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FEDERAL REGULATION OF AIR TRANSPORTATION: RATES AND BUSINESS PRACTICES*

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INTRODUCTION

THE Civil Aeronautics Act of 1938[1] sets the pattern of regulation for the air transport industry and is the charter for civil aviation. This legislation has for its purpose the regulation, control, and development of civil aviation and it effectuates this control by the creation of an administrative body now known as the Civil Aeronautics Board. Thus, with the passage of the Act, the need for an agency primarily interested in regulating and fostering civil aviation was fulfilled.[2] Safety and economic control flowed from a single command, in itself a vast improvement over the past, for probably in no other industry do considerations of safety so affect the economic well-being of an industry as in air transportation.[3] For the first time economic regulation of air carriers was provided. Formerly there had been no control of this type, other than an indirect control over the operation of air mail carriers.[4]

The domestic economic regulatory policy of the Civil Aeronautics Board with respect to the fixing of rates and fares for the transportation of mail, passengers, and property, and the control effected over those business practices of the airlines which bear

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[1] 52 STAT. 973 (1938), 49 U. S. C. § 401 (1940).

[2] Altschul, *Economic Regulation of Air Transport*, 12 J. AIR L. 163 (1941).

[3] FIRST ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY, 2 (1939).

[4] RHYNE, CIVIL AERONAUTICS ACT ANNOTATED, 97 (1939).

upon the issues of competition and monopoly within the air carrier industry are the subjects for consideration here. The importance of these regulations of an economic nature as embodied in the Civil Aeronautics Act cannot be overemphasized for the continued development and encouragement of civil aviation depend upon the wisdom, utility, and adaptability of these regulations and the intelligent administration of the industry thereunder.

THE REGULATION OF PASSENGER AND PROPERTY RATES

Prior to the enactment of the Civil Aeronautics Act, no control had been effected over the rates and fares charged by the commercial air carriers for the carriage of persons and property. Failure to regulate in this respect opened up a possibility of disastrous rate wars and discriminatory practices like those which characterized the operations of the railroads in the colorful if somewhat costly days of the "robber barons." However, it should be stated here that the air carrier industry had been singularly free from such corrupt and unprofitable practices, although there had occurred some instances of uneconomic rate reductions in competitive situations—those airlines pursuing such a course hoping to recompense themselves for any losses incurred through increased air mail compensation.[5]

The Civil Aeronautics Act filled this gap by placing within the hands of the Board the power to regulate passenger and property rates.

Each carrier was required to file with the regulatory body its tariffs, which were to show all of its rates, fares, and charges. Adherence to these tariffs was demanded and charges of greater or lesser amounts than set forth therein were disallowed. All rebates, refunds or remittances were prohibited.[6]

The granting of passes at free or reduced rates was strictly

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[5] See RHYNE, *op. cit. supra* note 4, at 107; also see Lupton, *New Route Certificates Under the Civil Aeronautics Act of 1938*, 12 AIR L. REV. 103 (1941).

[6] § 403 (a) and (b).

controlled.[7] An Airline Pass Agreement[8] entered into by most of the carriers fell within the purview of this clause. This agreement provided that passes might be issued to certain described categories of persons, and forbade the honoring of passes issued by any carrier not a signatory to the agreement. It also prohibited the honoring of passes issued to any person not falling within the categories of persons listed in the agreement. The Authority came to the conclusion that the agreement did not violate the terms of the Act. However, no opinion was offered as to whether persons listed in the agreement to whom passes might be issued fell within the categories set forth in Section 403 (b) of the Act.[9] It was not necessary to compare the classes of persons listed in the agreement with those listed in the Act inasmuch as the parties did not bind themselves to issue passes to the persons described. The clause applicable in the agreement reads "may" issue, not "must" issue. Therefore, a carrier may or may not issue as it chooses without creating contractual liability. This did not mean, however, that the carriers were free to issue passes to persons falling outside the list described in Section 403 (b). Furthermore, the granting of passes at free or reduced fare to persons other than those described in Section 403 (b) was not definitely prohibited as long as provision was made for such action in the published tariffs as required, and provided such action did not violate Section 404 by granting an unreasonable preference or undue advantage to any particular person.

Any tariff change in rates, charges, and fares, or change in a

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[7] § 403 (b).

[8] Airlines Pass Agreement, 1 C. A. A. 677 (1940).

[9] § 403 (b) provides in part: "Nothing in this Act shall prohibit such air carriers, or foreign air carriers, under such terms and conditions as the Authority may prescribe, from issuing or interchanging tickets for free or reduced rate tansportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemics, pestilence or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Authority may by regulation prescribe."

regulation or practice affecting such rate, fare, or charge is prohibited unless thirty-day public notice is given, although the Board may and does modify this procedure if it is deemed to be in the public interest.[10] In most cases where application for permission to file tariffs in less than thirty days was requested, the carrier wished to inaugurate promptly an authorized service or to correct errors or inconsistencies discovered in existing tariffs.[11] The carriers are also required to file with the Board all joint rates, fares, and charges for air transportation,[12] and maintain equitable divisions between air carriers participating therein so that none of the participating carriers will be unduly preferred or prejudiced.[13]

An affirmative duty is placed upon the carrier to provide reasonable through services, to maintain a safe and adequate service, and to charge reasonable rates for the carriage of persons and property in air transportation.[14] Reasonable rules, regulations, and practices must be established[15] and discriminations or undue preference of any person, locality or kind of traffic is forbidden.[16]

In order to give added force to these provisions the Board has the power, after notice and hearing, to prescribe rates whenever it is of the opinion that such a rate is unjust or unreasonable or unduly preferential;[17] to remove discriminations;[18] to suspend rates;[19] and to prescribe equitable divisions of joint rates, fares or charges.[20]

Broad rules were formulated which were to be followed in part

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[10] § 403 (c).
[11] See ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY, 8 (1940).
[12] § 403 (d).
[13] § 404 (a).
[14] *Ibid.*
[15] *Ibid.*
[16] § 404 (b).
[17] § 1002 (d).
[18] § 1002 (f).
[19] § 1002 (g).
[20] § 1002 (h).

as a basis for determining fair and reasonable passenger and property rates.

1. "The effect of such rates upon the movement of traffic;
2. "The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
3. "Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed or pursuant to law;
4. "The inherent advantages of transportation by aircraft;
5. "The need of each air carrier for revenue sufficient to enable such carrier, under honest, economical, and efficient management, to provid adequate and efficient air carrier service."[21]

These rules and other provisions of the Act prescribe the governing principles, but an exact method of fixing such rates is not provided for, leaving extensive discretionary powers to the Board in deciding just what are fair and reasonable rates in the public interest. It is to be noted that no mention is made in the Act of the familiar due process rule of requiring a fair return on investment or fair value of the property devoted to the service for the determination of rates. The Act places before the Board the five rules to be considered in conjunction with the other provisions, notably, the Declaration of Policy, so that rates are to be fixed in order to bring about the maximum contribution to the development of an air transportation system in accord with the public need of the United States. It was felt that to have required a scheme of rate-making based on a fair return of investment would have been unsatisfactory, as not meeting the needs of the air carrier industry, for airlines in comparison with other utilities have few capital goods. Their capital goods tend toward rapid obsolescence. Furthermore, the industry is subject to large fluctuations in traffic. These facts make adherence to a fair-return-on-investment standard untenable.[22]

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[21] § 1002 (e).

[22] *See* Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575 (1941). The Supreme Court states at 586: "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas." It has been stated in

For the most part there has been little direct control by the Board in fixing rates for passengers and property; therefore, by actual decisions, it is impossible to know with any accuracy the factors which will enter into rate determination. Investigations have been made to insure that rates and charges are reasonable and non-discriminatory, but complaints as to unreasonableness have been settled voluntarily by informal adjustment by the carrier concerned.[23] The carriers, it would seem, have fixed their own rates at a fair and reasonable level and in accordance with economic competitive principles to assure sufficiently reasonable profits but not so high as to place an unreasonable burden on the public, thus complying with the duty conferred upon them by Section 404.

In one decision,[24] however, the conclusion was reached that such rates, in order to be reasonable and non-discriminatory to persons, localities, and classes of traffic, were not required to be uniform since such words as reasonable charges, unjust discrimination, undue or unreasonable preference (as used in the Act) do not imply uniformity. Here the Board made an investigation of the legality of an Air Travel Card Plan which had been instituted by various carriers in order to obtain traffic; this plan offered a discount of 15% less than standard one-way fares to frequent users of air services who were eligible to subscribe. The Board found the agreement to be reasonable, non-discriminatory, with no undue or unreasonable preference or advantage to subscribers in relation to non-subscribers; consequently it felt that it should be considered

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this regard: "Indeed to adopt the judicially ramified rule of fair return on fair value as the sole standard of air transport rate-making would be disastrous. Capital investment constitutes no safe criterion for as yet capital goods are few, quickly obsolescent and subject to wide fluctuations. Congress was aware of this and prescribed a statutory standard remarkably close to observing the value of the services rendered to the public as the true yardstick." Hamstra, "*Two Decades—Federal Aero Regulation in Perspective*, 12 J. AIR L. 105, 143 (1941).

[23] See Neal, "*Some Phases of Air Transport Regulation*," 31 GEO. L. J. 355, 356 and 364 (1943).

[24] Air Passenger Tariff Discount Investigation, 3 C. A. B. 242 (1942).

in the light of the reasonable welfare of the industry, the producers, the shippers and the carriers.

> "... it appears that there is no competitive relationship in the customary sense between the classes of traffic involved, that the reduced rates are reasonably open to all, that the Plan constitutes a convenience and benefit to a considerable part of the travelling public, that the interests of the carriers are reasonably promoted, and that the difference in rates is not clearly improperly adjusted with reference to the actual savings and profit to the carrier from the Plan."[25]

During the recent war, the Board undertook an investigation to determine the legality of passenger rates maintained by the carriers and called upon them to show cause why such fares should not be reduced in view of the fact that, due to certain wartime conditions, rates were believed to be excessive; the Board wished these rates reduced 10% so as to restore the average passenger revenue per revenue passenger mile to an approximate level existing previously to July 1, 1942. However, the carriers either reduced the rates voluntarily or presented evidence that a reduction was not justified, and the proceedings were dismissed without a formal decision.[26] This investigation, however, indicates the vigilance with which the Board watches the rates and fares charged and its desire, in the public interest, to lower fares when conditions become favorable.

