<u>The Evolving World of Air Transport Regulation In the Old World and the New: A Review of Future Roles for the Air Transport Regulator</u>

Louis Gialloreto-
Institute of Air & Space Law
McGill University, Montreal, June 1989.

A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Masters in Air & Space Law.

The Evolving World of Global Air Transport Regulation: Future Roles for the Regulator

Louis Gialloreto ©, 1989.

ABSTRACT

Significant evolution of the global airline business has forced both carriers and regulators to adapt. While traditional roles for the regulator, including air safety and infrastructural regulation, (airports, etc) remain, the removal of economic regulation has produced an enhanced reliance on antitrust law among others to govern orderly development of the industry. This paper examines the resulting evolution in the role of the regulator in both the old world and the new.

EXTRAIT

La transformation profonde qu'a connue l'ensemble de l'industrie du transport aérien a obligé les transporteurs et les organismes de réglementation à s'adapter. Les fonctions traditionelles de réglementation rattachées notamment à la sécurité aérienne et aux règlements en matière d'infrastructure (aéroports, etc) n'ont pas changé, mais la suppression des règles économiques a engendré entre autres une plus grande dépendance envers la loi "antitrust" afin d'assurer l'évolution ordonnée de l'industrie. La présente thèse étudie les modifications qu'est appelé à subir le rôle de l'organisme de réglementation dans l'ancien et le nouveau monde.

TABLE OF CONTENTS

INTRODUCTION

In many jurisdictions the air transportation regulator has often held the unenviable task of trying to be everything to everyone. Some of the regulator's objectives include the fostering of productive competition that benefits the consumer while enforcing the prohibition of unproductive competition that may damage industry carriers and consumer choice. Some of those potential abuses of the system, such as undue corporate concentration that inhibits free competition, must be closely but not over zealously monitored so that those airlines that have achieved enough success to experience significant growth and through it dominate certain sectors of the industry are not punished for their competent management. The task of ensuring air safety while not imposing a regulatory burden that could bankrupt industry airlines is a significant responsibility in its own right. Regulators must be perceived as independent enforcers while others develop the policies that govern their activities. In some jurisdictions the aviation regulators are both the determinants and enforcers of policy. One must ask whether all of these diametrically opposed objectives are reconcilable into a single mission for the regulator in each separate jurisdiction.

A further complicating factor is the global transfer of such subconcepts as deregulation, liberalization, and antitrust law as it applies to air transportation. Should each jurisdiction have its own regulatory apparatus or are we evolving towards a global system of regulation for both domestic and international jurisdictions? Will the awarding of cabotage rights to foreign carriers occur sometime soon and if it does could that mean changes in the Chicago Convention and the bilateral system of which it is the foundation stone ? Several industry observers are saying that multilateralism is the coming regulatory wave. Others say that economic regulation will simply become obsolete once the air transport industry becomes populated with multinational mega carriers that will compete with other similar-sized carrier blocks. Others would doubt that we are on the verge of significant change in the global aviation industry. This skeptical sentiment can be historically justified primarily because air transportation has always shared an intimate attachment with the concept implicit in sovereignty. For both defence and civil reasons, aviation has been a closely protected national resource. This has always been intertwined with the concept of sovereignty over one's airspace and any commercial benefit that may flow from its exploitation. Will this intimate relationship between aviation and sovereignty diminish ? Many other strategically significant industries including those previously considered as vital have been internationalized and commercialized and may even be dominated by expatriate multinational corporations. Can we contemplate a world where 10-15 multinational airlines control 80-90% of all air travel ?

Computers, electronic goods, automobiles and other industry sectors have all been allowed to develop according to the rules of free competition and commercial advantage.

In contemplating the future dynamism of the global air transport industry the changing role of the regulator becomes a key issue. What types of regulation will continue and in which areas will the industry be left to its own devices ? How will the potential of one global market for air transport impact on this future view of the regulators' role ? Traditionally, the ideas of the old world have been transmitted to the new via colonialization and other migratory mechanisms. In the instance of lessened regulation or deregulation we find a contra-cyclical trend whereby the new world has instigated change that is slowly permeating the old world. With the U.S. deregulation of 1978 and the deregulatory moves in Canada and Australasia we are now noting regulatory upheaval in Europe. Is air transportation evolving towards a common global regulatory methodology, is that possible given the diversity of the world's nations ?

While looking at change and its various impacts upon the regulatory system we note that some areas have been and are likely to continue being regulated by a government body or organization. The issue of air safety is an area where impartial enforcement and policy development are essential and one can forsee very little change in the regulatory relationship between industry players and the government here.

A second area which is evolving is that which deals with the infrastructure that provides all of the facilities necessary for mounting a safe air transportation system. Airports, enroute navigation systems, meteorological systems, etc are all vital. In some countries parts of the system are being privatized meaning that some of these areas may fall out of the hands of government control. Private airport management in the US, UK, and in future in Canada may herald a different approach to the development of these portions of the air transport system. Despite these evolutionary moves, the regulatory and the airside (runways, air traffic control, enroute navigation systems) components of the system are likely to remain in government control for the forseeable future. Even those portions of the system that are privatized will have to be managed so as to conform to international standards set by government. Therefore the regulatory and policymaking control of these two key areas is not likely to change in the near or medium term. Several analysts predict that if current trends continue, that the lack of capacity available in the North American and European air traffic control systems and at airports will effectively serve as a method of re-regulation and a controller of industry growth.

This leaves one key area for evolutionary activity. Since most of the current change in the industry has been caused by either a deregulation/liberalization or a privatization of industry players it would make sense that the area of economic regulation is the one which would see major change. Once a government body has seen its control over fares, routes capacity, and market exit/entry dissipate it leaves only one significant lever of economic regulation at its disposition, the ability to regulate competition and the interaction between air carriers.

As a result, this paper will attempt to provide the reader with a comparative review of antitrust law, its current enforcement and a future outlook on possible developments. In order to achieve this, the paper will begin with a brief historical note for the three jurisdictions that will provide the comparative back- drop for this study, namely Europe, Canada and the USA. A short summary and projection of economic trends in the industry will help provide the reader with an outlook on carrier business behavior and some possible future industry structure scenarios. Following these preliminary historical and economic outlooks a review of the antitrust environment, legislation, application, and a look at possible future developments of antitrust law will be followed by conclusions.

If one assumes that the issues of air safety and the development and maintenance of the air transport infrastructure will remain as key roles, the only undefined area of responsibility is the link between the regulator and the economic forms of regulation still in the industry. Once having re-defined this role the resulting picture should be a profile of the likely future outline of the regulators' role in air transportation.

Historical Notes

A U.S.- European Comparison

Before becoming embroiled in present and future issues, let us look back at some historical events which form the foundation upon which many current day regulatory issues are based.

The three controlling factors in air transportation have been technology, economics and the legal/regulatory structure. The interaction of all three of these variables has, over time, produced the global air transport system we know today. As such, they are inextricably linked and hold common heritage in the formation of the industry. The early difficulties in setting up an economically viable industry, that not only made money for its investors but provided safe and reliable transit for its users, provided an early need for protective economic regulation. In the early days air transportation developed faster in Europe than it did in the U.S. Despite this, the first airline service began in the U.S. with operations between St. Petersburgh and Tampa, Florida in January of 1914. The 18 mile trip cost $5 each way or 28¢/mile. (People Express flew Boston-Washington, D.C. ,429 miles, for $19 (off-peak) or 4.4¢/mile.

The St.Petersburgh-Tampa Airboat line, despite a perfect safety record, carried 1200 passengers and folded in the spring of 1914. The airline was not revived. This example illustrates not only the first instance of a downturn of seasonal traffic on a leisure air route but that all the pioneer lines had trouble surviving. In the 1920's and early '30's there was little economic regulation of air transport in the U.S. This could lead one to surmise that the 1978 deregulation of the U.S. air transport industry was merely a re-deregulation that returned the industry to its natural economic state.

"At the close of WW1 in 1918, the belligerent powers on both sides of the Atlantic Ocean found themselves with an abundance of aircraft and trained pilots eager to fly them for peacetime purposes. In America, where a fast and efficient railroad system spanned the nation, there was little serious interest in aircraft as a means of transportation. Europe presented a far different story. The War had wrecked much of the rail system and at the same time acquainted Europeans first hand with the airplanes' potential. There were many heavily travelled routes that railroads could not serve, notably those over water, such as Paris-London."1

"Early passenger air transportation ventures were rarely successful (in the U.S.). The reason was that aircraft- in terms of safety, speed and range- could barely compete with ground transportation. Consequently successful air passenger service was usually between islands and the U.S. mainland where the early aircraft competed with boats."2

So we turn our attention to the European scenario which did evolve very quickly in the early days. The Germans, British, French, Italians etc, all got into civil air transportation. The Germans led the way with a service from Berlin to Weimar. This was the first service in Europe of its kind and was the only one to endure intact during the early years. More interesting was the commercial air war brewing over the Channel between two traditional rivals, the French and the British. The British started service charging £42 for a one way ticket,which using the £5/$1 conversion rate which prevailed at the time, came to $210 or $1/mile. This was equivalent to an average UK worker's annual salary at the time and certainly helps explain why air transport was an elite form of transport in the early years in Europe. It also served to highlight the much higher costs of air transport in Europe, when compared with those in the U.S., even in the early years. Amusingly one may note that the £42 fare was a no-frills fare. In 1919, "Handley Page Transport using converted bombers flew London-Paris and London-Brussels and pioneered food service to its passengers by offering lunch baskets- for 3 shillings extra !." 3 The unsubsidized Handley Page Transport would seem to have been a forerunner of the later Laker Airways in terms of offering a no-frills product.

The French had taken to the skies with several air carriers all forerunners of Air France. The difference on the French side was their rationale for having an airline in the first place. The French carriers were all subsidized with government funds because the French government viewed the maintenance of such service as a matter of national honour. This was one of the first examples of the formation of a national flag carrier. The British complained that this provided their French competitors with an unfair competitive advantage. In 1919 and 1920 these complaints fell upon deaf ears: "Satisfied as they may have been, passengers were nonetheless not plentiful enough to make operations profitable, as the airlines learned to their chagrin all pioneer lines lost money."4

A quote from a man who was to go on to greater things during the Second World War decreed that his country's struggling civil aviation business "must fly by itself; the Government cannot possibly hold it up in the air." Winston Churchill, the then junior Secretary of State for Air used this political rhetoric to keep UK carriers at bay until 1921 when, "all of the British lines suspended service, resuming only when the government relented and offered modest subsidies to them to meet their expenses."5

Secure in the knowledge that the subsidies assured at least a better financial situation, some carriers started experimenting with their product by increasing frequency and quality of service. The British carriers were now beating the French ones by providing daily service while the French operated London-Paris four times a week. This imbalance was quickly rectified, despite stagnant traffic, by an increase of frequency by the French supported by more government subsidy. By 1922 most European carriers were no longer members of private industry having been made into state-owned flag carriers. Many smaller lines within each country were amalgamated into a single larger flag carrier. As we saw earlier, the air fares in Europe were already high and government intervention in carrier ownership did not diminish these. In the UK the new subsidization scheme of 1922 was devised to ensure that British companies did not compete on the same routes. Two short years later Imperial Airways was formed "as the British government's chosen instrument for developing air transport. It was privileged as regards air subsidies; but was to "use its best endeavours to make its services self-supporting at the earliest possible moment."6

Significantly, the European carriers opened up many long distance routes so as to maintain links with their colonial possessions. The British, Dutch, French and others were involved in a fierce competition to develop safe and fast air lanes to Africa, Asia and the Americas. Government support was key especially since the cost of developing the ground facilities in largely underdeveloped colonies was very high. Through all of this pioneering period, the principles of political expediency, Empire and national defence, and public convenience and necessity were uppermost in the objective column. The option of running an efficient, low cost, air transport system was not a key concern of the day and Europe has had a hard time converting to a more competitive system since its air transport system has been subsidized, in various forms, for so long.

Turning to the U.S. we find that mail was the only willing passenger on the country's air services. Early conditions for passenger travel were less than adequate compared to today's standards.

Then as now, on shorter distances the impact of intermodal competition tended to tempt consumers to ground modes of transport. A major problem in the early days was air safety and the dramatic treatment that air mishaps got from the press; something which has not changed to this day: "In addition to souring the public on air travel, the accidents turned the financial community against investments in airline enterprises."7 "Given the unreliability of aircraft at the time and the lack of interest on the part of government and the public, it could hardly have been otherwise. As the European experience had demonstrated, an airline could not exist for long without government support, and no subsidies were forthcoming from Washington. Most Americans remained skeptical about air travel; trains, while not as fast as planes on long haul runs in the late 1920's, were much safer. European governments had supported commercial aviation for reasons of national prestige, but in American politics "subsidy was a dirty word."8

Or was subsidy a dirty word ? The struggle to try and maintain a relatively deregulated industry while ensuring there was an industry, provided the U.S. with a unique conumdrum, one which was not easily solveable. the turning point occurred in 1925 with the introduction of the Kelly Air Mail Act.

"The Post Office Department operated the mail flights until 1924 in spite of protests from the railroads in the early 1920's regarding government supported competition in the transportation of mail. As a result of these protests, the Air Mail Act of 1925 (Kelly Act) was passed to encourage commercial aviation and to transfer the air mail operation to private carriers on the basis of competitive bids."9

"The Kelly Act in effect, inaugurated commercial air transport in the U.S. At the time, because of high cost of service and relative scarcity of passengers, regular passenger air service had not yet become economically feasible."10

So while the railways were not successful in limiting competition to their own mail carriage privileges, they were able to privatize competition. This allowed for railways to buy or become part owners in many air carriers. This might not be permissible under present U.S. antitrust law but this was taking place in the 1920's not the '80's. Encouraging private investment was a formidable task and without it the government's mandate to provide those services, that public necessity required, was near impossible. "Initially the (mail) contracts were awarded for four year periods. Under the competitive bidding system, the most significant contracts were awarded to Boeing Air Transport for the San Francisco-Chicago route. The transcontinental route was joined by about a dozen feeder routes, with the result that almost every major city had air mail services."11

One again notes that the Boeing Company was both an aircraft manufacturer and airline. This horizontal integration of manufacturer and airline owned by the same company (Boeing) was to be prohibited based primarily upon anti-competitive grounds.

