1958

Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis - II

Aaron J. Gellman

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol25/iss2/2

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE REGULATION OF COMPETITION IN UNITED STATES DOMESTIC AIR TRANSPORTATION: A JUDICIAL SURVEY AND ANALYSIS—II*

By Aaron J. Gellman

Assistant Director of Research, The Transportation Center at Northwestern University

COMPETITION AND SPECIFIC CIVIL AERONAUTICS BOARD POLICY

As the United States trunk-line air carriers have emerged from their adolescence, and as competition between them has increased (or been permitted to increase), there has been a marked trend towards product differentiation. Such product differentiation has taken various forms, including differences in scheduling, equipment, and in-flight and ground services. Compared to the extent to which service competition has been employed in the industry, the amount of price competition attempted may seem insignificant. Nevertheless, it is important to trace briefly the extent to which price competition has been superimposed upon service competition.

There are two basic reasons for examining the role and nature of pricing and price competition. First, in this manner some idea can be obtained as to just how rigid the Board's explicit control of money prices has been through time. Second, it can be shown that the money paid for passage is but one—albeit perhaps the most important—of the dimensions of price. Price competition and service competition are inseparably intertwined. Neither can properly be considered without reference to the other. The close relationship between these two general forms of competition make it all the more important to examine the Board's actions and policies to determine to what extent it has recognized this interrelationship in its decisions.

There have been few instances of inter-carrier price competition between certificated airlines since the passage of the Civil Aeronautics Act in 1938. Even in these few instances of attempted price competi-

*This article is the result of work carried out at the Massachusetts Institute of Technology and the Transportation Center at Northwestern University. Much of the material was developed in connection with a current study underway at the Transportation Center concerning the role of the Civil Aeronautics Board in the development of the American air transportation system. Part I of this paper (which appeared in the Journal of Air Law and Commerce, Vol. 24, No. 4, pp. 410 to 434) dealt primarily with the background and history of the regulation of competition in the U. S. domestic airlines and the CAB's general attitudes towards competition.
tion, in most cases the carrier allowed to change its (money) price has expected that it will at once be met by its air transport competitor(s). 1

From 1938 until 1948 there were only a few analytically significant fare changes where the certificated air carriers were concerned. Furthermore, most such alterations were changes in the fare level, rather than modifications in the structure of fares. 2 Most of these changes came during or just after the War, when demand for the service generally exceeded supply due to widespread equipment shortages. Consequently, the changes in price levels had little discernible effect upon traffic in this period. Also, virtually all the fare changes until 1948 were permitted to go into effect without Board action; that is, the Board generally made no statements of position or policy on these changes. 3

In 1948, several pricing innovations were introduced which were either the subject of formal Board action, or were informally commented upon by the Board at the time that they were permitted to become effective. In mid-1948 the Board permitted Capital Airlines to offer reduced-fare flights known as the “Nighthawk.” These services were operated very late at night and passengers received no meal service. The aircraft used were those employed in first-class service during the more “conventional” hours of the day.

Also in 1948, the Board first allowed the “Family Plan” to be introduced. 4 Under terms of the Family Plan, an adult paying full first-class fare commencing a trip during certain off-peak portions of the week can take his spouse and children under 22 years of age with him for one-half the full first-class fare. The Board’s attitude towards this innovation was not unlike its viewpoint with respect to the Night hawk experiment. That is, it permitted this fare reduction in view of

---

1 Under such circumstances, “price competition” may not be the proper term to apply to the strategy. When the airlines, however, are thought of as competing with other modes of transportation, each and every fare change can be viewed as having some competitive impact. For the most part, “price competition” in this paper will refer to inter-carrier competition within the air transportation industry.

2 The distinction between rate level and rate structure is of extreme importance. “Level” refers to the overall arrangement of fares as related to some datum. For example, “the general level of fares is z cents per mile.” A change of level in fares usually takes the form of a percentage change in all fares. “Rate structure” refers to the relationship between fares charged for different services, i.e., if the rates were systematically made different (on a per mile basis) for shorter distances than for longer distances, there would be a change in the structure of rates. Major structural changes are generally administratively more difficult to introduce into a system of rates. In the few instances in which the Board has permitted structural changes it has used devices such as per ticket changes, round trip discounts, excursion fares, coach rates, etc. It is within the Board’s power to promulgate fare level changes, fare structure changes, or both.

3 Very generally, the mechanics of changing a specific tariff, when such changes are initiated by a carrier or carriers, begins with the filing of a tariff or tariff revision with the Board. Thereafter, the Board may permit the tariff to become effective after thirty days (or less in some cases) without any formal action on its part. See Civil Aeronautics Act of 1938, Section 403 (c) (49 USC 483). If the Board feels that any tariff or tariff change may be unlawful or otherwise undesirable, it may suspend the tariff or tariff change for a period not to exceed 180 days. Civil Aeronautics Act of 1938, Section 1002 (g) (49 USC 642). During the period in which the suspension is effective, the Board commences an investigation of the tariff and subsequently renders an opinion which results in its permanent suspension, or in its becoming (or continuing to be) effective.

4 American Airlines first filed the Family Plan tariff, and was quickly followed by the other certificated carriers.
the fact that the traffic stimulated by the innovation would be largely of a sort that would not otherwise have moved by air, and would, therefore, not represent any substantial diversion from regular fare services. The fact that more efficient and full utilization of equipment would be achieved as a result of these promotional fares was also recognized.\(^5\)

In early 1949, Eastern Airlines and National Airlines filed tariffs calling for reduced fares for round-trip excursions to Florida during the period May 15 to October 31, 1949. This “experiment” in pricing air transport service was allowed to take effect. In 1950, however, the Board suspended the carriers’ tariffs calling for a similar reduction in the same 1950 period. In the decision following this suspension, the Board said:

To find the proposed fares contrary to the anti-discrimination provision of the Act, it is not enough that we find them discriminatory, we must find them unjustly so.\(^6\)

This statement may well be squared with previous Board action (or inaction) where it was called upon to consider differential changes in airline fares. Indeed, the expression is but a re-affirmation of the Civil Aeronautics Act itself\(^7\) and of the Board’s own economic regulations\(^8\) concerning discrimination.\(^9\) In short, then, the Board, up to this time (1949) had apparently found the three major post-war pricing innovations—Nighthawk fares, the Family Plan, and off-season excursion fares—to be “not unjustly discriminatory.” (At least, all were allowed to be introduced on an “experimental” basis.)

In deciding the Summer Excursion Fares Case in 1950, however, the Board said it would not permit a tariff to become effective like the experimental one of the summer of 1949. In its decision in the case, the Board greatly limited the effective period of the 1950 edition of Florida excursion fares, and sanctioned price decreases considerably less sharp than those of the previous year. The reduction in the scope and degree of the summer 1950 authority was justified on two major bases. First, the Board simply found that the proposed fares were in fact “unjustly discriminatory.” Second, it also marked the airlines’ 1949 experience in generating new summer business in this market as not having been entirely successful, and as having diverted too much of their normal full-fare traffic.

\(^{5}\) For the economist, the Family Plan’s half-fare provision and, in a sense, Capital’s Nighthawk fares represent discriminatory pricing. Use of the word “discriminatory” is not to be construed as meaning “bad,” “illegal” or “unjustified.” On the contrary, the carriers would be acting wisely, since more than the added cost of providing the service was expected to be derived from the lower fares without any appreciable loss of other revenue. To oversimplify, the marginal revenue was forecast to exceed marginal cost.

\(^{6}\) Summer Excursion Fares Case, (1950) (11 CAB 218), at page 222.

\(^{7}\) Civil Aeronautics Act of 1938. Title I, Section II (49 USC 402). This provision of the Act is quoted in the initial portion of this paper, published in Vol. 24, JALC, p. 414. Also see Section 404b and 411 of the Act.

\(^{8}\) Section 404 (b) of the Civil Aeronautics Act of 1938 (49 USC 484). Quoted below.

\(^{9}\) It is to be noted that the language of the Act is broad and can be applied to all forms of competition, including price and service competition.
With respect to the first observation of the Board in this decision, it is appropriate to note the words of the Civil Aeronautics Act with respect to "discrimination":

No air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.\(^1\)

By its very vagueness, this statement gives the Board the widest discretionary powers in its deliberations as to whether a tariff or policy is "unduly discriminatory." In the Summer Excursion Fares Case, the Board based its judgment largely upon the wide time spread (5 months) of the proposed excursion fares, as well as on the magnitude of some of the proposed reductions (as much as 33 per cent).

In saying that the 1949 experiment with excursion fares had been unsuccessful, the Board in no way recognized that the summer of 1949 found the United States in a mild recession which may have distorted somewhat the results of the experiment, a short-term affair, in terms of the lessons properly to be derived from the alleged failure to generate large amounts of new off-peak traffic. That is, the Board interpreted the 1949 result as indicating that the demand in the market was relatively inelastic. The possibility should have been recognized (even if later discarded) that the 1949 excursion fares experiment may not have given a true picture of the nature of the demand. The experiment may well have been an "economic" success even if it did not generate great traffic flows. If it kept traffic from falling as much as it otherwise would have, this would be sufficient ground for arguing that demand was elastic.\(^1\)

In 1951 the Board issued another important decision—again specifically concerned with rates along the East Coast into Florida—the National-DC-6 Daylight Coach Case.\(^1\)\(^2\) Here the Board authorized National Airlines to conduct a one-year experiment with DC-6 daylight coach service between New York and Miami. Although several airlines intervened in the case, the Board found the fares not to be unduly discriminatory because the proposal called for the elimination of meals

---

\(^{10}\) Section 404 (b), Civil Aeronautics Act of 1938 (49 USC 484).

\(^{11}\) This is not to pass judgment as to whether the Board came to the wrong conclusion in deciding the case. The point made here is that the Board should explicitly recognize factors on every side of such problems and reach its decisions only after giving evidence of its having considered such factors. This decision of the Board could be interpreted as possibly expressing the belief that the demand for the services in question was somewhat price inelastic while in reality the lesson to be learned might have been that the demand was income elastic.

In this regard it is interesting to note that in another case, decided in early 1951, Investigation of Eastern Air Lines' Air Coach Fare Between Miami and San Juan (1951) (12 CAB 511), the Board stated that ". . . there has been a lack of correlation between fare and traffic changes which is indicative of relatively inelastic demand on that route." The Board, in using such terminology, almost invariably is talking about the price effects on demand rather than income and other effects.

