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THE DOCTRINE OF PRIMARY JURISDICTION:
DETERMINATION OF EXPRESS AND IMPLIED
IMMUNITY FROM THE ANTITRUST LAWS

EDWARD O. COULTAS

One of the recurring problems of federal administrative law
has been the inability of the courts to fashion predictable standards
to accommodate the conflict between administrative regulation of
industry and the federal antitrust laws. Congress has tried to elimi-
nate and control this conflict through the enactment of specific
legislative acts that have placed certain industries under the super-
vision of regulatory agencies in order to curb destructive free com-
petition. This regulatory legislation has served to create a conflict
between the spirit of “free competition” stressed in the antitrust
laws and the regulation of industries by administrative agencies for
the “public good.” Emphasizing “free competition” is the Sherman
Act, which was designed to protect commerce from unlawful re-
straints of trade and monopolies, as well as the Clayton Act, which
is directed toward assuring a continuation of competition in inter-
state commerce while preventing harmful trade practices. The
administrative agencies, however, regulate industries for the “public
good” and were created by Congress to supervise competition
within industries in order to improve efficiency and service. As a
result of congressional regulatory legislation having been enacted,
the antitrust laws have only limited application to the industries
regulated by these statutory provisions. Yet, it has also been re-

1 E.g., Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), as amended 49
U.S.C. §§ 1 et seq. (1970); Federal Reserve Act, ch. 6, 38 Stat. 251 (1913), as
728 (1916), as amended 46 U.S.C. §§ 801-42 (1970); Federal Communications
16 U.S.C. §§ 791a-828c (1970); Civil Aeronautics Act of 1938, 52 Stat. 973, as
amended 49 U.S.C. §§ 1301 et seq. (1970); Atomic Energy Act, ch. 1073, 68

2 See cases cited note 7 infra. See generally note 43 infra.


peatedly emphasized that the regulated industries are not exempt from the antitrust laws and that any specific exemption contained in an act that diminishes the scope of the antitrust laws should be strictly construed. The resulting confusion has led to complex questions regarding whether certain activities of a regulated industry are within the ambit of the antitrust laws, administrative agency law or both. This confusion is particularly evident in the varied approaches taken by courts in attempting to coordinate the antitrust laws with the Federal Aviation Act (FAA), which is administered by the Civil Aeronautics Board.

I. HISTORICAL BACKGROUND OF THE CIVIL AERONAUTICS ACT OF 1938

Increasing debate concerning the powers and purposes of administrative agencies within the overall regulatory scheme has ensued from the variety of interpretations given statutes creating administrative agencies that regulate our complex economy. Whatever the reason for the creation of a particular regulatory
agency, and although each varies from the other in significant ways, all of the statutes creating these agencies represent an attempt by Congress to solve the dilemma of whether competition protected by the antitrust laws or regulation by agency action is more desirable for the economy and the public good. To facilitate obtaining this goal, Congress provided certain statutory exemptions from the antitrust laws within each regulatory act in order to obtain a workable balance between competition and regulation. While not completely exempting all agency action from the scope of the antitrust laws, the regulatory statutes have expressly and the courts have impliedly exempted certain agency action from the scope of the antitrust laws. To understand the interplay between the antitrust laws and federal aviation legislation, it is necessary to look to the historical background surrounding the passage of the Civil Aeronautics Act of 1938.

The Civil Aeronautics Act (CAA) was passed during the depression era when there was a general disillusionment with the value of unrestrained, free competition. One of the main aims of this legislation "was to eliminate 'cutthroat competition' among air carriers." In reference to the air industry prior to 1938, it has been stated:

[c]ommercial air transportation in the United States has traveled a thorny path, beset by tribulations in the form of monopoly within the industry itself, on the one hand, and ruinous competition in the securing of air mail routes, on the other . . . [T]he results of this competition were disastrous to the industry.  

See K. Davis, Administrative Law § 1.05 (1972); C. Wilcox, Competition and Monopoly in American Industry 1-18 (1940).

An example of such a provision is provided in the Federal Aviation Act section 414 which provides:

Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.


A. Thomas, Economic Regulation of Scheduled Air Transportation
In a Senate report on the status of the air industry prior to the Act, the industry was characterized by extreme competition that weakened the financial status of the airlines. The instability of carrier finances had a dilatory effect on safety in transportation service.\textsuperscript{14} When the proposed aviation bill was being debated on the House and Senate floors, not only were the drafters of the bill trying to control the ruinous competition of air carriers, but they were concerned that the new system of regulations might create a monopoly. In fact, Commissioner Eastman of the Interstate Commerce Commission, who supported full federal regulation of air transportation, reminded the members of the Senate Commerce Committee that the proposed legislation would give the Commission unlimited authority to consolidate the nation's airlines. This power could be used effectively to eliminate competition altogether. Eastman sought an act that would prohibit undue consolidation among air carriers.\textsuperscript{15} Senator Borah echoed Commissioner Eastman's fear when he stated flatly that he did not want to be a party to writing an act that would aid in the destruction of competition.\textsuperscript{16}

When the Civil Aeronautics Act of 1938 was finally passed by Congress, it did contain an anti-monopoly restriction;\textsuperscript{17} thus, to

\textsuperscript{14} S. REP. No. 1661, 75th Cong., 3d Sess. 2 (1938).
\textsuperscript{15} Testimony of Joseph B. Eastman, Member, Interstate Commerce Commission, on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 334-35 (1937).
\textsuperscript{16} 83 CONG. REC. 6732 (1938); see generally 83 CONG. REC. 6728-6732 (1938); Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. at 302-05 (1938).
\textsuperscript{17} 49 U.S.C. § 1378 (1970) provides in part:
(a) It shall be unlawful unless approved by order of the Board as provided in this section—
(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;
(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;
(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any
some extent, free competition had been preserved from extinction

citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any
other common carrier, any person engaged in any other phase of
aeronautics, or any other person to acquire control of any air carrier
in any manner whatsoever: Provided, That the Board may by order
exempt any such acquisition of a noncertificated air carrier from
this requirement to the extent and for such periods as may be in the
public interest;

(6) For any air carrier or person controlling an air carrier to
acquire control, in any manner whatsoever, of any person engaged
in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship
established in violation of any of the foregoing subdivisions of this
subsection.

(b) Any person seeking approval of a consolidation, merger, pur-
chase, lease, operating contract, or acquisition of control, specified
in subsection (a) of this section, shall present an application to the
Board, and thereupon the Board shall notify the persons involved
in the consolidation, merger, purchase, lease, operating contract, or
acquisition of control, and other persons known to have a substan-
tial interest in the proceeding, of the time and place of a public
hearing. Unless, after such hearing, the Board finds that the con-
solidation, merger, purchase, lease, operating contract, or acquisition
of control will not be consistent with the public interest or that the
conditions of this section will not be fulfilled, it shall by order ap-
prove such consolidation, merger, purchase, lease, operating con-
tact, or acquisition of control, upon such terms and conditions as
it shall find to be just and reasonable and with such modifications
as it may prescribe: Provided, That the Board shall not approve
any consolidation, merger, purchase, lease, operating contract, or
acquisition of control which would result in creating a monopoly or
monopolies and thereby restrain competition or jeopardize another
air carrier not a party to the consolidation, merger, purchase, lease,
operating contract, or acquisition of control: Provided further, That
if the applicant is a carrier other than an air carrier, or a person
controlled by a carrier other than an air carrier or affiliated ther-
ewith within the meaning of section 5(8) of the Interstate Commerce
Act, as amended, such application shall for the purposes of this
section be considered an air carrier and the Board shall not enter
such an order of approval unless it finds that the transaction pro-
posed will promote the public interest by enabling such carrier other
than an air carrier to use aircraft to public advantage in its opera-
tion and will not restrain competition: Provided further, That, in
any case in which the Board determines that the transaction which
is the subject of the application does not affect the control of an
air carrier directly engaged in the operation of aircraft in air trans-
portation, does not result in creating a monopoly, and does not
tend to restrain competition, and determines that no person disclos-
ing a substantial interest then currently is requesting a hearing, the
Board, after publication in the Federal Register of notice of the
Board’s intention to dispose of such application without a hearing
(a copy of which notice shall be furnished by the Board to the At-
torney General not later than the day following the date of such
publication), may determine that the public interest does not require
a hearing and by order approve or disapprove such transaction.
by the Act. This type of free competition, however, was not the type of free competition provided for in the Sherman Act; instead, a carefully defined and limited free competition was outlined. Moreover, to balance the anti-monopoly provision and to insure the stability of the air industry from destructive competition, the 1938 Act provided explicit immunity from the antitrust laws for certain agency orders complying with the Act's requirements. Thus, the debates within Congress reflect two seemingly contrary concepts: on the one hand, a dislike of monopolies and a desire that the antitrust laws remain applicable to the greatest extent possible, and on the other, a belief that antitrust immunity should be allowed in limited circumstances. The regulatory scheme of the Civil Aeronautics Act was based on a policy of public interest and controlled competition as opposed to a policy of unbridled free competition within the aviation industry.

