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THE REGULATION OF COMPETITION IN UNITED STATES DOMESTIC AIR TRANSPORTATION: A JUDICIAL SURVEY AND ANALYSIS*

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INTRODUCTION

T is the purpose of this paper to discuss the role played by controlled competition in the growth and development of the commercial air transportation system of the United States. Though limited in scope to consideration of the economic regulation of domestic air carriers deriving the bulk of their revenues from the transportation of persons and mail, most of what is said is quite applicable to the federal government’s policy towards American-flag overseas carriers as well as to the several domestic air cargo operators.

The commercial air transportation industry, at least as much as any other American industry, owes its birth and development to specific governmental policies and federal action. Therefore, any discussion such as this can best proceed from a brief recounting of the early history of the industry, with emphasis on the legislation and governmental policies which have governed that history. This is undertaken in Part I.

Part II is devoted to a detailed discussion of the provisions and mandates of the Civil Aeronautics Act of 1938. In detailing these provisions, interest is centered upon those which pertain, both directly and indirectly, to the economic regulation of air carriers and to competitive practices. Those provisions pertaining solely to the organizational and "housekeeping" responsibilities of the Civil Aeronautics Board and the Civil Aeronautics Administration, as well as those promulgating standards of safety, will be excluded from consideration here.

Part III is concerned with the general attitude of the Board towards the maintenance of competition as an objective of policy and as one of the several principal requirements placed upon it by the Civil Aeronautics Act of 1938. The period covered terminates with July 1, 1957, and emphasis is greatest with respect to the Board’s more recent attitudes towards competition.

Part IV examines several particularly pressing present-day problems

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* This article is the result of work carried out at the Massachusetts Institute of Technology and the Transportation Center at Northwestern University. Much of the material was developed in connection with a current study underway at the Transportation Center concerning the role of the Civil Aeronautics Board in the development of the American air transportation system.
facing the Board and discusses them in relation to the Board's responsibilities with respect to the current state of development of the industry.

Finally, there is a brief summary of conclusions.

(Part IV and a Summary will be published in a subsequent issue of this Journal.)

I.

E A R L Y E C O N O M I C H I S T O R Y O F U N I T E D S T A T E S
C O M M E R C I A L A I R T R A N S P O R T A T I O N

Prior to 1925, there was virtually no commercial air transportation activity in the United States chiefly because it was not possible to conduct such operations on a sound or profitable basis. Therefore, in 1925 the Congress, recognizing the potentialities and desirability of having an American air transportation industry, passed the Kelly Air Mail Act authorizing the Post Office Department to contract for the transportation of mail by air.

As originally passed, the Kelly Act provided only for short-term contracts (which were usually let on competitive bid), and it forbade any payment to carriers in excess of eighty per cent of the receipts derived from the sale of air mail postage. There being insufficient response to such proposals, in 1926 the Kelly Act was amended to permit longer-term contracts to be negotiated. For the first time, subsidy payments to carriers were authorized in the form of increased remuneration for mail transported. With these changes in effect, in 1927 all domestic air mail first became transported in commercial rather than military aircraft. Concurrently, the airlines were made better able to attract the venture capital so vital to their future growth.

However, the Kelly Act, both before and after being amended, did not require the Post Office Department in awarding contracts to ascertain the requirements of the public convenience and necessity with respect to the service to be provided, nor did it require consideration of the low bidder's fitness or ability to perform. There were no means provided for the development of a sound route pattern; no protection was afforded a Post Office contractor from the competition of a parallel non-mail carrier or from unfair or predatory competitive practices.

The period of the late 1920's was characterized by a large number of mergers in the aviation industry. These mergers resulted from efforts to strengthen positions and to gain some protection from sharp competitive practices and also from growing public stock market speculation and the zeal of promoters. This trend towards integration was further aggravated by the stock market crash of 1929 as the weak components of the industry were absorbed by the strong. By 1933, virtually no firms remained active in commercial air transportation that were not connected with one of the three principal controlling groups in the aviation industry.

The first of these combines was the United Aircraft and Transport
Corporation which owned or controlled nineteen subsidiaries engaged in every phase of aviation. In 1933, the Corporation's flying subsidiaries collected about one-third of all air mail payments. The second dominant group was the Aviation Corporation of Delaware (the "Cord Combination") which at its peak had about eighty satellites including Pan American Airways Corporation, Stinson Aircraft Corporation, Waco Aircraft Company and American Airways, Incorporated. As of 1933, the air transportation operations of the Cord Combination attracted more than one-quarter of all federal air mail payments. The last of the triumverate was the General Motors-North American combine which had substantial interest in and control of the Bendix Aviation Corporation, Eastern Air Transport, Incorporated, Western Air Express Company, Transcontinental and Western Air, Incorporated, Curtiss-Wright Corporation and the Sperry Corporation, among others. The flying components of this group received about one-third of all 1934 air mail payments.

These three giants together were receiving more than ninety percent of all air mail payments. This is a good index of the degree to which they permeated the commercial air transportation scene and indicates how easy it was for them to join cooperatively in nullifying the intentions of the system of competitive bidding, to the point where air mail compensation became unnecessarily high. A Congressional investigation disclosed this state of affairs early in 1934 and also uncovered collusion between the Postmaster General and the three combines. As a result, in February, 1934, all domestic air mail contracts were cancelled.

Throughout the 1925-1934 period, the transportation of passengers, air express, and cargo rose steadily and sharply, making the revenue derived from such services increasingly important to the carriers. So far we have been discussing mostly the air mail portion of total airline revenues, because it had the federal subsidy locked into it and because this income was the largest part of the total. Its acquisition was the object of most of whatever competition had been displayed within the industry.

With the abrogation of all air mail contracts, the air carriers were deprived of an indispensable source of revenue and the stability which it afforded. Consequently, Congress enacted the Air Mail Act of 1934 in June of that year. This Act retained the competitive bid feature of earlier legislation, but for the first time set forth certain standards of conduct for airline management which were to be prerequisites to the award of an air mail contract. In brief, all inter-corporate and personal relationships between firms in the aviation industry had to be severed and each airline had to become independent of all others and of any person involved in the earlier collusive practices as well.

The 1934 Act, like the earlier, original Kelly Act of 1925, permitted the Post Office Department (now acting through the Interstate Commerce Commission rather than directly) to negotiate only short-
term contracts with the carriers. Again, the effect of this provision was adverse to the airlines, as uncertainty of tenure of an air mail contract made it difficult for them to plan expansions and to raise capital in a market already wary of the industry's management practices. Thus too much, or rather too frequent, exposure to competition contributed to the precarious position in which the airlines found themselves following passage of the 1934 Act.

During the period 1934-1938, two factors that indicated revision of the 1934 Act had become mandatory were brought forcefully to the attention of the government and the nation. First, it became increasingly obvious that financial stability was a prime requisite to the conduct of a sustained, safe air transport operation. Second, and perhaps an even more compelling factor, was the recognition that a sound and vital commercial air transportation industry was necessary for purposes of national security and defense. As the rumblings from Europe and the Far East became more ominous, pressures intensified. The arguments ran that a sound air transport industry was itself vitally important, but that such an industry would also provide a great stimulus for the expansion of the equally necessary aircraft manufacturing industry.

