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THE INTERNATIONAL AIR TRANSPORT ASSOCIATION AND THE CIVIL AERONAUTICS BOARD*

BY LEONARD BEBCICK

IATA — The Organization

IATA, in its present form, arose out of the recognition by national governments that the problem of rate-setting in international air transportation was both too complex and technical to be conducted effectively by the governments themselves on a multi-lateral basis. Presently, some thirty thousand separate rates, all highly inter-related, are involved; frequent and speedy revision is required by technological advances in aircraft, a developing mass market, and competitive pressures. And if multi-lateral negotiation among governments was so difficult as to be impractical, rate-setting by the slow and cumbersome method of a series of bilateral treaties was clearly out of the question.

The participants in the Conference on International Civil Aviation (Chicago, November 1944) also were unwilling to yield the degree of national sovereignty which would be required were an international agency to be vested with this responsibility. Fundamental disagreement on the basis of rate-setting, the difficulties of legal enforcement, and the close and undisclosed financial ties between the governments and their national airlines in this competitive business all militated against the conception of an international CAB.1

Thus, the only feasible alternative was to permit the carriers themselves to perform this function, while leaving to the individual governments the opportunity of policing these agreements in whatever fashion they desired, or were able to. Fourteen months after Chicago, the airlines had met and had drafted the requisite machinery, governmental approval had been received, and IATA was in business—the business of self-regulation.

Early in 1946, the IATA structure and methods of procedure were passed upon favorably by the CAB (6 CAB 639), and IATA regulation as the keystone of international rate-setting was embodied in the landmark Bermuda agreement establishing the basis of Anglo-American civil air relations. Section II, recognizing the role of IATA, was the prototype of similar agreements with all of the world's significant air

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* This article was prepared as a paper in a seminar on Administrative Regulation of Business at the Yale University Law School.

1 For a general discussion of the Chicago Conference, see: Bower, The Chicago International Civil Aviation Conference, 13 George Washington Law Review 308 (1945); Burke, Influences Affecting International Aviation Relations, 11 Law & Contemporary Affairs, 598 (1946); PAA Statement at Hearings, cit. n. 5, infra, p. 2691.
powers. While ten years of experience has resulted in criticism and proposals for modification, the considerations underlying IATA's establishment and its basic function have largely been accepted. Those who advocate some limitation of its powers nevertheless recognize IATA's indispensable role in developing to final form an inter-related international rate structure.

Chartered under an act of the Canadian Parliament, IATA is a private organization of air carriers in international service designed to meet common problems and to promote the standardization of practices and procedures. Today, some seventy airline companies from forty countries, and carrying over 95% of the world's scheduled international air traffic, have assumed membership in IATA. No significant carrier has determined to remain outside the organization.

Between annual General Meetings which wield ultimate authority, IATA activity is carried on under the general supervision of the Director General, Sir William Hildred, and a small staff. Planning centers largely in the six standing committees, composed of industry representatives.

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2 Aviation Law Reporter Par. 26, 318, Commerce Clearing House. See generally for all relevant air treaties.
3 In an address to an IATA General Meeting on 17 October 1955, Chairman Risley said in part:
   "You gentlemen of the International Air Transport Association constitute perhaps one of the world's most regulated business management groups. But it is also a fact that you have reduced the need for such governmental supervision to a minimum, by statesmanship of a high order.
   "This statesmanship is self-regulation; the ability to sit down around the conference table and hammer out an agreement that is the best of solutions to your problems . . .
   "I have profound admiration for your organization which, in little more than a decade, has reconciled thousands of differences of views into unanimous agreements . . .
   "Thanks to your insight and breadth of vision, the need for governmental intervention is limited to government's appropriate duties. The public interest is more than adequately served by the intensive and dynamic and fair competition which obtains within your field and by reason of the cooperative spirit which infuses the members of your organization.
   "It is no exaggeration to say that the existence and statesmanship of IATA, more than any other single factor, saved international air transportation in the postwar period from the disastrous rate wars and subsidy wars that would have otherwise effectually thwarted its sound development. The best tribute I can pay to the leadership of your organization is to say that it has created orderly freedom of the air."

4 Hearings before the Committee on Interstate and Foreign Commerce on H.R. 4648 and H.R. 4677, 84th Congress, 18 March 1955. Mr. Joseph Fitzgerald, Director of the Bureau of Air Operations, stated at p. 128:
   "... The Board today very strongly support the IATA machinery. In making the proposals here, it is not in any way questioning the desirability of the continuance of that machinery."

5 For a description of the IATA structure, see Gazdik, Rate Making and the IATA Traffic Conferences, 16 Journal of Air Law and Commerce 298 (1949); Hearings Before the Anti-trust Subcommittee of the Committee on the Judiciary, House of Representatives, 84th Congress, 2d Session, Prepared Statement by the Director of IATA, at pp. 1072-1083. For an excellent summary see Report of the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 85th Congress, 1st session. "Airline Investigation pursuant to H. Res. 107, April 1957."

Both are most informative, and are the best sources on this subject.
6 Hearings, Ibid., at 1082-1083.
tatives and dealing with financial, legal, technical, traffic, medical affairs, and border control facilitation procedures, respectively. There exists in IATA a clearing house performing a service in the area of interline ticketing similar to that carried on by banking clearing houses.

IATA's most significant activities are carried on at its Traffic Conferences, of which there are three, corresponding roughly to areas of North and South Atlantic, Europe and the Middle East, and Asia and the trans-Pacific. When the scope of business requires, the Conferences are convened in joint or composite session. Each Conference possesses a number of standing committees dealing with costs; fares, rates, and charges; and administration of agents.

Enjoying considerable autonomy within the framework established by the General Meetings, the Traffic Conferences are charged with the responsibility of evolving agreements relating to traffic and operational procedure, conditions of carriage, and most important, the fixing of fares and rates. Each IATA member carrier is required to belong to the appropriate Traffic Conference (a carrier may be a member of more than one conference, depending on its routes; e.g., PAA belongs to all three). Action on rates and fares can be taken only by a unanimous affirmative vote. Each member has one vote and an abstention is regarded as an affirmative vote. All members, including those absent, are bound by Conference decisions. Alleged violations of IATA agreements come before a Breaches Commission which is authorized to invoke appropriate sanctions. IATA resolutions are subject to the approval of all the governments of member airlines. In the area of fares and rates, disapproval by any one government within a specified period prevents the agreement from having effect and results in an open rate situation. The consequences of disapproval are spelled out by enforcement resolutions, themselves subject to unanimous governmental approval. In the case of the United States, approval of each resolution is required by Section 412 of the Civil Aeronautics Act, by a condition attached by the CAB to its initial approval of the Traffic Conference Machinery, and by provisions of numerous bilateral air transport treaties.

7 Article IV:
". . . The Traffic Conferences shall concern themselves with all air traffic matters involving passengers, cargo, and the handling of mail in their respective areas or routes, particularly the following
(1) Tariffs, rates, and schedules
(2) General conditions of carriage
(3) Traffic forms, documents, and procedures
(4) Reservation codes and procedures
(5) Government forms, regulations, and procedures
(6) Ethics of advertising and publicity
(7) All matters pertaining to agents."

8 For a recent list of cases decided by various IATA enforcement commissions in which U. S. carriers were involved, see Hearings, n. 5, supra, at p. 1069.

8a The United States, by far, has been most active in passing upon IATA agreements. Mr. Stuart Tipton has testified that the CAB has disapproved more IATA rate resolutions than all of the other governments combined. Indeed, the Board has disapproved almost seven times as many IATA resolutions as the government with the next highest total of disapprovals. Hearings, n. 4, supra, at p. 505.

CAB direct statutory authority over the rates charged by American carriers in foreign air transportation is practically nonexistent. The only substantive power, and a minor one rarely used, derives from Section 1002(f) of the Act which enables the Board to disallow discriminatory charges. Section 412\(^\text{10}\) requires that all agreements to which any American carrier is a party be submitted to the CAB for approval; and by virtue of Section 414,\(^\text{11}\) such approval places the carriers beyond the reach of the anti-trust laws, in acting under the terms of the approved agreements.\(^\text{11}\) The necessity of the American carriers to gain CAB approval of their participation in the IATA framework and in the agreements reached thereunder, presents the CAB with an indirect means of influencing and exercising control over foreign air transpor-

\(^{10}\) Civil Aeronautics Act of 1938:
"POOLING AND OTHER AGREEMENTS: Filing of Agreements Required:
(a) Every air carrier shall file with the Authority (Board) a true copy, or, if 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 of 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.
Approval by Authority (Board):
(b) The Authority (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 to 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 Authority (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.
(As amended May 16, 1942, 56 Stat. 301.)"

\(^{11}\) Civil Aeronautics Act of 1938:
"LEGAL RESTRAINTS:
"Sec. 414 (52 Stat. 1004, 49 U.S.C. 494)
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.’"

\(^{11}\) The Board has consistently maintained its position that the method used to achieve carrier agreement in no way affects the application of Section 412. ‘‘...The manner in which carriers establish rules, whether by way of agreement, concurrence, adherence, compromise, consensus of opinion, negotiation, or any other method does not remove the matter from Section 412.” 10 CAB 783 (1949).
By imposing conditions on present and future approval of IATA agreements and by retaining the right to end a temporary approval, the Board gained a degree of authority which Congress had denied it in direct form.

Rate Conferences

Industry agreement through rate conferences, entered into by the regulated, dealing with regulated subjects, and subject to the approval of the regulator were not unknown before the creation of IATA. Such procedures had long existed within the framework of the ICC and the Maritime Board. Agreements reached by American air carriers through the medium of the Air Transport Association (not dealing with passenger fares, though) and the Air Freight Transport Association (cargo rates) are subject, as are IATA resolutions, to CAB approval under Section 412 with concomitant anti-trust immunity under Section 414. Such agreements, when properly supervised, provide a means for more conveniently, and perhaps more effectively, accomplishing regulation by permitting the regulated to utilize their peculiar technical competency in evolving the details of regulation.

But while approval of such industry-reached agreements in the above instances represents a means of more effectively exercising powers of regulation, for the CAB it represents a means of acquiring authority. In the case of its domestic jurisdiction the Board possesses the authority to regulate the subject matter of such agreements were they to be rejected. Rejection does not result in an unregulated situation, at least for not more than a very short period. The rate conference provides a more convenient and efficacious manner of regulating what might be controlled in a direct fashion. In weighing approval of such an agreement in domestic aviation, the Board may well weigh the inconvenience and temporary disorder caused by disapproval, but its deliberations are free from the disturbing knowledge that disapproval will mean non-regulation or unilateral regulation by a group not subject to CAB authority.