The drafters of the Civil Aeronautics Act, which created the Civil Aeronautics Board (CAB), interpreted this Act as the most pervasive scheme of industrial regulation yet enacted. A House report stated:

It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air-transportation industry in the United States.

The Act gave more power and broader discretion than ever before to a regulatory agency. The power of the CAB to exempt air carriers from the operation of the antitrust laws has been termed "one of the most formidable powers possessed by any Government

18 See Pa. Water & Power Co. v. F.P.C., 193 F.2d 230 (D.C. Cir. 1951). Here, the court stated that the antitrust laws represented "an attempt to keep the channels of competition free so that prices and services are determined by the working of a free market." Id. at 234.

19 See note 10 supra; see generally Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. at 309 (1938).

20 "Competition was not forbidden, but by the terms of the Aviation Act it was permitted only when required by the public interest, as established by the agency after judicial proceeding." THOMAS, supra note 13 at 49.


agency. It was further suggested in a Senate report that the broad power given the CAB by the congressional enactment included the ability and power to take actions under general provisions and fill in the details on a case by case basis. This wide discretion in the agency can best be understood by referring to several specific provisions of the Federal Aviation Act.

II. SPECIFIC PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958

One provision of the Federal Aviation Act, section 408, makes illegal certain mergers, consolidations and other transactions without the approval of the CAB. The congressional debate leading to the adoption of this particular section centered around the authority given the CAB to approve mergers and consolidations unless they would “unduly” restrain competition. As a result of strong opposition to the section, the word “unduly” was deleted. The opposition to this provision was based on a dislike of monopolies and also on Congress’ desire for the antitrust laws to remain applicable to the greatest extent possible in the aviation industry. Therefore, section 408 permits acquisitions of control that the CAB finds are not inconsistent with the public interest and that will not result in a monopoly.

A second provision of the FAA, section 409, was created to regulate interlocking relations between air carriers and other common carriers or between air carriers and those “engaged in any phase of aeronautics.” By this section, the CAB is granted power

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54 S. REP. NO. 597, 75th Cong., 3d Sess. 13 (1938).
55 The Civil Aeronautics Act of 1938 was amended and superseded by the Federal Aviation Act of 1958. Since many provisions of the 1938 Act were not altered by the Federal Aviation Act of 1958, reference to either the CAA or FAA will present identical questions to the court unless otherwise noted.
56 See note 17 supra.
57 83 CONG. REC. 6728-32 (1938).
58 49 U.S.C. § 1379 (1970) provides:
(a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—
(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder
to control the designation of officers or directors of an air carrier who are also officers, directors, members or the controlling stockholders of, or any person who is connected with any other part of the aviation industry. The Board has to approve the "interlocking" relationship and approval will be dependent upon a showing that the public interest will not be adversely affected by the proposed relationship.\textsuperscript{9}

The previous two sections are related to section 412\textsuperscript{90} that re-

\begin{verbatim}
holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such person as an officer, director, or member; or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock, in or control of, any other person engaged in any phase of aeronautics.

(b) It shall be unlawful for any officer or director of any air carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof.


\textsuperscript{100} 49 U.S.C. § 1382 (1970) provides:

(a) Every air carrier shall file with the Board a true copy, or, if
\end{verbatim}
quires each air carrier to file a copy of every contract or agreement that affects air transportation with the Board. Moreover, this section empowers the Board to approve agreements between air carriers and thus exempt them from the antitrust laws. A previously approved agreement, however, can also be disapproved by the Board if it finds the agreement contrary to the public interest. Thus, the CAB is given broad power to approve and immunize pooling and other agreements between air carriers from the antitrust laws.31

Section 414 of the FAA provides that any person affected by an order of the CAB made pursuant to section 408, 409 or 412 of the Act is expressly granted exemption from the antitrust laws.32 This provision was included in the Act after it had been thoroughly debated since there was great concern over providing even a limited grant of antitrust immunity for the industry. It was decided, however, that in order to give the CAB the needed authority to deal effectively with air carriers in the interest of the public, it was necessary to include section 414 in the Act.33 The legislative history and congressional purpose indicate that section 414 was

oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

32 See note 10 supra.
created to provide the CAB with enumerated and specific powers within the area of exempted orders under 408, 409 and 412.

The Board is given further power under section 415 to inquire into the management of the business of any air carrier, and to the extent reasonably necessary for the inquiry, to obtain from the carrier and from any person controlling an air carrier, full and complete reports and other information. This allows the CAB to supervise and inquire into air carrier management.

Section 411 is another significant provision of the FAA. It is a general provision prohibiting unfair methods of competition. This provision authorizes the Board to issue cease and desist orders in cases involving "unfair or deceptive practices or unfair methods of competition." The legislative history of this provision indicates that it was patterned after section 5 of the Federal Trade Commission Act and it has been interpreted as bolstering and adding

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3449 U.S.C. § 1385 (1970) provides:
For the purpose of exercising and performing its powers and duties under this chapter, the Board is empowered to inquire into the management of the business of any air carrier and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common control with, such air carrier, full and complete reports and other information.


49 U.S.C. § 1381 (1970) provides:
The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

It should be noted that the CAB is not empowered to award damages and therefore is not in conflict with a claim for treble damages as provided by the antitrust laws. See S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 638, 661 (D.C. Cir. 1951), cert. denied, 343 U.S. 955 (1952); Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 78 F. Supp. 1, 8 (D. Hawaii 1948). Compare Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956); Carolina Motor Service v. Atlantic C.L.R.R., 210 N.C. 36, 185 S.E. 479, 481 (1936).

strength to antitrust law enforcement.\textsuperscript{28}

The overall objectives of the FAA are enumerated in section 102,\textsuperscript{29} which describes the general duties and aims of the Aviation Act in accordance with the "public interest." These aims include, among other things: economic stability, postal service, safety, relationship of air carriers, efficient service and national defense. Also, in assessing the public interest and public convenience and necessity, the Board is required to consider: "[c]ompetition 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. . . ."\textsuperscript{40}

Section 1506 is the "savings clause" of the Federal Aviation Act. It provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such

\textsuperscript{29} 49 U.S.C. § 1302 (1970). This section prescribes the general duties and aims of the Aviation Act in accordance with the public interest. It provides:

\begin{itemize}
  \item In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
    \begin{itemize}
      \item (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;
      \item (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;
      \item (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;
      \item (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;
      \item (e) The promotion of safety in air commerce; and
      \item (f) The promotion, encouragement, and development of civil aeronautics.
    \end{itemize}
\end{itemize}

\textsuperscript{40} 49 U.S.C. § 1302(d) (1970).

It has recently been urged that this clause, along with
the fact that the Act does not provide for damages, reflects Con-
gress' intent that the Act not be viewed as an all encompassing
scheme of regulation prohibiting parties from seeking remedies
under a different statute or by common law.43

These provisions of the Federal Aviation Act are the basis for
determining whether a specific action by an air carrier subject to
the control of the CAB will be expressly or impliedly exempted
from or found to be within the ambit of the antitrust laws. The
application of these provisions of the FAA by the courts and CAB
through the implementation of the doctrine of primary jurisdiction
has provided varying interpretations of the Act that may not have
been entirely in line with the drafters' intentions and goals when
they created the statute and administrative board that governs the
aviation industry.