So it was that the Congress recognized the desirability of lessening the competitive pressures on the airlines and determined to alleviate the existing conditions through new legislation. In reporting the bill that became the Civil Aeronautics Act of 1938, the Senate Committee on Commerce stated:

- Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the postal service, and of the national defense.

Since the 1938 Act still governs the regulation and conduct of American commercial air transportation, it is necessary to examine its provisions in some detail.

II.

THE CIVIL AERONAUTICS BOARD AND THE CIVIL AERONAUTICS ACT OF 1938

As originally passed, the Civil Aeronautics Act of 1938 established a Civil Aeronautics Authority which was to administer all the provisions of the Act. In 1940, however, by administrative change, there were set up two separate units with responsibilities for administering different parts of the Act. The Civil Aeronautics Board was established as an independent agency and was made responsible for the regulation and control of the air transportation industry. Therefore, the remainder of this paper makes no further reference to the Civil Aeronautics Administration of the Department of Commerce which assumed those duties (largely of an administrative nature) not vested in the Board.
In discharging its responsibilities towards civil aviation, the Civil Aeronautics Board is guided first by the Declaration of Policy contained in the General Provisions of the 1938 Act:

In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

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

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

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

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

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.\(^1\)

This Declaration of Policy thus places two fundamental responsibilities upon the Board: (1) the regulation of air carriers and (2) the maximum promotion of progress in air transport consistent with its long-term development. More about methods for carrying out these objectives is indicated in Title IV of the Act, “Air Carrier Economic Regulation.”

The promotional aspects of the program are to be conducted through three principal devices. The first is the issuance of certificates of public convenience and necessity to applicants who are found to be “fit, willing and able to perform such transportation properly . . . and (upon a finding) that such transportation is required by the public convenience and necessity.”\(^2\) While the issuance of a certificate of public convenience and necessity is itself not considered to be promotional in character in other fields of transportation, it must be so construed in the air transportation field because such a certificate usually carries with it the authority to transport mail, the payment for which constitutes the second promotional device employed by the Board.\(^3\)

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3. In confirmation of the fact that a certificate is a promotional device, the Board recognizes that the government-granted operating authority has value in and of itself and, on occasion, the Board has permitted certificates to be sold by one carrier to another.
Section 406 (b) (49 U.S.C. 486) contains the elements of rate-making to be used in determining each certificated carrier's remuneration for the transportation of mail. This section authorizes the Board to "fix different rates for different air carriers or classes of air carriers, and different classes of service." In determining such rates, the Board is to consider, among other factors,

... the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.\(^4\)

The foregoing passage, of course, is that which authorizes the federal subsidization of air transport activities. Since the subsidy device has been the most important single means of fostering the development of commercial air transportation in the United States, it will frequently enter the discussion in later parts of this paper.

The third means of promotion available to the Board is found in Section 416 (b). This section authorizes the Board to exempt an air carrier from certain of the requirements of Title IV of the Act where appropriate "by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier."\(^5\) Prior to World War II there was little promotional activity pursuant to this section. But since the war, the Board has, under these provisions, authorized the conduct of certain interstate air transport operations, the most notable being through the issuance of "letters of registration" to irregular or supplemental (non-scheduled) air carriers.\(^6\) The promotional character of the granting of exemptions to Title IV of the Act lies in the fact that without such exemptions only certificated air common carriers could operate in interstate commerce. Thus, while letters of registration have not permitted the exempted carriers to transport mail or to receive a federal subsidy, they have enabled them to conduct more or less limited operations in a field of transportation which would be inviolate without such exemption.\(^7\)

Other important regulatory provisions of Title IV of the Act prohibit air carriers subject to this title from consolidating with, merging with, or acquiring control of other air carriers, other common carriers, or any firms engaged in any other phase of the transportation industry without approval of the Board. Further, the Board

\(^4\) Ibid., Title IV, Section 406 (b) (49 U.S.C. 486).
\(^5\) Ibid., Title IV, Section 416 (b) (49 U.S.C. 496).
\(^6\) The issuance and conditions of issue of letters of registration to Irregular Air Carriers, Alaskan Air Carriers, Non-certificated Cargo Carriers, Air Freight Forwarders and Air Taxi Operators are governed by Parts 291 through 298 of the Economic Regulations of the Civil Aeronautics Board.
\(^7\) The Board's regulation and control of these irregular or supplemental carriers is discussed in detail in a subsequent section of this paper.
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. . . .

Also, there is strict prohibition of any interlocking relationships between an air carrier and any person engaged in any phase of aeronautics, except as approved by the Board.

The Board has been given the authority to "investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation" and, if so, it may issue a cease and desist order. Every air carrier must file with the Board any contract or agreement with another air 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. The (Board) shall . . . disapprove any such contract or agreement . . . that it finds to be adverse to the public interest, or in violation of this Act.

Finally, in a provision which has come to be more and more common where transportation and public utility regulation are concerned, the Act protects air carriers from anti-trust prosecution insofar as their conduct is governed by a Board order issued under Sections 408, 409 or 412 of the Act.

Comparison of the regulatory and promotional provisions of the Act show clearly that they are not entirely mutually compatible in all circumstances. For example, the subsidy provision of the Act makes it imperative that competition be kept to a comparatively low level if federal support payments are not to be "excessive." That is, as long as a carrier is below the optimum level of operations, and is therefore above minimum cost, the maintenance of competition may require subsidy. Furthermore, even the maximum attainable profit may be negative or below an "adequate" level of earnings, thus indicating the need for subsidy even if the carrier operates at or near its minimum cost level. In general, if competition reduced airline earnings below the "adequate" level (however defined by the Board), and thereby restricted expansion and necessitated subsidy, such competition would exact the subsidy as its price. Therefore, there is a basic conflict between competition and other aims and purposes of the Act. (It should be noted, however, that the conflict may be dissolved if airlines"

8 Ibid., Title IV, Section 408 (49 U.S.C. 488).
9 Ibid., Title IV, Section 409 (49 U.S.C. 489).
10 Ibid., Title IV, Section 411 (49 U.S.C. 491).
11 Ibid., Title IV, Section 412 (49 U.S.C. 492).
12 Ibid., Title IV, Section 414 (49 U.S.C. 494).
earnings would even under competition approach "adequacy.".) The earlier system of periodic competitive bidding for particular air mail routes could in no way be made compatible with the objective of the long-run development of the industry and of sound route patterns. Therefore, under the Act's "Grandfather Clause," certificates of convenience and necessity were first granted to operators who had been active over their particular routes for a specified period of time prior to the effective date of the Act. Only after such certificates had been issued could authorizations for additional or new services be considered. This is the situation with which the Board was faced when it first undertook to regulate and promote the development of commercial air transportation under the terms of the Civil Aeronautics Act of 1938.

III.

COMPETITION AND GENERAL BOARD POLICY

The Civil Aeronautics Act of 1938, as discussed above, left the Board with a difficult task because of its often conflicting mandates to foster competition in commercial air transportation while at the same time promoting its rapid growth and development. It is therefore desirable to examine the Board's general policies and declarations to determine what weight has been placed upon the former requirement in the face of the inevitable conflicts that arose.