\(^{12}\) National Airlines, Inc.—DC-6 Daylight Coach Case, (1951) (14 CAB 331).
and similar conveniences and the institution of high density seating. Of particular significance, as indications of Board policy towards price competition at that time, are two observations made in justification of the decision. First, the Board accepted National’s claim that the service would “improve its net profit position without significant injury to other air carriers.” While the “profits” referred to here apparently were short-run profits, a policy could have different results, for example, if the net profits sought were to be found only in the long run. Second, the Board here indicated that more freedom to price should attend the industry’s increasing attainment of financial independence. It said:

... As carriers become self-sufficient their latitude in the establishment of rates should increase. It can be expected that carriers will cancel reduced rates if they fail to yield an anticipated improvement in net profit. The regulatory function of the Board will be much concerned with the effect of new rates on the competitive balance between carriers and with questions of undue preference and prejudice. The future course will be determined on a case-by-case basis and some trial and error.13

The Transcontinental Coach-Type Service Case,14 decided shortly after the above case, gave the Board an opportunity to drive home its philosophy on pricing with whatever degree of force it felt appropriate. Apparently, the Board did not feel it had to use any force to compel wider coach services in the transcontinental market. Specifically, it refused to grant any new certificates to applicants who said they would specialize in coach services. Furthermore, it did not see fit to compel the certificated transcontinental trunk airlines to broaden their pattern and program of coach service inauguration and development. (Other aspects of this particular decision will be noted below in conjunction with the discussion of service competition and the irregular carriers.)

In April of 1952, the Board launched a General Investigation of Passenger Fares Between Points Within the Continental Limits of the United States.15 This was to be an all-encompassing investigation “to determine whether ... fares ... are unjust or unreasonable, unjustly discriminatory, unduly preferential, unduly prejudicial, or otherwise unlawful...” The significance of this proceeding, for purposes of this discussion, is that the investigation was abandoned16 after about a year was spent in preliminary conferences and other investigatory efforts. The Board never came to grips with the various problems associated with pricing and price competition in the air transportation industry.17

13 Ibid., p. 349.
14 Transcontinental Coach-Type Service Case, (1951) (14 CAB 720).
16 General Passenger Fare Investigation between Points within the Continental Limits of the United States of Various Certificated Air Carriers—Order Dismissing Investigation, Docket No. 5509, (Order Serial No. E-7376), May 14, 1957. CCH Aviation Law Reporter, Paragraph 21,592.
17 It is not that the Board was unaware of the problems inherent in establishing a policy with respect to pricing and price competition in the industry. The Board recognized their existence by some of the questions explicitly posed in the course of the abortive 1952-1953 passenger fare investigation:

“... does the general policy of constructing fares so that rate per mile varies
Consequently, the Board was in the position of continuing to regulate prices—fare levels, structure, and differential and competitive pricing—without having produced the analysis indispensable as a prerequisite of such regulation.\(^\text{18}\)

While price competition with respect to passenger business has been discussed thus far in this section, there was in this period an interesting decision of the Board dealing with the air lines' compensation for (or pricing of) the transportation of mail. In separating the mail pay and subsidy portions of the government's total payments to airlines, the Board, in the early 1950's, established a "service rate" for each carrier or class of carrier. This service rate was to represent just compensation for the services rendered the Post Office Department. It was determined that the appropriate service rate for the Big Four carriers should be less than the sevice mail rate for most of the smaller trunk airlines, including Capital, Western, Braniff and Delta.\(^\text{19}\) The Post Office, where it had a choice, thereafter began using the least-cost carrier for the mail. In 1954, therefore, the Board established a service rate for these latter four carriers exactly equal to the lower service rate of the Big Four carriers, but only for those flight segments where the services of carriers with the lower service rate were available.\(^\text{20}\) Thus, in 1954, the Board in a sense reaffirmed an implied position of long standing: inter-carrier price competition (as such) in air transportation would be discouraged; if any carrier was permitted to introduce rates differing from those previously prevailing, all carriers competitive to the first carrier would be permitted to offer identical rates upon filing for them.\(^\text{21}\) With this sort of policy, there is little wonder that there has been so little

\(^{18}\) In 1956 the Board inaugurated a General Passenger Fare Investigation. As this is written, the hearings before the examiner are under way. Unfortunately the Board's mandate to the examiner is narrower in scope than that of earlier attempted general fare investigations. In any event it appears likely that the current proceeding will be an extremely long one, and will be very costly for all the parties to the investigation as well as the government. It is to be hoped that much will be developed in the course of this proceeding to help the Board understand more fully the various economic phenomena inherent in the industry even though the proceeding is limited in its scope.

\(^{19}\) The Big Four carriers' mail service rate had been set at 45¢ per ton-mile and the smaller trunk carriers' service rate was established as 53¢ per ton-mile. American Airlines, Inc., et. al.—Mail Rates (1951) (14 CAB 558) and Capital Airlines, Inc., et. al.—Mail Rates. Docket Nos. 6308, 6309, et. al. (Order Serial No. E-8676), September 30, 1954. CCH Aviation Law Reporter, Paragraph 21,770.

\(^{20}\) Ibid.

\(^{21}\) It is clear that under the Civil Aeronautics Act the Board has the power to compel competitive carriers to offer rates identical to those of a price leader. However, the Board has never been faced with the necessity of so doing. Particularly interesting to contemplate would be a case where the Board would grant a fare increase to a relatively small trunk carrier in financial difficulty, while at the same time the carrier's competitors do not file for the increased fares (perhaps even though they were also in some financial difficulty). The larger carriers' rationale might be to drive the smaller carrier out of business and to derive its long-run
inter-carrier price competition. Pricing innovations are much less attractive, of course, where the innovator cannot reasonably expect to enjoy the beneficial differential effects of his innovation. Indeed, there are very few examples in the history of U. S. scheduled air transport where a pricing innovation introduced by one carrier has not soon been copied exactly by its competitors. The following are examples of the usual practice and exceptions thereto.

First, the usual course of events is found in the introduction of the Family Plan, as discussed above. The pattern was repeated in the inauguration of various low-priced excursion fares such as TWA's $80 transcontinental excursion fare (1955) which was soon duplicated by United and American, its direct competitors for the traffic. Other examples can be given in passenger rates (as well as in cargo tariffs) which would serve to extend the list of the usual occurrences in this area of regulation. But the exceptions to the usual uniform practice are perhaps of more interest here. The most important and clear-cut exception to the "price followship" phenomenon has been of comparatively recent occurrence. In early 1957, Capital Airlines filed for and was permitted an extension of the "conventional," mid-week Family Plan to include travel on Saturdays. Several of the carriers, particularly those most competitive with Capital, complained to the Board about the tariff revision.22 (Capital was subsequently joined by only two other carriers, Northwest and Allegheny, in offering the Family Plan on Saturdays.) Without suspending the tariff, the Board instituted a proceeding, the Capital Family Plan Case.23 It finally decided that the extension of the family plan was "not unreasonable" and that the net effect on Capital would be financially favorable while the impact upon its competitors would not be seriously detrimental.24

In a more recent case the Board denied Capital a tariff which would have resulted in the granting of greatly reduced fares to groups traveling together and meeting certain rigid requirements as to numbers, times of travel, etc.25 Here the Board found a tariff to be "unjustly discriminatory and unlawful" which granted substantial discounts to student groups of 25 or more traveling entirely on the two "slackest"

---

22 The complaining carriers were American, Delta, National and United.
24 It is interesting to speculate as to whether the Board's decision would have been the same had the relationship between the carriers been reversed. That is, if, for example, American, which was in a strong financial position relative to that of Capital, had requested the change, and if Capital had objected, would the Board have acted so as to permit an extension of the Family Plan?
days of the week. The Board did not specify whether the proposal was unjustly discriminatory because it discriminated between student groups and other groups, or because it drew a distinction (ratewise) between groups of travelers and individuals. The decision, however, states that the carrier proposing the tariff failed to show that its costs would be less in handling the subject groups, and that the Board, therefore, could not find the discrimination justified on the basis of lower costs being associated with the lower-priced transportation.

If the Board's passing remarks in this vein can be taken seriously, it opens the door to many interesting changes in the pricing of air transportation services. For example, a tendency to encourage (or at least permit) cost-oriented pricing would certainly affect many present segment price (and service) patterns. If carried to the ultimate, it would result in a tapering fare structure where, assuming similar service characteristics, the more costly (per mile) short-haul traffic would produce more revenues (per passenger-mile) than the long-haul traffic.

As noted above, from the very nature of the air transportation industry, it is to be expected that there will be powerful drives toward product improvement and differentiation as a general method of competition. With price largely unavailable to certificated carriers as a means of competing, since rate differentials disappear quickly, the motivation is particularly strong for an airline management otherwise to differentiate its identically-priced services from those of a competitive carrier. Such product differentiation has taken various forms, including such dimensions as scheduling, flight equipment, and in-flight and ground services. (All of these can loosely be grouped under the heading "service competition," which will be discussed presently.) The methods of product differentiation are clearly the concern of the Civil Aeronautics Board under provisions of the Civil Aeronautics Act. More specifically, although the Board has tended to recognize that decisions in these matters are a part of the prerogative of individual airline management, it has the explicit power to intervene whenever it sees fit. Under Section 411 of the Act, the Board, either on its own initiative or upon complaint of an interested party (carrier or otherwise), can conduct an investigation into any questioned practice to determine whether it is discriminatory or constitutes an unfair or deceptive method of competition. Nevertheless, there has been little action taken by the Board under this provision of the Act. Most "corrections" of questionable competitive practices have come either through competitive pressures being exerted, or from the mere threat of Board action or

26 The writer is not trained in the law. Perhaps this is why the following question comes to mind in connection with the sort of decision rendered in this case. Could not the Board be more helpful to the industry by being more explicit in a decision such as this concerning its reasons for arriving at its decision? Why does the Board not state just exactly the grounds upon which such a proposal was being declared "unjustly discriminatory"? The most obvious explanation is that the Board does not wish to be placed in a position where it is to rely strictly upon the doctrine of stare decisis, and that it can escape this burden by being less than completely explicit in such a decision as this.
investigation. For example, the advertising of certificated air carriers has never been the subject of a “formal” Board investigation;\textsuperscript{27} again, scheduling of aircraft\textsuperscript{28} in particular has been left largely to management’s discretion.\textsuperscript{29}

The propriety of in-flight and ground services to passengers (and the differences between them for various airlines) have seldom been questioned by the Board to the extent of the launching of a formal proceeding. Nevertheless, since this is the predominant form of service competition in this industry, it is necessary to look more closely at the forms and patterns of such practices as well as to consider the Board’s expressed attitudes concerning them.