Thus the postal service, by its own policies and procedures with respect to the letting of air mail contracts, to a great extent controlled the growth of, and, in effect, "regulated" the commercial air carriers."12

"The main problem during this period was that the mail revenues were too low to justify the capital expense of better equipment. Poor equipment also resulted in poor service, which in turn led to even lower revenues."13 The beginning of better times was reflected in the occurrence of several favourable factors during the late 1920's. Firstly, "the Air Commerce Act of 1926 initiated the development of civil airways, navigational aids and provided for the regulation of safety by the Federal government."14 (this divorced the infrastructure from the previous US Post Office jurisdiction). Therefore the U.S. government did eventually develop a dedicated body that funded the infrastructure that was necessary to run the system which was a form of subsidy in and of itself. In contrast with the European carriers who, although they were government-owned, were responsible for setting up their own operating infrastructures. This varied subsidy system was partially responsible for the present day differential in air fares between the U.S. and Europe. Subsequent modifications implicit in the Kelly Air Mail Act included an extension of the air mail contracts from 4 to 10 years. Also introduced at this time were payments for transportation of mail that were made to the carriers on the basis of space available and distance flown as opposed to the amount of mail carried, as had previously been the case.

This had several positive repercussions including the encouragement of long distance flight and the use of larger aircraft. This meant that passengers carried could increase and the added revenue they provided was purely supplemental since the mail contract already paid for most of the cost of the flight based on cargo volume. This near double compensation system provided a much needed revenue boost to both carriers and manufacturers who now had to build airplanes that flew farther, faster and carried more than before. The next significant developments were put in place by Postmaster General Walter Brown who believed that a few, larger, well capitalized, carriers was the solution to developing a stable air transport system. This required the removal of the open competitive bidding system previously in force. This preferred carrier system took the form of the awarding of ten year route certificates, as opposed to mail contracts. They were awarded to carriers who bid lowest for them and could prove previous daily operation for a period of at least 6 months over a route of 250 miles and second through extension or consolidation of routes that, in Brown's opinion, were in the public interest. Higher mail rates were provided to carriers who flew over dangerous terrain or habitually bad weather. It is alleged that in those cases when a contract was given to a larger carrier instead of a smaller one, the larger carrier was encouraged to buy out the smaller one at a "fair" price.

This may all seem a trifle anti-competitive in today's terms although the U.S. DOT has not been overly anxious to block any of the recent mergers. (1980's)

At this juncture, several things become apparent in a comparative sense. The weeding out of smaller carriers was practiced using different methods in both the U.S. and Europe. The result was several large carriers in the U.S. and one flag carrier per European country. So it seems that while Europe and the U.S. became embroiled in different evolutionary processes the results were similar. Several larger carriers and some form of subsidy was implicit in each scenario. This serves to point up the main consideration that no matter what the environment, air transport is an expensive business, especially when one considers the airline and infrastructural costs (airports, etc.) that are necessary to operate one passenger seat mile. For this reason various forms of economic regulation seemed a nececssary consequence in the early years. By 1934 a new Air Mail Act (Black-McKeller) had passed setting up a new three-tiered system. The contracts were still awarded by the Post Office Department, but the Interstate Commerce Commission was in charge of setting "fair and reasonable rates for the transportation of the mail." Thirdly, the Bureau of Air Commerce (FAA) was put in charge of developing the air transport infrastructure. More interestingly the Air Mail Act of 1934 established two classes of airline citizen, the subsidized and non-subsidized. "(the 1934 Act)....still allowed routes to be established freely by non- subsidized airlines, since only those with mail contracts were regulated. (passenger travel was more and more profitable as a separate venture.) If such a non-subsidized carrier established a competitive route, this lowered the passenger and express revenues of the established carrier and consequently damaged its financial position. Also, some of the subsidized airlines established off-line uneconomical and supposedly unsubsidized routes. Since any carrier could fly any route these problems were widespread."15 The Air Mail Act of 1935 partially remedied the competitive problem this partially deregulated environment was causing. It "prohibited off-line routes to any subsidized carrier if established in the territory of another subsidized carrier. The Act also disallowed losses incurred on non-scheduled mail routes."16 This effectively united rules of competition between subsidized carriers but the war still raged between the two classes of carrier. "The mail carriers were apprehensive of this potential competition and, as a consequence, then, as now, they favoured governmental control of entry/exit into new routes."17

This would clearly lead one to construe that nothing has changed in the industry over the last 45 years. The larger carriers wish regulatory protection from new entrants while the smaller carriers want new market access .

In 1938 the Civil Aeronautics Act was passed by the U.S. Congress. It "placed the development, regulation and control of air carriers under the jurisdiction of a single, independent administrative body, the Civil Aeronautics Authority (later the Civil Aeronautics Board, CAB). This Act broadened the scope of safety regulation and for the first time subjected the airlines, all the airlines, to economic regulation. The carriers received certificates of public convenience and necessity, specifying points to be served. Mail contracts were abolished with the mail being carried by the certificated carrier on each route. The Board also exercised complete power to determine "fair and reasonable rates for transportation of passengers, property and mail. The Board also had the power to regulate competition, two apparently antithetical terms. Consolidation, mergers, and acquisitions were also regulated; conflict of interest and antitrust applications (immunity from prosecution) were also given by the Board."18 A grandfather clause preserved the rights of carriers operating prior to the Act thus allowing the incumbent carriers to transit to a regulated state virtually intact.

Over the years between 1938 and the 1958 Federal Aviation Act, which superceded the former, the regulators gained more and more power through new rules and amendments to existing ones. During this period the Second World War pulled the world out of its state of economic depression and air transport in the postwar-years flourished at a pace not seen before or since. The advent of the Federal Aviation Act in 1958 did not, however, substantially change the powers alloted to the CAB. It did create the Federal Aviation Agency to regulate airports, airways, etc. One notices in looking at table #1 (see page #20) that the rule became competition if necessary but not necessarily competition. The conditions under which a new license is granted or an old one amended, tend to confirm this adage.

This largely concludes the significant regulatory developments in the US until 1978 when the Airline Deregulation Act took effect. From 1958 to 1978 the regulators took on an increasingly active role in virtually every facet of air transport management and the development of carriers and operating infrastructures alike.

Table #1-

Table 1

In the *Miami-Los Angeles Competitive Nonstop Case,*[69] the Board enumerated ten different factors it has weighed in determining which, among multiple applicants, should or should not receive certificated authority to serve a particular market:

(1) route integration as evidenced by the ability to convenience beyond-segment traffic;
(2) frequencies to be operated over the involved segment;
(3) the type of equipment to be employed;
(4) the fares to be charged;
(5) the identity of the involved points;
(6) the historic participation in the involved traffic;
(7) efforts to promote and develop the involved market;
(8) the need of the applicant for route strengthening;
(9) the profitability of the route for the applicants and the existing carriers; and
(10) the potential of diversion of traffic from existing carriers.[70]

As can be seen, only the first four of these criteria have as their objective the protection of the consumer interests. Most relate to how a regulated carrier's operations might become more profitable by diminishing the potential adverse influence of competition.

In a 1941 case, the CAB stated that four questions were to be considered in any application for new service:

1. Will the new service serve a useful public service, responsive to a public need?
2. Can and will this service be served adequately by existing routes or carriers?
3. Can the new service be served by the applicant without impairing the operations of existing carriers contrary to the public interest?
4. Will any cost of the proposed service to the government be outweighed by the benefit which will accrue to the public from the new service?[63]

Source - McGill, Casebook, Regulatory Air Law

During the post-war period in Europe things developed at a steady pace. The destruction of the war made it imperative for European governments to completely regulate air transportation. The issues of sovereignty implicit in air transport were just too sensitive to have allowed free market expansion. The flag carrier instrument was essential to the Europeans in competing on international sectors since the US had developed a technological edge and had not been as drastically affected by the war as had the Europeans. In addition, the costs of re-building the aviation infrastructure in Europe caused costs and fares to rise higher and served to widen the gap between US carrier costs and fare structures and those of the Europeans. Since the concept of a EEC was still far away, each independent country did not have the geography or market size to justify even limited competition in the forties and fifties. This basic intolerance of competition in the scheduled carrier environment was one of the contributing factors which caused the early and substantial development of charter type carriers in Europe. In the period from 1950-'70 the UK to Majorca route went from nearly 100% scheduled traffic to a 50/50 traffic split between charter and scheduled. Air services between Scandinavia and Spain went from mostly scheduled traffic to a situation that saw almost 100% of the traffic become charter-oriented.

By the late-1980's almost 65% of all intra-EEC air travel is performed by charter carriers.

Returning to scheduled carrier activities, the European view is summarized rather handily in a post-war summary of British policy *vis-a-vis* aviation development. "A major theme running through this document is that governments have special interests in the development of the air transport industry and that some kind of regulation of the airlines is necessary to secure these aims of national policy."19 "The intention of the 1946 Act was quite clearly that the operation and development of scheduled air services should be the exclusive responsibility of the air corporations (BOAC, BEA, (government-owned))."20 "Governments often have substantial reasons for requiring airlines to do things which they would not do if they were acting purely as commercial undertakings."21
While delivering the message that government control, is necessary in order to ensure that the public good is served, it does not demonstrate the fact that private carriers did indeed operate in the late 1950's,1960's and subsequent periods.The Berlin airlift provided for the formation of 69 private UK carriers to form. By 1957 there were 30 separate private carriers but only 15 by 1963. From 1963 on many of those private scheduled carriers also went bankrupt.

Overall, the European scenario was protectionist, characterized by high air fares, limited route entry/exit and high government equity involvement in the actual market players themselves. Therefore, the US/European experience of air transport development followed different regulatory tracks but by the late 1950's and early 1960's had produced similar air transport regulatory systems.

Canadian Historical Notes

In Canada things developed in similar fashion to that of the European (UK) air transport systems. Up until the mid-1930's most of the regulation was of a technical in nature with little thought given to economic regulation. This was to change by 1936 when Parliament passed the Department of Transport Act. (S.C.c.34), which took the administration of civil aviation away from the Department of National Defence and placed it in the hands of the newly formed Department of Transport.

"The Transportation Act charged the Minister of Transport, in Section 3(a)..."to supervise all matters connected with aeronautics.."and, among other things, in section 3(1)..."to consider,draft and prepare for approval by the Governor-in-Council such regulations as may be considered necessary for the control or operation of Aeronautics in Canada or within the limits of the territorial waters of Canada..."22

As had the railways before it, air transportation found itself becoming perceived as an instrument of national unity. Coast to coast was a feat that had only been achieved by the railway thus far.

"The appeal of a trans-Canada air route rested on two main grounds: The first of these was national unity. the Government wanted to link the scattered parts of a young nation together with the fastest means of communication. The desirability of having an airway over Canadian soil that would retain through air traffic and serve intermediate points was connected with this goal.

The second ground was the attraction of making Canada a link in an east-west air route. The argument in favour of a trans-Canada airway as part of a route between Europe and Asia hinged not only on the advantages of an "all-red" or all British route (with its military potential), but also on the ground that the northern passage is the shortest."23 "It was at this time that fears were expressed that the whole of the Canadian aviation might float into the hands of the Americans"24 who were all too eager to take over the Canadian aviation companies."Even though the Canadian route was the most economical one, if the routes in the U.S. were built up and subsidized, trans-continental traffic would become established in those channels and north-south feeder services would develop between the U.S. and Canada which would funnel traffic into the U.S. trunk lines for movement east-west."25

In Canada the transportation system (all modes) was accomplished by the direct intervention of the Canadian government. Therefore, from the very outset protectionism was seen as not only desirable but necessary in order to maintain a Canadian presence in transportation circles. This historical pattern of development is made all the more interesting when one takes current debates about which mix of free-trade and protectionism is optimal for Canada. (air transportation was expressely excluded from the Canada-US Free Trade Agreement).

"In the meantime the then Minister of Transport, the Hon. C.D. Howe, set about shaping the domestic and international policy for Canadian air transport."26

"One of the first things Mr. Howe undertook was to establish the Board of Transportation Commissioners under the provisions of the Transport Act (S.C. 1938,c.53).Prior to 1938, governmental regulation and supervision of commercial carriers was not very strict and carriers *per se* were not generally licensed restrictively. This gave rise to a situation of unrestricted competition. The 1938 Transport Act radically changed the situation for Canada with the creation of the Board of Transport Commissioners which had the authority to regulate in respect of railways, ships, and air carriers. Under the Act the Board could issue and prescribe air routes and schedules to be followed. The issuance of a license was predicated on the Board's satisfaction that the proposed service is and would be required by the present and future public convenience and necessity. The Board was also to approve tariffs and tolls and also had the power to investigate complaints pertaining to air services."27

The Board turned out to be more of a legislation interpreter than a legislation creator. It was a quasi-judicial body that derived its powers not from the Minister but from the actual legislation. "At this point the Board's powers did not include the power to designate routes as such, this power was reserved to the Governor-in-Council."28 Despite the fact that the new Board of Transportation had been created, it was interesting to note that most of its appointees were ex-Railway Commissioners, "and therefore Canada took the existing Board of Railway Commissioners, re-named it the Board of Transportation Commissioners, and expanded its authority to cover airline route operations, rates and schedules."29 It should be noted that route granting was only looked at from the perspective of whether public convenience and necessity was met. This system continued until the Board made a decision in 1943 that the government did not like, which unduly restricted its airline Trans Canada Airlines (Crown-owned and formed in 1937). It had to do with the access to transcontinental service, a route that the Americans had already managed to mount. TCA's mandate was to set up a transcontinental service but the Victoria-Vancouver route was awarded to Canadian Pacific Airlines (CP Air until early 1987, now part of Pacific Western Airlines).

This of course blocked TCA access since the awarding of this route to one carrier effectively blocked access to the other since markets were so small then that one carrier was enough to serve market demand.

"Government reaction to the awarding of the route to CP Air, under the proper finding of public convenience and necessity, was to transfer the Boards' powers to a new three man Air Transport Board (ATB). Section 12 of the ammended act eliminated all possibility of inconsistent policies on entry by specifying that the issuance of licenses by the ATB was to comply with any agreements between the Minister and TCA regarding routes."30 So, despite the efforts of the former Board to inject some competition into the air carrier system, the government moved quickly to establish its own flag carrier for the national good. One suspects the CP Air award was due to pressure from its powerful parent company, CP Rail. What the Aeronautics Act changes meant was that the final decision powers now rested directly with the Minister of Transport as opposed to a regulatory commission.

