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LICENSING OF DOMESTIC AIR TRANSPORTATION†

BY WILLIAM K. JONES††

PART I

I. INTRODUCTION

THIS study is concerned with the licensing of domestic air transport operations by the Civil Aeronautics Board. The issuance of permits to foreign airlines to operate in the United States and the certification of United States carriers to engage in international and overseas operations have been excluded. The unique problems presented by such international aspects require participation by federal instrumentalities other than the Board and would enlarge considerably the scope of the study. It should be noted, however, that there are many common elements in domestic and international certification proceedings.

As in the study of ICC truck licensing, this work begins with a consideration of the substantive policies and economic factors relating to airline licensing: the needs the licensing process must fulfill and the conditions under which it must operate (Chapters II, III, and IV). Attention is then directed to the manner in which the process is organized (Chapter V), the successive steps involved in processing formal route cases (Chapter VI), and the instances in which operating authority is granted pursuant to informal procedures (Chapter VII). And in order to facilitate an understanding of how the over-all process works, a single route proceeding, the St. Louis-Southeast Service case, is followed from beginning to end (Chapter VIII). The descriptive materials conclude with a summary of processing times and volume of CAB licensing matters (Chapter IX).

The remainder of the study is devoted to proposals to improve the licensing process—some recommended and others not (Part II).

Among the recommendations here advanced are suggestions directed at (1) the articulation of findings in initiating route proceedings, (2) the methods by which the scope of route proceedings is defined, (3) delegations of decisional authority in formal proceedings, (4) the role of staff assistance in reaching decisions and preparing opinions at the Board level, and (5) the separation of various components of the Board’s staff from

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one another. Recommendations are summarized in Chapter XI. Consideration has been given also to (a) the role of cross-examination in route proceedings, and (b) the degree of hearing examiner "independence" from the Board (Part II); but no definite recommendations concerning these matters have been advanced in this report.

II. THE FRAMEWORK OF FEDERAL LICENSING OF COMMERCIAL AVIATION

Licensing functions relating to commercial aviation are divided between two federal instrumentalities: the Civil Aeronautics Board and the Federal Aviation Agency. The Agency has primary responsibility for the licensing of equipment, personnel, and facilities in order to assure safety in both commercial and noncommercial air operations. Its functions are beyond the scope of this study. The Board has the primary responsibility for economic regulation of commercial air carriers, including the licensing of new operations by such carriers. The Board's approval is required to transport persons or property in interstate commerce as a "common carrier" by air. The CAB has broadly construed the scope of "common carrier," so that virtually all commercial aviation is subject to its licensing authority. Even so, the Board now seeks legislation which would subject air "contract carriers" to its economic controls.

A. THE BACKGROUND OF THE LICENSING PROVISIONS

The statutory framework of contemporary economic licensing emerged in the Civil Aeronautics Act of 1938, the successor of a number of federal statutes which had defined in varying ways the role of the federal government in shaping the economic regime of air transportation. The 1938 legislation attempted to provide a comprehensive framework of federal control over domestic commercial aviation by giving the Civil Aeronautics Authority (later the CAB) power to:

1. Control entry into air transportation by common carriers engaged in interstate commerce;
2. Control mergers and other relations among such air carriers and either (a) other transportation media or (b) other aeronautics companies;
3. Regulate both the maximum and minimum rates of such air carriers;
4. Award subsidies, in the form of mail pay, to such air carriers; and
5. Require adequate service by such air carriers, and otherwise regulate their operations.

The background of the act was a financial crisis in the air transport industry in the late 1930's. For a number of reasons, most air carriers were in serious financial difficulties, some on the verge of bankruptcy. Another cause for concern was the high degree of concentration in the

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3 One significant exception is Pacific Southwest Airlines, an intrastate air carrier not subject to the Board's licensing authority. See Pacific-Southwest Local Services case, CAB Order No. E-17930 (Jan. 23, 1962) (hereinafter referred to by the number only).
6 For a detailed consideration of the legislative history of the Civil Aeronautics Act of 1938, see W. K. Jones, Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis, 19 A.B.A. Antitrust Section 261, 300—312 (1961).
industry in 1938. The Big Four carriers—American, United, TWA, and Eastern—accounted for roughly eighty per cent of revenue passenger-miles and industry operating revenues. The bulk of the remaining scheduled operations were in the hands of seven additional companies; and there were about ten other, very small domestic scheduled airlines. Unscheduled operators were not then economically significant.

Congress reviewed the situation with alarm, but the exact dimensions of its fears are somewhat difficult to describe:

Would the financial crisis bankrupt all or such a large part of the industry that air transportation would vanish from the scene or be substantially diminished?

Would the larger airlines force the smaller carriers to the wall, leaving an air transportation industry concentrated in the hands of the few large survivors?

Would smaller operators invade the field in large numbers, with second-hand equipment and low-wage pilots, and drive out the established operators with their more expensive equipment and high overhead systems?

Would the airline system that emerged from the crisis be one which was sufficiently well developed to meet the needs of national defense, sufficiently modern and expensive to meet the demands of national pride, sufficiently stable in its growth to protect the investments and wages of existing entrepreneurs and employees, sufficiently profitable in its operations to assure sustained and costly attention to improvement of air safety, and sufficiently broad in its scope to provide service on low-density as well as high-density routes?

If not united with one another as to the cause for concern, the proponents of more comprehensive air carrier regulation at least found unity in their fear of an uncharted future. The common agreement was that all of the unpleasant prospects that were worrying any of the affected interests should be the subject of regulatory concern.

B. Statutory Standards For Air Carrier Licensing

The diverse and sometimes conflicting motivations of the various congressional proponents found their way into the act itself. The Board is directed to

consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers:

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

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
(e) The promotion of safety in air commerce; and
(f) The promotion, encouragement, and development of civil aeronautics.

The licensing provisions of the act were viewed as the most significant in carrying out these purposes. They were three in number.

First, there was a grandfather provision assuring certification for air carriers in operation in 1938 unless their services were "inadequate and inefficient." 8

Second, new common carrier operations might be certificated if, after notice and hearing, the Board found (1) that the applicant was "fit, willing, and able to perform such transportation properly, and to conform to the provisions of the act and the rules, regulations, and requirements" thereunder, and (2) that the transportation was "required by the public convenience and necessity." 9

Finally the Board was empowered to exempt from all or part of the act or any regulations thereunder "any air carrier or class of air carriers" if it found that the enforcement of any such measures "would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest." 10

While perhaps not of great significance at the outset, the provision has been widely utilized as a source of operating authority. The Board is presently seeking legislation to broaden and clarify its exemption powers. 11

In addition, the licensing of air carriers was influenced by the provision governing subsidy, which provided that each carrier would receive mail pay, over and above the cost of carrying the mail, "sufficient . . . 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." 12 In effect, the certificated carrier is assured reimbursement of costs and a reasonable return on its investment for services considered by the Board to be in the public interest. The subsidy element is distinguished from "service mail pay," which is based on the costs of transporting the mail. The two are now stated separately in making payments, 13 and the Board has been seeking legislation requiring even greater separation between these mail pay items. 14

C. Components Of The Air Transportation Industry

Within this statutory framework, the domestic air transportation industry has developed in its several distinct branches.

The domestic carriers in existence in 1938 have become known as the domestic trunkline carriers. Principally, they serve long-haul markets and heavily traveled segments between major cities. 15 However, they also serve a number of minor points, including some low-density, short-haul markets.

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No trunkline carrier has received mail pay subsidy for several years,\textsuperscript{18} and the Board has proposed legislation which would make them ineligible for subsidy.\textsuperscript{19} No carriers, other than the original grandfather lines, have been certificated to engage in domestic trunkline service.\textsuperscript{20} There remain eleven carriers in this group. The group continues to be characterized by considerable discrepancy in size between the Big Four and the seven smaller trunklines.

During the 1940's there developed a number of additional lines, designed principally to connect smaller population centers with one another and with nearby major cities. Later described as local service carriers,\textsuperscript{21} these lines originally received only temporary authority and their status was regarded as experimental.\textsuperscript{22} In 1955, Congress conferred limited grandfather rights on these airlines with the result that permanent certificates replaced many of the temporary authorizations.\textsuperscript{23} Subsidized since their inception, the local service carriers consume the largest share of current subsidy—estimated at 58.9 million dollars for fiscal 1961 for the thirteen local service carriers operating within the continental United States.\textsuperscript{24}

The grant of statehood to Alaska and Hawaii has resulted in the reclassification of a number of territorial carriers as local service carriers.\textsuperscript{25} Two such carriers operate wholly within Hawaii with the benefit of subsidy. Eleven airlines operate within Alaska: one is ineligible for subsidy, one was not subsidized in fiscal 1961 though eligible, and the nine remaining received subsidy. The total subsidy for Alaskan and Hawaiian carriers for fiscal 1961 is estimated at 9.6 million dollars.\textsuperscript{26}

After World War II, there arose a group of non-scheduled airlines, operating under general exemptions previously promulgated by the Board.\textsuperscript{27} After first attempting to suppress their operations,\textsuperscript{28} the Board in 1955 decided that there was room in the air transportation industry for a class of carriers which did not maintain regular route patterns but specialized in charter operations and in limited, individually ticketed flights required by peak traffic demands.\textsuperscript{29} The non-scheduled airlines were originally described as large irregular carriers and are now known as supplemental air carriers. Successive efforts by the Board to authorize their operations on a permanent basis, first by exemption and then by certification, were reversed by the Court of Appeals for the District of Columbia.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{19}CAB Ann. Rep. 9 (1961).
  \item \textsuperscript{20}Hearings Before Antitrust Subcommittee of House Committee on Judiciary pursuant to H. Res. 107, 85th Cong., 1st Sess., 944-949 (1956).
  \item \textsuperscript{21}CAB Ann. Rep. 24 (1955).
  \item \textsuperscript{22}Service in Rocky Mountain States Area, 6 C.A.B. 695, 730 (1946).
  \item \textsuperscript{24}CAB Ann. Rep. 32 (1961).
  \item \textsuperscript{25}CAB Ann. Rep. 24 (1960).
  \item \textsuperscript{26}CAB Ann. Rep. 32 (1961). There is some overlap among the carrier classifications. One of the domestic trunklines—Continental—operates a local service system. And some trunkline services are rendered by two of the Alaskan carriers and by United States international carriers.
  \item \textsuperscript{27}Investigation of Nonscheduled Air Services, 6 C.A.B. 1049, 1050 (1946).
  \item \textsuperscript{28}Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950).
  \item \textsuperscript{29}Large Irregular Air Carrier Investigation, 22 C.A.B. 838 (1955).
\end{itemize}
time the status quo was maintained by interim legislation, and the Board deferred action on applications for new supplemental authority while more permanent legislative solutions were pending. New legislation has recently been enacted providing for the transition of supplemental carriers to essentially all-charter operations (although the statute also makes provision for grant of individually ticketed authority on a temporary basis). Meanwhile the existing supplementals, operating without mail pay subsidy, have been experiencing significant financial difficulties. There are only about twenty such carriers still in operation.

Also since World War II, the Board has certificated, initially on a temporarily basis, six all-cargo carriers to specialize in the movement of air freight. These carriers have been authorized to carry mail on a non-subsidy basis. Today only three all-cargo carriers remain. In a recent decision, the Board renewed two certificates on a permanent basis and one on a temporary basis; denial of mail pay subsidy was reaffirmed.

Finally, the Board has authorized three experimental helicopter carriers in different metropolitan areas. These receive subsidy under a congressionally imposed ceiling of six million dollars annually (estimated at 5.6 million dollars for fiscal 1961). Their prospects are uncertain at the present time. The Board also has authorized, by exemption, a class of air-taxi operators, unsubsidized enterprises using small planes for services not competitive with certificated operations employing helicopters or small aircraft.

III. CRITERIA FOR ENTRY INTO COMMERCIAL AVIATION: ROUTE CERTIFICATION

A. Preliminary Considerations

The statute requires that each applicant be "fit, willing, and able" (1) to perform properly the transportation for which authority is requested and (2) to conform to the various legal regulations of certificated operation.

The first element is met by showing (a) a proper organizational basis for the proposed operation, (b) adequate financial resources, and (c) a plan for conducting the air operation in question. The final requirement has been largely diluted in recent years because of the difficulty of ascertaining, until the end of the proceeding, exactly what operations will be authorized. In most instances, this element of fitness raises no problems.

The second aspect of fitness—conformity to regulatory requirements—is determined by looking to past performance. Deliberate violations of the
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statutes or regulations administered by the Board may be held to demonstrate a lack of compliance disposition and result in disqualification of the applicant. But the Board also considers the need for the applicant's service in passing on the question of qualification, and seemingly does not regard the bar created by past violations to be absolute. In practice, this ground has been invoked most significantly in denying route authority to unscheduled operators.

B. Public Convenience And Necessity

The determination of public convenience and necessity in route cases is thought to involve two major questions: (1) Should new service be authorized? (2) If so, by whom should the service be rendered? This two-step approach has some uses and some advantages, but formulation of the problem in these terms may be deceptive.

Preliminarily, it should be noted that the answer to both questions is related to the response to still another query: What is the nature of the primary air transportation market in which new authority is sought? Is it the kind of market in which local service is most appropriate? Or is trunkline service the more suitable? Since the answer to this inquiry is clear or assumed at the outset in many cases, the issue often is not explicitly raised.

1. Local Service Routes

If local service is involved, the route sought may well be one not previously served by any air carrier. Estimates will be made of the volume of traffic likely to be generated, and the importance of air service to communities on the route will be assessed. The crucial questions concern: (1) the cost of the various services sought, as rendered by different carriers, in terms of mail pay subsidy; and (2) the selection of carriers and communities which will provide a maximum of needed air transportation for a minimum of subsidy cost. The Board has adopted a policy of certificating doubtful points, whether on a temporary or permanent basis, subject to a "use it or lose it" policy, i.e., communities must enplane an average of five passengers daily over a twelve-month period (after the first six months of operation) or face loss of air service. Exceptions are made of special cases, where, because of isolation or defense considerations, service may be permitted despite light traffic. Utilization above the five passenger minimum may be so marginal as still to be questioned, and entire segments may be deleted if less than seven passengers per flight are averaged. The "use it or lose it" standards are applied in cases initiated by the Board and also in cases where authority to serve temporarily certificated points is sought to be renewed.

An effort is made to avoid competition among local service carriers and between local service and trunkline carriers. And the Board has been

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43 Landis, Report on Regulatory Agencies to the President-elect 41 (1960).
47 Seven States Area Investigation, E-13214 (Dec. 8, 1958).
entertaining a number of proposals to substitute local for trunkline service at smaller points.\(^4\)

The issues of "what new service?" and "which new carrier?" are closely related.\(^8\) A decision to provide service between a sequence of towns—A, B, and C—may lead to the selection of Carrier No. 1, since the service can most economically be added to its route pattern. This may mean that an additional town of a marginal sort—\(D\)—may also be served, since it is well situated with respect to the service Carrier No. 1 will render to A, B, and C. On the other hand, if Carrier No. 2 were selected to serve A, B, and C, the cost would be a little more, but points \(E\) and \(F\) could conveniently be added. As a practical matter therefore, the choice may be between: (1) Carrier No. 1, points A, B, C, and D, and a particular subsidy figure; and (2) Carrier No. 2, points A, B, C, \(E\), and \(F\), and a different subsidy figure. The possible variations are quite extensive when consideration is given to joining the new segment with the carrier's existing route pattern.

2. **Trunkline Routes**

With respect to trunkline carriers, the issues are somewhat different because (1) no direct subsidy costs are involved, and (2) competitive services may be authorized. In fact, most trunkline cases in recent years have involved applications for competitive service. Briefly summarized, the issues are likely to take this form:

(a) One or more markets will attract interest because of their substantial traffic, and a number of applications will be made seeking to participate in the traffic. The first question is whether the traffic is substantial enough to be likely to provide support for additional air service.\(^5\) No precise figure has been established to mark this likelihood. Recently, however, the Board considered whether to investigate markets in which competition had been eliminated by the merger of Capital and United,\(^6\) with a view to certificating a new competitive carrier. Investigation was ordered where Capital had been an effective competitor in markets exchanging an average of 100 or more passengers per day (but not in two 100-plus markets where Capital had not been an effective competitor). Probably this figure will vary widely depending on the general economic situation in the airline industry and the resolution of the next two considerations.

(b) If the supporting traffic is on the borderline, the Board is likely to consider the manner in which the incumbent has developed the route: frequency of schedules, availability of seats, type of equipment, promotional activities, development of coach service. If the incumbent scores high, doubts usually will be resolved against new service;\(^7\) if the score is low, new service may well be authorized.\(^8\) But it must be emphasized that this step is concerned only with resolving doubts. If both the traffic and

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\(^7\) Mississippi Valley case, 8 C.A.B. 726, 733 (1947); Chicago-Milwaukee-Twin Cities case, E-11890, (May 19, 1959).

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existing service are poor, the incumbent may be confronted with a directive to render adequate service rather than certification of a competitor. If both the traffic and existing service are good, a new carrier may be certified nonetheless.

(c) Another factor of significance, particularly in borderline situations, is the identity of the incumbent and the importance of the route to its financial well-being. The Board is likely to be less concerned about diverting traffic from one of the Big Four than from one of the smaller trunks or a local service carrier. In any proceeding the amount of probable diversion will be considered, and it may be controlling where it is substantial enough to threaten the financial position of a weak carrier (or to increase the subsidy need for a local service carrier).

(d) If the first three points, considered together, point to a new authorization, the Board considers the feasibility of service by various applicants. New service is not rendered in a vacuum, and the Board has to satisfy itself that one or more carriers are so situated with respect to routes, facilities, and equipment as to be able to conduct an economically feasible operation. As among the competing applicants who are eligible, a number of considerations are taken into account in making the selection:

(i) Integration of the new authority with the old is an important consideration. First, the convenient location of existing facilities may mean that the new service can be rendered more efficiently and economically. Second, the existence of traffic flows over existing routes, which can be channeled into the new routes, may permit more extensive and economical development of the new route, since traffic levels over the latter will be higher than that for other carriers. Third, the existence of the new authority may permit changes in scheduling and equipment utilization which will make possible improvement of service on the old routes.