A controversy of importance has recently arisen with respect to air freight rates.[27] The disputants involved were certain certified air carriers, scheduled airlines, and a group of uncertified air cargo carriers. The latter group had commenced the development of the carriage of freight by air after the termination of the war. They had been permitted by the Board to transform their contract services[28] into scheduled common carrier freight service

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[25] *Id.* at 251.

[26] ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 14 (1943).

[27] Motions of Air Freight Forwarder Assoc., *et al* (C. A. B., Serial No. E-852, E-853) 2 C. C. H. AV. LAW REP. ¶ 21052 (1947).

[28] Those Air Carriers operating as contract carriers only, as distinguished from common carriers, are not considered to be within the Board's jurisdiction for air transporta-

to operate as such until a determination of their applications for certificates of public convenience and necessity could be made. The dispute concerned rates charged for the carriage of property by air, freight as distinguished from express.

These two groups of carriers filed air freight tariffs, the certificated carriers filing tariffs in amounts below those previously filed and the uncertificated cargo carriers filing tariffs which for the most part were substantially lower still. The uncertificated carriers filed motions with the Board under Section 1002 (g) to suspend these reduced tariffs filed by the scheduled airlines. It was alleged that such tariffs were unlawful inasmuch as they were unduly discriminatory and unfair because they undercut the tariffs filed by the cargo carriers. The contention was made that the tariffs were unfair because the certificated airlines set their rates below the cost of service and further that these airlines were in a position to lower rates because their tariffs were based upon the mail subsidy paid to them.

The Board refused to suspend and refuted the charges finding little evidence presented of undercutting. In fact a finding was made that undercutting which gives the public lower rates is not in itself undesirable if unfair competition is not present even if the lower rates are aimed specifically at certain air carriers.

As to the argument advanced that the certificated carriers were rendering the service below cost, the Board was of the opinion that there was not sufficient evidence available as to costs, and even in the event such evidence were available it would not be too material because air freight was in an experimental stage and at such time "all industry goes through the experience of promotional rates—of rates initially set below costs but with costs falling below that rate if the hoped-for volume is attained."[29] Furthermore the variation in rates between the two groups of carriers

tion as defined means the transportation of the U. S. Mail or the carriage of persons or property as a common carrier. Section 1 (10).

[29] Motions of Air Freight Forwarder Assoc., *et al*, 2 C. C. H. Av. Law Rep. ¶ 21, 052.01, p. 16,262 (1947).

was so small that a prima facie case of undue or unfair discrimination could hardly be spelled out.

The Board in rejecting the contention made with respect to the fact that competition by the scheduled airlines was subsidized by the United States Treasury stated that all but one of the airlines involved were on a service rate which compensated solely for the carriage of the mail and was not a subsidy. The remaining carrier, although a need carrier and receiving a subsidy to break even on its operating cost, could not be considered as competing through subsidy because the mail rate set for this carrier did not provide for losses on air cargo operation.

Concluding that a prima facie case of unfair competition had not been made out, but finding that the tariffs of all the air carriers involved showed little rationality of construction with respect to sound principles of rate making, the Board ordered an investigation of rates of both certificated and uncertificated carriers. The purpose of this investigation was stated to be the development of rational principles for the making of tariffs and also to inquire into the validity of tariffs already filed. Following this decision certain certificated carriers sought to reduce air freight rates still further. Here the Board stepped in to suspend further reductions for a period of 90 days at the petition of Slick Airways and the Independent Air Freight Association.[30] The Board believed that the rate reductions were made by the carriers involved to further "what appears to them to be their own best interests."[31] Since the Board was conducting an investigation of rates and would not know whether the rate reductions were lawful until such investigation was concluded, it believed further rate reductions should cease during the pending investigation.

It was later determined that the air freight rates established by the carriers were so low in relation to costs as to endanger the further development of air freight on a sound and economic basis.

[30] Slick Airways, Inc., *et al*—Air Freight Tariffs (Serial No. E-916) 2 C. C. H. Av. LAW REP. ¶ 21063 (1947).

[31] *Ibid.*

Therefore a general minimum rate order applicable to the entire industry was promulgated below which no air carrier could fix its rates without approval of the Board.[32]

By prescribing the minimum rate the Board aimed to limit the possibilities of destructive competition and at the same time not unduly restrict the continued growth of the air freight industry. The minimum rate fixed by the Board's action was 16 cents per ton mile covering the first 1,000 ton miles of any shipment, and 13 cents per ton mile covering the ton miles in excess of 1,000 for any shipment. These minimum freight rates were airport to airport rates.[33] Inasmuch as the Board did not wish to freeze rates at the developmental stage of air freight it decided to keep the proceeding open so that exemptions from the minimum might be made in specific cases necessitated by the proper development of air freight and in order to remove possible inequities and disparities.

Particular rates, rate structures or level of rates were not prescribed because the Board was of the opinion that it did not possess adequate information; that early action was necessary and to set such rates would call for prolonged proceedings; and that such rates might tend to be too restrictive in the developmental period of air freight. The Board refused to consider value of service in fixing its minimum rate since it believed that such was important only in fixing rate structures.[34]

In this decision it was indicated that promotional rates were justified, but sanction was refused to such rates fixed with no regard for costs. On the contrary rates must at all times be reasonably related to costs. It was stated:

> "The test of reasonableness must include recognition of variations in the ability of traffic to carry a full share of costs at different stages in the development of that traffic, the effect of low rates in generating new

[32] Air Freight Rate Investigation (Serial No. E-1415) 2 C. C. H. Av. Law Rep. ¶ 21,104.01 (1948).

[33] Air Freight Rate Case, 2 C. C. H. Av. Law Rep. ¶ 21,108 (1948).

[34] *Ibid.*

traffic and the resultant effect of increased volume of reductions in unit costs."[35]

The principle of charging lower rates for shipments of greater distance was recognized as sound. With relation to costs, economies are effected as the distance of shipment increases.

Following this decision the Board once again saw fit to suspend airline tariffs. These tariffs involved reduced summer excursion rates and were filed by Eastern, Delta, and National Airlines. The traffic that these reduced fares might generate was conjectural and since costs were rising generally, it was believed that such rates might well have a detrimental financial effect upon the carriers.[36]

At the outset and for years thereafter, the air carrier industry was plagued with obstacles which had to be overcome in order to obtain sufficient traffic. These obstacles in part consisted in the public's hesitation and wariness in accepting this new form of transportation and the disparity of air transportation rates when compared with those of surface transport. However, in the past few years, due to a number of reasons such as increased safety, the great amount of publicity arising from the wartime utilization of aviation, etc., the public has accepted air travel, and such acceptance has brought increased traffic. This coupled with more efficient equipment and other technological improvements, has permitted a reduction of rates on some routes to the level of Pullman fares.[37] It is still too early to forecast what such fares will be in relation to surface transport, but the rates charged for air carriage will to a large extent determine the place air travel will occupy in the national transport picture, and such will assuredly be borne in mind in any fixing of such rates. As the Board has so often stated in its air mail rate determinations, it is concerned

[35] Air Freight Rate Investigation, 2 C. C. H. Av. LAW REP. ¶ 21,104.03 (1948).

[36] Delta Air Lines Inc. [Complaint & Petition to Suspend Tariffs] (Serial No. E-1669) 2 C. C. H. Av. LAW REP. ¶ 21,110 (1948).

[37] See Tipton, *Air Transportation and Free Enterprise*, as included in VITAL PROBLEMS OF AIR COMMERCE, edited by Zacharoff, 76 (1946). The domestic carriers increased their passenger fares approximately 10% in 1947. ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 14 (1947).

with the fixing of a rate which will assure the property development of an air transportation system in the interest of the nation's commerce, its general security, and its Postal Service.

Air Mail Rates

The Civil Aeronautics Board is empowered and directed to fix fair and reasonable rates of compensation for the carriage by air of the mail,[38] but unlike former air mail legislation, which bound its predecessor in interest, the Interstate Commerce Commission, in fixing such rates, uncompromising and absolute rules are not ordained. Competitive bidding and the letting of air mail contracts thereunder are abolished; the Act requires all airlines to carry the air mail when requested to do so by the Postmaster General, provided authorization is granted in the certificate of public convenience and necessity. Compensation is paid from Post Office Department appropriations after a fair and reasonable rate is determined by the Board.[39]

Certain broad rate-making elements are prescribed for consideration by the Board in determining fair and reasonable air mail rates; among other factors to be considered is the need of the air carrier for compensation sufficient to insure the satisfactory performance of the mail service.

> "... and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."[40]

This latter clause indicates that the purpose motivating the Act was not only to regulate but to foster the air carrier industry, and it also demonstrates congressional awareness of the perilous financial condition existing in the industry at the time of the Act's passage, such financial condition being caused to a large degree

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[38] § 406 (a) and (b).
[39] § 406 (a).
[40] § 406 (b).

by the lack of sufficient revenues which seriously hampered the maintenance and development of commercial aviation.[41] Congress, recognizing the fact that few, if any, of the airlines could long survive without mail compensation, enacted Section 406 (b) quoted in part above. By the terms of this section it is apparent that compensation for the carriage of mail by aircraft goes beyond mere payment for the mail services and provides for the payment of a subsidy through such compensation, whenever and as long as the carriers do not derive sufficient revenue from their commercial activities, passenger and express services, to enable them to operate at a reasonable profit. Thus, in order to permit of the maintenance and development of an air transportation system in accordance with the recognized needs of the nation and the public interest, deficiencies in revenues from passenger and express services are to be made up through mail payments.[42]

The Civil Aeronautics Board is granted large discretionary powers in the fixing of air mail rates conforming with certain broad standards of "need";[43] these standards depart from the common judicial norm of a minimum-due-process base, which establishes as the test for fair and reasonable rates the covering of costs incident to providing the particular service plus a fair return on the investment utilized in rendering the service. The Act in defining a carrier's need goes beyond any such barely compensatory rate minimum and enjoins not only payments for the mail service but also the payment of substantial amounts to cover deficits from passenger and express services.[44]

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[41] Pan American Airways (of Del.) (Trans-Atlantic Mail Rates) 1 C. C. A. 220, 253 (1939).