Distribution of Statutory Duties and Powers of the Canadian Transport Commission

NATIONAL TRANSPORTATION ACT, 1967

CANADIAN TRANSPORT COMMISSION

PRESIDENT

Duties and Powers

1. Respecting the arrangement of sittings and business: Section 20
2. Respecting the performance of functions vested in the Commission by the NTA, *Railway Act, Aeronautics Act* (Part II) and *Transport Act*: Section 21
3. Respecting the formulation of transport policy and development: Section 22
4. Respecting the establishment and powers of Committees of the Commission: Section 24
5. Respecting the making of rules and regulations, including rules governing the practice and procedure of the Commission: Sections 26, 65

VICE-PRESIDENT (LAW)

REVIEW COMMITTEE

Established 1970; headed by VP (Law): Section 7(5)

Duties and Powers

Upon application, review orders or decisions of modal Committees: Sections 24(4), 63

VICE-PRESIDENT (RESEARCH)

RESE. RCH BRANCH

TRAFFIC AND TARIFFS BRANCH

Established 1968; headed by VP (Research): Section 7(4)

Duties and Powers

To superintend programs of research necessary to achieve objectives in Section 3 and the performance of duties under Section 22: Section 7(4)

AIR TRANSPORT COMMITTEE

Duties and Powers

Jurisdiction over air carriers operating commercial air services

1. *Aeronautic Act*, Part II
2. National *Transportation Act*: Sections 6, 22, 23, 27 and 63

RAIL TRANSPORT COMMITTEE

Duties and Powers

Jurisdiction over railways, railway companies or persons having authority to construct or operate a railway

1. Sections 6, 22, 23, 27 and 63
2. *Canadian National Railways Act*
3. *Government Railways Act*
4. *Maritime Freight Rates Act*
5. *National Energy Board Act*
6. *Railway Act*
7. *Transport Act* (Part IV)

WATER TRANSPORT COMMITTEE

Duties and Powers

Jurisdiction over transportation of goods and passengers by ship in selected geographical areas.

1. Sections 22, 23, 27 and 63
2. *St. Lawrence Seaway Authority Act*
3. *Transport Act* (except Part IV)
4. *Ferries Act*
5. *Shipping Conferences Exemption Act*
6. *Pilotage Act*

MOTOR VEHICLE TRANSPORT COMMITTEE

Duties and Powers

Jurisdiction over interprovincial transportation of goods or passengers by truck or bus

1. Sections 6, 22, 23, 27 and 63
2. Part III NTA
3. Lord's Day Act
4. *Atlantic Region Freight Assistance Act*

COMMODITY PIPELINE TRANSPORT COMMITTEE

Duties and Powers

Jurisdiction over commodity pipelines and combined pipelines.

1. Sections 6, 22, 23, 27 and 63
2. Part II NTA
3. *National Energy Board Act*

INTERNATIONAL TRANSPORT POLICY COMMITTEE

1. Established 1969 and acts on behalf of the Commission in respect of the work of intergovernmental, national or international organizations dealing with any form of transport under its jurisdiction of Parliament:
2. No regulatory functions

"The ATB continued in existence until 1967 when the passage of the National Transportation Act established the Canadian Transport Commission (CTC) and merged the ATB into a seventeen member CTC in the form of the Air Transport Committee (ATC). This major re-organization did not affect the degree or extent of airline regulation since the Aeronautics Act remained in force."31 In fact the CTC had developed into a multi- modal type of regulatory commission that attained a little more of an arm's length administrative relationship with the Minister and government.

In conclusion, we have seen in our brief historical survey, the history of Canadian aviation parallels many other Canadian economic sectors. Due to the uneven economics of operating in a geographically disparate country with far flung pockets of population, Canadian carriers and the regulatory systems that govern them have been much longer in development than those of their U.S. counterparts.

Beyond this we note that the regulatory system , while all-encompassing, was a relatively small one until the development of the full-fledged CTC in the late 1960's. The liberalization of the Canadian market via the 1988 changes to the National Transportation Act which resulted in the creation of the National Transportation Agency (NTA) have indeed provided the next steps in the evolution of the Canadian regulatory process. (see diagram page 30A).

Airline Deregulation: Major Changes

		UNDER PREVIOUS LAW	UNDER NEW LAW
DOMESTIC	ENTRY	●An airline was required to apply for a licence to operate a commercial air service; licence granted only if applicant proved service was and would be required by present and future **"public convenience and necessity"** (i.e. PCN test). [AA 16.17] ●The law **did not distinguish** between northern and southern services.	●PCN test **replaced** by different entry requirements in southern and northern Canada •For services in southern Canada. Agency **must** grant licence if applicant is certified as **"fit, willing and able"** to conduct a **safe** operation (i.e. holds an operating certificate issued by Transport Canada), is **Canadian** and has prescribed **liability insurance**. [72(1)] •For services within to/from northern Canada, applicant must meet **same criteria** above but Agency may disallow application if objector proves licence could lead to significant decrease or instability in level of service (i.e. **"reverse onus" test**). [72(2)]
DOMESTIC	EXIT	●An airline had to obtain **prior approval** before suspending or withdrawing a service. [AA Regulations]	●An airline (if it has provided service at least once a week for six months or more) must give at least **120 days notice** if it proposes to discontinue service or reduce frequency to less than one flight per week. [76.77]
DOMESTIC	FARES/RATES	●An airline was required to **file** all fares and rates with CTC before they went into effect. [AA 14] ●All fares and rates had to be published. An airline had to **obtain written approval** from CTC before issuing free transportation or reduced rates. [AA 14.15] ●CTC could **suspend, disallow or substitute** any fare or rate level increase if it were found to be unjust or unreasonable. [AA 14]	●Fares and rates **need not be filed**, only published with accessible records kept at airline's offices for at least 3 years. [83] ●**Confidential contracts** between an airline and a person are **permitted**. Copies of contracts must be kept by airline for at least 3 years. [79] ●On complaint: •In the North, Agency may review basic fare **level/increase** and may disallow reduce it if **unreasonable** and order **refund**; •In the South, Agency can only disallow or reduce **increase** if it determines there is no **competitive transportation service** and increase is **unreasonable**. [80]
DOMESTIC	CONDITIONS	●CTC could **impose any condition** considered necessary and desirable in the public interest. [AA 16] ●**Licences** were **categorized**: scheduled, chartered, specialty; airlines were restricted to providing service authorized by their licence.	●Provision to attach conditions to licences **removed** for South but **retained** for North. [72(4)] ●Licence categories **removed** for South but **retained** for North. [72(4)]
INTERNATIONAL		●International services were subject to **bilateral agreements** with other countries.	●Bilateral agreement requirement **retained** but Minister given explicit power to issue binding directions to Agency on licensing/other issues and to designate Canadian carriers on international routes. [86]

Source Westac Digest, 1987

Note: Unless otherwise noted, numbers in square brackets refer to sections of the National Transportation Act, 1987

Deregulated Airline Management Strategies-US

There can be no doubt that the 1978 Airline Deregulation Act opened the door to drastic change in the U.S. domestic industry. It was change that seemed drastic for the carriers who had been trained in regulated airline management. There had been relatively little real excitement in the preceding years. There had been Delta's purchase of the old Northeast airlines and the buyout of the Mohawk airlines by the then Allegheny Airlines.(US Air) These particular transactions were seen as saving actions for the two absorbed carriers and sensible network consolidations for the surviving carriers. As we note in the table below there were many carriers that were in at the start of deregulation that have since vanished.

Pre-Deregulation Carriers.

Trunk Carriers	Local Service	All-Cargo
	Aloha	
American	Air New England	Airlift International
Braniff	Allegheny (US Air)	Flying Tiger Line
Continental	Frontier	Seabord World
Delta	Hughes Airwest	Federal Express-1975
Eastern	North Central	
National	Ozark	
Northwest	Piedmont	
Pan American	Southern	
Trans World	Texas International	
United	Pacific Southwest	
Western	Southwest	
	Wien Air	

The market was then populated by a series of relatively stable carriers. Each stayed more or less in their territories and new route access and fares were strictly regulated so the scope for significant change was also limited. In addition to the above carrier categories we note that commuters and charter (supplemental) airlines had remained relatively stable in composition and scope of activity. If any group had been the innovators it would have been the charter carriers who had enjoyed more regulatory freedom to exit and enter markets and charge differentiated fares when compared to the freedoms allowed the scheduled carriers. The supplementals were in fact the only group of carriers that could consider that they offered a differentiated and segmented product to the air-travel-buying-public. Unfortunately deregulation would spell a practical end to the supplemental type carriers because most of the new entrants sought to enter the same low cost, low service type of product category thus removing the only original product feature that the supplemental's had possessed up until then.

At the outset it is probably fair to say that very few airline managers who had been around in the pre-1938 unregulated period in air transportation were still around and in positions of authority in 1978

Absent the knowledge of the early (pre-1938) history of air transport management techniques, many managers were on their own. These managers were getting ready, unbeknownst to some of them, to blaze new trails, only this time the new trails would not be technically or airmanship- based but management skills-based. This was a radical departure for many. It was however a welcome opportunity to attempt market and financial success of higher order than might previously have been possible.

Early Strategies- Surpassing Traditional "Golden Rules"

A set of so-called 'golden rules" were evolved towards which airline managers had developed a blind faith towards. The longer the distance flown, the better the return on investment and the more efficient the operation; a hub, any hub, was the best method to build up one's network; operating in high volume markets was always preferable to low density markets were a couple amongst other similar adages that seemed to abound. Overnight these and other previously held wise truths were not only challenged but many exceptions to these so-called golden rules became apparent. An early rule seemed to be that the best and fastest way to acquire market share in new market city pairs was, of course, to lower the fares.

United was obviously a firm early believer in the golden rules. United began a strategy that would have them drop out of many smaller markets and concentrate on the key transcontinetal markets. It had always been true that the longer the route the more efficient the operation. This was based on the simple truth that the most expensive parts of a flight were the takeoff and landing. Therefore, it stood to reason that the more distance between takeoff and landing (time at cruise altitude and configuration) the better and less expensive the operation. United had, like many other carriers, developed a network over many years that included many different sized markets. United's fleet, then the largest in the free world, was composed of several different sizes of airplane. The problem was that some of United's smaller markets were a little too small for their smallest jet (the Boeing 737) and therefore these operations were assessed as inefficient. In the regulated environment the tendency had been for United to retain these markets in an attempt to build them to acceptable levels. A prime reason why this made sense was because new domestic U.S. growth opportunities were rather limited. Now, however, the deregulated U.S. domestic market presented United with a plethora of seemingly viable commercial opportunities. It seemed that the rational thing to do was to abandon these smaller markets and concentrate on the bigger medium and long haul markets. United could streamline the number of types in its fleet and replace marginal short haul routes with better ones.

This is exactly what United began doing. They abandoned many smaller routes and initiated a reduction in the size of their smallest fleet type (B-737). They also increased their presence in the premium long haul markets. It all made sense, a large carrier prior to deregulation, United thought it could become dominant in many larger markets and improve its overall viability. A relatively short period afterwards United reversed its strategy. Why? Some of the key reasons revolve around the fact that United had exercised what would have been considered good decision-making in a regulated environment but one which failed to recognize the new realities.

First of all, the long haul markets became less desirable for two reasons. The first was that virtually every carrier thought that the long haul routes were best and therefore a large increase in competition occured in these markets. In fact, by 1982 none of the airlines flying the transcontinental routes was making as much as a 1% return on sales. The large influx of new competition brought with it the inevitable corollary of price wars.

Price reductions were necessary because the supply of seats quickly began to exceed demand. Because of this, the yield on these routes dropped drastically, a 50% drop in fares on some sectors within months of deregulation. Carriers who had previously been considered supplementals, such as World, began making the New York-Los Angeles route the most price-competitive in the world. World brought with it, its low price heritage which did nothing to improve the yield of its trunk carrier competitors. Because of its higher cost structure and restrictive labour work rules United had more trouble competing on price. A second major unforseen consequence of United's withdrawal from small markets was the attendant drop in feed traffic at its hubs. It may have been assumed that consumer loyalty that had been traditionally attached to United would simply stay with United. Unfortunately, consumer loyalty in many smaller centers went to the carriers that could get them all the way to their final destination online. (on the same carrier) The concept of air hubs had already evolved into the most efficient operational network structure around. Hubs had been more difficult to develop in regulated times simply because additional market access, that may have been required to enhance the size and market catchment area of the hub, were not easy to obtain in the CAB era. In the new deregulated era any carrier could fly any new routes it wished to, so hub building was greatly facilitated. United soon realized this and began returning to smaller markets and re-acquiring more smaller jets in order to enhance operations into lower density markets. In contrast to United, Delta used the reverse strategy and concentrated on shorter haul routes and the development up of its super-hub in Atlanta.

Distribution of Stage Lengths (Domestic-1981)

Stage length in miles	% of flights	
	Delta	United
less than 400	66	14
400 - 799	21	32
800 - 1199	10	24
1200 - 1599	10	24
1600 and over	3	9

Source-Lockheed.

We note that Delta had 87% of all its domestic flights flying distances of less than 800 miles whereas United had 53% of its total domestic frequencies flying 800 miles or more. This was one of the key factors which resulted in the following operating statistics for the two carriers for the 1981 year:

1981 statistics	Revenue Passengers	Departures	Net profit (Loss)
United-----	28,690,000	337,492	$(104,892,937)US
Delta -----	34,777,000	517,477	$ 91,640,000 US

While it would be misleading to say that Delta's network was entirely responsible for the difference, it is safe to assume that it had a definite impact on the outcome. Certainly Delta's network development activites, characterized by their direct hub enhancement strategy, would appear to have been better than United's hub-dismantling followed by hub re-construction strategy. In fact the whole issue of how to go about developing an optimal route structure was an early learning ground for many carriers. On first blush it would seem that air hubs are contrary to the concept of optimized customer service. It would be difficult to convince a traveller that it is better to fly one-stop than non-stop.

It is also true, however, that operating through a hub where all of the outlying points are roughly equidistant from the focal point is the most efficient way to fly airplanes. In an era of deregulation, however, it was customer satisfaction that was to have taken precedence, or was it ? It soon became evident that the hub could also enhance service to the consumer by allowing economic operation of more frequencies between smaller or medium-sized centers and the hub. While the use of non-stop flights was preferable, the number of non-stop frequencies in any market was controlled by the market size of that city pair. (e.g.- New York- Los Angeles). The frequency of service in a hub connector market was contingent on how much traffic was flowing between the point of origin and all the other points connected through the hub. Therefore in the case of a hub such as Delta's at Atlanta, with 192 departures a day (1981) that were coordinated to come and go in hub complexes (connection banks), the frequency between many points and Atlanta was much greater than could have been justified by a simple point to point non-stop frequency. This meant that 1 nonstop/day in any given market could be complemented by 2 or 3 one stop flights via the hub airport. This was amenable to consumer preferences which in many case listed frequency of service as high a priority as non-stop service .