Outright disapproval of an IATA agreement will mean the end of any degree of uniform regulation, resulting in considerable economic chaos, and will leave each government free to adopt its own

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11 For the application of the antitrust laws to air carriers see 40 Op. A. G. 335 (1944).
12b There is at least one instance where IATA has successfully prevailed by adhering without modification to its original resolution in the face of a CAB condition requiring modification during a period of temporary approval. Involved was IATA's attempt to raise the Gander-east fare segment of the North Atlantic run as a means for ending diversion on the New York-Gander leg by U. S. and Canadian carriers. The Board finally agreed to IATA's position. See E—817 (24 September 1947) and E—8284, 10 CAB 330 (23 May 1949).
13 Sections 402 and 1002, principally.
desired rate or practice. Understandably, the CAB is most reluctant to disapprove when such consequences lie around the corner.

The Shipping Conference agreements appear to bear greater similarity to IATA resolutions than those rate conference agreements arising in domestic aviation and in areas subject to ICC regulation.\(^{14}\) IATA proponents frequently draw upon the analogy. Neither the Maritime Commission nor the CAB possess direct control over rates in foreign traffic, and the direct statutory authority of both is confined to the removal of discriminatory charges.\(^{15}\) But in addition to important differences in rate structure and operation which militate against greater competition, the Shipping Act provides the Commission with a greater authority in regard to agreement approval. Of all the differences between Section 15 of the Shipping Act and Section 412 of the Civil Aeronautics Act, the most important is the authority given the Maritime Board to approve or "disapprove, cancel, or modify" any agreement; while the CAB may only approve or disapprove. The Maritime Commission has indicated that it believes this language gives it sufficient authority to change the level or rates in proposed agreements.\(^{16}\)

**Conditions Approval**

Given fears as to the unfortunate consequences of disapproval of IATA resolutions, the Board has resorted to the device of conditioned approval where the agreement in question was not wholly satisfactory. But the regulatory device of conditioned approval, either of an agreement or of general agency action, ordinarily provides flexibility without sacrificing control. Failure to meet the specified condition and/or subsequent disapproval finds the party as fully regulated as previously. He is unable to take any step in the general area of regulation on his own. While practical and/or equitable considerations may cause an agency to hesitate before pulling the rug out from under, such action does not result in a failure of agency jurisdiction. But this is precisely what happens when the CAB is confronted with a failure by IATA to meet a specified condition attached to the approval of a resolution, and revokes its 412 approval. Conditional approval here thus provides a means of working in an endurable fashion within an essentially limited jurisdictional framework, rather than enabling the agency to exercise more flexibly powers which it already possesses. Rather than establishing standards that are to be adhered to "or else," the conditions attached to IATA resolutions more often represent guides by which a subsequent IATA conference will gauge its decisions in arriving at an approximation that will satisfy the CAB to the degree at which it will not disapprove. In the major areas of substantive regu-


\(^{15}\) Section 16 of the Shipping Act (46 U.S.C. 815).

lations, the process, as a study of representative decisions will reveal, is one of continuing compromise.

Given the lack of direct statutory authority, what then is the true basis of CAB power over IATA members? Why is it able to bring the world's airlines to at least a partial recognition of its views within a period of time? To oversimplify and speculate somewhat: Similar objectives and similar fears. There exists the desire to maintain a uniformity regarding fares and conditions of carriage, and a marked disinclination to precipitate an open rate, or any generally uncontrolled situation, because of considerations of economic dislocation, technical disruption, and, one might even say, of aesthetics.

The fear that American carriers would take the initiative in undercutting the market in an open rate situation has always been strongly felt by European carriers; and although the danger of radical price-cutting is of diminishing likelihood and is one whose costs might better be absorbed by the subsidized European carriers, the preference for uniformity and a closed structure is marked. And although European countries can, under the Bermuda type of agreements, suspend such cut-rate fares, this power extends only to flights between such country and the United States. The competitive effects of cut-rate fares on traffic from further or nearer points cannot be met directly.

For the American carriers, immunity from the anti-trust laws is important, though the problem becomes most serious only when a move is made in the direction of the agreed-upon but disapproved rate or condition, rather than in the maintenance of the status quo. But probabilities aside, the assurance of freedom from prosecution is desired.

Likewise, the CAB, cognizant that air traffic is facilitated by uniform structure, is not anxious to precipitate an open fare or other unregulated situation, or leave American carriers at the mercy of other nations and able to meet competition only by exposing themselves to anti-trust prosecution. The process then becomes one of mutual accommodation and continuous adjustment.

STANDARDS

The IATA machinery came before the Board for approval in 1946 (6 CAB 639), and the temporary approval then granted was renewed at intervals and in 1955 was made permanent. The original opinion and its vigorous dissent represent the most comprehensive official pronouncement on the problem. While the highlights will be discussed, the reader will find it profitable to repair to the original text.

Competition

In discharging its responsibilities in the public interest, conven-

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18 The IATA machinery was passed upon in 6 CAB 639 (1946); E—269 (1947); E—706 (1947); E—1227, 9 CAB 222 (1948); E—3888 (1950); E—5709 (1951); E—6390 (1952); E—7407 (1953); E—8023 (1954); E—9305 (1955).
ience, and necessity, Section 2 of the Civil Aeronautics Act enjoins the CAB to consider among other things:

(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 U. S., of the Postal Service, and of the national defense.

It was the compatibility of the proposed IATA procedure over competitive matters, viz., rates and fares, with these standards, which the Board considered in 6 CAB 639. Even the dissent was willing to allow IATA to exercise primary control over non-competitive items.

For the majority, the lack of a feasible alternative dictated the decision. Should the Board assume some limited control over international rates which the IATA structure afforded, or should matters be left to the unilateral control of other governments? Further, both France and England, fearful of price-cutting initiated by the American carriers, were willing to lift present frequency restrictions upon U. S. flag carriers only upon assurance that some proper control would be maintained on rates—that the rates charged should be approved either by an intergovernmental agency or by agreement among the carriers themselves.

The Board recognized the desirability of competition, but certainly not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation, but having the power to provoke subsidy wars among nations. What is needed is "regulated competition which seeks to avoid the stultifying influence of monopoly on one hand and the economic anarchism of unrestrained competition on the other."

The Board was unable to accept the proposition that this machinery which gave the U. S. its only means of playing some role in regulating international rates was antithetical to the concept of regulated competition in air transportation. Neither was it able to conclude, without further proof, that the full benefits of competition, particularly the gearing of rates to the costs of the most efficient operator, would necessarily be realized under the procedure of agreements by the carriers themselves. Drawing support from rate conference practices permitted by the ICC and Maritime Commissions, the Board mounted the pragmatist pedestal and declared that it would "... refrain from prejudging a proposal that is assailed and supported by only theoretical considerations." Subject to conditions and interpretations dealt with below, IATA structure was granted temporary approval for one year with the purpose of gaining information and experience which would enable the CAB to re-evaluate its position and come to a more informed final judgment.
To Commissioner Lee, the views of his colleagues were, for all their pragmatism and fine language, little more than pious platitudes. Briefly, he felt that "competition by consent" is not competition—effective competition by its very nature depends upon the preservation to individual carriers of substantial freedom of action in the institution of fare reductions. Rate-setting by unanimous consent inevitably leads to a rate set at the level of the most inefficient operator. The result on the expanding air industry would be profoundly restrictive, and the desired development of the mass market as well as technical innovation would be effectively stymied. With controlled rates, the carriers would be forced to resort to non-price competition—itself productive of higher costs. Further, the IATA agreement was opposed to the economic philosophy and aviation policy of the U. S., Lee said, pointing to previous Board decisions where the "most chosen instrument" doctrine failed because of a desire to promote competition. The majority agreed regarding the primacy of competition, but the word meant something else. They felt a consistent course was being followed.

Further, contended Lee, the Board mistakenly was granting much and gaining little. Its purported gain in control over international rates was illusory. It would lack the needed information which a record develops, international pressures to approve would be intense, and the lack of an item veto would prevent the Board from eliminating "riders" which might be undesirable. At best, the carriers might make token obeisances to Board requirements.

Lee said the Board was surrendering to a system of world-wide restriction in order to satisfy two countries (England and France) and in order to gain a far less valuable right. Further, it undervalued the key economic position of the United States as, practically speaking, the sole gateway to the lucrative North American market—and the present situation did not represent the best America could obtain if it bothered to engage in some hard bargaining. The great fear of economic chaos and rate wars was far from real. Competitors are far from infected with a spirit of self-destruction—particularly here, where given the subsidy, it is impossible to eliminate any of the carriers. But the Board here might have replied that the very existence of subsidy might enable carriers to conduct loss-producing rate wars where fully self-sufficient competitors would hesitate.

And the analogy to rate conference experience in the shipping field is poor, said Lee. Aside from differences in statutory power, membership in IATA Traffic Conference is compulsory. Unanimous approval is required, and the decisions are binding on all members. This is not true of shipping. Further, a new shipping carrier could begin operations at any time without governmental license, setting its own rates and operating between any ports it might choose. Given the fact that no freedom of the air exists, carriers must first be granted operating

10 See American Export Air., Trans-Atlantic Service, 2 CAB 16 (1940); Northeast Air et al., North Atlantic Routes, 6 CAB 319 (1945).
authority from their own governments and receive commercial rights from other governments.

Not only was IATA inadequate effectively to meet the problems for which it was intended and productive of a far greater train of evils, contended Lee, but other alternatives were available. The Board could request greater statutory authority over international rates, and it could still maintain an effective check on the rate behavior of American carriers through timely reductions in subsidy. But here time has sided with the majority. Not only have the Board's requests for greater authority been consistently ignored by Congress, but subsidy control not only is highly unwieldy but has ceased to have importance even from a theoretical view. Today, American flag carriers in foreign air transport are almost entirely free of subsidy, and whatever control subsidy might have been used for has disappeared.