III. THE DOCTRINE OF PRIMARY JURISDICTION

When a claim is asserted in the courts against a member of a
regulated industry raising issues that have been placed within
the area of an administrative agency's competence by statute, the
doctrine of primary jurisdiction operates to postpone adjudication
of the controversy pending administrative determination of the
issues.44 Historically, the courts have been reluctant to review
alleged violations of a law that might fall within the jurisdiction
of an administrative agency. This reluctance reflected the judicial
policy that, if possible, litigants should pursue agency rulings, there-

(1963) (dissenting opinion).
45 E.g., United States v. Western Pacific R.R., 352 U.S. 59, 63-64 (1956);
General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433
(1940); S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 658, 662-63 (D.C.
Cir. 1951), cert. denied, 343 U.S. 955 (1952); Great N. Ry. v. Merchants Elevator
Co., 259 U.S. 285, 291-94 (1922) (dictum). See generally 3 DAVIS, ADMINISTRA-
TIVE LAW TREATISE ch. 19 (1958); Jaffe, Primary Jurisdiction Reconsidered—The
Anti-Trust Laws, 102 U. PA. L. REV. 577 (1954); Latta, Primary Jurisdiction
in the Regulated Industries and the Antitrust Laws, 30 U. CINN. L. REV. 261 (1961);
von Mehren, The Anti-Trust Laws and Regulated Industries: The Doctrine of Pri-
mary Jurisdiction, 67 HARV. L. REV. 929 (1954); Fox, The Antitrust Laws and
Regulated Industries: A Reappraisal of the Role of the Primary Jurisdiction Doc-
trine, 2 MEMPHIS ST. U. L. REV. 279 (1972); Kestenbaum, Primary Jurisdiction
to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Func-
tions, 55 GEO. L. J. 812 (1967).
by obtaining the benefit of administrative expertise and also preserving a uniform system of administration. The doctrine of primary jurisdiction has been characterized as a practice whereby:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

The judiciary has been faced with the problem of accommodating the regulatory scheme and the antitrust laws when a regulatory statute is not explicit whether the courts should defer to agency action or decide the case on its merits. A court may resist an assertion that it should defer a question to the administrative agency if the agency is without jurisdiction or if its jurisdiction is concurrent with that of the courts but without priority. Thus, when the courts and an administrative agency have been granted concurrent original jurisdiction over all or part of the subject matter of a case, a court whose jurisdiction has been invoked will, in certain cases, either postpone any action pending preliminary determinations by the agency or dismiss the action altogether.

In the antitrust field, the principal jurisdictional question is not only who decides an issue by invoking the doctrine of primary jurisdiction, but also where the line must be drawn between two standards—the standard of antitrust legality and the standard of the regulatory law. If the antitrust statutes govern, the court will adjudicate the case; if the regulatory statute applies, the agency will adjudicate the issue, subject to judicial review. Thus, in each antitrust case, the issue to be determined is whether the power of

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48 See cases cited note 46 supra. See also cases cited note 54 infra.
49 See cases cited note 7 supra.
the courts to entertain antitrust suits has been supplanted or limited by regulatory authority. Through the primary jurisdiction principle, the question of which law applies is allocated between the two tribunals so that the issue will be decided in the most efficient, orderly and equitable manner.\textsuperscript{59} The determination of whether court or agency has the power to hear a particular issue is of great consequence to the litigants since the law to be applied and its application will be different in each case.

A. Express Exemptions from the Antitrust Laws

1. Development of Non-Aviation Case Law

As in section 414 of the Federal Aviation Act, exemptions from the antitrust laws are expressly provided by the statutes of other regulated industries. These express statutory exemptions enable the agency supervising their application to approve the conduct of the members of the regulated industry and thus immunize them from antitrust prohibitions.\textsuperscript{60} Also, the anti-merger sections of the Clayton Act do not apply to transactions "duly consummated pursuant to authority" given by regulatory agencies.\textsuperscript{61} Most of the express exemptions from the antitrust laws are effective only if the practice in question has been approved by the agency.\textsuperscript{62} In some instances, when actions not having prior agency approval were attacked, courts have responded by sending the cases to the agency to see whether the agency would then approve the action.\textsuperscript{63} By this process of referral that invokes the primary jurisdiction of the agency, the courts stay or dismiss proceedings until the regulatory agency determines whether the action complained of is within the regulatory statute and thus within the competence of the

\textsuperscript{59} See generally note 43 supra.


agency. If the agency approves the action, even if it is illegal under the antitrust laws, it is exempt from the antitrust laws.

The above phenomena can be exemplified by two early antitrust cases involving actions based upon the use of a system of dual-rate contracts by a shipping conference. In United States Navigation Co. v. Cunard Steamship Co., plaintiff was an independent carrier who sought to enjoin a combination of competing steamship carriers that allegedly was in violation of the antitrust laws. The Supreme Court referred the questioned agreements to the Federal Maritime Board (FMB) and indicated that if the Board would approve the agreements, they would be exempt from the antitrust laws. By section 15 of the Shipping Act, the FMB had the power to exempt certain agreements among ocean carriers from the antitrust laws. Therefore, the Court dismissed the action, which in effect created exclusive primary jurisdiction over the matter in the FMB, and to that extent, superseded the antitrust laws. The Court held that the Shipping Act expressly covered the situation, thus creating an express exemption from the antitrust laws. As in Cunard, the Supreme Court in Far East Conference v. United States dismissed an antitrust action seeking to enjoin the operations of a conference rate system that discriminated against non-members. The rates in question had not previously been submitted to the FMB for approval. In spite of this lack of prior agency approval, the Court dismissed the action and vested exclusive primary jurisdiction in the FMB. The Federal Maritime Board then expressly exempted the actions of the defendant from the antitrust laws. In both cases, the Supreme Court relied on a primary jurisdiction argument based on the importance of administrative ex-

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"See note 43 supra.

"See cases cited note 54 supra.


284 U.S. 474 (1932).


When the Court dismissed instead of staying the action and referring it to the CAB, it vested exclusive primary jurisdiction in the agency.

342 U.S. 570 (1952).

Shipping Act § 15, 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1970). It is, however, interesting to note that nowhere in the Cunard opinion is the fact of possible complete exemption from the antitrust laws even alluded to. This is also true in Far East where the Court in effect conferred exclusive jurisdiction in the agency.
pertise and technical knowledge in dealing with issues arising in regulated industries. Therefore, the Court had determined that the Sherman Act was inapplicable in these situations even though the agreements under attack had not been approved by the FMB as required by the Shipping Act before the suit was instituted.

Subsequent to the Cunard and Far East decisions, the doctrine of primary jurisdiction, and in particular, its emphasis on administrative expertise, prompted wide criticism. Professor Jaffe, for instance, suggested that the courts exercise more original jurisdiction and implement the rule of primary jurisdiction only when there was a need to insure uniformity of decision. Thus, Jaffe stressed that the courts look to the statute that created the administrative agency in order to determine whether the doctrine of primary jurisdiction should be invoked. The dissatisfaction with the process of deferring antitrust issues to agencies which had the authority to remove conduct from the application of the antitrust laws under the doctrine of exclusive primary jurisdiction was reflected in the decision in Federal Maritime Board v. Isbrandtsen. In Isbrandtsen, there was a challenge to the anticompetitive rate practices existing in the shipping industry. The FMB had approved the rates in question, but the Supreme Court set aside the FMB’s approval of the rates noting that the Board could not immunize this particular action from the antitrust laws. The Court did not mention the FMB’s expertise; it emphasized instead that the scope of the agency’s statutory power was not broad enough to immunize the rates in question. Therefore, the Shipping Act’s exemption from

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64 46 U.S.C. § 815 (1970), which provides that agreements between carriers “controlling, regulating, preventing or destroying competition must be filed with the (Maritime) Board and shall be lawful only when and as long as approved by the Board and before approval or after disapproval . . . shall be unlawful.” See also United States v. Railway Express Agency, 89 F. Supp. 981 (D. Del. 1950).


68 Id. at 498-99.
the antitrust laws could only be obtained in strict compliance with the Act, and if the immunity was not obtained in the proper manner, the courts would decide the antitrust questions.\textsuperscript{69}

The effect of the \textit{Isbrandtsen} decision was modified by the case of \textit{Carnation Co. v. Pacific Westbound Conference.}\textsuperscript{70} In \textit{Carnation}, plaintiff brought an antitrust action claiming that the rate fixing engaged in by defendant had gone beyond the scope of approval given to it by the Federal Maritime Board. In particular, plaintiff alleged that defendant did not have approval by the Board to agree on rates with persons outside its organization; thus, this action could not have been approved by the Board and was not expressly exempted from the antitrust laws.\textsuperscript{71} The Supreme Court held that prior approval of an earlier agreement could be interpreted as approval of the agreement in question. The Court determined that the instant agreement was "arguably lawful," invoked the doctrine of primary jurisdiction and referred plaintiff's action to the Board so that a ruling could be obtained on whether immunity should be expressly granted from the antitrust laws, thus preventing the district court from deciding the case.\textsuperscript{72}

The Court, in dictum, indicated that had the agreement been "clearly unlawful," the doctrine of primary jurisdiction would not have applied and the district court would have heard the case and there would have been no possibility of the agency immunizing the action from the antitrust laws.\textsuperscript{73} Thus, \textit{Carnation} suggests that it would be proper for a court to take a statutory immunity provision literally and to rule that, until agency approval is obtained, the transaction is fully subject to the antitrust laws if the agreement in question is "clearly unlawful."\textsuperscript{74}

\textbf{2. Development of Aviation Case Law}

The aviation cases attempting to define the role between the antitrust laws and the Federal Aviation Act in relation to express ex-