This co-mingling of traffic was therefore helpful to the airlines who operate more efficiently in a hub configuration, as well as to the consumer who got more choice of frequency. In fact hub type operations became the so-called "state of the art" configuration for network design. So much so that carriers began to concentrate on ways to improve hubs and their attractiveness to air travellers.

Evolution of the Hubs.

Piedmont Airlines had usually been a competent smaller regional carrier that had served a part of the country neglected by many other carriers, namely the mid-Atlantic seabord states. In the late 1970's and early '80's Piedmont grew at an astounding rate.
As with many other carriers, Piedmont took advantage of free market access but they did not attempt to grow through acquisition of another major carrier, nor did they spend much energy on greatly expanding the geographic area that they served. Instead they concentrated on perfecting their operations in many of their familiar territories. As the first serious and concerted proponent of the perfected or second generation hub concept, Piedmont was able to attack the market with a new variation on the existing hub strategy. Piedmont became

very competitive with the trunks such as Delta and Eastern because they went beyond the simple fact of having a hub to having a hub of higher quality than the others. In practical terms this meant less airport congestion which meant better on-time performance, newer facilities that were more pleasant to wait in, and the same large network of available connecting points as at the big hubs. Piedmont decided that Charlotte, N.C. was the point on which it would center its operations. It got good mileage out of the fact that its main competitor, Delta, was encumbered by the delay-causing Atlanta hub that had grown very quickly over the last 24 months. Connect at a better hub, for a lower fare, was the message consumers got. It seems to have worked very well and Piedmont managed to install itself as a major conduit for north-south traffic on the eastern seabord.

1981 Growth in Market Share

U.S. Industry Rank	Carrier	Revenue Passenger Miles	Market Share
1	Piedmont	+36.9%	+41.1%
2	Frontier	+17.8%	+21.9%
4	Republic	+ 7.9%	+11.3%
9	Delta	- 4.1%	- 1.1%
13	United	- 9.4%	- 6.5%

Operating Profit and Operating Margin for Traditional Carriers 1981 (1st 9 months).

Rank	Carrier	Ops. Profit ('ooo's)	Ops. margin (%)
1	Piedmont	$41.5	10.2%
2	Frontier	$41.9	9.6%
4	US Air	$41.7	5.1%
6	Delta	$84.4	3.1%
12	United	-$25.5	-0.7%

As Piedmont itself says, "traditionally we had operated into New York and Chicago. Now when deregulation came along, all those super franchises (routes), the airlines had for so long and that were reportedly worth millions of dollars were now open for the taking....and we chose not to get into it and we certainly have no intention of getting into it....instead we chose a very different philosophy which was really two pronged. First, was a philosophy of bypassing regular route junction points ...The second prong to our philosophy, of course, has been a matter of feeding ourselves, the so-called hub and spoke concept."32

The added beauty of the Piedmont strategy was that they spread their risk by building up hubs at not only Charlotte but Dayton and Baltimore as well. By serving Baltimore/ Washington airport (BWI) Piedmont was clearly accessing the Washington market without having to build a major presence at a slot-restricted airport. (Washington National). The fact that Piedmont had several hubs meant that by definition they were less vulnerable than say a Delta that at the time had only one real hub. Piedmont and US Air had similar feed and market penetration and selection strategies. They stayed in the smaller medium-sized markets where the levels of competition were lower, yields higher and the chance to build up regional loyalties better due to the fact that these carriers took you all the way to your final destination online. A sub-strategy was the liberal use of commuter carriers to feed traffic to smaller jet-prone markets and build up grass roots level feed. There was good money to be made in connecting medium-sized centers to each other, smaller centers to each other, and medium and smaller centers to the big ones. Both Piedmont and US Air seem to have been adept at capitalizing on these circumstances. As the 1980's progressed we noted that multi-hub operations began to spring up everywhere. Delta, American, Continental and others all got involved in multi-hub operations which served to spread risk and allow a multi-pronged attack against competitors. Looking at what used to be a winning strategy for Piedmont in the early 1980's one must re-evaluate how long it will work. United has set up a competing Washington area hub at Dulles (100 flights/day by 1988).

Delta has picked Cincinnati as its Ohio hub while Continental is trying to turn Cleveland into its Ohio hub, this in addition to Piedmont's Dayton hub. Raleigh-Durham has welcomed an American Airlines hub, which by 1989 will have 280 daily flights by AA and AA Eagle commuters, while Memphis is another American airlines hub. These newer hubs are in addition to the well known hubs such as United's Chicago, Continental's and United's competing Denver hubs, TWA's St. Louis and Delta's Salt Lake City (ex-Western) and Atlanta. The issue for Piedmont will be how to maintain leadership in the hubs war. Their own hubs at Charlotte, Baltimore and Dayton are becoming busy and over time could be congested and reminiscent of the Atlanta type centers they were designed to replace. When their existing hubs become overly congested where will they establish their next hub ? Many are projecting a return to more point to point non-stop services. One of the reasons for this suggestion involves the varied behavior of the consumer. In healthy economic times when fares and yields go up will the passenger demand better schedule integrity and superior hub performance and fewer stops on the way to wherever they are going ? While some of these factors may conspire to increase the number of non-stops, few would say that hubs will disappear. In fact additional airports, or capacity within existing airport infrastructures at major airports, should grow over the next 5-10 years with new airports at such places as Denver. It is interesting to observe that the advent of deregulation has given carriers the chance to completely wean themselves off of linear schedules. Carriers can then progress through the simple hub and spoke and beyond to second generation (perfected) to multiple combinations of large, medium and mimi-hubs all operated by the same carrier.

The Early Experience

Overall, it is safe to say that most carriers were finding life to be very different. It may have been assumed by the politicians that the air transport industry had reached a state of maturity that would allow it to be left to its own devices but the road to achieving an acceptable status in a freely competitive environment had been expensive for some. After the early years of deregulation a pattern of carrier structures evolved which developed a certain predictability. The meshing of existing carriers, and several types of new entrant carriers formed a clearly segmented industry that still exists today. Both the demands of the consumer and the general economic cycle have conspired to force carriers into a defined set of options.

The issue was that in a deregulated industry the carriers had had difficulty in defining anything constant about their situation. In fact the relatively large upheavals that were to take place in the 1981-82 recession served to demonstrate what will happen in the next recession now scheduled for 1989-1990. It is in fact the putting into practice of the realization that air transportation in the U.S. has become like any other domestic industry sector and thus is prone to the extremes of the economy. There are no economic regulations to impede the cyclical evolution that takes place in many other sectors.
In fact the airlines have been thrust back into a corporate life cycle that now provides for the extreme options of either succeeding or failing in a spectacular, and sometimes final, way.

U.S. Domestic Carrier Types

The US industry has therefore evolved into a predictable industry structure that has spawned three basic types of air carrier. The type 1 carrier is the high cost/full service carrier that many became used to in the days of regulation. These carriers were around in the pre-1978 era and in fact the complete lack of differentiation among scheduled carriers meant that almost every interstate U.S. carrier was a type 1 airline.

These carriers were characterized by high labour costs in combination with inflexible job tasks, high debt, low profitability, high fixed costs, a primary hub network strategy and an exclusive concentration on price competition in the first 2-3 years of deregulation. Carriers who fell into this category in 1982-'83 were Eastern, Western, Pan Am, TWA, Continental (prior to Chapter 11), Frontier, United and Republic.

The type 2 carrier is the direct opposite of the type 1. It is characterized by low labour costs and flexible job tasks, low overheads, relatively low debt, second generation hubs, and a similar exclusive concentration on price as a marketing tool. The difference on price competition was that type 2's could afford to compete on price since their costs of operation were far lower than that of their major carrier type 1 competition.
Carriers in this category were Midway, People Express, (prior to merger),New York Air, (prior to merger), Altair (prior to bankruptcy), etc.

The last category, the type 3 carrier is, as stated earlier, a hybrid group of carriers. This group is the one that is characterized by the lower cost operating structures of the type 2's but the full or differentiated product of the type 1's. The early inhabitants of this group were new entrant carriers who sought to maximize the positive spread between lower costs and the higher yields of the full service airline. Several carriers went directly into this group and met with limited success. Air Atlanta, Air One, Regent Air among others tried and eventually failed. By entering the market as type 3's they had limited abilities to gain market presence for a variety of reasons. Many of these new entrants came into being just after the pit of the 1981-82 recession. As such the major carriers were beginning to recover and were eager to squeeze out any competition in their higher yield segment. In addition many of these type 3 carriers never got big enough to provide regular, dependable high frequency service on a large enough network of operations. There were 2 later categories of type 3 carrier. Both of these groups joined the ranks of the type 3 carrier after having evolved from either type 1's or type 2's. The latter group is composed of carriers such as Midway that adopted the Midway-Metrolink concept of product segmentation after having been a simple type 2/Midway product. The Metrolink product provided a higher quality level of pre-in and post flight service and was more clearly targeted at the business traveller. The Metrolink concept retained the low cost, low overhead operating structure of the previous incarnation Midway Airlines. (the first new entrant after deregulation in 1978). New York Air was another type 2 carrier that was part of the Lorenzo Texas Air Corp. group of carriers; it was eventually integrated into Continental. The third and final group of type 3 carriers were composed of the improved and leading carriers from the type 1 category. It could be argued that Delta, Northwest and American had been far enough ahead of their established carrier competition to have been practically considered as type 3's from 1978 on. Delta relied on its early and successful exploitation of the hub strategy, a non-unionized labour force that had equal if not better pay than the others but a more productive and flexible attitude towards job tasks all of which was complemented by a solid balance sheet. American was in trouble during the early days of deregulation because of an old fleet, high labour costs and all of the other traditional maladies of the regulated carriers. They came to the forefront primarily on their ability to develop a strong marketing capability that included the awesome distribution strength of the SABRE computer reservations system. In fact it was true that the profits from SABRE are a fairly healthy cross-subsidy facility for the airline. The development of the Dallas-Ft. Worth hub, after Americans move from New York, also helped improve the carriers' position. Finally, Northwest was recognized as the stingiest carrier around with an ultra-conservative financially-based management style. When going into the uncertainties of the newly deregulated environment and an impending recession, one could argue that this may have been the best possible management style to adopt. Financial management, along with a very tough attitude towards organized labour, helped keep Northwests costs the lowest of the big established carriers. Despite a number of strikes, Northwest had managed to keep the lid on labour costs. So these three carriers were in the forefront when deregulation struck, whether they had planned it or not. The identification of these three distinct types of carrier was only part of the story however. Using these three categories it became possible to project, with some degree of accuracy, the strategic options open to various carriers or categories of carrier. As U.S carriers were just beginning to get used to a deregulated environment they were forced to deal with a more serious obstacle to their individual survival, their first recession since being liberated from the protective cocoon of CAB regulation. This was to be a challenge and learning experience that would cost the industry billions of dollars and some carriers their corporate lives. It was to be the most serious threat the industry had faced, topping even the previous oil crises.

Carrier Types and the Economic Cycle.

One would assume that a recession,as occurred in the U.S. in the early 1980's would be bad news for all airlines. In looking at the carrier results we note that this was not true. It tended to be the larger, established carriers that had the most trouble. In fact the smaller new entrant carriers seemed to prosper with many posting 100%+ growth rates. It is true that one of the unexpected consequences of deregulation has been that not all carriers now have to face an economic downturn with a sense of impending doom. Similarily not all types of carrier face the economic upturn with an equal sense of excitement. In fact various types of carrier are strong or weak relative to each other at different points in the economic cycle. These inherent, structural factors cannot be ignored since they do impact various types of carrier structure depending upon timing and whether the carrier is a type 1, 2 or 3 airline. From these assumptions flow a concept that each of these types of airline has a zone of vulnerability as it does a zone of strength.

Zones of Vulnerability

Starting with the type 1 carrier we note that the downside and pit of the economic cycle represent the worst operating period for this group. This is a rather conventional expectation since most firms in most lines of business have a harder time during the recessionary phase. In the downside and pit the high cost, full service type 1 cannot defray costs by growing since the market is invariably contracting at this point. In addition, the overhead structures type 1's build up during the good years cost them a lot to retain. Large maintenance structures, in particular, are often underutilised as type 1's dump aircraft in order to consolidate and cut costs. Since it is difficult to cut off 20-30% of ones maintenance building, the type 1's invariably grant indirect help to their low cost type 2 competition by selling them underutilised maintenance capacity at bargain rates. This in turn means that the type 2's can avoid setting up most of the maintenance structure (hangars and facilities) within their own airline. Airport terminals, slots and gates also are sold off to the growing carriers during this phase, the type 2's and 3's. The timing of fleet acquisition and disposal has a critical effect on the relative strength of the carrier types. In downturns, the type 2 amd 3 carriers can pick up 2nd hand aircraft at bargain basement prices, as the type 1's are forced to unload excess capacity. These aircraft then represent an advantage that can be used for the rest of the recession and into the next cycle. This gives type

2's and new entrant type 3's a structural advantage over type 1's. The negative impact is compounded by the fact that type 1's tend to purchase new aircraft at or near the peak, when things are going well, and take delivery during the downside and pit. This means, of course, that the type 1's are making heavy lease and/or mortage payments when they can least afford to, during the recessionary phase. For type 2's and type 3's, on the other hand, the zone of vulnerability includes the top half of the upside and the peak of the economic cycle. At these phases, the higher cost operators can use the same tactics that they employed in the regulated market.

A Sample of Carrier Evolution Between Types.