[42] Chicago & Southern Airlines (Mail Rates for Routes Nos. 8 and 53) 3 C. A. B. 161 (1941). It is said at 188: "The Interstate Commerce Committee of both houses of Congress were well aware of the potential subsidy features of the 'need' provision in Section 406 (b), when the Act was being considered in bill form." *Also see* Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 54 (1939) where the Authority outlined the policy with respect to air mail rates.

[43] Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 54 (1939); Continental Air Lines (Mail Rates for Route No. 43), 1 C. A. A. 182, 188 (1939).

[44] Pan American Airways (of Del.) (Trans-Atlantic Mail Rates), 1 C. A. A. 220, 252 (1939); Pan American Airways Co. (of Nev.) (Mail Rates), 1 C. A. A. 385, 408 (1939).

The Board in its early cases was confronted in each instance by situations whereby the carriers were sustaining considerable losses from their commercial ventures before air mail pay. In these instances the body was, therefore, concerned with the fixing of air mail rates by determining the unfavorable balance between operating expenses and passenger and property revenues. The legitimate deficits incurred in the operations were ascertained and provision was made therefor. Thus, air mail payments sufficient to meet these deficits at a break-even level and an additional sum to assure a reasonable profit to the carrier were granted.

From the outset when the Board assumed its duties under the Act, it has directed its policies with respect to air mail compensation toward the development of an air transportation system conforming to the national objectives expressed. It has striven to expedite the attainment of economic stability so that dependency upon the government for air mail compensation in such sums as to amount to a subsidy might be eliminated.[45]

A. *Honest, Efficient, and Economical Management.*

In gauging an air carrier's need for mail compensation, the Board is called upon to analyze past and forecast future operating expenses, direct and indirect, in the light of the carrier's honest, economical, and efficient management.[46] This is required by statutory mandate. Costs occasioned by mismanagement are excluded from computations relative to air mail compensation.[47] Such a policy of determining need on a basis of honest, economical and efficient management recognizes and permits benefits to flow to the carrier exercising managerial efficiency, and on the other hand deters unreasonable expenses resulting from uneconomic management by disallowing the costs incident thereto in calculating mail

[45] Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 55 (1939); Pan American Airways Co. (of Del.) (Trans-Atlantic Mail Rates), 1 C. A. A. 220, 254 (1939).

[46] See FIRST ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY, 21 (1939).

[47] Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 49 (1939).

rates. A vigorous and stimulating incentive is thereby prompted.[48]

In surveying managerial practices, consideration is taken of a carrier's "capital structure, its methods of financing and the results of its operations, its particular operating problems, and the efforts of the management toward their solution."[49] The Board scrutinizes the reasonableness of expenditures and costs, inquiring closely into carrier managerial policy in the course of its decisions. Examples are here considered.

The prediction of a mail rate upon an unreasonably high estimate of traffic and advertising expense has been disallowed; and where expenditures for this item may be justified from a developmental aspect, continuance of such expenditures is reasonable only if experience indicates a profitable return will be provided therefrom.[50]

A carrier's action in retiring preferred stock to the extent of 100% of the actual investment recognized at the time of its issuance and in paying of dividends from the sum derived from the sale of one of its air mail contracts was thought most unwise, especially since the carrier's working capital was depleted and no provision had been made to meet a federal income tax liability. The Authority decided that the carrier, immediately after such poor managerial judgment, should not succeed in showing "need" with respect to another of its air mail operations.[51]

The installation of larger and more expensive equipment is a matter left to the managerial judgment of the carrier, but the use of such equipment is only justified if it improves the economic position of the airline and serves the interests of commerce, the national defense, and the Postal Service as prescribed. The vol-

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[48] *Id.* at 55; Continental Airlines (Mail Rates for Route No. 43), 1 C. A. A. 182, 188 (1939); Inland Airlines, Inc. (Mail Rates), 1 C. A. A. 155, 157 (1939).

[49] Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 50 (1939); Pan American Airways (of Nev.) (Mail Rates), 1 C. A. A. 385, 390 (1939).

[50] Mid-Continent Airlines (Mail Rates), 1 C. A. A. 45, 52 (1939).

[51] Inland Airlines, Inc. (Mail Rates), 1 C. A. A. 155, 163 (1939).

ume of traffic accruing therefrom should be sufficient to support the added expense.[52]

Where depreciation charges have been estimated by a carrier at an excessive figure, the Board has determined air mail compensation only to an extent confirmed by "experience with the type of equipment to be used."[53] Increases of salaries to airlines' officers not believed to be warranted have been excluded from calculations.[54] Although the Board's policy is not one of disapproving experimentation in reduced passenger and express fares in order to attract additional traffic and to improve the economic position of the industry, any such modifications that are unreasonable reflect upon the efficiency of management.[55]

Expenses incident to the development of new routes or the extension of existing routes are to be included within air mail compensation, although the carrier has the burden of proving the reasonableness and the purpose of such expenses, and if the carrier does not present sufficient data to permit of a finding of the reasonableness, their consideration will be excluded for rate-making purposes.[56]

A petitioner contended in an air mail rate case that the Board had not taken cognizance of the honesty, economy and efficiency of its management in fixing its air mail rates; that greater incomes had been allowed through air mail compensation for carriers whose operations, while comparable from the standpoint of scope and type of equipment utilized, were conducted at a higher cost than the petitioner's. The Board retorted:

> "It is, however, difficult to make any absolute comparison between operations of air carriers subject to our jurisdiction because of the existence of varying factors which influence both revenues and expenses.

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[52] Mid-Continent Airlines (Mail Rates for Route No. 48), 2 C. A. B. 392, 397 (1940); Continental Airlines (Mail Rates—Routes Nos. 29 and 43), 2 C. A. B. 683, 689 (1941).

[53] Braniff Airways, Inc. (Mail Rates), 1 C. A. A. 353, 356 (1939).

[54] *Id.* at 363.

[55] Northwest Airlines, Inc. (Mail Rates), 1 C. A. A. 275, 283 (1939).

[56] Pa. Central Airlines Corp. (Mail Rates), 4 C. A. B. 22, 33-35 (1942). Also see ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 18 (1943).

> Differences in the territory through which the carriers operate, the volume of traffic handled, and the revenues per mile accrued are all factors which bear upon the cost."[57]

It must be noted that it is not the intention of Congress or the Board functioning under the Act to superimpose governmental management upon the airlines.[58] An inquiry is made into the carriers' managerial policy as it is clear that the government does not wish to assume the burden of mismanagement, and the carriers acting either on their own initiative or under the direction of the Board, within the limits of its jurisdiction, must establish a managerial policy which produces the greatest benefit to the public interest from public monies expended. The Board has expressed itself to the effect that such an inquiry is—

> "... not for the purpose of invading proper managerial discretion, (of the carriers) but with the object of encouraging a progressive, efficient management which will be characterized by a constant effort to increase commercial revenues, thereby resulting in the attainment of an increasing measure of commercial self-sufficiency."[59]

B. *Services Allowable.*

The Act departs from the narrow concept established by prior legislation which disallowed in the calculation of air mail compensation the inclusion of losses from schedules and routes upon which the air mail was not carried.[60] In the fixing of air mail compensation to cover losses from non-mail schedules, it has been stated that the language of Section 406 (b) manifestly included a consideration of such schedules as well as designated mail operations in computing rates; and that deficits would be made up if these non-mail schedules were operated under an honest, economical and efficient management and moreover were justified by the requirements of commerce and the national defense.

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[57] Braniff Airways, Inc. (Mail Rates Proceeding), 2 C. A. B. 555, 582 (1941).

[58] Mid-Continent Airlines (Mail Rates), 1 C. C. A. 45, 49 (1939).

[59] FIRST ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY, 21 (1939).

[60] Pa. Central Airlines Corp. (Mail Rates) 1 C. A. A. 436, 446 (1939).

"It becomes necessary to consider the total number of schedules operated by petitioner in the light of the requirements of commerce and of the national defense.

"In determining the mail rates herein, allowance is made not only for the expenses and revenues incident to the operation of schedules required solely in the interests of the Postal Service, but also for the expenses and revenues incident to the operation of all additional schedules found to be required in the interests of commerce or the national defense, or both."[61]

On the other hand, cost arising from non-mail schedules in excess of the above requirements are outside the pale and are excluded from all compensatory considerations.[62]

As all expenses and revenues from schedules required by the interests of commerce or the national defense are considered in determining the amount of mail compensation to fulfill the carriers' need, no added expense accrues to the Post Office Department if all schedules so blanketed by the Board in its computations are designated for air mail carriage, and in such instances the Postmaster General designates as an air mail schedule any schedule so considered by the Board in its calculations. This results in definite benefits to the Postal Service by providing for more frequent mail service.[63]

In its determinations of governmental support through air mail compensation of these non-mail schedules, the Board speaks of measuring the requirements of commerce—whether or not the schedule is required in the interests of commerce as determined by the "response made by commerce to the service as offered."[64]

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[61] United Airlines, Inc., Transport Corp. (Mail Rates), 1 C. A. A. 752, 754 (1940).

[62] It has been said in this respect: "It is equally clear that non-pay mail operations in excess of such requirements (Commerce of the U. S., Postal Service, and National Defense) are to be excluded from consideration in the determination of the rate. It is impossible to accept a concept of rate determination which would result in a blanket assumption by the Government of losses resulting from the operation of non-pay mail mileage, and would leave to the sole discretion of the carrier the determination of the amount of such mileage that should be flown. The Act does not contemplate any such consequence." Northwest Airlines (Mail Rates), 1 C. A. A. 275, 279-280 (1939).

[63] United Air Lines, Inc., Transport Corp. (Mail Rates), 1 C. A. A. 752, 754 (1940).

[64] Braniff Airways, Inc. (Mail Rates), 1 C. A. A. 353, 361 (1939); Northwest Airlines, Inc. (Mail Rates), 1 C. A. A. 275, 283 (1939).