\textsuperscript{69} \textit{Id}. at 498.
\textsuperscript{70} 383 U.S. 213 (1966).
\textsuperscript{71} \textit{Id}. at 215.
\textsuperscript{72} \textit{Id}. at 222-24.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} "The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act (i.e., because approved by the Commission) implies that unlawful (i.e., unapproved) rate-making activities are not exempt." \textit{Id}. at 216-17.
emptions from the antitrust laws are confusing and contradictory. In the case of *S.S.W., Inc. v. Air Transport Association of America,* plaintiff, a nonscheduled air carrier, sued Air Transport, an association of regularly certificated air carriers, for treble damages and to enjoin defendants from continuing an alleged combination in restraint of trade. Plaintiff accused defendants of conspiring to monopolize air commerce and of employing various prohibited methods to achieve that end. The principal allegations centered around Air Transport's attempts to eliminate competition. The district court found that the Civil Aeronautics Act provided for economic regulation by the CAB of air carriers including non-competitive and pooling agreements. All alleged violations of the antitrust laws were also found to be possible violations of the CAA; therefore, the CAB had primary jurisdiction over the part of the action involving possible injunctive relief. The district court noted that the CAB could remedy the situation by either: (i) issuing a cease and desist order against unfair methods of competition and deceptive practices if there was found to be a violation of the CAA by Air Transport or (ii) approving the action under section 412, thus expressly exempting the action under section 414 from the antitrust laws. Therefore, the district court referred that part of the action asking for an injunction to the CAB while the portion seeking treble damages was remanded to the trial court to retain jurisdiction of the antitrust suit until plaintiff received or was denied injunctive relief by the CAB. The court noted that the savings clause of the 1938 Act, in addition to the absence of a provision for damages, reflected Congress' intent not to deprive an air carrier from seeking treble damages under the antitrust laws. The district court stated, however, that if the CAB found the matter to be within its jurisdiction and the alleged practices legal under section 412 of the Act, there could be no antitrust violation since defendant could be immunized by express exemption of section 414 from the treble damage action. This action was termed necessary in order to make the court and agency collaborative instruments.

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75 The aviation cases will be dealt with in chronological order to give some perspective to the development and diversity of case law decisions.
77 Section 412 of the FAA. *Id.* at 662.
78 See note 35 *supra.*
79 191 F.2d at 664.
of justice even though it might cause the litigants considerable delay. In S.S.W., the decision in S.S.W. was soon followed by a contrary decision from the District Court of New Jersey in Slick Airways, Inc. v. American Airlines, Inc. In Slick, plaintiff sued to recover treble damages and to enjoin defendants from continuing to injure it as a competitor. Defendants sought to invoke the doctrine of primary jurisdiction as was done in S.S.W. and thus have the action stayed in the district court while the CAB ruled whether the alleged actions were valid under the regulatory statute. If the CAB found defendant's action to be acceptable within the guidelines of sections 408, 409 or 412 of the Civil Aeronautics Act, plaintiffs would be unable to pursue an action for treble damages under the anti-trust laws since the CAB would have expressly exempted the questioned action. Notwithstanding the S.S.W. decision, the district court held that there was no need to invoke primary jurisdiction and refer the matter to the CAB. The district court observed that the CAB was not statutorily empowered to award damages for a violation of the Act, and therefore, plaintiff would not have this remedy available if the CAB were to approve the alleged actions of defendants. The district court agreed that the general rule would be to refer these questions to the CAB for prior determination. In this instance, however, the court in Slick relied on United States v. Socony Vacuum Oil Co. for the proposition that exemption from the antitrust laws must be secured in the precise manner and method prescribed by Congress. Since defendants in Slick had not submitted and had their agreement approved under any section of the CAA exempting the agreement from the antitrust laws, the district court retained jurisdiction over the entire case. Moreover, the district court indicated that Slick presented no administrative questions that would be within the special competence or expertise of the CAB.

Slick's strict literal interpretation of the Act was soon contradicted by the case of Apgar Travel Agency, Inc. v. International

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82 107 F. Supp. at 206.
83 107 F. Supp. at 216.
Air Transportation Association. In Apgar, plaintiff sought both injunctive relief and treble damages for alleged antitrust violations that were similar in effect to those described in the previous two cases. The district court noted the opposing decisions of Slick and S.S.W. and concluded that it would follow the S.S.W. decision. Therefore, proceedings in the court were stayed while the CAB was vested with primary jurisdiction over the complaint. The district court emphasized that the question before the court was directly within the comprehensive regulations of the CAB since the action involved the economic conduct of air carriers. The agreement entered into by defendants had not, however, been submitted for the Board's approval prior to the suit and thus was not expressly exempted from the antitrust laws by section 414. Even though the CAB would be able to expressly exempt the action of defendant, the district court concluded that plaintiff might still recover treble damages under the antitrust laws if the CAB found that some of the matters in the case were not within its jurisdiction or were illegal under the CAA and therefore not exempt from the antitrust laws. Further, the district court noted that some of the alleged violations were within the expertise of the agency and a decision by the CAB would promote uniformity of regulation within the industry. In Apgar, the district court chose to interpret the CAA and section 412 as being broad enough to give the CAB power to approve an agreement even though no attempt was made by defendant to obtain immunity from the antitrust laws prior to the suit.

A more recent case, Allied Air Freight, Inc. v. Pan American World Airways, Inc., marked a departure from the Apgar decision and the courts' eagerness to allow the CAB to have the opportunity to approve a previously unsubmitted agreement. The issue in Allied centered around plaintiff's contention that defendant allegedly forced plaintiff out of business through various past antitrust violations. Plaintiff asked for treble damages for the past

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85 107 F. Supp. at 711.
86 Id. at 712.
87 393 F.2d 441 (2d Cir. 1968), cert. denied, 393 U.S. 846 (1968); see 35 J. AIR L. & COM. 275 (1969).
violations. The agreement claimed to have been entered into by
defendants to force plaintiff from business had never been filed
with the CAB for approval and, at the time of the suit, de-
defendants were no longer acting under it. The federal district court
originally ordered that the suit be suspended until plaintiff ap-
ppeared before the CAB which was vested with primary jurisdic-
tion over the dispute even though it had no power to award
the relief plaintiff sought. Plaintiff did not appear before the
CAB, took a dismissal from the district court for want of prosecu-
tion, then brought an appeal. The Second Circuit held that since
the CAB was not empowered to give treble damages and there was
no "arguably lawful" conduct involved, the doctrine of primary
jurisdiction would not be applied and plaintiff could pursue the
suit in district court without prior Board action. The Second Cir-
cuit distinguished S.S.W. and Apgar on the grounds that plaintiffs in
those cases had sought injunctive relief as well as treble damages
and their claims had been current in nature. In Allied, however,
plaintiff was suing for past antitrust violations and asking for a
remedy the CAB was unable to provide—treble damages. Even
though sections 412 and 414 of the Act clearly give the CAB the
power to approve and thus exempt an agreement from the antitrust
laws that has not been previously approved, the court in Allied
found no grounds for referring the action to the CAB. The Second
Circuit further indicated that if the agreement between defendants
was "clearly unlawful," the Board would have no authority to
retroactively approve the agreement. Defendants also urged that
by not applying the doctrine of primary jurisdiction and vesting
the CAB with authority to rule on the agreement, the orderly ad-
ministration of justice within the regulatory scheme would be
hampered. In this fact situation, the court rejected defendant's
argument since uniformity was not demanded and the primary
jurisdiction doctrine was interpreted to be flexible enough to allow

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8 Av. Cas. 18,359 (1964).
9 See Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222
(1966).
93 F.2d at 445.
9 Id. at 446-47.
94 The court relied on the case of Carnation Co. v. Pacific Westbound Con-
ference, 383 U.S. 213 (1966), to circumvent the use of the doctrine of primary
jurisdiction and thus vest exclusive jurisdiction in the court.
the court and agencies to split the workload between them. Therefore, an allegation of past antitrust violations coupled with a treble damage claim enabled plaintiff to avoid the assertion of CAB granted antitrust immunity while vesting exclusive jurisdiction in the courts to hear the antitrust action.

The **Allied** case has been affirmed by the Second Circuit in the recent case of **Breen Air Freight, Ltd. v. Air Cargo, Inc.** In **Breen**, plaintiff sought treble damages from several defendants for alleged violations of the antitrust laws due to their concerted refusal to deal with plaintiffs as airfreight cartage agents in New York City. Defendants argued that the plaintiffs' action should be stayed, primary jurisdiction invoked and the cause referred to the CAB. The Second Circuit held that the CAB lacked jurisdiction to immunize the contracting parties from liability for antitrust damages since the contracts were not executed by "air carriers" under the FAA. Therefore, the court held that the agreements could not be immunized, were not "arguably lawful," and the CAB did not have primary jurisdiction over the issues presented in the action. The Second Circuit further indicated that even if the Board could immunize the agreements under section 412, it would still not invoke the doctrine of primary jurisdiction because the issues involved were not technical in nature, there was no need to seek uniformity in this situation and the CAB could not award the damages plaintiff sought. Moreover, the Second Circuit emphasized the need to avoid duplicated or drawn-out proceedings and to promote the efficient administration of justice by allowing courts to assume exclusive jurisdiction over the issues presented in a case regardless of whether the activity complained of was past or continuing conduct.