Finally, concluded Lee, the Board's temporary approval is an empty gesture. Little more will be known in a year and time cannot cure what is inherently unfit. Lee was essentially correct in his first observation. When the year had passed the Board was in possession of few novel or significant facts. Temporary approval was extended periodically, eventually to be made final in 1955. But the hope of having accumulated experience prior to the initiation of a novel project was unrealistic in itself.

The way best to judge the adequacy of all these arguments is to examine what has happened. Clearly, different economic philosophies underlay, to a degree, the contending positions. Both were marked by theoretical abstraction and by pragmatic considerations. To Lee must go credit for delineating many of the specific problems which existed—problems which the majority chose to deal with by sweeping them along in a cloak of broad generalities. But one cannot help feel that this was perhaps a more realistic resolution of these problems than to apply so broadly to an area presenting novel economic, technical, and political considerations a philosophy of competition which arose from and had its greatest relevance in the framework of the domestic economic order.

IATA Machinery—Nine Aspects

To facilitate both IATA adherence to a concept of regulated competition and to safeguard its own limited control over international air transport, the CAB appended a number of conditions to its approval of the IATA machinery. These conditions have been reiterated whenever the IATA agreement has received an extension of approval.

1. CAB, throughout, has been very careful to guarantee its complete freedom of action, and to do nothing that would bind it beyond the specific terms by which it had agreed to become bound in approv-

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As a result of Section 404(c) of the Civil Aeronautics Act of 1938, the Board undertook a study of the international rate problem. Its study was made and submitted on 22 August 1939 and recommended against any further extension of its powers over rates in foreign air transportation. The Board's report was published as House Document No. 478, 76th Congress, 2d Session.
ing a submitted resolution. Approval of any resolution was to be strictly limited to the agreement itself and was to admit of no implicit approval of a wider scope. Thus the approval of the IATA machinery was not to constitute approval of any agreement reached through that machinery. Submission to and action by the Board must occur in each case. Likewise, the approval of IATA machinery would not constitute approval of the participation of any U. S. carrier in any Traffic Conference which concluded a rate agreement which that carrier put into effect prior to Board submission and approval.

2. CAB insisted that it must have full information concerning all relevant IATA activities and actions. Copies of all resolutions and records of Conference proceedings, as well as all documents and material distributed by IATA to its members was to be transmitted to the Board.

The U. S. air carriers were given particular responsibility in this respect. But information has not been so easy for the Board to come by. CAB orders frequently complain of inadequacies in this respect; and after ten years, the Board was heard to protest vehemently that the basic minutes of an IATA Conference were transmitted three months after the event, thus greatly impeding the Board’s study of the rates agreed upon (E-9969, 2 February 1956).

But the difficulty in ascertaining what activities IATA was engaged in was slight in comparison to the bottleneck regarding basic economic data upon which its rate decisions were or should have been based. In passing upon the first rate agreement submitted to it, the Board disapproved the proposed North Atlantic rate structure and criticized IATA for failing to make any showing of the economic data upon which the rates were based—to indicate in what fashion they conformed to the CAB’s test of economic soundness—a reasonable relation between a rate and attainable costs of operation.20a The CAB requested that such data be submitted with any future agreements. The North Atlantic rate structure was summarily approved several months later with no mention of any supporting data (E—91).

In renewing IATA approval in 1948, the Board strongly commended the non-rate procedures of IATA. It stated that “there appears to be no more effective way by which these desirable objectives (reducing operational problems and facilitating movement of passengers and cargo) could be accomplished than through the machinery of an organization such as IATA.” But when it came to rates, the tune was somewhat different. Recalling the disapproval of North Atlantic rate structure in 1946, the Board pointed out that IATA had not yet established measures for obtaining and transmitting to the Board directly or through its U. S. members data in support of rate resolutions which can be regarded as satisfactory evidence of their economic soundness, or that such data had been given adequate consideration by IATA in its rate determinations. The Board indicated that the mini-

20a North Atlantic Traffic Conference Rate Resolutions Case, 6 CAB 845 (1946).
mum character of information necessary is that which IATA members are already committed to furnish to ICAO, and that "the Board will regard as reasonable cause for prompt disapproval of a rate resolution the failure to support such resolutions with a minimum of information covering the operations of principal carrier participants in rates included in a resolution for not less than six months preceding the adoption of the resolution." 9 CAB 221, E-1227 (1948).

To date, no IATA resolution has been disapproved solely upon this ground. Yet, it is clear that the Board still is not receiving what it deems to be the minimal amount of relevant data.

In recently disapproving a requested five percent increase in North Atlantic fares (E-11392, 28 May 1957), the CAB strongly criticized the carriers for failing to submit data with respect to unit costs of operation. Deeming such data to be the essential basis for determining the legitimacy of proposed fare changes, the Board proceeded to adopt the unit operating cost statistics of the more efficient American carrier as the standard of comparison for the route. Finding there a downward trend in the unit cost, the proposed fare increase was rejected by the Board. The technique of utilizing U.S. carrier experience in this fashion as the sole basis for evaluating an IATA rate proposal is somewhat novel, and among other things is perhaps designed to "smoke out" foreign carrier statistics.

The Board, in subsequently denying a motion for reconsideration of this decision (E-11662, 7 August 1957), engaged in its first thorough review of the economic data problem since its 1948 pronouncement. Recalling both that decision and the one in which it initially approved the IATA machinery, the Commissioners indicated that the Board's long standing and specific injunctions had not been adhered to. Data sufficient to demonstrate the economic soundness of proposed rates and to permit the Board to discharge properly its responsibilities under the Act still was lacking, though such information was in the possession of the carriers.

The CAB declined to rely upon data prepared by the IATA Cost Committee because (1) no attempt had been made to validate previously forecasted "representative" costs by reference to the corresponding actual experience, and (2) estimates of such factors as revenue yields and load factors were based upon past rather than reasonably anticipated future conditions. Yet, such statistics undoubtedly form a portion of the basis utilized at IATA conferences to construct rate levels.

Reiterating its long standing threat to disapprove rate agreements in the absence of such supporting data as unit operating costs, the Board strongly urged compliance. However, experience cautions one against great expectations. The probability that basic rate agreements will be rejected solely because of a lack of relevant data is limited. It should be noted however that the CAB quite recently disallowed proposed group excursion fares for South America largely because of the
absence of relevant cost statistics (E—11988, 2 December 1957). But other factors were involved, and the agreement did not involve a basic rate pattern. The Board might derive greater success in this area by approving a basic rate agreement subject to its automatic extinction should appropriate supporting data not be submitted within a certain period thereafter. Incidentally, according to one leading attorney in the field, not even ICAO has received the economic data called for by treaty obligation.

3. Above all, the CAB in first passing upon the IATA Traffic Conference structure, felt it essential that every carrier be guaranteed the "right of independent action"—a concept that reappears throughout the Board's decisions in a variety of contexts. Although no direct reference was made, one may assume that ICC experience in regulating surface transportation and the importance placed upon the principle of "independent action" by both the ICC and the Attorney General was in the minds of the Commissioners.21

To insure such independent action, the Board reiterated its understanding that a carrier would be free to initiate any rate it desired during an open rate situation, resulting either from a failure of the carriers to agree or from governmental disapproval of an IATA agreement. Further, the Board felt that the requirement of carrier unanimity at IATA Traffic Conferences helped safeguard the right of independent action. But while such a requirement theoretically assures the sovereignty of each carrier, the requirement itself generates great pressure to conform, particularly upon the smaller carriers; and may weaken staying power in bargaining. There is no record of this power actually being exercised, of any carrier refusing to go along so as to retain and exercise the right of independent action. And in the one recorded instance where a single carrier persisted in its view as a minority of one and forced all the other carriers to agree to a lower price under threat of initiating independent action, the CAB was highly critical.2

The Board has also expressed concern, in a different context, over the continued application of the unanimity rule. In discussion of the establishment of North Atlantic cargo rates, it indicated that the requirement that all actions of the Commodity Rate Boards be unanimously agreed to might seriously curtail development of an adequate specific commodity rate. The Board urged the carriers to examine the need for such a rule with a view towards some modification so as to render more effective the Commodity Rate Board structure. Thus, the over-riding importance of independent carrier action is to be diluted, at least in the cargo area where agreement generally is notoriously difficult.22 To date, there is no record of a change in IATA's unanimity requirement.

21 Attorney General's Report, cit. n. 12, supra.
21A Hearings, n. 4, supra, at pp. 138-139, 614-615. Cites North Atlantic Cargo rate structure situation and failure of IATA to impose adequate charges for berths and sleeper seats as illustrations of the "blackmail" power which the unanimity requirement can vest in a single carrier.
22 E—9969 (2 February 1956).
4. An important factor in guaranteeing carrier freedom of action is the limited life of rate agreements. Initially, such agreements were approved for not longer than one year. During the late '40's and early '50's, the period was extended to three years; but in its permanent approval of IATA in 1955, the Board again reduced the period to one year. Upon expiration of any agreement, the carriers are completely free either to agree in a new agreement or not. When the specified period has run, the Conference agreement is a nullity.

It is interesting to contrast the Board's view here with its attitude in dealing with cargo agreement reached by the domestic carriers. One of the chief points of contention in approving conference rates reached through the Air Freight Transport Association was the requirement that a member, though free to file a new tariff agreement at any time, must give fifteen days notice and must agree to discuss such changes with all affected carriers. The Board rejected this proposed requirement, claiming that it removed almost the last vestige of competition in the air freight field. But compared with the IATA situation, this is mild. True, the rate agreements are of limited duration, but they are of a certain duration during which all IATA members must conform to their terms. Not only is a carrier not free to upset the applecart, but the deadline is known and prior consultations regarding a new rate will always occur.

The element of temporary surprise which the Board in the Air Freight case felt essential to maintain the most minimal degree of competition is totally lacking. While this may be the most feasible way of dealing with international rates, nevertheless a comparison of the two decisions illuminates the different views the Board takes of "competition" and "independent action," depending on the setting.