(ii) Related to this is the applicant's "historic participation" in the traffic. In order to encourage carriers to build up traffic on their routes and to minimize disruption of existing traffic relations, the Board will give some weight to the carrier's prior participation in the traffic in question, either as a connecting carrier or a more circuitous carrier. Thus American recently was selected as a third nonstop carrier between New York and San Francisco because it had participated in the New York-San Francisco traffic on its transcontinental route through Chicago; Northwest, the rejected applicant, was a complete stranger to San Francisco.

(iii) Pointing in a different direction is the Board's policy of strengthening the smaller trunkline carriers, attempting to balance the industry

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56 Transcontinental and Western Air, Inc., Additional North-South California Service, 4 C.A.B. 373, 375 (1943); Southwest-Northeast Service case, 22 C.A.B. 52, 60 (1955).
57 Great Lakes-Southeast Service case, 27 C.A.B. 829, 830-841 (1958); Southern Transcontinental Service case, E-16500 (March 13, 1961), appeal pending.
58 Southern Transcontinental Service case, E-16500 (March 13, 1961), appeal pending.
62 Middle Atlantic Area case, 9 C.A.B. 131, 144 (1948).
by equalizing to some extent the strong and the weak. This may involve
the injection of a smaller trunkline, with a limited system, into an entirely
new market. This factor received particular emphasis in a series of de-
cisions in the mid-1950's which granted extensive new route authority
to the smaller trunklines, particularly in long-haul, high-density markets. Actually a similar attitude probably has been present in more generalized
form throughout the administration of the act. It is difficult to review a
series of route cases without coming to the conclusion that the Board is
endeavoring to distribute desirable routes among all the existing trunk-
lines, big and small, so that none will feel neglected. This may be described
as maintaining “balance” in the industry; but this approach also maintains
the status quo to a large extent and the good will of the existing carriers
toward the Board.

(iv) The Board also considers the operational policies of the different
carriers, choosing a specialist in coach service if that is the most glaring
deficiency in the market under consideration or choosing a regional carrier
if the traffic to be served lies wholly or primarily within that carrier’s
region. This probably is not one of the stronger factors, and it seems to
be advanced most often in support of decisions resting on other grounds.
The same observation may be made as regards many of the other factors
found in Board opinions.

(v) Finally, the Board has to consider what other services will be made
possible as an incident to selecting one carrier over another for the ma-
jor market needs. Each carrier has a different route system and, absent
express restriction, the carrier selected may render service between the
newly awarded points and any of its existing authorized points as long
as junction points are observed (mandatory stops where different routes
or segments are joined). Thus the selection of each carrier brings
with it different new services to and from other points on that carrier’s
routes. This may be good or bad. If the new combinations are worthy
of service and presently have none, this is a factor in the carrier’s favor. If
the new combinations already have ample service, and the addition of the
applicant will lead to “excessive” competition, this is a negative factor—
although one which may sometimes be eliminated by an appropriate re-
striction.

Once again, the questions of selection of route and selection of carrier
are intermingled. Although the issues may be divided for consideration,
the separation, while valid in terms of emphasis, is never complete. For
the choice in the last analysis is between one carrier with an existing route
system and a consequent “package” of city pairs which will be served, and
another carrier with a different route structure and a different “package”
of city pairs. Indeed, even the usual emphasis may be reversed, and instead

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65 New York-Chicago Service case, 22 C.A.B. 973 (1955); Denver Service case, 22 C.A.B.
66 Reopened Milwaukee-Chicago-New York Restriction case, 21 C.A.B. 760 (1955); New
67 Braniff Airways, Inc., Memphis-Oklahoma City-El Paso Service, 6 C.A.B. 169, 180 (1944);
69 Reopened Milwaukee-Chicago-New York Restriction case, 21 C.A.B. 760, 764 (1955); Service
by Western Air Lines, Inc. to Sioux Falls, South Dakota, 20 C.A.B. 757, 758 (1955); New
York-Chicago Service case, 22 C.A.B. 973 (1955); Southwest-Northeast Service case, 22
of starting with a route that needs a new carrier the Board may begin with a carrier that needs new route authority.

The more conventional cases coming under this heading are the route consolidation cases, where a carrier seeks the consolidation of separate routes by: (1) elimination of a junction point, making non-stop operation possible;\(^7\) (2) transformation of common points on separate routes into intermediate points on a single route for the same purpose;\(^7\) or (3) certification of a new intermediate point to unite separate routes into a single route.\(^7\) Where the consolidation will not result in duplication of existing service, the primary focus is on the effect of the applicant's proposal in reducing its costs and facilitating better service.\(^7\) Where duplication will result, the Board has required that a need for improved service be shown and that diversion from existing carriers be weighed against the factors favoring the route consolidation.\(^7\) Even so, the primary impetus for the new authority comes, not from the demand for new service, but from the carriers' attempt to achieve greater operating efficiency.

In a less conventional setting, the Board on occasion may have injected a new carrier into a route for reasons other than the need for new services on that route. Thus in 1956 the Board certificated Northeast\(^2\)—the only trunkline then still on subsidy—into the lucrative New York-Miami market for five years. To be sure, the Board found a need for additional competitive service. But the circumstances surrounding the case—the admittedly good development of the route by existing carriers, the rejection of other applicants with seemingly superior claims, and the limited duration of the certificate—all seem to indicate that the principal impetus for the certification was the desire to get Northeast off subsidy.

This summary does not purport to be complete, nor to exhaust the factors adduced by the Board in support of particular route awards. It does, however, indicate the major types of considerations frequently advanced in deciding route cases.

IV. THE ECONOMIC SIGNIFICANCE OF AIR CARRIER LICENSING

Domestic commercial aviation has made great strides since 1938. Even so, it remains today a highly specialized transportation medium, accounting for only a small minority of intercity freight and passenger traffic. Prospects for the future are the subject of considerable debate.

A. Development Of The Air Transportation Industry

In the twenty-one years from 1939 to 1960, the transportation of all forms of property by commercial air carrier within the United States increased 6,667 per cent from twelve million ton-miles\(^6\) to roughly 800 million ton-miles.\(^6\) But the 1960 shipments (including small quantities of private air transport) amounted to only 0.058 per cent of all intercity

\(^{71}\) American Airlines, Inc., Consolidation of Routes, 7 C.A.B. 137 (1946).
\(^{75}\) New York-Florida case, 24 C.A.B. 94 (1956).
freight movements.\textsuperscript{78} Over 99.9 per cent of intercity freight moved by rail, truck, water carrier, or pipeline.\textsuperscript{79}

In the same twenty-one year period, domestic air passenger travel on commercial aircraft increased almost 5,000 per cent from 683 million revenue passenger-miles\textsuperscript{80} to thirty-three billion revenue passenger-miles.\textsuperscript{81} But in 1960 the airlines accounted for only 4.38 per cent of all intercity passenger travel.\textsuperscript{82} The 1960 totals for domestic intercity passenger-miles are as follows:\textsuperscript{83}

<table>
<thead>
<tr>
<th>Transportation medium</th>
<th>Passenger-miles (millions)</th>
<th>Share of public transit</th>
<th>Share of total transit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Railroads</td>
<td>21,574</td>
<td>28.9</td>
<td>2.86</td>
</tr>
<tr>
<td>Motorbus</td>
<td>19,896</td>
<td>26.7</td>
<td>2.63</td>
</tr>
<tr>
<td>Waterways\textsuperscript{1}</td>
<td>2,068</td>
<td>.27</td>
<td>.27</td>
</tr>
<tr>
<td>Commercial airlines</td>
<td>33,035</td>
<td>44.3</td>
<td>4.38</td>
</tr>
<tr>
<td>Other aircraft</td>
<td>923</td>
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</tr>
<tr>
<td>Private automobiles</td>
<td>677,589</td>
<td></td>
<td>89.74</td>
</tr>
<tr>
<td>Total public transit</td>
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<td>100.0</td>
<td>9.77</td>
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<tr>
<td>Total private transit</td>
<td>680,580</td>
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<td>90.24</td>
</tr>
<tr>
<td>Total transit</td>
<td>755,085</td>
<td></td>
<td>100.0</td>
</tr>
</tbody>
</table>

\textsuperscript{1} Traffic on inland waterways is treated as private transit, since division between public and private is impracticable and the shares involved are extremely small.

As these figures indicate, the important characteristic of domestic air transport is the large share it holds of public intercity passenger traffic. The growth in this respect has been from 2.3 per cent in 1939\textsuperscript{84} to 44.3 per cent in 1960,\textsuperscript{85} giving commercial aviation a larger share of this traffic than any other form of public transport; much of this is believed to be business travel.\textsuperscript{86} The dominance of the private automobile, however, has limited the airlines’ share of total intercity passenger movements: the growth has been from 0.2 per cent in 1939\textsuperscript{87} to 4.38 per cent in 1960.\textsuperscript{88}

Within the domestic air transport industry, passenger and freight movements have been shared by the various components of the industry in the following proportions (figures are for fiscal 1961):\textsuperscript{89}
DOMESTIC LICENSING: THE CAB

<table>
<thead>
<tr>
<th>Component</th>
<th>Revenue passenger-miles</th>
<th>Share of total revenue passenger-miles</th>
<th>Cargo^1</th>
<th>Share of total cargo ton-miles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic trunkline</td>
<td>Billions</td>
<td>Billions</td>
<td>Millions</td>
<td>Millions</td>
</tr>
<tr>
<td></td>
<td>28.96</td>
<td>90.2</td>
<td>564.1</td>
<td>65.8</td>
</tr>
<tr>
<td>Local service and helicopter</td>
<td>1.24</td>
<td>3.8</td>
<td>11.2</td>
<td>1.3</td>
</tr>
<tr>
<td>All-cargo</td>
<td>1.92</td>
<td>6.0</td>
<td>147.9</td>
<td>17.3</td>
</tr>
<tr>
<td>Suplemental</td>
<td></td>
<td></td>
<td>1.92</td>
<td>6.0</td>
</tr>
<tr>
<td>Total</td>
<td>32.12</td>
<td>100.0</td>
<td>857.6</td>
<td>100.0</td>
</tr>
</tbody>
</table>

^1 Cargo ton-miles include freight, express, excess baggage, and mail. Movements wholly within Alaska and Hawaii have been excluded.

The following table shows the division of traffic among the eleven trunk-line carriers, in annual revenue passenger-miles, in shares of domestic trunkline traffic, and in shares of industry traffic.

<table>
<thead>
<tr>
<th>Trunkline carrier</th>
<th>Revenue passenger-miles (12 months ended Oct. 31, 1961)</th>
<th>Per cent of trunkline revenue passenger-miles</th>
<th>Per cent of industry revenue passenger-miles^1</th>
</tr>
</thead>
<tbody>
<tr>
<td>American</td>
<td>5,896,075</td>
<td>19.8</td>
<td>17.8</td>
</tr>
<tr>
<td>Braniff</td>
<td>1,049,349</td>
<td>3.6</td>
<td>3.2</td>
</tr>
<tr>
<td>Continental</td>
<td>880,196</td>
<td>3.0</td>
<td>2.7</td>
</tr>
<tr>
<td>Delta</td>
<td>2,127,421</td>
<td>7.2</td>
<td>6.5</td>
</tr>
<tr>
<td>Eastern</td>
<td>3,941,257</td>
<td>13.8</td>
<td>12.4</td>
</tr>
<tr>
<td>National</td>
<td>1,071,821</td>
<td>3.7</td>
<td>3.3</td>
</tr>
<tr>
<td>Northeast</td>
<td>723,791</td>
<td>2.5</td>
<td>2.3</td>
</tr>
<tr>
<td>Northwest</td>
<td>1,011,290</td>
<td>3.5</td>
<td>3.2</td>
</tr>
<tr>
<td>TWA</td>
<td>4,223,832</td>
<td>14.5</td>
<td>13.1</td>
</tr>
<tr>
<td>United^2</td>
<td>7,463,495</td>
<td>25.5</td>
<td>23.0</td>
</tr>
<tr>
<td>Western</td>
<td>839,295</td>
<td>2.9</td>
<td>2.6</td>
</tr>
<tr>
<td>Total</td>
<td>29,228,222</td>
<td>100.0</td>
<td>90.0</td>
</tr>
</tbody>
</table>

^1 Percentage of trunkline revenue passenger-miles was multiplied by 0.9, since trunklines account for approximately 90 per cent of industry revenue passenger-miles.

^2 Figures include traffic of Capital applicable to periods prior to Capital's merger with United on June 1, 1961.

The Big Four accounts for some 73.6 per cent of domestic trunkline passenger traffic and 66.3 per cent of the total domestic passenger traffic. These percentages may be compared with the eighty per cent share of the Big Four when regulation was first imposed in 1938. Despite the Board's policy of strengthening the weaker trunklines, the Big Four remain dominant both among the trunklines and in the industry as a whole. The modest dilution that has occurred in the Big Four's share of industry traffic is as much the consequence of introducing new components into the industry (local service and supplementals) as it is attributable to strengthening the weaker...
trunks. And yet the Board's policy of strengthening the weaker trunks, coupled with other factors, has led to extensive point-to-point competition among trunkline carriers.

In the following table there are set forth trunkline schedules for the 100 city-pairs accounting for the largest number of revenue passenger-miles in 1960. Some authorizations may be restricted, thereby limiting the number of schedules which may be offered by an individual carrier; in other instances authorizations may not be fully utilized.

<table>
<thead>
<tr>
<th>Number of trunklines offering schedules</th>
<th>Number and nature of city-pairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 or more nonstop</td>
<td>3 (the New York-Washington-Boston triangle).</td>
</tr>
<tr>
<td>4 nonstop</td>
<td>4 (3 in the top 10 city-pairs).</td>
</tr>
<tr>
<td>3 nonstop</td>
<td>22 (14 in the top 45 city-pairs).</td>
</tr>
<tr>
<td>2 nonstop, plus 1 or more significant 1-stop</td>
<td>8 (scattered).</td>
</tr>
<tr>
<td>2 nonstop, plus 1 or more significant 1-stop</td>
<td>23 (scattered).</td>
</tr>
<tr>
<td>1 nonstop, plus 1 or more significant 1-stop</td>
<td>17 (scattered).</td>
</tr>
<tr>
<td>More than 1 multistop</td>
<td>10 (7 in the bottom half of the 100 city-pairs).</td>
</tr>
<tr>
<td>1 nonstop</td>
<td>4 (all in bottom 22 city-pairs).</td>
</tr>
<tr>
<td>1 multistop</td>
<td>9 (7 in bottom 20 city-pairs).</td>
</tr>
</tbody>
</table>

To place these figures in perspective, consideration must be given to the nature of these city-pairs. Two factors are of importance:

1. The average number of revenue passengers moving over the segment each day—this indicates the density of the movement and has an obvious bearing on the practicability of multiple flights.
2. The total revenue passenger-miles moving over the segment annually—this indicates the general revenue potential of the route, since gross revenues vary roughly in proportion to revenue passenger-miles.

Of the 100 city-pairs which have the highest revenue passenger-miles and, therefore, the highest revenue potential, seventeen generated less than fifty passengers daily in each direction. If city-pairs are ranked in terms of density (revenue passengers) rather than revenue potential (revenue passenger-miles), the one hundredth shows an average daily passenger flow of only eighty-one in each direction. But this grouping contains many short hauls which generate less revenue because they account for fewer revenue passenger-miles.

Without attempting to set any precise outer limit, it is evident that there are not an unusually large number of routes which, under current traffic flows, are sufficiently lucrative (revenue passenger-miles) and sufficiently dense (revenue passengers) to support multiple carrier operations. Under either measure the point is soon reached where average daily traffic flows are well under 100 each way. With these figures comparison may be made to the capacities of modern aviation equipment: jets capable of

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83 The 100 city-pairs in order of passenger-mile rank were obtained from CAB, Domestic Origin-Destination Survey, Jan. 1 to Dec. 31, 1960, vol. 1-13, Table 4 (1961). The trunkline schedules for these city-pairs were obtained from Official Airline Guide, North Am. ed. (Sept. 1961).
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carrying between forty and 179 passengers,\textsuperscript{95} jet propeller craft with capacities ranging from forty to ninety-eight;\textsuperscript{96} large conventional aircraft with capacities between forty and ninety-five;\textsuperscript{97} and the venerable DC-3, which can carry twenty-one passengers.

It is possible, of course, for individual market flows to be combined by a multistop flight servicing several markets. But this too carries important implications: services in individual markets thus become closely interrelated, necessitating inquiries much broader than the service needs between various isolated pairs of cities. In any case, the domestic trunkline appears to be flying capacities which, at current passenger fares, substantially exceed the public's demand for accommodations. They reported that in 1961 they were able to fill only fifty-six per cent of available seats (a drop of 3.5 per cent from the previous year); and they ran losses amounting to roughly thirty million dollars.\textsuperscript{98}

The development of the domestic trunkline market since World War II is summarized in the next table, the numbered columns of which relate the following information: (1) domestic revenue passenger-miles of domestic trunklines in scheduled service;\textsuperscript{99} (2) percentage increase or decrease in such revenue passenger-miles over the previous year;\textsuperscript{100} (3) domestic route miles operated by domestic trunklines;\textsuperscript{101} (4) percentage increase or decrease in such route miles over the previous year; (5) total capital invested in domestic operations of domestic trunklines;\textsuperscript{102} (6) rate of return on such invested capital.\textsuperscript{103}

\begin{center}
\begin{tabular}{|c|c|c|c|c|c|}
\hline
Year & (1) & (2) & (3) & (4) & (5) & (6) \\
\hline
1945 & 3,336,278 & 54.4 & 42,486 & 11.0 & 256,937 & -1.91 \\
1946 & 5,903,111 & 76.9 & 58,168 & 6.0 & 299,439 & -4.57 \\
1947 & 6,016,237 & 1.9 & 61,066 & 6.96 & 319,132 & 1.74 \\
1948 & 5,840,211 & -2.9 & 54,622 & 1.88 & 321,218 & 1.74 \\
1949 & 6,570,726 & 12.1 & 51,643 & 1.88 & 321,218 & 1.74 \\
1950 & 7,766,008 & 18.2 & 56,072 & 7.7 & 341,744 & 12.31 \\
1951 & 10,210,726 & 31.5 & 55,867 & -3.6 & 353,248 & 13.44 \\
1952 & 10,120,739 & 4.7 & 55,483 & -0.1 & 347,421 & 14.19 \\
1953 & 12,297,181 & 18.0 & 54,523 & 1.90 & 486,208 & 11.22 \\
1954 & 16,234,638 & 33.1 & 54,314 & -0.31 & 532,470 & 11.21 \\
1955 & 18,205,671 & 18.5 & 54,997 & 6.96 & 553,761 & 11.85 \\
1956 & 21,641,140 & 12.7 & 58,376 & 6.11 & 711,159 & 9.57 \\
1957 & 24,499,510 & 13.2 & 60,693 & 3.97 & 903,668 & 4.80 \\
1958 & 24,437,617 & -3.3 & 61,341 & 1.07 & 1,006,858 & 6.49 \\
1959 & 28,127,216 & 15.1 & 63,396 & 3.31 & 1,326,673 & 7.12 \\
1960 & 29,233,199 & 3.9 & 63,265 & -0.21 & 1,579,640 & 2.79 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{95} Passengers: Boeing 707, 121-179; Boeing 720, 149; Convair 880, 84-110; DC-8, 118-176; Caravelle, 64-80. The figures in this and succeeding footnotes are taken from various editions of Jane's All the World's Aircraft.