The **Allied** and **Breen** cases were contradicted by **Laveson v. Trans World Airlines, Inc.**, decided by the Third Circuit a month

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96 470 F.2d at 769.
97 Id.
98 Id. at 771.
99 Id. at 774 (alternative holding).
100 Id. at 773-74.
after the Breen decision. The Laveson case involved plaintiffs who alleged that past antitrust violations by defendant airline companies arose by virtue of defendants having conspired to fix the price coach passengers paid for the rental of headsets used with inflight motion pictures. Plaintiffs urged that the doctrine of primary jurisdiction did not apply in this situation since the action of the airlines in fixing the price of headsets was not approved even though it had been submitted to the CAB; therefore, there could be no immunization under the FAA. Plaintiffs also sought treble damages, a remedy the CAB cannot provide. The Third Circuit analogized the present case to S.S.W., Inc. v. Air Transport Association of America and concluded that the action should be referred to the CAB under the doctrine of primary jurisdiction to see if the agency would approve the action, thus expressly immunizing defendants from the antitrust action. Additionally, the court pointed to Apgar Travel Agency, Inc. v. International Air Transportation Association in concluding that the ability of the CAB to grant a remedy either for past or present conduct does not affect the application of the doctrine of primary jurisdiction. The Third Circuit acknowledged that the FAA does not explicitly say whether the CAB has the power to immunize conduct retroactively, but concluded that the CAB was the proper body to decide if it had the power. The court went on to say that the CAB should decide if the agreements can be approved by it since the challenged actions were of "debatable legality" and within the specific regulated area encompassed by the FAA. Since a judicial determination of the antitrust issues in the case might disrupt the overall scheme of agency action if it was concluded by the CAB that they did have the power to immunize the defendants' alleged action, the Third Circuit stayed the suit and vested primary jurisdiction in the CAB.

102 471 F.2d at 76.
103 Id. at 80-81.
105 471 F.2d at 81.
107 471 F.2d at 82.
108 Id. at 83.
109 Id. at 81, 83.
110 Id. at 83-4.
The Laveson decision, in turn, has been contradicted by the decision of the District Court of Hawaii in Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.\textsuperscript{111} In Aloha, plaintiff sought treble damages for an alleged antitrust violation. The court relied on Allied Air Freight, Inc. v. Pan American World Airways, Inc.\textsuperscript{112} in holding that the doctrine of primary jurisdiction did not apply since the CAB could not award damages for past unfair competitive practices.\textsuperscript{113} On motion for reconsideration, the district court affirmed its earlier decision and added “that only acts which have been approved, authorized or required by a valid CAB order are so immunized.”\textsuperscript{114} Since the acts complained of by plaintiff were past acts, there was nothing to refer to the CAB for approval; therefore, the proceedings were not stayed and the doctrine of primary jurisdiction was not applied.

The most recent case involving a primary jurisdiction question in an antitrust action is Price v. Trans World Airlines, Inc.\textsuperscript{115} In Price, plaintiffs instituted a class action against airlines alleging a violation of the antitrust laws since defendants supplied headsets for inflight movies free of charge to first class passengers, but charged second class passengers for the headsets.\textsuperscript{116} Plaintiffs urged that the doctrine of primary jurisdiction was inapplicable since they sought only treble damages which the CAB could not give. The Ninth Circuit, however, noted the broad statutory power given in the FAA to the CAB to determine disputes by implementation of the doctrine of primary jurisdiction and concluded that this broad power coupled with the CAB’s expertise in regard to tariffs vested primary jurisdiction in the CAB.\textsuperscript{117} To bolster its decision, the court quoted the Second Circuit in Lichten v. Eastern Airlines, Inc.:\textsuperscript{118}

A primary purpose of the Civil Aeronautics Act is to assure uni-

\textsuperscript{112} 393 F.2d 441 (2d Cir. 1968), cert. denied, 393 U.S. 846 (1968).
\textsuperscript{113} 349 F. Supp. at 1068.
\textsuperscript{114} 58 F.R.D. at 434.
\textsuperscript{115} 481 F.2d 844 (9th Cir. 1973).
\textsuperscript{116} Id. at 845. The tariff agreement had been submitted but not approved by the CAB.
\textsuperscript{117} Id. at 846, 849.
\textsuperscript{118} 189 F.2d 939 (2d Cir. 1951).
formity of rates and services to all persons using the facilities of air carriers. . . . to achieve this, it is essential in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services.\textsuperscript{119}

Thus, \textit{Price} echoed the rationale in the earlier \textit{Laveson} case\textsuperscript{120} and concluded that primary jurisdiction should be invoked allowing the CAB to determine whether the action by the airlines was expressly exempt from the antitrust laws.

The described cases illustrate the wide variety of decisions that have been rendered when an antitrust action has been implemented by a plaintiff seeking treble damages, injunctive relief or both for past or present conduct of a defendant. These cases suggest that when confronted with the possibility of an express exemption from the antitrust laws by implementation of the provisions of the FAA, courts are almost evenly split on whether to refer antitrust allegations first to the CAB on the basis of the doctrine of primary jurisdiction or to retain antitrust jurisdiction. This is evident in cases where plaintiff has complained of past antitrust violations and is seeking only treble damages.\textsuperscript{121} Moreover, if plaintiff is asking for injunctive relief plus treble damages and the violation is present and ongoing, the cases infer that courts will most likely, but not always, invoke the doctrine of primary jurisdiction and vest initial jurisdiction in the CAB.\textsuperscript{122} If the doctrine of primary jurisdiction is invoked, a determination by the CAB of the issues will then determine whether an action, including a demand for treble damages, will be expressly exempted by the CAB or whether the action will ultimately be heard by the courts. Although each court that decides whether to invoke the doctrine of primary jurisdiction in-

\textsuperscript{119} \textit{Id.} at 941.
\textsuperscript{120} 471 F.2d 76 (3d Cir. 1972).
cludes some discussion of agency expertise, technical knowledge or possible disruption of the delicate agency-antitrust law balance by their decision, there is no definite trend regarding the importance of these considerations. Several courts that have invoked the doctrine of primary jurisdiction, however, strongly urge that the CAB, rather than numerous courts under diverse laws, should have the primary responsibility for supervising the aviation industry and determining whether a particular action is expressly exempt from the antitrust laws by operation of section 414 of the Federal Aviation Act.

B. Implied Exemptions from the Antitrust Laws

1. Development of Non-Aviation Case Law

On occasion, implied exemptions from the antitrust laws have been recognized. Courts, however, have repeatedly ruled that the regulated industries are not per se exempt from the antitrust laws. Further, it is considered a cardinal principle of construction that repeals by implication are not favored. Only a clear repugnancy between the old law and the new regulatory laws should result in the former giving way and then only to the extent of the repugnancy. A principal type of incursion into the domain of regulation takes place when antitrust enforcement is sought in an area where uniformity of treatment, afforded only by a single regulatory agency as opposed to a multiplicity of courts, is imperative. When a need for uniform regulation exists, an implied repeal of any other laws covering the same subject matter will be found. This principle was first announced by the Supreme Court in Texas & Pacific Ry. v. Abilene Cotton Oil Co. Abilene involved an action brought by a shipper against a carrier alleging the exaction of an unjust

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122 The district court explicitly stated this in Price v. Trans World Airlines, Inc., 481 F.2d 844, 849 (9th Cir. 1973).
126 Id.
127 Id., 204 U.S. 426 (1907) (first primary jurisdiction case).
and unreasonable rate. Defendant contended that the state courts were without jurisdiction and that only federal district courts and the Interstate Commerce Commission (ICC) had concurrent jurisdiction as provided for in the Interstate Commerce Act (ICA). Plaintiff contended that the ICA had preserved to him his common law remedies against the carrier. The Supreme Court held, that although the courts may still give common law damages for unreasonable rates, they may not make determinations of reasonableness. If determinations of rates were made by several different courts, it would defeat the ICA's purpose of establishing uniform nondiscriminatory rates. Therefore, to preserve uniformity of regulation, primary jurisdiction was invoked and exclusive jurisdiction to determine reasonableness of rates was vested in the agency subject only to judicial review. In this fact situation, the decision impliedly excluded common law actions to determine reasonableness of rates.