1980		1985	
TYPE 1		TYPE 1	
Eastern	Northwest	Eastern	Frontier
Delta	Republic	U.S. Air	
U.S. Air	Piedmont	Republic	
Continental	Frontier	Western	
Ozark	American	Ozark	
TWA	Braniff	Pan Am	
Pan Am	Western	TWA	

1980-'84.	1985
TYPE 2	TYPE 2
People Express	People Express
Altair	Braniff
New York Air	Continental
Midway	Presidential
Frontier Horizon	

1980-'84.	1985
TYPE 3	TYPE 3
Southwest	Southwest
Midway Metrolink	Midway
Air Atlanta	Air Atlanta
Air One	Delta
	New York Air
	Northwest
	American

These included domination of the distribution chains, through expensive computer reservations systems, purchase of more efficient aircraft and control of gates and slots at key hub airports. All these cycle upside and peak oriented strategies depend on growth in the market. Increasing revenues enable the type 1's to expand into new sectors and use their sheer size to conquer the smaller niche players. During the upside and the peak the bigger carriers can afford to go after all sectors, undertake more vigorous fare wars with a greater chance of success resulting in fights with smaller carriers for even 1 or 2% market shares. At other points in the cycle the type 1's and cannot afford to segment their operations to the extent necessary to compete with original type 3's which have specialized in an all-business or similar operating format using a low cost operating base. This set of forces has been largely responsible for the problems that were faced by type 3's like Midway, Air One and New York Air in late 1985. All of a sudden these carriers were being actively pursued by larger carriers who were gaining back their market strength and able to compete for customer loyalty using expensive but effective and attractive frequent flyer programs. It is a fact that these larger type 1 are and will continue to be better growth absorbers in the upside and peak, than the smaller former new entrants are, simply because of their size and resultant market and network synergy In addition the factors of production that had been so cheap and readily available to the type 2's and type 3's during the recessionary phase had all but disappeared. Cheap, trained labour, second hand aircraft, cheap gates and slots were no longer available. For this reason Texas Air among others had to start buying new aircraft for its member carriers- a move that was expensive and will hurt Continentals' costs in the next downturn. Finally, the huge capacity of the type 1's to generate cash during the upside of the cycle is a key factor in determining their decided strength over other types. It is one of the prime reasons why merger fever has emerged, again, as a popular strategy during late 1985, 1986 and 1987. It is equally clear that in the downside and pit of the economic cycle the dynamic and lower cost type 2's and 3's are better market share stealers than the larger type 1's. Gaining market size becomes key because during the upside and peak of the economic cycle the larger the carrier, the larger the synergy, network and market share. This in turn means that market growth absorbtion is facilitated for the type 1's.

The reversal of the prevailing economic scenario serves to negate size because it is often less efficient in a declining market. That is why mergers between medium and large sized carriers are less successful in the downside and pit of the cycle and why the bigger, higher cost type 1 carriers find that the same synergy of size that stood them in good stead during market growth has betrayed them in the downside. This roller coaster-effect of size that provides huge sums of operating cash flows in the upside/peak often leads to large cash flow operating deficits in the downside/pit. This weakening of the larger type 1's often gives their smaller competitors the breathing space they require to grow, primarily through market share steal. The trick is that the new entrants must grow fast enough to have comparable synergy before the next peak arrives; otherwise they are at a real competitive disadvantage. Of all the new entrants since 1978 only the Texas Air Group was able to make the crossover from new entrant to large carrier in the period between the economic pit of 1982 and the upside/peak of the cycle in the late-1980's. As a result the Texas Air Group of carriers are the only major new entrants left in the U.S. domestic market. All of the other remaining new entrants are segmented either by geographically regionalized networks or by their product offering. The Texas Air Group achieved cross-over to bigness and synergy not through internally-generated growth but through acquisition and merger. By combining the remains of the debt-ridden Continental, Texas International, new entrants, New York Air & People Express (Frontier as a piece of People Express), and later Eastern Airlines, Continental was able to achieve the synergy of bigness fast enough to stay a major player in the market. This was not achieved without much dislocation to employees and has resulted in a conglomerate carrier that is not out of the woods yet. Continental still has to worry about $3,9 billion of debt among other things.

The experience of the last economic cycle begs the following question; can any new entrant get big enough by itself to become a significant and sustained (long term) competitor in the industry ? The last cycle shows that the only carrier that is still around is composed of two of the weaker former type 1's (Continental, Eastern), the largest of the new entrants, People Express, plus three smaller carriers of various lineage, (New York Air, Frontier and Texas International). The fact that the weaker market players were absorbed into a bigger, hybrid carrier (composed of type 1, 2 and 3's) illustrates the survival of the fittest dictum. In the next economic downturn one can expect a new crop of weaker type 1's to be absorbed into another growing carrier. The difference is that in the next economic downturn, the second since U.S. domestic deregulation, the prevailing cost structure gap between new entrants and the established carriers will be less than in the previous recession. The larger carriers of type 1 structure will be more efficient than their predecessor type 1's were in 1981-82. Therefore, the competitive dislocation will be diminished. This trend towards increasing industry stability through all phases of the economic cycle should continue unabated until one reaches a point, in the 4th or 5th economic cycle since deregulation, that the cyclical regeneration of new entrant competitive carriers will be greatly reduced. At that point the incumbent carriers will have developed the flexibility to remain relatively cost and service competitive through the downside and upside of the cycle. Because of these more flexible and healthier carriers the barriers to new carrier market entry will be greatly increased. This is not to say, however, that market niche new entrant carriers will not continue to enter the market, especially during the downside and pit of the cycle. One could speculate that once the U.S. domestic industry has reached this point of relative stability (oligopoly) that the politicians might not try to re-regulate the buisness in order to provide more equal access to markets for smaller carriers. It is commonly known that the re-regulation of access to limited airway and airport infrastructures is a potential solution to the artificial barriers to entry now blocking smaller carrier access to these airports. In 10-15 year time could incumbent carrier size represent another inequity in the system ?

As the upside and the peak of the economy arrive the words "customer-service" take-on new importance. "When discussing the new Delta advertising campaign , Mr.W. Hawkins, Sr. V.P. Marketing at Delta said: "the campaign focuses on personal service, which is the single most important reason people choose one airline over another, since fares and equipment are at parity". (in the upside and peak of the economic cycle). Large segments of the market no longer look at price as the only criterion and are in fact willing to pay for better service. The large, low cost, Texas Air Group of carriers were far behind their established contemporaries in this area. In fact Continental must now impair its low cost structure to add large chunks of overhead costs in order to support better customer service within its airlines. Another carrier that took early advatage of this swing in consumer preference segmentation was People Express. By providing no-frills at the right time they achieved phenomenal growth in the pit and recessionary phase. Paradoxically, it was their ignorance of the impact of abandoning their chosen segment that was one of the key downfalls of PE on their way to being absorbed by the Texas Air Group.

Clearly the different phases of the cycle constitute different zones of vulnerability for the respective carrier types. Even so, some carriers do try to bridge the gap with hybrid strategies designed to borrow on the strengths of another type of carrier. America West, which went rapidly from a type 2 to type 3 in its early history, decided to sign a feed agreement with Northwest at Phoenix. Even though the agreement has since lapsed it was entered into at a critical point along America Wests' growth curve, the fledgeling stage when resilience to large carrier competition is at its lowest ebb. Northwest was in fact a competitor of America Wests' in earlier times in addition to being an impediment in their quest to obtain a dominant share of the Phoenix hub market. (something America West now has). By having the feed agreement, America West freed up Northwest to fight competitive battles in other markets while providing critical longer haul European and Asian feed to the Northwest system network. It also allowed America West to build up strength at Phoenix. After the agreement was de-activated America West kept its market advantage. From the concepts of zones of vulnerability several complementary sub-strategies can be developed. The key concept which cannot be forgotten is that every point in the economic cycle has its peculiar and specific characteristics. Different types of carrier do better at different times and none do inherently well at all phases of the cycle.

Sub-Strategies in the Next Recession.

Some differences between the last recessionary cycle and this one will revolve around network development. Last time many cities such as Newark, Kansas City, Phoenix, Raleigh-Durham, Dayton, Cincinnati, Cleveland, Midway Airport-Chicago, Dulles Airport-Washington, Salt Lake City and many others did not have hub or mini-hub operations headquartered there. In addition several other hubs such as Charlotte, Baltimore/Washington and others were not as well developed second generation hubs as they are today. The issue becomes finding a market slot for the new entrant to key on

A subsidiary issue is one which deals with the question of how many carriers will be able to maintain hub strength at multiple hubs ? Will Continental be able to maintain Newark, Miami, Houston and keep up in the constant fight with United for hub dominance at Denver ? Will the new U.S. Air/Piedmont manage to keep all of their hubs at Pittsburgh, Philadelphia, Dayton, Charlotte, Baltimore and Syracuse competitive ? The ability for one carrier to maintain market strength and dominance at multiple-hubs will be a new skill for many carriers and one which may not be easy to practice. Every hub is prone to attack, especially by low fare type 2 new entrants and the incumbent carrier will have to decide how much money they will expend to defend a hub and which hubs in order of priority they would be most willing to defend. Of the 50 U.S. airports with passenger enplanements of over 500,000 (2nd quarter 1987), 15 showed the number 1 carrier at that hub with in excess of 45% of airport total enplanements*. Another 18 airports show the number 1 carrier with in excess of 25% of total airport enplanements*. Of the seventeen remaining airports we find that San Diego, Orlando, Los Angeles, Las Vegas, Columbus, and Boston as key undefended hubs*. Airports like Los Angeles and Boston are difficult to penetrate because of slot constraints at key times but the others could represent a home base for new entrants. It is in fact true that infrastructural constraints at key airports help the incumbent hub carrier in any hub war unless the government opts to legislate more equal access to slots and gates at that airport, as has been done in the past. Another way for a new entrant to install itself could be to buy out one of the smaller existing type 2 or type 3 carriers and build a base at the acquired hub. Finally, one must wonder when the U.S. market will have reached saturation point on the number of hubs within its borders. While Columbus remains one of the few unexploited hubs of any magnitude, one wonders whether the state of Ohio can withstand a fourth hub (after Cincinnati, Dayton, Cleveland) within its borders. There can be no doubt that there will be fewer new hubs established this time

*- Source- Aviation Daily.-November, 1987.

around the economic cycle but that more inter-hub rivalry will develop with the quality of hubs and the transit experience they offer consumers taking on a new importance. Hub wars will become commonplace with the losers abandoning hubs instead of losing their whole airline to the competition. With no or negative growth it stands to reason that in the recessionary phase some hubs will change hands and 2-4 newer hubs will be created. Several analysts also predict a return to more of a linear network which overflies hubs. This revised network strategy may eventually come about simply because it is different from the status quo or because it does offer customers more direct access to key points. The chances of this change coming about during a recession are limited simply because linear-type networks are much more expensive to operate than hubs and in a recession that kind of additional expense will be difficult to sustain. It will, be interesting to bear these market-based experiences and realities in mind when looking at the antitrust implications of a deregulated air industry in future chapters.

The Economic Results of Change-Canada

Looking at the Canadian market one notes a relatively small population mostly strung out in a 150 mile wide band adjacent to the U.S. border. The enormous size of the country (2nd largest in the world in land area after U.S.S.R.) means that competition from ground modes of passenger transportation is limited to short distances. Originally, there was a relatively limited number of carriers that were divided into four echelons.

The 2 trunk or national carriers flew across the country and internationally and the 5 regional carriers were each assigned to a specific geographic zone within the country. In addition there were some commuter carriers and several charter carriers. By the time the impact of deregulation had been felt in 1986, the bill amending the National Transportation Act had yet to be passed, Canada had experienced a net decrease in carrier population. All of the regional carriers, Pacific Western, Nordair, Quebecair, Eastern Provincial, Transair (absorbed into PWA) have been assimilated into the new Canadian Airlines International Limited. Air Canada has remained intact and a former charter carrier, Wardair, has recently been bought out by Canadian Airlines International. The fact that deregulation was introduced in the upside of the economic cycle, contrary to the U.S. experience, meant that the larger type 1 carriers in Canada were able to take advantage of their superior market size to overcome the smaller regionals. By introducing deregulation in the upside the government also made it more difficult for any (jet carrier) new entrants to come into the market. This difficulty of access was exacerbated by the relatively small number of high density domestic sectors in Canada that were prone to market entry. Since there are few sectors, it becomes that much easier for the incumbent carrier to defend against incursion by a new entrant. In fact there have been no new entrants into the Canadian market, except for commuter carriers, since de-facto deregulation took effect 18-24 months ago. Canada has had a de-facto deregulation ever since the route access mechanism, and its regulatory agency, were effectively by-passed by a series of carrier appeals directly to Federal Government Cabinet. The unofficial deregulation in Canada has really reduced competition in the area of mainline jet operations. It has, however, spurred a growth in the number and size of commuter carriers. It is true most of these new commuters are either owned by Air Canada or Canadian Airlines International Limited (CAIL) but the scope of this type of operation has increased dramatically. The market has gone from having three levels of carrier to having two levels.

The elimination of the former regional airlines has meant that commuter operations had to expand to pick-up the slack in capacity to many smaller points that were uneconomically served by jets before deregulation. So what has really happened is that a majority of smaller sized communities have experienced an increase in frequency but with smaller turbo-prop airplanes. Part and parcel of this trend has been an improvement in effeciency by the big carriers who can now pull jets out of smaller towns and re-deploy them more economically on other denser city pair markets. Since the major area of change has been on the lower density routes there often is only room for one or two commuter carriers to compete. Therefore, the limited increase in competition has come in the commuter markets, not the mainline routes.

Canada also happens to have one of the most travelled populations in the world. Consequently there was very little dormant demand waiting to be released by a move to deregulation.

A synopsis reveals that the number of competitiors has dropped, except among the commuter ranks. Leisure air fares had already been low and it would be difficult to credit Canadian deregulation with giving the consumer significant incremental benefit. One could say that while quality of service has dropped in many markets, from jets to props, the frequency of service with smaller gauge props has increased. In the next economic downturn the expectation is that one or even two new entrant carriers may decide to try and penetrate the limited number of city pairs where additional competition might be sustainable. These carriers will inevitably be type 2 low cost low service carriers and will try to compete on price since this is a segment where Canada has no competitors today. The ability of the potential scheduled carrier new entrants to survive past the next economic upturn is highly questionable. So the Canadian market is one that has not really benefited from deregulation yet, except at the commuter carrier level.

The Economic Results of Change-Europe

Market Structure

While it is true that the U.S. environment and the various European air transport environments are different, it is also true to say that the industry structures vary as well. In the U.S. there were three categories of air carrier as there are in Europe. The relative strengths of these types of carrier are quite different. The U.S. environment was populated by high cost, full service type 1 carriers with very little to choose from between them in terms of product quality. In Europe we note that prior to the mid-1980's all of the major European scheduled air carriers were also of the high cost full service type 1 variant. Since the mid-1980's some smaller regional jet carriers have begun to gain market momentum although their growth has been restrcicted by regulatory hurdles thus far. The difference in Europe is that the various type 1 (high cost /full service) scheduled carriers do display a marked difference in brand quality. This differential has allowed certain carriers to garner higher shares of the high yield business traffic than others.

The second category of carrier in the U.S. prior to deregulation was the charter carriers or supplementals as they were then known. In the U.S. this group of carriers who were a relatively small presence on U.S. domestic segments when compared to the large importance of non-scheduled carriers in Europe. The intra-European market share of the charter carriers has traditionally been around 60% of the total passengers carried. In fact from 1971 to 1984 the actual non-scheduled carriers market share rose from 58% to 63% of the total. This has been balanced by a loss of market share on several international sectors including the North Atlantic. As a result of the loosening of tariff regulations and an increase in scheduled route rights exchanged in more recent European-N. American bilaterals the scheduled carriers have been able to increase their share of the overall market especially since the early 80's. The third category of carrier that is common to both environments is the commuter carrier. As in the U.S. the commuters in Europe have enjoyed a less stringently regulated environment than their bigger scheduled carrier competitors.