In any event, one should note that frequent termination not only maintains what the Board calls "independent action," the prerequisite of "regulated competition," but equally important, it provides the Board with one of its greatest elements of leverage in controlling IATA. While a number of pressures may compel the CAB to approve any single resolution which it otherwise dislikes, IATA can be placed on notice by the insertion of conditions regarding future Board approval and a declaration of its probable position. The fact that another resolution must be submitted to the Board for approval within a year gives the CAB a check on what otherwise might be serious difficulties arising from dilatory practices in adhering to CAB conditions or pressure techniques whenever a key resolution was before the Board. Whatever excuse IATA may offer for the moment, it is only good for one year. Notice of the Board's position has been provided, and it will be much less inclined to go along unless IATA has taken some positive action in the interim. Of course, were the agreement to remain effective for longer periods, the Board could, and on occasion has, approved an agreement only for short periods, subject to reconsideration. But it would seem to be more effective if the IATA
structure itself provided for such frequent renewal in every rate situation.*

5. One should note that originally IATA was composed of nine Traffic Conferences. In 1947\(^{28}\) the number was reduced to three, in recognition of the inter-dependency of many routes spanning various geographical areas and the impracticality of dealing with such routes in isolated segments in the evolution of fares and rates.

Be that as it may, approval of the change served to weaken CAB control of IATA and to strengthen the power and effectiveness of that body. For now, an agreement would effectively bind a third of the world and all member carriers operating therein. There would be decreased competition in the sense that a carrier desiring lower rates and losing in one conference had fewer additional forums in which to press his point. And the consolidation may well have weakened the voice of the smaller carriers. And yet, CAB approval of this increasing concentration and reduction in bargaining arenas makes no mention of these considerations, nor does it find expression in any other CAB order. As are most CAB decisions dealing with IATA, the one approving the change in structure was in summary form.

6. Although Section 421 does not give the CAB authority to modify any agreement submitted to it for approval, it lacks, as Lee pointed out, an item veto. It must approve or disapprove a resolution in toto.

As might be expected, IATA practice was to present its rate resolutions in large packages and attach various subsidiary resolutions not wholly relevant to a major agreement. In 1953, the Board was compelled to disapprove the entire Pacific fare structure resulting in a one-year open rate as the only means of defeating a provision for reduced emigrant fares which had been tacked on to the major fare agreement. The opinion remarked:

"The Board has noted with concern the increasing tendency of the carrier members of IATA to use the interlocking device to restrict the power of review of responsible regulatory agencies of all governments concerned which have to act on the resolutions submitted to them. The Board is cognizant that various rates may be commercially interdependent under certain circumstances. The Board believes, however, that except where the inter-relationship is clear and really significant, the interlocking of resolutions or parts thereof is improper, and in considering future agreements it will

* One might argue that a short period of effectiveness can, to some degree, work to weaken Board control. Because the Board always knows that it can re-evaluate or reverse a previous decision, a tendency develops to "let things slip by this time to see what happens . . . we can always shift our position." The unpleasant job of putting one's foot down hard is more easily postponed.

It should be noted that IATA compliance with CAB conditions requiring modification of an approved agreement has been weakest in those areas where the practical compulsion to do so was not strong, i.e., where the approved agreement was not to expire in a short period.

\(^{28}\) E—706 (21 July 1947).
consider the presence of unjustified interlocks as an important adverse factor in determining whether agreements should be approved."

(E—7210, 6 March 1953.)

I have been unable to determine whether the Commission's advice has been followed or whether the interlocking device is still used prohibitively. There is no mention of this problem in decisions subsequent to E—7210.

7. For the first few years American carriers were not permitted to participate in IATA agreement establishing rates charged or quoted for transportation of mail, as contrary to Section 405 (i) of the Act. As IATA increasingly undertook cooperation with the UPU, the CAB modified this restriction to the degree that such action preserved the statutory authority of the Postmaster General and rates charged were not inconsistent with those he established.

8. In 6 CAB 639, CAB interpreted IATA Traffic Conference agreements as not embracing authority over schedule frequencies and seating capacities, a matter which was to be left to the national governments. It seems that the carriers never intended to move into this area, anyway.

9. The Board has disapproved, in its most recent decision, a proposed fare increase (not causing an open rate) because of a most undesirable, if not unexpected practice indulged in by IATA. The Board said:

"... (we) note that this agreement was initiated by IATA as an organization, as opposed to the usual practice whereby a mail vote is requested by one or more individual carriers. In the Board's opinion, the initiative in the formulation of fare and rate adjustments should remain with the carrier members of IATA which have intimate knowledge of all the operating factors involved. Initiation of agreements by the Secretariat of IATA appears unsound as a matter of policy, and represents a type of price-fixing procedure which the Board considers objectionable."

(E—11215, 10 April 1957.)

One wonders how much of this occurs in a less patent fashion.

Recently, the Board has reviewed the manner in which it has dealt with IATA agreements and announced that modifications would be forthcoming (E-11954, 13 November 1957). Further, all conditions which in the past have been appended to the various IATA resolutions would be restated. This appears to be indicative of the new seriousness, described in later portions of this article, with which the Board is coming to deal with IATA. Two of the initial modifications deserve brief mention.

(1) The Board will now require that certain agreements which are reached informally within IATA be submitted to the CAB for formal approval. In the past such agreements took effect unless specifically disapproved. This requirement is applicable to agreements dealing with transportation to and from the United States, leaving
unchanged for the present the procedure for those agreements relating to traffic in areas outside of "air transportation" as defined by the Civil Aeronautics Act—Section I (20) and (21).

(2) The CAB modified its standing policy of approving resolutions fixing rates or fares for a period not in excess of one year. Henceforth, agreements dealing with fares and rates which do not apply to transportation to and from the United States will be approved for the full period of their intended effectiveness, as determined by the IATA Conference. The Board indicated that such a change was appropriate and consistent with its general policy of "non-interference" in areas not encompassed by the Act's definition of "air transportation."

During 1957, the Board in approving IATA agreements has employed this policy of "non-interference" in areas not involving air transportation to and from the United States in about a dozen decisions. It is not clear what accounts for the comparative flood of such decisions, given their paucity in past years, at least with respect to the decisions which the author has uncovered. The Board has indicated that the policy of "non-interference" will lead it to approve an agreement even where such agreement may not be consistent with the Board's concept of a sound transportation policy.

This approach seems unobjectionable if one applies the "non-interference" doctrine only to areas which do not directly affect air transportation as defined by the Act—to and from this country. The Board frequently has utilized such an understanding of the doctrine, as for example when it sought to determine whether intra-European or intra-Asian fares might possibly be utilized in the construction of fares for transportation to and from the United States (E—11244, 18 April 1957; E—11447, 14 June 1957).

Such an approach must be contracted logically from an application of the "non-interference" doctrine to all traffic other than transportation to and from the United States. A responsible discharge of its duties would require the CAB to apply the narrower understanding of the "non-interference" doctrine, that is, to withdraw its total supervisory powers not from all transportation moving to and from this country but only with respect to those portions of such transportation which do not directly affect transportation to and from the United States.

The Board, in E—11954 which modifies the one year effectiveness rule, uses language which indicates that it may have in mind the less desirable application of the "non-interference" doctrine. In any event, a more specific statement on this matter would seem desirable.

The Board has stated that:

"... the approval of IATA resolutions is often affected by the views of interested foreign governments and foreign carriers, by an appraisal of possible advantages of approval as compared with possible dangers attendant upon the open rate situation and by limits of jurisdiction in foreign air transportation where our rate powers are limited to the removal of discrimination... The factors
considered in passing on IATA resolutions frequently differ from criteria which we measure similar proposals in interstate or overseas air transport."\textsuperscript{24}

We shall examine what this has meant in specific areas.\textsuperscript{24a}

\textit{Fares— the "Open Rate"}

In the all-important area of rate-setting, the threat of the "open rate" has been the most potent factor influencing the Board in its action on IATA resolutions. Through all ten years, but particularly in the early period, constant reference is made to the fear of chaotic price-cutting warfare which would result were the particular IATA fare agreement then in question not approved.

There has been little opportunity to verify the fear of the open rate situation, for the mere possibility of such an eventuality usually has led the Board to grant the requisite approval.\textsuperscript{25} But an examination of the few open rate situations which actually have occurred as well as recent statements by the Board and its chairman\textsuperscript{26} indicate that the problems of economic chaos is a less real one today than perhaps was the case earlier. Further, it appears that though the Board still utilizes the open rate argument in its decisions, the primary feared consequences of an open rate situation are somewhat different today from those which the term originally and most commonly connoted. In other words, perhaps one of the most important standards used in weighing approval of rate agreements has changed in actual meaning during the period of its use, although this has not been openly recognized. Where once the tag primarily designated a type of economic chaos arising from uneconomic price-cutting, it now appears to stand for other consequences of the disapproval of an IATA rate agreement.

As noted previously, the Board, in the first IATA rate agreement case, disapproved proposed North Atlantic rates because of a complete failure to demonstrate the economic cost basis of rate determinations. In September the rates were summarily approved, no mention being made of a showing of data. There is no indication as to what happened rate-wise in the interim. Of course, this was an agreement to close initially the rate structure. But there was strong pressure from PAA at this time to cut the North Atlantic fare\textsuperscript{27} and the British and French fear underlying their support of IATA was to a large degree based

\textsuperscript{24} 12 CAB 75 (1950); E—6690 (14 August 1952).

\textsuperscript{24a} This study has been hampered not only by the difficulty of obtaining material, but by a lack of assurance that all Board decisions on IATA have been accounted for. Given incomplete files to work through and no index or reference source, one can merely hope that all relevant pronouncements have been tracked down and that none remain outstanding to upset conclusions drawn.

\textsuperscript{25} \textit{Hearings}, cit. n. 4, \textit{supra}, Supplementary statement of the CAB at pp. 136-141. This statement, as well as its successor (n. 40), are essential reading for anyone desiring a grasp of the practical implications of the Board's present and proposed statutory authority over fares in foreign air transportation. And see testimony of Fitzgerald at 192, stating the absence of an open rate situation causing "basic concern."

\textsuperscript{26} See infra, p. 25.

\textsuperscript{27} 6 CAB 639, 662-663 (1946).
upon the PAA attitude. It seems that the IATA rate level was higher than that desired by PAA and higher than that currently being charged. Yet whatever little evidence which exists points to the conclusion that CAB disapproval had no effect on the rate structure. Of course, air traffic at that time consisted of less than ten percent of the present level and tourist service had not been inaugurated, and thus the incentive to push things during that summer was perhaps lacking. Yet an initiative at this period might have placed PAA in a better bargaining position at a subsequent IATA meeting. However, this is all in the realm of speculation.

