the smaller operators were prevented from bidding successfully.¹⁵ Admittedly, compensation of a few mills per airplane mile was not remunerative of the services which the mail contractor rendered. The larger airlines which had bid successfully incurred severe operating losses,¹⁶ while some of the smaller companies disappeared in bankruptcy. One hundred and twenty million dollars of private capital had been invested in commercial aviation, one-half of this sum having been wiped out.¹⁷

This situation the Civil Aeronautics Act of 1938¹⁸ was designed

7. Sec. 7.

8. Sec. 15.

9. Note 6, *supra*.

10. Sec. 6.

11. Secs. 11, 12.

12. American Airlines, Inc., United Air Lines Transport Corporation, Transcontinental and Western Air, Inc., and Eastern Air Lines, Inc.

13. McKellar, Hearings before Subcommittee of Committee on Appropriations on First Supplemental Civil Functions Appropriations Bill for 1941, 76th Cong., 3rd Sess. (1940), 216.

14. The Commerce Committee, in reporting out S. 3845, viewed the extreme competition among air carriers as a prime evil which jeopardized their financial stability. It considered the existing laws inadequate and obsolete because the airlines had altered their status from airmail contractors to common carriers; and it declared that aviation under the existing laws was unsatisfactory to investors, labor, and the air carriers themselves. Sen. Rep. No. 1661, 75th Cong., 3rd Sess. (1938), 2. In the Congressional debates, the two fundamental needs of aviation in 1938 were said to be security of route and protection against cut-throat competition. Lea, 83 Cong. Rec. 6407 (1938).

15. Lea, 83 Cong. Rec. 7069 (1938). But the writer is advised by Mr. Paul M. Godehn that United Air Lines' bids were close to the maximum on each route, and that United was underbid on the Chicago-Dallas route by Braniff; see Finding No. 129 of Commissioner Akers' report in *United Air Lines Transport Corporation v. United States*, Note 4, *supra*.

16. Mr. Godehn adds that United would have incurred losses even at the maximum rates permitted by the advertisements of March 30, 1934.

17. Gorrell, Hearings before Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess. (1938) 298; Hearings before Subcommittee of Committee on Interstate Commerce on S. 3659, 75th Cong., 3rd Sess. (1938) 30.

18. 52 Stat. 973 (1938), 49 U.S.C. 401 (Supp. 1940).

Discussions of the Act are found in Hamstra, *Two Decades—Federal Aero-Regulation in Perspective* (1941) 11 JOURNAL OF AIR LAW 105, 133-147; Hester, *The Civil Aeronautics Act of 1938* (1938) 9 JOURNAL OF AIR LAW 451; Hester, *The State and the Nation under the Civil Aeronautics Act of 1938* (1938), 9

to rectify. The declaration of policy¹⁹ requires the Civil Aeronautics Board to "consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

* * * * *

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"²⁰

* * * * *

The statute does not prescribe competition at all events; it does not say that competition is to be maintained, but the Board is to consider its necessity.²¹ How much competition must exist under the terms of the Act, and how much may exist before it becomes wasteful and destructive?²² What is the Board's concept of monopoly and competition as evolved in the cases it has decided during the first three years of its existence? Is its concept the same when applied to the field of granting new routes as when applied to the field of regulating business practices? And to what extent has the Board carried out the Congressional intention in its disposition of the cases according to its interpretation of the statutory standards? These are the problems raised by Section 2(c) and (d). The Act attempted to swing the pendulum away from unrestrained competition, but not to the extreme of monopolistic control. While it is not the purpose of this article to suggest the present position of the pendulum, it is its purpose to indicate the considerations which have guided the Civil Aeronautics Board in its decisions.²³ An examina-

JOURNAL OF AIR LAW 635; Gorrell, *The Civil Aeronautics Act of 1938 and Democratic Government* (1938), 9 JOURNAL OF AIR LAW 703; Leroy, *Civil Aeronautics Authority* (1938), 9 AIR L. REV. 315; Note (1938) 52 HARV. L. REV. 137.

For the legislative precedents of the Act, see Hearings before Committee on Commerce on S. 3760, 75th Cong., 3rd Sess. (1938) 12, and Hearings on H.R. 938 (note 17, *supra*), at 305, 306.

19. Sec. 2.

20. Sec. 2(d) first appeared in S. 3845 in the form of an amendment added by the Committee on Commerce, which the Senate adopted with little discussion. 83 CONG. REC. 6730, 6748 (1938).

21. Note 128, *infra*.

22. "There must be enough competition to serve as a spur to the eager search for progress, but there must not be so much as to raise costs materially through the duplication of facilities." Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (1935), 62.

23. A confusion in terminology was apparent in the statute as enacted in 1938, and was remedied by Reorganization Plan No. IV, Sec. 7, effective on June 30, 1940: 5 FED. REG. 2421-2423 (1940). Since that date, the word

tion will be made of the opinions dealing with the issuance or denial of certificates of convenience and necessity, and with the regulation of the business practices of the air carriers.

I

CERTIFICATES OF CONVENIENCE AND NECESSITY

Prior to the passage of the Civil Aeronautics Act of 1938, certificates of convenience and necessity had been familiar administrative devices for the regulation of business affected with the public interest.²⁴ Colonel Edgar G. Gorrell, President of the Air Transport Association of America, in testifying before various committees, gave most illuminating and persuasive arguments in behalf of their use in the regulation of the air transport industry. He considered them a means of giving the air carriers a reasonable assurance of the permanency of their operation,²⁵ and of protecting them against ruinous competition. The requirement of a certificate of convenience and necessity would afford an orderly procedure to provide for minimum standards of service to be complied with before operations were commenced. This device would not only protect existing lines, but would remedy the precarious position in which small aspirants would find themselves if the establishment of unwarranted services were permitted.²⁶

At the same time, he stated emphatically that these certificates would in no sense sanction a monopoly. In the first place, the existing Air Mail Law itself created a monopoly since no airmail contractor was permitted to fly parallel to the line of another airmail contractor, or to maintain a passenger or express service off the line of his airmail route which competed in any way with the passenger or express service available on another airmail route.²⁷ In the second place, he declared it most unlikely that a monopoly could ever arise in the air transportation industry because of its inherent nature. It was highly competitive not only within itself, but with

"Authority" is the over-all term referring to the Administrator and the five-man body, while the latter is termed the "Civil Aeronautics Board." For the purposes of this discussion, the word "Authority" is taken to mean the five-man board until the reorganization; that body will be called the "Board" in dealing with the cases decided after June 30, 1940.

24. They were first adopted by several states as an administrative continuance of the system of granting legislative franchises to public utilities. Their first appearance in the federal scheme was under the Transportation Act of 1920, to regulate new railroad construction; they were later adopted by the Communications Act of 1934 and the Motor Carrier Act of 1935.

25. Congressman Lea stated that their purpose was to assure security of route, which is declared to be one of the two fundamental needs of aviation. 83 Cong. Rec. 6406 (1938).

26. Hearings before Committee on Interstate and Foreign Commerce on H.R. 5234, 75th Cong., 1st Sess. (1937) 66.

27. 48 Stat. 938 (1934).

highway and railroad systems. On the contrary, there was more danger of irresponsible and ruinous competition than of any monopolistic control.²⁸

A. Domestic Air Carriers

1. Grandfather Certificates

One of the first matters which the newly installed Authority had to consider, and which occupied it for a considerable time afterwards, was the flood of applications for routes under the "grandfather clause," Section 401(e)(1) of the Act. In general, under the terms of this subsection, an applicant is entitled to a certificate authorizing air transportation over the route which it used in continuous operations as an air carrier from May 14 to August 22, 1938, unless its service was inadequate or inefficient. Broad questions of public convenience and necessity were thus precluded by the statute from coming before the Authority for determination, since the principal issues were confined to the citizenship of the applicant, the scope and continuity of its operation, the extent of its authorization by the Postmaster General, and the adequacy and efficiency of its service. It is noteworthy that it differs from the Motor Carrier Act²⁹ in not requiring bona fide operation during the grandfather period.³⁰

In debates and hearings, Congress spent more time in the consideration of this clause than it did in the consideration of any other provision of the Act.³¹ The purpose of this provision was to give a preferential place to those who had expended money, energy, and initiative in pioneering an airline.³² To require an established carrier to prove convenience and necessity before it was permitted to continue its service would in effect penalize it for having pioneered a service, while the fact of an established service should be a sufficient guarantee of public convenience and necessity to warrant its continuance.³³ Furthermore, it was felt by the proponents of the bill that if there

28. Hearings on H.R. 5234 (note 36, *supra*), at 67.

29. 49 Stat. 551, 552 (1935), 49 U.S.C. 306, 309 (Supp. 1940).

30. The Authority pointed out this distinction in *Marquette Airlines, Inc., Grandfather Proceeding*, Order No. 99, Docket No. 7-401 (E)-1 (July 19, 1939), and overruled TWA's contention that such proof was required.

31. Debates: 83 Cong. Rec. 6632, 6727, 6767-6769, 6848-6852 (1938) (on S. 3845); 83 Cong. Rec. 7068-7078 (1938) (on H.R. 9738). Hearings on H.R. 9738 (note 17, *supra*) at 39, 40, 90, 94-99, 173-179, 195-201; Hearings on S. 3760 (note 18, *supra*) at 13-16; Hearings on S. 3659 (note 17, *supra*) at 18-20; Hearings before Subcommittee of Committee on Interstate Commerce on S. 2, 75th Cong., 1st Sess. (1937) at 432-434, 497-500. H.R. Rep. No. 2635, 75th Cong., 3rd Sess. (1938) 68-69; H.R. Rep. No. 2254, 75th Cong., 3rd Sess. (1938) 6-7.

32. McCarren, 83 Cong. Rec. 6769, 6848 (1938); Hester, Hearings on H.R. 9738 (note 17, *supra*) at 39.

33. Gorrell, Hearings on S. 2 (note 31, *supra*), at 498.

were no grandfather period during which continuous services were required prior to the passage of the bill, bidders might acquire rights that were not warranted, and there would be a mad scramble to establish routes and secure airmail contracts that would destroy the industry.³⁴

All hearings on applications by domestic air carriers under the grandfather clause were completed by January 1, 1939.³⁵ Between February 25, 1939, and July 31, 1940, the Authority granted grandfather certificates to nineteen domestic carriers³⁶ and denied the applications of two domestic carriers.³⁷ Most of these applications were disposed of without opposition, and by a stereotyped review of the evidence to support the requisite findings. In four of these cases,³⁸ other airlines intervened or entered appearances³⁹ to contest the inclusion of certain airmail stops on these routes, but the disposition of these conflicting claims involved no formulations of new policy. But in a fifth case⁴⁰ the inclusion of an intermediate point was challenged as falling within the proviso of Section 401 (e) (1).⁴¹

34. Gorrell, *ibid.* McCarran, 83 Cong. Rec. 6850 (1938); Lea, 83 Cong. Rec. 7069 (1938); Lea, Hearings on H.R. 9738 (note 17, *supra*), at 174.

35. Rhyne, *The Civil Aeronautics Act Annotated* (1939), 110.

36. Delta Air Corporation, Order No. 5, Docket No. 8-401(E)-1 (Feb. 25, 1939). Mid-Continent Airlines, Inc., Order No. 13, Docket No. 3-401(E)-1 (March 7, 1939). Continental Air Lines, Inc., Order No. 14, Docket No. 2-401(E)-1 (March 9, 1939). Chicago and Southern Air Lines, Inc., Order No. 20, Docket No. 4-401(E)-1 (March 17, 1939). Northwest Airlines, Inc., Order No. 21, Docket No. 42-401(E)-1 (March 14, 1939), (also received certificate for Canadian route). National Airlines, Inc., Order No. 22, Docket Nos. 5-401(E)-1 and -2 (March 14, 1939). Inland Air Lines, Inc., Order No. 27, Docket No. 26-401(E)-1 (March 28, 1939). Western Air Express Corporation, Order No. 29, Docket No. 31-401(E)-1 (April 7, 1939). Pennsylvania-Central Airlines Corporation, Order No. 38, Docket No. 18-401(E)-1 (April 21, 1939). American Airlines, Inc., Order No. 53, Docket No. 22-401(E)-1 (May 9, 1939). United Air Lines Transport Corporation, Order No. 57, Docket No. 16-401(E)-1 (May 22, 1939), (also received certificates for Canadian route). Boston-Maine Airways, Inc., Order No. 59, Docket No. 13-401(E)-1 (May 31, 1939), also received certificate for Canadian route). Eastern Air Lines, Inc., Order No. 67, Docket No. 9-401(E)-1 (June 9, 1939). Transcontinental and Western Air, Inc., Order No. 70, Docket No. 17-401(E)-1 (June 16, 1939). Braniff Airways, Incorporated, Order No. 90, Docket Nos. 1-401(E)-1 and -2 (July 18, 1939). Marquette Airlines, Inc., Order No. 99, Docket No. 7-401(E)-1 (July 19, 1939). Wilmington Catalina Airline, Ltd., Order No. 220, Docket No. 24-401(E)-1 (October 13, 1939). Tri-State Aviation Corporation, Order No. 608, Docket No. 59-401(E)-1, 2 C.A.B. 159 (July 31, 1940). Mayflower Airlines, Inc., Order No. 609, Docket No. 46-401(E)-1 2 C.A.B. 175 (July 31, 1940).

37. Airline Feeder System, Inc., Order No. 65, Docket No. 57-401(E)-1 (June 9, 1939), (no continuous operation); Condor Airlines, Inc., Order No. 424, Docket No. 23-401(E)-1, 1 C.A.J. 140, 1 C.A.A. LXXXVI (March 8, 1940), (no continuous operation, no operation as interstate carrier).