The inter-relationship between price and service competition is extremely close. This point has been made before. However, the relevant questions here become: Does the CAB recognize the relationship? Does it act appropriately and consistently in the face of such a relationship?

The Board’s attitude toward service competition has largely been a laissez-faire one. That is, the Board has generally remained quite aloof from the industry’s service competitive practices. The exceptions to this general detachment are important because of the insights which can be derived from them as to how the Board views certain of the more obvious methods of competition in this area.

While there are aspects of several cases decided by the Board be-\textsuperscript{27} The Board apparently considered launching an investigation concerning the advertising practices of a carrier in 1964 when TWA persisted for a time in advertising its Super-G Constellation non-stop coast-to-coast flights as requiring less than eight hours. American and United, operating faster DC-7 aircraft, knew they themselves were unable to maintain “under eight-hour” schedules westbound, and therefore challenged TWA’s statements. TWA withdrew its advertising along these lines before the Board acted formally. There have been other cases where carriers’ advertising has been challenged before or by the Board. Most such cases have resulted in consent orders or agreements.

\textsuperscript{28} “Scheduling of aircraft” as used here means the routing of aircraft about a system in such a manner as to achieve maximum and most profitable utilization of the firm’s largest component of capital investment. To be sure, the Board takes cognizance of the published schedules in ascertaining the reasonableness of point-to-point (flight) times quoted and the adequacy of service offered at a station. But from the point of view of this analysis it is in the other sense that “scheduling” is most significant.

\textsuperscript{29} There seem to have been two major reasons for this laissez-faire policy toward scheduling: First, competition (or the threat of it) will force a carrier to schedule so as to offer conveniently timed and frequent service if he is to get the maximum share of each market. Second, efficient scheduling is one of the keys to economy and financial success in air transportation where timed maintenance checks are required to be performed at a carrier’s maintenance bases. The best scheduling will keep aircraft dead-head time to a minimum by having a paying aircraft flight terminate at, or near, the maintenance base when such checks are due. Because this is an excellent means of competition between carriers for the best financial showing, the Board has seemed hesitant to meddle. See Continental Air Lines, Incorporated, et al., Route Consolidation Case, (1949), (10 CAB 657). It is interesting to note, however, that the Board will occasionally have some indirect effect on scheduling through a route authorization or route change proceeding. In such instances a carrier desirous of gaining a route (or one wanting to keep it for itself alone) will often display its willingness to serve by citing the fine service it will offer if granted the route (or if protected from further competition). For a notable decision indicating an attempt at this brand of schedule competition, see Additional Service to Virginia Peninsula, Docket 4841 et al., (Order Serial Number E-9013), March 14, 1956. CCH Aviation Law Reporter, Paragraph 21,809.
between 1945 and 1952 which imply something about the Board's early attitude toward service competition, it was not until 1953 that the Board rendered a decision directly and specifically relating to service competition. In 1952, United Air Lines, which had been cool towards the institution of air coach service and fares, decided to beat its competitors (principally American and TWA) at their own game. With much fanfare about crowded aircraft being unsafe, United proposed to lower air coach seating density so that all seats were two abreast on both sides of the aisle rather than three-and-two as was customary in coach service. United adopted the practice of selling substantially fewer seats on its coach aircraft than were fitted in the plane; it further proposed ultimately to reduce the number of seats in its coach aircraft. The Board, in denying United’s petition for a change in its coach policy, stated that:

Under the Board's decisions . . . and policy, the seating density standards of coaches are related to the service offered. By regularly selling (less seats) than the number specified in this tariff on coach flights, United is able to offer coach service superior to that offered by other carriers . . . . The competitive advantage secured by this practice may constitute an unfair method of competition. . . . As a result . . . the service offered, and the cost of service on United's coaches may be sufficiently similar to United's standard service as to constitute undue preference to United's coach passengers.

In a further statement in this proceeding, the Board went on to reaffirm this policy with respect to coaches:

The Board’s policy with respect to seating density on coaches was established for the purpose of promoting adequate and economical air service. . . . The achievement of this goal of providing service at the lowest cost reasonably obtainable by the industry as a whole, and the requisite low cost service could be assured only by setting minimum density standards for the industry at levels that would result in low unit cost consistent with comfort and safety. . . . The lower seating density involved in United's proposals would undoubtedly raise the unit cost of and diminish the revenue from coach services. . . . The competitive impact of permitting United to offer reduced seating on its coaches would probably force other carriers to follow suit. . . . This in turn would make coach service uneconomic and impossible on many routes. . . .

In the final disposition of this matter, the Board stated even more strongly:

. . . If the seating density proposed by United is permitted to become effective it appears probable that it will initiate a trend to lesser

---

30 For example, see Transcontinental Coach-Type Case, (1951) (14 CAB 720).
33 Ibid.
seating with resulting higher costs on coach services, or at least reverse the present trend to greater seating with lower costs on such services, thereby destroying the economic basis for the low fares essential to the development of a mass air transportation system. . . . The seating densities proposed by United may so approach the seating densities used by United and other carriers on first-class services as to obscure or eliminate the distinction between first-class and coach services and result in unjust discrimination or undue or unreasonable preference or prejudice, together with a general breakdown of the domestic industry fare structure.34

The next occasion on which the CAB was called upon to judge an alleged unfair method of service competition was in Capital Airlines, Inc. vs. Northwest Airlines, Inc.35 Here the former carrier complained that the advertising and sale of alcoholic beverages aboard the latter's aircraft constituted unfair practices and unfair methods of competition. While the Board admitted that Section 411 of the Civil Aeronautics Act gave it jurisdiction in the matter, it refused to take such jurisdiction and suggested that Capital first seek relief through the "appropriate enforcement officers" of the states whose laws might be violated by the Northwest practice. The Board then, once again, shied away from the possibility presented to define a bit more clearly what constitutes unfair practices and unfair methods of service competition.

Since 1953 service competition has been the principal focus in only one formal Board proceeding. In the United Custom Coach Case36 decided in October 1957, the issue was whether the "DC-7 Custom Coach" tariff filed earlier by United Air Lines and subsequently suspended by the Board was "unreasonable or unjust, unduly discriminatory or unduly preferential or prejudicial."

The Custom Coach tariff originally filed by United called for a fare increase of from $99 to $102 for coast-to-coast DC-7 coach flights and for lesser increases for similar service between Chicago and east and west coast points. In the course of the decision that held the approximate three per cent increase proposed not to be unreasonable, the Board went to great lengths "to show the increased value offered, and the increased cost of providing the service." In fact, the decision pictures Custom Coach travel as being so much more attractive than regular coach travel that it is difficult to imagine first class service being superior to Custom Coach service in many of the latter's service dimensions. For example, the Board begins to measure the increased

---

34 United Airlines, Inc.—In the Matter of a Rule which Provides for a Reduction in DC-4 Seating Configuration for Air Coach Service, op. cit.

It is interesting to note that one of the complainants against United's practice was Eastern Airlines which, as will be noted below, seemed to have little objection to offering first-class and coach passengers similar accommodations so long as the seating density was high for both classes. As a result of the Board's decision in this case, United installed 64 seats, still two-abreast, in its coach equipment.


value of the service and the cost of providing it by saying that "United's DC-7 Custom Coach provides more than an improved air coach service, offering in effect a new class of service distinguished both by the type of equipment utilized and the speed offered as well as by passenger appointments and service featured." The decision specifically notes that the DC-7 is as fast as any other aircraft in any class of service found in competition with it, that the aircraft interior "maintains the high standard of excellence and taste characteristic of United's Mainliner (first class) fleet," that there are wide aisles, two stewardesses, full course hot meals, reserved seats and many other extras such as are usually found only in first class service. After this discussion the Board attempts to distinguish between Custom Coach and other coach services by noting that United's regular coaches are DC-6's which are slower, incapable of flying coast-to-coast non-stop, etc. Where it attempts to make a distinction between Custom Coach and first class service, however, the decision rests primarily upon two differences: first, that the Custom Coach has more numerous and slightly less comfortable seats and has no lounge; and second, that meal service on first-class flights offer passengers "choicer ingredients in the way of cuts of meats."

In summation, the Board states, "... the record is clear that the 'DC-7 Custom Coach' is sufficiently different from ordinary coach service in terms of cost and value of service to justify the fares set forth in United's tariffs. However, we wish to make it clear that the mere fact that a coach service is instituted with additional amenities and cost as compared with ordinary coach service is not enough in itself to justify higher fares. The additional services and cost must be substantially different from existing services in order to warrant collection of higher fare ..."

The discussion in the United Custom Coach Case is quoted here at length for several reasons. First, it is the Board's most recent expression with respect to the play of service-cost-rate factors upon the market. Second, it is interesting to note how the policies enunciated in this recent decision square with other activities within the industry and with earlier Board policy. With respect to patterns of service competition in the industry, there is an extremely wide range of services offered to first class passengers traveling similar distances at similar fares; for example, there have been many changes in the levels of service and in the forms and intensities of service competition which have completely failed to attract the Board's attention formally. This is not to say *per se* that the Board should properly intervene in the industry's service competitive practices more than it does, but rather that it is perhaps inconsistent for the Board to control fares so rigidly while virtually ignoring the myriad price "differences" introduced by different types and levels of service. The few cases cited in which the Board took specific cognizance of elements of service competition indicate that the Board is interested only where it sees an obvious violation of its general policy (i.e., the United DC-4 coach proceeding), or where a carrier seeks to depart from the approved pricing practices
of the day (i.e., the United Custom Coach Case). In between these polar cases, the Board remains relatively aloof, and, because of the close relationship between price and service competition, this appears to be extremely inconsistent.