In 1953, the entire Pacific fare structure remained open for a year because of the disapproval of a subsidiary resolution reducing the fare for Chinese emigrants. Nothing happened. The carriers continued for the year at the then existing level. In a sense, the situation was not wholly typical of the North Atlantic route because of the smaller number of competing carriers. But this far from fully explains away the experience, and CAB officials indicate that it was this event which led them to re-evaluate their initial assumptions concerning the open rate situation.

On 2 February 1956, the CAB for the first time disapproved a rate agreement as such—here an increase in North Atlantic fares—for reasons discussed in detail below. This meant an open rate situation as soon as the then existing agreements expired. A flood of protest from foreign governments and carriers led the Board to reverse itself and to approve the agreement temporarily—thus closing the rate. But an examination of the communications from foreign governments as well as Chairman Risely's testimony before the House Judiciary Committee, indicates that the major fear was the chaos resulting from the necessity to change schedules and ticketing at this late date, with a large market in the offing for the summer. While there is some talk of economic chaos, it seems to relate largely to the technical jumble rather than to the feared consequences of a price-cutting war.

In testimony before the House Committee on Interstate and Foreign Commerce in March 1955, Chairman Risely, in urging extension of the Board's authority in international aviation, pointed to a major change in the economic situation governing rates. In arguing that the Board required power to establish just and reasonable rates in addition to setting minimum rates as the legislation then under scrutiny provided, he indicated that the greatest danger arose out of continually rising level of rates rather than from precipitous price slashes. Although reiterated throughout his testimony, the essentials of the position are well summarized in one paragraph:

"Although the emphasis upon the need for regulatory authority with respect to rates in foreign air transportation has hitherto been focused upon the need for the power to prescribe minimum rates to prevent the development of cutthroat competition, the

28 Hearings, n. 5, supra, at pp. 334-337.
changing situation in foreign air transportation indicates that this power alone will be sufficient. Heretofore, all of the air carriers engaged in foreign air transportation were heavily subsidized. Under those circumstances, there always existed a temptation to cut rates below economic levels in order to try to capture a larger share of the market, with the hope that the losses, if any, could be transferred to the subsidy. Now that a number of major routes are for the first time being operated without subsidy, there is a real danger that the trend will shift in the opposite direction. Since revenue increases to a subsidy-free carrier redound to his financial benefit, there will be an increasing temptation to increase rates to a point which will maximize the carrier's revenue, though this may well be above levels that would be considered as reasonable. Moreover, the rate agreements of IATA which through rate conference action fixes the fares for the great bulk of foreign air transportation, have shown a trend toward increase in fares and rates which in some instances do not appear to be fully justified."

In such a context, an open fare situation carries little of the economic meaning originally ascribed to it. While, of course, the situation outlined by Risely has not fully materialized and the possibility of price-cutting exists, the open rate fear has much less than it originally was thought to have. Yet, the term is still used in a sweeping fashion by the Board without an explanation of precisely what are the dangers which are feared and must be avoided.

A leading Board official has admitted that the CAB may well be guilty of misleading decision-writing in this respect. He indicates that price-slashing wars (particularly given the present economic position of the carriers) are rather unlikely and that it is most probable that disapproval of an IATA rate agreement would result in a continuation of the status quo.

Discussion with CAB officials indicates that the "undesirable consequences" of an open rate situation today center about other than pure considerations of the economic behavior of the carriers themselves. Technical difficulties, a general air of uncertainty, and the attitude of foreign governments to such a situation appear to be the factors lying behind the recognized undesirable nature of open rate.

For most foreign governments, IATA has become the way of doing business. It has become an accepted part of their civil aviation policy, particularly since governments' views generally are adequately expressed by closely-tied national airlines in the IATA forum. The governments feel IATA decisions to be a compromise. They believe, and the CAB indicates agreement, that a good amount of arms-length bargaining occurs at the Traffic Conference sessions. Disapproval jars the boat. While maintenance of the status quo is much more likely than a round of deep price slashes, still the situation is uncertain; and given the inter-related character of rates, a small shift by a carrier in one small area reverberates throughout the entire world structure. This engenders considerable technical difficulty in scheduling and ticketing. Indeed, such difficulties arise even if all carriers maintain the status quo, since literature is many times prepared prior to Board
action upon the assumption that IATA resolutions will be approved. It is this very element of uncertainty which troubles foreign governments. Even in the absence of any specific problem, the maintenance of a closed rate structure is highly preferred, almost as a matter of aesthetics. CAB actions which offend such sentiments may well result in a disruption in general aviation relations with foreign governments and even a general deterioration of commercial and foreign policy relations upon a broader plane. Dutch reaction to the recent negotiations on KLM's application for a route extension to the West Coast dramatically illustrated this vital inter-relation. Elusive as are such factors as “uncertainty” and “a general governmental attitude,” they exist and the CAB must and does give them recognition.

Thus, while the “chaos” to which the open rate situation may give rise means much more than price slashing, it still must be reckoned with in weighing disapproval of an IATA resolution. Given the fact that this is a milder sort of chaos, however, the Board appears in its recent decisions more willing to face up to that alternative and endure it if the situation warrants.

Level of Fares

In the past year, the CAB has turned perhaps its most searching attention to date to IATA rate-setting activities and to the proper standards to be considered in the level of establishing rates. This is due to a number of factors. In the late '40's, the airlines were facing a depressed situation and the possibility of unjustified profits was not a factor to be considered. Further, it has been admitted that due to a lack of staff, the CAB has generally neglected IATA affairs in the past. The technical problem involved prevented any close scrutiny and approval was given to rate resolutions almost as a matter of course. Increased traffic, sparked in particular by the introduction of coach service, has brought the matter of rates to the attention of a growing segment of the public. An increasing public interest has manifested itself in letters to the Board and in more frequent Congressional rumblings. The development of coach service domestically and the marked drop in rates has led many to wonder why corresponding development in like degree has not occurred abroad. The comparison of the Los Angeles-New York fare with the New York-Shannon-London charge, given the similarity of route length, is one which frequently has impressed Congressmen and despite a number of explanations, the feeling persists that international air rates, particularly those in the North Atlantic run remain too high.* To this general ferment was added the dynamic personality of former Chairman Risley, who was spurred on by a philosophy of increased competition in air matters.

* Aside from other factors, the continental route is not hampered by the directional imbalance which occurs over the North Atlantic.

It is recognized that costs are somewhat higher for American carriers

29 Id., pp. 1035 et seq.
The newly articulated philosophy of the Board in regard to rate levels is set out in a series of recent decisions dealing with IATA attempts to raise North Atlantic rates. As noted previously, the proposed increase was initially disapproved, then temporarily approved, and the new set of rates then proposed was also approved, but with evident Board dissatisfaction and notice that things were going to have to change.\textsuperscript{30}

The Board starts from the assumption that the general overall level of revenues is not excessive. Rather, it is the level of fares that is higher than necessary to realize this level of earnings under a standard of

on the Atlantic run than on the domestic one.\textsuperscript{31} Given the many hidden subsidies arising from facility use, it would be difficult to ascertain to costs of European carriers, even if the books were available.

In late 1955, North American airlines applied for permission to provide low cost coach service across the North Atlantic for the coming summer. It offered to provide service at a cost of 4 cents per mile at 70% load factor and its briefs provided that following cost information:\textsuperscript{32}

Certified on season transatlantic coach fares .............7.74\ per mile
Certified off season transatlantic coach fares .............7.14\ per mile
Proposed North American transatlantic coach fares ........4.04\ per mile
Certified coach fares within United States ...............4.94\ per mile
North American coach fares within United States .........3.34\ per mile

It is difficult to draw any definite conclusions from this data. The North American proposal recognizes that foreign transportation is more costly than domestic travel of somewhat similar length. But a charge that anything above its 4\$ cost is unreasonable is unfair. North American's cost is based on flights during the rush period on a route subject to strong seasonal variations in traffic flow. Further, North Atlantic route is the most lucrative of many less remunerative overseas routes which the certified carriers are compelled to fly. The Board itself has recognized that “... the North Atlantic route must be viewed as part of the overall international route network, that it cannot be considered as an isolated segment ... any evaluation of the profitability of the high-frequency, high-density operations of the North Atlantic route must be measured in relation to the contribution which such service makes toward the overall economic soundness of world-wide operations which embrace less profitable services in other areas.” (E—10530, 10 August 1956.) Just as the cost gap between North American and certified carriers in domestic coach traffic probably does not indicate uneconomic behavior on the part of the latter, as the CAB has plenary power in this area, so the gap in overseas costs are not necessarily conclusive. Given subsequent Board action, however, it is clear

\textsuperscript{30} E—9969 (2 February 1956); E—10017 (20 February 1956); E—10530 (10 August 1956).

\textsuperscript{31} Hildred, in a letter to the Celler Committee following his appearance, submitted the following data (Hearings, n. 5, supra, at p. 1068):

<table>
<thead>
<tr>
<th>Operating Costs per Available Ton Mile:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>United States Domestic Operators</td>
<td>25.98$</td>
</tr>
<tr>
<td>United States International Operators</td>
<td>37.17$</td>
</tr>
</tbody>
</table>

(representing a differential of 43%)

For TWA, the figures were:

| TWA domestic operations | 27.29\$ |
| TWA foreign operations   | 46.28\$ |

(representing a differential of some 70%)

\textsuperscript{32} North American Airlines “application for exemption to provide aircoach service between the United States and Europe,” 8 December 1965.
service commensurate with the proper development of air transportation.*

In tones reminiscent of Lee's dissent, service in a competitive situation has developed into a "give-away" race of champagne, orchids, and increasing elbow- and leg-room, which has unjustifiably inflated the costs of air service. With the wide-spread adoption of sleeperette service, there has been a lack of seating standards for first-class flight; and, more important, an absence of appropriate charges for luxury service. This has resulted in an improper subsidization of luxury service by tourist passengers, thus defeating for tourist passengers their just claim for lower rates. The competitive give-away race has also affected tourist service and has made it unnecessarily costly. There has been a failure to exploit technological advances in aircraft capacity and to institute more realistic and economical (minimum) seating densities.

IATA's policy on standards of service is deficient and the Board's continued recommendations have been ignored. The Board considers this a very important matter and is willing to risk an open rate situation if necessary in order to stand by its beliefs.