Beginning with the certificated passenger-carrying domestic airlines, it is necessary to distinguish between two classes of carriers exactly as the Board has done for purposes of regulation and administration. There are, first, the certificated trunkline carriers and, second, the certificated local service carriers. The Board has placed each certificated carrier in one of these two categories largely on the basis of function and character of service performed. However, the operations of some of the carriers in each group have often left little to distinguish between them on this basis. Be that as it may, for most purposes, including those of this paper, it is sufficient to think of the trunkline carriers as operating on a larger scale and over greater distances than do the local service carriers whose operations are confined to a comparatively small geographic area in which they serve many points both large and small.

Because of the authorization to carry mail (and thereby receive a subsidy) contained in these air carriers' certificates of convenience and necessity, the Board has always declared itself, in accordance with the Act, to be administering the program so that the public derives the maximum benefit from each subsidy dollar spent. This has meant that

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18 For example, before 1956 there was little difference in the function or character of the operations by which to distinguish between Northeast Airlines and Piedmont Airlines, the former the smallest of the trunk lines and the latter the largest of local service carriers. After the effects of all recent decisions "take hold," it is expected and hoped (particularly by the Board) that a dichotomy between subsidized and unsubsidized carriers will be the same thing as dividing the carrier into the trunk and local service categories.
some restriction on competition has been necessary to keep the subsidy payments at a "reasonable" level. As something of a quid pro quo for such protection from competition, the certificated carriers have had to submit themselves to the more or less rigid regulation of their fare structures, management practices, qualities of service, etc. Thus the certificated carriers have in a very real sense been treated as public utilities, at least as far as their regulation by the Board is concerned. However, the regulation of the certificated air carriers has become much more complex than is usually true in the case of the more orthodox public utilities such as power and communications companies. This is a result of the Act's commandments that the Board must also foster competition in the air transportation field and also prevent monopolies from being created. Such positive and complicating requirements are seldom, if ever, so directly placed upon the regulators of the traditional public utilities. Another complicating Congressional mandate makes the Board responsible for the development of the industry even while regulating and subsidizing it. This latter provision is an even more unique feature of the Civil Aeronautics Act.

With respect to the certificated air carriers, competition can take several forms, each of which the Board is empowered in some measure to control and each of which the Board must always be prepared to regulate. The principal sources of such competition, both actual and potential, for each certificated air carrier are as follows: (1) applicants for air carrier certificates of public convenience and necessity, (2) other active certificated air carriers, (3) irregular or supplemental (non-scheduled, non-certificated) air carriers and (4) carriers engaged in other modes of transportation.

There were eighteen air carriers certificated by the Board in 1938 as soon as the Act became effective. All received their certificates in accordance with the "Grandfather Clause" contained in the Act. Of these original eighteen, only twelve remain operative today. They alone comprise the ranks of the certificated trunkline passenger carriers, as no certificates have been issued to new carriers for the performance of trunkline passenger service since the passage of the Act. Prior to and during World War II, there were few applications for certificates of convenience and necessity by would-be entrants into the industry. The applications that were made were turned down most often for want of a finding that the applicant was "fit, willing and able," coupled with an expression that the number of carriers already certificated was sufficient to afford the competition necessary for the development of the industry and was adequate to insure against undue monopolization. Further, it was pointed out in several decisions that the strengthening

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14 Ibid., Title IV, Section 408 (b) (49 U.S.C. 488).
15 Prior to 1945, almost all applications for certificates by potential entrants were for services which would be characterized as trunkline service. Until after the War, the Board did not find it necessary to make any distinction between trunkline and local service certificated carriers because, except for one operation, all the carriers up to that time were performing what was thought to be the former type of service.
of the smaller existing trunkline carriers, instead of certificating new ones, would increase the former's ability to compete in the industry, make for improved service to the public and lower the carrier's subsidy requirement by helping it along the road to self-sufficiency.\(^{16}\)

Since the close of World War II, applications for new certificates of convenience and necessity have come from two principal sources: (1) from those desirous of performing a local service type of operation and (2) from irregular air carriers wanting to graduate to regularly scheduled operations. Applicants in the former group have acted in response to a policy of the Board enunciated in its war-time report following an "Investigation of Local, Feeder and Pick-up Air Service." This report stated, in effect, that the Board was prepared to encourage and assist (through the granting of the necessary certificates and subsidies) in the establishment of air carriers to perform services of a strictly local and feeder-line character.\(^{17}\) Those certificates which were originally issued were written so as to restrict severely the local service carriers' competition with trunkline carriers and with each other.\(^{18}\) This was done for the protection of both the trunkline carriers and the local service operators. In this regard, the thwarting of competition has usually been accomplished by writing into the local service certificates prohibitions against non-stop and skip-stop operations in cases where it was not possible to give the right to operate over a given route segment (or segments) to one or the other type of carrier alone.\(^{19}\) In the Board's own phraseology,

We are of the general opinion that feeder service should seldom if ever be competitive. The traffic potential is so limited in most feeder territory that duplicate operations by two or more carriers can seldom if ever be economical. We have reached the conclusion that in general where a feeder carrier's route is duplicated by a trunkline carrier and such route is not necessary to the trunkline carrier's operation, then such route should be served by the feeder carrier alone. Conversely, where a route is a necessary and integral part of a trunkline carrier's system and essential to its economical operation, then such route should not be served by a feeder carrier. Where two feeder carriers substantially duplicate service between certain communities, then the feeder routes should be adjusted to avoid such duplication.\(^{20}\)

\(^{16}\) For an important and typical decision along this line, see Delta Air Corporation, et al.—Additional Service to Atlanta and Birmingham, (1941), (2 CAB 447).

\(^{17}\) Investigation of Local, Feeder and Pick-up Air Service, (1944), (6 CAB 1).

\(^{18}\) The report made it clear that the certificates to be issued would be temporary in character because of the experimental nature of the operations.

\(^{19}\) This is still largely true today. For exceptions to this, however, see below, pp. 423-426.

\(^{20}\) All local service certificates contain some non-stop and skip-stop restrictions. Where the local service carrier is unavoidably in competition with a trunk-line carrier, this assures that the former's service will be inferior to that of the latter over the common portion of the route. Further, such certificate restrictions keep the local service carrier from wandering into the trunk-line field contrary to the Board's intention and policy. For recent decisions where the Board has modified its views (and some carriers' certificates) to permit more inter-carrier competition where local service airlines are concerned, see page 423 below.

With respect to the second group of applicants in the post-war period, the irregular (or supplemental) air carriers, the Board has thus far steadfastly refused to grant certificates of convenience and necessity to any one of them to cover domestic passenger operations. In 1955, however, the Board broadened the scope of their permissible operations and expressed the view that these carriers "... represent a significant part of our air transport system, and that our (the Board's) policy towards them should be directed toward their survival and continued healthy growth, subject to the overall objectives of our Act and a proper relationship to our certificated air carrier system." While a more detailed discussion of the Board's attitude towards the competitive operations and practices of non-certificated carriers will be undertaken in a later section of this paper, it should be stated at this point that notwithstanding the Board's explicitly expressed interest in fostering the growth and development of the non-certificated segment of the industry, these carriers have, with few exceptions, been very ineffectively competitive with the services of certificated carriers in the recent past. (The remainder of this chapter, which discusses the Board's general attitudes towards competition, will therefore proceed without further reference to the irregular or supplemental carriers.)