\textsuperscript{96} Passengers: Fairchild F-27, 40; Lockheed Electra, 66-98; Vickers Viscount, 40-59.

\textsuperscript{97} Passengers: Convair 240, 44; Convair 340, 44; Convair 440, 44-52; DC-6, 82; DC-7, 95; Lockheed Constellation, 94; Lockheed Super G, 92; Martin 404, 40.

\textsuperscript{98} ATA Press Release, Jan. 1, 1962.


\textsuperscript{101} Letter from Mr. William Weinfeld, Chief, Research and Statistics Division, Office of Carrier Accounts and Statistics, Civil Aeronautics Board, to Professor W. K. Jones, dated Feb. 16, 1962.

\textsuperscript{102} This figure is the net certificated domestic route mileage of the domestic trunkline carriers, being a total of the shortest distance connecting all of the points served by each individual carrier on all of its routes along flight paths authorized in its certificate of public convenience and necessity. Duplication is removed for each carrier's routes but not as between different carriers. The data are weighted for the time element involved in route changes.

\textsuperscript{103} CAB, Handbook of Airline Statistics II-64 (1961).

\textsuperscript{104} The figures for 1946 through 1950 were obtained from the Initial Decision of Examiner Ralph
From columns (1), (3), and (5) it is evident that over the entire post-war period substantial growth has occurred in domestic trunkline traffic, route mileage and investment. But columns (2), (4), and (6) illustrate the erratic nature of this growth and the impact on domestic trunkline profits. While other factors, such as equipment capacity and operating expenses, undoubtedly affect the profit margins of the trunklines, it seems evident that traffic growth has a positive effect on such profits and new route mileage a negative effect.

B. Prospects For The Future

The probable direction of future air carrier licensing can be discussed in terms of the two major branches of the industry.

1. Local Service

Applications for the extension of local service operations place the Board between two significant political pressures. On the one hand, there is always opposition to lavish disbursements of the taxpayers’ money in the form of mail pay subsidy. The Board’s staff has been traditionally conservative on this issue. On the other hand, there is a strong desire for the extension of air service to smaller communities, particularly where satisfactory surface transportation is unavailable. These communities have articulate and forceful spokesmen in the Congress. The conflicting pressures probably will come to a head in the near future on two issues: deletion of communities presently receiving service, pursuant to the “use it or lose it” policy; and determination of applications for a subsidized “third-level” of air service to communities too small to be reached even by the local service carriers. To date the Board has received little guidance from the Congress on how far it should go in expending the taxpayers’ dollars for rural air service.

2. Trunklines

With the advent of the jets—with their faster speed and greater capacity—the trunkline network is overextended in many places, at least insofar as jet operations are concerned. The emphasis in coming years undoubtedly will be on transferring smaller cities to local service carriers rather than introducing trunkline service into new markets, although this is a highly controversial subject. There remains, however, the question of whether (and to what extent) competitive services should be authorized over segments admittedly suitable for trunkline operations. The present inclination on this issue appears to be decidedly negative. Its future resolution will probably depend on:

1. The magnitude of growth in traffic potential. At present traffic levels, there seems to be little room for additional competitive service with large-capacity equipment. Indeed, many of the markets which have such service are unusually “thin.”

2. Conclusions about elasticity of demand for air transportation. If the demand is highly elastic—i.e., many more passengers would travel at lower fares—present traffic levels are not decisive. Additional competition could be certificated to drive down fares and build up traffic. If, on the

L. Wiser in the General Passenger Fare Investigation, Doc. No. 8008 et al, Appendix No. 1, May 27, 1959. Figures for 1951 and later years were obtained from CAB, Handbook of Airline Statistics II-65 (1961).
other hand, demand is inelastic—i.e., about the same number of passengers would travel despite wide variations in fares—the benefits of extending competitive services are less evident. Competition in nonprice matters—schedules, equipment, service—can probably be effected by certifying two carriers over important routes (as measured by present traffic standards); and fares can be controlled by the Board. One difficulty is the lack of systematic knowledge about the elasticity of demand for air transportation, particularly as it concerns long-run consumer preferences related to general fare levels (as contrasted with the results of promotional fares in particular markets).

(3) The Board’s attitude toward subsidy. In addition to the overt subsidy received by local service carriers, it is generally recognized that many airline services are internally subsidized, i.e., the trunklines serve small cities or lean routes at a loss or with little profit and make up the difference by charging higher fares than are necessary on the more heavily traveled routes.100 If greater entry is permitted on the popular routes, profits earned there will be forced down, making it impossible for the trunks to subsidize internally their leaner routes. The Board has taken actions in recent years inconsistent with the concept of internal subsidy: certificating multiple carriers on monopoly routes formerly yielding high profits to the monopolist; substituting local service carriers for trunklines at smaller communities. On the other hand, the Board has sometimes awarded profitable routes to local service carriers to aid them in reducing subsidy100 and has begun to compel “adequate service” in lean markets neglected by recalcitrant trunklines.100 Perhaps the safest escape from the conflict between public subsidy costs and rural service demands is to augment the contributions of internal subsidy to leaner routes and to protect profitable routes to facilitate such contributions. The Board can justify this approach on the ground that internal cross-subsidization is a common ingredient of most regulated pricing and some unregulated pricing. But the significant appeal is the fact that a disguised tax and internal subsidy—in the form of protected profits on the more lucrative routes—is evidently more acceptable politically than the overt taxes which must be used to support government subsidies.

(4) The Board’s concern about industry profits. Protection of high profit routes may be needed to make feasible a policy of internal subsidization. Industry profits may also be an object of concern because of a number of other views: that high profits are essential to an adequate safety program; or that such profits are essential to the introduction of new equipment styles at a rapid pace; or that the Board is responsible for the “health” of the air carrier industry and that profits are a measure of such health. These attitudes are of course promoted by the degree of identification Board Members have with the industry. If these attitudes are strong, the tendency would be to protect profits from the depressing effects of additional competition. By contrast a policy more imbued with competitive spirit—willing to have prices and profits drop and to allow weaker or

100 Richmond, Regulation and Competition in Air Transportation 154-158 (1961).
100 Syracuse-New York City case, 24 C.A.B. 779 (1957); Pacific-Southwest Local Service case, E-17950 (Jan. 21, 1962).
ineffective carriers to fail—might point in the opposite direction. The situation may become confused, however, by a desire to preserve "competition" as concretely embodied in the smaller trunklines, and to do so by sheltering them from the adverse effects of the general decline in industry revenues that might be prompted by additional licensing.

All of these issues involve complex interrelationships of fact and policy. The factual elements are clearer in the first two; and the policy aspects predominate in the latter two. But policy outlook certainly colors factual appraisals; and factual premises or assumptions underlie the policy conclusions. The complexity of the relationships is difficult enough. More troubling is the extent to which the facts are in doubt—or largely unknowable—and the extent to which the important issues of public policy are left to resolution by the individual Board Member with little authoritative guidance from the Congress.

V. ORGANIZATION OF THE LICENSING PROCESS

The ultimate responsibility for authorizing new domestic air transportation rests with the Civil Aeronautics Board, an independent regulatory agency for five members appointed for staggered terms of six years each.\(^{107}\)

The tenures of the current members of the Board are 10.8 years, 5.6 years, 2.1 years, 2.1 years, and ten months (as of December 31, 1961). Their average tenure is 4.3 years; but it is only 2.9 years if the single ten-year member is excluded. The twenty-two prior Board members appointed since 1938 had tenures averaging 4.2 years; but the average is only 2.8 years if three members with ten or more years of service are excluded. The longest term recorded was 16.4 years. Three appointees served less than a year. More than half of the twenty-seven past and present members of the Board had experience in aviation regulation or in other economic regulation prior to their appointment to the Board: nine with the federal government, four with state governments, and three in nongovernmental positions. The remaining eleven evidently had no prior experience directly relevant to their duties on the Board.

Each Board member has one personal assistant—except the Chairman, who has two. These are ungraded 17,000 dollar employees, except for one with a GS-15 rating. Their average experience with the Board is 7.4 years.\(^{108}\) For additional professional assistance in the discharge of their many duties, Board members must look to the general staff. The staff components principally involved in licensing domestic air transportation are as follows:

A. Bureau Of Economic Regulation

Headed by a Director (GS-18, 20.4 years)\(^{109}\) and a Deputy Director (GS-17, 3.7 years),\(^{110}\) the Bureau is divided into three Divisions: (1) Rates, (2) Subsidy, and (3) Routes and Agreements.\(^{111}\) The Routes and

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\(^{108}\) Unless otherwise indicated, time with the Board is as of Dec. 1, 1961, and includes absences for military service.

\(^{109}\) Organization § 4.2; Delegations and Review of Action Under Delegation; Non-Hearing Matters, 14 C.F.R. § 385.12 (hereafter "Delegation").

\(^{110}\) Organization § 4.3.

\(^{111}\) Organization § 4.1.
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Agreements Division is the largest, and it plays an important role in the licensing of new air transportation. Its professional staff includes both lawyers and economic analysts. The Chief of the Division (GS-17, 14.3 years) is a lawyer. The Assistant Chief (GS-15, twenty years) is an analyst. The Routes and Agreement Division is divided into five components:

1. Legal Staff

There are twenty authorized positions for attorneys on the Legal Staff. Their functions are to act as Bureau Counsel in formal proceedings and to do other legal work connected with the processing of route cases. The eighteen attorneys currently employed range from the Chief of the Staff (GS-15, 10.1 years) and two attorneys with over fifteen years experience (GS-14 and 13), to three attorneys who are with the Board for less than a year (GS-9 and 11). There are two vacancies. Most of the attorneys are in the GS-11 to GS-13 range; their average time with the Board is 4.9 years.

2. Trunkline Section

There are fourteen authorized positions for analysts in the Trunkline Section. Their functions are to perform statistical and analytical work for the Division, process informal matters, prepare exhibits and act as expert witnesses in formal proceedings, and otherwise assist Bureau Counsel in such proceedings. In addition to domestic trunkline carriers, this section handles matters related to United States international carriers and foreign air carriers. Counting the Section Chief (GS-15, 19.9 years), there are seven analysts with ten or more years time with the Board. Only two have less than two years experience. There is one vacancy. Six analysts are GS-12 to GS-15; four are GS-11; and three are GS-7. The average tenure of all analysts is 9.5 years.

3. Local Service Section

There are sixteen authorized positions for analysts in this section. Their functions are similar to those of the Trunkline Section analysts except that they are concerned with local service carriers, helicopters, and territorial carriers. Including the Section Chief (GS-15, 17.9 years), there are six analysts with ten or more years time with the Board. Only one has less than two years experience. There are three vacancies. The personnel are divided into three groups of roughly equal size: GS-13 or higher, GS-11 and GS-12, and GS-7 and GS-9. Average tenure of all such analysts is 9.2 years.

4. Carrier Services Section

There are eight authorized positions for analysts in this section. Their functions are the same as the other analysts considered except that they are concerned principally with supplemental air carriers, charter authorizations, and freight forwarders. With the Section Chief (GS-15, 19.4 years), there are three analysts with ten or more years of experience. Only one has less than two years experience. There are two vacancies. Four of the analysts are GS-11, and two are GS-7. Their average tenure is 10.6 years.

112 Organization § 4.10.
113 Organization § 4.11; Delegation § 485.13.
114 Organization § 4.12.
5. Agreements Section

This section is not concerned with initial licensing but with relations among air carriers. Details on its composition are, therefore, omitted.

Considering the Division as a whole, the workload is divided very roughly as follows: domestic air carrier licensing, fifty per cent; other licensing (primarily international), twenty per cent; and matters other than initial licensing, thirty per cent. With respect to domestic licensing, the Bureau spends a little more than twice as much time on formal proceedings as on informal authorizations.

B. Bureau Of Hearing Examiners

Headed by a Chief Examiner, the Bureau has authorized twenty-four positions for hearing examiners, all GS-15. Of the twenty examiners on whom information is available, four have been CAB examiners for twenty or more years and fourteen others for ten or more years. There are also some vacancies and a recent appointee. The average tenure of the twenty is 16.5 years, and they average another 5.6 years of specialized governmental experience related to their examiner function. All are appointed pursuant to Section 11 of the Administrative Procedure Act and their primary function is to preside at formal evidentiary hearings and render initial decisions based on the records made. Except for a secretary, they normally work without individually assigned assistance. About forty per cent of the workload of all hearing examiners concerns the licensing of domestic air transportation; another ten per cent involves other licensing, primarily foreign and international carriers.

C. Office Of General Counsel

The General (GS-18, 23.2 years) and Deputy General Counsel (GS-17, 14.9 years) head a legal office that is divided into four parts. Portions of two of these components have a direct relation to the licensing process.

In the immediate office of the General Counsel are a number of specialists in different subjects. One of these is the Special Counsel (Routes) (GS-15, 21.5 years), who advises on novel and important questions concerning domestic route matters and is the principal coordinator on this subject in relations among the Board, the Bureau, and other branches of the office of General Counsel.

Two of the Divisions of the Office—(1) Rules and Legislation and (2) Litigation and Research—are not specifically involved in the licensing process, but may contribute indirectly: the former by advising on changes in rules and legislation affecting licensing activities; and the latter (primarily concerned with defending Board orders in court) by engaging in generalized research with respect to licensing problems.

The Opinion Writing Division, by contrast, is directly involved in the licensing process, since its major responsibility is the drafting of Board opinions and orders. Headed by the Associate General Counsel, Opinion

\[\text{References}\]

118 Organization §§ 3.1, 3.2, 3.3; Delegation § 385.10.
119 Organization § 3.3, 3.8; Delegation § 385.11.
120 Organization § 7.2, 7.3; Delegation § 385.20.
121 Organization § 7.1.
122 Organization § 7.2.
123 Organization § 7.5.
124 Organization § 7.7.
125 Organization § 7.8.
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Writing (GS-16, 13.6 years), the Division has an authorized strength of twelve additional attorneys. The present staff of ten range from GS-12 to GS-14 and from complete newcomers to one attorney with almost thirteen years with the Board. Their average tenure is 3.8 years. About forty-five per cent of the workload of the Opinion Writing Division involves domestic route matters and another ten per cent is concerned with international and foreign carrier licensing.

D. Other Board Components

Independent of the three previously described staff groups are a number of additional units which also play a part in the licensing process.

Recently the Board established a Planning Office with an authorized strength of three economists. Two are now on the premises (GS-16 and GS-15). Although these economists do not participate in individual licensing proceedings, the general policies they formulate, if accepted, undoubtedly would have a significant impact on the Board's decisions on the licensing of domestic air transport.

The Office of Carrier Accounts and Statistics is a substantial establishment concerned primarily with the collection and collation of statistical data and with the auditing of carrier records. Its impact on the licensing process is twofold. First, the statistics and reports it disseminates are the primary data—the raw material—on which other participants in the licensing process rely. Second, three of the direct participants in the licensing process—Board Members, hearing examiners, and opinion writers—may call upon this Office to provide special technical and analytical assistance. It is estimated that special assistance in the latter category, involving primarily traffic analysts and accountants (GS-9 through GS-13), requires four man-years of effort annually. The Office may also assign an analyst to work directly with a hearing examiner on a particularly complex economic case. This has occurred about once a year over the last several years.

The Executive Director of the Board plays an important role in management and personnel matters, including suggestions for improvement of processing methods; but he is not a direct participant in individual licensing cases. Similarly, the Director of the Office of Community and Congressional Relations, while not a participant in the decisional process, advises community representatives as to the most promising methods of obtaining improved air service; and they in turn may trigger a licensing proceeding.

VI. PROCESSING OF FORMAL ROUTE PROCEEDINGS

In roughly chronological sequence, the successive stages of a formal route proceeding will be considered. Thereafter the processing of new operating authority by informal methods will be briefly described.

A. The Decision To Initiate Proceedings

Requests for additional air transportation may originate (1) with one or more air carriers, through the filing of applications, or (2) with community interests seeking to obtain new or additional air service by the
filing of community applications or by petitioning the Board to act with respect to pending carrier applications. Occasionally the Board may itself originate a route proceeding, but normally such Board "initiation" follows, rather than precedes, requests for service by carriers or communities.

The selection of applications for processing involves important policy determinations. In theory at least the Board used to process applications in the order in which they were filed, although reserving power to make exceptions and expedite later-filed cases where special reasons require their early disposition. But the small number of route cases currently heard in relation to the Board's large backlog of pending applications has tended to make the exceptions more important than the general rule. And the Board itself recently has announced that the policy of recognizing priority of filing dates in assigning applications for hearing has been honored more in the breach than in the observance. The net result is that a proceeding is not really started until a notice of prehearing conference (or some substitute) manifests Board intention to consider particular applications or additional air transportation needs between designated points. It is the Board and not the applicant which, in a realistic sense, controls the initiation of licensing proceedings.