38. United Air Lines Transport Corporation, (Pennsylvania-Central appeared); Eastern Air Lines, Inc., (Braniff and Delta intervened and American appeared); Braniff Airways, Incorporated, (Eastern intervened); Marquette Airlines, Inc., (TWA intervened).

39. Under Rule 4 of the Authority's Rules of Practice.

40. Transcontinental and Western Air, Inc., Grandfather Proceeding, note 36, *supra*. This was the Boulder City stop. In order to assure its inclusion on TWA'S route, Mr. Jack Frye, president of TWA, had urged that the date commencing the grandfather period be moved up from December 1, 1937, to the date of the passage of the Act. Hearings on S. 3760 (note 18, *supra*) at 13-16; Hearings on H.R. 9738 (Note 17, *supra*) at 174-177, 191-193, 195-201. When the suggestion was made during the debates on S. 3845, Senator McCarran opposed it on the ground that it would do away with the grandfather clause entirely. 83 Cong. Rec. 6769 (1938). The joint committee set the date at May 14, 1938. H.R. Rep. No. 2635 (note 31, *supra*), at 68.

41. "Provided that no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier

The Authority found that the applicant's service to that point competed directly with the intervener's service to a nearby city, and that the intervener was adversely affected by this service. But the requisite finding of public convenience and necessity was based on the convenience to passengers of direct air transportation to the proposed point, and the possible saving in operating costs to the applicant resulting therefrom.

Several grandfather applications have involved the definition of an "air carrier" within the meaning of the Act, and the extent of an airline's interstate operations so as to bring it within the jurisdiction of the Civil Aeronautics Board. An express company, not engaging in the physical carriage of property by aircraft but acting as an intermediary between the shipper and the ultimate operator of the aircraft, has been held to be an air carrier within the definitions of Section 1.⁴² But although a company is formed actually to engage in the physical transportation of persons, property, and mail by air, it does not become an air carrier within the purview of Section 408 until it obtains a certificate of convenience and necessity.⁴³ While a grandfather certificate will be denied if an air carrier operated as such only spasmodically and not continuously during the grandfather period,⁴⁴ the Board will not refuse to assume jurisdiction to entertain the application when the line has operated only in one state.⁴⁵ This latter view is consistent with the Board's position in two other cases. Without considering the entirely intrastate nature of an airline's operations, it has granted its application on the bare showing of continuous operations during the grandfather period.⁴⁶ And it successfully contended that a certificate was required for an entirely intrastate route when passengers might use it as a segment of an

competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity."

42. Railway Express Agency, Inc., Certificate of Public Convenience and Necessity, Order No. 940, Docket No. 19-401(E)-1, 2 C.A.B. — (March 13, 1941) (Mr. Mason dissented on this point, but concurred in the view that Sec. 401(e) does not require nor authorize the issuance of certificates for operations such as those conducted by the applicant).

43. American Export Airlines, Inc., Application for Approval of Control by American Export Lines, Inc., Order No. 581, Docket No. 319, 2 C.A.B. 45 (July 12, 1940) (The Board was reversed on this point on Pan American's appeal, see note 182, *infra*).

44. Note 37, *Supra*.

45. Condor Airlines, Inc., Grandfather Proceeding, (Note 37, *supra*); The Authority said: "Continuous existence of 'interstate air transportation' during the grandfather period does not depend solely on applicant's operation of aircraft between the certain geographical points listed in section 1(21), but may also be determined by the interstate character of the flow of traffic transported between these points . . . The fact that applicant has operated wholly between points in California does not necessarily establish that it did not engage in interstate air transportation during the grandfather period." 1 C.A.J. 142, 1 C.A.A. LXXXVIII.

46. Mayflower Airlines, Inc., Grandfather Proceeding, note 36, *supra*. (Passengers and express from Boston to Cape Cod, Martha's Vineyard, and Nantucket; since operations are inherently seasonal, the Board considered continuity of scheduled service after June 15, 1938, rather than May 14).

interstate journey, and when the airline was already engaged in foreign air transportation over another authorized route.⁴⁷

Two cases⁴⁸ have involved the so-called "mandatory routes"—those for which the Authority was required by Section 401 (e) (2) to issue certificates "notwithstanding any other provisions of this Act."⁴⁹ Only one of these cases raised issues of significance, and it is treated in the next section.

2. *New Route Certificates*⁵⁰

The Act, after prohibiting any air carrier from engaging in air transportation without a certificate, provides in Section 401(d) (1) that the Board shall issue a certificate if it finds that the applicant is fit, willing, and able to perform the service, and that such transportation is required by the public convenience and necessity.

a. *Uncontested Applications*

Although the first new route application⁵¹ was uncontested, the Authority realized that it was breaking new ground, and took occasion to discuss the standards which should govern such proceedings. The heart of Section 401(d) (1) is the prescribed finding that the proposed service is required by "the public convenience and necessity." This phrase, said the Authority, "is susceptible of no exact definition, and its meaning must be largely ascertained by reference to the context and objectives of the particular statute in

47. *Civil Aeronautics Board v. Canadian Colonial Airways, Inc.*, (D.C.N.Y., 1940), noted 12 Air L. Rev. 73 (1941) (Defendant having contended that its line was entirely intrastate and therefore did not require a certificate, a consent decree was entered permanently enjoining it from operating an airline without the Board's consent). See also *Canadian Colonial Airways, Inc., Montreal-Nassau Service*, Order No. 1126, Docket No. 601, 2 C.A.B. — (July 7, 1941), where the Board held that Canadian Colonial's service between Montreal and Nassau, with an overnight stop at Jacksonville for safety reasons, was not "foreign air transportation" within the meaning of the Act, and hence was not "air transportation"; the complaints of Pan American and Eastern were dismissed, since the service required neither a certificate of convenience and necessity nor a foreign air carrier permit.

48. *Continental Air Lines, Inc., et al., Wichita-Pueblo Route*, Order No. 43, Docket Nos. 2-401(E)-2 and 150 (April 28, 1939); *Mid-Continent Airlines, Inc., Bismarck-Minot Operation*, Order No. 475, Docket No. 328, 1 C.A.J. 208, 1 C.A.A. CXLVIII (April 9, 1940).

49. The appropriation bill of March 1, 1938, had authorized the carriage of airmail over these routes, and had made the necessary appropriations; contracts had been let after competitive bidding, and work had already been commenced by the airlines. The Senate added this subsection to S. 3845 with the intention of putting these eight lines on the same basis as the existing lines, and of bringing them within the protection of the grandfather clause. Senator McCarran referred to this subject as the most controversial one in the entire study of the proposed bill, and opposed the insertion of the amendment as protection of "grandchildren" rather than "grandfathers", and as undermining the whole purpose of the grandfather clause. See 83 Cong. Rec. 6848, 6850 (1938).

50. A general discussion of this problem appears in Lupton, *New Route Certificates under the Civil Aeronautics Act of 1938* (1941) 12 Air L. Rev. 103.

51. *Northwest Airlines, Inc., Duluth-Twin Cities Operation*, Order No. 417, Docket Nos. 131 and 232, 1 C.A.J. 123, 1 C.A.A. LXVI (March 6, 1940). Editorial comment in 11 JOURNAL OF AIR LAW 163 (1940) suggests that the opinion may become as famous in air transportation as *Smyth v. Ames* and the *Minnesota Rate Cases* have become in the general field of public utility rate-making.

which it is used."⁵² It then recited the declaration of policy contained in Section 2.

"Obviously, in the light of these standards, it was not the congressional intent that the air transportation system of the country should be 'frozen' to its present pattern.⁵³ On the other hand, it is equally apparent that Congress intended the Authority to exercise a firm control over the expansion of air transportation routes in order to prevent the scramble for routes which might occur under a 'laissez faire' policy. Congress, in defining the problem, clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices, such as the opening of nonproductive routes, and other uneconomic results which characterized the development of other modes of transportation prior to the time of their governmental regulation."⁵⁴

The opinion next outlined some of the primary considerations which should govern the disposition of such applications: (1) whether the new service will serve a useful public purpose, responsive to a public need; (2) whether this purpose can and will be served as well by existing lines or carriers; (3) whether it can be served by the applicant with the new service without impairing the operations of existing carriers contrary to the public interest; (4) and whether any cost of the proposed service to the government will be outweighed by the benefit which will accrue to the public from the new service.⁵⁵

Other uncontested applications have raised questions of competitive duplication of service and of authorization to operate for only a part of the year. An intermediate stop may be permitted on an existing route though a competing line already provides the same service between that stop and one terminal point, if the rival routes do not parallel each other through the major portion of their lengths, but converge and continue to a common terminal for a relatively

52. 1 C.A.J., at 126, 1 C.A.A., at LXIX.

53. Senator King expressed concern that S. 3845, especially the grandfather clause, might "freeze" existing routes; Senator McCarran answered that it was not the purpose of the bill "that any line might be 'frozen' nor that any line might be perpetuated, nor that any monopoly over any terrain might be established to the exclusion of the necessity which the public may present." 83 Cong. Rec. 6851-6852 (1938). See also, Report of Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (1935) 62.

54. 1 C.A.J., at 127, 1 C.A.A., at LXX.

55. With respect to this fourth point, the opinion declared: "... unless exceptional circumstances, such as the particular importance of a route from the standpoint of the national defense, exist in a given case ... (the relationship between the estimated commercial revenues and operating costs of the proposed service) ... should not initially impose upon the Government an unduly large proportion of the total operating cost. Conditions surrounding the operation of any service receiving a certificate should also be such as to justify an anticipation that commercial revenues will show an increasing tendency to rise, with a consequent and progressive decrease in the degree of the carrier's dependence on the Government." 1 C.A.J., at 128, 1 C.A.A., at LXXII.

short distance.⁵⁶ And when traffic between points of a proposed new route is seasonal and insufficient to justify service during the entire year, limited service will be authorized.⁵⁷

Few problems that are difficult or at all relevant to the present discussion have been raised in cases under Section 401(h), in which the Board has considered the uncontested application of an airline for the inclusion of an intermediate stop,⁵⁸ for the extension to a new terminal,⁵⁹ for the authorization of direct service between two points,⁶⁰ or for authority to carry mail,⁶¹ on existing routes. And purely formal in their nature are proceedings under Section 401(h) to amend a certificate so as to reflect a change in the name of the company holding it.⁶²

b. *Formal Interventions and Consolidated Proceedings*

Rule 4(b) of the Board's Rules of Practice permits "any person having a substantial interest in the subject matter of any proceeding" to intervene and become a party.⁶³ When two or more applications

56. Pennsylvania-Central Airlines Corporation, Pittsburgh, Youngstown, Erie, Buffalo Operations, Order No. 575, Docket No. 247, 296, 1 C.A.J. 378, 1 C.A.A. CCCIII (June 28, 1940); noted in 11 Air L. Rev. 405 (1940), at 406-408.

57. Pennsylvania-Central Airlines Corporation, Grand Rapids-Traverse City Operation, Order No. 660, Docket No. 242, 2 C.A.B. 275 (Sept. 26, 1940) (May 1 to October 31).

58. Continental Air Lines, Inc., Roswell-Hobbs-Carlsbad Operation, Order No. 425, Docket Nos. 265, 285, 1 C.A.J. 144, 1 C.A.A. XCI (March 8, 1940); Eastern Air Lines, Inc., St. Louis-Nashville-Muscle Shoals Operation, Order No. 574, Docket Nos. 9-401(B)-5 and 230, 1 C.A.J. 360, 1 C.A.A. CCLXXXIV (June 28, 1940) (New route from St. Louis to Nashville, via Evansville, also granted); United Air Lines Transport Corporation, Red Bluff Operation, Order No. 573, Docket No. 261, 1 C.A.J. 347, 1 C.A.A. CCLXIX (June 28, 1940); United Air Lines Transport Corporation, Philadelphia-Camden Amendment, Order No. 556, Docket No. 419 (June 14, 1940) (passengers and express only); American Airlines, Inc., Bridgeport, Conn., Operation, Order No. 813, Docket No. 324; 2 C.A.B. — (Jan. 14, 1941); Transcontinental & Western Air, Inc., Boulder City Operation, Order No. 882, Docket No. 273, 2 C.A.B. — (April 16, 1941); Pennsylvania-Central Airlines Corporation, Service to Tri-Cities, Order No. 920, Docket Nos. 550 and 551, 2 C.A.B. (March 5, 1941); Pennsylvania-Central Airlines Corporation, Morgantown Operation, Order No. 1128, Docket No. 572, 2 C.A.B. — (July 10, 1941); Inland Air Lines, Inc., Alliance, Nebr., Operation, Order No. 750, Docket No. 438, 2 C.A.B. 346 (Dec. 2, 1940); Canadian Colonial Airways, Inc., Burlington-Albany-Glens Falls-Lake Placid Operations, Order No. 1151, Docket No. 377, 402, and 494, 2 C.A.B. — (July 7, 1941) (Also permitting carrier to begin and/or terminate trips at points short of terminal points). Note also the permission granted to Northwest to consolidate its two routes into a single route, in order to eliminate the necessity of stops at Fargo and Yakima; Northwest Airlines, Inc., Order No. 586, Docket Nos. 279 and 409, 2 C.A.B. 96 (July 18, 1940).

59. Catalina Air Transport, Service to Santa Catalina Island, Order No. 1158, Docket Nos. 538 and 487, 2 C.A.B. — (July 22, 1941).

60. Pennsylvania-Central Airlines Corporation, Muskegon-Chicago Service, Order No. 1051, Docket No. 565, 2 C.A.B. — (May 17, 1941).