The Board recommends (1) a separate charge for sleeperettes and berth service based upon the loss in seating capacity occasioned by such conversion; (2) a realistic schedule of minimum seating densities to be established for all aircraft, and (3) a revision of basic fares designed to eliminate subsidization of first class service by tourist traffic. The objective is the correlation of a given present level of revenues with the utilization of maximum standards of service so as to pass on to the travelling public the lowest fares consistent with economic operations and attainable costs. An increase in the number of passengers carried necessarily causes a reduction in the yield per passenger within the framework of yield per plane currently being realized. The Board

that part of the disparity is due to uneconomic activity. The North American applications were denied because of the character of the applicant rather than because of the economic unsoundness of its proposals. (North American's attorney indicates that its application envisioned year-round authority for two years.)

One further point regarding costs. There are perhaps more carriers on the North Atlantic run than might be desired from an economic viewpoint. But since having a national airline is treated by some governments as an essential aspect of their national sovereignty, such national policies must be recognized and a price must be paid.33

* The general impression given by the three opinions involved seems to be that the Board is satisfied with the present level of revenues. This is substantiated by comments from Board personnel of a high level that the airlines have not made excess earnings in the past two years and that any suggestion that the public is being gouged is ridiculous. Further, it is indicated, that it is essential that the present level of earnings be maintained in order for the carriers to draw the vast sums of capital needed to make the large required investment in jet aircraft, if they are to maintain a competitive position. And, of course, costs have been rising steadily!

33 Hearings, n. 5, supra, at p. 1054.
IATA AND CAB indicates that utilizing maximum carrying capacity of present aircraft should result in a ten per cent reduction in tourist fares (still leaving them well above North American's 4$ per mile cost) without disturbing the overall general revenue position of the carriers.

Finally, the Board welcomes certain adjustments in first-class service and the proposed introduction of a third class tourist service to be initiated in the Spring of 1958, but expresses disappointment over the failure of IATA to accomplish any revision in seating densities and basic fare levels of tourist traffic (constituting 75 per cent of total North Atlantic passenger carriage) in the interim. The Board indicates the need for governmental consultation to set up a satisfactory framework of broad considerations upon which to consider the fare structure. Subject to reconsideration in the light of these discussions (just what does such "reconsideration" mean, really?), the IATA agreement is noted and approved.

Here, then, the Board has finally grabbed hold of a major problem. Rather than attempting the impossible task of determining the reasonableness of present rates based upon the costs of each service, it tackles the problem obliquely. It appears to grant the adequacy of the present level of revenues and profit (the language is somewhat ambiguous and contradictory in the decisions, but this is probably due to unjustified close legal reading of them) and attempts to work within the present framework, by demanding the most efficient use of aircraft and fares based to the degree possible on costs of the various services—at least by allocating such ascertainable costs as those of luxury services. By not questioning the level of profits, the Board manages to overcome a good deal of resistance that one might expect the carriers and governments to present. By placing its emphasis upon fairness of tourists' costs, not only are unjustified burdens removed from the bulk of North Atlantic traffic but steps are made in the direction of attracting a greater market. The result of higher costs, due to allocation, will tend to diminish the importance of first class travel even further, to a point where it will not be worth the airlines' trouble to engage in extensive uneconomical service competition. Besides, given six-hour jet trips over the North Atlantic, sleeperettes and the like will become obsolete.

Although the suggested steps are clear enough, the effects on the level of profits are left vague. Surely there will be some effect since it would seem that institution of the Board's recommendations should result in some decrease in the overall level of costs. But the Board has determined to attack the problem pragmatically and deal with first things first. One can only wait to see how things will turn out. But CAB-IATA relations have entered a new phase, as the Board, for once, seems determined to press its case. The introduction of CAB concepts as to standards of service, relations of level of fares to costs of services within an overall revenue framework, and the view that tourist traffic "... is the foundation upon which the fare structure should be built, and that fare levels for such other classes of service as may be provided
can reflect realistically the value of such service only if established in relation to the base of a soundly constituted low-fare service” (E-10530, 10 August 1956) should have a profound impact on international air service.

**Cargo Rates**

Generally, the CAB experience with the cargo rate-setting of IATA has been quite satisfactory. Pointing to the profound differences which had existed previously, the Board hailed the IATA agreement establishing a Commodity Rate Board structure to evolve rates as “an outstanding example of the ability of the IATA machinery as a means of resolving differences” (E-9161, 29 April 1955). The elaboration of this structure has been deemed “a commendable achievement” (E-9969, 2 February 1956). The Board’s suggestions generally have been minor and technical in nature and appear to have received the attention from IATA which the Board desires. As we have seen, only in the retention of the unanimity rule has the Board’s advice been unheeded.

In only one other respect has the Board, for a time, been critical. And significantly, it has been over the adoption of basic standards similar to those which it has injected into the passenger rate situation in the past two years.

The Board urges the adoption of more specific commodity descriptions which more fully indicate what items are included and excluded and to include in each specific commodity rate agreement a detailed description with explanations of what is covered.

“It is believed essential to the sound development of cargo transportation on the North Atlantic that commodity descriptions be defined with sufficient clarity and detail to minimize dilution of carrier revenues. This dilution appears to result from a two-fold deficiency in the application of broad generic descriptions. First, the inherent nature of such a system of classification requires that high-valued commodities be included within the broad classifications which are necessarily rated upon the basis of the lowest valued commodity therein. Second, the wide latitude of interpretation which is permitted by loosely-defined, and sometimes ambiguously worded, descriptions has facilitated the misapplication of rates (and increased the difficulty of detecting and policing violations) . . . The protection of carrier revenues, through ensuring that high-value commodities are carried at an appropriately high rate, is considered necessary if the carriers are to be in an economically sound position to develop tonnage through the offering of lower rates to attract cargo not presently moving by air in significant volume.” (E—10508, 3 August 1956.)

Thus we see in the commodity field a policy of requiring each product or reasonable grouping of products to bear its full share of the cost with the purpose of preventing an artificial inflation of the rate level due to partial subsidization. The objective is to keep rates as low as economically feasible in order to attract a potentially large market and provide the greatest possible degree of competition with
sea carriers. This certainly is consonant and parallels the Board's passenger policy. In a recent decision, the Board has indicated approval of the IATA's adherence to its policies in this regard (E—10836, 7 December 1956). See also E—11534, 3 July 1957 and E—12072, 31 December 1957.

Charters

The Board has experienced difficulty in gaining IATA conformity to the interpretation upon which approval of the IATA Charter provision was based.34

In dealing with groups eligible for charter flights, the IATA resolution (045) appears to restrict application to those groups

"... whose principal aims, purposes, and objectives are other than travel, and where a group has sufficient affinity existing prior to the application for charter transportation to distinguish it and set it aside from the general public..."

It was the Board's position that the nature of the group of itself should not be sufficient grounds for denying a charter. This had been the domestic policy (quite recently restated35), and the CAB felt that any charter restriction based upon the nature of the group would impose an unreasonable burden on the potential charter market. The Board has found it necessary to restate this interpretation upon which approval was conditioned, for IATA Breaches Commission decisions enforcing charter violations have indicated that the CAB view was being ignored. Early in 1956 the Board's position was stated in a more categorical form, though it was indicated that this was merely a restatement of existing policy rather than a new departure. Upon petition of some carriers claiming surprise and upon a showing that an IATA group had been established to examine the problem and that the previous Breaches Commission's decisions were not binding for the future, the Board reverted to the language of its original condition. It is difficult to discern any practical difference in the two versions. The outcome of the IATA study is unknown. In any event, the charter field has been one in which clear statement of Board conditions has been ignored for a period.

Conditions of Carriage

The area in which the CAB has encountered some of its stiffest resistance from IATA has been in the determination of carrier liability for loss or injury to passengers, baggage, and goods.

IATA quite early undertook the attempt to evolve a system of uniform conditions of carriage for passengers and goods. This important step in facilitating an efficient traffic flow was to be commended, but the attempts to exclude carriers from practically any semblance

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34 E—8103 (15 February 1954); E—8295 (26 April 1954); E—9969 (2 February 1956); E—10017 (20 February 1956).
of liability and to reject the common law obligations of the common carrier were somewhat reprehensible.

In May 1948, the first IATA agreement was presented to the Board (E-1590, 18 May 1948) and it was disapproved in summary form. The Board expressed justifiable indignation over blatant attempts to insert clauses by which the carriers disclaimed any liability for any traffic not covered by the Warsaw Convention, regardless of the carrier's negligence. In addition the Board disapproved of resolutions which incorporated by reference all existing conditions of carriage, tariffs, rules, and regulations of the individual agreeing carriers, as the CAB had had no opportunity to pass upon these conditions. Indeed, it did not even know what they were. The Board noted that the limitation of carrier liability for passengers and shippers appeared to be a more appropriate subject for government negotiation through ICAO or an international conference than through the carriers themselves.

A year later, the product of IATA reconsideration was presented to the Board. While indicative of some change, their resolutions were far from free from defect—the Board's decision is little more than a catalogue of IATA shortcomings.\textsuperscript{6}

While passenger liability in non-Warsaw traffic was not totally disclaimed, the Warsaw limits were extended to this area. The Board expressed dissatisfaction, declaring that the Warsaw agreement represented a modification of U. S. public policy and the common law duty of the common carrier and that the Treaty was to be strictly construed and to be extended only by formal agreement. Further, the limits set by the Warsaw Convention itself were totally inadequate. In addition, the resolution marked the debut of the British disclaimer clause. This notorious provision disclaimed any liability for injury or loss occurring through a carrier having its principal place of business in the British Empire or Ireland or in any case governed by British or Irish law. While the Board later called the provision "one of the most flagrant types of liability clauses," it did not even give the clause separate mention in its discussion of the IATA agreement. Though the reason is unknown, one wonders if it was because the Board felt that approval of the agreement before it would be extremely difficult were it to call particular attention to such an objectionable provision. The sleeping dog was let lie.\textsuperscript{7}

\textsuperscript{6} 10 CAB 783 (1 September 1949).

\textsuperscript{7} In a memorandum submitted to the Celler Subcommittee, IATA made the following points regarding the British disclaimer clause (Hearings, n. 5, supra, at 1061-1062).

The clause had been inserted because British lawyers had interpreted the case of\textit{ Numan v. Southern Railway Co.} (1923, 2 K.B. 703) to mean that where British law applied, a carrier could exclude its liability but not limit it.