This appraisal suggests a determination of the public need relative to the issuance of a certificate of public convenience and necessity, but it is not to be confused with such a proceeding and is to be distinguished from it. Here the consideration and appraisal of the volume of traffic goes to the allowance or disallowance of non-mail schedules only as far as the determination of air mail rates is concerned. It does not involve the disallowance of operations over any schedule whose expenses are not included in mail compensation. Such continued operation lies within the discretion of the carrier, just as does the discontinuances of any schedule which the carrier feels not to be justified. However, in order to discontinue any schedule designated as a mail schedule permission must first be obtained from the Postmaster General. Furthermore, any discontinuance of schedules is always subject to the carrier's duty to continue to furnish adequate services to points named in its certificate.[65]

The Board has dealt with cases arising where exclusive passenger and property routes, as distinguished from schedules, were operated by a carrier, such routes not being designated by the Postmaster General as mail schedules. These exclusively commercial routes are treated in the same way as non-mail schedules. This is illustrated by the *Chicago and Southern Airlines* rate case.[66] There, the carrier requested that an allowance be made in air mail computation not only for route A, which was designated by the Postmaster General as an air mail schedule, but also for route B which was limited to the transportation of persons and property only, although authorization had been granted by the Board to transport mail over the route. The Postmaster General intervened and contended that even though route B had been certificated for the transportation of mail and was therefore available to the mail service, such action created no duty on the part of the Post Office Department to compensate for any part of the operating expenses

[65] United Air Lines, Inc., Transport Corp. (Mail Rates), 1 C. A. A. 752, 762 (1940).

[66] Chicago & Southern Air Lines, Inc. (Mail Rates for Routes Nos. 8 and 53), 3 C. A. B. 161, 190 (1941).

of that route. The issue then presented was whether or not the Board could cover operating costs by mail compensation on a route devoted to exclusive commercial services in fixing rates for the transportation of mail over the entire system. The Board reasoned that the Act prescribed no narrow route concept, but to the contrary authorized and permitted such inclusions.

> "The new act of 1938 discarded the route concept and established in its place the air carrier as the primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation.... The 'need' is that of the air carrier as a whole and not that of any particular geographical division of its operations."[67]

Therefore, any route or segment certificated is to be supported if serving the needs of commerce or the national defense and the Board is not confined to a consideration solely of revenues and expenses upon routes on which air mail alone is transported. This interpretation led to the fixing of rates of compensation based upon the carriers' systems as a whole and thus eliminated much of the detail previously involved, by doing away with the necessity of fixing rates for individual routes.[68]

In the earlier cases the mail rate was, for the most part, fixed at a base rate of cents per airplane mile for the first 300 pounds or fraction thereof, plus a percentage of this base rate for each additional 25 pounds of mail or fraction thereof on schedules upon which the mail was transported, such rate to be applied to direct airport-to-airport mileage as the basis for computation.

Later the Board in order to enable the Post Office Department to use certain non-mail schedules, modified its air mail orders so as to provide for an automatic rate adjustment by fixing rates on a sliding scale. Non-mail schedules operated by the carriers which had not been considered by the Board in computing its rate of mail compensation could not be utilized by the Post Office Depart-

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[67] *Ibid.*

[68] American Airlines, Inc. (Mail Rates), 3 C. A. B. 323, 342 (1942).

ment for air mail carriage unless the carrier was compensated for any additional mail mileage at the existing mail rate. This brought about inconveniences for, although the mail service as provided by the designated air mail schedules might be adequate, still, benefits would accrue to the Postal Service if these non-mail schedules were available for the carriage of air mail. The carriers would also benefit, in many instances, for the use of non-mail schedules would allow for the spreading of the mail load over additional schedules and obviate the necessity at times of limiting the space available for other types of traffic. The Board then ordered a sliding rate scale which would permit the use of such schedules without substantially changing the total amounts paid to the carrier.[69]

C. *Earnings and Return on Investment.*

Attention has been given herein to the granting of amounts through air mail compensation in order to make up operating deficits at a break-even level. But in addition to break-even amounts the carrier is entitled to a reasonable profit.[70] There is no rigid criterion in establishing the reasonableness of profits as variances ensue with respect to differing times and conditions. Earnings may be unreasonably high or unreasonably low for certain periods of time, but the standard of fair and reasonable rates is complied with if "the average earnings over a reasonably extended period reach a fair level."[71] In providing return to the carriers, the Board

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[69] *Id.* at 357. "This automatic variation will be accomplished in accordance with the principles laid down in the show-cause orders issued by the Board on February 19, 1942, with respect to all existing rate orders, by varying the base rate of payment per mile flown with mail in inverse proportion to the ratio of the average daily schedule mileage represented by schedules actually designated by the Postmaster General for the carriage of mail to the base mileage established in the order; and by varying the base poundage, from its normal figure of 300 pounds, in the same ratio."

See also THE ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 25, 26 (1942) and Braniff Airways, Inc. (Automatic Rate Adjustment), 3 C. A. B. 420 (1942).

[70] Mid-Continent Airlines, Inc. (Mail Rates—Routes Nos. 26 and 48), 3 C. A. B. 464, 472 (1942); Inland Air Lines, Inc. (Mail Rates for Routes Nos. 28 and 35), 3 C. A. B. 491, 498 (1940).

[71] Braniff Airways, Inc. (Mail Rates—Routes Nos. 9, 15 and 50); 3 C. A. B. 633, 636 (1942).

has stressed the recognition of efficiency so as to provide an incentive and impulse toward self-sufficiency and thereby reduce airline dependency upon the government.[72]

As indicated earlier, the Board, in the great majority of cases, has refused to apply the usual rule of a fair return on the investment or property utilized in the transportation services as a basis for rate determination. The Act does not subscribe to any such method of rate compensation and the Board has departed from this orthodox test in the fixing of air mail compensation.[73] The matter was first discussed in the *Trans-Atlantic* mail rate case when Pan American Airways sought to earn an annual return of 10% on all its claimed investment. This was rejected by the Board. A minimum compensatory rate as prescribed by the Constitution would call only for a return on that part of the carrier's investment devoted to the mail service and under such a standard, an allocation of costs between the different services—mail on the one hand and commercial services on the other—would have been necessary. The Civil Aeronautics Act, in prescribing a fair and reasonable rate, recognizes the need of the carrier for added finances to cover costs and to provide a fair return on all services; and the carriers cannot be heard to complain that a rate is non-compensatory and denies due process when it is in excess of the minimum. The Board refused to apply the standard of a fair return upon the fair value of the property used and useful in the public service, as it believed such a standard to be economically and administratively unsound and one that has plagued and burdened other regulatory agencies in its application.[74] Nevertheless, the Board has held that a reasonable return on the carrier's entire investment used and useful for its transport services is one factor, among others, to be considered as to the reasonableness of allow-

[72] Chicago & Southern Air Lines, Inc. (Mail Rates for Routes Nos. 8 and 53), 3 C. A. B. 161, 190 (1941).

[73] Pan American Airways (of Del.) (Trans-Atlantic Mail Rates), 1 C. A. A. 220, 253 (1939).

[74] See ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 17 (1943).

able profit.[75] A rate of return upon the actual legitimate investment is one item for consideration in deciding the net income to be permitted to the carrier, and weight is given to the funds legitimately devoted to the enterprise by the owners in determining the reasonableness of air mail rates. But the Board is not bound by any fixed rate base determined by cost of reproduction, going concern on investment, or other similar standards.

> "A specified return on a carrier's investment which would enable that carrier to earn an amount sufficient to cover its capital cost would not be an inflexible measure of the fair and reasonable rate contemplated by the Civil Aeronautics Act; it would, however, constitute significant and valuable evidence to be taken into account in connection with the determination of such rates."[76]

Other facts have been listed which offer evidence of the reasonableness of rates, for example "the relationship which the carrier's profit bears to its total revenue,"[77] and "the ratio between the carrier's investment and the volume of service rendered."[78] Moreover, "the susceptibility of the industry to large and unpredictable fluctuations of net operating income" is an element for consideration in reaching a conclusion regarding a fair rate.[79]

It should be noted that during the war, and as the Board stated, solely because of wartime conditions, a fair return on investment became, in some cases, the determining factor in providing for net operating income. However, the language of the decisions makes it clearly apparent that they are not to be taken as precedent inasmuch as the Board was looking toward future peacetime conditions when the incentives to develop the greatest possible commercial services would again be effective.

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[75] American Airlines, Inc. (Mail Rates), 3 C. A. B. 323, 337 (1942).

[76] *Ibid;* American Airlines (Mail Rates on Rehearing), 3 C. A. B. 770, 789 (1942).

[77] American Airlines, Inc. (Mail Rates), 3 C. A. B. 323, 337 (1942).

[78] *Ibid.*

[79] Delta Air Corp. (Mail Rates for Routes Nos. 24 and 54), 3 C. A. B. 261, 285 (1942).

"... in that future period the net earnings of such carriers as are in any degree dependent upon Government-support should again be established to reward carriers that display exceptional initiative in increasing the volume of their service and in improving the relation between the volume of service rendered and the amount of capital employed."[80]

It has further been determined that although the Act is broad in its implications relative to the development of air transportation, it was not the intention of Congress to provide, through air mail funds capital for the carriers' expansion other than incidentally, by providing a profit to the carriers which would serve to attract capital from private sources sufficient to meet their needs.[81]

D. *Retroactive Mail Rates and "Recapture."*

The Board is empowered, after fixing fair and reasonable air mail rates, "to make such rates effective from such date as it shall determine to be proper."[82] This provision was the cause of heated controversy in the "recapture" decisions.

A considerable amount of time usually elapses between the institution of proceedings in air mail compensation cases and the date on which the order is issued, and during such time mail payments continue. The question then arises whether the old or the new rate shall be effective during the pendency of the proceeding. The Board, under its power to make the rate retroactive, concluded that the rate should take effect at the time the petition was filed. This procedure was well and good with no challenges of such retroactive rate-making as long as the rate of mail pay was increased in each instance. But in the *American Airlines* case[83] a substantial period of time had elapsed during the pendency of the case and during this period increased volume of traffic had rendered the carrier a sizeable profit. The Board found these earnings to be an excessive return—a profit to the carrier in excess of that which

[80] Pan American Grace Airways, Inc. (Mail Rates), 3 C. A. B. 550, 590 (1942); Northeast Airlines, Inc. (Mail Rate Route No. 27), 4 C. A. B. 181, 189 (1943).