61. United Air Lines Transport Corporation, Seattle-Vancouver Mail Service, Order No. 1011, Docket No. 496, 2 C.A.B. — (March 19, 1941); Transcontinental & Western Air, Inc., Additional Mail Service, Order No. 305, Docket Nos. 295, 297, 1 C.A.J. 23, 1 C.A.A. VIII, (Dec. 20, 1939); United Air Lines Transport Corporation, Additional Mail Service-Philadelphia, Order No. 768, Docket Nos. 323 and 321, 2 C.A.B. — (Dec. 18, 1940).

62. Northeast Airlines, Inc., Change of Name, Order No. 861, Docket No. 513, 2 C.A.B. — (Jan. 29, 1941) (Formerly Boston-Maine Airways, Inc.); Western Air Lines, Inc., Change of Name, Order No. 1152, Docket No. 579, 2 C.A.B. — (July 9, 1941) (Formerly Western Air Express Corporation); Catalina Air Transport, Change of Name, Order No. 1158, Docket Nos. 538 and 487, 2 C.A.B. — (July 22, 1941) (Formerly Wilmington-Catalina Airline, Ltd.).

63. Rule 4(b) of Sec. 285.1 of the Economic Regulations. Rule 4(a) permits any person or public body to appear at any hearing regardless of its interest in the subject matter, and present any evidence which is relevant to the issue.

for new routes relate to the same route or to different routes located in the same competitive area, the Board has usually ordered the applications to be consolidated for a single hearing. This procedure is not governed by a rule of practice, but has been adopted as a matter of convenience.⁶⁴

In consolidated proceedings, or those in which another carrier intervenes, the question of competition has arisen in four different types of situations. For convenience, each type will be discussed separately.

(1) Consolidated applications for inclusion of same intermediate point.

When the addition of the same intermediate point is sought by two or more carriers under Section 401(h), the questions raised are essentially the same as in any other consolidated applications. The Board must first decide whether the additional service is required at all; if so, it must next determine whether both applicants should be authorized to conduct the operations, or in the event that it is found that only one should be so authorized, which should be selected. Where the city is of sufficient commercial and industrial significance, and where the types of proposed service are different, the applications of both airlines have been granted.⁶⁵ But where these factors are not present, the award has been given to that route whose cities show the greater volume of traffic passing to and from the point in question;⁶⁶ additional makeweights are the anticipated amount of revenue which operation by one would divert from the other, and the relative cost to the airlines of the new service.⁶⁷ The only consolidated application for a new terminal point, the famous North Beach Airport case,⁶⁸ may be mentioned more for its notoriety than for its bearing upon the competition-monopoly problem.

(2) No existing service between any points on route; two or more applicants propose service between the same termini.

64. Sec. 1001 of the Act provides that the Board "may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

65. United Air Lines Transport Corporation, Youngstown Operation, Order No. 953, Docket Nos. 269 and 449, 2 C.A.B. — (March 19, 1941) (Youngstown designated as stop on routes of United and PCA; United's service being transcontinental, and PCA's being short-haul inter-city service).

66. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, Order No. 869, Docket No. 162 et al., 2 C.A.B. — (Jan. 30, 1941) (Brunswick, Ga., included as intermediate point on Eastern's existing route, rather than as terminal of Delta's new routes; such service would involve little additional cost and no additional mileage).

67. Transcontinental & Western Air, Inc., Reading Operation, Order No. 1028, Docket Nos. 380 and 466, 2 C.A.B. — (May 3, 1941) (Granting application of TWA and denying that of United, both being transcontinental carriers on this route).

68. American Airlines, et al., New York Airport, Order No. 254, Docket Nos. 278, 282, 284, 302 (Nov. 7, 1939) (Over violent protest of City of Newark, New York and Newark designated as co-terminals on routes of American, Eastern, TWA, and United).

The first question is, again, whether the public convenience and necessity require the inauguration of the route at all. Only twice in this situation has the Board decided the question in the negative, once because the service was not warranted by the traffic needs of the territory,⁶⁹ and once because similar routes were applied for by other applicants in pending proceedings.⁷⁰ If the answer is affirmative, the Board must either choose one of the applicants to be the sole operator, or must permit competition between two or more of the applicants. In all of the cases so far decided, the traffic needs of the territory have admittedly warranted operations by only one airline; the ultimate question has been the selection of the carrier.

Where one applicant has never engaged in air transportation, and its executives have had little experience in the business, the new service will be granted to the established carrier which is financially able to provide and maintain the additional equipment needed.⁷¹ And where one applicant appears to have given greater consideration and effort to the problems involved in the establishment of the proposed route, and has a superior record of past operations, it will be preferred.⁷² If the proposed route is but a short segment of the distance already sought by one applicant, and its operation by that applicant would entail the establishment of expensive ground equipment and facilities at terminal points remote from points it already serves, the application of that carrier will be denied.⁷³

But assume that both or all applicants are fit, willing, and able to conduct the proposed operation, and can do so at approximately the same cost per trip. This close question the Board will resolve by designating that carrier to whose existing system there is the greater movement of traffic from the points on the proposed route,⁷⁴ or that carrier which is in a position to furnish through service along that route to an important traffic center.⁷⁵

69. Trans-Southern Airlines, Inc., et al., Amarillo-Oklahoma City Operation, Order No. 656, Docket No. 12-401(B)-1 and 195, 2 C.A.B. 250 (Sept. 24, 1940) (Memphis-Oklahoma City segment lopped off).

70. Pennsylvania-Central Airlines Corporation, Norfolk-Knoxville Route, Order No. 652, Docket No. 245, 2 C.A.B. 207 (Sept. 17, 1940) (Knoxville-Cincinnati segment involved in pending applications of Delta and Southern Air Lines; see note 85, *infra*).

71. Trans-Southern Airlines, Inc., et al., Amarillo-Oklahoma City Operation, note 69, *supra* (Trans-Southern's application denied; see note 91, *infra*).

72. Western Air Express Corporation, et al., Great Falls-Lethbridge Operation, Order No. 796, Docket Nos. 31-401(B)-1 and 257, 2 C.A.B. — (Dec. 5, 1940). (Inland's application denied).

73. Northwest Airlines, Inc., et al., Additional Service to Canada, Order No. 1010, Docket Nos. 327, 254, 306, and 376, 2 C.A.B. — (March 8, 1940). (Canadian Colonial, between Buffalo and Toronto).

74. *Id.* (Buffalo-Toronto route awarded to American instead of to P.C.A.).

75. Braniff Airways, Inc., et al., Houston-Memphis-Louisville Route, Order No. 757, Docket Nos. 1-401(B)-1, 4-401(B)-1, and 9-401(B)-3, 2 C.A.B. 353 (Dec. 6, 1940) (Evansville-Louisville route given to Eastern); Continental Air Lines, Inc., et al., Wichita-Pueblo Route, note 48, *supra* (Mandatory route given to Continental instead of Braniff). For the Senate's discussion of the latter route, see 83 Cong. Rec. 6848 (1938); the House discussed it in 83 Cong. Rec. 7069 (1938).

(3) Existing direct one company service; applicant proposes to serve the same termini, either directly or indirectly.

In one case, the applicant sought authorization to carry mail over its grandfather route, on which the intervener already furnished a mail service as a part of a through route. Rather than increase the number of the intervener's mail schedules, the Board authorized the new service on the ground that the applicant's obligation to render an adequate service under its existing certificate could not be fulfilled by operating less than one daily mail schedule.⁷⁶

When it is not a question of mail alone, but of full service that the applicant proposes to furnish in competition with the existing line, duplicating service will not be authorized simply for the sake of providing competition, when the existing service is adequate and the operator is capable of accommodating the foreseeable growth of air traffic.⁷⁷ But in one case duplicating service was permitted along a relatively short segment of a 1,500-mile route; since the diversion of traffic from the existing carrier would be substantial, the certificate prohibited the applicant from transporting local passengers.⁷⁸

(4) Existing indirect one-company or two-company service; one or more applicants propose direct service between same termini.

If there is a relatively light movement of traffic along the existing route, authorization for the new route will be denied because of the diversion of traffic from the established lines.⁷⁹ The application

76. Braniff Airways, Inc., Houston-Corpus Christi-San Antonio Operations, Order No. 639, Docket Nos. 317 and 322, 2 C.A.B. 199 (Aug. 27, 1940) (Braniff authorized to carry mail in addition to existing passenger and express service).

77. Northwest Airlines, Inc., et al., Additional Service to Canada, note 73, *supra* (Canadian Colonial's application for New York-Buffalo route, already served by American); Braniff Airways, Inc., et al., Kansas City-Wichita-New Orleans Service, Order No. 1106, Docket Nos. 192, 251, 309, and 310, 2 C.A.B. — (June 21, 1941) (Tulsa-Kansas City, already directly served by Mid-Continent; application of Kansas City Southern denied).

Duplicating service has not been permitted along one segment of a route awarded in the same proceeding to another carrier: Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (Knoxville-Atlanta route being awarded to Delta, applications of PCA and Dixie denied).

78. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (Birmingham included as intermediate point on Eastern's route). Reaffirmed and clarified, Order No. 997, Docket Nos. 162, et al., 2 C.A.B. — (April 24, 1941). Eastern was later authorized to conduct non-stop service between Birmingham and New Orleans; though Chicago and Southern would suffer some diversion of traffic, this consideration was outweighed by the benefits to the public in the form of improved service; Eastern Air Lines, Inc., Birmingham-New Orleans Non-Stop Service, Order No. 998, Docket No. 566, 2 C.A.B. — (April 24, 1941).

79. Braniff Airways, Inc., et al., Houston-Memphis-Louisville Route, Note 75, *supra* (American operating between Memphis and Louisville via Nashville; applications of Braniff, Eastern, and C. & S. for route between Memphis and Louisville, via Paducah and Evansville, denied). Trans-Southern Airlines, Inc., et al., Amarillo-Oklahoma City Operation, note 69, *supra* (Applications of Braniff and Trans-Southern for Atlanta-Memphis segment of Atlanta-Amarillo route denied, when Eastern and Delta operated connecting service along that segment). Braniff Airways, Inc., et al., Kansas City-Wichita-New Orleans Service, note 77, *supra* (Wichita-New Orleans, already connected by Braniff and Eastern).

But if the possible diversion to a proposed intersecting route will be offset by connecting business that the new route will develop for the intervener at

will likewise be denied if only a slight saving in distance is contemplated,⁸⁰ or if substantial expenditures by the government would be required, even though the new service would effect a considerable saving in distance, flying time, and passenger fares.⁸¹ The denial is made more certain if the applicant and the smaller existing line are the only competitors within the entire region.⁸² The threatened diversion of traffic to the new line has been the ground for denying a certificate where two carriers propose a new service over different routes, one of which is partly served by one applicant. In an early consolidated proceeding, an extension of the existing route was authorized in order to safeguard the efficient and economical operation of a small line which was the only competitor of the larger line within the entire state.⁸³

But new one-company service has been authorized where the route will effect proportionately large savings in distance, flying time, and passenger fares,⁸⁴ and will give direct service between important intermediate points already served only indirectly.⁸⁵ The new route has been awarded to that applicant which could operate it as an integral part of its system rather than as a mere spur, thus enabling

the point of intersection, the opposition of the intervener will be overruled; Pennsylvania Central Airlines Corporation, Norfolk-Knoxville Route, note 70, *supra*.

80. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (New Orleans-Birmingham-Cincinnati, already served by four connecting two-company routes; 37 miles to be saved). Braniff Airways, Inc., et al., Kansas City-Wichita-New Orleans Service, note 77, *supra* (Kansas City-New Orleans, already connected indirectly by TWA and C. & S.; applications of Kansas City Southern and Mid-Continent denied. The Board observed: "It would appear to be unsound to grant authority to an applicant to engage in air transportation over a proposed route designed to supply through service as against existing service rendered by two or more connecting carriers until it has been shown that the connections provided in good faith have over a reasonable period of time proved inadequate or unless, aside from the question as to adequacy of connections, there is other public need for an additional service.")

81. Braniff Airways, Inc., et al., Kansas City-Memphis Route, Order No. 734, Docket Nos. 196, 9-401(B)-4, and 368, 2 C.A.B. 288 (Nov. 15, 1940) (Applications of Braniff, Eastern, and C. & S. denied in toto, when service available by combined routes of TWA and C. & S.). Braniff Airways, Inc., et al., Kansas City-Wichita-New Orleans Service, note 77, *supra* (Shreveport-New Orleans, already served by connecting services of Delta and C. & S.; applications of Mid-Continent, Kansas City Southern, and Braniff denied).

82. National Airlines, Inc., et al., Daytona Beach-Jacksonville Operation, Order No. 441, Docket Nos. 5-401(B)-1, 222, 9-401(B)-1, and 203, 1 C.A.J. 163, 1 C.A.A. CV (March 21, 1940) (Eastern's application for direct route between Tampa and Miami denied).

83. *Id.* (Applications of Eastern for Tampa-Jacksonville and Orlando-Tallahassee routes denied, and Jacksonville-Daytona Beach route given to National).

84. Braniff Airways, Inc., et al., Kansas City-Wichita-New Orleans Service, note 77, *supra* (Wichita-Tulsa, saving 50% in mileage and more than 60% in fare; awarded to Continental rather than Braniff). Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (Pittsburgh-Birmingham, stressing community of interest between points served and circuitry of rail and air service; awarded to PCA rather than Dixie, see note 92, *infra*; Messrs. Warner and Baker felt that the new service was not yet warranted. Also Atlanta-Savannah route, already served by connecting routes of Eastern and Delta, awarded to Delta rather than Eastern, PCA, or Southern Air Lines).

85. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (Atlanta-Cincinnati, already served by Eastern and American; saving of 75 miles and \$8.50 in fare; awarded to Delta rather than PCA or Southern. Messrs. Warner and Baker dissented, favoring readjustment of schedules on existing routes).

it to make greater and more efficient use of its presently adequate equipment, and to eliminate inconvenience to passengers;⁸⁶ a decisive element has also been the close community of interest between the points to be reached on a local service offered by only one applicant.⁸⁷

A difficult problem has arisen in two cases, where one of the applicants for the new service already conducted the existing indirect one-company service. Having first found that the traffic needs of the territory warranted the establishment of the new route, it was necessary for the Board to decide whether it was to be operated by the carrier already serving the same termini, or by one of the competing applicants.

In one case it was awarded to the existing carrier; not only would the award to the other applicant divert traffic from the established route, but it would cause wasteful duplication of service and destructive competition. In view of the relatively short distance between the termini, the Board foresaw the inauguration of non-stop service between these points within a short time. If one carrier were authorized to fly between these termini, it might be justified in scheduling non-stop service at a comparatively early date. But if two carriers operated between these points by different routes, both would have the privilege of flying a non-stop service along the direct route; not only might this competitive situation force the adoption of such service before the time was ripe for either carrier in view of traffic potential, but such non-stop service would be made doubly premature when inaugurated by both carriers.⁸⁸

In the second of these cases, each of the applicants relied chiefly upon the claimed adverse effect which operation by either of the others would have upon its existing system through the diversion of traffic. But the Board issued the certificate to the line which could be expected to develop maximum traffic on the new route regardless of its destination; neither of the other applicants intended to develop through traffic over the new route to the detriment of their existing systems. A second ground for the decision was the desirability of the through service to important termini which could be furnished

86. See notes 84 and 85, *supra*.

87. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 66, *supra* (Atlanta-Savannah, via Augusta; awarded to Delta rather than Eastern, PCA, or Southern).

88. Mid-Continent Airlines, Inc., et al., Twin Cities-Des Moines-Kansas City-St. Louis Operation, Order No. 585, Docket Nos. 3-401(B)-1 and -2, 132, 194; 2 C.A.B. 63 (July 18, 1940) (Mid-Continent given Y-shaped route, its very indirect grandfather route running between the Twin Cities and Kansas City, via Omaha; Braniff's application denied for reasons here discussed, and Northwest's since it had not applied for a substantial portion of the route).

by that airline.⁸⁹ This case is not inconsistent with the one first mentioned. Though competing lines were allowed to provide alternative routes between the same termini, the distances between these points renders it unlikely that either company will attempt to establish a non-stop service. The elements of destructive competition and wasteful duplication were not present in the case.

Two predictions appear to be justified in the light of three of the Board's decisions of the past year: first, no additional airlines will be authorized to operate a transcontinental service out of New York; and second, it will be virtually impossible for new airlines, not already authorized to operate existing services, to enter the field.

In March, 1941, the Board denied Northwest's application for a route between New York and Chicago or the Twin Cities, via the alternative Canadian cities of Toronto or Windsor.⁹⁰ Northwest intended primarily to render a transcontinental service which would allow it to compete with United at Seattle for traffic destined for New York, and which would save 84 miles over the route already operated by United between those points. The application was denied chiefly on the ground that the transcontinental traffic was very light and that the existing competitors between New York and Chicago could absorb any increase in traffic between these points by the inauguration of additional flights, without cost to the government, and without inconvenience to transcontinental passengers requiring connections with Northwest's planes at Chicago. The Board suggested that any inconvenience to passengers might be remedied by an interchange of equipment at Chicago between Northwest and either TWA or American. It further suggested the possibility that future development of traffic might require additional facilities between the Twin Cities and the East over a more direct route than by way of Chicago. In the meantime, Northwest does not appear to have diminished its efforts to realize its "destiny" of becoming a transcontinental operator; and one may well speculate about the Board's attitude if Northwest were to seek a different Atlantic Coast terminal, such as Washington.

When the Board denied the application of Trans-Southern Airlines, Inc., for a route between Amarillo and Oklahoma City, its action foreshadowed the closing of the gates upon the number of

89. Braniff Airways, Inc., et al., Houston-Memphis-Louisville Route, note 75, *supra* (Houston-Memphis route given to C. & S. instead of to Braniff or Eastern; C. & S. already operating between Memphis and Chicago, and Braniff very indirectly between Houston and Chicago. Messrs. Branch and Baker dissented, favoring an award to Eastern).

90. Northwest Airlines, Inc., et al., Additional Service to Canada, note 73, *supra*. The routes via Toronto were denied on other grounds, note 107, *infra*.

air carriers which would be authorized to enter the field.⁹¹ And when it denied the application of Dixie Airlines, Inc., for the Pittsburgh-Birmingham route, it became more than ever apparent that the small newcomers would fight an uphill battle to obtain a certificate.⁹² It is reasonably clear that an untried, newly organized company must either offer a unique service or propose a feeder route before its application will be viewed with favor. Southern Air Lines, Inc., proposed to operate a short system radiating from Atlanta, carrying passengers and express without air mail compensation, to be integrated with the flying school which it already conducted; but its plans were so indefinite and the proposal was so speculative that the Board found that it was not fit, willing, and able to perform the service for which it applied.⁹³ But the Board granted the application of All American Aviation, Inc., to engage in local feeder-line service, using a device whereby mail and express would be picked up and delivered in flight at intermediate points along the proposed routes.⁹⁴ It overruled the claims of TWA and Eastern that existing carriers should have a preemptive right in developing feeder routes, as inconsistent with the policy declared in Section 2(d), and as ignoring the fact that such service could not be rendered by lines engaged in long-distance service over through routes. It concluded that any such theory, "which would result in reserving solely for existing airlines the privilege of providing all additions to the present air transportation system of the United States, is untenable."⁹⁵ One concession, however, was made to the interveners; in order to prevent competition with them on their existing routes, the new applicant's certificate was qualified to prevent it from operating a non-stop service between the terminals served by its predecessor. In finding that the new service was required by the public convenience and necessity, the Board appears to have been intrigued with the pick-up and delivery device, and felt that its technical and commercial development should continue.⁹⁶

91. Note 71, *supra*.

92. Delta Air Corporation, et al., Additional Service to Atlanta and Birmingham, note 84, *supra*.

93. *Id.*

94. All American Aviation, Inc., Pick-up and Delivery Service, Order No. 596, Docket No. 363, 2 C.A.B. 133 (July 22, 1940). The general subject of feeder lines is dealt with by B. E. Cole, Feeder Air Routes, (1940) 11 JOURNAL OF AIR LAW 17.

95. Compare with the Board's later language in denying Dixie's application, note 92, *supra*: "The number of air carriers now operating appears sufficient to insure against monopoly in respect to the average new route case, and we believe that the present domestic air transportation system can by proper supervision be integrated and expanded in a manner that will in general afford the competition necessary for the development of that system in the manner contemplated by the Act. In the absence of particular circumstances presenting an affirmative reason for a new carrier there appears to be no inherent desirability of increasing the present number of carriers merely for the purpose of numerically enlarging the industry."

96. Another novel application was for Eastern's transportation of mail by autogiro between the Camden Airport and the rooftop of the Philadelphia Post

It is submitted that the Board's restrictive policy is entirely sound and consonant with the purposes of the Act. Not only does there appear to be no inherent reason for adding to the number of authorized airlines, but there are positive arguments to the contrary. The economic regulation of a limited number of established carriers instead of a profusion of new lines would appear to be in the interests of administrative simplicity and effectiveness. More important, the financial stability of the industry is better assured by a restrictive policy than by a policy which encourages new entrants to come into the field. A careful apportionment of routes among existing carriers would better guarantee the continued existence of those carriers than would a policy of admitting experimental, untried lines into the field. Not only would the expense to the government be minimized, but the capital of the investing public would be given greater protection.

Of all new route applications, this much may be said: though the Board has dismissed as a consideration in its choice of carrier the relative size of the applicants in assets and route mileage,⁹⁷ all of its decisions except three have been in favor of the smaller of the established applicants.⁹⁸ The Act was designed to protect the small airlines from destructive competition. The effect of these decisions has been to bolster the smaller lines so that they may survive and compete more effectively with the larger carriers. Furthermore, by adding to the mileage of the small lines, it is possible to spread overhead expenses to a greater extent than if the mileage were added to the larger lines. The economies thus resulting to the successful applicant would tend to reduce the amount of airmail subsidy paid by the government, a consideration which has bulked large in all of the decisions.

The gaps in the great continental airway network are rapidly decreasing in number and size, so that few cities of any commercial importance are without air transport connections. As the saturation point is approached with respect to the number of economically desirable routes, the number of applicants for each route increases. In almost every instance in which the Board has authorized a new route, it has carved down the major part of the distance applied for, and on occasion has denied the application in toto. In selecting the carrier to render the service, the ultimate question will continue to

Office Building. The Board felt it impossible to determine whether the permanent establishment of the service was required by the public convenience and necessity; since the application had been filed for a permanent certificate under 401(d)(1), a temporary certificate could not be granted in the same proceeding. *Eastern Air Lines, Inc., Autogiro Service*, Order No. 582, Docket No. 403, 2 C.A.B. 54 (July 16, 1940).

97. *Continental Air Lines, Inc., Wichita-Pueblo Route* (note 48, *supra*).

98. See notes 72, 73-74, and 75, *supra*.

be the advantages of an increasingly competitive situation, weighed against the disadvantages of an increasingly duplicated air transportation service. Exactly where the line is to be drawn in each situation will be an increasingly perplexing problem. And as the number of disappointed applicants grows, so will the likelihood of resort to the courts for judicial review of the Board's decisions.

B. Overseas and Foreign Operations

It is in this field that the Board has had to face most squarely the competition-monopoly issue, and where the bitterness, most publicized, and perhaps the most significant battle is being waged between potentially competing airlines.

1. Spur-Line Operations

Seven domestic airlines conduct overseas and foreign operations which are unaffected by this conflict. Five were awarded grandfather certificates, authorizing service between Chicago and Winnipeg,⁹⁹ Seattle and Vancouver,¹⁰⁰ Boston and Montreal,¹⁰¹ New York and Montreal,¹⁰² and service on a route within the Hawaiian Islands.¹⁰³ The needs of the national defense, and the desirability of closing the gaps in the international airway service were important grounds for authorizing additional service between Bangor and Moncton,¹⁰⁴ and between Great Falls and Lethbridge.¹⁰⁵

The issue of competition entered into the last-mentioned case only, a consolidated proceeding which has already been discussed. But there was keen rivalry in a second consolidated proceeding, which involved the Air Transport Arrangement of August 18, 1939,¹⁰⁶ between the governments of the United States and Canada. By a subsequent exchange of notes, it was agreed that the Buffalo-Toronto

99. Northwest Airlines, Inc., Grandfather Proceeding, note 36, *supra*.

100. United Air Lines Transport Corporation, Grandfather Proceeding, note 36, *supra*.

Certificate later amended to permit carriage of mail on same route: United Air Lines Transport Corporation, Seattle-Vancouver Mail Service, note 61, *supra*.

101. Boston-Maine Airways, Inc., Grandfather Proceeding, note 36, *supra*.

102. Canadian Colonial Airways, Inc., Grandfather Proceeding, Order No. 322, Docket No. 45-401(E)-1, 1 C.A.J. 48; 1 C.A.A. XXIV (Jan. 9, 1940) (Holding that neither the requirements of citizenship nor of continuous operation as an air carrier were affected (1) by the fact that the applicant conducted operations under lease-purchase agreements with American, or (2) by the inter-company financial arrangements with the Canadian subsidiary relating to the division of expenses and revenues on northbound and southbound routes).

Intermediate stops at Burlington and Glens Falls authorized later, and shortened New York-Albany service permitted: Canadian Colonial Airways, Inc., Burlington-Albany-Glens Falls-Lake Placid Operations, note 58, *supra*.

103. Inter-Island Airways, Ltd., Grandfather Proceeding, Order No. 72, Docket No. 25-401(E)-1 (June 16, 1939).

104. Boston-Maine Airways, Inc., Bangor-Moncton Operation, Order No. 739, Docket No. 290, 2 C.A.B. 317 (October 28, 1940).

105. Western Air Express Corporation, et al., Great Falls-Lethbridge Operation, note 72, *supra*.

106. Executive Agreement Series No. 159.

route was to be operated solely by a United States carrier, while non-stop routes between Toronto and New York would be operated solely by a Canadian line; routes from Windsor to any points in the United States would be served only by a United States line, and routes from Detroit to any points in Canada, by a Canadian line. In view of this arrangement, the Board denied the applications of American and Northwest for the Detroit-Toronto route, and the applications of American and Canadian Colonial for the New York-Toronto service.¹⁰⁷ For the same reason, it denied the application of Trans-Canada Air Lines for a foreign air carrier permit to operate between Toronto and Buffalo, but granted it the Toronto-New York non-stop service.¹⁰⁸ In a companion proceeding decided on the same day,¹⁰⁹ it amended American's New York-Chicago certificate to include Windsor and Niagara Falls, thus giving it almost the identical route which it had denied Northwest.¹¹⁰

Finally, an interim opinion has been rendered in the matter of the applications of thirty-eight small Alaskan airlines for certificates under Section 401. In view of the inadequate state of the applicants' records, and of the sweeping change that would be involved in bringing the Alaskan lines within the statutory scheme of regulations, the Board reopened the proceedings for further investigation.¹¹¹

2. *Trans-Atlantic and Trans-Pacific Operations*

The first certificate granted to Pan American Airways¹¹² authorized operations over the new routes with termini at New York, London, and Marseilles: north, via New Brunswick, Newfoundland, and Ireland; and south, via Bermuda, Horta, and Lisbon.¹¹³ By an exchange of notes with the governments of France and England, the United States government had secured six weekly landing rights in the two countries, to be granted to American air carriers. Pan American had applied for a grant of all six, and called attention to the provision in Section 401(f)¹¹⁴ in support of its claim. But the Authority recognized the monopolistic position that Pan American

107. Northwest Airlines, Inc., et al., *Additional Service to Canada*, note 73, *supra*.

108. Trans-Canada Air Lines, *Toronto-Buffalo-New York Route*, Order No. 1009, Docket Nos. 308, 311, and 312, 2 C.A.B. — (March 8, 1941).