The first application of the Abilene rationale in an antitrust case was in Keogh v. Chicago & N.W. Ry Co. In Keogh, a shipper alleged a conspiracy by defendant carrier in the fixing of railroad rates in direct restraint of trade. Defendant contended that the rates alleged to be discriminatory had been filed with and approved by the ICC and thus, were immune from antitrust attack. The Supreme Court held that the action was barred since the supervision of rates was within the jurisdiction of the ICC. At least to a limited extent, the antitrust laws were superseded by the ICA and were therefore impliedly repealed in the interest of uniformity of agency action. Thus, in striving for uniformity of agency regulation in an industry, the courts have been influenced in certain situations to imply a repugnancy between the antitrust laws

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120 Interstate Commerce Act § 9, 24 Stat. 382 (1887).
121 204 U.S. at 446. For the extension of the Abilene doctrine in similar situations requiring uniformity in the development of national transportation policy, see von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 HARV. L. REV. 929, 935 n.23 (1954).
122 260 U.S. 156 (1922).
123 A contrary result was reached in Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945), where the Court held that the ICC did not have express statutory power to consider an alleged discriminatory rate fixing conspiracy; and therefore, there was judicial jurisdiction to hear a civil action arising therefrom. The Court distinguished Keogh by noting that the plaintiff there had sought damages whereas in Georgia the plaintiff sought only injunctive relief. Id. at 453.
and the regulatory statute and, to that extent, override the antitrust laws by implication.

A more frequently given basis for a finding of primary jurisdiction has been the reliance upon the expertise of administrative agencies. For example, in Great Northern Ry. v. Merchants Elevator Co., plaintiff shipper sued defendant carrier not for the exaction of an unreasonable rate, but for the exaction of a rate greater than called for by the tariff. The Court pointed out that a "determination [of the issue] is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." Reliance upon administrative expertise rather than the courts in determining technical questions of fact is thought to enable the agencies to fulfill one of the purposes for which they were created. Until recently, the trend in case law was to broaden the scope of primary jurisdiction and thus imply exemptions from the antitrust laws on the basis of presumed agency expertise. This trend, however, has been criticized by those who believe that the Supreme Court is fashioning a substantive, judge-made exemption of the regulated industries from the competitive dictates of the antitrust laws.

123 There has, however, been a tendency for the courts to overwork the concept of administrative expertise when finding primary jurisdiction in the regulatory agencies. See Jaffe, Primary Jurisdiction Reconsidered: The Antitrust Laws, 102 U. Pa. L. Rev. 577 (1954).


125 Id. at 291. The Supreme Court thus emphasized that the ICC would have primary jurisdiction over factual matters within its expertise.

126 One of the recurring reasons for the establishment of administrative agencies has been the need for technical or professional skills in particular areas subject to congressional legislation. For example, the CAB must be staffed with persons who understand the scientific aspects of air safety and others who grasp the economics of competition among air carriers. See S. Doc. No. 8, 77th Cong., 1st Sess. 19 (1941).


128 Schwartz, Legal Restrictions on Competition in Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 471 (1954); see also Douglas, Ethics in Government 28-40 (1952); see Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), where Mr. Justice White recognized that the Board possessed special expertise in resolving the immediate issue in the case. He further observed, however, that this expertise was not exclusive and stated: "Courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment." Id. at 686.
It has also been argued that the congressional enactment of a pervasive regulatory scheme either pre-empts or so constricts the area in which the antitrust laws might operate that their enforcement would be unnecessary or even disruptive. Following this rationale, it has been urged that the antitrust laws have no function whatever to perform in areas regulated in a comprehensive manner by the agency. Variations of the "pervasive regulatory scheme" argument have until recently had a history of Supreme Court rebuffs. The argument was first used by the Court in *United States v. RCA* where it was held that plaintiff could bring an antitrust action against defendant despite prior approval by the Federal Communications Commission of the conduct in question. The Court noted that the statute did not specifically grant an exemption from the antitrust laws; therefore, there was no pervasive regulatory scheme warranting an implied suspension of the antitrust action. In an analogous case, *California v. FPC* the defense of priority of the regulatory scheme over the dispute was summarily rejected. Moreover, in *Marnell v. United Parcel Services*, plaintiff brought a suit attacking an alleged monopoly in the retail delivery trade. Defendants contended that the ICC had primary jurisdiction over the matter; therefore, the situation should be referred first to the ICC. Defendants claimed no express exemption, but claimed an implied exemption from the antitrust laws based on repugnancy between the ICA and the antitrust laws. The district court held that no repugnancy existed and that the regulatory scheme was not so pervasive as to "impliedly exclude judicial enforcement of the antitrust laws." Therefore, the district court retained jurisdiction to

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111 This argument was most recently urged in the case of *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). The Court, however, decided the case upon other grounds without mention of the possibility of a pervasive-regulatory-scheme defense.

112 369 U.S. 482 (1962).

113 *Id.* at 485.


115 *Id.* at 404; *see* Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), where plaintiff attacked the "anti-rebate" rule of the Exchange and contended it was an unlawful
hear the antitrust action. In most cases, the "pervasive regulatory scheme" argument has not been enthusiastically received by the courts when urged by defendants trying to obtain implied immunity from the antitrust laws in non-aviation cases.

2. Development of Aviation Case Law

Until recently, when considering aviation questions involving possible repugnancy between the Federal Aviation Act and the antitrust laws, courts were hesitant to find an implied repeal of the antitrust laws.\textsuperscript{144} For example, in the case of \textit{Slick Airways, Inc. v. American Airlines, Inc.},\textsuperscript{145} the district court held that the CAB did not have authority to award money damages under the FAA. Since plaintiff had sought to recover damages, the court took note of the savings clause contained in the FAA and concluded that there was no repugnancy between the Sherman Act and the FAA. In this situation, the antitrust laws were not impliedly repealed by the FAA.\textsuperscript{145} The trend of not allowing repeal by implication of the antitrust laws, however, was dealt a severe blow by the Supreme Court's decision in \textit{Pan American World Airways, Inc. v. United States}.\textsuperscript{146}

In \textit{Pan American}, the Justice Department instituted a civil antitrust suit for injunctive relief, at the request of the CAB, against Pan American World Airways, W. R. Grace & Co., and their jointly owned subsidiary, Pan American-Grace Airways (Panagra) alleging violations of sections 1, 2 and 3 of the Sherman Act. The complaint alleged that Pan American and Grace, each of whom owned fifty percent of the stock of Panagra, agreed to divisions of restraint of interstate trade and monopoly of the securities market. The Exchange contended that the rule was immune from antitrust attack since it was part of the SEC Act of 1934. The court of appeals held that the rule was not automatically exempt from the antitrust laws because the alleged activity fell within the scope of the 1934 Act. The court stated that to establish an exemption from the antitrust laws it would be necessary that the purpose of the 1934 Act would be frustrated if the rule were subjected to antitrust attack. Therefore, in the absence of a statutory grant to the SEC to immunize Exchange operations from antitrust scrutiny, the court held that such immunity should not be implied merely because the particular rule came within the scope of the Exchange self-regulation.

\textsuperscript{146} See notes 124-26 supra.
\textsuperscript{148} The court indicated that the power of the CAB was not altered by the retention of jurisdiction in the courts to enforce certain antitrust violations. 107 F. Supp. at 206.
\textsuperscript{149} 371 U.S. 296 (1963).
South American territories between Pan Am and Panagra and had conspired to and did monopolize air commerce between the East Coast of the United States and the West Coast of South America. It was also alleged that Pan American had used its fifty percent control of Panagra to prevent that company from extending its routes to the United States. The district court dismissed the charges against Grace and Panagra, but held that Pan American had violated section 2 of the Sherman Act by suppressing Panagra’s desire to extend its routes to the United States. On appeal to the Supreme Court, the case was dismissed with the Court holding the Federal Aviation Act had vested the CAB with exclusive authority to grant injunctive relief when the division of territories, allocation of routes or combinations between common carriers and air carriers were involved.

The Court in *Pan American* recognized that the CAB was empowered by section 414 of the FAA to approve or disapprove mergers, consolidations, acquisitions of control entered into under section 408, interlocking relationships under section 409 and pooling and certain other agreements under section 412. The Court also recognized that the CAB, by approving these acts, could exempt them from the antitrust laws. Moreover, the Court noted that the CAB was empowered to approve or disapprove alleged “unfair methods of competition” and issue “cease and desist” orders under section 411, but that these orders would not grant immunity from the antitrust laws. Since the Court was dealing with alleged violations that would fall under section 411, these actions, even if approved by the CAB, would not exempt defendants from the antitrust action seeking injunctive relief. The Supreme Court, however, concluded that section 411 was analogous to section 5 of

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150 United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961). Pan American argued that it possessed immunity from the operation of the antitrust laws by virtue of CAB approval of its Through Flight Agreement with Panagra, 8 C.A.B. 50 (1947), and by reason of § 414 of the CAA of 1938, which grants exemptions from the antitrust laws to CAB approved conduct. Pan American also argued that the doctrine of primary jurisdiction required original resort at the agency level and that the district court was therefore without jurisdiction. The court held that the Through Flight Agreement did not incorporate within it the limitations upon Panagra in its application for new routes and therefore no immunity was granted Pan American.