European Industry Structure-Carrier Types.

Leaving aside the commuter carriers for the moment, I would like to take a closer look at the two dominant types of carrier in Europe today. Beginning with the type 1 high cost/full service carriers we note that they have a rather similar structure to the U.S. based type ones. Both have high costs of operation, high fixed costs, high salaries and inflexible job tasks characterize their labour resource. The fleets of these carrier are populated mostly by new, fairly young, aircraft. High debt and full service type products are other common traits between U.S. and European type 1's. The factors that differentiate the two groups are the ownership structures, with U.S.

carriers being privately-held while the European carriers usually have a majority of government ownership. European type 1's also come from different countries, not different states or provinces like the U.S. While U.S. carriers are more reflective of their American roots than their Dallas, Atlanta, or Minneapolis home bases, in Europe the contrary is of course true. European carriers are not so much European as they are German, Austrian, Italian or French. Whether these carriers want it or not, consumers often associate the national traits of a country with their home carrier. Lufthansa must be mechanically excellent and punctual because they are German. Swissair must also share this endless concern for punctuality and the Swiss fetish for cleanliness. As a consequence the European carriers have gone much further in branding themselves and their air transportation product than the U.S. carriers had prior to 1978. As a result there are two sub-categories of type 1 carrier in Europe. The type 1 prestige brand airlines are those that have accomplished not only a full service product, which all type 1's have, but those who go beyond to have a high quality full service product.

In order to deliver these higher quality full service products, these prestige type 1's have evolved specific characteristics of their own. A primary concern to many of these carriers is the state of their home base of operation, their home hub. Europe, as a consequence of geography and sovereign boundaries, has been forced to set-up better, more sophisticated hubs faster than their American brothers did. I speak not of a simple primary hub where a collection of airplanes come and go in a somewhat coordinated fashion, but of superior air transit and passenger processing facility. An airport that is so ergonomically correct and passenger friendly that passengers don't even feel as if they are being processed. A variety of features including intransit areas, large roomy holding areas, jetways, a large variety of services and of course a good schedule of flights and connections all help to make the second generation hub a different place to go through than the basic primary hub. Building and maintaining these facilities is expensive but the carriers who have found their way into the prestige category have inevitably managed to afford this expense. Other factors that differentiate the prestige from the standard brands are their network, the state of their fleet, their punctuality and overall product image with the customer. Carriers in the standard category provide basic transportation with relatively few frills and an operation that may not be as predictable as that of their prestige type1 competition.

The second category of carrier is the type 2 charter carrier group. As previously mentioned this group is much larger and more powerful in terms of market share, than their U.S. counterparts were at the beginning of deregulation in 1978. What is interesting is that the cost of production gap between most of the highly efficient European charter carriers and the European type 1 scheduled carriers is very similar to the gap that existed between the big type 1 U.S. carriers and their new entrant scheduled type 2 (low cost/low service) competition.
In other words the market segment that was filled by new entrant carriers in the U.S. may be at least partially filled by type 2 charter carriers crossing over to scheduled operations. This would mean a reduced role for new entrants in Europe and more formidable, better established competition from the outset for European majors. Within the type 2 category there are two distinct although subtle sub-categories of carrier. The first is the non-aligned type 2 that is characterized by low operating costs, a mix of union and non- union, low cost labour with inflexible job tasks. (not many pilots loading baggage here), mostly new aircraft, a primary hub or strictly linear route network which, of course, varies in form from season to season. Other attributes include low fixed costs, private or wholesaler-owned, a lower quality

product (caters to bulk leisure traffic), and a varied level of subsidiary activity either directly or through the parent firm.

The second sub-category of type 2 are the aligned group that are usually a subsidiary company of one if the bigger national flag carriers. This group distinguishes itself from the other by basically being encumbered with many of the costs of the parent airline. Consequently, the aligned type 2 has low to medium cost labour that is more unionized than not. Inflexible job tasks, new or used aircraft (handed-down by the parent firm), a primary or linear route network that fluctuates from season to season, government ownership (to same extent as its parent airline) are additional criteria for this group of type 2's. Certain infrastructural costs and overheads are often passed onto the charter subsidiary in some sort of prorata basis that usually mean that the charter subsidiary has a higher than usual fixed cost pile to amortize than the non-aligned type 2's.

These two groups of type 2 have varied abilities to operate as new entrants in scheduled markets which could have an impact in the upcoming liberalization. The fact still remains that the major carrier type 1's could still use their charter subsidiaries to compete with other

The Longer Term Future in Europe.

Much of the longer term future will depend on the combination of timings that accompany the liberalization. The phase of the economic cycle at which it occurs will be a key determinant.In addition it must be admitted that a large portion of the future of European carriers will depend on how well they perform in international markets outside Europe which contrasts with the situation in 1977 for most American domestic carriers.Finally it seems that on balance the chances for a successful liberalization are about the same as those which existed in the U.S. in 1977. While Europe has a more abundant level of high quality, ready made type 2 competitors waiting in the wings, the U.S. set a clearer regulatory direction by invoking a quick change, overnight deregulation. Another important question is how much market homogeneity will be present in the EEC over the longer term. Will Europe ever be one single domestic air transport market ? Despite the potential for pessimism, many analysts maintain , and correctly so, that the trend away from the strictly-regulated status quo of 5 years ago is now irreversible in Europe.

The Antitrust Environment

The Webster Collegiate Dictionary (9th Edition) defines competition as "the act or process of competing: rivalry: a contest between rivals : the effort of two or more parties acting independently to secure business from a third party by offering the most favourable terms". This would seem to lay down fairly clear rules of conduct for any competitor with the operative term being "independent competition". If one were to add a definition of the term "perfect" one would uncover the following: " being entirely without fault or defect". In simplistic terms that is really the ultimate form of competition, perfect competition. We know that the avowed aim of most antitrust (anti-competition) legislation is to foster a fair and equitable form of competition throughout all commercial activity. Concurrent with this will to have fair competition are other competing motives that form the commercial realities or peculiarities in many industries. Air transportation is no exception to this fact and we shall now try to evaluate those practices and commercial requirements that could conceivably contradict the strict definition of perfect competition.

Before leaving the definition stage I would linger long enough to contemplate the practical commercial translations of perfect competition.

Certainly the maintenance of longer term perfect competition would entail a group of similar sized competitors with similar resources and similar market competence who achieve similar commercial fates. Should the balance become upset it would most likely be caused by a competitor who has gained some form of dominance or advantage over the others or one or more competitors who drop to a level inferior to the others. For many, the simple discovery of dominance can become tantamount to grounds for an antitrust investigation. Other more thoughtful advocates would seek to discover the rationale or reasons for the coming about of such dominance. As we shall examine later some companies who have the foresight to make correct commercial decisions before their competitors did are sometimes rewarded with anti- competitive suspicion. Certainly many airline leaders would say that commercial advantage is derived by better commercial strategy and execution than that which the competition can muster. The inevitable result of this is dominance by one carrier over another of either a major or minor magnitude. Drawing the line between competitive weakness by one's adversaries and the use of collusionary tactics to achieve similar results amongst the competition can often prove difficult to do. Therefore the actual discovery of all but the most clear cut cases of competitive abuse can be difficult to ascertain and as such require a good understanding of existing commercial practice.

Canada

In Canada, as in many other jurisdictions, the establishment of a safe and reliable air transport system that meets the criteria of public convenience and necessity has not been an easy or quickly accomplished task. So much so that the air transport sector, since its inceptive stages, has been treated as a semi-public utility that enjoyed a certain level of protection from the normal brunt of commercial interaction. The simple introduction and maintenance of a government-owned presence in the industry would tend to destroy any thought of perfect competition that any economist might conceivably hold. This may now change, however, with the completion of Air Canada's privatization. Since the early times of air transport in Canada the building of a safe system has meant large expenditures that did not meet the accepted commercial criteria for borrowed fund repayment. The building of the airport and airway infrastructure in and of itself proved an immensely expensive task that has resulted, up until now, in a virtual domination of major airport ownership by the federal government. Similarily the airlines that flew Canada's restricted air network in the early days operated in a near route monopoly situation since there were not enough entrepreneurs willing to fund new entrants. So the nurturing of the fragile early air network in Canada meant giving those few willing to invest, including the federal government, the incentive to continue to do so. Often this incentive entailed the protection of various carrier route network's and pricing structures from potentially harmful competition. In a Canadian context the beginning of interest in lowering costs of service to the consumer is a relatively new phenomenon that has only recently been justified by the coming of age, so to speak, of the air transport industry. It is commonly acknowledged that the establishment of that safe and reliable air transport system has now been achieved. Consequently, the wishes of consumers to travel this system but at a lower cost has become more pronounced and more difficult to ignore. The age-old measures of consumer convenience and necessity seem to have been met in terms of a route network linking the far flung outposts of Canada to the larger centers of the south. Now the public is looking for a wider variety of permanent product and pricing options on which to travel.

It is true that not only the consumer has evolved but that the Canadian regulatory infrastructure that must control the activities of carriers has also evolved. The Canadian Transport Commission had heretofore been responsible for controlling the route networks of competing carriers and the fares that they could offer on all Canadian domestic flights.

Since the regulatory body controlled all of the commercial levers that conspiring carriers could potentially use to short circuit the competitive situation, they also had the ability to contain any such uncompetitive behavior. In fact there was a mandated equality of service and product for all carriers since all were forced to have nearly identical fare offerings and the access to new routes was strictly controlled. With the tabling of the 1986 air policy paper, and the air liberalization implicit therein, the practical role of the regulator began to evolve. So when looking at the commercial realities of the Canadian situation one must note that the air transport heritage is one based on protective government intervention in order to further the philosophy of consumer convenience and necessity. One may subsequently assume that in the context of the late 1980's that fit, willing and able to deliver service will continue to produce services that meet public convenience and necessity.

Europe

Europe could best be classified as an air transport environment that is still in a state of flux. Unlike the U.S, where complete freedom is now 11 years old, or Canada, where official deregulation is 18 months old (defacto Canadian deregulation is over 3 years old), Europe is moving towards reduced economic regulation far more slowly than either Canada or the US did. As we shall discover later on, the application of antitrust legislation in Europe (EEC) is being used to defend and install in the market the principle that more free competition is needed. This contrasts with the U.S. scenario where any potential antitrust implications are resulting from inequities that come about from a commercially deregulated system and in some instances re-regulation is proposed as a method with which to inject more equitable competition into the system.

The commercial air transport history of Europe was one which advanced more rapidly than that of its North American counterparts due to shorter distances and larger population bases. The government policies that regulated the evolution of air transport were very similar however. In fact Europes' policies are the product of a collection of several sovereign states, each with its own government-owned airline, that has contributed to a much higher level of direct government intervention in air transportation matters. Even though certain carrier privatization moves within Europe are taking place, few are contemplated as total privatizations (exception British Airways) therefore ensuring a continued public role in both regulation of the system and management of some of the key carriers

As a consequence the resulting commercial realities have been tightly linked to political motives. The cooperative system of air transport services that evolved has been controlled by many mechanisms such as pooling agreements, etc that would be considered as collusionary in other jurisdictions or would require exemptions from antitrust penalty in others. These accords are basically concluded between the major carriers, despite the fact that they are predicated upon authority granted in bilateral air services agreements, of the two states in question and usually control prices, levels of service and capacity on the route in question.

In its most blatant form these types of agreements can serve to implicitly exclude competition from the market. The applicability of antitrust legislation has clearly never been a factor in the management of the air transport system in Europe. There are a number of reasons for this. Firstly, all of the same developmental rationale that applied in Canada pertains equally in Europe. The first and overwhelming goal was to develop a safe and reliable air transport system. As such, government involvement and financing became paramount requirements to the evolution of such a system. In trying to assure some future return on investment, government sought to protect their investments by fostering the conclusion of some protectionist type agreements. In the early times, however, this so-called collusionary approach was an academic issue since very little additional competition had evolved. Today things have changed in many European countries where more than one airline has evolved and in some cases potential new carriers feel they are being unecessarily constrained by larger protected players. Obviously there is a lack of consensus among European carriers and governments about whether there is indeed a problem as relates to the level of existing competition. So the commercial heritage of Europes' air transport system has been one where the need for equal and fair competition has not been seen as a top priority. In fact since the vast majority of air travel in Europe takes place on an inter-country as opposed to an intra-country level, the opportunity to enforce any antitrust legislation has had to rely upon the far more difficult to enforce EEC type legislation. In fact the only scheduled carrier sector of air transport that has evolved to be a little more competitive has been the commuter carrier segment (prop aircraft with up to 50 seats). Now, however, a trend that is becoming more evident is that the larger government-owned carriers are buying out existing commuter carriers or creating their own carriers in this segment. As we shall see the European independent charter-type carrier probably will have the best future opportunity to inject some level of competition into the system in the short or medium term.

The United States

Unlike the other zones that we have discussed, the U.S. has never ignored the existence of its long standing antitrust legislation. Instead they have chosen to provide for the exemption of many of the practices that are involved in U.S. air transportation from the law. As in Canada and Europe, the early situation in the U.S. was one in which the government was trying to foster the development of air transportation. There were, however, some differences. The Civil Aeronautics Act of 1938 was designed to allow a measure of government control over the system. As a result, the commercial levers available to the market players were decided upon by the government and not market forces. There was a major difference in the U.S., and that was the fact that there were no government-owned carriers in the market. Therefore the larger carriers were intent upon securing exclusive, or near exclusive franchise, to operate their route network for strictly commercial reasons. Once again the argument of being able to justify the huge investment required to operate an airline was used to explain why some exclusivity for existing carriers was necessary if they were to continue to cater to public convenience and necessity. In fact, for a long period, the burden of proving whether any new entrant could gain access to a new route was incumbent upon the new entrant carrier.

This made it easier for existing market participants to block new access by potential competitors. All of this was, of course, sanctioned by the creation of the Civil Aeronautics Board which enforced and controlled competition between carriers through the awarding, or witholding, of route exemptions and fare changes. As such, these route franchise awards became rather valuable assets for any airline to possess.