109. American Airlines, Inc., *Windsor and Niagara Falls Operation*, Order No. 1008, Docket No. 397, 2 C.A.B. — (March 8, 1941).

110. Note 90, *supra*.

111. Alaska Air Transportation Investigation, Order No. 1153, Docket Nos. 71-401(E)-1 et al., 2 C.A.B. — (July 21, 1941).

112. For a history of Pan American's origin and expansion, see "The Coming Struggle for the Air Lanes," *Fortune*, March, 1941, pp. 128 *et seq.*

113. Pan American Airways Company (Delaware), *Trans-Atlantic Operations*, Order No. 55, Docket No. 163 (May 17, 1939).

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

would occupy, contrary to Section 2(d). It held that although the limitation of Pan American's landing rights might result in a curtailment of its schedule, the Authority's action was consistent with Section 401(f), "since landing rights are the subject matter of the restriction and schedules are only incidentally affected." It also felt that the limitation was compelled by Section 1102, which requires the Authority to take international agreements into consideration. Declining to estimate what frequency of flights would best fulfill the requirements of Section 2, it left the determination to future developments, and for the time being, awarded the applicant only two of the six available weekly landing rights. A grandfather certificate later authorized the New York-Bermuda service, and a "temporary" certificate to operate between Baltimore and Bermuda via New York was denied.¹¹⁵

The Nevada subsidiary was given its grandfather certificate to operate over the Pacific route from San Francisco to Hong Kong.¹¹⁶ A second leg was added to these operations by the authorization of service between San Francisco and Auckland, New Zealand, via Los Angeles. Finding that the inclusion of Los Angeles was justified by the public interest and required by the national defense, the Authority was careful to prohibit Pan American from engaging in local service between Los Angeles and San Francisco, thus foreclosing the possibility of the applicant's engaging in purely continental operations, and restricting it to overseas and foreign transportation.¹¹⁷ Finally, operations were extended into Alaska by Pacific Alaska Airways, Inc., a wholly owned subsidiary. This company was given a grandfather certificate for local service entirely within Alaska,¹¹⁸ and a certificate for a new route between Seattle and Juneau;¹¹⁹ in each proceeding the Authority denied permission to engage in certain specified local service, in order to protect a number of Alaskan carriers which had grandfather applications pending.

Pan American had thus staked out a trans-Atlantic and trans-Pacific empire, with its termini in London and the English crown colony of Hong Kong. In this empire it had no American com-

115. Pan American Airways Company (Delaware), New York-Bermuda Operations, Order No. 205, Docket No. 37-401(E)-1 (Sept. 29, 1939).

116. Pan American Airways Company (Nevada), Trans-Pacific Operations, Order No. 78, Docket No. 6-401(E)-1 (June 27, 1939). This certificate was later amended to authorize operations for five years between Manila and Singapore: Pan American Airways Company (Nevada), Singapore Operation, Order No. 1021, Docket No. 511, 2 C.A.B. — (Feb. 25, 1941).

117. Pan American Airways Company (Nevada), New Zealand Operations, Order No. 552, Docket No. 6-401(E)-2 and 305, 1 C.A.J. 273, 1 C.A.A. CLXXXVIII (June 7, 1940).

118. Pacific Alaska Airways, Inc., Grandfather Proceeding, Order No. 540, Docket No. 10-401(E)-1, 1 C.A.J. 269, 1 C.A.A. CLXXXIII (May 29, 1940).

119. Pacific Alaska Airways, Inc., Seattle-Juneau Operations, Order No. 539, Docket No. 14-401(B)-1, 1 C.A.J. 263, 1 C.A.A. CLXXVI (May 29, 1940).

petitors, and in the trans-Atlantic field shared the traffic only with Imperial Airways, Ltd., which had been given foreign air carrier rights for flights between the United Kingdom and New York, via the northern route of Canada, Newfoundland, and Ireland, and via Bermuda.¹²⁰

A potential trans-Atlantic competitor had appeared when American Export Airlines, Inc., was incorporated in 1937 as a subsidiary of American Export Lines, Inc., a steamship company.¹²¹ Two years later it filed for approval under Section 412(a) an agreement with Pan American, which, in substance, divided the eastern hemisphere into "spheres of influence", northern Europe being allotted to Pan American and southern Europe, western Asia, and Africa to American Export. The Authority disapproved the contract, sensing a potential monopoly in the proposed race for rights in foreign countries, and fearing that the contract "might discourage" the realization of the policies declared in Section 2.¹²²

Shortly thereafter, American Export filed an application for routes (1) between New York and Marseilles, (2) between New York and Southampton, and (3) between New York and Rome via Horta, Lisbon, and Barcelona.¹²³ The applications for service to England, France, Spain, and Italy were denied, in view of the presidential proclamations¹²⁴ pursuant to the Neutrality Act of 1939,¹²⁵ which precluded operations to the combat zone as therein defined.

Pan American had been granted leave to intervene in the proceeding, and both parties made it clear that the basic issue was the inauguration of a second United States trans-Atlantic service over the general north Atlantic route, rather than service between any

120. Imperial Airways, Ltd., Foreign Air Carrier Permit, Order No. 129, Docket No. 147 (Aug. 4, 1939), and Order No. 156, Docket No. 43-402(C)-1 (Aug. 29, 1939).

121. For a history of the financial vicissitudes and unsavory past reputation of American Export Lines, and of the incorporation and early projects of its subsidiary, see Hearings before Subcommittee of Committee on Appropriations on H.R. 10,539, 76th Cong., 3rd Sess. (1940) 194-216; Hearings before Subcommittee of Committee on Appropriations on Post Office Department Appropriation Bill for 1942, 77th Cong., 1st Sess. (1941) 571-574, 594; "The Coming Struggle for the Air Lanes", *Fortune*, March 1941, pp. 128 *et seq.*

The Maritime Commission had suggested in 1937 that steamship lines should establish subsidiary and supplementary airlines over their routes, instead of building superliners to attract the luxury express passenger traffic: United States Maritime Commission, *Economic Survey of the American Merchant Marine* (1937) 22-25. But more than a year before, American Export Lines had commenced plans for such a project: Gardner, Hearings on H.R. 9738 (note 17 *supra*), at 283.

122. Pan American Airways Company (Delaware), American Export Airlines, Inc., et al., Agreement, Order No. 31, Docket No. 412-B-1 (April 7, 1939).

123. American Export Airlines, Inc., Trans-Atlantic Service, Order No. 581, Docket No. 238, 2 C.A.B. 16 (July 12, 1940); noted in 12 *Air L. Rev.* 165 (1941).

124. Proc. No. 2376, 4 Fed. Reg. 4495 (Nov. 4, 1939); Proc. No. 2410, 5 Fed. Reg. 2209 (June 11, 1940).

125. 54 Stat. 4 (1939), 22 U.S.C. 245j (Supp. 1940).

particular terminals. The Board first decided that Pan American's two weekly schedules¹²⁶ were insufficient to meet the demands of the service, and that additional air transportation over the north Atlantic trade route was justified. Thus the question was squarely raised whether Pan American would continue to enjoy its monopoly over this route by an extension of its existing service, or whether American Export would be permitted to thrust an entering wedge into a field already occupied.¹²⁷

First observing that it lay in the Board's discretion to require or to prohibit competition according to the peculiar circumstances of each case,¹²⁸ the opinion stated the specific reasons for breaking the Pan American monopoly. First, the inauguration of services by a competing American line would stimulate and accelerate technical advances in the whole industry. This competition would not be supplied to the same degree, and with the same beneficial effects, by foreign-flag carriers.¹²⁹ It is also to be noted that overseas and foreign operators, like Pan American and American Export, are not subject to such comprehensive economic regulation under Title IV of the Act as are domestic operators. It imposes no duty to provide adequate services, equipment, and facilities; the stimulus to do so must be supplied by United States competitors. The Board cannot regulate fares, rates, and charges; competition must be the medium through which control is exercised.¹³⁰ Second, the national defense would benefit from such competition, since the research and

126. Pan American was authorized to run three trips per week on June 18, 1940, several weeks after the conclusion of the American Export hearings: Branch, Hearings on H.R. 10,539 (note 121, *supra*), 187.

127. "The issue thus presented involved the entire underlying policy of the Civil Aeronautics Act of 1938": 2 C.A.B., at 29.

128. "We conclude that competition in air transportation is not mandatory, especially when considered in relation to any particular route or service. Clearly, Congress has left to the discretion of the Board the determination of whether or not competition in a particular area is necessary to assure the sound development of an appropriate air transportation system." 2 C.A.B., at 31.

129. At present, no competition is supplied by foreign-flag air carriers. Compagnie Air France Transatlantique, by Order No. 500 of May 7, 1940, was permitted to continue its experimental flights to New York from May 1 to November 1, 1940, and to carry French mail on its westbound crossings. Due to the war, these flights were discontinued. Imperial Airways, Ltd., after securing its foreign air carrier permit on August 4, 1939 (see note 120, *supra*), inaugurated scheduled trans-Atlantic service but discontinued operations in September on the outbreak of the war. British Overseas Airways Corporation was created as a government-controlled corporation to be Imperial's successor-in-interest; on July 29, 1940, the Board approved the transfer of Imperial's permit to Airways (Atlantic) Ltd., a subsidiary of the new corporation: Airways (Atlantic) Limited, Permit to Foreign Air Carrier, Order No. 625, Docket No. 401, 2 C.A.B. 181 (July 29, 1940). This permit, together with the permit of Airways (Bermuda) Ltd., was then transferred back to the parent company, but operations have not been resumed: British Overseas Airways Corporation, Trans-Atlantic and Bermuda Operations, Order No. 1150, Docket No. 614, 2 C.A.B. — (June 23, 1941).

130. "We are unable to find that the continued maintenance of an exclusive monopoly of trans-Atlantic American flag air transportation is in the public interest, particularly since there is no such public control over the passenger or express rates to be charged or over the standards of service to be rendered as is customarily provided in the case of a publicly protected monopoly." 2 C.A.B., at 34.

Chairman Branch emphasized this point in testifying at the hearings on the first appropriation bill: Hearings on H.R. 10,539 (note 121, *supra*), 261.

development by foreign competitors would not be available to the national defense of this country.¹³¹

The Board next observed that the additional cost to the government in subsidizing American Export's service should not have controlling significance in this case; it also declared that the alleged superiority of Pan American's equipment was not decisive of the issue and that it was a matter for decision by the traveling public. After making the further findings of fitness, willingness, and ability, the Board adjudged American Export entitled to a temporary certificate to transport passengers, express, and mail between New York and Lisbon in the new Vought-Sikorsky 44's when completed, and to a second temporary certificate, valid until September 1, 1941, to transport mail and express only between the same termini in the Consolidated survey ship.

The Board's action precipitated the issue into the national spotlight. Pan American secured a certification of the record for review by the Circuit Court of Appeals for the Second Circuit,¹³² and the Board promptly moved to dismiss the petition on the ground that the court was without jurisdiction to review the order. The court granted the motion,¹³³ holding that Section 1006(a)¹³⁴ does not authorize review of an order which is subject to approval or disapproval by the President,¹³⁵ who is the "ultimate arbiter"; the authority vested in him would render judicial review futile.

Although the appeal was dismissed on the question of jurisdiction, it is difficult to see how the Board's order could have been reversed if examined on the merits. The decision was not compelled by the language of Section 2(d); the Board expressly pointed out that the consideration of the factor of competition was entirely discretionary.¹³⁶ But this was clearly a test case. American Export had spent three million dollars in three years in an effort to challenge Pan American's monopoly,¹³⁷ and was the only formidable contender. If competition were denied here, it would be discouraged for an indefinite length of time and possibly foreclosed forever.

131. Mr. Ryan, in testifying at the same hearings said that "the national defense interests primarily tipped the scales" in American Export's favor, and regarded them as "overwhelming the economic facts." *Id.*, at 236.

132. Order No. 778, 2 C.A.J. 34 (Dec. 20, 1940).

133. *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. (2d) —, 10 U. S. Law Week 2074 (C.C.A. 2nd, 1941).

134. "Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States . . ."

135. Sec. 801: "The issuance . . . of . . . any certificate authorizing an air carrier to engage in overseas or foreign air transportation . . . shall be subject to the approval of the President."

136. Note 128, *supra*.

137. Slater, *Hearings on Post Office Department Appropriation Bill for 1942* (note 121, *supra*), at 550.

The ultimate question is whether the United States will emerge from the war stronger in air transportation if it is conducted on a monopolistic or on a competitive basis. Arguably, if Pan American is allowed to monopolize the field for the United States, the cost to the government will be less; and if there were two American competitors, foreign governments could play one against the other to the detriment of both. It has also been suggested that foreign-flag carriers could supply the competition necessary to stimulate technical progress, and that the status of foreign air transportation should be one of carefully controlled regional monopoly.¹³⁸ This ultimate question involves the broadest issues of policy but the decision appears to rest simply upon expediency, and the wisdom of the Board's conclusion should not be open to challenge by the courts.