In considering the modification, suspension or revocation of the certificates of public convenience and necessity of existing carriers, the Board has constantly been faced with the problem of regulating competition in such a manner as to meet the Act's requirement that the air transportation industry be developed, that the needs of commerce, the Postal Service and the national defense be met and that subsidy payments be kept to a "reasonable" level. Because of the inevitably unique character of each case calling for such a decision by the Board, it is extremely difficult to predict with any degree of certainty the Board's decisions in most cases brought before it. Nevertheless, the Board contends that there are several major threads of policy which run through most, if not all, of its decisions. It is therefore an objective of the remaining portions of this paper to determine in a general way just how consistent the Board has been in regulating competition between the certificated air carriers.

In response to several early applications by established certificated carriers for the performance of additional, competitive services, the Board has received a number of applications from the Trans-American combine (formerly North American Airlines). This operation, which was conducted very successfully (from the standpoint of attracting passengers and showing profits) was finally terminated, after long attempts on the Board's part to do so, with a 1957 decision of the United States Supreme Court. This whole episode is discussed in detail in Part IV below.

21 Large Irregular Air Carrier Investigation (Order Serial No. E-9744), November 15, 1955. CCH Aviation Law Reporter Par. 21,879.01.
22 By far the most effective competitor among the irregular carriers was the Trans-American combine (formerly North American Airlines). This operation, which was conducted very successfully (from the standpoint of attracting passengers and showing profits) was finally terminated, after long attempts on the Board's part to do so, with a 1957 decision of the United States Supreme Court. This whole episode is discussed in detail in Part IV below.
23 The author recognizes that if there were more predictability in over-all judicial and quasi-judicial systems, there would be much less call for adjudication than there now is. It is the intention here to point out, however, that it is in part because of the contradictory requirements placed upon the Board by the Act that Board decisions are much more difficult to predict and predications more likely to be upset than perhaps in any other judicial or quasi-judicial proceedings in the United States.
Board in 1943 stated firmly that the Act implies the desirability of competition only when such competition is neither “destructive nor uneconomical” in nature. The decision further states that because competition itself presents an incentive to improved service and technological development, there is a strong, though inconclusive, presumption in favor of competition on routes offering sufficient traffic to support competing services without an unreasonable increase of total operating costs. This pronouncement, of course, contains several qualifications which will perhaps always require a Board decision to be resolved. The most important point in such cases has probably been the determination in each case as to what constitutes an unreasonable increase of total operating costs. This, in effect, has tied the Board down to determining whether, in each case, the increase in costs resulting from the introduction or increase of competition will be offset by the improved service and further development of the industry that also results. And, too, because any operating losses may have to be made up from the public treasury in accordance with the Board’s recommendations, the Board has an additional incentive—and responsibility—to weigh the various factors with extreme care.

An example of the Board’s operation under the general policy of the Additional North-South California Services decision is found in a 1944 decision in which it was decided not to award a route to an applicant because of the resulting inevitable diversion of traffic from another carrier, notwithstanding the public benefit in the form of improved service that might also result from the increased competition. The Board stated that to permit such competition would weaken the original carrier’s position as a competitor in its section of the country and would cause it to become more dependent upon air mail payment and subsidy for its continued operation. This was deemed to be contrary to Section 2 of the Act which requires the Board to provide for competition to the extent necessary to assure the sound development of our national air transportation system and to foster sound economic conditions in air transportation.

24 Transcontinental and Western Air, Incorporated et al., Additional North-South California Services (Supplemental Opinion), (1943), (4 CAB 373). This decision also observes that, because of Congress’ failure to lay down definite rules or formulas for determining a specific and correct measure of competition, there is perhaps no way to formulate a general rule to substitute for the Board’s discretionary judgment. See also Northeast Airlines, Incorporated et al., Additional Service to Boston, (1944), (4 CAB 686).

25 See p. 414 above.

26 Western Air Lines, Incorporated et al., Denver-Los Angeles Service, (1944), (6 CAB 199). In an important decision on appeal from the Board’s judgment in this case, the Federal District Court found the Board to be acting within its power in granting the application of one carrier rather than another on grounds that the public interest represented by the economic and competitive value of the successful applicant to our national air transportation system outweighed the public interest represented by the convenience of a large number of travelers which would result had the other carrier’s application been approved. United Air Lines, Incorporated v. Civil Aeronautics Board et al., (1946), (155 F. 2d 169).

Note also that in selecting from among several carriers to perform a new or competing service, the Board is not required by the Act to award the service so as to equalize the size or opportunities of the various air carriers. Northwest Airlines,
Again in 1946, in response to the application of a regional trunk-line carrier for a certificate amendment to permit an extension of service in competition with a larger, transcontinental carrier, the Board stated:

The principle of strengthening a small carrier by authorizing an extension of its system in order to permit it to compete effectively with existing services has its converse in the principle of safeguarding an existing service from unique impairment by another carrier.27

Through the War, as has previously been pointed out, all certificated air carriers were performing (in greater or lesser degree) what can be designated as trunkline services.28 After the War, the Board's announced policy of backing experiments in local service air transportation led to the certification of a number of new air carriers. As mentioned above, competition between local service and trunkline carriers has been effectively minimized for the most part as it was the Board's intention to do. The Board's purpose behind this seems to have been four-fold. First, the Board, by supporting the experiment, was attempting to determine the demand for strictly local air service throughout the United States. It therefore granted each local service carrier a spatial monopoly on air transportation whenever possible in all but the larger, terminal communities along its routes.29

Second, the local service operations were to be strictly experimental in character, with the carriers holding only temporary certificates that could be revoked or allowed to lapse, as appropriate, if the trial proved the infeasibility of the project. By keeping the local service carriers out of competition with the permanently certificated trunkline operators, the Board thereby minimized the impact on the planning and steady development of the latter group from the standpoint of both the introduction of local service operations and from the possibility of curtailment, should the experiment fail.30

Third, the Board knew full well that because of the high-cost nature of local service operations, it would have to subsidize the new carriers heavily, at least in the beginning. By restricting competition, the Board

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27 Incorporated et al., Chicago-Milwaukee-New York Service, (1944), (6 CAB 217). But where the extension of a route will strengthen a small carrier materially by providing access to important traffic-producing communities, such extension may be in consonance with the Board's duty to encourage and develop a sound air transportation system through the issuance of a certificate of public convenience and necessity, all other things considered. Colonial Airlines, Incorporated et al., Atlantic Seaboard Operation (Supplemental Opinion), (1944), (4 CAB 552).

28 West Coast Case, (1946), (6 CAB 970). A similar statement is to be found in the Board's opinion in the New England Case, (1946), (7 CAB 27).

29 There is one exception to this statement: Pioneer Air Lines, Incorporated was certificated in 1943 and became the first of the class of certificated air carriers designated formally at the close of the War as Local Service Carriers.