[81] American Airlines, Inc. (Mail Rates), 3 C. A. B. 323, 333 (1942).

[82] § 406 (a).

[83] American Airlines, Inc. (Mail Rates), 3 C. A. B. 323, 333 (1942).

might reasonably have been anticipated if fair and reasonable rates had been fixed at the beginning of the case. Therefore, a refund to the Government was in order—a sum of some $4,000,000 in this case alone. The Board determined that if air mail rates are not reasonable, but in fact greater than the revenues necessary to enable the carrier under honest, economical and efficient management to maintain and continue the development of air transportation pursuant to the mandate of the statute, such excesses should be scaled down to a reasonable level, the new rate made retroactive to the date of the institution of the proceeding, and the government thus allowed to "recapture."

In later "recapture" decisions[84] the Board modified this order and also reversed its decision as to American Airlines, although it reiterated its power to reduce rates and make them retroactive. In these cases it found that such retroactive rates calling for refunds to the government would be inconsistent with the public interest due to the harmful effect of such a policy upon the carrier during wartime conditions. It was also believed that the carriers would need reserves on hand to provide for possible pressing financial requirements after the war's end.

Although it decided not to enforce retroactive rates in these cases, the Board did place restrictions upon the use of these excess earnings where the carriers were not yet self-sufficient It was said that the monies were to serve the public need for air transportation and should be reinvested in the transportation service and were not to be devoted to the personal needs of the stockholders through dividend payments.[85] Moreover, until the carrier's operations were self-sufficient, these excess earnings were not to be considered as a part of its investment for the purposes of permitting a return thereon in mail rate determination. The Board said:

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[84] Pan American Grace Airways, Inc. (Mail Rates), 3 C. A. B. 550 (1942); Pan American Airways, Inc. (Latin American Mail Rates), 3 C. A. B. 657 (1942); American Airlines, Inc. (Mail Rates), 3 C. A. B. 770, 776 (1942).

[85] Pan American Grace Airways, Inc. (Mail Rates), 3 C. A. B. 550, 565 (1942).

"So long as the respondent's rates are based upon its financial needs in excess of a compensatory return, it is in no position to assert an equitable or legal claim for such a profit upon capital thus derived. Only when the company attains a commercially self-sustaining status and is paid for the carriage of the mail upon the basis of compensation for such service will the Board regard it as entitled to earn a return upon that part of its investment which had its source in excessive mail payments."[86]

E. *Self-Sufficiency of Carriers and the Determination of Air Mail Rates.*

Through increased volume of commercial traffic, several airlines found themselves in a prosperous financial condition toward the close of World War II. The return from passenger and express services yielded these lines sufficient revenue to meet their operating deficits not only at a break-even level but also in amounts adequate to insure substantial profits. The Board was then confronted with the problem of fixing mail rates to cover only those costs incident to the operation of the mail service and to provide a reasonable profit upon that part of the carrier's investment used and useful for that service alone for, as the carrier had reached self-sufficiency, an amount necessary to meet deficits of revenue in passenger and property services was no longer required.

It therefore became necessary to allocate costs and investment devoted to the mail service separately from that devoted to passenger and property services. All expenses attributable to the commercial services alone, such as expenses for airport passenger and ticket agents, consolidated ticket office expenses, expenses for traffic and advertising, and the like, were allocated to commercial services. Other operating expenses were allocated to both mail

[86] *Id.* at 566 in relation to this problem of "recapture" see two editorials *'Recapture' Air Mail Pay for American Airlines*, 13 J. AIR L. 140 (1942); *More About 'Recapture' Air Mail Pay*, 13 J. AIR L. 321 (1942).

The Board has determined it has no legal authority to fix rates retroactively for a period during which a final rate has been in effect, where such final rate has not been challenged by the introduction of a revisionary mail rate proceeding. *See* Pa. Central Airlines Corp. (Mail Rates) and TWA, Inc. (Mail Rates) (Serial Nos. E-1032 and E-1033), 2 C. C. H. AV.. LAW REP. ¶ 21,072 (1947).

and commercial services "on the basis of the ratio existing between the pound-miles of mail service and the pound-miles of commercial service rendered."[87] In determining such a minimum rate, the carrier is also entitled to a reasonable profit or return on investment devoted to the mail service, so it was necessary to make an allocation in this respect also. This allocation was carried out on the same basis. The Board, in basing its determination on a weight allocation, fully recognized that certain other methods might also be employed to reflect costs, such as the space used, etc. It was not rigid in its viewpoint here, stating that no method of allocation could be depended upon to represent an absolute science, and in fixing its rate, account was taken of the uncertainties and fallibilities involved in this method of cost allocation.

The rate fixed of .3 mills per pound mile or 60 cents per ton mile goes beyond a minimum compensatory rate. The Board said there were other reasons present why the rates could be fixed in excess of the minimum.

1. "No serious governmental financial problem would result if the mail rate is somewhat higher than the minimum . . . because the United States through the Post Office Department receives more from users of mail service than is paid by the United States through the Post Office Department to this carrier by way of compensation.

2. "There are various operating practices imposed on account of the mail service which are not adantageous to the passenger service.

3. "Comparison of earnings on the basis of a common denominator of service is an accepted standard in measuring transportation rates. . . . There is no support on the present record, however, and no sound reason now apparent for a conclusion that earnings under a rate which respondent has no power to initiate for a service which it is required to perform should be substantially less than its reasonable earnings from other traffic.

4. "It is only reasonable that the mail should continue to aid even a self-sufficient carrier in a trend which can be expected to result in

[87] Eastern Airlines (Mail Rates), 3 C. A. B. 733, 753 (1942). This problem is discussed fully therein.

greater revenues from non-mail sources and thus on the weight basis of allocation in further decrease in the mail costs."[88]

In 1945 the four largest domestic mail carriers were placed on a service rate of 45 cents per ton mile. The rate was made uniform since there was an overall similarity of costs and operating patterns of the carriers involved, and the setting of such uniform rates would provide, it was believed, incentives for economy and efficiency.[89]

Airline self-sufficiency from commercial services has of course been the aim of the Civil Aeronautics Board from the beginning. The volume of passenger traffic has grown astoundingly.[90] From 1942 through 1945 the revenues of many airlines from commercial services were sufficient to cover costs and provide profits so that mail rates could be based upon amounts sufficient to provide a reasonable return for the rendering of the mail service only. The goal of the Board seemed to have been attained. This public acceptance of air transportation produced rosy optimism, and high estimates of ever-increasing volumes of traffic were made. However, during the last half of the year 1946, the volume of traffic declined sharply due in part to a series of very disastrous airplane crashes here and abroad. Operating costs are up and in some quarters it is thought that the airlines have purchased an excessive number of aircraft and also in other respects have overexpanded too quickly. In any event, through a combination of factors, the sixteen domestic trunk lines suffered great losses in

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[88] *Id.* at 757-759.

[89] Eastern Air Lines, Mail Rate, 6 C. A. B. 551 (1945); American Airlines, Mail Rate, 6 C. A. B. 567 (1945); United Air Lines, Mail Rate, 6 C. A. B. 581 (1945); TWA, Mail Rate, 6 C. A. B. 595 (1945).

[90] See Chart, Operating Revenues and Expenses, Mileages and Traffic Statistics for the fiscal year 1940 through 1945 included within the ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD (1945), Appendix D, 28. It is shown there that the total miles flown by domestic carriers in 1940 was 99,473,678 as compared with 186,244,384 in 1945; number of revenue passengers in 1940, 2,240,023—in 1945, 5,137,877; and pound miles of express in 1940, 5,989,693,788—45,191,644,447 in 1945. For articles pertaining to the subject of air mail rates see Neal *supra* note 23 and Altschul, *supra* note 2.

1946 and 1947.[91] As a consequence of losses there has been a clamoring for higher mail rates.

In April 1948 the Board offered increased air mail rates to the five largest domestic carriers. This action was taken in order to give the unsubsidized service rate air carriers additional mail compensation to meet increased operating costs and lower load factors. The formula designed was based on a uniform service rate; block rates were set, beginning at 75 cents a ton mile for the first 2,500 ton miles of mail per day, declining 5 cents per block until 40 cents is reached for the block, 30,000 and over ton miles of mail per day.[92]

The fixing of mail rates for the feeder airlines has also occupied the attention of the Board. Certain carriers of this short haul, local service type were granted certificates of public convenience and necessity to operate in air transportation. Therefore it became necessary to prescribe a mail rate based upon a "need" standard inasmuch as the feeder airlines were and are not self-sufficient. In the *Pioneer Airlines* case a sliding incentive basis was adopted by which a maximum rate was fixed to decline when the passenger load factor rises above a minimum. Under such an arrangement net revenues will increase as the carrier develops its non-mail air traffic.[93]

Business Practices

The Civil Aeronautics Act rounds out its economic control of the air carrier industry by providing authority to regulate the busi-

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[91] See *Survival in the Air Age*, a Report by the President's Air Policy Commission, 99 (1948) where it is stated that the domestic airlines lost approximately $22,000,000 in the fiscal year ending June 30, 1947. See also the Annual Report of the Civil Aeronautics Board, 9 (1947).

[92] Tentative Findings and Conclusions in the "Big 5" Mail Rate Case, Serial Nos. E-1351-55 (March 29, 1948). See also Aviation Week v. 48, No. 16, p. 14 (April 19, 1948); Aviation Week v. 48, No. 17, p. 37 (April 26, 1948).