151 371 U.S. at 311-12.

152 *Id.*
the Federal Trade Commission Act. Therefore, section 411 was designed to strengthen antitrust enforcement and protect the public from the abuses of competition. The Court further noted the legislative history of the Federal Aviation Act and concluded it was Congress' intention that the CAB have broad jurisdiction over air carriers. The Court interpreted the phrases "unfair competition" and "unfair methods of competition" contained in section 411 as being broader than the common law concept of unfair competition and that the two phrases should take their meaning from the facts of each case. Therefore, the Court expanded the meaning of section 411 to include anything that could be rationalized as being an "unfair method of competition."

The Supreme Court in Pan American next turned its attention to section 102 of the FAA which includes a standard of "public interest." The Court observed that it would be "strange, indeed, if a division of territories or an allocation of routes which met the requirements of the public interest as defined in section 102 were held to be antitrust violations." In order that the two regimes, courts and agencies, might not collide, the Court concluded that under section 411 the Board should handle all questions of injunctive relief against the division of territories, the allocation of routes or against combinations between common carriers and air carriers. The Court further expanded the powers of the Board to include the power to compel divestiture by analogizing it to a "cease and desist" order under section 411 concluding that "Congress must have intended to give it [CAB] au-

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183 The Court reached this conclusion by citing the case of American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956). In American Airlines, the Court looked to past judicial interpretation of section 5 of the Federal Trade Commission Act to resolve questions raised under the "public interest" clause of section 411 of the FAA. In determining the scope of the "public interest" clause, the Court concluded that air carriers were to conduct their business within a framework of limited competition and the CAB had special competence to deal with problems of competition within the aviation industry. Id. at 84.

184 371 U.S. at 303.

185 The Court emphasized, however, that the Act was not to displace the antitrust laws in total without a specific declaration of such intent by Congress. Id. at 304-05.

186 Id. at 306.


188 371 U.S. at 309.

189 Id. at 310.
thority that was ample to deal with the evil at hand." Therefore, the Court, though dealing with conduct clearly within the scope of section 411, reasoned that since the acts alleged were within the "precise ingredients of the CAB's authority" and since the CAB was "designed to change the prior competitive system" and serve the "public interest," the antitrust laws were, through implied repeal, no longer applicable to the conduct alleged in this section.161

Since the Supreme Court did not qualify its grant of immunity from the antitrust laws in Pan American and limit it to conduct that has been or shall be approved by the CAB, it could be assumed that this immunity is all encompassing. This immunization would thus transcend the limited and qualified express immunity of section 414 that is contingent upon agency approval of the questioned conduct.162 On the other hand, the decision can be limited since the Court gave substantial weight to the fact the alleged conduct in the complaint was basic to the CAB's regulatory authority. Additionally, the Court unequivocally stated that it was not now holding that antitrust laws were completely superceded by the Federal Aviation Act since there were a great number of additional civil violations of the antitrust laws that were not exempted.163 The Court also suggested that it might take jurisdiction over an antitrust cause of action predicated on the facts of the instant case, but seeking a remedy not available in a section 411 proceeding.164 It seems, however, from the overall tenor of the majority's opinion that any transaction that meets the Court's standard of the "public interest" and produces the degree of limited competition envisioned by the Federal Aviation Act could be impliedly exempted from attack under the antitrust laws.165 Also, by inferring in Pan American that the CAB has the power to order a stock divestiture in order to provide a complete remedy, even though this power is not expressly granted to the CAB, the Court implied that it can expand the remedial powers of the CAB by judicial action.166 Thus, even

160 Id. at 312.
161 Id. at 305, 313.
162 The agency would thus have exclusive jurisdiction over the alleged antitrust violations and the CAB's decision would be subject only to judicial review.
163 371 U.S. at 305, 310.
164 Id. at 313 n.19.
165 Id. at 309.
166 See also Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962).
though the Court attempted to limit the decision to "narrow questions" presented in this case, commentators have cast doubt on the applicability of antitrust laws to any situation involving the airline industry. These doubts proved to be premature, however, when the next significant air industry case was decided in late 1972.

The district court in Aloha Airlines, Inc. v. Hawaiian Airlines, Inc. did not accept the rationale of Pan American; instead, it held that the CAB had neither primary nor exclusive jurisdiction over an antitrust action when only treble damages for past antitrust violations was sought. Aloha alleged seven acts that defendant undertook in violation of the Sherman and Clayton Acts to eliminate it as a viable competitor. Hawaiian Airlines (HAL), relying on Pan American, alleged that all seven acts of alleged antitrust violations were within the exclusive authority of the CAB; therefore, the court was precluded from exercising its normal antitrust

where it was held that the ICC had the power to compel divestiture even though such power was not expressly granted by the Interstate Commerce Act. "The justification for the remedy is the removal of the violation." Id. at 130.

See e.g., Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abuse of Judicial Responsibility, 67 Harv. L. Rev. 436, 469-70 (1954). The dissenting opinion in Pan American stated that "[a]s a result of today's decision, certain questions under the antitrust laws are placed in the exclusive competence of the Board and will not be the subject of original court actions to enforce the antitrust laws." The dissent indicated that the decision would create a "pro tanto repeal of the antitrust laws" since the law to be applied when dealing with section 411 would not be based on the standard of competition embodied in the antitrust laws, but rather would be judged in light of the broad and vague "public interest" standard of section 102 of the Federal Aviation Act. Further, the dissent pointed out that the CAB had expressly felt that it could not effectively deal with the problems presented by the Pan American and Panagra relationship and had originally asked the government to file this antitrust action. The dissent urged the application of the doctrine of primary jurisdiction in this situation so the courts would not lose all jurisdiction over an antitrust action. This procedure would accommodate both the goals of the courts and agencies. Lastly, the dissent pointed to the savings clause of the Act and its failure to provide for damages or reparations and argued that this indicated Congress' intent to preserve the courts jurisdiction over hearing antitrust actions. 371 U.S. at 319-21, 327-28.


The seven acts alleged were: (1) excessive flight schedules; (2) excessive purchasing, ordering, leasing of aircraft; (3) misrepresenting its schedule to the public; (4) providing below cost servicing to interstate air carriers between stops; (5 & 6) publicizing the fact that plaintiff and defendant should merge, while twice in bad faith renouncing merger agreements into which defendant had entered; and (7) opposing before the CAB plaintiff's request for the subsidy. 349 F. Supp. at 1065.
jurisdiction. Defendant also pointed to the CAB's previous intervention, at Aloha's request, between the two parties that resulted in Aloha being awarded a subsidy by the CAB after finding HAL guilty of having engaged in uneconomic competition that resulted in Aloha suffering operating losses. The district court cited the case of Hughes Tool Co. v. Trans World Airlines, Inc., which has since been reversed, and part of the Pan American opinion to support its observation that the antitrust laws were not completely displaced by the Federal Aviation Act. The court referred to the savings clause of the Act to lend weight to its decision and emphasized that the CAB was not authorized to award treble damages for past unfair competitive practices. Moreover, the court distinguished acts considered "basic" to the regulatory scheme involved in the Pan American controversy from the allegations in the instant case that were termed "not basic to the regulatory scheme" of the FAA. Therefore, the Board had neither primary nor exclusive jurisdiction over the action.

After Pan American was narrowly construed in Aloha, it was reaffirmed and given a broad interpretation in a recent Supreme Court decision, Hughes Tool Co. v. Trans World Airlines, Inc. In this case, TWA brought an antitrust action against Hughes Tool Co. (Toolco) and others for treble damages as a result of the manner in which Toolco had exercised its controlling interest in TWA. TWA's complaint centered around the use of Toolco of its control over TWA to control and dictate the manner and method by which

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171 The court did note, however, that the Hughes case was to be decided by the Supreme Court during the term in which this decision was being made. 349 F. Supp. at 1066.
173 371 U.S. 296, 304-05.
174 58 F.R.D. 429, 433 (D. Hawaii 1973) (where the court indicated that its previous references to Hughes Tool Co. v. Trans World Airlines, Inc., were not crucial to the result previously reached).
175 349 F. Supp. at 1067.
176 Id. at 1067-68. The court pointed out that there had been no merger or CAB approved agreement between the two airlines that had bearing on the instant action and thus, the CAB had no jurisdiction to hear the alleged violations of the antitrust laws. Id. at 1068.
TWA acquired aircraft and financed its planes. As a defense, Toolco relied on the *Pan American* decision. The district court, however, entered a default judgment in favor of TWA. In affirming the district court's decision, the court of appeals concluded that *Pan American* was inapplicable because the conduct complained of by TWA was not within the CAB's exclusive competence or related to any specific function of the CAB. The Supreme Court reversed, holding that the transactions between TWA and Toolco were under the CAB's control and, by virtue of sections 408 and 414 of the Aviation Act, had been exempted from the antitrust laws.