30 For a direct statement of the Board as to how it expected to accomplish this goal, see the quotation from Board Order Serial Number E-2680 to be found on page 419 above. Also see Bonanza Air Lines, Incorporated—Transcontinental and Western Air, Incorporated, Route Authorization Transfer Case, (1949), (10 CAB 893).

31 That the Board recognized the possibility that the experiment might fail is most interesting. Also to be noted is the fact that the Board established no criteria by which to judge "failure."
minimized the need for subsidy on the part of the local service carriers. In addition, since the trunkline carriers were also on subsidy, the introduction of local service carriers on a non-competitive basis would not increase the former carrier group's need for financial aid.\textsuperscript{31}

Finally, the local service type of operation was recognized by the Board as being highly specialized in character and as requiring the full-time attention of the operator if the cost to the government was to be kept within reasonable limits and if the service area's full traffic potential was to be realized. Part of this recognition stemmed from the fact that the local service operator would be faced with the most intense kind of competition from well-entrenched surface carriers and would need little further stimulus to keep his organization in trim.

While local service carrier certificates of convenience and necessity have been converted—at least in part—to permanent grants of operating authority in the past several years,\textsuperscript{32} the Board is still protecting and strengthening these carriers much as it has always done.

In short, when making route awards involving only local service carriers, the Board has made its decisions on bases frequently similar to those used in choosing between several trunk carrier applicants for the same authorization. On many occasions, of course, the fact is cited that local service operations are not generally self-sufficient and therefore require subsidy. This can more or less significantly affect the choice of a carrier for a local service award where the minimization of subsidy needs is deemed of sufficient importance. Furthermore, in few cases has the Board departed from its general policy of authorizing only one local service carrier over a specific route.\textsuperscript{33}

\textsuperscript{31} Not only were the local service carriers' operations seen as not hurting the trunkline group, their introduction was expected to increase trunkline traffic by creating air-mindedness in the hinterlands and by bringing passengers into terminal airports for connections with trunkline flights. See \textit{Southwest Airways Company Renewal Case—United Suspension Case}, (1952), (15 CAB 61).

\textsuperscript{32} As previously noted, originally all local service certificates of convenience and necessity were issued on a temporary basis, i.e., for a stated number of years. This was in explicit recognition that the type of service to be rendered thereunder was experimental in nature. While the Board at that time did not indicate precisely what it would look for in determining when such operations were to be up-graded from "experiments" to a firmer footing, there was at least a presumption that economic self-sufficiency (or the close approach thereto) would be one of the criteria to be used. It is interesting to note in passing that the Board has now made permanent most local service carrier certificates without having this part of the industry even remotely approach economic independence (of the Federal treasury). Without doubt, political pressures, the carrier needs for long-term financing through which they can acquire new equipment, and other similar considerations have prompted the recent Board actions solidifying the status of the local service carrier. But it would nonetheless be most interesting to examine in greater detail the earliest view of the local service type of air transportation in order to compare it with the pattern that now seems to be emerging.

\textsuperscript{33} Exceptions are made only in what the Board considers to be "special" cases. For example, in the \textit{Erie-Detroit Service Case}, Dkt. 6927, (Order Number E-10625), September 20, 1956. CCH Aviation Law Reporter, Paragraph 21,991, duplicate service by Mohawk Airlines and Allegheny Airlines was authorized by the Board between Erie, Pennsylvania and Detroit, Michigan. In promoting duplicate service the Board held that the public benefits would outweigh any disadvantages which might occur. It was pointed out that duplication would occur only on the Erie-Detroit portion of each carrier's routes and that this limited amount of duplication was seen as not violating the Board's policy of limiting subsidized local service for a given market to a single local service carrier.
Overall, the Board has followed a continuing policy of granting route extensions and related authorizations to local service carriers in the hope that it will make them better able to attain economic self-sufficiency and at the same time offer improved service to the traveling public.34 Primary considerations for the Board remain the effects of each authorization on the subsidy needs of the carrier, with the result that, other things being equal, a new authorization goes to the carrier which can provide the service for the smallest addition to its subsidy bill, or, presumably, for the largest decrease in existing subsidy payments. Public benefit to be derived, integration of a route authorization with a carrier’s existing route structure, “need” for the additional route extension, and type and quality of service the carrier is capable of performing all come in for mention; but, by and large, subsidy considerations are seen as governing.

In several cases involving route authorizations where the applicants were both trunkline and local service carriers the Board has followed a policy of authorizing local service carriers where the routes were determined to be mainly of a “local service nature.” This has even been true in certain cases where the Board has felt that the cost to the government may be greater if a local service carrier is authorized rather than a trunkline, but that local service operation should nonetheless be permitted because it alone would provide increased and improved service and best develop the market. The local service carrier is still expected to meet the needs of the smaller communities more adequately and thus be able to generate the maximum traffic over the routes.35

In at least two unique decisions in the recent past the Board has placed a local service carrier in competition with a trunk carrier. In the *Southwest Airways Renewal Case,*36 various points in California


35 See *Route No. 106 Renewal Case Supplemental Opinion,* Dkt. 6050, (Order Serial Number E-9292), June 10, 1955. CCH Aviation Law Reporter, Paragraph 21,844: *Osark Certificate Renewal Case—Supplemental Opinion,* Dkt. 5988, (Order Serial Number E-9292), June 10, 1955. CCH Aviation Law Reporter, Paragraph 21,844: *Panama City, Florida—Atlanta Investigation,* Dkt. 7233, (Order Serial No. E-10332), May 29, 1956. CCH Aviation Law Reporter, Paragraph 21,969.01. Also *American Airlines, Inc.—Chicago-Detroit Route 7 Local Service Case,* Dkt. 6411 et al, (Order Serial No. E-8975), February 28, 1955. CCH Aviation Law Reporter, Paragraph 21,804. This latter case, among others, illustrates that the trunklines frequently are not unhappy to relinquish parts of their route structure to local service carriers when the route is not profitable for the former. American Airlines volunteered to give up its several intermediate points between Detroit to Chicago to a local service airliner in this proceeding. This case also indicates that local service carriers can provide better service for the communities along such routes than can a carrier which is long-haul oriented. After succeeding to this route North Central Airlines offered much more frequency to the points served than had American—partly by using smaller aircraft—and partly because of its ability and inclination to specialize in this type of operation.

36 *Southwest Airways Renewal Case,* Dkt. 6503, (Order Number E-9592), September 27, 1955. CCH Aviation Law Reporter, Paragraph 21,872.
which had been served by Southwest, following suspension of United Air Lines' rights to serve them, were re-certificated to United to allow it to offer competitive services. The Board felt that United's restriction could be removed because these points needed additional service and because the traffic had become such as to support service both by the trunkline and the local service carrier. The Board specifically stated:

"... Two new elements, when considered together with the matters weighed by the Examiner, have inclined us to reinstate United. The first is the enactment of section 401 (e) (3) of the Act, which may be taken as reflecting a legislative finding that local service air carriers are generally past the experimental stage and are to be recognized as an established part of our national air transportation system. From this it follows that certain Board actions which were warranted during the earlier phases of local service carrier evolution may require re-examination to determine whether they are appropriate when the local service carriers' survival is assured. While suspensions of pre-existing trunkline certification at points served by local service carriers may still be required for various reasons in particular cases, such suspensions as are before us now represented at least in part promotional devices to assist the local service carriers in establishing themselves, and were avowedly temporary in nature.\(^3\)

This statement seems to indicate that since local service carriers are now to be viewed as a permanent part of the national transportation scene, changes might be in order in local service authorizations and in the nature of route restrictions and extensions. It can perhaps be expected that the Board will now be less prone to "protect" the local service carrier in view of their new status. But this is not yet certain and can only be determined with the passage of time.