The variations in methods of initiating proceedings are quite extensive. They can usefully be considered under four headings:

1. Noticing Applications

Simplest in form is the assignment of a single application for prehearing conference. This is accomplished by a notice of the Chief Examiner setting forth the time and place of the conference and the identity of the presiding officer. The Chief Examiner may also add a list of applications, compiled from a review of the docket, which will be considered for consolidation with the principal application. The notice may be the result of specific Board instructions or the product of the Chief Examiner's independent implementation of general Board policies.

Usually the notice does not identify the scope of the proceeding except by its enumeration of one or more applications. On other occasions, where the Chief Examiner is implementing fairly specific instructions of the Board, there may be considerable definition in the initial notice. Thus the Southern Rocky Mountain Area Local Service case was initiated by a notice stating that it was "contemplated that this proceeding will cover the local service pattern in the area bounded on the east by the cities of Denver, Albuquerque, and El Paso; on the north by the cities of Denver, Las Vegas, Salt Lake City, Reno, and San Diego; on the west by the Pacific

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137 Municipal applicants proceed under 72 Stat. 754 (1958), 49 U.S.C. § 1371 (g) (1958), which empowers the Board to amend a carrier's certificate upon petition or complaint. The act, however, does not provide for municipal applicants as such. See Adequacy Of Domestic Airline Service: The Community's Role In A Changing Industry, 68 Yale L.J. 1199 (1959).

138 The Board's power to originate a route proceedings is based on 72 Stat. 754 (1958), 49 U.S.C. § 1371 (g) (1958), which authorizes the Board, on its own initiative, to amend or modify a carrier's certificate if it finds, after notice and hearing, that the public convenience and necessity so requires; and also 72 Stat. 788 (1958), 49 U.S.C. § 1482(b) (1958), which authorizes the Board to institute an investigation, on its own initiative, concerning any matter within its jurisdiction.


140 CAB Rules of Practice in Economic Proceedings 23 (a), 14 C.F.R. § 302.23 (a) (hereafter "Rules of Practice").
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Ocean; and on the south by the United States-Mexican border.\textsuperscript{131} The notice further stated that the scope of the proceeding might be modified as a result of the conference, and that consideration would be given to consolidation of a list of twenty-one applications. Notices of this nature generally are the product of planning and formulation by the Bureau of Economic Regulation.

2. Order of Investigation

Hearings upon applications may also be instituted by order of the Board directing an investigation into air transportation requirements of specific markets.\textsuperscript{132} The docket may be reviewed to list applications which will be considered for consolidation, but the scope of the proceeding is determined independently of the applications, either by designating the terminal points of markets (e.g., air service between Cleveland and New York) or by defining the relevant area (e.g., in language similar to the Southern Rocky Mountain case). The notice of prehearing conference follows shortly thereafter simply to provide the time and place of the conference.

Orders of investigation generally originate as recommendations of the Bureau of Economic Regulation, based upon the work of analysts in studying the potential of markets for new air service. Such studies may be precipitated by the suggestion of a Board Member or a member of the staff, or they may emerge from the varied statistical work continually carried on in the Bureau. The recommendation is sent to the Chief Examiner for concurrence or information and to the Special Counsel for Routes in the General Counsel's office, before it is considered by the Board.

3. Order to Show Cause

The Board may, at the outset, not only define the scope of the proceeding, but also announce its tentative conclusions on the merits. The initial order, prepared by the Bureau with the concurrence of the Chief Examiner and the General Counsel (through the Special Counsel for Routes), is one to “show cause” why the tentative conclusions should not be adopted.\textsuperscript{133} This technique has not yet been used with great frequency in route cases, and the exact manner of its use is not clearly defined. Its origin and processing, however, are similar to those of an order of investigation except that it will require additional work on the Bureau's part to formulate the tentative conclusions advanced and the supporting statistical exhibits.

4. Motion to Expedite

Private parties—cities or carriers—may seek to influence the initiation of processing by filing a motion to expedite the hearing of a particular application or group of applications.\textsuperscript{134} The motion may be considered by the Chief Examiner and a recommendation made by him to the Board, with the concurrence of the Bureau requested; or the Chief Examiner may refer the motion to the Bureau, particularly if reliance is placed on assertions as to economic facts. The Bureau then makes a recommendation to the Board requesting concurrence by the Chief Examiner. The Board ultimately de-

\textsuperscript{133} See, e.g., Boise-Las Vegas case, Statement of Tentative Findings and Conclusion and Order to Show Cause, E-17161 (July 3, 1961).
\textsuperscript{134} Rules of Practice 14(a).
cides whether or not the matter should be expedited and issues an order embodying its conclusion and stating findings of varying specificity. An affirmative response to the motion will result in issuance of a notice of prehearing conference.

Extensive Board control over initiation of proceedings is probably inevitable because of a number of factors built into the structure of the licensing process:

First, the Board’s examiners—limited in number—are consolidated into a single Bureau which must conduct hearings in all formal matters coming before the Board, of which route proceedings are but one class. Moreover, some of the other matters requiring hearings involve sufficient urgency that normally they are accorded priority over applications for new domestic authority: rate matters; mergers and agreements; enforcement proceedings; foreign air carrier permits; certificate renewals; and deletion of local service points pursuant to the “use it or lose it” policy. In short, route applications must compete with other types of proceedings and often the latter gain an overriding priority because of their international or economic implications or the transitory nature of the transaction involved.

Second, applications for new air transportation authority do not give rise to issues which can be settled once and for all. A route request which yesterday was turned down because of economic unfeasibility may be granted today if the governing economic factors have changed. Thus in 1961, in the Southern Transcontinental Service case, the Board certificated two transcontinental air carriers across the southern tier of states, granting authority which had been denied in 1951 in the Southern Service to the West case and continually deferred throughout the 1950’s (although some service was rendered via an interchange). Where it is fairly apparent at the outset that a particular request for additional authority is unlikely to be granted, the Board’s limited hearing examiner resources can be conserved by deferring consideration of the application until economic factors become more propitious. Meanwhile, the examiners can act on applications which promise some chance of success. There are, for example, helicopter applications pending since 1946, upon which the Board feels it could not act favorably until existing experimental helicopter services demonstrate their economic feasibility. Instead of holding hearings and denying helicopter applications as they are filed, year after year, the Board has simply deferred consideration of pending applications until it feels that there is some prospect of favorable action—or at least definitive action. Only recently hearings have been initiated on some helicopter proposals.

Third, a number of factors combine to encumber the Board’s docket with large numbers of inactive applications. (1) Since applications are not going to be heard for some time, there is an inducement to seek authority which may be justified at a future date. Speculations as to future needs obviously yield higher numbers of applications than convictions about

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137 Organization § 3.1.
138 E-16500 (March 13, 1961), appeal pending.
139 12 C.A.B. 518 (1951).
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present requirements. (2) Since the air transport industry is composed of closely interacting units, an application by one airline is likely to precipitate applications by others to "protect" their interests in the area in question and express their desire to be heard with respect to that area at the same time as the first application. (3) Since the Board defines the scope of proceedings, perhaps encompassing less than the entirety of an application, parts of applications must be severed for independent consideration. In an effort to prevent the accumulation in the docket of odds and ends left over in severing portions of applications for hearing, the Board recently had adopted a regulation providing that, where only a portion of an application is included in a hearing, the remainder will be dismissed without prejudice to its being refiled as an independent application. 141

Finally, the Board has the means available to exercise some measure of discriminating judgment in selecting among pending applications. The Board is not the passive recipient of evidence generated by the parties. Much of the relevant data is produced by the Board's own Office of Carrier Accounts and Statistics. And this data is subjected to analysis by the Bureau with a view to recommending actions by the Board in processing pending applications.

The relation between the Board, the Chief Examiner, and the Bureau in determining which cases to initiate is a complex one. The Chief Examiner is aware of the availability of hearing examiners and of the other (non-route) matters which are ripe for hearing and are, therefore, competing for the attention of available examiners. The Bureau is in a position to indicate the economic background of the various matters the Board may consider. The Board passes on the recommendations of the Bureau and the Chief Examiner. But the Board also influences the Bureau and the Chief Examiner by the formulation of general policies and the issuance of specific instructions. And, as previously indicated, all three play a role in many instances. While the function of the Chief Examiner is predominant in noticing applications and that of the Bureau is paramount in orders to investigate or show cause, there are no ironclad compartments, e.g., a Bureau recommendation may precipitate Board instructions leading the Chief Examiner to notice one group of applications rather than another. The close interaction is most clearly illustrated on motions to expedite, which may be the subject of conflicting recommendations by the Chief Examiner and the Bureau respectively.

As between pending applications for new or additional service, a number of factors determine which will be considered. Some are heard pursuant to a previously devised plan—as in the case of the series of area proceedings to review local service needs of various parts of the country. Some are accorded priority by the nature of the request: city requests for first air service generally prevail over requests involving additional air service. Some result from problems created by prior Board decisions, as illustrated by the recent investigation into the major monopoly markets created by the merger of Capital and United. 142 Others receive attention as the Board or the Bureau initiates inquiry into an area of apparently deficient service. Finally, there is the pressure created by the demands of communities for improved air service; these may take the form of independent applications

141 Rules of Practice 12(d).
or of motions to expedite pending proceedings. And here the theory seems to be that the more noise a city can generate, the more likely the CAB will schedule a hearing.

B. Preliminary Arrangements

Once it is decided to initiate a route proceeding, arrangements must be made for a prehearing conference. Such matters are handled by the Chief Examiner. He sets the precise time for the conference and designates the place, usually Washington, D.C. His approval is required to hold the conference or the hearing itself at some other location, a decision influenced by the availability of funds for out-of-town proceedings.

Another decision made at this stage is the selection of a hearing examiner. This is done by the Chief Examiner with an eye to the nature and complexity of the case and the degree of speed required in its disposition. Not all examiners have the same capabilities; nor do they respond alike to urgent situations. Mechanical rotation is rejected in favor of making use of the examiner corps in the manner most conducive to the effective handling of the pending caseload.

The number of cases being handled by an individual examiner varies according to the nature of the cases. With respect to major route proceedings, an effort is made to permit an examiner to concentrate on a single case until it is nearly completed. When the end is in sight, the examiner is assigned a new case so that the early prehearing stages of the second case will be completed by the time the examiner is ready to devote his primary attention to that case.

The notice of prehearing conference is sent by the Chief Examiner to all parties and to "other persons who appear to have an interest in the proceeding." A mailing list of carriers and cities is maintained by the Docket Section. The notice is also published in the Federal Register.

C. The Prehearing Conference And Efforts To Shape The Proceeding

One of the most difficult tasks of the Board is defining the scope of its proceedings. In part this problem is related to the manner in which proceedings are initiated. If the first step is a bare noticing of applications by the Chief Examiner, practically no definition is achieved at this first stage. If, on the other hand, the proceeding is begun by a Board order, the scope of the proceeding may be fairly well defined at the very outset. Thus the choice of initiating technique has a bearing on the problem of shaping the proceeding.

At or before the prehearing conference, airlines and communities are permitted to file additional applications for inclusion in the proceeding. Motions to consolidate these applications with those pending and motions to alter the scope of the proceeding may also be made at this time. Petitions to intervene may be submitted at any time prior to the conference. Answers may be filed to all such requests. The prehearing conference is concerned primarily with discussion of the proceeding's scope and with the

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143 Rules of Practice 23 (a).
144 Organization § 3.2.
145 Rules of Practice 23 (a).
146 Rules of Practice 12 (b).
147 Ibid.
148 Rules of Practice 11 (c) (2) (ii).
149 Rules of Practice 11 (c) (3).
filing of last-minute applications and motions, including those made orally at the conference. Matters relating to the conduct of the proceedings—stipulations, requests for information, scheduling of submission of exhibits—are also taken up, but these matters are often overshadowed by the problem of determining the scope of the proceeding. They are discussed in the next section.

The hearing examiner who presides at the prehearing conference prepares two documents. One is a confidential report to the Board which (1) describes the various applications, petitions, and motions made at the prehearing conference which affect the scope of the proceeding, (2) recommends the disposition to be made of each, with supporting reasons, and (3) includes a draft of an order by the Board disposing of the matters pending and defining the scope of the proceeding with presumptive finality. Where significant legal issues are involved, concurrence of the General Counsel (through the Special Counsel for Routes) is sought. In simpler cases the examiner's memorandum may be a cryptic transmittal of a draft order. All such matters are routed through the Chief Examiner. In case of disagreement with the examiner's recommendation by the Chief Examiner or Special Counsel, the matter is sent back to the examiner to draft a new order. As previously indicated, the tasks of all these parties are made easier if the initiating action provides some guidance as to the nature and purpose of the proceeding and does not simply notice applications for hearing.

The second document is a public report of the prehearing conference which (1) announces in a general way the examiner's "assumptions" as to the scope of the proceeding, and (2) states his conclusions on other matters considered at the conference. The examiner has no authority to reach a decision on consolidation issues, so it is necessary to await the decision of the Board. Indeed, the issue may require several decisions by the Board, since the Board's first consolidation order often is subjected to petitions for reconsideration by disappointed parties. The petitions are the subject of memoranda by the hearing examiner and concurrence by the Chief Examiner and General Counsel (again through the Special Counsel for Routes). While efforts are made to keep the proceeding moving during the pendency of unresolved consolidation issues, progress is difficult while the scope of the proceeding remains unsettled.

The considerations which govern definition of the proceeding's scope will be considered in greater detail at a later point. For now it is sufficient to observe that this is often an extremely complex and hotly contested issue:

(1) Parties seemingly excluded from the proceeding fight vigorously to have their applications included in order (a) to obtain an early decision on their applications, and (b) to prevent their own applications from being prejudiced by grants of applications in the pending proceeding.

(2) Parties clearly included in the proceeding fight just as hard to exclude additional applications (a) so as not to encumber the proceeding

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150 Rules of Practice 23 (a), 12 (b).
151 Rules of Practice 23 (a).
152 Rules of Practice 23 (b).
153 Rules of Practice 23 (b); Organization § 3.8; Brown, the Prehearing Conference 7 (unpublished paper delivered at the Annual Meeting of the American Bar Association, Administrative Law Section, St. Louis, Missouri, 1961).
154 Rules of Practice 37.
unduly and delay its disposition and (b) so as not to dilute the opportunities for success of the included parties.

(3) The examiner and the Board are subjected to conflicting pressures: (a) On the one hand, there is the desire to confine the proceeding to the particular air transportation problem which prompted the Board to set the case down for hearing in the first instance, so that this problem may be resolved as expeditiously as possible. (b) On the other hand, there are borderline applications which may be prejudiced by a grant in this proceeding and which, in fairness, ought to be considered. The courts are likely to find reversible error if the exclusion of applications from the proceeding is tantamount to denying them without an evidentiary hearing. Such reversals occur under the "Ashbacker doctrine," which is designed to assure comparative consideration of mutually exclusive applications. The recurrence of Ashbacker problems result in detailed and time-consuming consideration of consolidation orders by both the responsible examiner and the Special Counsel for Routes.

D. Other Aspects Of The Prehearing Conference

Apart from its role in helping to shape the proceeding, the prehearing conference also is intended to serve more conventional purposes. The CAB's procedural regulations state that such a conference "ordinarily" will be held in economic proceedings (other than enforcement cases)

to define and simplify the issues and the scope of the proceedings, to secure statements of the positions of the parties with respect thereto and amendments to the pleadings in conformity therewith, to schedule the exchange of exhibits before the date set for hearing, and to arrive at such agreements as will aid in the conduct and disposition of the proceeding. For example, consideration will be given to: (1) matters which the Board can consider without the necessity of proof; (2) admission of fact and the genuineness of documents; (3) admissibility of evidence; (4) limitation of the number of witnesses; (5) reducing of oral testimony to exhibit form; (6) procedure at the hearing, etc.

The prehearing conference is informal in nature. Ordinarily no official transcript is kept of the proceedings, although the examiner may have his secretary attend to assist in taking notes. The conference is open to the public but attendance is usually limited largely to the parties to the proceeding. The conference undoubtedly serves a useful purpose in familiarizing parties with the positions of their adversaries. Among its more specific achievements are:

(1) Arrangement of a timetable for submission of exhibits, submission of rebuttal exhibits, and commencement of hearing.

(2) Stipulations of fact, particularly as to matters the Board may officially notice. (This function probably is of less importance now that the Board has taken steps to formally recognize the documentary facts it will officially notice).

(3) Requests for the admission of information. In the absence of agreement, the examiner may direct any party to the proceeding "to prepare

155 Rules of Practice 23(a).
156 See Brown, the Prehearing Conference (1961).
157 Rules of Practice 23(b).
158 Rules of Practice 23(a).
and submit exhibits setting forth studies, forecasts, or estimates on matters relevant to the issue in the proceeding. This often is a sore spot in the relations between Bureau Counsel and carrier representatives. The airlines complain about requests for extensive information which is expensive and difficult to compile; the Bureau objects to efforts to suppress relevant information. Similar disputes may arise among the carriers themselves. Where carriers are unwilling to voluntarily comply with requests, the hearing examiner must pass on the countervailing arguments of burden and relevancy. Examiners are said to vary greatly in their disposition to compel compliance with Bureau requests or requests by other parties. The tension is in part the result of a feeling by some that the theory of the adversary process should be more fully applicable and that individual carriers ought to prove their own cases without reliance on the submissions of others. There is also some uncertainty as to the sanction to be applied to a party refusing to produce material in response to an examiner’s directive. Probably most information sought is voluntarily produced, if only to avoid any inference that the withheld information is adverse to the party subject to the request. Compliance with such requests is achieved by embodying the material sought in the responding party’s exhibits.

(4) Encouragement of parties with like interest to consolidate their representation and the presentation of evidence.

In order to facilitate disposition of these and other matters, parties may be requested to submit in advance of the conference all motions, statements of suggested issues, proposed stipulations, and requests for evidence. Such a request may be embodied in the original notice of the prehearing conference.

Many of the other matters considered at the prehearing conference are handled in standardized fashion under a set of ground rules prepared by the Bureau of Hearing Examiners and entitled “Standards of Procedure in Economic Proceedings.” The “Standards” are applicable to all economic proceedings (except enforcement matters) unless exceptions are sought and departures approved at the prehearing conference. They provide among other things:

(1) That all evidence, including the testimony of witnesses, shall be prepared in written exhibit form and shall be served at designated dates in advance of the hearing. Witnesses must be made available for cross-examination, but they are not permitted to read prepared testimony into the record.