This victory of American Export merely proved to be another step preliminary to the commencement of operations. The major problem¹³⁹ has been, and still is, to secure an airmail appropriation from Congress; and it has been contended until recently that the mail subsidy is essential before any trans-Atlantic service can be operated.¹⁴⁰ The first estimate of \$500,000 was approved by the Bureau of the Budget,¹⁴¹ but the committee of neither house reported it favorably.¹⁴²

The second estimate suffered no better fate. The first ground of Congressional opposition was the cost to the government. Pan American had now offered to schedule a fourth weekly trip which would cost the government \$468,000 per year as against one weekly trip by American Export at \$1,229,736 per year. The question simmered down to whether the government should pay this additional sum in order to establish competition between the airlines,¹⁴³ and the subcommittee decided the question in Pan American's favor.

138. Report of Federal Aviation Commission (note 22 *supra*), 88.

Mr. Edward P. Warner, a member of the Board, was also a member of the Federal Aviation Commission. The Commission's advocacy of regional monopolies contemplated a control over standards of service which was not given by the Civil Aeronautics Act. This point was emphasized in the opinion: note 130, *supra*.

139. Another obstacle has been the fifteen-year grant of exclusive landing rights, given to Pan American by the Portuguese government. This obstacle seems of a secondary nature only; a clause provides that the exclusive feature can be removed by agreement between the two governments, and the State Department was advised in January, 1941, that an agreement with the Portuguese government in all likelihood would be reached: Burke, *Hearings on Post Office Department Appropriation Bill for 1942* ((note 121, *supra*), at 537. For the text of the grant, see *id.*, at 636 *et seq.*

140. Branch, *id.*, at 504; Slater, *id.*, at 576. Juan Trippe, president of Pan American, testified that even with the airmail subsidy, the trans-Atlantic operations had not been profitable to date: *id.*, at 628. In so doing, he answered a question which had appeared uppermost in the minds of the subcommittee of the Senate when considering H.R. 10,539: See *Hearings on H.R. 10,539* (note 121, *supra*), at 230.

141. H.R. Doc. No. 901, 76th Cong., 3rd Sess. (1940).

142. H.R. Rep. No. 2966, 76th Cong., 3rd Sess. (1940); Sen. Rep. No. 2196, 76th Cong., 3rd Sess. (1940).

143. Ludlow, *Hearings on Post Office Department Appropriation Bill for 1942* (note 121, *supra*), at 345.

The second chief consideration was the matter of competition. Naturally, the representatives of the Board stressed the desirability of bringing another airline into the service, but they were met by the retort that the unsettled world conditions in time of war made the competitive situation in time of peace a matter of speculation.¹⁴⁴ Also discussed were American Export's financial condition, and the adequacy and safety of its proposed equipment, but apparently Congress did not balk over these questions. Neither committee reported favorably on the estimate,¹⁴⁵ the chief objections being the increased cost to the government and the desirability, "under existing conditions," of monopoly in trans-Atlantic air operations.

The hearings are significant in bringing to light several basic considerations which the Board's opinion left relatively untouched, and in sharpening the issues in a far more satisfactory manner. And the action of the committees shows that the Board must write opinions which will not only survive the courts but will also withstand Congressional criticism; for Congress, in holding the purse-strings, can effectively veto the policy-determination of the agency which it has created.

3. *Latin American Operations*

Ten days after the Board authorized trans-Atlantic operations by American Export, it granted grandfather certificates to three components of Pan American authorizing operations to the southward. Pan American Airways, Inc., was granted seven routes which touched or terminated in Argentina, Brazil, Colombia, the Guianas, Venezuela, Mexico, the Canal Zone, all the Central American republics, and many of the Caribbean islands.¹⁴⁶ In a routine proceeding, Pan American-Grace Airways, Inc., secured its grandfather certificate for the route between Cristobal, C. Z., and Buenos Aires, via twenty designated points in Colombia, Ecuador, Peru, Chile, Bolivia, and Argentina.¹⁴⁷ Finally, Panama Airways, Inc., was granted a certificate for the transportation of passengers and express

144. Johnson, *id.*, at 580. Congressman Taber feared that there would be no competition in the trans-Atlantic mail service; since the steamship line was the only American line operating to Europe, the company would control both ocean and air transportation over the Atlantic and freeze out Pan American: *Id.*, at 344, 514.

145. H.R. Rep. No. 60, 77th Cong., 1st Sess. (1941); Sen. Rep. No. 142, 77th Cong., 1st Sess. (1941). For the Senate debate on the appropriation, see 87 Cong. Rec. 3633-3644, 3704-3715, 3774-3793 (1941).

146. Pan American Airways, Inc., Latin American Grandfather Certificate, Order No. 592, Docket No. 14-401(E)-1, 2 C.A.B. 111 (July 22, 1940). The Cristobal-Turbo route was later transferred to Uraba, Medellin, and Central Airways; it was amended to include Balboa, C. Z., and extended to Medellin, Colombia; Uraba, Medellin and Central Airways, Inc., Canal Zone-Central Colombia Operation, Order No. 749, Docket Nos. 28-401(E)-1 and 421, 2 C.A.B. 334 (Nov. 4, 1940).

147. Pan American-Grace Airways, Inc., Latin American Grandfather Certificate, Order No. 589, Docket No. 38-401(E)-1, 2 C.A.B. 104 (July 22, 1940).

on scheduled service between Cristobal and Balboa, C. Z. The applicant moved to dismiss for want of jurisdiction, on the ground that exclusive jurisdiction over air transportation in the Canal Zone is vested in the President by the Panama Canal Act of 1912, as amended in 1937;¹⁴⁸ the motion was denied, the Board holding that there was no such limitation on its power to issue the certificate.¹⁴⁹

Pan American-Grace was later permitted to add six stops and two mail services, and to abandon four stops.¹⁵⁰ The case is interesting in being the first in which the abandonment of stops was authorized,¹⁵¹ and in bringing to the Board's attention the factor of competition by local South American airlines. The abandonment of Tumaco, Colombia, was influenced by the interest of the Colombian government in Avianca,¹⁵² and its supposed hostility to the inauguration of a competitive service; the designation of Quito, Ecuador, as an additional stop appears to have been influenced by the local competition between Pan American-Grace and SEDTA, a German-controlled airline. The same subsidiary next obtained an amendment to its certificate, by which one stop in Brazil and nine in Bolivia were added.¹⁵³ It is noteworthy that a month previously, the operations of German airlines had been stopped by the Bolivian and Peruvian governments; the Board stressed the importance of the new service to the national defense because of its relation to hemispheric defense.

Pan American experienced its first setback in this field when its application for Los Angeles-Mexico City service was denied.¹⁵⁴ An affiliated Mexican company had been given a foreign air carrier permit for the same route,¹⁵⁵ but it was apparent that increased passenger service was required. Instead of authorizing a parallel, non-competing service by Pan American, the Board considered it to be more in the public interest to permit an increase in the frequencies operated by the existing carrier. The Board expressed reluctance to incur the expense of airmail compensation, which it was not necessary to pay to the Mexican company. But it is difficult

148. 37 Stat. 561, 48 U.S.C. 1305 (1912); 50 Stat. 486, 48 U.S.C. 1314a (1937).

149. Panama Airways, Inc., Grandfather Proceeding, Order No. 595, Docket No. 27-401(E)-1, 2 C.A.B. 124 (July 22, 1940).

150. Pan American-Grace Airways, Inc., Amended Certificate, Order No. 736, Docket Nos. 459, 492, and 493, 2 C.A.B. 301 (Nov. 2, 1940).

151. The chief grounds were unsuitability of airport facilities and insignificance of traffic to and from these points.

152. Formerly SCADTA: 80% of its stock is held by Pan American, and the balance by the Colombian government. For a history and account of SCADTA, see Marchant, *Aviation in Colombia*, (1938) 9 Air L. Rev. 45.

153. Pan American-Grace Airways, Inc., Bolivian Operations, Order No. 1075, Docket No. 606, 2 C.A.B. — (June 3, 1941).

154. Pan American Airways, Inc., Los Angeles-Mexico City Operation, Order No. 1167, Docket No. 318, 2 C.A.B. — (July 7, 1941).

155. Compania Mexicana de Aviacion, S. A., Los Angeles-Mexico City Operation, Order No. 1066, Docket No. 30-402(C)-1, 2 C.A.B. — (May 29, 1941).

to escape the conclusion that the decision was partly influenced by the pending application for a route between Mexico City and points in Texas by American Airlines, the intervener. It is not impossible that the Board's desire to curb Pan American's unrestrained expansion was foreshadowed in the American Export case and further reflected in its denial of the Mexico City service.

II

BUSINESS PRACTICES

Proceedings under Section 401 involve the relation of the respective air carriers to the government through the issuance or denial of a permit to engage in air transportation. In vying for routes, the airlines assume a position antagonistic to each other. In regulating business practices under Sections 408-415, the Board's power concerns chiefly the relations of the various airlines with each other, rather than with the government. Except with respect to methods of competition, the airlines are not in a mutually antagonistic position; instead, the very closeness of these relationships may be opposed to the general public interest.

A. Consolidation, Merger, and Acquisition of Control

While the Board is given wide discretion over the granting of new route certificates by Section 401(d) under the standard of "the public convenience and necessity," its discretion in approving the merger or acquisition of existing companies is strictly limited. Section 408(a) makes unlawful a consolidation, merger, purchase, lease, operating contract, or acquisition of control involving persons engaged in any phase of aeronautics, without the Board approval.¹⁵⁶ Section 408(b) provides that the Board shall approve such proposals if, after notice and hearing, it finds them not inconsistent with the public interest: "*Provided*, That the Authority (Board) shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to . . . (the transaction)."

156. Karl A. Crowley, Solicitor of the Post Office Department, was severely criticized by Senators McCarran and Truman for having permitted, under Sec. 15 of the Air Mail Act of 1934, the consolidation of two competing lines—Pennsylvania-Central Airlines Corporation and Central Airlines, Inc.: Hearings on S. 2 (note 31, *supra*), at 112-115, 159. On the other hand, Colonel Gorrell observed that in some instances, mergers or acquisitions of control are not only highly desirable but absolutely indispensable if competition itself is to be preserved, by preventing the disappearance of the weaker lines in bankruptcy: *Id.*, at 503. He felt that a limited amount of common action among air carriers, if kept open and subject to the Board's supervision, would result in the elimination of wasteful and unjustified duplication: *Id.*, at 512.

The proviso appeared in S. 3845 as ". . . and thereby unduly restrain competition or unreasonably jeopardize another air carrier" These words were studiously written into the bill in the light of judicial decisions and administrative rulings, but were stricken out in order to pacify Senators Borah¹⁵⁷ and McKellar, who wanted the prohibition to be inflexible.¹⁵⁸

Few cases have arisen as yet under this section of the Act. The acquisition of an airport company by an aircraft manufacturer has been approved in a decision which called for no formulation of new policy.¹⁵⁹ And in another uncontested proceeding,¹⁶⁰ the Board approved the acquisition by Pan American Airways, Inc., from its parent company, Pan American Airways Corporation, of seven subsidiary air carriers¹⁶¹ and two airport companies;¹⁶² it also approved the merger of four subsidiary airlines¹⁶³ into Pan American Airways, Inc., and the transfer of their certificates to the latter company. The plan, purely internal to the Pan American system, was designed to save taxes and to simplify bookkeeping, details of operation, and general intercorporate relationships.

Four other cases have raised important questions under this Section, and may be classified as follows:

(1) Interpreting the proviso of Section 408.

One case involved a contract providing for successive leaseings to each other of sleeper planes owned by United Air Lines and Western Air Express.¹⁶⁴ United's route from New York to San Francisco and Oakland connected at Salt Lake City with Western's route from Salt Lake City to Los Angeles and San Diego.

157. When the words were stricken, Senator Borah further explained his position: "Mr. President, the suggestion of my colleague that a merger necessarily destroys competition, in my judgment is not well sustained. There may be a merger or there may be a combination, and it may not have any effect on the question of competition whatever. It all depends upon the facts of each case. What I desire to see accomplished is the preservation of the opportunity of competition. When we say to the commission that these lines shall not do a thing 'unduly' or 'unreasonably' it is very different from saying that they shall not do it. It gives too much room for unlimited construction." 83 Cong. Rec. 6732 (1938).

158. Senator McCarran felt that the omission of the words eliminated the necessary flexibility of human judgment, and that it would now make impossible any such transaction. The whole debate on the subject appears at 83 Cong. Rec. 6729-6732 (1938).

159. Lockheed Aircraft Corporation, et al., Acquisition of United Airports Company, Order No. 745, Docket No. 507, 2 C.A.B. 328 (Nov. 22, 1940).

160. Pan American Airways, Inc., et al., Merger, Order No. 899, Docket No. 454, 2 C.A.B. — (Dec. 31, 1940).

161. Pan American Airways Company (Delaware); Pacific Alaska Airways, Inc.; Panama Airways, Inc.; Uraba, Medellin and Central Airways, Inc.; Compania Mexicana de Aviacion, S. A.; Compania Nacional Cubana de Aviacion, S. A.; and Panair do Brasil, S. A.

162. Pan American Manufacturing and Supply Corporation; Marine Airport Corporation was acquired from the Delaware subsidiary.

163. Pan American Airways Company, of Nevada and of Delaware; Pacific Alaska Airways, Inc.; Panama Airways, Inc.

164. United-Western Sleeper Exchange Case, Order No. 557, Docket No. 215, 1 C.A.J. 301, 1 C.A.A. CCXV (June 19, 1940).

The agreement for pooling of equipment was designed to provide through service on these connecting routes and to avoid the necessity of passengers changing planes at inconvenient hours of the night.¹⁶⁵

TWA, as intervener, claimed that the contract would give United a virtual monopoly of all the west coast business, in violation of the proviso. In construing Section 408 as a whole, the Authority concluded that an acquisition or lease which restrains competition or jeopardizes another air carrier is prohibited only in the event that either one or both of such results will follow from the creation of a monopoly. And it accepted a definition of the word "monopoly" as referring to "a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country." The opinion then demonstrated that there was no existing domination or control of Western by United, and that the agreement did nothing to alter the situation; therefore, it did not result in creating the monopoly prohibited by the proviso.