The clause was early objected to by Canada, and carriers were directed not to include it in their tariffs filed in Canada. (The CAB lacks such power.)

In 1952, a new statute was passed in Great Britain which extended to all international carriage the right of air carriers to limit liability to the extent specified in the statute.

At the 1953 Traffic Conferences, the Clause was omitted in considering reso-
The Board further objected to liability limits placed on baggage and goods which were even lower than the Warsaw limits. It criticized the lack of "the single carrier responsibility" rule established by the Warsaw Convention and of other procedures contained in that agreement. And it expressed concern over a provision which might limit the application of *res ipsa loquitur*.

Yet, when all was said and done, the Board blithely proceeded to approve the entire agreement. To be sure, the approval was "conditioned" in a manner to be discussed shortly. But despite the patent undesirable character of the agreement and in contrast with its resolute action a year earlier, the CAB felt that "considerations of the public benefit to be achieved for the use of all international carriers which would be made possible by the present proposals justify the approval of those proposals for an interim period." Temporary approval in order "to permit immediate use of the uniform arrangements" was given. That uniformity was achieved cannot be denied; that it resulted in a public benefit is somewhat more difficult to discern.

In a statement presented to the House Committee on Interstate and Foreign Commerce in 1955, the Board provided a different justification for its action:

"Because of the lack of direct regulatory authority over rates and practices, there is almost nothing the Board can do to control the type of exculpatory material that a carrier can individually include in his ticket. Due to this situation the Board has in the past found itself forced to approve IATA agreements which include in the uniform conditions of contract many conditions which are considered unreasonably burdensome to the travelling and shipping public. But here, as in the case of rates, the only effect of disapproving the agreement would be to permit the carriers individually to file conditions of contract which were even more objectionable."

*(Hearings, cit. n. 4, at pp. 140-141.)*

While this may well be true, one wonders whether the Board did not pay too high a price for insuring that the carriers, the British Empire excluded, would assume some measure of liability. Indeed a good number of the carriers did not have tariff provisions disclaiming liability in cases of non-Warsaw traffic. The Board gained little and permitted much. It also perhaps underestimated the desire of the carriers themselves for uniform conditions and the modification that would have resulted had the agreement been disapproved. As matters developed, it is unlikely that conditioned approval accelerated the evolution of fair standards of liability any faster than would have been the case had the Board disapproved the resolutions, as it should have.

The CAB (E—8543, 5 August 1954) disapproved several articles of the proposed conditions of carriage as well as certain parts of the previously approved passenger ticket conditions of contract. The effect of this disapproval was that neither of the 1953 resolutions could become effective, and the Clause still remained technically a part of the prior CAB-approved resolution (1949). This remained the situation until early 1957.
To be sure, the Board's approval was "conditioned" upon compliance with the many interpretations and suggestions contained in the decision. The big stick was raised high—"should the carriers fail to make such revision at their first opportunity, the public interest may well require us to withdraw the approval herein granted." Upon the U. S. carrier members of IATA was placed the special responsibility of promoting study and cultivating action in the direction of eliminating restrictions on liability. They were to attempt to hold the carriers to complete passenger liability in non-Warsaw traffic, liability regarding baggage and cargo was to be raised at the very least to Warsaw limits, disclaimer of unchecked baggage inconsistent with Warsaw and general U. S. law was to be eliminated, single carrier responsibility rule was to be adopted, the period for presenting claims was to be lengthened considerably, etc. This enumeration is illustrative, not exclusive.

For five years all was silent along both sides of the front. Then in August 1954 the Board was presented with a series of agreements intended to modify the 1949 conditions of carriage. Rather than constituting an improvement upon the lines suggested by the Board, many of the resolutions introduced some nifty gimmicks that the carriers had not been keen enough to conceive in 1949. In approving some of these resolutions and in disapproving others, the Board in greater detail than previously specified its objections to each resolution. A reading of the opinion unsettles one. The provisions are full of "cute lawyer's tricks" for limiting liability—unconscionable in the public interest field. The carriers themselves present the best case ever made against leaving the field unregulated.

The Board noted that it previously had granted approval on a temporary basis while some of the objectionable provisions were revised. It indicated that it was "seriously concerned with the little progress that appears to have been made to revise the basic provisions of these agreements to meet the points raised in the aforesaid opinion."

The Board continued:

"A reading of the provisions which have been submitted to us leaves the definite impression that the philosophy behind these agreements is that of limiting carriers' liability and responsibility to the maximum in every situation where it might be conceivable that some liability or responsibility would exist, and with little regard to whether or not such provision is really required for an economically stable air transportation operation.

The Board is strongly of the opinion that this tendency to transfer responsibility and liability to the maximum extent possible to passengers, shippers, and consignees is inimical to the growth and development of a new and dynamic form of transportation which is establishing itself in the market in competition with older and better known modes of transportation. The Board believes that it would be much more consistent with the full exploitation of the potentials of air transportation if a completely new approach were used to formulate the conditions of carriage for both passengers
and cargo. There is in existence a well developed law of transporta-
tion generally understood and accepted by shippers, travelers, and
carriers on the surface. It would, we believe, greatly benefit the
developments of air transportation if there were adopted as the
basis for formulating the conditions of carriage the principle that
no restriction above that found in the general law of transportation
should be included without an adequate showing that such further
restriction was necessary because of conditions peculiar to air
transportation."

Clearly the Board had been ignored and had been asleep for five
years. Following through on this new approach, the Board, late in
December 1954 (E-8824) authorized informal conferences between
the Board staff and IATA members for the purpose of clarifying the
issues and attempting to gain agreement. The meetings were open to
all interested parties. The results were presented to the Board and were
approved very recently (E-11024, 12 February 1957). The result is
a uniform interline ticket and waybill which meets many of the pre-
vious objections and measures up to the Board's satisfaction to the
standard enunciated in 1954. It could and should have occurred a
long time ago.

Agency Matters

Early in 1951, the Board, in adopting the Examiner's report as
its own, took action on three IATA resolutions which made significant
additions to the framework of the agency structure. The first two inter-
related resolutions were approved and provided (1) that all agents
acting as general agents for non-IATA carriers shall not be approved
or retained as IATA agents without Traffic Conference approval, and
(2) that no IATA agent may accept from a non-IATA carrier a rate
of commission higher than that received from IATA carriers.38

The first resolution is required to effectuate the second—to prevent
the circumvention that non-IATA carriers had utilized, that of treating
agents performing the duties of a regular agent as a general agent for
the purpose of paying them higher commissions (general agents receive
an additional 2 1/2 per cent on all sales). And as most agents will elect
to handle IATA as opposed to non-IATA traffic when forced with a
choice, the effect of the second resolution is to compel non-IATA
carriers to pay IATA commissions—to "dictate the commissions non-
IATA carriers could pay to agents."

Recognizing that this constituted a restraint of trade under the
anti-trust laws, the Board nevertheless felt that the only competition
that would be stifled would be that for agency-generated traffic. Com-
mission competition is not directed at developing new sources of

38 There are two types of sales agents: general and regular. A general agent
is the exclusive representative of a carrier in a definite area which may cover a
large city or even an entire country. An IATA general agent is not permitted to
deal with other IATA carriers except with approval of those carriers which are
non-competing. The regular agent operates as a retailer, many times under the
supervision of one or more general agents, and sells transportation for all carriers
with whom he is under contract.
traffic, reasoned the Board. Rather, it is directed largely towards diverting that air traffic which already has been developed through travel agents. There would be no increase in the air travelling public with the possible exception of an undetermined amount of agency traffic diverted from ocean travel.

The competition envisioned under the Civil Aeronautics Act, continued the Board, is that which directly benefits the travelling public from competition in fares, quality of service and equipment, scheduling, etc. The uncontrolled bidding for agency business, if allowed to develop, would produce a spiral of rising commissions, and thus increase the costs of transportation and perhaps the level of fares. Further, such uneconomical competition would jeopardize the agency business which IATA carriers had established at some expense, while any benefit to agents because of a rising level of commission would be temporary as they eventually would be driven out of the market. A good amount of assumption, to say the least. Furthermore, given a competitive commission structure, the possibility would increase of pressure by agents for passengers to patronize service not so well suited to their (passengers') needs as it was to provide the agents with higher commissions.

And finally, argued Examiner Bryan, it is established practice for competitive enterprises to establish levels of expense for one another. After all, he disingenuously argued, were the resolutions to be disapproved, non-IATA carriers by increasing agency commissions would force IATA carriers correspondingly to increase their expenses for that purpose. Regardless of the Board's decision, certain carriers will dictate to others the level of commissions paid! The fact that "freedom of independent action" was present in one case and absent in the other seems to have occurred to no one.

Having approved the commission resolutions, the Board turned to the fare equalization resolution which provided that no IATA agent may sell transportation for non-IATA carriers at rates below those charged by IATA carriers for the same or similar service between the same points. As in the case of commissions, agent preference for IATA business when confronted with forced election, would mean that non-IATA carriers would in effect be compelled to charge IATA rates of fares. And since the Traffic Conferences were to determine whether the competitive service offered by a non-IATA carrier was different in character from that provided by an IATA member, the net effect of the resolution would be to force the non-IATA carriers to conform not only to IATA rates, but also to the standards of service which it would prescribe.

Such a resolution, argued the Board through Bryan, would deprive the non-IATA carriers of the right to take independent action in setting rates—the unanimity rule and limited effectiveness period of IATA resolutions attempt to insure such freedom among IATA members. But here the non-IATA carriers would have no voice in
drafting IATA resolutions. They would be forced to conform without having the opportunity afforded IATA members to attempt to bring the fares down at IATA Conferences by utilizing the threat of vetoing an agreement.

Price competition is essential in the development of an adequate air transportation system, said the Board. Service competition among existing carriers alone is inadequate. The existence of both price and service competition is of paramount importance to provide service commensurate with cost and to attract potential users through lower price transportation. Given the Board's lack of control over air rates and standards of service, competition is the only means of securing such improvement.

Yet permitting non-IATA carriers to retain such freedom of action, concluded Bryan, would not be likely to precipitate a disastrous rate war. Thus, the resolution is disapproved.