(2) That the evidentiary record shall be confined to evidence and shall exclude argument. Formerly an applicant used to begin its case with a “policy witness,” whose principal function was to explain the proposals and theories of the applicant. Now parties (except Bureau Counsel) are directed to exchange statements of position, explaining their theories, prior

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161 Rules of Practice 23(a).
162 See reopened Pacific-Northwest Local Service case, E-14564 (Oct. 19, 1959), where the Board reversed an Examiner’s ruling that certain material need not be produced.
164 For discussions of the Standards, see Brown, the Prehearing Conference (1961); Remarks of Paul W. Pfeiffer at the Federal Bar Convention, Washington, D.C., Sept. 13, 1961.
165 Standards § 1.
166 Ibid.
to the hearing. These are not subject to cross-examination. More detailed trial briefs may also be required by the examiner.\textsuperscript{167}

(3) That the authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless either (a) written objection is filed prior to the hearing, or (b) good cause is shown for failure to have filed such written objection.\textsuperscript{168}

(4) That the order of presenting cases will be in alphabetical order in each of the following categories:
(a) City and state interests and other government departments.
(b) Applicants.
(c) Other private parties.
(d) Bureau Counsel.

Rebuttal evidence normally must be presented at the same time as the party’s direct case.\textsuperscript{169} Exhibits are to be offered in evidence at the close of the sponsoring witness’s direct testimony for ruling by the examiner prior to cross-examination.\textsuperscript{170}

(5) That, except for Bureau Counsel, cross-examination shall be limited to witnesses whose testimony is adverse to the party desiring to cross-examine, thereby precluding “friendly cross-examination.” Second rounds of cross-examination are not permitted, and cross-examination of any particular witness is limited to one attorney for each party.\textsuperscript{171}

The prehearing conference is followed by a report of the examiner, to which reference already has been made. The report embodies an account of the results of the conference.\textsuperscript{172} Objections may be filed, and the examiner may revise his report in the light of such objections. The revised report may be subjected to exceptions based upon timely filed objections not met in the revised report. The report, although subject to subsequent reconsideration and modification for good cause, controls the course of the proceedings.\textsuperscript{173}

E. Parties To Formal Proceedings

One consequence of shaping the proceeding is to indicate with some definiteness the appropriate parties. Carriers and cities whose applications have been included are obviously parties. So are those whose petitions to intervene have been granted. Finally, there is Bureau Counsel.

Examiners recently have been delegated authority to rule on petitions to intervene.\textsuperscript{174} Formerly these were presented to the Board in the same manner as consolidation issues. Petitions may be filed subsequent to the prehearing conference only on a showing of good cause.\textsuperscript{175}

Persons who are not permitted to intervene as parties nonetheless may participate at the hearing before the examiner—presenting relevant evidence, submitting a written statement on the issues involved, and with the permission of the examiner, cross-examining other witnesses.\textsuperscript{176} This

\textsuperscript{167} Standards § 6.
\textsuperscript{168} Standards § 5.
\textsuperscript{169} Standards § 7.
\textsuperscript{170} Standards § 11.
\textsuperscript{171} Standards § 9.
\textsuperscript{172} Rules of Practice 23(b).
\textsuperscript{173} Ibid.
\textsuperscript{174} Delegation § 385.11(a); Rules of Practice 15.
\textsuperscript{175} Rules of Practice 15(c)(2)(i), 15(c)(2)(ii).
\textsuperscript{176} Rules of Practice 14(b).
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The technique is often used by civic participants. On the whole, however, participants are identified in the course of shaping the proceeding.

Divided functionally the parties include: (1) carrier applicants seeking new or expanded authority; (2) civic interests, either applicants or interveners, generally seeking new or improved air service; (3) incumbent air carriers, interveners, concerned with preventing authorizations competitive with theirs; and (4) Bureau Counsel. An air carrier may be cast in dual roles, seeking additional authority for itself while also attempting to protect its existing routes from competitive grants to others.

Bureau Counsel ordinarily does not attempt to align itself with any of the other parties. During the proceeding he tries to assure a complete record, including the introduction of Bureau exhibits. But at or near the conclusion of the proceeding Bureau Counsel will take a position as to the result believed to be required by the public interest. Recently Bureau Counsel has been tending to take a position earlier in the proceeding.

The effort of the prehearing conference to encourage common representation has been paralleled by a recent policy statement governing civic participants. The statement urges public and civic bodies representing the same geographic area or community to consolidate their presentation of evidence, briefs, and oral argument to the examiner and the Board, and to “keep to a minimum the number of witnesses used to present the factual evidence in support of the community’s position.”

F. Conduct Of Formal Proceedings

As previously noted, the prehearing conference sets dates for the exchange of exhibits, including rebuttal exhibits, and for the hearing itself. The hearing date, time, and place also are embodied in a formal notice sent to all parties and published in the Federal Register. The exhibits embody the great bulk of direct evidence on the part of the various participants and oral testimony is usually concerned with explaining, correcting, or supplementing the exhibits on direct examination, and with defending the methodology of the exhibits on cross-examination. The extent of cross-examination appears to vary considerably and is often prolonged by successive turns of a large number of adverse parties.

Although there may be some testimony concerning personal experiences of travelers in attempting to use existing transportation media, most of the evidence is statistical in nature and is presented by expert witnesses. Cities attempt to demonstrate the size and importance of their various activities, their need for new or improved air service, their capacity to support such air service, and the closeness of their ties with the points to which the requested air service is sought. Applicant carriers seek to show their ability to render the service required, the attractiveness of their respective proposals, and the economic feasibility (or modest subsidy demands) of their proposals—based on projected costs and revenues. Both the cities and the carrier applicants seek to demonstrate, through past traffic volumes, the significant traffic potential of the route in question; and if the question is adding a new carrier to those already in a market, the applicants will focus on any service deficiencies and the alleged failure of the incumbent to develop fully the traffic potential of the route. The incumbent, of course, attempts to show just the opposite: that the traffic

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177 49 C.F.R. § 399.39.
178 Rules of Practice 24(a).
potential of the route is low and that it has done its utmost to keep abreast of any developments in the traffic.

While the applicants will be united in their effort to show the need for new service, they will divide sharply on who should render it. Each will attempt to demonstrate why its proposals are superior to those of any of the other applicants. Similarly, cities will divide sharply on the nature of the final authorization: claims for through service will conflict with demands for inclusion by intermediate points; diverse routes proposed by different carriers will each pick up adherents among the cities to be benefited thereby.

The starting point may be a common body of statistics, emanating in large measure from the Board’s Office of Carrier Accounts and Statistics and from individual carrier records. But as supplemented and adjusted by the various parties for differing estimates as to future contingencies, the opinions grow further and further apart and the examiner is confronted by widely conflicting conclusions.

The common statistical base is recognized in a recent regulation setting forth forty-two categories of documents as to the contents of which official notice may be taken. The tendencies to proliferation of estimates and supplementary statistical data have resulted in notices of proposed rule-making, policy statements, and rule amendments which would exclude or severely limit (1) evidence concerning proposed schedules of applicants except in special cases, (2) evidence of civic participants as to electricity, gas and water meters, telephones, schools, freight car loadings, building permits, sewer connections, and bank deposits, and (3) evidence of applicants as to service to points or segments not covered in their applications. An even more ambitious undertaking is involved in a recent rule-making notice which proposes to standardize methods of estimating costs of proposed changes in local service carrier operations.

The CAB’s regulations grant to hearing examiners the powers normally associated with officers presiding over formal proceedings. In addition the rules prohibit interlocutory appeals from the decisions of an examiner unless the examiner finds “that the allowance of such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party.”

G. Within The Bureau

Paralleling the development of a route case in formal proceedings are activities within the Bureau relating to that same case. As cases are noticed for prehearing conference, a decision must be made as to whether Bureau Counsel will participate. The Director of the Bureau has the authority to limit or preclude Bureau participation, but Bureau Counsel traditionally participates in all important route cases.

Where participation is decided upon, there are assigned to the case an attorney from the Legal Staff and an analyst from the appropriate section.
They work together in preparing requests for information, Bureau exhibits, and statements of Bureau position. They also examine the exhibits of other parties, formulate questions of cross-examination, and generally decide upon their tactics in the proceeding.

As previously indicated, the Bureau's role is partially a neutral one: to assure a complete record adequate for decision by the Board. The effectuation of this function probably can be handled in large measure by the lawyer and analyst directly assigned to the case: clarifying the meaning of exhibits submitted by other parties; preparing and submitting standard Bureau exhibits. On the other hand, the formulation of a Bureau position may involve the entire Bureau hierarchy: Director, Deputy Director, Division Chief, Section Chief, etc. The development of a Bureau position does not follow any fixed pattern. Sometimes it is based on a general attitude developed some time in the past. In other instances it is decided upon to meet the problems of the particular case. While there is a tendency to delay in formulating a position until most or all of the evidence is in, tentative positions often must be adopted earlier in the case in order to facilitate the preparation of Bureau exhibits.

Bureau attorneys report that the adversary process is well reflected in their relations with carrier attorneys. That is, no matter what position they adopt, they can generally count on the antagonism of the totality of carrier counsel.

H. The Decisional Process

Following the close of the evidentiary hearing, the parties, including Bureau Counsel, submit briefs to the examiner including proposed findings. While the rules require "exact references to the record and authorities relied upon," the references sometimes are very general and provide little assistance to the examiner in working with the record. The examiner also may permit oral argument at the conclusion of the hearing, subject to such time limits as he imposes. The argument is transcribed and bound with the transcript of testimony so as to be available to the Board for consideration in deciding the case. In practice, oral argument before the examiner is extremely rare.

The examiner then prepares his initial decision. Except for a secretary, he is without immediate direct assistance. There is some uncertainty as to the extent to which examiners call upon other staff members for assistance. But apparently there is a tendency, whenever such assistance is sought, to look to the Office of Carrier Accounts and Statistics rather than to the Bureau of Economic Regulation, which is viewed as one of the adversaries in the proceeding. Among the kinds of assistance requested are (1) explanations of technical terms of exhibits, (2) statistical analyses required by an examiner's inclination to follow a path not suggested by any of the parties, and (3) construction of tables and the like for inclusion in the initial decision. But more significant than any of these matters is the pronounced tendency of examiners to refrain from having any informal contact with the Bureau about the case.

When the initial decision is served, the parties have ten days within

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188 Rules of Practice 21(b).
189 Ibid.
190 Rules of Practice 27.
which to file exceptions. It is contemplated that the exceptions will be limited to the ultimate conclusions in the initial decision with which the party disagrees, such as "selection of one carrier rather than another to serve any point or points; points included in or excluded from a new route; imposition or failure to impose a given restriction." Specific exceptions to underlying findings or statements are forbidden, but the exceptions must specify any matters of law, fact, or policy to be set forth for the first time on brief to the Board. If no exceptions are filed within the ten day period and if the Board in the next twenty days takes no action to review the decision, the initial decision becomes the order of the Board.

With the filing of the initial decision, the case is assigned to an attorney in the Opinion Writing Division of the Office of General Counsel. After exceptions are filed, the parties, including Bureau Counsel, file briefs to the Board, limited to fifty pages in length in the absence of special leave. These are reviewed by the opinion writing attorney as they come in. Arrangements for oral argument are made through the Chief Examiner. Requests are granted as a matter of course, and it is customary to have oral argument before the Board in every significant route case. Allocations are made generally on the basis of thirty minutes each to carrier applicants, fifteen minutes each to carrier interveners, and five minutes each to civic interveners. The Chief Examiner has been able, in most cases, to make satisfactory arrangements; serious complaints can be passed on to the Board.

As the date for oral argument approaches, the opinion writing attorney prepares a "memorandum of issues," briefly summarizing the main points in dispute and the decision of the examiner and contentions of the parties with respect to these points (with page references to the initial decision and the briefs). The documents, transmitted by the head of the Opinion Writing Division, is quite cryptic containing only (1) an introduction descriptive of the general posture of the case, and (2) a summary of arguments on each of the issues listed, usually limited to a sentence or two per party. No conclusions are stated, and no analysis is set forth (other than that implicit in the arrangement of issues). Since there appears to be considerable effort directed at keeping the total length of the memorandum down, the document may be more lucid when the case is not overly complex. Probably the memorandum serves as a useful guide to the oral argument and as an index and cross-reference sheet for the initial decision and briefs, but it is doubtful that it could serve, or is intended to serve, any broader purpose.

At this time or somewhat later the opinion writing attorney prepares a second memorandum isolating any significant legal problems. This is transmitted by the head of the Opinion Writing Division to the Special

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191 Rules of Practice 30.
192 Rules of Practice 30(b).
193 Ibid.
194 Rules of Practice 30.
195 Rules of Practice 27(c). Effective Feb. 1, 1962, the Board established new procedures for review of examiner decisions, 27 Fed. Reg. 853 (1962). These are discussed in a subsequent section dealing with delegation of decisional authority to hearing examiners.
196 Rules of Practice 31(a).
197 Rules of Practice 31(c) (3).
198 Rules of Practice 32(a).
Counsel for Routes so that major legal problems can be resolved prior to
the actual drafting of the Board's opinion.

At the oral argument, which is usually limited to a single day or less
but may last for several days in a major case, the parties often use exhibits
or written materials to supplement their oral presentations. 198 The re-
sponsible opinion writing attorney attends the sessions. Formerly argu-
ments of the parties were preceded by speeches of political figures, making
arguments which usually had no relation to the record. This practice re-
cently has been abolished by amendment of the Board's Rules of Practice.°

Following oral argument and preceding Board decision, the opinion
writing attorney prepares a "request for instructions," an extremely brief
document (one or two pages) which merely lists the issues the Board
must decide in order to fully dispose of the case. The request is transmitted
to the Board by the head of the Opinion Writing Division.

The Board then convenes for the purpose of deciding the case. The ex-
aminer, having filed his initial decision, and the Bureau, having made its
arguments in the public arena, generally are not consulted further. Even
the opinion writer is removed from the deliberative process by the Board's
retirement to executive session for the purpose of discussion and decision.
The General Counsel's presence may be requested to discuss a particular
matter, or the Board may honor a request from the General Counsel to
present his views, but generally the decisional process is carried on out-
side the presence of the staff.

The Board's tentative decision, made after conference and vote of the
members (with personal assistants sometimes acting for members), is em-
bodyed in a press release for general disclosure to the public. The Board had
found its tentative decisions invariably were "leaked" to the industry
shortly after they had been made, so the press release practice was estab-
lished to preclude any individual outsider from gaining an unfair ad-

vantagex. Press releases have been used with decreasing frequency in re-
cent months.

Under a recent revision of Board practice, Board Members are assigned
individual responsibility for the preparation of opinions. Assignments are
made by the Chairman of the Board, 201 who takes into account the in-
dividual Member's interest in the case and the time he has available in light
of his other commitments. However, the initial draft generally is prepared
by the assigned opinion writing attorney with a minimum of contact with
the responsible Board Member. While the practices of individual Members
vary, and their personal contributions to some opinions may be greater
than to others, the usual sequence seems to be this:

(1) The Board Member returns from the conference and informs his
personal assistant of the instructions of the Board in the case for which he
is responsible, and any ideas of his own as to the direction the opinion
should take.

(2) The personal assistant conveys the instructions to the head of the
Opinion Writing Division.

(3) The head of the Opinion Writing Division in turn conveys the in-
stuctions to the assigned opinion writing attorney.

198 See Rules of Practice 32 (b).
201 Organization § 2.2.
(4) The opinion writing attorney, working with instructions, initial
decision, exceptions, briefs, and the evidentiary record, drafts an opinion.

(5) The opinion is reviewed by the head of the Opinion Writing Division
or one of his senior aides, and revisions are made as required.

(6) The new certificate, if one is required by the grant of operating au-
thority, is drafted by a senior attorney in the Opinion Writing Division
who specializes in such matters.

(7) The total product is transmitted to the General Counsel for review
by him or someone in his immediate office. Revisions are held to a minimum
by prior consultations with the Special Counsel for Routes.

(8) The draft is submitted to the responsible Board Member, who re-
views it and makes such revisions as he considers advisable, either personally
or through his personal assistant.

(9) The responsible Board Member circulates the draft to other Mem-
bers of the Board until a majority is obtained.

(10) Consultations occur during the course of the opinion writing pro-
cess as problems arise. While a Board Member may invite an opinion writ-
ing attorney to come in to discuss revisions in the opinion, more often
contact will be made with the head of the Opinion Writing Division, possi-
bly through the Board Member's personal assistant. There seems to be a
strong tendency to "follow channels," placing several persons between the
Board Member and the opinion writing attorney on communications in
either direction.

Board Members generally accept the work of the Opinion Writing Di-
vision in large measure. Revisions, though sometimes significant, are often
rather minor "personal touches." On the other hand, concurring and dis-
senting opinions usually are prepared in their entirety in the offices of in-
dividual Members.

The opinion writer's familiarity with the record is likely to be gained
rather late in the process. Heavy reliance is placed upon the parties' briefs
and exceptions for record references since the initial decision contains
none. Under prior practice where opinion writers were present during
the Board's discussion and decision of the case and might be called upon to
answer queries from the Board (usually routed through their superiors),
their tendency was to acquire an earlier familiarity about crucial data, such
as traffic flows over congested segments. There seems little point to such a
familiarization by opinion writers under present procedures.

The inclination of opinion writers to consult Bureau personnel has de-
clined in recent months. As with hearing examiners, any inquiry is likely
to be directed to the Office of Carrier Accounts and Statistics.

When the Board's opinion issues, the parties have twenty days within
which to petition for reconsideration, rehearing, or reargument.\footnote{202}{Rules of Practice 37(a).} These
are generally reiterations of the main points on which the parties pre-
viously relied. Another Board order is required to dispose of the petitions.
Successive petitions on the same grounds will not be
entertained.\footnote{203}{Rules of Practice 17(c).} The
petitions are processed in much the same way as the drafting of opinions
and by the same opinion writer except that here the Opinion Writing
Division will usually recommend the disposition thought appropriate. The
recommendation may be circulated in written form or conveyed orally at
a Board meeting.
VII. Operating Authority Not Dependent Upon Formal Proceedings

Although the certification process is the principal means by which operating authority is granted, the Board has by regulation established other methods by which such authority may be obtained or exercised.