Support for this view is perhaps best derived from a discussion as to how different one carrier’s service can be from that of another without intervention from the Board. Several examples will be cited which serve in varying degree to point out differences which can exist along the same route and which exist differently between regions. Development of the in-flight service patterns along the East Coast affords an interesting opportunity to examine a situation which the Board might have examined with respect to discrimination charges. For many years numerous first class and most tourist flights were made in aircraft having identical high density seating arrangements. For example, Eastern Air Lines’ L-1049 Constellations were used extensively in both first class and tourist service with three-and-two abreast, high-density seating. Furthermore, often nearly identical schedules would be operated with identical aircraft except that one flight would be first class and might include a meal and the other would be a coach without any meal service. The Board has never even intimated that such a practice might be discriminatory. Obviously, the cost differences associated with rendering the two classes of service just described are extremely small—perhaps even just the cost of the meal—and certainly the substantial fare differential could not be justified in terms of improved service or higher cost alone.

The above situation illustrates both inter-carrier and intra-carrier discrimination, which apparently was viewed by the Board as being within the limits allowed by its policies. A particularly glaring example of the former type of discrimination may be found in examining Continental Air Lines’ service between Chicago, Kansas City, Denver and Los Angeles. Continental entered these markets in 1957 with all coach service offered exclusively in DC-7B’s, the most modern aircraft available. The fares charged by Continental are standard coach fares and not the higher fares of, say, United Custom Coach service. Yet, Continental’s service offers passengers reserved seats, two lounges, cocktails, and full meal service, the latter two features at extra cost to the passenger if he wishes to buy them. Obviously this service costs Continental substantially more to provide than did the former coach services available over the route. While it is undeniably desirable that the level of service afforded the traveling public be raised continually, it is somewhat ludicrous to find virtually unrestricted service competition prevailing in this industry while prices are more or less rigidly controlled. The proof of cost differences justifying price differences appears to be required in one direction only. That is, differences in cost must be shown to justify a different fare level. However, very substantial differences in cost do not necessarily result in the imposition of appropriately different rates.

A final example from the many which could be selected is that of
the introduction of "sleeperette" seats by TWA on its trans-continental first class flights without any accompanying increase in fare. If United's early DC-4 coach tariff was ruled unduly discriminatory against first class passengers because cost and service differences did not justify the rate differences, it is difficult to understand why TWA's domestic "sleeperette" seat service is not also unduly discriminatory. The introduction of such seating materially reduces the number of seats which can be fitted in the aircraft, and thereby substantially increases costs on an available seat-mile basis. There is a basic inconsistency present when at one time a service is outlawed because costs and quality of services and prices do not move appropriately with respect to one another, while nothing is said when the same relationship obtains later, and in a similar competitive context.

The Board's attitude towards product differentiation through the type of flight equipment used is a particularly interesting one. For many years, the Board never officially expressed a contrary opinion concerning the type of equipment purchases being made by the carriers. This seems to have resulted from a belief by the Board that the selection of equipment, like the scheduling of aircraft, was also an inviolate management prerogative and that the use of new and more modern aircraft was a legitimate method for management to use in attempting to differentiate its product from that of its competitors. For example, shortly after the War, Northwest Airlines acquired Boeing B-377 Strato-cruiser aircraft for use on its routes. It was well known in the industry that this aircraft would have a high operating cost associated with it. Still, the Board remained silent.\textsuperscript{37} Later, when Northwest's losses began to mount, the Board met them all with subsidy assistance, criticizing management's decision little, if at all, in so doing. This pattern has been repeated many times over with respect to the trunk-line carriers until now, with most of them off subsidy, the Board's power to control or influence their equipment purchases is all but gone.

Returning for a moment to the local service portion of the industry in this respect, there appeared to be an extremely important change in the Board's attitude towards their equipment purchases in 1953. It is necessary to note this not only because of its effect upon the local service carriers themselves, but also because it may indicate a shift in the Board's general attitude which can have a powerful impact upon competition through the type of equipment purchased if any or all of the trunk-line carriers ever return to the ranks of the subsidized. For the first time in its history, in the \textit{Pioneer Air Lines Mail Rate Case}\textsuperscript{38} of 1953, the Board refused to underwrite the losses of a carrier brought about by the introduction of new flight equipment. In so doing, the Board stated that Pioneer's substitution of Martin 202

\textsuperscript{37} Though the Board actually has little official power to intervene in the actual purchase of an aircraft type, it might have hinted that it would consider the wisdom of management's decision in awarding subsequent mail pay subsidy.

equipment for Douglas DC-3's did not meet the Act's standard of "economical and efficient management" which is required in reckoning the subsidy to be awarded a carrier. While the decision also emphasized that Pioneer was a local carrier which had little air transportation competition to combat, there was also a strong indication that the Board's general attitude towards bailing out all types of carriers was being changed and that economy of federal funds might be moving to the fore in relation to the Act's mandate to promote and develop commercial air transportation. This indication of the increasing importance of subsidy considerations has been buttressed by several other decisions of the Board since that time, and by the pronouncements of various Board members in public speeches. Such a policy shift could, of course, have ramifications reaching into all phases of the Board's economic regulation of air carriers.

The thresholds of what the Board will tolerate in service competition might be determined by the level of competition involved, the character of the market, and the state of technology in the industry. But if so, this has not been made clear by any action (or consistent inaction) by the Board. About the only certain thing that can be said is that the Board will not tolerate any clear-cut violation of its "domestic coach policy" as enunciated in part 399.19 of its Procedural Regulations. This policy is exceedingly general, with the most significant aspects from a service competitive standpoint being that minimum seating capacities are established for various aircraft used in coach service, and that there is a prohibition against free food service. It should be noted that the minimum seating requirement is frequently quite low and opens the way to discrimination between first class and coach passengers on both an inter-carrier and intra-carrier basis, as noted above with respect to Eastern Air Lines' use of L-1049 Constellation aircraft. To make this point still clearer, the following example is given. The prescribed minimum seating capacity of a DC-6B in coach service is 76 seats. It is entirely possible to place 76 first class (normal size and fully reclining) seats in a DC-6B aircraft. It is also possible to fit as many as 102 narrow, high density seats in the same fuselage. Indeed, at present there are a number of instances in which aircraft in each of these configurations are competing directly with each other over identical routes, with the passengers all paying the same fares. This point is made not in furtherance of any belief that the Board should regulate the industry more closely, but rather to point out again the inconsistency of regulating fares with extreme rigidity while pro-

---

39 As if in confirmation of its decision with respect to Pioneer's attempted conversion to Martin 202's, the Board made a similar decision shortly thereafter in connection with a subsidized territorial carrier. This time Hawaiian Airlines, Ltd. was refused support for its partial change-over from DC-3 to Convair 340 aircraft. In this instance it is significant that Hawaiian, unlike Pioneer, does have airline competition over many of its routes. It is uncertain what significance can be attached to the fact that since 1955 several local service carriers have introduced Convair and Martin aircraft as replacements for DC-3's without subsidy loss.
mulgating standards of service within a given fare range in an extremely loose fashion.\footnote{The Board, while recognizing that the irregular or supplemental carriers have contributed to the development of the United States air transportation system, apparently feels that these carriers should be confined to operations which are not competitive with the business of the certificated, scheduled carriers. Thus the Board apparently also feels that the market for air transportation service can be split in a manner that will permit both the supplemental and certificated carriers to operate without being competitive to one another. This represents a naive view of the nature of the demand for air transportation services, to say the least.}

A discussion of the role of price and service competition in the air transportation industry would not be complete without consideration of the role of the so-called irregular, non-scheduled or supplemental carrier portion of the industry. It is difficult to ascertain directly what the impact of these carriers has been on Board policy and on the level and nature of price and service competition in the industry as a whole. There are two major reasons for this difficulty. First, as previously noted, when the Board permits a lower fare to go into effect, hearings are not usually held and no formal opinion is written, so that it is difficult to determine what forces were at work to produce the lower fares being permitted. Second, when seeking Board approval for, or when publicly announcing a fare reduction or the inauguration of improved low cost air service, the individual scheduled air carriers have never explicitly mentioned the competition of the irregular carriers as a factor. This, of course, reflects the position in which the former group of carriers finds itself. On the one hand, they recognize the threat and have felt the impact of successful irregular carrier operations; still, they do not wish to credit such operations with having been a motive for their own fare reductions and service improvements. Furthermore, it is quite painful to the certificated carriers to find that what they considered to be strictly inferior, poorly administered operations can survive financially, and in some instances must be recognized as effective competition. In any case, it is entirely reasonable to suspect that the existence of the irregular carriers has had a substantial influence in bringing about the downward trend of average fares of the certificated air carriers.

Even though the Board has also been silent concerning the specific impact of irregular carrier operations upon the fare level and rate structure of the certificated trunk-line group, it has brought a number of actions against and written several opinions involving irregular carriers that leave little doubt as to how the Board itself feels about the "non-skeds" as competitors of the certificated trunk-line carriers. In short, the Board has looked upon the irregular group of carriers as poachers who have frequently skimmed the cream off the top of the air transportation market. The basis for this attitude is that many irregular carriers did not confine themselves to the non-scheduled, strictly limited operations to which their letters of registration and the economic regulations of the Board restricted them.

Specific and detailed restrictions were formally placed upon the
irregular carriers shortly after World War II, when their numbers had grown meteorically and after most individual carriers' operations had taken on a character in no way consonant with the Board's intention that they be irregular, limited and sporadic in nature, and thus not directly competitive with the certificated carriers. The Board's motive for objecting to the extensive, regular, route-type services being performed by most "irregular" carriers was born of its responsibility to promote and oversee the orderly development of commercial air transportation. This required that the certificated carriers be protected from uneconomic competition, so that they could eventually form the backbone of the optimum national air transportation system, requiring little or no federal subsidy for its continued operation.

Many, if not most, of the irregular carriers conducted their operations solely between the most lucrative points, with flights dispatched as frequently as they could get a profitable load aboard. Often these carriers attempted to use subterfuge to cloak the regularity of their operations. The Board has usually detected these, though not always quickly. Beginning in 1948, the Board began suspending and/or revoking letters of registration where it found the holder to be operating in violation of the Board's regulations and the Act. Such proceedings were numerous, though they were extremely costly to both the government and the carriers and required extensive time to be heard and decided.