[93] Pioneer Airlines Inc. (Mail Rates) (C. A. B. Docket No. 2002, July 2, 1947) 2 C. C. H. Av. Law Rep. ¶ 21,038 (1947). See also, The Annual Report of the Civil Aeronautics Board, 11 (1947). A sliding scale mail rate has been applied to trunk line carriers also. Continental Air Lines Inc. (Mail Rates) (Docket No. 2682, Serial No. E-1072, Dec. 19, 1947); Braniff Airways, Inc. (Serial No. E-2129) 2 C. C. H. Av. Law Rep. ¶ 2129 (1948); Delta Air Lines, Inc. (Serial No. E-2130) 2 C. C. H. Av. Law Rep. ¶ 21130 (1948).

ness practices of the airlines. The Board is empowered to regulate the air carrier's accounting methods;[94] consolidations, mergers, and acquisitions of control;[95] interlocking relationships;[96] loans;[97] methods of competition;[98] and agreements between carriers.[99] Under these sections of the statute the issues of competition and monopoly become of vast significance. In those proceedings where certificates of public convenience and necessity are requested, the regulatory body is interested in limiting the number of air carriers in the field of air transportation to prevent wasteful and uneconomic competition in the form of needless duplication of routes. Here, the problem becomes one bearing on the prevention of those close interrelationships between the carriers themselves which lead to consolidations of economic power which might suppress competition in such a manner as to retard the development of air transportation in contravention of the public interest.

A. *Consolidations, Mergers, and Acquisitions of Control.*

Consolidations, mergers, and acquisitions of control by air carriers, common carriers and air carriers, or any person engaged in any phase of aeronautics are prohibited by the Act and made unlawful unless approval is granted therefor by the Civil Aeronautics Board. The Board is to approve such practices after notice and hearing and a finding that they are consistent with the public interest. However, its discretion is severely restricted inasmuch as

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[94] § 407.

[95] § 408 (a) and (b).

[96] § 409 (a).

[97] § 410.

[98] § 411.

[99] § 412 (a) and (b). Other sections relative to business practice are: 409 (b) which makes it unlawful for an officer or director of an air carrier to receive profit from the sale of securities issued by the carrier; Section 414 which empowers the Board to exempt any air carrier from the anti-trust laws when necessary to do so in order to comply with the Board's orders under Sections 408, 409, and 412; Section 415 which grants authority to inquire into air carrier management; Section 416 (a) confers authority to classify air carriers into groups and to make reasonable rules to be observed by each class or group; and Section 416 (b) which provides power to exempt air carriers from the provisions of Title IV or any regulation made thereunder which would unduly burden the carrier.

it is governed by a proviso to Section 408 (b) stating that it 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 consolidation, merger, purchase, lease, operating contract, or acquisition of control."

There are, then, two paramount problems to be decided in these cases.[100]

1. Is the proposed merger or consolidation within the public interest?

2. Will the proposed merger or consolidation result in a monopoly and thereby restrain competition or jeopardize another carrier not a party thereto?

In regard to the first problem, the Board is guided in its decisions by those standards prescribed in the Declaration of Policy, which are equally applicable to cases involving applications for certificates of convenience and necessity. A balanced competition is to be maintained in air transportation to the extent required for the attainment of the stated objectives: the development of an air transportation system to meet the present and future needs of the commerce of the country, the national defense, and the Postal Service; any acquisition of control of one air carrier by another tending to stifle competition so as to hinder such development is adjudged detrimental to the public interest.[101]

In its first acquisition of control case, the Board was faced with the problem of a proposed merger and its prospective restraining of competition. There, approval was sought to effectuate the merger of Western Air Express with United Airlines.[102] It was shown that

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[100] United Airlines Transport Corp. and Western Air Express Corp.—Interchange of Equipment, 1 C. A. A. 723, 728 (1940).

[101] United Airlines Transport Corp.—Acquisition of Western Air Express, 1 C. A. A. 739, 745 (1940).

[102] *Ibid.*

certain definite advantages in the public interest would accrue if the merger were approved; however, these advantages were not of sufficient weight to offset the disadvantages which would arise, for the proposed merger would so increase the size and control of United as to make it the predominant air carrier in the region, thus giving it a competitive advantage in obtaining business. The Board said:

> "It is the concentration of ownership and control which is fatal to the operation of a competitive economy. To allow one air carrier to obtain control of air transportation in the West coast area greatly in excess of that possessed by competitors would, in our opinion, seriously endanger the develpment of a properly balanced air-transportation system in this region . . ."[103]

Furthermore, it was thought unwise, from a competitive standpoint, to eliminate Western which was the only local company operating a north-south route in the area west of the Rocky Mountains. Such elimination would be contrary to a balanced system of air transportation, for it was to be expected that a local carrier would develop local business to a greater degree than a transcontinental carrier.

As the proposed merger was found to be outside the public interest, on the above grounds, the Board concluded that there was no necessity to consider the proviso of Section 408 (b) relative to monopoly. Apparently, therefore, the proviso is only a supplemental condition to the question of public interest and it would seemingly follow that even though the public interest would be served by a proposed acquisition of control, if the arrangement violates the proviso by creating a monopoly in air transportation, the acquisition or merger must be disapproved. On the other hand, if, as in the case at bar, the arrangement is contrary to the public interest and approval is withheld, no consideration of the proviso is necessary, though it must be understood that the factor of

[103] *Id.* at 750.

restraint of competition is also an element to be considered in determining the public interest.

In a case decided the same day between the same two parties relative to an interchange of equipment agreement,[104] the proviso was discussed in detail. The case concerned an agreement providing for the leasing by the companies to each other of sleeper aircraft owned by them respectively. By such action through service could be provided, as a change of planes which caused inconvenience to sleeper passengers would be eliminated. TWA intervened, contending that the arrangement would give United a virtual monopoly.

The improvement in service and the elimination of inconvenience to passengers was deemed to be in the public interest, not inconsistent with it. The Board then turned its attention to the question whether the agreement resulted in the creation of a monopoly and thereby restrained competition or jeopardized another air carrier not a party thereto. In construing the statutory proviso, it was determined that any merger, acquisition of control, combination, lease, operating contract "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 or monopolies."[105] A broad definition of the term "monopoly," as "embracing any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public,"[106] was rejected. The Board accepted as applicable a definition of "monopoly" which rendered a meaning to the term as "a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country."[107]

The interchange of equipment agreement was found not to give

[104] United Airlines Transport Corp. and Western Air Express Corp.—Interchange of Equipment, 1 C. A. A. 723 (1940).

[105] *Id.* at 737.

[106] *Id.* at 733.

[107] *Id.* at 734.

United control or dominance of Western;[108] it did not violate the terms of the proviso by creating a monopoly in air transportation; and as it benefited the public interest it was approved.

Decisions in accord with the principles of these two cases were rendered in later cases, the Board considering closely the issue of monopoly in restraint of competition which might be a consequence of any proposed merger. Where TWA sought approval for its acquisition of Marquette Airlines, a finding was made that the acquisition of control would promote the public interest to the extent that certain improvements in service and development of the traffic potential of the area would ensue. It was ascertained that by the acquisition, TWA would not gain the "degree of control of air transportation or some phase thereof within a particular section of the country, necessary to constitute a monopoly therein,"[109] as it would be subjected to competition from another trans-continental air carrier at each point on its route.

In the *Acquisition of Inland Airlines by Western Airlines* case,[110] the two carriers in question served different areas not competing with each other. Because of this there could be no monopoly resulting or any lessening of air service to the general public through an elimination of competitive services.

The acquisition of Mirow Air Service by Wien Alaska Airlines[111] was approved even though by such acquisition Wien became the largest operator in the territory. It was concluded that monopoly would not result for other carriers continued to offer competing services in the area. But in subsequent cases, as in the *Acquisition of Western* case, mergers were denied where the result would have

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[108] *Id.* at 735. "There is no evidence of record indicating that Western is controlled by United or that the latter dictates the managerial policies of the former. No Western stock is owned by United or its officers and directors, and no United stock is owned by Western or its officers and directors, and there is no provision in the agreement for any change in stock ownership."

[109] Acquisition of Marquette by TWA, 2 C. A. B. 1, 9 (1940).

[110] Western Air Lines, Inc. (Acquisition of Inland Air Lines, Inc.) 4 C. A. B. 654 (1944).

[111] Wien Alaska Airlines, Inc. Sigrid Wien and Mirow Air Service. Acquisition of Mirow Air Service, 3 C. A. B. 207 (1941).

increased in large degree one carrier's competitive advantage in the region, so as to stifle competition and retard "the development of a proper competitive balance."[112]

In the *American Airlines Acquisition of Control of Mid-Continent Airlines* case,[113] the Board denied the proposed merger since it was felt that such merger would violate the public interest requirement on two grounds. First it was believed that the systems of the two carriers were so uncomplimentary that their merger would not create an integrated pattern, and second, the acquisition of control by American would produce a great diversion of traffic from other airlines "as to be inconsistent with sound economic conditions in air transportation and would impair the competition . . . requisite to assure the development and maintenance of an adequate air transportation system."[114]

A further problem is involved in these acquisition cases. If the acquisition is approved, a transfer of the certificate of public convenience and necessity is involved. This also requires approval by the Board, such approval being predicated upon consistency with the public interest.[115] The acquisition of Marquette by TWA[116] is illustrative. There, as stated previously, certain public benefits would be conferred by the acquisition and the agreement did not violate the monopoly proviso, but it was found that the price to be paid by TWA as embodied in the agreement was excessive when considered in relation to Marquette's rather limited assets. Since the amount to be paid was fifteen times the value of the tangible property, it seemed clear that a big part of the proposed payment was to effectuate the transfer of the certificate.

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[112] *See* Acquisition of Cordova Air Service by Alaska Air Lines, 4 C. A. B. 709, 712 (1944). *See also* Alaska Airlines, Service to Anchorage, 3 C. A. B. 522 (1942) wherein Pan American's proposed acquisition of Lavery Airways was refused because it would adversely affect in great measure another air carrier, Star Air Lines, if it were forced to compete with Pan American in the same territory.

[113] American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C. A. B. 365 (1946).

[114] *Id.* at 379.

[115] § 401 (1).

[116] Acquisition of Marquette by TWA, 2 C. A. B. 1 (1940).

The Board declared that a certificate of public convenience and necessity should not be "treated as if it were a speculative security."[117] Such an excessive price would be contrary to the public interest as it would tend to exhaust or reduce the purchasers' assets, which might have as a consequence the impairment of service or an increased financial obligation on the public. The purchaser airline would offset such an extravagant price through increased mail payments or increased commercial fares. The acquisition was therefore denied.