A. Nonstop Authorizations

A certificated carrier may inaugurate scheduled nonstop service between any two points not consecutively named in its certificate, simply by filing a new schedule, as long as the certificate (1) authorizes service between such points, i.e., they are on the same segment of the same route, and (2) does not prohibit nonstop service between them (as is the case with local service carriers). 204

B. Airport Authorizations

A certificated carrier, desiring to regularly serve a point to which service by it is authorized, through an airport not then regularly used by such carrier, must file a notice with the Board at least thirty days prior to such intended use. 205 Notice is also given to other interested persons including all scheduled air carriers regularly serving the point in question, and they are given fifteen days to file memoranda in support of, or in opposition to, the airport notice. 206 In the absence of CAB disapproval, service through the new airport may be commenced on the day specified. 207 If, on the other hand, the Board indicates that the airport use intended may adversely affect the public interest, the carrier must then file an application, more detailed than the original notice and with supporting economic data, seeking affirmative Board authorization. 208 Service on the same interested persons is required, and opportunity is afforded to file supporting or objecting memoranda; but no provision is made for a hearing. 209 The Chief of the Routes and Agreements Division has been delegated authority to approve or disapprove airport notices. 210

C. Service Pattern Changes

Local service carriers are required to serve all points on their routes until a designated minimum number of flights per day have been provided. If such a carrier desires to omit service to one or more points without complying with the restrictions in its certificate, it must file an application for a change in service pattern, setting forth the facts relied on with supporting economic data, to establish that the proposed service pattern is in the public interest and consistent with the carrier’s performance of a local air transportation service. 211 Service on interested parties is required and an opportunity to answer is afforded. 212 The Chief of the Routes and Agreements Division has been delegated authority (1) to approve or disapprove applications seeking authority to effect temporary or seasonal

204 14 C.F.R. § 202.2; Organization § 4.11, 4.3C(2); Delegation § 385.13 (b).
205 14 C.F.R. § 202.3 (a).
206 14 C.F.R. § 202.3 (a), 202.3 (c).
207 14 C.F.R. § 202.3 (a).
208 14 C.F.R. § 202.3 (b).
209 14 C.F.R. § 202.3 (b), 202.3 (c).
210 Organization § 4.11, 4.3C(1); Delegation § 385.13 (a).
211 14 C.F.R. § 202.4 (b).
212 14 C.F.R. § 202.4 (b), 202.4 (c).
changes in service patterns; and (2) to revoke, modify, or renew prior approval of temporary or seasonal changes in service patterns.\textsuperscript{215}

D. Charters And Special Services

A certificated carrier may engage in charter and special service flights to points not designated on its routes if a number of conditions are met.\textsuperscript{214} (1) Such flights during any calendar quarter may not in the aggregate, on a revenue plane-mile basis, exceed $2\frac{1}{2}$ per cent of the revenue plane-miles flown by the carrier in scheduled air transportation during the preceding twelve-month period.\textsuperscript{216} (2) Such flights must conform to prescribed limitations designed to assure irregularity of operation.\textsuperscript{218} (3) Tariffs covering such flights must be on file with the Board and effective.\textsuperscript{217} (4) Charter flights must conform to the regulation's definition of a charter designed to assure sale of the entire capacity of the plane to the charterer.\textsuperscript{218} Special service flights (all flights except those pursuant to certificated, exemption or charter)\textsuperscript{219} must be preceded by a notice to the Board and to carriers certificated to serve the points in question. The Board may preclude the special service flight by notifying the carrier that the flight does not appear to be consistent with the public interest.\textsuperscript{220}

E. Air Taxi Operations

Air carriers not holding any certificate or operating authority from the Board may utilize small aircraft exclusively (less than 12,500 pounds take-off weight) in rendering irregular service between points not certificated for service by helicopters or small aircraft.\textsuperscript{221}

F. Helicopter Flight Patterns

An operator of certificated helicopter services may change its flight pattern within its certificated area in accordance with a special procedure.\textsuperscript{222} Notice must be given to the Board and designated persons twenty days before the proposed change.\textsuperscript{223} Opportunity to answer is afforded.\textsuperscript{224} The change may be put into effect on the effective dates unless and until the Board disapproves of the flight pattern.\textsuperscript{225} The Chief of the Routes and Agreements Division has been delegated authority to approve or disapprove of proposed amendments of helicopter flight patterns.\textsuperscript{226}

G. Individual Exemptions

Perhaps the most significant source of uncertificated authority is individual exemptions.\textsuperscript{227} These may involve authority to overfly junction

\textsuperscript{213} Delegation § 385.13(k).
\textsuperscript{214} 14 C.F.R. § 207.
\textsuperscript{215} 14 C.F.R. § 207.5.
\textsuperscript{216} 14 C.F.R. § 207.3, 207.7.
\textsuperscript{217} 14 C.F.R. § 207.4.
\textsuperscript{218} 14 C.F.R. § 207.1(a).
\textsuperscript{219} 14 C.F.R. § 207.1(c).
\textsuperscript{220} 14 C.F.R. § 207.9; MATS charters are not considered here because: (1) primarily such charters cover international operations, and (2) processing of such charter authorizations is concerned primarily with rates, being handled by the Rates Division of the Bureau of Economic Regulations.
\textsuperscript{221} 14 C.F.R. § 298.21(b).
\textsuperscript{223} 14 C.F.R. § 376.4.
\textsuperscript{224} Ibid.
\textsuperscript{225} 14 C.F.R. § 376.10
\textsuperscript{226} Delegation § 385.13(i).
DOMESTIC LICENSING: THE CAB

points, i.e., to fly directly between points on different route segments, or to render service to a point or series of points not covered by the certificate. Usually the exemption is granted for a limited period, such as a year or two. Application is made to the Board with notice to designated persons, including carriers serving any of the points involved or applicants seeking authority to serve any such points. Answers may be served within ten days of the application. Both application and answers should be accompanied by statements of economic data the parties desire the Board to officially notice, and by affidavits establishing any other facts relied upon. A reply is permitted within seven days of the answer. A hearing may be requested by applicant or opposing parties, but normally no formal hearing is held on the disposition of an application for exemption. Opportunity for notice and answer may be curtailed when required by emergency situations.

Exemption applications are processed in the appropriate sections of the Routes and Agreements Division of the Bureau of Economic Regulation. Recommendations made by the analyst working on the case go through the Section Head, Division Chief, and Bureau Director to the Board. Exemptions are most likely to be granted if they are unopposed. The chances of favorable action diminish considerably if substantial opposition develops. The Director of the Bureau of Economic Regulation has been delegated authority to approve or deny (1) applications of certificated route air carriers for exemptions to serve a point certificated on one segment of its route in place of a point certificated on another segment of its route whenever no substantial competition to other lines will result, and (2) applications by such carriers to perform single flights outside the authority contained in the certificate.

H. Board Review Of Staff Action

Acting under Reorganization Plan No. 3, the Board recently has codified its delegations in informal proceedings and prescribed the methods by which they are to be exercised. Among other things, the new Board regulation provides that persons adversely affected by staff action under delegated authority may petition for Board review, urging "that (1) a finding of material fact is clearly erroneous; (2) a legal conclusion is contrary to law, Board rules, or precedent; (3) a substantial and important question of policy is involved; (4) a prejudicial procedural error has occurred; or (5) the staff action is substantially deficient on its face." Board review will be granted on petition, or on its own motion, if two or more Board Members so desire. Otherwise the Board in its discretion may deny review.

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229 Rules of Practice 403(a), 403(b), 403(c).
230 Rules of Practice 406.
231 Rules of Practice 402(c), 406.
232 Rules of Practice 407.
233 Rules of Practice 408.
234 Rules of Practice 410.
235 Organization § 4.3C(4); Delegation § 385.12(a).
237 Delegation § 385.50.
238 Delegation § 385.51(b).
239 Delegation § 385.54(b).
240 Delegation § 385.54(a).
VIII. AN EXAMPLE OF CAB LICENSING: THE ST. LOUIS-SOUTHEAST SERVICE CASE

The functioning of CAB licensing can perhaps be understood only in the context of a concrete example. Illustrative of the problems of major route cases is the St. Louis-Southeast Service case, one of several such proceedings finally resolved by the Board in fiscal 1961.

A. Initiation Of The Proceeding

The St. Louis-Southeast case began as a motion in another proceeding, the pending Great Lakes-Southeast Service case, concerned with air transportation needs in an area bounded by Chicago, Detroit, and Buffalo on the north; Indianapolis, Louisville, and Atlanta on the west; Washington and Baltimore on the east; and Tampa and Miami on the south. On February 10, 1956, following the airing of complaints before a Senate Subcommittee, the City of St. Louis and related civic interests filed (1) an application for authorization of additional nonstop air service between St. Louis, on the one hand, and Atlanta, Tampa, and Miami, on the other, and (2) a motion to consolidate this request with applications then pending in the Great Lakes-Southeast case. By order dated March 2, the Board denied the motion to consolidate but directed that an independent proceeding be instituted to consider the need for new air service "between St. Louis on the one hand and Florida and other southeastern points on the other hand." On March 7, the CAB's Chief Examiner issued a notice of prehearing conference to implement the Board's direction. The St. Louis application was noticed, as were several subsequently filed carrier applications concerned with air service in the same area. Thus was born the St. Louis-Southeast Service case.

B. Prehearing Conference And Consolidation Issues

The prehearing conference was held as scheduled on March 22, 1956. Numerous applications were sought to be consolidated, other motions were made, and petitions to intervene and other matters were placed before the examiner for consideration. Answering memoranda were filed. The examiner's conclusions were embodied in a published report of the prehearing conference dated April 25 and in an internal memorandum dated April 26. The Chief Examiner transmitted the internal memorandum, with his summary concurrence, to the Board on May 16, and the Board issued its consolidation order on May 18, 1956.

The applications involved and their disposition may be briefly summarized:

The St. Louis application, of course, was included in the proceeding.

Braniff sought to extend its route 48—which ran from Minneapolis-St. Paul to St. Louis—beyond St. Louis to Nashville, Chattanooga, Atlanta, Tampa, and Miami. The application was included as clearly within the scope of the proceeding as initially defined.

Delta sought to extend its route 54—which ran from Miami to Chicago...
through alternate segments touching Cincinnati, Knoxville, and Atlanta—from Atlanta to Birmingham and beyond Birmingham to St. Louis and Kansas City via two branches: one including Chattanooga, Nashville, and Evansville; and the other by way of Memphis. Delta also sought to add Tampa to the route. The application was regarded as clearly included except for the segment from St. Louis to Kansas City. The examiner recommended the exclusion of the latter because consideration of Kansas City might require that Tulsa, Shreveport, and New Orleans be brought in. Delta, it should be noted, had other routes touching points in the area, including one running from Chicago through St. Louis and Memphis to New Orleans.

National sought to extend its route 31—which ran from New York and northeast points to Jacksonville, Tampa, and Miami—from Jacksonville to Atlanta and beyond Atlanta to St. Louis via two branches; one through Chattanooga, Nashville, and Evansville and the other through Birmingham and Memphis. National also sought to extend its route 39—which ran from Miami to New Orleans—beyond New Orleans to St. Louis via alternate routes. The route 31 extension was regarded as within the scope of the proceeding, but the route 39 extension was regarded as expanding the scope of the proceedings, requiring, inter alia, inclusion of another New Orleans-St. Louis application.

TWA proposed extension of its route 2—which ran from the West Coast across the southern half of the United States to St. Louis (via Kansas City)—beyond St. Louis to Nashville, Atlanta, Tampa, and Miami. The proposal was clearly within the scope of the proceeding.

North American (later changed to Trans American), a combination of non-scheduled airlines having no certificated mileage, sought a new route from St. Louis to Nashville and (1) beyond Nashville to Birmingham, Tallahassee, Tampa, and Miami and (2) beyond Nashville to Chattanooga and Atlanta and (3) beyond Atlanta to Jacksonville and Miami and (4) beyond Atlanta to Tampa and Miami. This proposal was included, but the examiner recommended exclusion of other, very extensive proposals of North American, because they were filed too late and because they expanded unduly the scope of the proceeding.

Southern, a local service carrier, sought to include an application for authority between Memphis and Atlanta via intermediate points, because this paralleled segments of the Delta and National proposals. The examiner recommended exclusion because of the policy of considering local service and trunkline proposals separately; also implicitly rejected was a Southern motion to expressly exclude trunkline carriers from rendering a local service in this market.

The City of Nashville sought improved air service by inclusion on a St. Louis-Southeast route, a Chicago-Southeast route, and a Detroit-Cincinnati-Southeast route. The Nashville application was included insofar as it related to St. Louis-Southeast service but was otherwise excluded because of the obvious expansion in the proceedings that would follow from the other aspects of the application.

Similarly, Kansas City and Minneapolis-St. Paul sought to expand the scope of the proceeding to consider their needs. And Continental asked to have a Kansas City-St. Louis proposal of its own consolidated if Kansas City were included. All were rejected.
The incumbent on St. Louis-Southeast service was Eastern with its route 10 running from Miami and Tampa along parallel segments to Nashville, touching Atlanta, Birmingham, Chattanooga, and most other area points here involved. At Nashville the route broke into two forks, one terminating in St. Louis and the other in Chicago. Eastern moved that the entire proceeding be deferred and take its proper place on the docket, complaining that many Eastern applications filed long before the St. Louis application were still languishing on the Board’s docket, some for more than ten years. In the alternative, Eastern sought to consolidate applications for:

1. Extensions from Chicago to Twin Cities, from St. Louis to Twin Cities, and from St. Louis to Kansas City. Eastern contended that Braniff’s application, if granted, would permit Braniff to connect the Twin Cities and Kansas City, on its existing route, with the Southeast by means of an extension to the south and east. This same connection was sought by Eastern, except that the extension would be from Eastern’s certificated points in the Southeast and Chicago to the north and west. Similar extensions were sought by National and Delta.

2. Extensions from St. Louis to Chicago and from Tampa to Knoxville and Cincinnati. Eastern contended that Delta’s application, if granted, would permit service between Chicago and the Southeast via St. Louis and between Tampa and Knoxville-Cincinnati, because Chicago, Knoxville, and Cincinnati were already included on Delta’s routes.

3. Service between St. Louis and the West Coast. TWA, it was argued, would gain a route from the West Coast to the Southeast if its application were granted. The same route was sought by Eastern’s extension west of St. Louis. Similar extensions were sought by National and Delta.

The examiner assumed that Eastern’s motion to defer was foreclosed by the Board’s discretionary judgment to institute proceedings. Rejection was recommended as to all of Eastern’s applications because of their tendency to expand the proceeding.

The final issue concerning scope of the proceedings was the nature of restrictions to be imposed on any authority granted so as to limit the new award to one basically for St. Louis-Southeast service. The examiner recommended a mandatory stop at St. Louis for all flights from the Southeast terminating north or west of St. Louis. More extreme limitations—such as mandatory change of plane at St. Louis—were rejected without prejudice to their renewal later in the proceeding.

The examiner’s recommendations, included in his internal report to the Board, were in all cases followed. The Board issued as its consolidation order the draft prepared by the examiner. In his published prehearing conference report, on the other hand, the examiner merely noted which applications seemed to be within the scope of the proceeding as initially indicted by the Board and stated that other applications would be reported to the Board.

The examiner was also confronted with motions to intervene by American, Capital, Northwest, Southern, and three civic groups. Denial of all such petitions was recommended. No definitive action was taken on Bureau Counsel’s request for information or the determination of dates for submission of exhibits and commencement of the hearing. In late April and early May exceptions to the prehearing conference report were filed by Capital, Northwest, Kansas City, American, Eastern, TWA, and Delta.
On June 14 the examiner passed on the exceptions of the parties in a supplementary prehearing conference report, finding them foreclosed by the Board’s consolidation order or subject to further Board consideration. This report also established procedural dates which, because of subsequent revisions, were not observed.

Petitions for reconsideration of the consolidation order were filed in June by Eastern and North America, and answers were filed by American, Braniff, Delta, TWA, and St. Louis. The North American petition did not raise any new points, but the Eastern petition did. It pointed out that consolidation of Delta’s application for a St. Louis-Memphis-Southeast segment would permit Delta, already authorized between St. Louis and Kansas City, to connect Kansas City to Southeast via Memphis. Eastern therefore sought: (1) a Memphis-Kansas City segment; (2) a Chattanooga-Birmingham authorization; and (3) a St. Louis-Memphis segment. Eastern was already authorized to serve these last four cities; but the cities were so located on different routes that Eastern could not provide direct service between the two pairs indicated.

On September 17 and 28, the Board granted the petitions to intervene of American, Capital, Northwest, Piedmont, Southern, and seventeen community representatives. Intervention by additional community representatives was subsequently allowed, resulting in some ten carrier parties and over twenty civic representatives.

On October 2, the Board passed on the petitions to reconsider its consolidation order. The North American petition was denied. Also rejected was the Kansas City-Memphis proposal of Eastern, the Board relying on the fact that Delta would be obligated to stop at Memphis on flights between Kansas City and the Southeast. The second and third proposals of Eastern were included because (1) they were within the area that coincided with proposed segments of other applicants, and (2) either they were made orally at the prehearing conference and overlooked by the examiner or they were filed late (after the conference) under extenuating circumstances.

Meanwhile the procedural dates set by the examiner had been revised several times, finally specifying:

Submission and exchange of exhibits in chief

Submission and exchange of rebuttal exhibits

Hearing

Contemporaneously with the Board’s order of October 2 on the petitions for reconsideration, a notice by the examiner confirmed that hearings would commence on October 18. Additional time, if needed, was to be allowed on the newly added phases of the case. Despite some further procedural skirmishing, the hearings did commence on that date.

C. Formal Hearing And Positions On The Merits

The formal hearing consumed nine days, concluding on November 1. The transcript engrossed 1,054 pages. There were filed in addition some 1,847 pages of exhibits.