Another recent decision of the Board in the Syracuse-New York City Case,\(^4\) installed Mohawk Airlines as a competitive carrier to American Airlines in offering non-stop service over the Syracuse-New York route segment. It was pointed out by the Board that since American serves this area as part of a transcontinental route, the local haul nature of the market had largely been neglected and hence required the authorization of a local service carrier to develop it adequately in the public interest. For the sake of analytical completeness (and in fairness to the Board), it is also important to note that the Board did not view its decision in this case as precedent-setting. In its words:

There has been a great deal of discussion as to whether the Syracuse-New York route should properly be characterized as a typical local service or trunkline route and whether an award of non-stop rights to Mohawk would be contrary to the Board's long-standing policy applicable to local service carriers... In reaching a decision in this case we fail to find any need for labeling the Syracuse-New York route as reserved exclusively for either a local service or a

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\(^3\) Southwest Airways Renewal Case, CCH Aviation Law Reporter, Paragraph 21,872.03 (italics added).

\(^4\) Syracuse-New York City Case, Dkt. 6179, (Order Serial Number E-11173), March 27, 1957. CCH Aviation Law Reporter, Paragraph 22,035.
trunkline carrier. Nor do we believe our decision herein should be viewed as a landmark case which reverses, modifies or changes the essential characteristics of the local service concept heretofore developed by the Board.\footnote{Ibid., Paragraph 22,035.02.}

Turning now to the regulation of competition between trunkline carriers in the post-war period the Board, as stated above, has generally held that it has adhered to the policies enunciated by it in previous periods. However, with this segment of the industry having become stronger, more mature and economically more sophisticated with the passage of time, the Board has been faced with specific competitive problems so complex that earlier causes of action come to take on an aura of simplicity by comparison.

The maturity of the trunkline carrier group is evidenced in several ways, each of which complicates the Board's task of promulgating and rationalizing its regulatory decrees. For example, the subsidy requirements of the trunkline carriers (individually and as a group) have dropped steadily and sharply in recent years.\footnote{It is anticipated that the close of the government's fiscal year 1958 will find all of the twelve trunkline carriers off subsidy entirely as far as domestic operations are concerned. Indeed, all but one trunk carrier have been unsubsidized for the past several years. (This is not to say that all trunk carriers save one have shown profits for each of the past few years.)} This makes it more difficult for the Board to decide competitive issues principally on the basis of cost to the government, since the Board apparently sees the possibility that the government may be required to foot the bill of a competitive action (as a result of a carrier's being forced back onto the subsidy rolls) as quite remote.

In the recent cases where new competition has been widely authorized between trunk carriers, it is impossible to ascertain the exact role that the growing independence of the more "successful" trunk carriers has played in the Board's decisions. But it is obvious from a careful reading of these decisions, particularly in the light of previous statements of policy, that the background of sustained, subsidy-free performance on the part of many of the trunklines that have now been more effectively paralleled, has actually had much to do with the fact that they \textit{were} paralleled.

The Board's "new" outlook, brought about by changing subsidy conditions and the increased financial independence and maturity of the trunk group of carriers, has produced more loosely regulated competition where competition between trunk carriers was at issue. For example, in the recent past the Board has promulgated a number of decisions supporting this thesis and having long-run implications for Board policy as well as far-reaching effects upon the United States air transportation system. For purposes of discussion and analysis, it is possible to separate the cases into several general categories: (1) situations where competition between Big Four trunkline(s) and other trunkline(s) was at issue; (2) cases where competition between two or more Big Four carriers was at issue; and (3) cases in which compe-
REGULATION OF COMPETITION

The Southwest-Northeast Case is a typical example of the Board's most recent view of competition between Big Four and other trunk airliners. In this decision, where much new and additional competitive air service was authorized between cities in the Northeastern and Southwestern United States, the Board explicitly cited as its prime objective in selecting the recipients of the awards the strengthening of smaller trunklines. In choosing to improve the position of these smaller trunklines rather than add to (or leave) the route structures of any of the Big Four carrier parties, the Board said that their actions would—

"... so strengthen the smaller trunklines as to insure that they will in the future be able to continue operations without subsidy even during periods of economic adversity."

The Board also said—

"It is vital, in our opinion, to so develop the national air route structure as to tend to decrease rather than increase the gap between the relative size of the Big Four carriers and the smaller trunklines."

In further justification of its policy to strengthen the smaller trunklines, the Board stated explicitly that—

"... to create a greater unbalance in carrier size (would) thereby adversely affect the ability of the smaller trunklines to compete effectively in markets which they serve with the larger carrier. (The Board believes) that the benefits to be derived from effective competition will be spread to a greater number of cities if the size disparity between the smaller and larger carriers is reduced. To the extent that we choose a small trunk instead of a Big Four carrier to provide a needed new service... we enlarge the small carrier's opportunity to render effective competitive service in other markets which they are already authorized to serve."

And further—

"As the smaller carriers' route systems are strengthened they will be in a better position to experiment with the provision of low cost transportation."

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41 The so-called "Big Four" carriers are American, United, TWA and Eastern. The remaining trunkline carriers are Braniff, Capital, Continental, Delta, National, Northeast, Northwest and Western.


In addition to the considerations cited above for the Southwest-Northeast Case, the Board in this decision also made two other noteworthy observations having particularly important implications as to its policy with respect to the extension of competition between trunk carriers of diverse sizes. First, the financing and costly operational problems to be faced by the smaller trunks as they enter into the re-equipment program necessary to compete in the jet era were cited as further reasons to reduce the size and "opportunity" disparity between them and their larger brethren. Second, the question of the diversion of revenue was relegated to a subordinate role in determining the need for and choice of a competing carrier, largely because "we (the Board) are no longer faced with the problem of heavy subsidy support for our trunkline carriers—which was a factor which necessarily inhibited the award of competitive services and, at an earlier date, made the question of diversion of particular importance."

It may be of more than passing interest to note the line of development of the Board's recent viewpoint towards competition between trunkline carriers of greatly different size as expressed in this series of cases. In the New York-Chicago Service Case the Board seemed to be feeling its way along, not quite certain if it were laying down a strong general policy for itself or not. This decision is characterized by statements of the following sort:

"We believe that the services we are authorizing for Capital are typical of the kind of service especially suitable for operation by a regional carrier, and will contribute substantially to the strengthening of Capital's system, an objective which we consider of great importance in perfecting the route structure of the nation... Capital... is not one of the larger trunkline carriers... and requires additional opportunity for growth in order to insure that it will remain on a subsidy-free basis... Capital has a greater need than the other applicants... While the Civil Aeronautics Act seeks the development of a sound national system, and not the advantage of an individual carrier as such, we find that this case is one where the strengthening of an individual carrier is required for the sound development of the national system of which it is a part."