By mid-1951, the Board, recognizing that it had a mammoth problem on its hands in trying to cope with treatment of irregular carriers, decided to combine all requests for exemptions and renewals by irregulars then docketed into a single, all-inclusive investigation. It is quite

---

41 By far the most painful restriction for the irregular carriers (and administratively the most troublesome for the Board) was that placing frequency restrictions upon their operations. In general, the original regulation limited an irregular carrier to a maximum of three round trips in any four-week period between the eleven greatest traffic generation points in the United States and to a maximum of eight round trips per four-week period between any other pairs of points. This regulation proved so difficult to police that the Board suspended it during an early investigation of the irregular carriers. Nevertheless, similar prohibitions on regular and route-type services were soon re-instituted and are still effective as far as these carriers are concerned. See Civil Aeronautics Board, Economic Regulations, Part 291 and below.

42 For example, several irregular carriers, possibly sharing common ownership, would join together in retaining a single ticket agent to sell tickets for them. The combine would then operate the aircraft of each individual carrier in such a way as to stay within the Board's frequency limitations and rotate the aircraft to another route for its turn there.

43 Typical of such actions have been:

- Air America, Incorporated—Enforcement Proceeding, (December 9, 1953), CCH Aviation Law Reporter, Paragraph 21,656.
- Large Irregular Carrier Investigation, Docket No. 5132, Initiated September 21, 1951.
possible that the Board would not have inaugurated such an investigation at that time had it not been for the continued goading of the Senate Small Business Committee from 1948 onward. In early 1951 it appeared likely that the Board would launch a program aimed at the systematic elimination of all but the relatively few irregular carriers that were living within the law and the Board’s economic regulations. The technique the Board seemed most likely to use was the wholesale suspension of and refusal to renew the letters of registration of offending operators. Before this was done, however, the Board, as noted, initiated the Large Irregular Carrier Investigation, and simultaneously extended the irregular carriers’ letters of registration for the duration of the proceeding.

The Board’s decision in the Large Irregular Carrier Investigation was issued on November 15, 1955, over four years after the proceeding was inaugurated. In reviewing the record of achievement of these carriers in considerable detail, the Board recognized among other things, that

... the irregular air carriers have played a significant role as innovators in air transportation. It was they who made an invaluable contribution to air transportation by risking their own capital to pioneer in and develop the field of low-cost coach-type air transportation. And, it was largely as a result of such experimentation that the certificated trunk-line carriers became active participants in this field.

Thus did the Board recognize that the irregular carriers had been a significant factor in causing lower fares to be introduced by the certificated carriers as well as in bringing about improvements in service.

The Large Irregular Carrier Investigation decision included the assurance to the irregular carriers that they had a place in the spectrum of air transportation service that the Board considered necessary to meet the legitimate demands of the public. The decision also re-designated these carriers as “large supplemental air carriers” and attempted to establish rules governing their conduct. Nevertheless, the restrictions upon the operations of the supplemental carriers have continued to be

---

45 To some extent because of the Committee and also because of pressure from the military establishment, the Board in March, 1951, relaxed some of its restrictions upon the irregulars as far as military contract and charter flights were concerned. As this changed the competitive relationship between the certificated and irregular carriers negligibly, if at all, this change can be largely ignored for present purposes. Evidence of the Senate Small Business Committee’s hostility towards the Board can be found in any of the following documents, among others:


severe enough to prohibit them from becoming a serious threat to the well-being of the certificated carriers.\(^4\)

Perhaps the most interesting portion of the Board's decision in this case concerns the potential certification of supplemental carriers. The Board adopted

\[\ldots\] a policy under which a formal proceeding will be instituted to consider expanding the number of regularly certificated carriers over any segment or group of segments whenever the volume of the supplemental air carriers thereunder exceeds 15 per cent of the traffic of the regularly certificated carriers (for one year, and) that any supplemental air carrier may participate in such proceeding as an applicant for certification.\(^4\)

This aspect of the decision is distinguished, among other things, for its naivete. It is hard to imagine a circumstance under which a certificated carrier or group of competing carriers would permit any supplemental carrier or carriers to acquire such a share of any market knowing that such achievement on the part of the supplemental carriers would at least put them across the threshold to certification. Also, it is inconceivable that supplemental operations could become such a substantial factor in any market without attracting the attention of the certificated carriers who could then introduce their best equipment and service on the routes (even at the risk of a short-run loss) in order to forestall the supplementals' more permanent incursion into the market.

Also, with respect to this first step towards the certification of supplemental carriers, it is interesting to note that the 15 per cent yardstick will apparently be applied regardless of the market. The Board has failed to recognize the varied character of the several markets in which supplemental carriers tend to operate. For example, 15 per cent of a small market (in terms of passengers and/or passenger-miles) may be relatively easy to acquire, but would probably be a losing operation financially. On the other hand, 15 per cent of a very large market may require a substantial operation and permit maximum (or near-maximum) economies of scale to be achieved as well. Consequently, at the very least, the Board should include some qualification of its market penetration criteria, perhaps in terms of the absolute size that a supplemental carrier might have to achieve. Failure to make multi-dimensioned the threshold which a non-certificated carrier must cross en route to certification again illustrates the Board's lack of understanding of the complexity of the industry it oversees and is not consistent with the degree to which it prescribes rules, regulations and "thresholds" in other areas affecting competition.

The next major problem area to be discussed which affects the nature and degree of competition in the air transportation industry is that of intra-industry mergers and acquisitions. Since the end of World War II, there have been a number of mergers and attempted

\(^{47}\) Generally, the most severe restriction placed upon the supplementals is one which limits them to ten flights in the same direction between any two points in any calendar month.

\(^{48}\) Large Irregular Carrier Investigation, op. cit., at Paragraph 21,879.07.
mergers, each of which required formal Civil Aeronautics Board action in the course of their being consummated or rejected. In considering the propriety of a merger the Board is required by the Civil Aeronautics Act to approve an amalgamation—

... unless (it) finds that the ... merger ... will not be consistent with the public interest (or that it) would result in creating a monopoly or monopolies and thereby restrain competition.49

Obviously, this gives the Board considerable leeway in deciding whether a merger is permissible and encourages it to act according to the merits of the case and the status of the industry at the time the decision is made, rather than forcing it to be guided by a static and inflexible rule of law or to be bound strictly by stare decisis.50

Among the certificated air carriers, there are three general types of mergers: (1) mergers of trunk-line carriers alone; (2) mixed mergers of local service and trunk-line carriers; and (3) mergers of local service carriers alone. Each such type of merger has its own problems and implications for the industry, for the development of the national air transportation system, and for the economy as a whole through its effects upon competition.

Considering first the general case of a merger between trunk-line carriers alone, such mergers can in turn be broken down into several sub-groups, i.e., mergers involving only Big Four carriers, mergers between a Big Four carrier and a smaller trunk-line, or mergers involving small trunk-line carriers only. With respect to the very first intra-trunk-line sub-group, there has been no instance in which two or more Big Four carriers have attempted to merge. However, it appears reasonable to assume that the Board would not look with favor upon any such combination. Even if the Board were disposed in the foreseeable future to permit such a combination, pressures emanating from the Justice Department and from the Congress against such action would undoubtedly be very great.

With respect to mergers between a Big Four carrier and a smaller trunk line, there have been two notable post-war cases. The first of these was American Airlines, Incorporated—Acquisition of Control of Mid-Continent Airlines, Incorporated.51 In this 1946 decision the Board considered the application of American Airlines, the largest of the trunk carriers, to acquire Mid-Continent Airlines, among the smallest of the trunk carriers. One of the principal reasons for disapproving the proposed merger was that, after noting American was

49 Civil Aeronautics Act of 1938, Title IV, Section 408 (b), (49 USC 488).
50 There are certain economic phenomena which in a sense justify the Act's granting to the Board broad discretionary powers concerning the approval of mergers. For example, through time and with changing technology, the shapes of the cost curves for airline firms may change. (The cost curve is derived by plotting cost per unit against size or output.) For instance, if cost per unit would be significantly less with firms A and B joined rather than kept separate, this might be a powerful argument for the Board to approve a merger. However, if at one point in time this were so, this cost-output relationship may not necessarily have been the same at another point in time.
51 American Airlines, Incorporated—Acquisition of Control of Mid-Continent Airlines, (1946), (7 CAB 365).
already the largest carrier in the industry and that this acquisition
would make it even larger, the Board said—

... underlying circumstances of size and competitive position are
critical factors in measuring the application now before us against
the standards of public interest set forth in Section 2 of the Act,
in particular, the injunctions to promote sound economic conditions
in air transportation (subsection (b)) and to consider in the public
interest competition to the extent necessary to assure the sound
development of an air transportation system properly adapted to
our needs (subsection (d)).52

Also, in considering the increased disparity between the size of Ameri-
can and Mid-Continent combined, as opposed to other carriers serving
the central United States, the Board said—

... the facts of record require us to find that the acquisition of
control of Mid-Continent by American must reasonably be expected
to produce so great a diversion of traffic from other air carriers as
would be inconsistent with sound economic conditions in air trans-
portation and would impair the competition we deem requisite to
assure the development and maintenance of an adequate air trans-
portation system. In this respect, therefore, the transaction pro-
posed would transgress against important principles of policy
incorporated in the over-all standard of public interest.53

It appears from this case that the Board was not disposed to permit
one of the larger carriers to become significantly larger relative to the
size of other firms in the industry. As one student of the industry put
it in 1954, "(The Board's) principles seem to have been to prevent
large carriers from becoming larger except for very minor additions."54
Indeed, this seemed a reasonable conclusion until 1956.

In the Colonial-Eastern Acquisition Case55 the Board approved the
acquisition of Colonial Airlines, one of the smallest trunk lines, by
Eastern Air Lines, one of the Big Four. In so doing, the Board said
that the combination would not result in a monopoly in restraint of
competition, nor would it jeopardize the well being of other air car-
rriers. Perhaps because the most prominent issues of the case were more
"legalistic" and procedural than economic, the Board did not devote a
great deal of attention to elements of the case falling in the latter
category.56 The Board did not, at any time, attempt to distinguish its

52 Ibid. at p. 378. (For appropriate quotations from the Act, see Part I of
this paper. (24 JALC 410) at p. 414.)
53 Ibid., at p. 379.
54 Bluestone, David W., "The Problem of Competition Among Domestic Trunk
Airlines, Part II," (21 JALC 79). The Board's decision in 1947 to permit United
Air Lines to acquire through purchase, Western Airlines' Denver-Los Angeles route
can probably be cast a "minor addition" in Bluestone's terminology.
55 Colonial-Eastern Acquisition Case, Docket 6998, (Order Serial Numbers
E-9945 and E-9946), January 11, 1956, CCH Aviation Law Reporter, Paragraph
21,929.
56 The Colonial-Eastern merger was consummated only after a lengthy and
bitter contest between Eastern and National for the acquisition of Colonial. In the
course of this struggle, among other things, Eastern was found to be in violation
of the Act by having acquired control of Colonial through stock ownership
without the Board's permission and the White House had intervened to prevent an
earlier merger between Colonial and Eastern on these grounds. National and Colonial in
the meantime were discussing a merger, but Eastern still was victorious in the end.
decision in this case from that rendered in the earlier American-Mid-Continent Case. It is a reasonable supposition that in reaching a decision to permit Eastern and Colonial to merge, the Board took into consideration the fact that it would thereby enable the government to reduce airline subsidy payments to the extent that Colonial would at once be removed from the ranks of the subsidized. Perhaps it is reasonable to assume that this aspect of the case was governing in the Board's deliberation and decision to permit the Colonial-Eastern merger.