The agreement was then modified by the carriers concerned and the price scaled down, although the modified price was still excessive in relation to tangible assets. In a supplemental opinion the acquisition was approved. There was a divided opinion, however, among the members on the question whether or not the value of the certificate or the right to operate the route should be included in the purchase price. The majority took the affirmative position but held that such value should be considered only for the purpose of the sale and not for rate-making purposes. It was said:

> "It is clear that in the sale of the property of an air line the value of the right to operate the route is an element which the parties necessarily take into consideration in determining the price which they are willing, respectively, to receive and pay. The existence of such value in the exchange of property, as distinguished from value for rate-making purposes, has long been recognized by the courts and regulatory commissions."[118]

The dissenting member held to the conclusion that the value of the operating right should not be included in the purchase price as he believed such would result in placing an "additional burden upon the public, through the allowance of speculative transactions."[119]

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[117] *Id.* at 14.

[118] Acquisition of Marquette by TWA (Supplemental Opinion), 2 C. A. B. 409, 412 (1940).

[119] *Id.* at 419.

B. *Control of an Air Carrier by a Surface Carrier.*

Section 408 is applicable not only to consolidations, mergers, and acquisitions of control of air carriers; it applies with equal force to any other common carrier seeking to acquire control of an air carrier. Thus, any such arrangement between an air carrier and a carrier engaged in another form of transportation is unlawful unless approved by the Board. In order to grant approval, as stipulated in a second proviso of Section 408 (b), a finding is required to be made that the transaction will "promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." The rights of surface carriers to engage in air transportation are, therefore, vitally affected by these provisions and the manner in which they have been construed. This issue leads directly to the decisions in the much discussed *American Export Airlines* cases. American Export Airlines was organized in 1937 by American Export Lines, a steamship company, which held 70 per cent of the former's stock. The airlines, as a subsidiary of the steamship company, then applied to the Civil Aeronautics Board for a certificate of public convenience and necessity authorizing it to engage in air transportation across the Atlantic to European points. It also sought approval of the control by the parent steamship company under Section 408, if the Board found such to be necessary.[120] Pan American Airways, already operating a transatlantic service, intervened and claimed that the certificate should not be issued as its own existing service was adequate, and further that the acquisition of control of the applicant by the steamship company must be approved in accord with Section 408 prior to the issuance of a certificate. The Board disagreed with Pan American; granted a temporary certificate to the applicant; and dismissed the application filed under Section 408. The section was construed as applicable "only where the acquisition of control of a corporate entity occurs at a time when

[120] American Export Airlines, Inc. (Trans-Atlantic Service) 2 C. A. B. 16 (1940).

that entity is already an air carrier."[121] The applicant was not an air carrier at the time of the acquisition and could not be an air carrier until a certificate of convenience and necessity was issued and it undertook to engage in air transportation. The words "to acquire control of an air carrier" used in Section 408 (a)(5) were taken to mean just that, and not the acquisition of some nebulous organization, newly formed, with no particular status yet conferred. To reiterate, as the applicant was not an air carrier at the time the steamship company obtained control, no acquisition within the meaning of the statute had occurred and consequently the Board was without jurisdiction over the relationship.

Pan American Airways then appealed to the United States Circuit Court of Appeals.[122] The Court reversed the Board's decision pertaining to the application under Section 408 and remanded the case for a determination on the merits. The Court, agreeing with Mr. Ryan who had dissented from the Board's decision, took the view that the Board did have jurisdiction to rule on the acquisition of control, and that its action in dismissing the application was an "unduly literal interpretation of subdivision (5)."[123] It was determined that the language used therein "to acquire control of any air carrier in any manner whatsoever" included all the steps or series of events resulting in the control of the applicant by the steamship company.

The Court pointed out the anomaly which would have resulted from the Board's decision, for it was apparent that under such a decision it would be possible for any surface carrier to form a subsidiary, wholly controlled by it, for the purpose of engaging in air transportation and thus circumvent the requirements of Section 408 (b). It would be strange to require the Board's approval for an acquisition of control by a surface carrier over an existing carrier and not require it when control is acquired

[121] *Id.* at 46.

[122] Pan American Airways Co. v. Civil Aeronautics Board and American Export Airlines, Inc., 121 F. (2d) 810 (C. C. A. 2d 1941).

[123] *Id.* at 815.

prior to the time the entity becomes an air carrier. As far as the public interest is concerned, the results are the same, for control of an air carrier has been acquired in one way or another.

In the subsequent proceeding,[124] the Board was then required to approve the control of the applicant by the parent company if it found such control to be in accord with Section 408 (b). The acquisition of control was disapproved as it did not meet the conditions set forth in the second proviso. It was declared:

> "... this proviso is extremely restrictive and only those limited air transport services which are auxiliary and supplemental to other transport operations, and which are therefore incidental thereto, can meet the conditions laid down by that proviso."[125]

As the air transport services of the subsidiary airlines were not auxiliary and supplemental to the steamship operations, the steamship company was required to divest itself of control of the air carrier.

But the Board did not stop with the finding that surface carriers entering the field of air transportation through subsidiaries, whether by acquisition of an existing carrier or by organization of a subsidiary intended to function as an air carrier, must meet the requirements of Section 408 (b). It was further determined that a carrier engaged in other forms of transportation seeking to enter air transportation directly, in its own name, must meet these same requirements. Such a construction was felt to be necessary due to the broad interpretation placed upon the pertinent sections by the Court of Circuit Appeals. The Board said:

> "Under this construction of the statute no sound basis appears for distinguishing between an undertaking of a carrier engaged in another form of transportation to engage in air transportation through a subsidiary and its undertaking to engage in the air transportation field directly.... It seems clear that Congress must have intended the same principles to apply to both situations because there is no sound basis

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[124] American Export Airlines, Inc.—American Export Lines Control—American Export Airlines, 3 C. A. B. 619 (1942).

[125] *Id.* at 624.

for distinguishing between these situations so far as the public interest is concerned."[126]

Thus, when a surface carrier applies for a certificate of public convenience and necessity to engage in air transportation, it must show in relation to the public convenience and necessity, as a condition to the issuance of a certificate, that there is compliance with the proviso of Section 408 (b).

In a supplemental opinion[127] where American Export Airlines contended that the acquisition of control did meet the second proviso of Section 408 (b), the Board again withheld its approval stating that "the air service is not an integral part of the steamship operation but constitutes instead an alternative means of transportation to the steamship service from point of origin to destination."[128] The Board elaborated its opinion that it had long been the intent of Congress that the various forms of transportation should be independent of each other. Because of this long-established policy and the fact that such congressional intent was also embodied in the language of the Civil Aeronautics Act, a construction severely limiting the entrance of other forms of transportation into the air carrier industry was justified.

Thus a surface carrier must show, in accord with the second proviso of Section 408 (b), that its proposed air transport operations will promote the public interest by enabling the surface carrier to use aircraft to public advantage in its operations. As construed by the Board only those air transport operations which are supplemental, auxiliary or incidental to the surface carrier's other transport operations can meet the test. It is therefore doubted whether any considerable number of carriers by water or by land can qualify.[129]

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[126] *Id.* at 625.

[127] American Export Lines, Control of American Export Airlines (Supplemental Opinion) 4 C. A. B. 104 (1943).

[128] *Id.* at 109.

[129] It may be noted that Section 408 does not apply to an acquisition of control by surface carriers or air carriers prior to the effective date of the Act. The Board stated in Boston & Maine & Maine Central Railroads, Control—Northeast Airlines, Inc., 4

The Board's interpretation was criticized and it was stated that it erred in requiring such compliance with the second proviso, especially in those cases where surface carriers are desirous of directly engaging in air transportation and there is no question of acquisition of control. The conclusion that Congress intended that surface carriers were to be excluded in such a manner from air transportation was disputed. The critics believe that Congress intended entrance by surface carriers to the same extent as the railroads have been permitted to enter the field of motor transportation.[130]

The Board has now partially retreated from its former stand at the behest of nine steamship companies petitioning for an investigation of the problem.[131] The Board reconsidered the question of the direct participation by surface carriers in air transport and overruled the dictum which required a surface carrier to show as a condition to the issuance of a certificate of public convenience and necessity that there had been compliance with the proviso of Section 408 (b). No legal requirement was found to exist that a surface carrier proposing air transport operations must first meet the test of promoting the public interest by enabling the surface carrier to use aircraft to public advantage in its operations. Nevertheless the Board added that the policy as embodied in the test should be considered. The Board was required to limit the entry of surface carriers to those operations whereby the public interest would be promoted through the use of aircraft to public advantage in the carrier's surface transport unless the record revealed that service by a surface carrier was required even though it were a surface carrier. In other words the policy

C. A. B. 379, 386 (1943): "The courts do not favor constructions which give retroactive effect to legislation, and in the absence of language expressing a contrary intent, Section 408 must be construed as having only a prospective effect."

[130] See Baggett, "*Are Surface Carriers Grounded by Law?*" 31 VA. L. REV. 337 (1945). Also see Henry, "*Acquisition of Control of an Air Carrier by Another Common Carrier Under the Civil Aeronautics Act*," Editorial Note, 10 GEO. WASH. L. REV. 719 (1942).

[131] Petition of American President Lines, Ltd., et al. 2 C. C. H. Av. Law. Rep. ¶ 21,011 (1947).

as embodied in the proviso should be considered as one of the standards guiding the Board in its determination as to whether a certificate of public convenience and necessity should be granted. Such a construction was believed to be necessary because of the congressional and statutory intent to regulate carefully the engaging of surface carriers in air transportation.

C. *Interlocking Relationships.*

Section 409 (a) prohibits interlocking relationships. Stated broadly, the Act makes it unlawful for an officer or director of an air carrier or for a representative of such officer or director to be an officer, director, member or controlling stockholder in another air carrier, or any other common carrier or any person engaged in any phase of aeronautics unless the interlocking relationship is approved by the Board as not adverse to the public interest. The section does not require notice and hearing for the determination of the applications for approval of these relationships, hence many of them have been decided informally. Nevertheless, when doubt arises and the proceeding is considered vital to the public interest, formal hearings are held.[132]

As the Board has no precise standard to guide it in resolving the public interest other than the partial guide provided in Section 2, the Declaration of Policy, it has declared that it must proceed cautiously in exercising discretion in excepting any interlocking relationship from the prohibition of the section. Consequently, the applicant requesting approval for any such relationship is required to bear the burden of proof by an affirmative showing that the public interest will not be adversely affected by the proposed relationship.[133]

In passing upon those relationships in which an officer or director is common to both an air carrier and a person engaged in any

[132] See ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 18 (1941).