The strengthening of the individual carrier seems to have high
priority in this proceeding while the remodeling of the air transportation system has not yet loomed so large.

In the second of these cases, the Denver Service Case, much the same in tone, although the language is perhaps a bit more broad in its sweep:

"Some of the major benefits resulting from sound competition are increased frequency of service, improved service, choice of equipment, choice of carrier, data available to a state and greater generation of traffic . . . United and TWA have consistently done a better job in developing traffic under the stimulus of competition than they have while operating under monopoly conditions."

And with respect to the two smaller trunklines awarded extensions in the decision:

". . . Western is the smallest of the non-subsidized trunk lines and its award of this route would strengthen its regional system. Western provides air service to a number of small communities which produce less revenue than the expenses involved in serving them. It is obvious . . . that the vast majority of Western revenues are derived from a few high-density routes which must subsidize the unprofitable services to the small communities. . . . Continental's lack of size is demonstrated by the fact that it is the only trunkline carrier which does not serve one of the leading 100 passenger-mile markets. In revenue ton-miles flown it carries less than one per cent of the trunkline total, and its total non-mail operating revenues amount to only 1.19 per cent of the industry total. In traffic density per route mile, Continental ranks lowest among the domestic trunk lines, and it also has the shortest average length of passenger haul of any of the applicants in this proceeding. The extension of Continental's route from Denver to Los Angeles and from Kansas City to Chicago, would for the first time, give it access to the high density travel market."

In the third case, the Southwest-Northeast Service Case, the Board at the outset declares its basic objective to be most general:

"This case is the third in a series of major area route cases in which the Board is reappraising important portions of the national air route structure."

The decision further goes on to say, as noted above —

"It is vital, in our opinion, to so develop the national air route structure as to tend to decrease rather than increase the gap between the relative size of the Big Four carriers and the smaller trunk lines. . . . Our objective is so to strengthen the smaller trunk lines as to insure that they will in the future be able to continue operations without subsidy even during periods of economic adversity. . . . We cannot ignore the fact that substantial route awards to the larger carriers would tend to create greater unbalance in carrier size, and thereby adversely affect the ability of the smaller trunk lines to compete effectively in markets which they jointly serve with the larger carriers. We believe the benefits to be derived from effective competition will be spread to a greater number of cities if the size disparity between the smaller and larger carriers is reduced."
The next two decisions in this series of cases that now stand at five were the Florida-Texas Service Case and the New York-Florida Case. These decisions have served largely to echo the sentiments expressed in the statements in the earlier cases as just outlined.

With respect to direct, major competition between two or more of the smaller trunklines, the Board has seemed reluctant to authorize such duplication of services except upon fairly strong showing that the resulting diversion will be small and will not affect the paralleled carrier in any seriously detrimental way. The Board may also permit duplication of service by two smaller trunklines where the duplication occurs only over a comparatively small portion of one or both carriers’ total long-haul routes and where the duplication is necessary to afford both entry to the primary long-haul markets of the country.

In short, the Board permits competition between smaller trunklines to materialize only where the routes are seen by it to be strong enough to support the operations of all franchised carriers or where such competition emerges as a result of some other objective of the Board which inevitably results in such duplicated service.

Finally, it is necessary to examine the Board’s attitude with respect to competition between Big Four carriers in the post-war period. Immediately after the war and for some time thereafter the Board was confronted with the problem of permitting Big Four carriers to compete with each other only over a comparatively few heavily travelled long-haul routes, usually a part of a transcontinental route one or more of them already had in one form or another. While taking into account such “conventional” factors as the public convenience issues, the profitability of the route, the need for “realignment” of an applicant’s route structure, etc., the selection of a carrier, where the traffic was thought to warrant such new competition, was generally correlated quite closely with the magnitude of the additional cost to the government (or reduction of such cost) in the form of subsidy which would result from the award. In reality, the Board’s actions placing Big Four carriers in direct competition with each other from the time when the “grandfather” certificates were issued until the 1950’s, almost always took the form of permitting non-stop operations between points already served on a given route, but not on a non-stop basis.

46 For example, in the New York-Florida Case, Northeast Airlines and National Airlines were placed in competition with each other (and with Eastern Air Lines) after a finding that the route could support all the carriers adequately. See also New York-Chicago Case. Frequently a long-haul restriction will be placed on one or more of the competing carriers, partially to assure the “proper” competitive balance between them over a route. This was true in the award to Northwest Airlines of a Chicago-New York segment in the New York-Chicago Case.

47 An illustration of this would be the Southwest-Northeast Service Case in which Braniff Airways, Delta Air Lines, and Capital Airlines were placed in competition with other carriers and themselves between various points, including New York and Washington and intermediate cities.

48 For example, prior to the decision in American Airlines, Inc., et al., Consolidation of Routes, (1946) (7 CAB 337), both American Airlines and United Airlines had coast-to-coast routes, although they differed in the requirements for stopping en route between various cities. In this proceeding, the Board permitted the “consolidation” of certain of these carriers’ routes so as to permit new non-stop
words, almost without exception no Big Four carrier in this period received an entirely new route or major route extension which placed that carrier in direct competition with another Big Four carrier. In the recent past the Board has continued to inaugurate new competing Big Four service largely by permitting existing routes to be consolidated or by authorizing non-stop flights to be made between cities where intermediate stops had previously been required. There are, however, two particularly noteworthy exceptions to these methods of putting Big Four carriers into new competition with each other. First, in the Reopened Milwaukee-Chicago-New York Restriction Case, the Board established TWA as an additional carrier (to United among the Big Four) providing non-stop service between New York and Cleveland, subject to a long-haul restriction. In its decision the Board said:

"... we find that additional New York-Cleveland non-stop service should be authorized, subject to a long-haul restriction and that TWA should be selected to provide the additional service. Our action herein is motivated in large part by the need demonstrated on this record for improved service between Cleveland and Western points, and for improvement of TWA's route pattern."

This emphasized language with reference to a Big Four carrier is notable for its uniqueness at this stage in the development of the United States air transportation system. Such a remark with reference to a Big Four operator has seldom been found in Board decisions in recent years. It is not clear just what significance it has for the future of our certificated air transportation network. Suffice it to say that not since this decision has the Board explicitly stated it was granting a new or enlarged authority to a Big Four carrier in order to improve its route pattern.

services which placed them in more direct competition with each other. (In so doing the Board cited, among other things, "improvements of schedules and operating efficiency," and "administration savings.") Also, as a result of this proceeding, American, the only carrier up to that time with non-stop Chicago-Washington authorization was duplicated in such service by Capital, United, and TWA. The technique used was to permit route "consolidation" and the latter two carriers were subjected to long-haul restrictions on such flights. Again, in this decision TWA and United were placed in competition with each other in Chicago-Boston non-stop service through the same device—also with long-haul restrictions applying to both authorizations.