The next merger sub-group is that involving two (or more) smaller trunk carriers. The first post-war instances of this type of proceeding were the Braniff-Mid-Continent Merger Case\(^57\) and the Delta-Chicago and Southern Merger Case\(^58\) both of which were decided in 1952. In each case, both carriers, prior to the merger, conducted an essentially north-south operation in the "middle" of the country, but were infrequently in direct competition with one another. As might be expected of cases decided so close together and involving such similarities, the decisions in both cases were reached on substantially the same bases.

The Board, in deciding these cases, pointed out that other carriers would suffer little loss of traffic as a result of the mergers. It also indicated that substantially improved services to the public from through-plane flights would result in some instances with a resultant stimulation of additional traffic over the combined routes. Furthermore, in both cases the mergers were expected to permit total government subsidy payments to be reduced to zero for the merged companies, though the total dollar amount to be saved in each case was quite small since the parties to both mergers were then approaching subsidy-free operation independently. Finally, the Board considered the monopoly aspects of the mergers. In neither case did the Board deem resulting route monopolies to be in restraint of trade and therefore did not bar the mergers.

When local service carriers are considered, two kinds of mergers become a possibility. First, as noted above, there can be mergers involving a trunk line carrier and a local service carrier, and second, those involving local service carriers alone. There have been decisions of the Board in which both of these types of mergers were involved, although, with respect to the former class, the expression of the Board's attitude is quite "thin," being derived from only one proceeding. The decision referred to is that rendered in 1954 in connection with the union of a small trunk line and a local service carrier, the Continental-Pioneer Acquisition Case\(^59\). In this proceeding the Board approved the merger, but the bitterness of the dissents in this three-to-two decision

---

\(^{57}\) Braniff Airways, Incorporated—Mid-Continent Airlines, Incorporated—Merger Case, (1952), (15 CAB 708).


indicates the controversial character of the issues upon which the case turned.60

Many students of the industry believed that this decision marked a new trend in general Board policy which departed from the long-standing position of keeping trunk line and local service carriers separated. Certainly the majority, perhaps in anticipation of criticism which would be leveled at the Board for the apparent departure from previously firm policy, insisted with particular vigor that there would be no lessening of competition in any way because of the merger and stated that the instant case was "an exception to, not an abandonment of, the Board's policy."61 Notwithstanding the majority's insistence that the decision did not establish a new policy, the dissenters in this instance62 held with equal vigor that approval of the merger would not only tend to weaken Continental's position as a competitor of other trunk line carriers (contrary to the view of the majority), but would also create pressures on the succeeding firm which would lead to a gradual slackening of service on the local service routes of the combined system. The dissenters, however, were strongest in saying that this decision did great harm to the Board's long-range program of re-aligning routes so as to transfer more and more of the trunk line carrier's smaller points to the exclusively local service carriers, thereby strengthening each class of carrier in its own highly specialized field of service. They insisted that this indication of abandonment of the Board's previously clear-cut policy would cause the trunk line operators to shrink from further cooperation with the Board in this program for fear that subsequent Board decisions would permit the local service carrier to which a point is given to be merged with another trunk line carrier which then becomes competitive with the original donor. Finally, returning to the specifics of the instant case, the minority contended that in the long run the Continental-Pioneer consolidation would cost the government additional subsidy payments rather than realize the savings anticipated by the majority.

Again it must be emphasized that while the Continental-Pioneer Acquisition Case may very well not be more than an exception to the Board's general rule with respect to the separation of trunk line and local service carriers, the decision, standing alone as it does in this area, certainly might have some of the effects on the industry's development as noted by the dissenting opinion. If the Board were in the habit of being strictly bound by stare decisis, the decision in this case would certainly be a more important indication of a shift in Board policy than it has been taken to be. However, due to the changeability of the

60 From the day the decision was rendered in the Continental-Pioneer Acquisition Case, there was some question as to whether certain special situations surrounding the merger did not substantially reduce its predictive value. For example, the Board correctly pointed out that the Continental and Pioneer route systems were not so different as the trunk line—local service dichotomy would indicate, i.e., Continental's average length of haul was the lowest of the trunk lines and Pioneer's the highest of the local service carriers, etc.
61 Continental-Pioneer Acquisition Case, op. cit. at Paragraph 21,782.08.
62 Board Members Josh Lee and Joseph Adams.
Board's policies and its proneness to make exceptions to general policies, the majority might be taken at its word that this decision represents such an exception. However, it must be noted that too many exceptions can abridge a general policy quite effectively, and the Board's decision in the *Syracuse-New York City Case* which also was hailed as something of an exception in this area, perhaps lends more strength to the minority opinion in the *Continental-Pioneer Acquisition Case*.

With respect to mergers between local service carriers alone, there have been three decisions by the Civil Aeronautics Board. The first of these is the *Southwest-West Coast Merger Case*, where the Board unanimously refused to approve the proposed transaction. Notwithstanding the fact that no monopoly in *restraint of trade* was found to result from the combination of the two carriers, it was held that the proposed merger would be adverse to the public interest because of the lack of similarity between the carriers' two operations and areas of service. This was expected to jeopardize the chances for success of a combined operation. The Board took pains to point out, at the same time, that its policy with respect to the experimental local service carrier group was clearly "... to authorize operations by local companies whose interests are centered in the area to be served." It indicated that the proposed merger would cover an area entirely too large and too varied to permit adherence to this principle. Furthermore, the Board stated that if the merger were approved, the resulting single carrier would be subject to great pressures to operate between the largest traffic centers with as few stops as possible, thus neglecting the smaller communities along the route and affording more direct competition to the two paralleling trunk line carriers. In the course of this decision, the Board bent over backwards to state that it was not discouraging all mergers between local service carriers because of its action in this case. In fact, it suggested to the parties before it several alternative merger possibilities involving other local service carriers upon which the Board might be inclined to look favorably.

Shortly thereafter, the Board had before it the *West Coast-Empire Merger Case*. True to its word from the *Southwest-West Coast Merger Case*, the Board approved this consolidation, although it admitted that it did not particularly like all of the financial aspects of the agreement of merger. In addition, the Board granted two important concessions to the merged company: first, it extended the merged carrier's routes

---

63 As discussed in Part I of this article, (24 JALC 410) at p. 425.
64 *Southwest Airways Company—West Coast Air Lines, Inc.—Merger Case*, (1951) (14 CAB 356).
65 Under present general Board policy which restricts virtually all direct competition between local service carriers, it is difficult to see how any merger between them could possibly result in anything but a further monopoly, although still a "legal" one.
66 *Southwest-West Coast Merger Case*, op. cit. at p. 357.
67 The routes of the combined company would have run along the Pacific Coast essentially from border-to-border. Separately, the carriers met only at Medford, Oregon, and interchanged virtually no traffic at all at that point.
68 *West Coast-Empire Merger Case* (1952) (15 CAB 971).
to provide two direct connections between the formerly separate carriers; second, in an unprecedented move the Board permitted the succeeding company, West Coast, for mail pay purposes, to value the acquired assets of Empire at a figure greater than their value on Empire's books at the time of the merger. In this way the Board gave added impetus to the consummation of the merger. The following passage from the decision clearly indicates the Board's general policy as well as its eagerness to have West Coast and Empire joined:

The history of West Coast's efforts to enlarge its operations through merger has been a long and an arduous one. In response to the Board's repeated encouragement to air carriers to undertake route improvements through merger, West Coast in 1950 negotiated a merger agreement with Southwest. . . . This agreement was found to be adverse to the public interest. . . . The Board's opinion denying approval of the agreement noted that . . . "West Coast and Empire present interesting possibilities for merger." . . . West Coast interests have endeavored to effect a satisfactory merger over an extended period of time and we are reluctant to impose any more obstacles to . . . the present merger proposal than are absolutely necessary.69

Thus, the Board was at that time willing to extend itself greatly to approve any merger proposal it deemed reasonable involving two local service carriers.

A glance at a map showing the pre-merger routes of West Coast, Empire and Southwest Air Lines lends some credence to the Board's fundamental observations concerning the dissimilarity of the Southwest and West Coast routes and areas on the one hand, and the kinship between the routes and service areas of Empire and West Coast on the other. Also, the additional segments granted to the merged carrier appear to make possible a well integrated operation.

There has been one other more recent action before the Board requiring it to consider the propriety of a merger between two local service carriers. In the North Central-Lake Central Acquisition Case,70 decided in July of 1957, the Board rejected the proposal on the grounds that—

. . . the two areas proposed to be served by one carrier are insufficiently related to each other . . . to permit a sound, integrated local service system and that . . . proposed acquisition would defeat the Board's policy of authorizing operations by local companies whose interests are centered in the area to be served . . . in terms of route mileage, number of cities served, density of population and geographical area covered, North Central (the successor carrier) would take on characteristics akin to a trunk line carrier and pose the kind of threat to existing trunk lines which was of concern to the Board when it denied approval of the proposed merger in the Southwest-West Coast Merger Case.71

69 Ibid., p. 973.
71 Ibid. at Paragraph 22,057.01.
The Board also, as in the earlier disapproved merger, cited the historic dearth of traffic interchanged by the two carriers at their one common point, Chicago.\textsuperscript{72}

Lest this decision be misunderstood, the Board added

\ldots our decision to disapprove the proposed acquisition \ldots does not mean that we intend to freeze the present local service routes in the mold of the status quo, but it does signify our intention to insist route realignment and system modification be held within limits which are reasonably related to the objectives followed by the Board in formulating its local service policy. \ldots We see no reason \ldots to revise our original belief that the objectives providing short haul services geared to local needs and maximum development of local traffic can best be carried out by local carriers concentrating their efforts on operations in reasonably compact and homogeneous marketing areas. We are satisfied that, in most instances, any need for expansion of local air services or for changes in route structure of a local carrier can best be determined in area or individual route proceedings rather than through the merger of carriers serving adjacent but not complementary trade areas for local traffic.\textsuperscript{73}

In summation, with respect to mergers between local service carriers, the Board seems inclined to permit and even encourage them whenever it feels that a stronger carrier will emerge from the union, but it also requires that the service areas of the merging carriers be similar, and readily integrated operationally. Also, there must be some through service traffic to be served and the enlarged operation must not be tempted, through its increased size, to concentrate on longer haul services which would place it in competition with the industry’s trunk lines.