[133] Ames-Continental Air Lines, Interlocking Relationship, 1 C. C. A. 498, 500 (1939).

other phase of aeronautics,[134] it has been necessary to measure the breadth of the term, "any other phase of aeronautics."[135] Section 1 (1) of the Act defines aeronautics as the "science and art of flight." This definition when used in conjunction with the words, "any phase" would seem to include any business having only a remote relation with aviation. It was believed that Congress did not intend such a strict interpretation, and it has been concluded in this respect that—

> "Section 409 (a) of the Act was designed to protect the public interest in cases where such interest appears with reasonably clarity; and not to include cases where that interest is only very remotely involved."[136]

In these cases the Board is interested in determining whether or not an actual or potential conflict of interests will result by the approval of the interlocking relationship, such conflicts of interest being considered as adverse to the public interest. This is illustrated by the decision in the *Ames-Continental Airlines-Interlocking Relationship.*[137] There approval was requested in order to permit a director of Lockheed Aircraft Corporation to serve concurrently as a director of Continental Air Lines. Lockheed was a manufacturer of commercial aircraft from whom Continental had purchased in the past and intended to purchase in the future aircraft to be used in its air carrier operations. Although it was shown that the director in question had not participated in any negotiations for the purchase of planes, the application was refused on the grounds of conflict of interest between the air carrier and the aircraft manufacturer. It was believed that situations could possibly arise whereby a director common to both companies could be placed in an unfavorable position, thus being prevented from acting in the best interest of either concern. There was a

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[134] § 409 (a).

[135] Interlocking Relationship—W. A. Patterson, et al. 3 C. A. B. 711 (1942).

[136] *Id.* at 714.

[137] Ames-Continental Air Lines, Interlocking Relationship, 1 C. A. A. 498, 500 (1939).

danger of the possible payment of excessive price by the carrier through such a relationship as well as a possible limiting of the carrier's freedom in the choice of its equipment. The fact that no present unethical purpose was found to exist was by no means conclusive.

> "The fact remains that the type of relationship here sought to be created is such as to furnish a medium through which the desirable arms-length relationship between buyer and seller may be materially altered."[138]

An application was disapproved which would result in a common directorship between an air carrier and an air investment company, whose business was that of holding stocks of aviation enterprises.[139] There are marked hazards involved in such a relationship inasmuch as it would make possible abuses operating to the detriment of the carrier but benefiting the investment company, in that the common director would be enabled to disclose confidential carrier information to the company holding stocks of the carrier. Moreover, the director could influence air carrier policy in such a manner as to benefit the stock-holding company, and injure the air carrier.

Interlocking relationships between an air carrier and a concern whose business is the operation of an airport and flying school have been approved.[140] A conflict of interest was found not to exist where the relationship was between an air carrier and a manufacturer of military aircraft solely.[141] Again an application was held not adverse to the public interest where there was proposed a common directorship in an airline and a company organized to conduct studies and research to aid in the development of a phase of air transportation, air express and air cargo.[142]

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[138] *Id.* at 501.

[139] Cohu-TWA, Inc.—Interlocking Relationship, 1 C. A. A. 547 (1940).

[140] Darling-Canadian Colonial Airways, Inc.—Interlocking Relationships, 1 C. A. A. 641 (1940).

[141] Cohu-TWA, Inc.—Interlocking Relationship, 1 C. A. A. 547 (1940).

[142] Interlocking Relationship—W. A. Patterson, et al. 3 C. A. B. 711 (1942).

D. *Loans, Methods of Competition, and Agreements.*

The Board is given authority to approve or disapprove in whole or in part loans or other financial aid from the Federal Government to any air carrier,[143] and a loan is not to be made unless approval is granted—its terms and conditions to be prescribed by the Board. It has been decided that the type of equipment to be used is a managerial problem, and that when a loan is requested for the purposes of purchasing new equipment, managerial judgment as to the type of equipment should be permitted to control unless exercised contrary to the public interest.[144]

Section 411 is concerned with unfair methods and practices of competition and empowers the Board upon its own initiative or upon complaint of air carriers to investigate and determine whether or not such unfair practices are being pursued. If such is found to be true, a cease and desist order is to be issued after notice and hearing. The section applies only to unfair methods and practices committed or in the process of being committed; it is applicable "only to past or existing practices or methods of competition."[145]

Section 412 requires filing of all contracts between air carriers, air carriers and foreign air carriers, or other carriers and includes pooling agreements as well as other cooperative working arrangements. If not adverse to the public interest or in violation of the Act, these agreements are to be approved. It may be observed that both Sections 408 and 412 may be applicable to a given agreement in some instances. The pooling or interchange of equipment agreement entered into by Western Air Express and United Airlines is an example. Section 408 speaks in terms of an acquisition of control by one carrier of another; an intercorporate agreement such as a lease, purchase, or operating contract, providing for the operation of the properties "or

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[143] § 410.

[144] Northwest Airlines, Inc.—RFC Loan, 1 C. A. A. 60 (1939).

[145] United Airlines Transport Corp. and Western Express Corp., Interchange of Equipment, 1 C. A. A. 723, 725 (1940).

any substantial part thereof" of any air carrier, comes within its terms. Hence, if the agreement is one not inclusive of the operation of a substantial part of the properties, it is sufficient if it meets the public interest test of Section 412 (b). On the other hand, if a substantial part of the properties of an air carrier entering into the lease, purchase or operating contract is affected, a hearing must be held and the additional test of the first proviso in Section 408 (b) must be met, for there is greater possibility of control.[146]

An agreement between Pan American Airways, The Matson Navigation Company and Inter-Island Steam Navigation Company[147] involved a decision under Section 412. It was shown that Matson, the principal American steamship company in the Pacific area, controlled Inter-Island, also a steamship company which provided local Hawaiian steamship operations and which in turn controlled a local Hawaiian airline. The contract entered into by three companies prior to the enactment of the Act related to the formation of a jointly owned and operated local air service between the West Coast of the United States and Hawaii. It was determined that such a joint operation would be adverse to the public interest for, by a pooling of the resources of the three powerful corporations, they would be placed in such a strong position as to enable them to stifle present and future outside competition between the Coast and Hawaii.

Another objectionable feature of the contract was one whereby Pan American agreed not to conduct more flights between the West Coast and Hawaii than it did between Hawaii and points beyond. The Board concluded that the apportionment of territory in this manner would tend to restrain competition, and such a restraint would be adverse to the public interest. Moreover, disapproval was voiced of any agreement with provisions included, whereby the agents of another form of transportation were to be

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[146] *Id.* at 727.

[147] Pan American Airways, Inc.—Pan Amrican-Matson-Inter Island Contract, 3 C. A. B. 540 (1942).

appointed the exclusive agents for an airline in certain regions, inasmuch as it would give the agents of a rival form of transportation a great influence in the development of air transportation, and this was thought to be undesirable.

In two cases previously discussed, Section 412 was held applicable. In the *Airline Pass Agreement* case,[148] the agreement was not deemed adverse to the public interest test. On the contrary, such an agreement, having as its purpose the restricting of free or reduced rate passes, was considered to be in accord with the public interest. The other case was that of the *Air Travel Card*[149] agreement. It was adjudged there that such a plan would be in the public interest if certain modifications were carried out. One such modification thought to be necessary was the changing of a provision in the agreement prohibiting a carrier from soliciting as subscribers users of air transportation who were already subscribers through another air carrier. The Board felt that this provision would tend to curtail free competition.

The great majority of these agreements are disposed of by routine filing after careful scrutiny to see if action should be taken in the public interest. They are generally of two classes —those between individual carriers relating to their problems of operation, or those to which all carriers subscribe in order to inaugurate certain uniform actions as exemplified by the resolutions of the Air Traffic Conference or the Air Transport Association of America.[150]

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These regulations regarding business practices in the main strike at monopoly and it seems evident that Congress in drafting the Act intended that there should be no substantial monopoly in air transport. In line with Section 2 stating that the Board should consider competition to the extent necessary to assure the sound

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[148] Airline Pass Agreement, 1 C. A. A. 677 (1940).

[149] Air Transport Discount Investigation, 3 C. A. B. 242 (1942).

[150] ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD, 29 (1942).

development of air transportation in determining the public interest, the Civil Aeronautics Board has adopted its policy of balanced competition both as regards the issuance of certificates for new routes or extensions of existing routes and its approval of these intercorporate relationships between carriers. Acquisitions of controls and mergers of airlines have not been viewed with favor in the past if competition were lessened thereby. However, due to financial difficulties of certain of the smaller air carriers at the present time, there is indication that such mergers may be permitted in order to strengthen the air system and to prevent the weaker carriers from plunging into bankruptcy.[151] The query may then be raised as to the lengths the Board can go in approving mergers. As far as the public interest is concerned there is no absolute prohibition of decrease in competition to the point of monopoly if the public need is served thereby. Section 2 cannot be construed to require competition or to prohibit monopoly. Nevertheless, as has been shown, any merger must meet the proviso of Section 408 (b) and the Board's interpretation thereunder which prohibits monopoly in restraint of competition. Thus the Board will be checkmated in approving any merger creating such a monopoly even though it is found to be in the public interest.

It is too early to venture an opinion, for as mentioned earlier, the slump in airline business may be only temporary. If this proves to be true, the airlines now operating in the red may well overcome their difficulties, thus alleviating the necessity for such action.

It has been said that because of the great improvements and advancements made in aviation during the period of World War II, the Civil Aeronautics Act is already outmoded for the air world as it exists today and as it will exist in the future.[152] If

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[151] See an article entitled *The Airline Squeeze*, Fortune, v. 35, 117 (May 1947); Time, Feb. 24, 1947, p. 92.

[152] See *Domestic Air Transportation*, 1 EDITORIAL RESEARCH REPORTS, 393 (1944).

this proves to be the case, and if the situation cannot be coped with under the present enactment, it is hoped that whatever legislation follows, will accomplish as much for the air transportation of tomorrow as the present statute has accomplished since its inception.