The meshing of antitrust and air transportation came early to the U.S. (1978) With the advent of deregulation the official government mechanisms that ensured a less competitive situation were removed but the carriers who had lived under this regulated regime were not immediately converted to the cause. As time passed it became plain to all market participants that deregulation was there to stay and that carriers would now have to woo consumers based on commercial competence rather than on the ability to convince the regulator that protecting a certain carrier from competition was appropriate. The problem which emerged is that not all carriers were born equal into the new deregulated environment. The larger carriers of old were still large and could, through sheer size, pre-empt any newcomers from making an effective entry into new markets. At least this is what many thought prior to the 1980-82 US economic recession.

The recession tended to damage high cost, established carriers more than it did their smaller, lower cost new entrant competition. The subsequent recovery of the late-1980's has once again favoured larger carriers who have become larger via acquisition/merger or self expansion. One can observe that the antitrust issues that come from this situation will reflect direct commercial abuse of the competitive system. One cannot leave the U.S. discussion without making some preliminary remarks about the political linkage between the enforcement of anti-trust law and the ideology that the political party in question happens to hold dear. It has been said that the Republicans, being in favour of big business, do not appear very anxious to encumber big business with this type of concern. The same may not hold true during Democratic administrations, however, when large companies are often criticized for interfering with the public good. Overall we have, in the U.S, an environment that has developed along parallel lines to the others when it came to evolving a safe and secure air transport network. All the protection from competition that was necessary to achieve this was usually granted in the form of temporary/quasi permanent exemptions. This may not be totally correct, however, since the incoming Bush Republican administration appears to be tightening the antitrust enforcement screws on CRS issues, (rejecting the American Airlines/Delta airlines CRS merger) in addition to questioning the necessarily automatic nature of international route sales (Eastern trying vto sell its S. American route network to American) and (US Air trying to buy Eastern facilities at Philadelphia and being rejected in favour of new entrant Midway Airlines). In the old days the only action that was specifically disallowed was the set up of an airline (the forerunner of United) by aircraft manufacturer Boeing. Interestingly, Boeing tried to buy equity in United in exchange for aircraft a couple of years ago and was again rejected because of the undue industry concentration posed by a manufacturer owning all or part of an airline. (vertical integration)

Overall then, once the US air transport system was deemed to have reached full operating maturity the additional stimulation of free competition, conditioned by air market and overall economic conditions, began to appear. Since the U.S market is all one single jurisdiction it is much easier to enforce the antitrust legislation than it may be in future in Europe.

Review of Present Antitrust Legislation

Canada

" There is a long history of the Canadian anti-combines legislation being sustained as criminal law........The statute was motivated by concern over emergence in Canada of smaller versions of the huge trusts in the United States, through which few personalities could control enormous financial empires. The combines problem was seen as one with strong moral overtones and criminal sanctions were selected as the appropriate means for its control. In 1910 Parliament enacted The Combines Investigation Act which provided investigative machinery and empowered a board appointed by the Minister to levy fines against individuals and companies whom the board find guilty of combines offences, and who "continued to so offend"........."In 1923 Parliament enacted The Combines Investigation Act which repealed the two 1919 statutes (Board of Commerce Act and the Combines and Fair Prices Act) and replaced them with a more modest scheme that prohibited combines in restraint of trade, but went no further. The new Act gave investigatory powers to a registrar and commissioners, but did not convey authority to issue cease and desist orders."33 "In the 75 years the Combines Investigation Act has been in force, the federal government has never won a contested merger case."34

This statement was a testament to the futility of past legislation and a contributing factor to the new stronger legislation now in force. For the purposes of this section we shall begin by introducing the relevant sections of the previous statute. The former Act enumerates a number of offences that, if proved, could result in the conviction of the defendant. Part V sub. 32(1) of the former Act stated: "Everyone who conspires, combines, agrees or arranges with another person to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any product, (b) to prevent, or lessen, unduly, the manufacture, or production of a product, or to enhance unreasonably the price thereof, (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, or supply of a product, or in the price of insurance upon persons or property, or (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or both."35 While the description of the offence seemed quite exhaustive and clear, it did not translate into actual practice this way. Technically the concept of perfect competition, as previously discussed, would represent the embodiment of what the act sought to preserve. Yet we recognize that perfect competition is more often than not a textbook concept that rarely exists in actual practice. Such being the case, every time two companies merge or embark on some kind of joint venture it would seem to provide grounds for an anticombines investigation. Yet the key term in the offence is "unduly". What constitutes the undue restriction of competition ? If one returns to the Webster dictionary one finds that unduly is defined as " in an undue manner: Excessively. The problem becomes one of defining, in commercial terms, what constitutes an excessive restriction of competition. Clearly one cannot postulate that any restriction of competition is grounds for prosecution since many everyday occurrences in all sectors would constitute a reduction of competition. Applying some kind of economic rule to the discussion of anti-competitive activity would prove equally difficult. For example one could say that anytime one company had more than 50% of the market in any sector that this would be tantamount to restricting competition. Other industry sectors with private and government-owned competition may not be able to indulge in competition, pure or otherwise. Clearly such a type of standard would have to take into account many exceptions in various industries. Therefore, the drafting of a general "catch-all type" standard was clearly impractical. This leaves a case by case process that seeks to find the true meaning of excessive restriction of competition in each set of circumstances.

Getting beyond the nebulous concept of undue restriction of competition we come to a number of exceptions that aid the suspected. These are found in Section 32(2) which states that " subject to subsection (3), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy , combination or agreement or arrangement relates only to one or more of the following: (a) exchange of statistics, (b) the defining of product standards, (c) the exchange of credit information, (d) the definition of terminology used in a trade, industry, or profession, (e) cooperation in research and development, (f) the restriction of advertising or promotion , other than a discriminatory restriction directed against a member of the mass media, (g) the sizes or shapes of the containers in which an article is packaged, (h) the adoption of the metric system of weights and measures, or (i) measures to protect the environment. "36

There is a proviso in the following section that serves as a check on the exceptions that stipulates " Subsection 2 does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following : (a) prices, (b) quantity or quality of production, (c) markets or customers, or (d) channels or methods of distribution, or the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry

"In 1969, the Report of the Economic Council of Canada identified the need for substantial reforms to the Combines Investigation Act to ensure that market forces perform their basic function of allocating resources in an efficient and impartial manner. Among changes recommended by the report were the shifting of merger and monopoly (abuse of a dominant position) from criminal to civil law and the creation of a specialized tribunal to adjudicate civil matters......In 1976 a small amendment to the Act enlarged its scope to cover services......On June 19, 1986 the renamed Competition Act came into force. Substantial changes were made to the merger and monopoly provisions as well as the investigative and remedial powers of the director. Investigative and adjudicative powers were clearly separated. The Competition Tribunal Act established the Competition Tribunal, a new civil adjudicative body, to address reveiwable practices."38 Additional factors of note in the new Act include; (1) the Competition Tribunal constitutes a court of record with the same powers vested in superior courts, (2) introduction of civil merger provisions to replace prior criminal merger provisions. (3) the Act includes a non-exhaustive list of factors which will affect the interpretation of the merger test by the Tribunal, (4) a three year limitation period for the Director to challenge mergers. Overall the new Act gives the Tribunal & Director more scope and the mechanisms with which to pursue the abuse of competitive position

Europe

The situation in Europe is greatly complicated due to the overlap of a number of jurisdictions that are vying for control over competition in air transport in Europe. The various national jurisdictions are really unable to respond effectively to the challenge of determining the actual existing level of competition in air transport since almost every European nation owns its own carrier that it operates in a near monopolistic economic environment. This is aggravated by the fact that not all European nations are members of the EEC, some are members of ECAC but it is the EEC that is really pushing towards the magic date of 1992 for liberalization within its boundaries. As such, the relevant legislation on which any concerted challenge to the status quo will be based is the Treaty of Rome. The Treaty of Rome has two major thrusts to it in a socio economic sense which include, a) "the promotion of economic activities, an accelerated raising of the standard of living and closer relations between the Member States. Among these activities are a common transport policy and a system to ensure that competition is not distorted." 39 "The principle of pursuing the objectives of the Treaty by a common transport policy is clearly valid for inland transportation. It is, however, evident that the same general objectives would apply also to any future legislation for civil aviation within the EEC and the discretionary powers given by Article 84 to the Council are subject to the aims of the Treaty."40 Other adjoining nations such as Switzerland and Austria are trying to negotiate aeropolitical entry into the EEC liberalization arrangement, which means that the actual scope of the EEC moves may surpass its geographic boundaries. Other jurisdictions such as Canada and the US only introduced a less regulated scenario when they felt the job of building up a safe and comprehensive industry infrastructure was complete. Even if Europe may not feel that its system has reached the point in development when it can consider liberalization, many in Europe perceive that the Euro-air transport industry has reached a satisfactory stage of maturity where it can withstand unfettered competition. So we have a difference of objectives within the Treaty if one were to place articles 85 and 86 against the preambular terms contained in Article 3 which deals with the role of air transport in the socio-economic development of the community and the need to protect carriers in order that they may serve the greater function. Clearly, however, articles 85 and 86 which effectively prohibit conspiracy to limit competition and forbid the use of size to impede others from an equitable opportunity to compete in the market, are intended as the governing articles that relate to the derivation and control of a freely competitive market. "The European Commissioner for Competition, Mr L. Britton, said that the EC will be vigilant in controlling airline mergers in the run up to a single European market for air transport in the 1990's. Brittan added that, "the market should have ,less regulation, less bureaucracy, more competition, and cheaper air fares.... But the official added that liberalization in 1992 must be accompanied by strict enforcement of antitrust rules. He also said that the EC does not plan to adopt the *"laissez-faire"* attitude of the US antitrust authorities who have allowed numerous mergers of US carriers following deregulation in 1978."41 The European issues that have arisen have been those related to the interpretation of the acceptable level of competition needed to satisfy the consumer or user. A definition of the consumer that is frequently invoked in Europe is that of business and government travel.

"The following partial list of objectives might be deduced from the interests of the users, the airlines, the workers, and the general public taking into account the aims of the community:

1) Users: a total network unhampered by national barriers with efficient services beneficial to the different user groups at prices as low as possible without discrimination.

2) Airlines: financial soundness* for the airlines, a diminution of their costs of operation and an increase in their productivity;

3) Staff: safeguarding the interests of airline workers in the general public and in respect for the wider interests of our economies and societies.

4) General Public: improvements in conditions of life for the general public and respect for the wider interests of our economies and societies.

5) Network in the consumer interest: The existing air transport system in the Community and in the world meets important needs of passengers through:

i) interchangeability of most tickets between scheduled airlines ;

ii) a fairly consistent scheduled tariff structure within Europe;

iii) an extensive system of low tariffs on some routes through IT, IPEX, EX and charter operations;

iv) the possibility for the greater part to obtain a reservation on a scheduled flight at short notice ;

v) the cohesion of the scheduled network, i.e. it is possible in most cases to piece together a combined trip without excessive delay at the main transfer points due to coordination of timetables and fairly high frequencies.

6) It is true these qualities relate in particular to needs of business and government travellers, which constitute the largest group of scheduled passengers in the Community. For these, speed and associated attributes, i.e. availability, flexibility and frequency are particularily important, with cost being less important since the transport activity is related to potential loss of production and working time."42

If one were to accept that these preceding arguments were correct then one must also agree that there is a certain amount of commercial interaction which should be permitted between Euro- carriers. Items such as the maintenance of similar fares and coordinated flight schedule products could all be construed as limiting competition since carriers do not have their own commercial policy but instead a concerted group marketing approach to the market. Clearly, the smaller carriers that are not part of the so called "group" will lose out on these opportunities.

The Treaty of Rome

Turning to the treaty itself we note that it is the primary document that governs the application of antitrust law in the EEC. The key articles are articles 85 & 86. Article 85 stipulates:

"The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision, by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets source of supply;

(d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature, or according, to commercial usage, have no connection with the subject of such contracts.

2- Any agreements or decisions prohibited pursuant to this Article shall automatically be void.

3- The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

-any agreement or category of agreements between undertakings.

-any decision or category of decisions by associations of undertakings.

-any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensible to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." 43

In looking at the Article we note that many agreements between air transport undertakings contravene the relevant restrictions placed on cooperative covenants which limit competition. Unlike the U.S. situation, the European carriers have never directly sought any antitrust immunity for any of the joint tariff, capacity pool or other agreements into which they enter. Therefore one must assume that since the legal option of applying for exemption does not exist that carriers are either ignoring the law or that they fall under the category of undertaking that is covered by the exemption in 85(3). This would mean that the current air transport system "would contribute towards an improvement in production or distribution of goods". It seems likely that this could be interpreted as a valid justification for the continuance of the present system. In fact several have postulated that 85(3) provided all the legal leverage necessary to exempt air transport from the other provisions of the anti-competition articles.

If such were the case then the Treaty of Rome would not apply to air transport, or any other non-specifically enumerated mode of transportation. The burden of proof for those who would dispute this interpretation would be to prove that 85(3) no longer applies or that air transportation should no longer be considered for *de facto* coverage under 85(3). As we have seen the 85(3) interpretation would be supported by the present and by the subsidiary arguments which lay out the rules for exchange of air rights between sovereign countries. (Chicago Convention). The case for the defence of the present system seems formidable. Examining certain practices in today's environment we cannot help but notice that some of the practices would be considered in direct violation of 85 in other industry sectors.

Article 86 subsequently defines in more precise commercial terms the types of infringements that are outlawed by 85. It states:

" Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development
to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts."44

It is the use of dominant position by the larger government owned carriers that upsets smaller carriers who are intent upon entering the market. It is the alleged violations under paragraph (a) that are most often cited. The issue of overcharging consumers for air travel is a another common complaint. Some of the wording of the subsequent article 87 may provide the leeway necessary for favourable interpretation of the specific commercial infractions contained in article 86. Article 87 (2) b states;

"2(b) to lay down detailed rules for the application of article 85(3) taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

2(c) to define, if need be, in the various branches of the economy, the scope of the provisions of articles 85 and 86 2(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article."45

In the past the air transport sector has been treated differently than others. In fact all modes of transport have been singled-out for their valid and in some cases, substantial contribution towards the aims of article 3. In fact in some other sectors (rail) there is even less competition. Cleary the size of the commercial investment required is a key determinant of government interaction in a particular transport sector, the two with the highest level of government involvement being rail and air. As we shall evaluate later on, subparagraph 2(e) can also have some implications in the issue of forum shopping for a particular action although thus far many national jurisdictions have recognized the European Court of Justice in dealing with these issues.

In summary our general look at the European scenario is complicated by several realities including the fact that individual governments have had a historically entrenched attitude of developing and protecting their own flag carriers. As such smaller scheduled airlines have had a hard time getting off the ground especially when they were perceived as a direct threat to any of the larger established carriers. Charter carriers have, however, enjoyed solid growth both in numbers and size of carriers over the past 10 years.