On November 1, Eastern submitted a petition to the Board to reconsider the latter’s consolidation order of October 2. The petition was de-
nied on December 31 on the grounds (1) that some of the matters urged were repetitious of arguments made in Eastern's prior petition for reconsideration, and (2) that other matters involved a collateral attack on interlocutory rulings of the examiner.\textsuperscript{248}

After the conclusion of the hearings, briefs were submitted to the examiner. Pursuant to several requests, the deadline for filing these was extended to February 7, 1957. In all, seventeen briefs (and several letters) were filed totaling 533 pages.

On the primary issue of whether additional air service was required between St. Louis and the Southeast, Eastern opposed all other applicants:

(1) Eastern made pessimistic projections from the traffic figures available and compared its low estimates with recent decisions in which the Board had refused to authorize additional service in markets manifesting similar or greater traffic potential. Contending that this was a marginal route, Eastern argued that diversion of traffic revenues through a competitive authorization would jeopardize its ability to serve numerous smaller communities which did not produce a profit. The other applicants made more optimistic projections from the statistics, compared St. Louis-Southeast air service with the greater service available between other city-pairs claimed to be comparable, and compared their high estimates of traffic potential with recent Board decisions granting competitive air service in markets with similar or lesser traffic potential. Similar arguments were made as to other major city-pairs.

(2) The other applicants generally criticized the schedules of Eastern in the St. Louis-Southeast market, the equipment used, and the alleged failure of Eastern to adequately develop the market. Eastern maintained that it had always provided service commensurate with the size of the market, and in fact had anticipated market growth by maintenance of excess capacity. This second argument was related to the first, since, if Eastern was right, the existing traffic was about as much as could be expected if a new carrier were certificated. Whereas, if the other applicants were correct, existing traffic figures were depressed and estimates for the future would have to include a liberal allowance for the additional traffic that would be generated by the better service and more intensive promotion borne of competition.

(3) Bureau Counsel ultimately sided with Eastern on this issue, contending (a) that the other applicants had failed to show that Eastern had not developed the route's traffic potential, and (b) that the city-pairs compared with St. Louis-Southeast, which tended to indicate deficient service in that market, were not shown to be comparable with the St. Louis-Southeast market in their pertinent economic characteristics, \textit{i.e.}, the poorer traffic flows to and from St. Louis were as consistent with lack of "community of interest" with the Southeast as with under-development of traffic potential.

On choice of carrier, assuming a market sufficient to support at least some additional service, there was, of course, a divergence of views. Putting to one side the many subsidiary disputes about the validity of carrier estimates of traffic flows, costs, and scheduling possibilities, the various positions may be briefly outlined:

Braniff argued that it would be in a position to support the St. Louis-
Southeast segment by traffic from the Twin Cities and Kansas City which it was carrying into St. Louis under existing authorizations, and that passengers from these more remote cities would be conveinced by being able to continue on to the Southeast after a stop in St. Louis. (The same argument was applicable on traffic from the Southeast to Kansas City and the Twin Cities.) New one-carrier service would be made available between the Southeast and such cities as Minneapolis-St. Paul, Kansas City, Des Moines, and Omaha. Other applicants minimized this argument by contending (1) that the main stream of traffic from the Twin Cities to the Southeast would continue to move via Chicago rather than St. Louis and that proposals for improved service in this very market were pending in other proceedings, and (2) that Braniff was carrying very little of the St. Louis-Kansas City traffic. To this Braniff rejoined that its weakness on the Kansas City-St. Louis and Twin Cities-St. Louis routes was due to the lack of connecting traffic on those routes, which curtailed its scheduling possibilities. This defect, Braniff argued, would be remedied by a St. Louis-Southeast authorization.

Delta argued that it was already authorized to serve most of the cities involved in this proceeding, although not in all cases in the direction here in issue, and that the grant of its application would greatly improve its route structure, eliminating loose ends and facilitating flexibility in arranging schedules, service, and utilization of equipment. It contended, moreover, that since the service involved was primarily "regional," i.e., covering service within the southeastern quadrant of the United States—the new authority should go to Delta as a carrier specializing in that region. Finally, Delta argued that its historical participation in the traffic involved was greater than that of any other applicant, exceeded only by Eastern, and that its certification would mark the least disruption in existing patterns—fewest new cities, least new mileage, and minimum disruption of historical patterns. In contrast the proposals of the other applicants would create additional competition, e.g., between Atlanta and Miami—where none was shown to be needed. On the other hand, the route integration sought would permit a wide variety of scheduling, including coach service and some new one-carrier service. The other applicants argued that this proceeding was not concerned with remedying the defects of Delta's route structure but with improving St. Louis-Southeast air service; and that Delta's existing routes, while criss-crossing the area, contained no substantial traffic flows which could be funneled into the main St. Louis-Southeastern market to support extensive services there or to add to existing travel conveniences of passengers entering that market from outside cities. Delta's historical participation was minimized by pointing to Eastern's substantial monopoly of the traffic, making Delta's share merely the highest of several inconsequential percentages. Moreover, one of Delta's major interests—certification into Tampa—was at issue in the Great Lakes-Southeast Service case.

National urged its selection on the grounds (1) that it proposed more coach service than any of the other applicants, (2) that it was a specialist in Florida traffic, serving more Florida cities than any other applicant, and (3) that a recent Board decision, adding a competitor to a National route, might leave National with more equipment than it could utilize. But National's main point was that, of all the trunklines, it was most in need of
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strengthening by additional route authority. It pointed to recent grants of authority to the other small trunklines and to the reverse consequence in its own case by reason of the certification of an additional competitor on its important New York-Miami route. The St. Louis market was viewed by National as one of the last remaining avenues for its expansion. Other applicants, countered that an award to National would not necessarily strengthen that carrier since the route in question was not a particularly lucrative one, that National lacked any back-up traffic to support services on the route, and that the seasonal nature of the route coincided with seasonal fluctuations on National’s other routes, thereby aggravating the variation in utilization of its equipment. Furthermore, they argued, these same factors minimized the amount of new service that would be offered by National, particularly since no service would be provided to any points west of St. Louis. Finally, it was pointed out that National’s revenues had been ample compared to its investments, i.e., that its operations were quite profitable.

TWA placed primary reliance on the new service its proposal would provide between the Southeast and major cities west of St. Louis: first one-carrier service between Southeast points and Los Angeles, San Francisco, Tulsa, Oklahoma City, and Kansas City. The addition of traffic to and from these cities to traffic moving over the St. Louis-Southeast segment would mean: (1) greater support for service between St. Louis and the Southeast, and (2) improved service between the western cities and the Southeast, more new one-carrier service than proposed by any other applicant. TWA also pointed out that present seasonal fluctuations in its equipment utilization were the reverse of the seasonal demands of the Florida traffic and accordingly that its selection here would permit improved utilization of equipment. The other applicants responded that TWA was attempting to convert a St. Louis-Southeast case into a southern transcontinental case and that, in any event, TWA would not be able to attract much traffic between western cities and the Southeast because the mandatory stop at St. Louis would make TWA’s service less attractive than transcontinental service being provided by interchange among a number of other carriers.

Trans American (successor to North American) based its argument on two factors: (1) its willingness to render coach service at fares lower than any proposed by other applicants, and (2) the desirability of permitting new entry into the trunkline industry. Its primary obstacle was an outstanding Board order finding that Trans American’s constituents had engaged in violations of the statutory and regulatory scheme administered by the CAB. Other applicants relied on this order in arguing that Trans American was “unfit.”

Eastern’s affirmative proposals were limited to the “gaps” it desired to close between Chattanooga and Birmingham and between St. Louis and Memphis. Capital was the only carrier authorized to render service between the first two; and Delta was the only one certificated between the second two. Eastern argued that Capital and Delta had failed adequately to develop their respective routes; that the addition of Eastern would improve service between these two pairs of points; that Eastern would be able to improve its long-haul services to the Southeast if these gaps were closed, augmenting scheduling possibilities and routing flexibility; and that

...
such improved flexibility would also permit better utilization of Eastern equipment and personnel. Diversionary impacts on Capital and Delta were estimated to be small. Even so, Capital and Delta objected to certification of Eastern.

The positions of some of the interveners were as follows:

American was concerned because an award to TWA would permit service by that carrier between the Southeast and cities west of the Mississippi. American was then participating in such traffic, either by direct service or by interchange with other carriers, and argued that the traffic potential was too small to support an additional carrier. American, therefore, advocated that any grant to TWA prohibit through-plane service between the Southeast and the West.

Northwest was concerned about a grant to Braniff which would enable that carrier to participate in traffic between the Twin Cities and the Southeast. Northwest was actively participating in such traffic by providing service between the Twin Cities and Chicago, where connections to the Southeast were available. Northwest urged that any award to Braniff preclude through-plane service between the Twin Cities and the Southeast. Northwest also had an application pending in the Great Lakes-Southeast Service case to extend its Twin Cities-Chicago route to Miami.

Southern rendered local service between Memphis and Atlanta via Birmingham, and between Atlanta and Jacksonville. Portions of the applications of Delta and National duplicated these segments. Southern argued that other routings between St. Louis and the Southeast would be preferable and would protect it against undue loss of revenues.

As noted, Capital objected to certification of Eastern as a competitor on the Chattanooga-Birmingham segment.

Kansas City urged that it be permitted to benefit from improvement of service between St. Louis and the Southeast by granting the application of Delta or TWA, both of which were already authorized to render service between Kansas City and St. Louis.

Evansville, included in the St. Louis-Southeast proposals of Delta and National, expressed a preference for Delta because of the greater frequency of service offered by the proposed schedules of that carrier.

Chattanooga asked to be included on any new St. Louis-Southeast route and supported Eastern’s Chattanooga-Birmingham proposal.

Memphis, included in the St. Louis-Southeast proposals of Delta, Braniff and National, supported Delta because (1) Delta’s service proposals were more extensive, and (2) Delta’s certification would make Memphis a gateway for traffic between Kansas City and the Southeast.

Birmingham complained of service deficiencies to St. Louis, Chattanooga, Nashville, and Memphis, and supported Delta’s application because it offered the greatest quantity of service.

Jacksonville desired competitive air service to Nashville, Memphis, and St. Louis.

The major cities involved—St. Louis, Nashville, Atlanta, Tampa, and Miami—urged the need for additional air service but expressed no marked preference for one applicant over another, except for Atlanta’s desire for Delta’s more attractive schedules. They emphasized their community of interest with one another. A number of large and small cities located on
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Delta's route supported that carrier's application in order to insure better service for themselves.

Bureau Counsel argued that there was no need for any new service and contended that all applications should be denied. If, however, an award was to be made, the choice of Delta was said to involve the least new competition since Delta was already certificated to serve Chattanooga-Atlanta, Birmingham-Atlanta, and Atlanta-Jacksonville-Miami.

With the submission of briefs on February 7, 1957, the case stood ready for decision by the examiner. One further detour was provided by Eastern which, in a motion filed on May 7, sought to reopen the record to include information on the financial and traffic results of its recent operations in the St. Louis-Southeast markets. Answers in opposition were filed by St. Louis, TWA, and Delta. And on July 2 the examiner summarily denied Eastern's motion.

D. Initial Decision And Subsequent Maneuvering

On July 12, 1957, the hearing examiner rendered his initial decision, a document running 129 pages in the record. After noting briefly the procedural framework of the case, the examiner proceeded to describe: (1) the cities involved in the proceeding, their economic characteristics, their air service, and their views with respect to new air service; (2) the proposals of the applicants, including their arguments for being preferred over competing applicants; (3) the arguments of applicants, incumbent, and Bureau Counsel concerning the need for new service in the St. Louis-Southeast market; and (4) the objections of interveners. Statements of fact—apparent subsidiary findings—were so intermingled with statements of the parties' contentions, that it was difficult to tell which statements were accepted by the examiner. But the examiner made clear his ultimate conclusions, to the effect that:

(1) Additional air service was warranted over a route encompassing St. Louis, Nashville, Atlanta, Tampa, and Miami. As to other cities within the area, the available traffic was found to be insufficient to support new service except as servicing might result under existing authorizations. But as to the basic St. Louis-Southeast route the examiner found that there was sufficient traffic, independent of any back-up traffic, to support an additional carrier, and that Eastern had not adequately developed the route. The diversion in revenues that Eastern would sustain was not considered to be a threat to that carrier's financial position.

(2) The carrier to render this basic service should be National. The projected beyond-area benefits advanced by Braniff and TWA were minimized by the examiner on the grounds suggested by the other applicants. And as between Delta and National, the examiner found that National had the greater need for route strengthening because of recent route awards to Delta and the confined character of National's route pattern. Trans American was found to be unfit because of prior Board orders based on previous violations by members of the Trans American group.

(3) Additional authority should also be granted to Eastern between St. Louis and Memphis and between Chattanooga and Birmingham, and to Delta between Memphis and Birmingham. These awards were based on the opportunities for route improvement afforded by the closing of "gaps"
in these carriers' route structures, and were deemed to meet the justifiable complaints of the cities affected.

Exceptions to the examiner's decision were filed during July by twenty of the parties to the proceeding. On August 5, TWA moved to strike portions of Eastern's exceptions which embodied some of the recent operating data that Eastern had unsuccessfully sought to inject by its effort to reopen the proceeding. Delta and St. Louis supported TWA's motion. On August 28 and 29 notices relating to oral argument before the Board were promulgated, supplemented by a further notice on September 4 setting oral argument for September 19. By reason of an earlier notice by the examiner, briefs were due on September 9.

Briefs to the Board were filed by nineteen parties, and letters were submitted by two others; together with the exceptions they totaled 576 pages. Oral argument before the Board consumed seven hours on September 19 and 20 and ran for 219 pages. In addition, some forty pages of materials were submitted for use in connection with oral argument. The pressure of work prevented the General Council's office from preparing its usual Memorandum of Issues.

During the course of the argument Northwest requested that the Board defer its decision in this case for contemporaneous consideration with the pending Great Lakes-Southeast Service case. By order dated October 18, the Board granted the request on the ground that both cases involved service between Atlanta and Florida (the stem of a fork with one prong reaching to St. Louis and the other to the Great Lakes area), and that their contemporaneous consideration would facilitate a sound decision in both cases. Petitions for reconsideration of this order were filed by Delta and Eastern, each asking different relief, and they were supported by several cities. They provoked in turn responses by National, Braniff, TWA, Northwest, and Capital, who urged that the petitions be denied or, in the alternative, that they be stricken to the extent that they involved a reargument of the merits. Several additional exchanges on this subject concluded on December 11, 1957, without the benefit of any decision by the Board on the various petitions, answers, motions, and letters.

Another exchange took place in May and June of 1958 when Eastern sought once more to reopen the record for recently developed operating data; replies were filed by Northwest and TWA.

At about this time a dramatic succession of events occurred which altered considerably the orientation of the proceeding. On March 26 and 31, 1958, the Board announced in several press releases its tentative decision in the St. Louis-Southeast case, making the primary grant to TWA to render service between St. Louis and Miami via Nashville, Atlanta, and Tampa. At about the same time, March 24, the Board instituted the Houston-West Service case, an investigation into the need for improved service between Houston and California and for first one-carrier service between Florida and California via New Orleans and Texas points. On April 21, TWA amended a pending application so as to propose a southern transcontinental route of the type described and moved to consolidate it into the Houston-West case. And on August 5 the Board issued an order enlarging the scope of the Houston-West case into a Southern Transcon-
Encompassing points in Georgia and Florida in the East, and California in the West, via intermediate points in Alabama, Louisiana, Texas, New Mexico, Arizona, and Nevada; at the same time the Board deferred decision with respect to the Dallas-California portion of the pending Dallas to the West Service case and consolidated that portion with the Southern Transcontinental case. In all, nine applications were consolidated at this time. The announcement of the result in the St. Louis-Southeast case and the almost simultaneous birth of the Southern Transcontinental case set the stage for the next round of controversy.

On August 8, Delta moved to defer consideration of TWA's application in the St. Louis-Southeast case for contemporaneous consideration with the applications pending in the Southern Transcontinental case. On August 12, American moved to dismiss so much of TWA's application as permitted through-service beyond St. Louis to the West Coast or, in the alternative, to defer TWA's application for comparative hearing and contemporaneous consideration with applications pending in the Southern Transcontinental case. Answers in opposition were filed by TWA, Eastern, and a number of communities. On September 29, the Board dismissed the motions on the ground that they were, in essence, an attempt to obtain reconsideration of the Board's press release and that, as such, they were prematurely filed.

Finally, on September 30 the Board issued its formal opinion in the St. Louis-Southeast case, confirming the awards announced in its press release. At the time of this decision the record totaled 5,169 pages. The General Counsel's request for instructions from the Board was 1 page in length.

E. Board Decision And First Reconsideration

In its opinion, the Board agreed with the examiner on several points: (1) that a St. Louis-Nashville-Atlanta-Tampa-Miami routing should be granted to one of the applicants; (2) that Delta should be granted the Birmingham-Memphis segment; and (3) that Eastern should be granted the Chattanooga-Birmingham segment. But the Board disagreed with the new authority granted to Eastern between Memphis and St. Louis and, as previously indicated, it chose TWA as the carrier to render the basic new service between St. Louis and the Southeast. In making this selection, the Board emphasized (1) the amount of new one-carrier service TWA would provide between the Southeast and cities west of the Mississippi, and (2) the relationship between the seasonal demands of the new route and the complementary seasonal characteristics of TWA's existing system.

American had argued that TWA should be prohibited from providing through-plane service between the Southeast and the West Coast because, in the absence of a restriction against such service, TWA would be in a position to render southern transcontinental service in preference to carriers whose applications were pending in the Southern Transcontinental Service case. The Board rejected the argument, pointing out (1) that service between St. Louis and the Southeast was found to be required without regard to any transcontinental aspects, (2) that TWA's beyond-area advantages were the kind traditionally taken into account in making a selec-
tion among competing applicants, and (3) that the transcontinental service TWA might render, with a mandatory stop at St. Louis, was materially different from direct one-carrier service between Florida and the West Coast. The Board affirmed "that the availability of TWA's service via St. Louis would not in any real sense preclude a finding of public need for a more direct routing. . . . Our grant to TWA . . . does not in any way prejudge the merits of the proposals of the various applicants in the Southern Transcontinental case."257

The rejection of competing applications was based largely on arguments previously advanced by their adversaries.