In reaching its decision, the Supreme Court reviewed past transactions between Toolco and TWA since 1944 and concluded these transactions were carried out under the Board's power under section 408 to approve any change that might take place in the relationship between TWA and Toolco. Each time Toolco had gained additional control of TWA, the action was investigated by the CAB and resulted in a decision by the Board that the conduct was in the "public interest." No conflict of interest between Toolco's activities and the antitrust monopoly provisions were alluded to. The Court noted that from 1944 to 1960, every acquisition or lease of aircraft by TWA from Toolco and each financing agreement between the two parties required and had received Board approval. The Court reasoned that each approval was an order under section 408 that was exempted from the antitrust laws.

The court of appeals had previously ruled that the acts of Toolco in controlling TWA and financing the flow of new equipment to TWA was unrelated to any function of the Board under the Act. The Supreme Court, however, held that these consid-

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179 449 F.2d 51, 71 (1971).
180 32 F.R.D. 604 (2d Cir. 1964).
181 332 F.2d 602 (2d Cir. 1964).
182 409 U.S. at 388-89.
183 Id.
184 Id. at 374; see also note 18 supra.
185 409 U.S. at 379.
186 Id. at 388-89.
187 Id. at 380. The court of appeals held that Trans World Airlines, Inc. complaint contained transactions over which the CAB had no explicit authority and
erations were in the mainstream of the Board's section 408 responsibilities to insure only those acquisitions of control that were in the "public interest." Because of the various orders issued by the CAB under section 408 and the authority of the CAB to grant the power to control and to investigate and alter the manner in which that control was exercised, the Supreme Court concluded that the jurisdiction of the CAB, like in the Pan American case, pre-empted the antitrust laws.\textsuperscript{188} By section 414 of the FAA, the antitrust laws were excluded from the instant action. Therefore, the Court found that what TWA had alleged in its complaint was the same kind of conduct the CAB had previously approved and exempted from the antitrust laws as being consistent with the "public interest." Therefore, in Hughes, plaintiff's action for treble damages for past violations of the antitrust laws was referred to the CAB for determination and resulted in the antitrust laws being repealed by implication.

In Hughes, the dissent echoed what many observers see as being the present trend in actions involving antitrust questions with possible CAB jurisdiction: implementation of the doctrine of primary jurisdiction and referral to the CAB resulting in implied repeal of the antitrust laws. The dissent relied on the legislative history of the Federal Aviation Act to show that there was considerable concern over even limited antitrust immunity when the FAA was passed and that certainly the framers of the Act did not intend to expand section 408 beyond the air transportation industry into every market that might happen to be touched by transactions with an air carrier.\textsuperscript{189} The dissent further distinguished the "basic" to the regulatory scheme violations alleged in the Pan American case from the instant decision where the violations alleged in TWA's complaint were components of an antitrust conspiracy to restrain trade in the aircraft supply and manufacture market and were not solely within the CAB's competence.\textsuperscript{190} The dissent pointed out that

\textsuperscript{188} 409 U.S. at 385.

\textsuperscript{189} Id. at 402. See notes 13, 15-16 supra.

\textsuperscript{190} 409 U.S. at 403.
the majority's opinion giving a broad meaning to section 408 would extend the CAB beyond its competence and manpower and would not contribute to the effective enforcement of the congressional scheme for promoting a sound national system of air transportation.\textsuperscript{191} Thus, the dissent would narrow the limit of immunity from the antitrust laws by holding that actions permitted by the Board and approved under 408, and thereby, immunized by 414 from antitrust liability, should be exercised "only to the extent that the antitrust claim falls within the core of the Board's statutory responsibility to regulate air transportation while maintaining, in the market, the maximum degree of competition consistent with the public good."\textsuperscript{192}

IV. CONCLUSION

Although antitrust actions involving the possibility of an express exemption from the antitrust laws by implementation of specific provisions of the FAA and the doctrine of primary jurisdiction have been decided in a variety of ways, the cases have an underlying thread of continuity. The case law reflects a desire on the part of the courts to balance the interests of "free competition" as expressed in the antitrust laws with the "public interest" and "public good" as defined by the CAB. For example, if the CAB approved an action that was alleged to be in violation of the antitrust laws and the approval came under sections 408, 409 or 412, then, under section 414, the alleged unlawful action was expressly exempted from the antitrust laws. If, however, an action was brought alleging antitrust violations and plaintiff asked for injunctive relief and treble damages, the usual course would be to invoke the doctrine of primary jurisdiction\textsuperscript{193} and refer the question of injunctive relief to the CAB for determination while staying the treble damage action. If the CAB found the alleged antitrust violations to be within its express statutory authority, it could approve the challenged action and thus immunize the defendant from the treble damage action that had been stayed pending agency determination of the injunctive request. Finally, if plaintiff alleged a past antitrust violation and asked for damages only, the court would main-

\textsuperscript{191} \textit{Id}. at 411.
\textsuperscript{192} \textit{Id}. at 412.
\textsuperscript{193} See cases cited note 122 \textit{supra}.
tain its jurisdiction over the cause and not invoke primary jurisdiction since the alleged actions were clearly not within the express statutory authority of the CAB.\(^{194}\) The recent Supreme Court decision in *Hughes* which interpreted and expanded the earlier *Pan American* decision has rendered suspect the agency-antitrust law relationships developed through the doctrine of primary jurisdiction in cases involving questions of possible express exemptions from the antitrust laws. Now, courts will not be bound to find an express exemption from the antitrust laws through the implementation of a specific provision of the FAA before vesting the initial decision making powers in the CAB by application of the doctrine of primary jurisdiction. Instead, courts can reason that even though there is no express exemption of the alleged antitrust violation under the FAA, the issues before the court are within the "public interest" and should be referred to the Board for primary determination. By this procedure, the power of the CAB is greatly expanded at the expense of free competition.

In *Hughes*, the earlier *Pan American* decision could have been narrowly restricted in scope by the Court since it had indicated in *Pan American* that it had not intended to repeal by implication all antitrust laws—only the antitrust laws that were applicable to the narrow fact situation presented in that case.\(^{195}\) By affirming and expanding the *Pan American* rationale in *Hughes*, however, the Court has substantially broadened the courts' ability to exercise repeal by implication of the antitrust laws through judicial determination. Now, when implementing an antitrust action involving even remote questions that could arguably be within the CAB's competence, the plaintiff will be faced with the distinct possibility of having a court rule that the antitrust allegations present matters within the "public interest" and thus, the regulatory scheme demands these issues be decided by the CAB. To determine if the alleged unlawful acts fall within the exclusive jurisdiction of the CAB, the Supreme Court has established a broad and flexible standard that hinges on a "public interest" test that is subject to varied judicial determination. Moreover, the decision by a reviewing court does not depend on whether the CAB has the ability to render the relief sought since

\(^{194}\) See cases cited note 121 *supra*.

\(^{195}\) 371 U.S. at 304-05, 313.
the Supreme Court in *Pan American* impliedly expanded the remedial powers of the CAB beyond its explicit statutory powers.\(^{196}\)

Therefore, whatever the alleged antitrust violations and relief requested, the implementation of the doctrine of primary jurisdiction and vesting of the initial determination of issues in the CAB could turn on a nebulous “public interest” test of whether the alleged unlawful activity is basic to the regulatory scheme of the CAB. Hopefully, the Supreme Court in future decisions will delineate fully the guidelines to be used in determining the “public interest.” This delineation is essential if there is to be continuity and stability in the relationship between the antitrust laws and the FAA as administered by the CAB. These guidelines should reflect the broad statutory power envisioned by Congress when formulating the Federal Aviation Act and allow the CAB to deal effectively with aviation related matters. The guidelines, however, should also be restrictive and not allow the courts too much discretion in repealing the antitrust laws by implication. Neither the interest in “free competition” nor the “public good” would be served by a complete implied repeal of the antitrust laws with a resultant monopoly of power in the Civil Aeronautics Board.

\(^{196}\) *Id.* at 311-12.