But one concession was made to TWA. The contract omitted any rental charge based on the depreciation of planes subject to the lease. If United should furnish more planes than Western for the Los Angeles service, the absence of such a charge would operate to Western's advantage, and "might be sufficient inducement to discourage competition and increase the possibility of United exercising some control over the policies of Western." To avoid this possibility, the Authority conditioned its approval upon the adoption of a rental charge covering such depreciation.

(2) Interpreting "not inconsistent with the public interest."

Together with the proposed interchange agreement, United had also filed for approval a proposed acquisition of Western by United.¹⁶⁶ The Hon. Roscoe Pound, as special trial examiner,

165. This contract was the third of its kind to be submitted for official approval. In 1937, the two companies had sought a through passenger and express service between New York and Los Angeles via Salt Lake City. Solicitor Crowley ruled that the agreement amounted to actual control by United of practically every detail of Western's operations; he feared that if permitted, such agreements would result in the concentration of complete control of the air transport industry in the hands of a few large monopolistic corporations. 8 JOURNAL OF AIR LAW 635 (1937).

A second proposal was then submitted, providing for the operation of through sleeper plane passenger and express service on the same routes. It too was rejected on the same grounds, the Solicitor believing that it differed from the first only in the degree, and not in the character, of control by United over Western. 8 JOURNAL OF AIR LAW 651 (1937).

166. United-Western Merger Case, Order No. 558, Docket No. 270, 1 C.A.J. 314, 1 C.A.A. CCXXX (June 19, 1940); on reargument reaffirmed without opinion: Order No. 629, 1 C.A.J. 430 (August 14, 1940); noted in 11 AIR L. REV. 310 (1940) and 11 JOURNAL OF AIR LAW 359 (1940).

Aside from the principles at issue, the case is interesting in being the first in which a formal pre-hearing conference was held: 1 C.A.J. 54. Further pre-hearing conferences were conducted after this proceeding was concluded; and

recommended approval of the application, finding the merger to be in the public interest because of the elimination of the change of planes at Salt Lake City. The examiner gave the same grammatical construction to the proviso as did the Authority in the sleeper interchange case. But he appears to have taken the word "monopoly" to mean a virtual monopoly, one which exists because competition is improbable for economic reasons. Distinguishing air carriers from railroads in the relatively small investment required to establish a new line, he said that a virtual monopoly in a whole region was impossible where other airlines can extend their routes into this region, uninhibited by large investment. And he seems to have dismissed the possibility of an exclusive, perpetual, law-granted monopoly, since competitors may always apply to the Board for new routes or for extensions of existing routes.¹⁶⁷ Not only did he conclude that the acquisition would not result in creating a monopoly, but he also found that there would be only incidental interference with existing competition. He pointed to the many factors which already unified the companies, and showed that the effect of the agreement would simply continue a condition existing before the merger.

The Authority denied the application upon the ground that it would be inconsistent with the public interest, thus rendering unnecessary a consideration of the proviso. United's argument of convenience to passengers was scotched by the approval of the sleeper interchange. The chief consideration was the factor of competition, injected by Section 2(d) into the standard of "the public interest." Reversing the examiner's finding on this point, the Authority concluded that in fact a competitive situation existed between Western and United for north-south business between Los Angeles and Spokane, and between Salt Lake City and Seattle; Western also afforded a route connecting with Northwest between Salt Lake City and the Twin Cities which was approximately the same length as the alternative route between these same points via United and Mid-Continent. In language which was quoted in a later case,¹⁶⁸ the Authority said:

"The intensity or the effectiveness of competition is not to be confused with the existence of a competitive situation, and it is not necessary that rates and times of departure be approximately the same . . . in order to establish that competition exists.

on May 24, this procedure was expressly authorized by an amendment to Sec. 285.1 of the Economic Regulations, following the example of the Federal Rules of Civil Procedure.

¹⁶⁷. Compare the views of Colonel Gorrell, who reached the same conclusion on different grounds: note 28, *supra*.

¹⁶⁸. Acquisition of Marquette by TWA, (note 171, *infra*), at 2 C.A.B. 9.

That two companies offer a comparable service between the same points is enough to establish the existence of competition."¹⁶⁹

The acquisition would give United direct access to the entire Pacific Coast area for the origination of transcontinental traffic. Western had the only north-south route west of the Rockies independent of the transcontinental airlines; the elimination of this competitor might enable United to discourage other aspiring competitors. To the examiner's suggestion that monopoly was impossible and that competing lines had only to apply for certificates of convenience and necessity, the Authority answered that it could not compel the establishment of competing routes.

The opinions of the examiner and the Authority differed in two chief respects. First, because they split over the question of existing competition between United and Western, the basis of the decision might seem to be one of economic fact-finding only. Second, while the Authority considered only the factor of competition and stopped short of the proviso, the examiner discussed the proviso exhaustively and focussed his attention upon the word "monopoly". It is his concept of monopoly which appears to be open to criticism.¹⁷⁰ Dean Pound required much more to constitute a monopoly than did the Authority. Under his definition, the proviso would, in effect, be cut out of the statute, since there would never be the monopoly in air transportation which is the basis of its prohibition. Congress did not view a monopoly as exclusive, permanent control of a region, which is an academic, theoretical meaning of the term. It regarded monopoly in its layman sense, as a situation that permits no possibility of competition in a particular area. Certainly it would not have sanctioned such a merger of companies whose combined routes dominated the Pacific Coast area and the territory west of the Rockies.

A third case involved a proposed contract for the acquisition of Marquette by TWA,¹⁷¹ and its approval depended upon satisfying the requirement of "the public interest" found in the relevant sections 408 (b), 412(b) and 401(i).

Marquette had been authorized to transport passengers and express between Detroit and St. Louis, via Toledo, Dayton, and

169. 1 C.A.J. at 322, 1 C.A.A., at CCXXXIX.

170. The notes in 11 Air L. Rev. 310 (1940) and 11 JOURNAL OF AIR LAW 359 (1940) both support Dean Pound's recommendations; the latter note, however, takes the view that the proviso should not be construed as a limitation supplemental to the public interest criterion.

171. Acquisition of Marquette by TWA, Order No. 578, Docket No. 315, 2 C.A.B. 1 (July 3, 1940); noted 11 Air L. Rev. 424 (1940).

Cincinnati; TWA had routes between Dayton and Chicago, and between Dayton and St. Louis. The Board considered the contract desirable because of the better service which TWA was prepared to supply, and which was then impossible because of Marquette's lack of proper operating equipment. In considering the proviso of Section 408(b), it noted that if the application were approved, TWA would have competition from at least one of the other two trans-continental operators at every point on the route,¹⁷² and accordingly found that the proposed acquisition would not result in the monopoly prohibited by the proviso.¹⁷³ As other factors bearing upon the public interest, the Board felt itself compelled to examine the consideration, terms, and conditions of the contract, and it balked over the price as being excessive. The assets and going-concern value of Marquette were found to be worth about one-fifteenth of the contract price, which therefore represented in large part the consideration for the transfer of the certificate. Stating that a certificate issued to an airline must not be treated as a speculative security, the Board denied the application.

Upon the basis of a modified contract, the Board reopened the proceeding for a reconsideration of its earlier order. The majority of the Board found the acquisition to be consistent with the public interest, and approved it,¹⁷⁴ on condition that the payments should be deposited in escrow, pending a final decision in the Marquette certificate proceeding.¹⁷⁵ As in the earlier case, the disputed ques-

172. Detroit: Penn-Central (Washington and Chicago, via Detroit); American (New York and Chicago, via Detroit). Toledo: United (New York and Chicago, via Toledo). Dayton and Cincinnati: American (Cleveland and Nashville, via Dayton and Cincinnati). St. Louis: American (Fort Worth and Chicago, via St. Louis); Chicago and Southern (New Orleans and Chicago, via St. Louis).

173. In view of certain disarming observations, this part of the opinion is open to closer study. The Board acknowledged that TWA would be the only carrier operating between certain points, "as for example, between Detroit and Toledo," but pointed out that this situation would not result from the acquisition because Marquette had the only route between these cities. It did not notice, however, that TWA and Marquette provided alternative routes between Dayton and St. Louis, and that the acquisition would obliterate the competitive situation between these two points. Both of these cities were served by American and Chicago and Southern on their north-south routes, but these airlines afforded no east-west competition. For two reasons, though, this oversight does not appear to destroy completely the force of the finding. In the first place, when the route is taken as a whole, it will be seen that American still would provide an alternative service between Detroit and St. Louis via Chicago; the competition between these major terminals would be intensified by putting two of the stronger lines into direct competition. In the second place, the rail and bus traffic between Dayton and St. Louis was shown to be very light, while between Detroit and St. Louis the volume of traffic was approximately six times as great. While the air traffic figures between these points were not in evidence, it was clear that by far the greater number of passengers preferred TWA to Marquette because of the latter's inadequate equipment and infrequent schedules.

174. Acquisition of Marquette by TWA, Order No. 769, Docket No. 315, 2 C.A.B. — (Dec. 18, 1940).

175. On February 20, 1940, the Authority had reopened the grandfather proceeding for the purpose of taking further proof upon the issue of Marquette's citizenship during the grandfather period, with a view to possible modification of its previous order. (Order No. 398). This proceeding was consolidated with the acquisition case for the purpose of hearing. By agreement of the parties, the opinion in the acquisition case was rendered while the record in the grand-

tion was the excessiveness of the price. The public interest in this matter rested in the fact that an unreasonable price might lead to a depletion and waste of TWA's assets, resulting in an impairment of the service rendered by the airline, or in a burden upon the public; TWA might recoup the additional price either through increased mail compensation or through increased fares.

Underlying this question was the basic issue which divided the Board: whether the value of the certificate of convenience and necessity should be included in the purchase price. Mr. Ryan withdrew from his former position, and with Chairman Branch, who had not participated in the first decision, held that the value of the route should be taken into account for the purpose of the sale, though not for rate-making purposes. They followed the practice of the Interstate Commerce Commission in its administration of the provisions of the Interstate Commerce and Motor Carrier Acts which are comparable to Section 408(b), since the statutes are similar in their general scope, purpose, and terms. Mr. Baker concurred in the result, believing that unless the payment for the certificate weakened the purchaser to such an extent as to jeopardize the adequacy of its service, the amount of the payment should be simply a matter of managerial discretion.¹⁷⁶ Mr. Warner dissented, holding to his former position that the value of the certificate should be excluded from the terms of the acquisition. It was his opinion that the inclusion of the certificate's value would result in a burden upon the public. He further declared it an easy matter to determine the total value of Marquette's assets "including good-will and going concern value but excluding any value attaching to the bare certificate." This amount would be represented by "the difference between the maximum commercial valuation that an open market would place upon the operation, complete with certificate . . . and the commercial valuation that would be similarly placed upon the certificate alone, if it were for sale alone with no existing enterprise of any kind attached to it."

There is much to support the view taken by the dissent. A certificate is not a franchise, but a mere revocable permit conferring

father case was held open, pending efforts to obtain evidence on the question of citizenship.

176. It is questionable, however, whether such a matter should be left too freely to managerial discretion. In determining mail rates the Board might be forced to recognize the pressure by the purchaser's investors for a greater return on their investment. While the value of the transferred certificate would not be recognized in regulating passenger rates, the presence of the subsidy element provides a new and different point upon which this pressure may be exercised.

no exclusive property right in the route or its facilities.¹⁷⁷ A franchise grants a limited property interest and is associated with the concept of privilege rather than with the concept of right; while the Act recognizes transit through the navigable air space as resting in right, not in privilege.¹⁷⁸ Furthermore, once an airline is established and a certificate obtained, its management should be encouraged to operate the line for service rather than find a market for the bare certificate. It is apparent that the latter course was taken by Marquette's management. Having secured grandfather rights by operating with outmoded equipment, Marquette made little effort to develop the commercial possibilities of its route, which were shown to be considerable when the route was operated by TWA.¹⁷⁹

Nevertheless, it is submitted that the majority opinion is sound in following the precedents of the Interstate Commerce Commission decisions, which have been undisturbed by the courts. The dissent, curiously enough, seems to have had little faith in the Board's ability to curb the imposition upon the public which was feared. Further, though the dissent searched more deeply into the basic issue than did the majority opinion, the conclusions which are quoted above are questionable as a matter of accounting. The computation of the total value of the assets exclusive of the certificate is a purely academic question, because a competitive market for the whole enterprise cannot always be available for the valuation of these items, and because the existence of a bare certificate detached from an enterprise is impossible, and therefore its calculation is impossible. It appears inconsistent to imagine the sale of such a detached certificate in the open market, and still hold to the view that a certificate should not be treated as a speculative security.

(3) Defining an "air carrier" under Section 408.

When American Export Airlines filed its application for a certificate, it also sought approval of its control by American Export Lines, its parent steamship company, "if such approval is deemed necessary." The airline had been incorporated in 1937 as a wholly owned subsidiary of the steamship company. Pan American argued that the Board's approval was necessary under Section 408(a) (5) and 408(b): that the acquisition of an air carrier would not take

177. Civil Aeronautics Act, Secs. 302(a), 303, 401(j). See *Pennsylvania R. Co. v. Public Utilities Commission*, 116 Ohio 80, 155 N.E. 694, 696 (1927); the case holds improper the payment of \$157,300 for the bare certificate of a motorbus line.