It is important to recognize that from the standpoint of competition in the industry, any widespread merger movement could, in the long run, have substantial effects upon the character and nature of such competition. No matter how small the elements of monopoly are that each consolidation adds, the total impact in terms of concentration over the years could be substantial, if only because a reduced number of carriers would find it easier to reach informal agreement on fare levels, the nature of traffic development, etc., notwithstanding the Board’s prohibition against such group action, and in spite of the Board’s responsibility to set the pace and direction of the development of the American air transportation system. In short, it appears that the Board, if it were to adopt a general easy merger policy, might thereby be actively retreating in some measure from its former position of being able to exercise considerable control over the carriers at a time

\textsuperscript{72} It is interesting to note that the Board continued to parrot the sentiments of the earlier \textit{Southwest-West Coast Merger Case} throughout the decision, to wit: "We are convinced that \ldots to combine North Central and Lake Central \ldots would require the efforts of management to be dispersed over too much territory to permit that concentration on local service problems which is the essence of the Board’s local service policy. Furthermore, the inevitable consequence of operating such a wide flung local service system \ldots would mean an increased concentration \ldots on the lucrative traffic between the larger cities and less service to the smaller communities. \ldots" \textit{Ibid.}

\textsuperscript{73} \textit{Ibid.}"
when a large segment of the industry has reached a crucial juncture in its development, that of attaining financial independence from the government.

As the certificated airlines reach maturity and as general route patterns become clearly defined in such a way as to preclude future major individual route extensions, the carriers, individually and as a group, can be expected to recognize their mutual interdependence more clearly. This will, of course, be true with respect to the big three directly competitive transcontinental carriers (if they do not realize it already), but it will also hold in substantial measure for the entire industry, because all carriers are bound together in common regulation by the Board and because of the importance of interline traffic to each of them. With the growing recognition of mutual interdependence and with the temptation that it will present for concerted action, the Board has another major problem on its hands in determining policy with respect to the detection and prevention of such group action.74

There are two principal forms of group action which can be expected to be prevalent in the future. First, there are the interchange agreements between carriers, which have already become quite common in the industry. In such agreements, two or more carriers (these will almost always be trunk lines) seek to pool their equipment on a particular route in order to provide through-plane service between distant terminals, both of which are not served by any single party to the agreement. In addition, all such flights are routed to pass through at least two stations served by each of the interchanging carriers (including the interchange point) and traffic may usually be carried over any segment of the total length of the flight.

In general, the Board has approved all proposed interchange agreements where the actual or potential traffic merits the service and where it is found that the agreement will not result in a monopoly or in domination of one carrier by another. Though interchange agreements actually date back to the early days of the Act,75 it was not until the

74 To be sure, in addition to anti-trust prohibitions, there is some safeguard arising from the present nature of the industry and the inter-carrier competition that exists. Even recently, when airlines have generally not fared so well financially, there has been some open disagreement as to how best to cure the situation. In some instances differences between the attitudes of various carriers have precluded their reaching any agreement on the basis of group action. For example, late in 1957 most airlines cancelled the tariff provision which for many years had granted the United States government a 10 percent discount on official travel. Among the transcontinental carriers, however, TWA refused to go along and continued its reduced rates to the government. As a result of TWA's decision and an action on the part of the government which told its personnel to use the lowest cost airline whenever possible, the other carriers soon reinstated their government discounts.

Generalizing a bit further, it may be that as long as an airline is discontent with its share of the market, it will be difficult for there to be concerted action between all carriers with respect to all dimensions of competition. TWA apparently is at present extremely unhappy with its share of the markets which it serves, and is attempting to distinguish itself from its competitors in many ways to remedy the situation. The reluctance to go along with the majority in cancelling the governmental discount, like its Sleeperette seat policy discussed above, represents, it would seem, such an attempt to distinguish itself from its competitors and thereby enlarge its share of the market in the long-run.

75 United Air Lines Transport Company—Western Air Express Corporation—Interchange of Equipment, (1940), (1 CAB 273).
late 1940's that the Board was again asked to approve such an agreement to provide direct, one-plane service between widely separated major terminals. In the latter instance, the Capital-National Interchange Case, the Board approved the agreement almost entirely on the basis of public convenience and the fact that the arrangement would be particularly advantageous to the two carriers from a management standpoint. Competitive impact, though considered, was not prominently cited in the Capital-National decision, and the decision cannot be strongly interpreted as expressing a Board policy of substituting interchange for new competition.

In the several interchange cases heard and decided in the two years after the Capital-National Interchange Case, the Board for the most part, followed similar reasoning. But, in 1951, in an historic decision, the Board expressed a substantially different view on the interchange device. In Southern Service to the West, the Board was generally considering the need for additional and through-plane service between points in the southern United States and the West Coast. Concluding that additional and through service was required, the Board nevertheless turned down the proposals of six carriers for route extensions which would permit their performing one-carrier service between certain cities in each area, on grounds that such extensions would result in increased competition to the detriment of the long-range development of the industry. Consequently, in lieu of route extensions, the Board in the course of the proceeding approved an interchange agreement between three carriers to provide Florida-New Orleans-Texas-California through-service and, in addition, on its own initiative suggested several other interchange agreements which would meet the need for the additional and direct services found wanting.

In a strong and important dissent in this case, Josh Lee, a member of the Board, stated that the Board had found the need for a new southern transcontinental route but failed to grant it, instead "(creating) an inferior and inadequate route which perpetuates a monopoly over one of the strongest route segments in the country." Lee further condemned the majority opinion on the basis that "it changes the policy of the Board from one that favors competition whenever it can be justified to one that opposes it whenever its refusal can be justified."

With respect to the former statement cited from the dissent, the important question is raised as to how the Board would govern itself

---


77 Under the agreement, Capital provided all aircraft to be used in interchange during the winter months and National provided them in summer because of the difference in traffic peaks of the two carriers. In smoothing out their seasons in this way, both carriers benefited by having to purchase less equipment than would otherwise have been necessary to handle their peak loads.

78 Southern Service to the West Case, (1951), (12 CAB 518).

79 The monopolized route segment referred to here is the western portion of American Airlines' Route 4 which runs transcontinentally from the Northeast to the Pacific Coast via the "southern" route, i.e., through the Southwest.
concerning a route where a monopoly was originally created to assist in the development of a carrier in particular and the national system in general, but where that monopoly is no longer required for either purpose. The latter quotation seems to answer this question based upon one interpretation of the instant decision.

After the Southern Service decision, for several years it appeared that Lee's interpretation was not far wrong, at least insofar as it pertained specifically to the Board's attitude toward interchange agreements. From 1951 through much of 1954, the Board continued to approve and encourage interchange agreements rather than grant route extensions or permit entry through the issuance of new certificates where traffic and public convenience were found to merit additional service.

The second major form of group action with which the Board will have to cope more frequently is that of concerted industry pressure concerning rates and tariffs. Here at least, the Board appears thus far to have retained control of the situation and to have fully recognized the problem. This supposition is based principally upon a 1954 pronouncement of the Board. In this instance the Air Transport Association of America (ATA), the trade association of United States certificated air carriers, requested Board approval for inter-carrier discussions of "all possible methods of increasing revenues except

---

80 Note that in a Supplemental Opinion to the Original Decision in 1952, the Board did find that still more service was needed between the areas and approved another interchange which utilized TWA from Amarillo on the western end instead of American. This service was never inaugurated, however. Southern Service to the West Case—Supplemental Opinion, (1952), (15 CAB 94).

81 Mid-Continent Airlines, Incorporated—Continental Airlines, Incorporated—Equipment Interchange, 1951, (14 CAB 663).

REGULATION OF COMPETITION

compensation for the transportation of mail." The Board, in refusing to grant the ATA petition in the main,83 said,

In view of the fact that such discussions contravene the underlying philosophy of the antitrust laws and may well be considered contrary to the declaration of policy in our Act, we believe that such permission should be granted only upon a convincing showing:
1. Of an immediate need for basic changes in fare or rate structure levels.
2. That such changes can practically be accomplished only through the requested discussions.

In our opinion the industry has failed to make a convincing showing that rate or fare changes are needed at this time.

In effect, its order held that as long as the industry remained reasonably prosperous, joint action with respect to rates and fares was precluded. The order, in this form, does justify some concern because it leaves the door open to such action in the event that a traffic and revenue slump should develop. However, as matters have developed, the industry in general has recently experienced a substantial decline in its financial position, but the Board has still not permitted the industry to hold inter-carrier discussions with respect to matters pertaining to fare or rate structure or levels. Instead, the Board has used the device of The General Passenger Fare Investigation to permit the carriers individually to present their views on subjects which they formerly (in 1954) had wished to discuss jointly and behind closed doors.84

If the Board continues to mean that it might grant permission for inter-carrier discussions of methods of increasing revenues, it should recognize the fact that the airlines, as they become more mature and more sophisticated, will increasingly recognize their mutual interdependence with the result that discussions of the type proposed in 1954 by the ATA would be even more likely to produce monopolistic pricing policies. This pressure towards monopolistic pricing would, of course, be intensified by any reduction in the number of carriers in the industry, such as through mergers.

SUMMARY AND CONCLUSIONS

The commercial air transportation system of the United States has reached the size and level of development it enjoys today largely be-

83 The Board did state that the carriers could discuss matters "in a number of areas related to fares and rates," but prohibited mutual and joint consideration of "changes in basic fare and rate levels." The latter was, in reality, the approval that the ATA sought, and without it, the carrier discussions fell flat in virtually all matters which the Board authorized to be considered.