As to National, the Board observed that strengthening of weaker carriers was but one of many factors to be considered and that National would not be particularly strengthened by a route that dead-ended at St. Louis. It should be noted, further, that about this time (February 8) a subsidiary of National was exposed as a participant in the Florida, Channel 10 television scandal.

As to Braniff, the Board observed that the Twin Cities support on which it had relied had been further diluted by a grant to Northwest in the Great Lakes-Southeast Service case. Already authorized between the Twin Cities and Chicago, Northwest was granted an extension from Chicago to Miami via Atlanta, thereby fortifying its hold on Twin Cities-Florida traffic.

With regard to Delta, the Board noted that, as a result of the grant here of the Birmingham-Memphis segment and the addition of Tampa to its route in the Great Lakes-Southeast Service case, most of the new service benefits upon which Delta had relied could be furnished without granting it direct St. Louis-Southeast authority. Indeed, in view of Delta's new authority it became necessary to require Delta to serve Birmingham, in addition to the junction points of Memphis and Atlanta, on all flights serving St. Louis or Kansas City, on the one hand, and Florida points on the other. Otherwise Delta would have constituted a third competitor for St. Louis-Florida traffic.

Eastern's two applications met with divergent treatments. On the Chattanooga-Birmingham segment, the benefit to Eastern's route structure was deemed to outweigh the diversionary impact on Capital, particularly in light of Capital's poor service. On the St. Louis-Memphis segment, the diversionary impact on Delta was held to outweigh the benefit to Eastern's route structure, apparently because Delta had rendered good service. Eastern's motion to reopen the record was denied.

Three members of the Board concurred in the majority opinion. One member concurred in the awards to Delta and Eastern but dissented on the award to TWA on the ground that no need had been shown for additional service in the St. Louis-Southeast market, particularly in view of the Great Lakes-Southeast decisions, which had added two carriers to the existing two carriers in the Atlanta-Florida market. Another member came to the same result, emphasizing the marginal character of the St. Louis-Southeast market and the effect of the TWA award on the Southern Transcontinental case. However, he would not have required Delta to make a mandatory stop at Birmingham, thereby permitting that carrier to participate in the St. Louis-Southeast traffic.

The Board's opinions totaled thirty-seven pages in the record.

The Board's order provided that the new operating authority was to become effective on November 29, 1958. Petitions for reconsideration and other relief were filed by American, Delta, Eastern, National, and a number of civic participants. Numerous answers were filed, as well as some motions addressed to these filings. On November 21 the Board postponed the effective date of the new certificates to December 15 because of the pendency of the petitions for reconsideration. And on December 8 the Board issued its Supplemental Opinion and Order on Reconsideration making a minor change in a restriction on Delta's new authority and otherwise rejecting the petitions for reconsideration. The opinion, twenty-four pages in length, was addressed primarily to arguments of the carrier participants that the Board's awards to TWA and Delta deprived competing applications of comparative consideration, i.e., those seeking southern transcontinental service and Eastern's Memphis-Kansas City proposal.

TWA's certificate became effective on December 16 and it commenced service over the new route.

F. Judicial Review

Petitions to review the Board's order were filed by American, Delta, Eastern, and National. The Court of Appeals rendered its decision on December 10, 1959. While rejecting summarily all arguments directed to the merits of the awards to TWA and Delta, the Court considered in great detail objections to the scope of the proceeding.

All four petitioners challenged the award to TWA on the ground that it constituted a southern transcontinental route which they had also sought. Petitioners argued that, instead of being relegated to the Southern Transcontinental proceeding, their applications should have been given comparative consideration with that of TWA in the St. Louis-Southeast case. The Court agreed (at least as to three of the four petitioners) and found that prima facie the Board by its award had transformed the limited area proceeding into a southern transcontinental case; that the mandatory stop at St. Louis did not preclude TWA from becoming an effective competitor for transcontinental traffic; and, therefore, that the grant to TWA might prejudice some or all of the southern transcontinental applications. The Board was given three ways in which to remedy the defect: (1) it could condition the award to TWA so as to preclude it from becoming an effective transcontinental carrier; (2) it could hold an evidentiary hearing to buttress its announced conclusion that the award to TWA could not exclude any southern transcontinental awards; or (3) it could reopen the proceeding to hold a comparative hearing on all transcontinental applications.

The award of the Memphis-Birmingham segment to Delta was challenged by Eastern. Eastern contended that this permitted Delta to render Kansas City-Memphis-Southeast service, the very authority Eastern sought to secure by its Kansas City-Memphis application, which had been excluded from the proceeding. On this phase of the case the Court sustained the Board, finding a necessity that the Board be in a position to restrict the

258 E-13189 (Nov. 21, 1958).
259 E-13248 (Dec. 8, 1958).
scope of its proceedings to manageable proportions. In reconciling this conclusion with its apparently contrary holding on the transcontinental phase, the Court observed: "The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings."

On May 2, 1960, TWA's petition for certiorari to the United States Supreme Court was denied.

G. Board Decision On Remand

The next action of the Board took place on May 9. Acting on a request filed by TWA on April 18, the Board granted a thirty-day exemption to prevent interruption in TWA's St. Louis-Southeast services. Rejecting the opposition of Delta and Eastern, the Board conditioned the exemption on a change of planes at St. Louis. On May 17 an order issued setting oral argument on the remanded case for May 26 and specifying the issues the Board thought to be significant. The Board's ability to act was handicapped by the fact that of the five members who originally had decided the case only the two dissenters remained. Oral argument actually took place on June 3, and on June 8 the Board extended TWA's exemption to July 31.

On July 29, 1960, the Board issued its Supplemental Opinion and Order in the St. Louis-Southeast case. Reaffirming its decision on need for the service and selection of TWA to render the service, the Board turned to limiting TWA's transcontinental operations in accordance with the mandate of the Court. The Board required that, on transcontinental flights, TWA must change planes at either St. Louis or Kansas City. This created three problems:

First, this requirement seemed to conflict with the basis of the Board's original selection of TWA: the integration of the St. Louis-Southeast segment with TWA's route west of St. Louis. The Board concluded that, even though single-plane service between the Southeast and the West Coast was no longer a supporting consideration, TWA was still the best choice because of: (1) seasonal integration of operations, (2) single-plane service between Kansas City and the Southeast, and (3) availability of back-up traffic west of Kansas City which, despite the change of plane, could be funneled into the St. Louis-Southeast market to support service there.

Second, it was disputed that this requirement was sufficient to comply with the mandate of the court without also establishing a connecting time more prolonged than the forty to forty-five minutes then being used by TWA under its exemption authority. It was argued, further, that to the extent TWA could rely on back-up traffic beyond Kansas City, it was a transcontinental competitor. The Board rejected the contention, finding that the circuitry, delay, and change of plane involved in TWA transcontinental flights made its competitive impact on the transcontinental market "minimal."

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251 271 F.2d 632, 644.
253 E-15202 (May 9, 1960).
254 E-15239 (May 17, 1960).
255 E-15511 (June 8, 1960).
256 E-15599 (July 29, 1960).
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Third, a new Ashbacker objection was injected when Eastern contended that one of its transcontinental applications, which had been refused consolidation, involved a St. Louis-Kansas City segment which was mutually exclusive with the single-plane Kansas City-Southeast service permitted by the Board’s order. Relying on the Court’s decision on the Memphis-Birmingham award to Delta, the Board held that it had discretion to reject consolidation of Eastern’s beyond-area application even though the award to TWA permitted the service sought by Eastern.

On the first and second points, one member of the Board dissented. On the third point Eastern filed a petition for reconsideration, which, together with a Delta petition, was denied on October 11, 1960. The opinions on remand ran some twenty-four pages. The St. Louis-Southeast Service case was finally over.

H. Concluding Notes

Two postscripts may be in order:

First, TWA’s passengers between the Southeast and the West Coast are still going through the tiresome ritual of changing planes at St. Louis or Kansas City. The Board’s files include inquiries from passengers who used TWA’s through-plane service in 1959 and express some understandable ire with the subsequent requirement of changing planes.

Second, the Board decided the Southern Transcontinental Service case on March 13, 1961, awarding two new transcontinental routes, one to National and one to Delta. TWA’s application was summarily rejected on the grounds that it lacked any historic interest in Florida-West Coast traffic and that its certification would result in excessive competition with National’s trans-Gulf operations.

As concluded, the record in the St. Louis-Southeast case filled eleven volumes.

IX. STUDIES OF PROCESSING TIME AND VOLUME OF LICENSING MATTERS

The St. Louis-Southeast case is but one proceeding. Additional information is required in order to place that case in perspective. How does it compare with other major route proceedings in length and complexity? Among other things, the following discussion should permit a comparison with the St. Louis-Southeast case and facilitate a more realistic estimate of the nature and magnitude of the Board’s licensing proceedings.

In fiscal 1961, six major route proceedings (not counting St. Louis-Southeast) were closed by the Board: one trunkline case, four local service area cases, and one case substituting local for trunkline service. For reasons indicated elsewhere, the intervals between the filing of the various applications and the prehearing conference are not meaningful measures of processing time. In the six cases here considered, applications were included which were almost nine years old at the time of the prehearing con-

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267 E-15904 (Oct. 11, 1960).
269 Southeastern Area Local Service Investigation, 25 C.A.B. 819 (1957); Northeastern States Area Investigation, E-14294 (July 31, 1959); Cincinnati-Detroit Investigation, 31 C.A.B. 63 (1960); Pacific-Northwest Local Service Investigation, 29 C.A.B. 660 (1959); Great Lakes Local Service Investigation, 24 C.A.B. 813 (1956); Southern Transcontinental Service case, E-16500 (March 13, 1961).
ference; others were filed at the conference or shortly before. These time intervals are therefore excluded. Also omitted are intervals required by judicial review or evidentiary hearings on reopened portions. Working within these limitations, a composite picture of the six major route cases, from the prehearing conference to the final Board order, discloses the following time intervals:

From prehearing conference to the examiner's original report of the conference, 1.2 months elapsed; from the examiner's report to the Board's first consolidation order, another two months; from the first consolidation order to the Board's final consolidation order, an additional 4.4 months; from the final consolidation order to the start of the evidentiary hearing, another 2.2 months. The total time consumed prior to the evidentiary hearing averaged 9.8 months. The time required to finally determine the scope of the proceedings amounted to 7.6 months. 270

From the beginning of the evidentiary hearing to its conclusion an average of 2.9 months elapsed. During this period an average of thirty-three days were actually devoted to evidentiary hearings.

From the conclusion of the formal hearing, the examiner took 10.9 months to prepare his initial decision.

The Board's decision, on review of exceptions to the examiner's report, was issued 10.6 months later. It took another 6.4 months to dispose of petitions for reconsideration. The total time required from prehearing conference to final Board action averaged three years and five months.

A number of other sources indicate that these are typical figures. Thus the Board's own budget personnel compiled averages based on seventy percent of the route cases closed in the five-year period 1956 through 1960, excluding extreme or typical cases. The averages obtained for major route cases were:

One year from prehearing conference to completion of the hearing (almost identical to fiscal 1961);

Fifteen months from conclusion of the hearing to the initial decision (10.9 months for fiscal 1961);

Thirteen months from initial decision to Board decision (10.6 months for fiscal 1961).

It is useful, in reviewing the time required to decide these cases, to simultaneously consider their complexity. The six cases used to construct a composite for fiscal 1961 each involved on the average:

Thirty-three applications sought to be consolidated;

Seventeen applications actually consolidated, four by civic interests and the remainder by six carrier applicants;

Seventy interveners, six of them carriers and the remainder civic interests;

An initial decision of 210 pages, two days of oral argument before the Board, and one or more Board opinions totaling 113 pages; and

A total of some twenty-eight volumes.

As compared with these proceedings, the St. Louis-Southeast case stands at the less complex end of the spectrum of major route cases. Only 32.5 months were consumed between the prehearing conference and the final Board order prior to judicial review; only thirty-odd parties were involved; and the record was a mere eleven volumes.

270 The evidentiary hearing is sometimes commenced before the scope of the proceeding is finally determined.
Recognizing the complexity of major route cases is of some importance. If, for example, the 106 applications actually consolidated in the six major route cases under discussion were each credited with a pro rata share of the 246 months required to dispose of the six proceedings, the time allotted to each application would be only 2.3 months. This compares favorably with the time required to dispose of "simpler" route cases, those concerned with only one or a few applications.

In fiscal 1961, there were six proceedings that might be considered minor route cases (including two reopened portions of major route cases). They each required an average of 15.7 months to conclude; and if credit is given for multiple applications in several proceedings, the pro rata share of the total time applicable to each application is 9.4 months. The Board's budget study for 1956 through 1960, previously referred to, indicates that seventeen months is typical for minor route cases (exclusive of the reconsideration stage).

Route cases closed in fiscal 1961 have been deemed to encompass six major and six minor route proceedings. This is a fairly representative figure, somewhat better than fiscal 1960 and not quite as high as fiscal 1959. The Board's classification of "closed" proceedings, based on the initial Board decision on the merits, does not coincide with the one used here—which treats as "closed" only those cases in which petitions for reconsideration have been disposed of and deferred portions have been resolved (even through deferred portions requiring evidentiary hearings were treated as separate cases for purposes of time studies). The Board's classification of "route cases" is also somewhat broader in that it includes suspensions, renewals, international applications, and other types of proceedings excluded from this study of initial licensing of domestic air transport. Even so, the Board's figures are useful if compared with one another over a period of time. For the fiscal years 1947 through 1961, the Board's dispositions of route matters, including dismissals, was as follows:

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<td>429</td>
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<td>122</td>
</tr>
<tr>
<td>1953</td>
<td>604</td>
<td>218</td>
<td>114</td>
</tr>
<tr>
<td>1954</td>
<td>668</td>
<td>135</td>
<td>73</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Pending at start</th>
<th>Received during year</th>
<th>Disposed of during year</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955</td>
<td>730</td>
<td>203</td>
<td>130</td>
</tr>
<tr>
<td>1956</td>
<td>803</td>
<td>360</td>
<td>191</td>
</tr>
<tr>
<td>1957</td>
<td>972</td>
<td>195</td>
<td>135</td>
</tr>
<tr>
<td>1958</td>
<td>1,032</td>
<td>202</td>
<td>88</td>
</tr>
<tr>
<td>1959</td>
<td>1,146</td>
<td>171</td>
<td>360</td>
</tr>
<tr>
<td>1960</td>
<td>957</td>
<td>194</td>
<td>119</td>
</tr>
<tr>
<td>1961</td>
<td>1,032</td>
<td>159</td>
<td>1398</td>
</tr>
<tr>
<td>1962</td>
<td>793</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

1 Included about 200 dismissals of a nonrecurring nature.

Also during fiscal 1961 the following applications for operating authority were disposed of by informal procedures:

<table>
<thead>
<tr>
<th>Exemptions</th>
<th>112</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airport notices</td>
<td>126</td>
</tr>
<tr>
<td>Service pattern changes</td>
<td>12</td>
</tr>
<tr>
<td>Charter authorizations</td>
<td>26</td>
</tr>
</tbody>
</table>

Pittsburgh-Syracuse Investigation, E-16412 (Feb. 21, 1961); Wheeling-New York Nonstop case, Doc. No. 9914; Sarasota-Bradenton Investigation, E-15974 (Oct. 31, 1960); Lake Central Airlines, Temporary Intermediate Points, E-16908 (June 7, 1961); Application of Vance Roberts d/b/a Northwest Air Service, E-15930 (Oct. 18, 1960); reopened Pacific-Northwest Local Air Service case (Sacramento to Reno), E-15913 (Oct. 12, 1960).
The docket on informal matters is fairly current; there is virtually no backlog. But the formal docket is quite another matter. An examination of that docket as of November 30, 1961, reveals that there were then pending 681 applications for domestic operating authority. Of these, 188 applications in thirteen separate cases were before the Board for its decision, including some that were being held for other matters or were awaiting the enactment of pending legislation. Another seventy-two applications involved in a single proceeding were the subject of an initial decision recently served. Hearings had been held on another forty applications involved in three proceedings; and prehearing steps had been taken with regard to forty-five more applications embraced in twelve cases.

This left 336 applications which were simply "awaiting action." These were encompassed in the following categories:

Domestic conventional aircraft—
- Filed between 1946 and 1952 .......................................................... 8
- Filed between 1953 and 1955 .......................................................... 32
- Filed in 1956 and 1957 .......................................................... 29
- Filed in 1958 and 1959 .......................................................... 49
- Filed in 1960 ........................................................ 54
- Filed in 1961 ........................................................ 51

Domestic helicopter aircraft, the earliest pending since 1946 .......................................................... 77
Alaska authority, the earliest since 1952 and most since 1958 .......................................................... 14
Nonscheduled authority, 1 since 1954 and most since 1959 .......................................................... 5
Miscellaneous formal route matters .......................................................... 17

Of significance is the fact that the largest numbers of pending applications are concentrated at the two extremes of the licensing process: either they had reached the Board for decision (or were about to) or they were simply awaiting action. The number of applications recently committed to the hearing process is relatively small. This is not wholly accidental. The general sentiment at the Board favors the view that outstanding domestic air transport authorizations are generally ample; that new licensing will proceed henceforth at a diminished rate; and that, in view of the poor financial condition of the industry, the present need is for a contraction of outstanding authorizations through route suspensions and amendments and through approvals of mergers and route transfers. Whether this is a relatively permanent fixture of contemporary CAB operations, or merely the pessimistic phase of a cyclical development, is difficult to say. It is clear, however, that the rate at which domestic route applications are processed in the near future will depend upon Board attitudes concerning the substantive policies underlying the granting of new authorizations.

It is entirely possible that the major route proceeding, which has been a source of so much anguish and study, is in large measure a thing of the past; and that future route cases will concentrate on minor adjustments to the route pattern rather than over-all review of large geographical areas and interrelated markets of substantial proportions. But a resurgence of traffic growth and industry profits could well lead to a return to ambitious licensing—and enlarged proceedings—with all of the problems they encompass.

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