178. Sec. 3. See Fagg, *Legal Basis of the Civil Air Regulations* (1939) 10 JOURNAL OF AIR LAW 7, 9.

179. This operation had been approved without opinion after the denial of the first application: Order No. 600, 1 C.A.J. 409 (July 25, 1940).

place until the corporate entity became an air carrier by receiving its certificate and by actually undertaking to engage in air transportation. The Board accepted American Export's argument, and held that Section 408 applies only where the acquisition occurs at a time when the corporate entity is already an air carrier; that since American Export was not an air carrier at the time when the steamship company acquired control of it, the Board's approval of such acquisition was unnecessary.¹⁸⁰

Mr. Ryan dissented from the majority's conclusion and felt that approval was required. He construed Section 408 as requiring the Board to "regard the series of events which will result in the control of an air carrier by the steamship company as constituting an acquisition." He felt that it was not the purpose of Congress to limit the jurisdiction of the Board to such an extent, and pointed out the ease with which an air carrier would circumvent the Act by forming a subsidiary corporation, and then causing it to engage in the manufacture of aircraft.¹⁸¹ This view was adopted by the Circuit Court of Appeals for the Second Circuit, when it declared that the majority view was an "unduly literal interpretation of subdivision (5)", and that "the Board ought not to have dismissed the application but should have proceeded to deal with it on the merits."¹⁸²

It has been said that the majority opinion was arrived at by "anomalous reasoning."¹⁸³ One may at least question the reasoning, and doubt that it was the Congressional intention to limit the Board's jurisdiction in such a manner. One may also speculate upon the Board's position had the application been filed by the parent company rather than by the subsidiary. It is arguable that this technical difference in procedure would have rendered approval necessary, by bringing into play Section 408(a) (6) and the second proviso of Section 408(b).

It seems that Pan American was almost as intent upon preventing the acquisition of control as it was upon preventing the authorization of competing operations over the trans-Atlantic route. By its

180. American Export Airlines, Inc., Application for Approval of Control by American Export Lines, Inc., Order No. 581, Docket No. 319, 2 C.A.B. 45 (July 12, 1940).

181. This possible loophole in the Act was noted in the appropriation hearings, and Congressman Keefe expressed himself in favor of correcting it: Hearings on Post Office Appropriation Bill for 1942 (note 121, *supra*), at 545. But it is only in the control of an incipient airline that there is such a loophole; for if a subsidiary were formed for the manufacture of aircraft, its articles would state its corporate purposes, and it would be such a manufacturer at the very time of incorporation. Any acquisition of control over this corporate entity would necessarily take place subsequent to its incorporation, and this transaction would require the Board's approval.

182. Note 133, *supra*.

183. Keefe, Hearings on Post Office Department Appropriation Bill for 1942 (note 121, *supra*), at 546.

argument it placed itself in an anomalous position which could hardly have escaped its notice. Pan American Airways Corporation had controlled as subsidiaries Pan American Airways Company of Nevada and Delaware, Pan American Airways, Inc., Pan American-Grace Airways, Inc., Pacific-Alaska Airways, Inc., and Panama Airways, Inc., long before these subsidiaries were awarded their certificates. Their position was similar to that of American Export Airlines.¹⁸⁴ If the Board had accepted Pan American's argument, the maintenance of these relationships would have been unlawful under Section 408(a), and subject to the heavy criminal penalties imposed by Section 902(a).

B. *Interlocking Relationships*

In general, Section 409 outlaws relationships in which any officer or director of an air carrier is (or has a representative as) an officer, director, member, or controlling stockholder¹⁸⁵ in any other air carrier, common carrier, aeronautical company, or aeronautical holding company. After February 19, 1939, such relationships were to be illegal unless previously approved by the Authority as not adversely affecting the public interest.¹⁸⁶ Although the statute does not require a hearing upon these applications, a hearing has been held wherever there was any possible doubt concerning the effect of the relationship in question upon the public interest.¹⁸⁷ While the Authority disposed of a considerable number, favorably and adversely, it has seen fit to issue only three orders which have been accompanied by opinions. It is only from these three opinions that one may gather upon what precise grounds the findings were based.

Since no express statutory standards are furnished, beyond the broad test of "public interest", the Authority has proceeded with caution in granting exceptions to the statutory prohibition. It places upon the applicant the burden of showing affirmatively that the public interest will not be adversely affected by the existence of a particular interlocking relationship. Because of the potential conflict of interest in negotiations for purchases by an air carrier from a

184. Pan American's position is distinguishable from that of American Export in that the former's subsidiaries acquired certificates under the grandfather clause. Thus, it could be argued that such subsidiaries were air carriers prior to the effective date of the Act, and that the acquisition of control was therefore not subject to approval under Section 408.

185. S. 3845 prohibited, without prior approval, the holding of any stock by any officer or director of an air carrier in one of the designated enterprises. The House bill prohibited only the holding of a controlling interest, and in conference this latter provision was accepted. See H.R. Rep. No. 2635, 75th Cong., 3rd Sess. (1938), 72; report reprinted in full, 83 Cong. Rec. 8843-8868 (1938).

186. The breadth of the statutory standard was given only scant consideration in the deliberations prior to the passage of the Act. See Hearings on H.R. 9738 (note 17, *supra*) at 45.

187. First Annual Report of the Civil Aeronautics Authority (1940), 24.

manufacturer of aircraft used in air transportation, it has disapproved the holding of a common directorship in such companies; the danger of destroying a desirable arm's-length relation between buyer and seller is not overcome by proof that the common director has played no part in the negotiations or decisions relating to such purchases.¹⁸⁸ A common directorship in an airline and in a company holding investments in airlines will likewise be disapproved, since the intercorporate mechanism might be abused to the detriment of the air carrier.¹⁸⁹ But no potential conflict of interest has been found in a common directorship in an airline and in a manufacturer of military aircraft,¹⁹⁰ or of the holding of directorships in an airline and in a company which operates an airport and a flying school.¹⁹¹

C. Loans, Contracts, Methods of Competition

Section 410 empowers the Board to approve or disapprove applications for loans from the United States or any agency, by or for the benefit of any air carrier, and empowers it to prescribe the terms and conditions upon which such loans are provided.¹⁹² Only once thus far has action been taken under this section: an RFC loan to Northwest for the purchase of equipment was approved, the applicant desiring to compete on more equal terms on the eastern part of its route with the transcontinental lines.¹⁹³

The Board is authorized, by Section 411, to issue a cease and desist order if, after notice and hearing, it finds that an air carrier is engaged in "unfair or deceptive practices or unfair methods of competition." In one case, an airline charged that the inauguration of additional schedules by a competitor constituted such prohibited practices,¹⁹⁴ but the complaint was later withdrawn.¹⁹⁵ And in another, it was held that the Section applied only to past or existing

188. Lawrence C. Ames—Interlocking Relationship, Order No. 289, Docket No. 246, 1 C.A.J. 12, 1 C.A.A. III (Dec. 11, 1939) (Continental and Lockheed).

189. Lamotte T. Cohu—Interlocking Relationship, Order No. 403, Docket Nos. 156 and 289, 1 C.A.J. 96, 1 C.A.A. LI (Feb. 21, 1940) (TWA and Air Investors, Inc.). Darling-Canadian Colonial Interlocking Relationship, Order No. 451, Docket No. 234, 1 C.A.J. 189, 1 C.A.A. CXXXIV (March 28, 1940) (Canadian Colonial and The Aviation Corporation).

190. Lamotte T. Cohu—Interlocking Relationship, note 189, *supra* (TWA and Northrop Aircraft, Inc.).

191. Darling-Canadian Colonial Interlocking Relationship, note 189, *supra*. (Canadian Colonial and Roosevelt Field, Inc.).

192. The sole purpose of this provision was to give further control over the business practices of the air carriers: Hearings on H.R. 9738 (note 17, *supra*), at 438.

193. Northwest Airlines, Inc., Application for a Loan from RFC, Order No. 33, Docket No. 223 (April 17, 1939).

194. Eastern Air Lines, Inc., v. American Airlines, Inc., Order No. 121, Docket No. 249 (July 28, 1939). The Postmaster General had authorized the transportation of mail on American's additional schedules; Eastern also charged that it would be aggrieved by the Postmaster General's order within the meaning of Section 405(e), and asked that such order be amended, suspended, or cancelled. This part of the complaint was dismissed on the ground that the designation of a mail schedule was not an "order" within the meaning of Section 405(e).

195. Order No. 337, 1 C.A.J. 61 (Jan. 16, 1940).

practices or methods of competition, and not to future operations under a proposed contract.¹⁹⁶

Section 412(a) requires every air carrier to file with the Board a copy of every contract affecting air transportation, between such air carrier and any other carrier, for pooling and for designated types of cooperative working arrangements, subsection (b) directs the Board to disapprove or approve such contracts according to whether it finds or does not find them to be adverse to the public interest, or in violation of the Act. This section was involved in an agreement between eighteen domestic airlines holding grandfather certificates, governing the signatories in the issuance and exchange of passes and reduced-rate transportation; the monopoly-competition issue appears to have been absent from the case, and the Authority approved the agreement as in furtherance of the public interest.¹⁹⁷ Section 412 was also involved in the disposition of three cases already discussed.¹⁹⁸ While there have been a substantial number of orders issued under this Section, these are the only cases in which opinions have been rendered.

It is natural that the Board's docket should have been more occupied with applications for certificates of convenience and necessity than with matters concerning the relations of the air carriers to each other. An air carrier's very existence depends upon staking out a route over which it is authorized to operate, and upon securing airmail authorization in order to make such operations financially practicable. A scramble for these government grants was the necessary consequence of the passage of the Act, and any intercompany arrangements were of secondary importance except insofar as their continued existence required official approval.

As suggested above, the time is approaching when the number of available new routes will reach the vanishing point. When this time arrives, the work of the Board will enter its second major phase—that of regulating the intercorporate relations of the aviation industry.

CONCLUSION

The certificate of convenience and necessity is the fulcrum for the economic control of the air transport industry. In order to prevent the establishment of a monopoly over any terrain, it has been

196. United-Western Sleeper Exchange Case, (note 164, *supra*).

197. Airline Pass Agreement, Order No. 527, Docket No. 425, 1 C.A.J. 251, 1 C.A.A. CLXX (May 24, 1940).

198. Notes 122, 164, and 171, *supra*.

the Board's consistent policy to allow alternative service between two points by competing lines where the demand for service is great enough to support both carriers.¹⁹⁹ If the traffic needs do not warrant a second service, the application is denied, since both lines might collapse. This policy is clearly in accordance with the Congressional plan.²⁰⁰ And where such duplication of service would result in destructive competition and uneconomic practices, the airline serving the termini in question is given a regional monopoly.²⁰¹ The desirability of through service is a factor, but not controlling; and the Board always considers whether the traffic on a competitor's route will be diverted to an extent that will not be compensated by traffic to be developed by favorable connecting service.

The grandfather clause set the pattern of the air routes, and the effective date of the clause found four domestic airlines dwarfing the others with respect to route mileage. In its unacknowledged policy of favoring the smaller lines, the Board has endeavored to overcome the effect of the grandfather clause by removing the disparity in route mileage as far as lies within its power; but it has declared itself opposed to the invasion of the field by small newcomers. And in the back of the Board's mind is the hope that all the airlines will attain such economic strength that the airmail subsidy will eventually disappear.

A certificate of convenience and necessity to a limited extent allows a monopoly in the legal sense, but the statute forbids a monopoly created by merger. In connection with the issuance of certificates, the word "competition" appears in a different grammatical context than in connection with the approval of mergers, and only with respect to the latter does the word "monopoly" appear at all. But it is submitted that the Board has proceeded in both these fields with an entirely consistent notion of what constitutes competition and the degree thereof which it is desirable to maintain. In considering the merger applications, the Board has permitted the domination or control of a smaller line by a larger where the situation will not stifle competition within a given section of the country; if competition is endangered, the Board curbs any tendencies toward accentuating the effect of the grandfather clause. And

199. "The present high quality of American air transport is largely due to the competitive spirit that has existed throughout its development. There has been little point-to-point competition on identical routes. Of much greater benefit has been the availability of two or more alternative routes, served by different companies, between widely separated centers." Report of the Federal Aviation Commission (note 22, *supra*), at 61. See also Mid-Continent Airlines, Inc., et al., Twin Cities-Des Moines-Kansas City-St. Louis Operation (note 88, *supra*) at 2 C.A.B. 93.

200. See McCarran, 83 Cong. Rec. 6851 (1938).

201. Note 88, *supra*.

in each of these fields the Board conceives of a competitive situation as one in which two companies offer comparable service between the same points; the effectiveness or the intensity of competition is immaterial.

While it would be somewhat premature to venture a general estimate of the success and effectiveness of the Board's economic regulation, at least two observations may be made. In spite of the intensity of the controversies, and the controversial nature of the issues presented and decided, only one unimportant decision has thus far been upset by the courts. Secondly, the chaotic financial condition of the air transport industry has been remedied. Commercial revenues are increasing so satisfactorily as to lead the Board to expect the substantial reduction of the mail pay required; economic stability of the airlines is in prospect.²⁰² This result has been accomplished by recognizing the air transport industry as a public utility, and by exercising public regulation over private enterprise.²⁰³ And instead of adopting a system of state-controlled monopolies on the European plan, the United States has maintained a system of controlled competition within a framework of free enterprise.

202. Second Annual Report of the Civil Aeronautics Authority (1941), 1.

203. "Even after air transportation shall have attained a purely commercial footing, needing no direct support from the government, we consider that it will still require control as a public utility and one which in some cases must take on a monopoly character." Report of the Federal Aviation Commission (note 22, *supra*), 52.