84 There are two significant points which should be made concerning the current General Passenger Fare Investigation. First, this investigation was launched by the Board prior to the recent decline in the airlines' financial positions. Therefore, there can be some uneasiness that the Board might well have permitted the industry to hold closed-door discussions when the slump appeared but for the fact that it had already scheduled the General Passenger Fare Investigation to serve essentially the same ends. Second, it is deplorable, and in great measure indicates the Board's lack of understanding of the industry which it regulates, that it has virtually eliminated from consideration during this proceeding the fare structure problem. Failure to consider and explore the industry's fare structure can only lead to a less than complete analysis of the problems which the Board ostensibly seeks to solve.
cause of the various promotional activities of the Civil Aeronautics Board provided for in the Civil Aeronautics Act of 1938. Particularly the certificated air carriers, which form the bulk and backbone of the industry, have benefited from the Board's promotional activities. They have received the protection from competition afforded by the certification provisions of the Act as well as many millions of dollars of direct subsidy payments, also as provided for in the law. To be sure, these vast sums have not been paid from the federal treasury without substantial resultant public benefit. For example, the needs of commerce and the Postal Service have been well served by the carriers. Also, in the matter of national defense the airlines have provided and continue to provide invaluable pools of aircraft and skilled flight and administrative personnel. Their importance in this context was clearly demonstrated by their role in World War II, during the Berlin Airlift and in the Pacific Airlift of the Korean affair. Whether the public benefits derived from the development of the system have matched the subsidy expenditures is difficult to say, though these benefits, direct and indirect, have certainly been enormous.

The Civil Aeronautics Board, under the Act, has had the dual, often conflicting tasks of regulating as well as promoting the development of the United States air transportation industry. On the one hand the Board is charged with the responsibility to stand as the overseer of air transportation rates, standards of service and competition; on the other hand it grants and controls operating franchises and subsidy payments. Nowhere in performing its two basic functions does the Board meet conflict as frequently as it does in specifying and controlling the level and character of competition that will prevail over the myriad routes operated by the industry. According to the Act, it must foster competition, but only to the extent necessary to promote the sound development of the industry. The question for the Board, then, is always how much and what kind of competition is necessary to achieve the prescribed end.

Because the industry has been expanding and changing many of its basic characteristics in the course of its development, the extent and methods of whatever competition is necessary can be expected to shift through time. In other words, because the industry is exceedingly dynamic in character and the Board is responsible for its development, both as to direction and pace, the standards of competition to be exacted by the Board must also be flexible and changing in order to establish competitive balances within the industry which are appropriate to each stage of its development. Nevertheless, it does not

---

85 Presently, most United States air carriers using four-engine equipment, including certificated, supplemental, domestic and overseas carriers, under the auspices of the Departments of Commerce and Defense have joined to form the Civil Reserve Air Fleet consisting of several hundred such aircraft and crews to be made available to the government on short notice in time of emergency.

86 In an article published in 1954, Professor Louis B. Schwartz attacks the notion of having public utilities wholly regulated by administrative bodies, largely on the grounds that such bodies may be inconsistent in their application of rules of competition and other such regulations. He would give most discretionary powers
REGULATION OF COMPETITION

seem unreasonable to expect that, in making its decisions, the Board be reasonably explicit as to why it is acting in one way rather than some other. Furthermore, it is not unreasonable to expect the Board to adopt some clearly discernible line of progression in its regulation of competition, one which bears some evident relationship to the state of development of the industry or of the involved portions thereof.

While subsidy was a major factor for the bulk of the industry, the Board, as expected, minimized inter-carrier competition in great measure. After all, the Board, through its discretionary powers on the level of subsidy of each carrier retained a powerful tool of control over the carriers. With all local service carriers still clearly subsidized, the Board largely continues to minimize competition between such carriers as well as between these carriers and trunk lines. (The several exceptions to this anti-competitive policy for local service carriers have been noted above.)

As the bulk of the industry, the certificated trunk carriers, have left the rolls of the subsidized, the Board has clearly tended to use the device of increased inter-carrier competition to exert the pressures upon management which it otherwise could no longer bring to bear so strongly. Indeed, it was as much to be expected that, as its own powers waned, the Board would fall back upon competition as a regulator of the industry as it was that the Board would minimize competition when it still retained substantial powers over the carriers' activities. The question remains, then, as to the extent to which competition has been applied in a consistent manner and in such a way as to achieve the Board's objectives, as stated in the legislation from which the Board derives its powers.

Clearly, there are three general dimensions of influence which the Board has at its disposal in regulating and controlling competition. These are: (1) control of rates; (2) control of standards of service; and (3) entry-exit-merger controls. It is equally clear that an application of rules and regulations and the establishment of policies in any of this sort to the judiciary which would more likely be objective and uniform in the application of regulatory standards to the various public utilities. The writer submits Professor Schwartz' proposition is quite wrong in supposing that the effects of such a transfer would be beneficial, at least as far as the air transportation industry is concerned. Where the Congress desires a promotional as well as regulatory function to be performed, these functions can best (and perhaps only) be undertaken by a single body of experts who understand and can keep abreast of the happenings in the field and who can adjust the regulatory standards quickly and in league with the particular promotional drive appropriate at various stages of industry development. In short, one cannot attack the dynamic problem of industry development (for which Congress has had the government assume responsibility) with a static rule of law such as the courts would be obliged to do were they to assume many of the present regulatory duties of the Board. If the Board has failed to discharge its responsibility satisfactorily, perhaps it is because of a lack of qualified and understanding personnel on the Board. However, the concept of the establishment of a specialized quasi-judicial body to oversee the development of an industry such as air transport is an appealing one. Perhaps the long-run national interests are best served in matters of this sort by improving the quality and workings of such an agency rather than by its abolition.

one of these areas has its effects upon the nature and development of competitive pressures in the other areas. Therefore, the Board’s actions, and the effect of Board policy, must be evaluated in terms of the competitive and economic results in all dimensions.

The discouragement of price competition is, of course, inherent in the administrative procedures employed by the Board to facilitate tariff changes. Although the Board can, if it wishes, fix or place a floor or ceiling upon prices, there is little opportunity for price competition as such to take place under the Board’s policy of permitting price “followship” to prevail. The inevitable result is similarity in pricing and reasonably rigid fares through time. With respect to controls on passenger service competitive devices, the Board has not seen fit to prescribe so rigidly the boundaries to which carriers can proceed without being restrained by the Board. The prime inconsistency flowing from the rigidity in one area and relative freedom in the other can easily be seen by reflecting upon the possible effects of such policies on airline economic health. For example, the Board might restrict a carrier from offering service at an “uneconomically” low price (i.e., not sufficiently compensatory in relation to the costs incurred), while the same carrier is free within broad limits to offer in-flight service to its passengers so elaborate as to raise its costs substantially and to the point where the relevant fare becomes just as “uneconomic.”

With respect to entry-exit-merger controls, the Board has not sufficiently spelled out in its decisions, and has not otherwise displayed an understanding of the effects of its policies in this area upon other forces abroad and active within the industry. For example, the Board shows little evidence of having evaluated the effect of the increased concentration which results from mergers where entry of new firms is, as a practical matter, not permitted.

Again, where the only effective entry is not by new firms but rather by existing carriers into new markets through extensions of existing routes, the Board does not appear to examine fully the effects of its actions upon all parties to decisions as well as upon the industry as a whole. For example, in a recent set of decisions, the Board extended small and medium-sized trunk carriers into larger and presumably more lucrative markets. In doing so, in almost every case, it placed them in competition with other trunk carriers already operating over the same routes. The Board has stated on several occasions that its intention has been to strengthen the weaker carriers of the trunk-line group; however, it has at no time indicated upon what grounds such route extensions—generally or individually—will actually strengthen the positions of such carriers financially. Why, for instance, has the Board never presented a convincing argument that route extensions should be used to achieve this end, rather than a re-structuring of air fares to produce higher revenues per passenger-mile in recognition of the

---

87 In themselves, these remarks are not to be taken as a plea for the relaxation of controls on rates or for the tightening up of controls on service competition; they are intended merely to show the inconsistency of present policy.
higher per-mile costs of short haul operations? If it holds that route extensions will best strengthen the smaller trunk carriers, even in the face of the increased competition which results, it follows that the Board must believe one or more of several possible conditions to prevail. For instance, it could be the Board’s belief that simple enlargement of scale (however defined) will be a source of added strength to carriers in need of help. Or perhaps the Board foresees increased load factors and/or higher average length of haul to be the source of the added strength to result from such enlarged certifications. In any case, the Board must certainly give explicit reasons for reaching decisions to strengthen weak carriers by creating new competition.

The explicit substantiation of actions taken is important for at least two reasons. First, the industry, the general public, and the Congress are thus made aware of the methods and reasoning the Board employs to achieve its ends and to discharge its responsibilities. Second, decisions of the Board will thus take on a more predictive quality. This latter aspect is desirable because a clearly discernible line of development is valuable in any legal process, and because it makes possible more orderly development and planning in an industry where the time horizons for such functions are necessarily far in the future. The Board cannot properly sidestep its responsibility to be explicit in its decisions by saying that it cannot possibly take account of the myriad phenomena at work in the industry. It can and must state the assumptions upon which its decisions rest to provide a basis in experience and precedent for the soundest possible decisions in the future.

In the course of its decisions and in the promulgation of policy, the Civil Aeronautics Board should also give evidence that it has at least considered the impact of its actions upon firm and industry “efficiency” in some sense. That is, at present the Board does not exhaustively analyze the effects upon all parties of its decisions and policies. For example, in extending smaller trunk carriers into new markets where they became competitive with other trunk lines, the Board has not given evidence of having explicitly and sufficiently considered the impact of such decisions upon the carriers being paralleled. Put most simply, the question might be the degree to which strengthening (i.e., improving the “efficiency” of) the smaller trunk carriers is being achieved at the cost of imposing a “diseconomy” upon carriers already in the market. To be sure, it is not necessary that the Board always operate so as to improve the efficiency of the industry in the short run. However, there would seem to be a heavy burden upon the Board to make clear just how any decision which does not promote maximum efficiency in the air transport industry in the short run does result in the optimum and orderly development of the air transportation system of the United States in the long run. The same responsibility rests with the Board with respect to its handling of the certification of new carriers and of the merging of existing carriers and in all other decisions affecting competition in the air transport industry.