51 The author believes it is a different thing for the Board to grant a Big Four carrier a substantial new segment for the purpose (in part) of improving its routes (as in this extension of TWA from Cleveland to New York) than it is for the Board to grant new authority to a Big Four carrier in order that it may better be able to compete with another Big Four carrier for long-haul traffic. An illustration of the latter is to be found in the New York-Florida Case where United and TWA were permitted to serve Boston, New York and Washington (and intermediate points between) on the same flight pursuant to a rather severe long-haul restriction. The purpose of this grant was to afford the carriers "... the ability
The second recent major exception to the general Board policy and method with regard to authorizing or permitting new competition between Big Four carriers is to be found in two parts of its decision in the Denver Service Case. In one part American Airlines was granted a substantial extension to its routes in order to permit it to offer competitive non-stop service to United and TWA between Chicago and San Francisco/Oakland. In making the award the Board said:

"... this market is of sufficient size and importance to justify an effective service by a third transcontinental carrier. ... We will therefore authorize American to operate directly between Chicago and San Francisco/Oakland. ... We are cognizant that this action will give American entry into a highly lucrative market, and that this carrier's vigorous participation will result in substantial diversion from United and TWA. Nonetheless, we find that the public need for this additional competitive service and the benefits that will flow therefrom outweigh the factor of diversion from other carriers."

Also in the Denver Service Case, the Board, in adding Denver to TWA's transcontinental routes and Kansas City to United's transcontinental routes created additional competition between these Big Four Carriers over a number of new segments. Prior to this decision Denver and Kansas City were the private preserves of United and TWA respectively, as far as transcontinental traffic was concerned. They had no transcontinental competition at either of these points to which they offered service.

In putting each of these Big Four carriers into the stronghold of the other, the Board found that each of the two points needed and deserved competitive transcontinental service to afford the cities more one-plane service to more points, to stimulate growth of coach services, to make possible more frequent and more convenient schedules to the large coastal cities to the east and west, etc. No promotional objective is made evident insofar as the specific strengthening of one or the other of the carriers' route structures is concerned.52

52 In granting the United and TWA awards, the Board took care to minimize the diversionary effects of the new Big Four service on the smaller, regional trunklines serving the area by placing restrictions on each of the carriers' new services into Denver and Kansas City. But with respect to the diversionary effect upon each other of these "mirror image" authorization, the Board stated—

"... it is clear that United's services will have no substantial adverse effect upon TWA, since TWA's diversion from United at Denver and United's diversion from TWA at Kansas City tend to offset each other."

This is a most curious statement in that it stands alone, without any substantiation at all of the notion that the diversionary effects would be cancelling. Of course, this might well be the case as far as the number of passengers to be carried (or passenger-miles produced) is concerned. But the effects on net income might be far different as a result of the added costs incurred in providing service to an additional community. The increase in fixed (station, promotional, etc.), costs is
The contrast is quite evident between the words and rationalizations employed in the Denver Service Case with respect to the Big Four authorizations and those used in giving TWA non-stop authority between New York and Cleveland. In the former case there is present the strong implication that the Board is really not too concerned about revenue diversions from any of the Big Four carriers in view of their self-sufficient position at that time.

The implication in this respect in the Denver Service Case is more explicitly recognized in other recent decisions of the Board in which competition between Big Four carriers has been introduced or substantially changed by means of the granting of non-stop authority or by permitting a consolidation of existing routes. In the Louisville-New York Non-Stop Investigation, the Board, after deciding that non-stop service between the two points was required and justified, the Board decided to permit all three Big Four applicants (American, Eastern and TWA), to offer the non-stop service. It did so in the following words:

“Each of the carriers here involved has been economically self-sufficient for many years, and each has a strong and lucrative route pattern developing substantial volumes of traffic. Therefore, there is no longer any need for protecting any one of these carriers from the competition of the other in their market. . . . To grant only one of the carriers such (non-stop) authority would disrupt the present competitive balance wherein each carrier is in a position to provide Louisville-New York service with one stop. Since the economics of the situation now appear to justify non-stop operation in this area, we conclude that each carrier should be placed on an equally competitive footing. . . .”

Again, in its decisions in Tucson Airport Authority and the Eastern Route Consolidation Case, the Board made route awards placing Big Four carriers in competition with one another without specifically mentioning the strengthening of the routes of any such carrier as an objective. In the first of these cases the Board gave as its reasons for placing TWA into Tucson alongside American “. . . the (impressive)

fairly obvious, given the reasonable assumption that no decrease in such costs will occur at the "old" station. (Indeed, at least the promotional type of cost could be expected to rise at the "old" station with the advent of the new competition.) Less obvious, but nonetheless reasonably to be expected are the increased costs arising from the increased aircraft time and operating expenses associated therewith which arise from the necessity to add another point to the system and the schedule.

The Board's apparent lack of understanding of these relationships between costs and revenues is somewhat surprising.

53 Louisville-New York Non-Stop Investigation, Dkt. No. 7253); (Order No. E-9640) September 1, 1955, CCH Aviation Law Reporter, Paragraph 21,888.

54 It is interesting to note in passing that in the Louisville-New York Non-Stop Investigation the Board refers to TWA's route pattern as being "strong and lucrative" while in the Reopened Milwaukee-Chicago-New York Restriction Case it grants TWA a substantial addition to its system in order to afford it needed "improvement in its route pattern." The contrast between these two views of TWA's position in the industry is heightened by the fact that both of the decisions referred to were issued on the same day.


improvements in air service which will flow from TWA's service" such as greatly increased one-carrier service to other cities, the availability of substantially more tourist service, the lowering of fares to certain points through less circuitous routings, and, finally, the provision of competitive schedules which "will help develop additional traffic for Tucson." With respect to diverson of revenues from American, the Board held that "whatever actual reduction in revenues may be experienced . . . will not seriously affect that carrier, and will be justified by the benefits accruing to the travelling public."

In the second case the Board expresses its feelings in much the same way while granting, in effect, non-stop authority to two Big Four carriers who will be competing with a third such carrier—

". . . the equalization of competitive opportunity holds the greatest prospect, in our estimation, for the development of this segment's ultimate traffic potential. The proper competitive spur can be provided by authorizing both Eastern and American to serve more effectively a route which they are both already serving."

Once again the Board is introducing competition in order to provide the public with a better service rather than to strengthen routes. Also, the Board again seems to feel that with the Big Four financially independent of the public treasury, it can put such carriers into competition with each other much more freely than it formerly could and much more freely than it still can introduce competition when any other class of carrier is concerned. It remains to be seen if the Board will carry its present doctrine to its ultimate conclusion. If so, it may be expected to begin creating competition for its own sake any time government support is not seen to be required by the carriers involved.

In the following sections of this paper certain specific problems which have faced the Board will be discussed in order to gain further insight into its changing attitudes toward competition and its use to foster development of the United States air transportation system. Problem areas to be considered include airline merger and acquisition of control, price and service competition, and the non-scheduled airline question.

57 In the Eastern Route Consolidation Case the Board used this sort of language on this point: “We recognize that the addition of two carriers to this market will have a diversionary effect upon TWA. It should not . . . however . . . impair TWA's ability to conduct its operation economically and profitably . . . . Surely there is no question here of needing protection for Eastern, for that carrier is fully capable of withstanding the diversion that will result from the competitive service.”