Generally, non-IATA carriers have not been able to buckle the IATA rate structure. The greatest strain has been imposed by Icelandic Airlines, particularly in its competition with SAS. But if all that the Board says is true, then how important is this non-IATA competition which the Board wants to preserve? Will the Board's present encouragement of competition fade once the competition becomes effective re: the IATA fare structure in accomplishing the results for which the Board desires competition? The Board, in limiting IATA, seems to have done so by endorsing a principle which would logically result in practically forcing every effective competitor into IATA. For if the Board will grant IATA the sort of "protection" here denied it once a competitor effectively challenges an IATA-created rate structure, then the pressure to join the club will be immense.

In looking at both the commission and rate resolutions, one obvious question arises. If commission differential is undesirable because it interferes with the proper discharge of an agent's function, by inciting him to push remunerative if unsuitable service on his clients; then what difference does it make if such a differential arises from different commission rates or from the same rate applied on a differential fare structure? Thus, some opponents of the resolutions urged that disapproval of fare equalization required disapproval of commission equalization. The opinion attempts to dispose of this, tossing in arithmetic for support, by stating:

"While the IATA carrier would enjoy a competitive advantage in agency business with all carriers paying the same rate of commission and non-IATA carriers charging low fares, it does not appear that such competitive advantage would be as great as that to the non-IATA carriers in the event they were to pay higher agent's commission and quote lower fares."

Yet, when turning to deal with the countervailing argument that the fare resolution like the commission resolution must be approved

89 Hearings, n. 25, supra, at p. 138.
to protect the IATA agency business, reliance is placed upon the
advantageous position in which IATA agents find themselves. When
non-IATA carriers charge less than IATA rates, the IATA business is
more attractive to agents since it produces a greater dollar return. The
logical consistency of such arguments seem lacking, but they may
possess greater validity when viewed in the perspective of the actual
economics of the problem. From the decision alone, one cannot reach
any final conclusion.

Interline Agreements

Recently (E-10992, 31 January 1957) the Board re-examined its
former approval of IATA’s interline agreement and conditioned its
approval so as to preclude the restriction from binding a U. S. air
carrier member with respect to foreign air transportation involving
only domestic carriage by the U. S. carrier and the foreign segment of
a non-IATA carrier.

Involved was the National-TAN (Brazil) interline agreement.
TAN, a non-IATA member, charged less than IATA fares with the
result that the total fare for both segments was significantly less than
the IATA fare for the through journey. IATA, by various devices, had
in effect prevented such agreements. In this case TAN was protesting
National’s withdrawal.

The Board here faced the central issue—it found no justification
for the price-fixing. Its criterion was the effect on the IATA rate struc-
ture, and it found that interline agreements involving the domestic
carriage of a U. S. carrier did not jeopardize the stability of the rate
structure in any sense. Further, not only was such a restriction unneces-
sary for this purpose, but there were positive advantages in the inter-
line agreements—through ticketing and confirmed reservations, etc.

Given a lack of evidence, the Board did not extend its limitation
of the IATA restriction to the overseas segments of a U. S. carrier. It
asserted that interline agreements of such a nature and scope might
well upset the applecart.

As in the agency resolutions, the Board has followed a philosophy
of allowing IATA restrictive devices only to the extent necessary to
assure the stability of the rate structure and to prevent rate wars.
Otherwise it appears to feel that such “competition” sets a good
example. But as pointed out before, if the “competition” does not
present such a threat, it really doesn’t appear to be real competition.
One also wonders whether the Board’s policy of allowing IATA to
protect its rate structure by invoking restrictions effecting the freedom
of action of non-IATA carriers is appropriate. Perhaps the lack of such
assurance would constitute a strong factor in forcing IATA to more
reasonable rate levels. This latter objective can be furthered, however,
if the Board is to interpret broadly the protection it gives the rate
structure and to permit the application of IATA restrictions only when
the non-IATA competition is truly unfair and uneconomical. But this
is difficult to do through regulation by broad standards. It necessitates
a case-by-case approach. It is not possible to evaluate the effects of CAB action when it has permitted IATA to take action to protect the stability of its rate structure, though one would guess that perhaps there is more than enough such protection.

In passing one might speculate that although nowhere expressed, a source of the CAB's dissatisfaction with the interline agreement which it disapproved was the fact that in addition to restricting a non-IATA carrier, it also inhibited the totally domestic business of a U.S. carrier. The home front is the CAB's exclusive bailiwick and one might imagine annoyance over IATA extension into this area.

**SUMMARY AND THE FUTURE**

The IATA machinery has enabled the CAB to exercise a measure of control over international rates, fares, and conditions of carriage which otherwise would be beyond its statutory reach. Given its circumscribed framework and limited ability to impose its standards the CAB has done a fair job, particularly when it has made the effort. Its approval has many times been a choice between evils, in particular, the knowledge that disapproval would result in complete carrier freedom to institute what might be disapproved, and/or unilateral regulation by other governments. The conditions upon which it has based approval have at times been largely ignored, at other times followed to varying extents. There have been periods when IATA received inadequate staff consideration. Approval of the complex agreements became rather automatic and follow-up on conditions imposed was practically non-existent.

Information still remains a problem; and the CAB, in contrast to most other governments, has been unable to rely on the U.S. carrier members to convey fully and accurately to the foreign carriers, and through them to their governments, the Board's position on major problems (E-10017, 20 February 1956). Indeed, at times it has been the U.S. carriers who have spearheaded agreements contrary to principles announced by the CAB and opposed by most other IATA members.40

Of late, a combination of circumstances has created new interest in IATA. The Board has taken a new look and its recent decisions appear to mark somewhat a new departure, at least in regard to the firmness with which the Board will adhere to its policies and utilize all powers available to it.

In the past, the Board has proceeded with no actual knowledge of how foreign governments might react to its disapproval of IATA decisions or the conditions of its approval. It many times assumed governmental attitudes on the basis of little or no evidence. Little was done to educate foreign governments of the rationale behind CAB decisions.

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40 Hearings, n. 4, supra, at pp. 612-620, Supplemental statement of the CAB (dealing largely with comments made before the Committee by Stuart Tipton). And see ftn. 5.
Of late, in dealing with the North Atlantic situation, the Board has come to recognize the need for determining at governmental level the basic objectives which should serve as the broad outline in the development of the international fare structure (E-10530, 1 August 1956). It determined that the present deficiency must be remedied and that a reconciliation was needed of "divergent views into an agreed framework within which action by IATA is to be reviewed." And the CAB feels that such an ultimate determination of broad considerations transcend and do not rest with any one or a group of carriers, but with the national governments.

CAB dispatched the Chief of its Rates Division, Bureau of Air Operations, to Europe for such consultation, and it feels that they have been helpful. Governments were responsive to the objectives of U. S. air policy, and at the same time the CAB was made aware of technical difficulties which necessitate a slackening in the pace which it originally set in effecting changes in the North Atlantic transportation picture. (E-11215, 10 April 1957). In any event, such governmental consultation should tend to make CAB-IATA relationship a more effective one from the viewpoint of responsible regulation.

The truly effective resolution of the problem rests with the Congress.\(^4\) At the very least, the Board requires power to suspend the rates of both American and foreign carriers in foreign air transportation in the event of an open situation due to the failure of the IATA carriers to agree, or disapproval of an IATA resolution by a carrier government. Such power by the CAB would activate provisions of Section II of the Bermuda type of agreements which are designed to stabilize rate structures during open rate situations. But as shown during this discussion, the Board requires also the power to set fair and reasonable fares and rates similar to that which it exercises in the domestic field. Most foreign governments possess such powers.\(^2\) And the fact that Americans comprise such a significant portion of the travelers in international air transportation underscores the basic responsibility which the Congress has in this area, a responsibility which yet remains to be discharged in a responsible fashion.

While such powers might be exercised on occasion to establish the general basis of a rate structure, the details of which would be left to IATA, the CAB feels that the mere existence of such a power, even if unexercised, would greatly improve IATA responsibility to the CAB's conditioned approvals and would generally increase the CAB's bargaining power with IATA. The knowledge that disapproval would not result in an unregulated situation would have a powerful effect; in addition, the strategic position of the U. S. gateway could be utilized

\(^{41}\) Originally, it had been intended to give intensive treatment to proposals for increasing the CAB's statutory authority. The length of the IATA coverage, as well as a recognition that the statutory problem really presents a somewhat independent issue, have dictated this cursory study. Those interested should turn to the materials cited in footnotes 25 and 40 for an excellent summary and starting point.

\(^{42}\) Hearings, n. 40, supra, at pp. 617-620.
to its fullest extent as a bargaining point with foreign governments, and bargaining within the IATA would itself become more effective. American carriers, fortified with the knowledge that the CAB approved of their position and would allow their proposals to be instituted in an open rate situation would become even more decisive factors in the IATA framework. Given plenary CAB authority, it would be rare when the Board and the carriers would assume contrary attitudes, as is the case frequently today. The Board would be able to make more effective use of the American carriers as a vehicle to effect sound regulation.

Of course the power is one which Congress is less likely to grant, and the Board, throughout Congressional hearings on the subject, has placed emphasis on its disinclination to use such powers if granted, particularly since the desired consequences could probably be achieved by the mere threat of their use. But at points, it indicated that if the situation warranted, it would step in and establish a new basis in which IATA might operate. As in the past, the CAB would be guided by its paramount standard of promoting an expanding air service reaching an increasingly larger market based on lower costs moving in the direction of the attainable future.*

* The Report of the House Antitrust Subcommittee (cit. ftn.5), which was unavailable when this article originally was written, calls upon the Congress to grant the CAB authority over international air rates comparable to that exercised by it in domestic air transportation. Finding the current IATA "modus operandi" to be objectionable, the Report calls upon the Board to re-evaluate and to effect changes in the IATA rate-making mechanism so as to establish a fair and sound rate structure. The Committee appears to be recommending that the Board withdraw its approval of the IATA rate-making machinery. But it is not entirely clear whether this should be the initial or final step in corrective action, whether the renunciation should be partial or total, and whether the Board should act even if Congress does not extend its powers.

The Committee questions the contention that chaos would result from the open rate. Indeed, it welcomes such a situation as the "substitution of normal competitive market forces for joint industry price fixing agreements." Nevertheless, the Committee recognizes that joint-industry action can be useful in dealing with certain problems. But it would consider resort to such an "expedient only after existing procedures have been broken up, and a period of free competition under CAB's increased authority with respect to international rates has ensued."

43 Hearings, n. 4, supra, at pp. 142, 266.