In a legal context this had projected a situation of practical immunity from anti-trust concerns. The fact that government-owned EEC carriers could be negatively impacted by the strict interpretation of articles 85 and 86, while other similarily-sized and government protected carriers in other non-EEC (ECAC) European jurisdictions could continue unabated, is perceived as a great potential injustice. In fact "officials of privatized or publically held European airlines are asking the European Commission to declare government ownership of carriers "incompatible" with the mandate of the European Community to protect consumer economic interests"[46] Another central issue revolves around how much competition Europe really requires. Is perfect competition the right answer and is it practically feasible ? Certainly when we look in depth at the European scenario evolution we will note that multiple jurisdictions trying to impose a competitive air transport system on an environment that is vastly different from its U.S. counterpart will prove difficult but not impossible. Will individual countries indeed accept the jurisdiction of the Treaty when governing what has, up to now, been an exchange of bilateral rights between countries? The collision of an accepted bilateral system with a multilateral one that, so far, has had little force of law to back it up may forbode less than desired results.

The United States

Determining the relevant anti-trust legislation in the U.S. becomes difficult since there are a number of antitrust statutes that can apply to the airline business. Beginning with the Sherman Act of the late 1800's we note that two main sections would be of concern to air carriers. Section 1 which stipulates that " every contract, combination...or conspiracy, in restraint of trade, is illegal." 47 As in Canada, the sometimes vague nature of the offence makes applicability of the statute difficult. The U.S. situation is different since a set of guidelines for interpretation were developed. In 1911 the Supreme Court, after analyzing the common law view on restraints of trade and the legislative history of the Sherman Act, held that "section 1 would be construed to prohibit only "unreasonable" restraints of trade."48 With this new test the courts began looking at a wider array of evidence including economic evidence, facts peculiar to the business, the condition of the business before and after the restraint and its effect, history of the restraint, and the reason and purpose of adopting the restraint (of trade).

In certain cases, however, *per se* violations were deemed to have rather less generous categories of allowable evidence. These *per se* violations include (1) Price fixing, market divison or allocation, (3) group boycott and (4) tying arrangements. For these violations the court may refuse to look at economic evidence and other secondary sources beyond the actual information on which the charge is based.

The second section of the act that is relevant to the express anti-trust issue is section 2 of the act which prohibits " monopolization or attempts to monopolize, either of which may be effected by the unilateral conduct of specific person, and further prohibits any combination or conspiracy to monopolize. Thus section 2 defines three specific offenses: (1) monopolization, (2) attempts to monopolize, (3) any combination or conspiracy to monopolize. Monopolization consists of the possession of monopoly power in a relevant market and the wilfull acquisition of or maintenance of that power as distinguished from development as a consequence of a superior product, business acumen or historical accident."49

Once again we note in going back to our earlier discussion, relating to definition of abuse, that the interpretation of the Sherman Act allows for some exclusions that would arise in the normal course of business. It also provides for loopholes in establishing exclusion from the monopoly category. Jurisprudence provides another more restrictive view " The central issue is not whether prices are raised or that competition is actually excluded, but that the power exists to do so."50 In addition to the following parameters, two different tests for scope are applied. Monopoly must be definable in a geographic market or product class scenario. Either of these previous scope criteria will suffice but there remains a last test that cannot be overlooked. "The element of deliberateness or general intent to monopolize, which must be further established when actual monopolization is claimed, has been held to have been proved if the monopoly was a probable result of the actions which were undertaken."51

So the Sherman Act was the legislation that began all of the anti-competition law in the U.S. but it was supplemented and in some areas superseded by the Clayton Antitrust Act of 1914. Once again the basic premise of the Act was to "protect trade and commerce from unlawful restraints and monopolies."52 While the application of the Clayton Act was very similar to that of the Sherman Act there are some important differences. The most important is that the Clayton Act, in section 4, extends the line of punishment from one that is exclusively criminal in character to one which includes full civil liability.

Damages are recoverable and these are automatically trebled with proviso for the recovery of additional reasonable legal fees. So the potential full weight of the law for the convicted can be rather severe. As we turn away from the mainstream commercial activites that these two pieces of legislation cover, we note that a series of exemptions have built up over the years to cover specifically air transportation.

The major linkage comes when differentiating the powers of the Civil Aeronautics Board in the U.S. (CAB) and those of the court in prosecuting carriers. In a first instance section 7 of the Clayton Act was subsequently amended to state that CAB had jurisdiction on deciding the issues of merger and that it would apply the test of public convenience and necessity in deciding such cases.

"Nothing contained in this section (section 7 Clayton Act) shall apply to transactions duly consumated pursuant to authority given by the Civil Aeronautics Board...."53 Section 7 speaks of acquiring other companies and the exclusion of such activity were it to significantly reduce competition. Two additional provisions that the CAB could exercise its authority over are cases where the "failing business doctrine" applies. "Because the failing business principle is applicable under this section of the Clayton Act, it likewise can be applied to section 408(b) of the Federal Aviation Act. Such application gives the CAB power to approve the merger of two trunkline air carriers where one is in financial distress and in danger of bankruptcy." 54 (e.g.-Delta buys Northeast).

In addition the CAB had the power to issue an order under which interim financial assistance may be rendered to an air carrier by another engaged in a phase of aeronautics in order to permit it to continue operations. All of these additional powers would tend to confirm that the CAB has the power to maintain artificial levels of competition by supporting the losers in the competitive wars. As such it would make monopolization a little more difficult. On the other hand the CAB power to allow merger in cases approaching bankruptcy could provide opportunity for significant concentrations of carriers to emerge.

Ever since the 1938 Civil Aeronautics Act and the later Federal Aviation Act of 1958 the power of decision in antitrust matters as applied to air transportation lay with the CAB. As such, many industry-specific standards were adopted. Consequently, the main criteria for all of the CAB's activities became what it perceived to be public convenience and necessity. All anti-competitive issues were then subjected to this test which in practical terms, as we shall see, meant that a rather liberal approach was taken towards exempting certain practices. Beginning with the question of rates, we note that the CAB fixed fares for all participants in any given market thus removing carriers' ability to compete on this factor. Since all carriers had to file fares with the CAB the Board could control how closely carriers were following the prescribed fare formula and levels in each market and chastise those who did not. A second factor on which carriers can compete is their ability to fly to any point that they wish to. The ability to exit and enter markets is a key consideration in any carriers' product. However in the case of the U.S. environment the CAB once again controlled this factor and decided whether or not a specific carrier could be allowed to enter a new market. In effect the CAB, through its exhaustive regulation, ensured that competition was effectively stifled and that carriers who achieved early dominant status had those grandfather rights continued in complete immunity from normal antitrust practice. In adition to these government condoned anti-competitive practices, U.S. carriers were granted specific immunity so that they could participate in the IATA rate and tariff conferences, which were commonly acknowledged as rate-fixing conferences for international routes to/from the U.S.

The last matters which the Clayton or Sherman Acts sought to control were those which applied to mergers. The Federal Aviation Act has its own rules in this area as well:

"it shall be unlawful-

(1) for two or more carriers, or for any air carrier and any other common carrier or any person substantially engaged in the business of aeronautics, to consolidate or merge their properties, or a substantial portion thereof, into one person for the ownership, management or operation of the properties previously in separate ownerships:

(2) for any air carrier, any person controlling an air carrier, any other common carrier, or any person substantially engaged in the business of aeronautics, to purchase, lease, or contract to operate all or a substantial portion of the properties of any carrier;

(3)...........to engage in the business of air transportation other than as an air carrier.

(4) for any foreign air carrier or person controlling a foreign air carrier to acquire control in any manner whatsoever of any citizen of the U.S. substantially engaged in the business of aeronautics;

(5) .... to acquire control in any carrier in any manner whatsoever;

(6) for any air carrier or person controlling a certificated air carrier to acquire control, in any manner whatsoever, of any person substantially engaged in the business of aeronautics other than as an air carrier.

(7) for any person to continue to maintain any relationship established in violation of any of the foregoing paragraphs of this subsection."55

All of these are forbidden without CAB antitrust exemption and were designed to be more restrictive than the normal rules governing mergers. In no way is the concept of restricting competition brought in as a valid limiting factor on mergers. The statute simply excludes all possibility of any merger without a review process.

Overall, there was a big change with the advent of the 1978 Airline Deregulation Act which in many areas amended the Federal Aviation Act of 1958. In 1958 section 102 of the Federal Aviation Act stated that contemplation of competition was to be considered only to the "extent necessary" to assure the development of an air transport system.

The new Deregulation Act changed the emphasis on competition from a passive one to one which made it a fundamental cornerstone to industry practice, to wit:" .....the placement of maximum reliance on competitive market forces and on actual and potential competitive forces and on actual and potential competition, ...to provide the needed air transportation system, and to encourage efficient and well-managed carriers to earn adequate profits and to attract capital."56 A following section (7) dealt with the new attitude towards competitive practices: "the prevention of unfair, deceptive, predatory or anti-competitive practices in air transportation, and the avoidance of-
(a) unreasonable industry concentration, excessive market domination, and monopoly power; and (b) other conditions that would tend to allow one or more carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation."57

A second area of potential antitrust activity is the area of mergers and the resulting monopoly that can arise from such activity. Section 408 of the Federal Aviation Act required the Civil Aviation Board's approval for any consolidation, merger or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition. The actual rules of interpretation meant that the first criterion was to determine whether there was a monopoly being created and the second to determine if any resulting curtailment of competition would be outweighed by the advantages of improved service (public interest).

The advent of the Deregulation Act brought changes to section 408 bringing it more in line with the concept of the other portions and intent of the Act. First the mergers or acquisitions control was only applicable when it involved " a person substantially engaged in the business of aeronautics". Other significant changes that were involved included a change in the test applied in order to determine admisability of the merger. Basically the Board (CAB)(this power was later shifted to the DOT and then to the DOJ) must find that the merger is inconsistent with public interest in order to refuse it. The other rules that relate to a disapproval of a particular merger transaction include:

"(1) If it would result in a monopoly or be in furtherance of any combination or conspiracy to monopolize or to any attempt to monopolize the business of air transportation in any region of the United States; or (2) The effect of which on any region of the United States may be substantially to lessen competition or to tend to create a monopoly, or which in any other manner would be in restraint of trade."58

Any of the above may be waived in the event that , (1) the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public; and (b) such significant conveniences and needs may be satisfied by a reasonably available alternative having materially less anticompetitive effect."59

In trying to reconcile all of the pertinent legislation into a simplified rule the legislators stated their intentions to be the following :

" The intent of the new section 408 of the proposed legislation is to insure that, in light of deregulation, mergers in the air carrier industry will be tested by the antitrust standards traditionally applied by the courts to unregulated industries. However, under the new section 408, even if a merger does not meet antitrust standards of the Sherman amd Clayton Acts it may nonetheless be approved if it meets "significant transportation needs of the community to be served, and if there is no reasonably available less anti-competitive alternative to the merger. These latter tests only apply if a merger or similar transaction does not meet the Sherman and Clayton Act standards."60

In adition to section 408, a section 409 amendment dealt with the now required approval of any interlocking relationship exercised by any individual whether they be officer, director or controlling shareholder.

Overall, therefore, the arrival of U.S. deregulation greatly changed the legal parameters of antitrust legislation as applied to air transport. This did not mean that significant interpretive and discretionary powers did not continue to be a part of the process. As we shall discover when we turn to actual substantive issues which have arisen thus far, the parameters of public interest and the actual definition of "undue" competitive activities have had limited applicability to US air transport during the years of the Reagan Administration.

Current Aplication of Antitrust Law.

Canada

Canada has had several opportunities to apply the new Competition Act (1986) to air transport issues. Several of these occasions arose during the recent past when several regional carriers were bought up by the then CP Air. The CP Air was itself bought out by Pacific Wetsren to from Canadian Airlines International.(CAIL) Then the 1989 CAIL purchase of Wardair was approved with several pre-conditions and the decision is reveiwable for up to three years. The recent approval of the CAIL/Wardair merger had prompted many to say that deregulation in Canada has had the effect of reducing not increasing competition. "In the past few days the Consumers Association of Canada has gone before the government on the CAIL/Wardair merger and the Air Canada/CAIL Gemini computer reservations system (CRS) merger, seeking in the case of the Wardair purchase a Cabinet decision to rescind previously granted approvals and a specific vote t o disallow any future offer by PWA Corp. (CAIL) to purchase Wardair... The Association admits that "the track record for granting Cabinet appeals in Canada is very low". David McKendry (Head of Cosumers Assoc. of Canada) said statistics compiled by the Bureau of Competition Policy show that if the CAIL/Wardair deal goes through, Air Canada will control 56% of scheduled passenger revenue kilometers in Canada and CAIL will control 44%. As you can see competition in Canada is weak. We would oppose the buyout of Wardair by any other Canadian carrier as well, said McKendry. The Bureau of Competition Policy gave its blessing to the CAIL purchase of Wardair essentially on a "failing carrier doctrine" basis." 61 When looking at the relationships between Canadian deregulation, officially enacted Jan. 1, 1988 and the level of competition present in the system as defined by number of carriers, one notes that all of the Canadian carrier consolidations except one took place before deregulation officially started. The only one which took place post-deregulation was the CAIL/Wardair merger which was approved. The fact that Air Canada has been fully privatized in 1989 means that Canada will soon have two, privately- owned , air scheduled air carriers.This is different from the jet regional carrier policies of the Pepin era which saw government policies compartmentalize geographic regions of service allowable to each carrier. The two mainline (or trunk) carriers, Air Canada and CP Air, had been allowed to fly over the complete national network of routes including all major national markets. In contrast the regional carriers (Nordair, EPA, PWA and Quebecair) were traditionally designated to certain geographic regions of operation and allowed to fly on an intra-regional basis.

The third level of service was provided by commuter carriers who were once again allowed to fly on an intra-regional basis but usually on routes with thinner traffic volumes than the regional carriers and consequently using smaller (prop) aircraft. In essence, the former government policy really prevented a scenario of full unfettered competition between all jet carriers. Such being the case the application of antitrust law was limited. The present situation has seen trunk-carrier-affiliated commuter carriers fill the void created by the buyout of the former regionals.The affiliation with either Air Canada or CAIL has created two competing national commuter carrier networks.

Therefore the Canadian scenario was a unique one which was clearly distinguishable from the other two that we are evaluating. In the U.S., antitrust applicability is now a post-deregulatory concept that is practically applied to sustain what is already perceived as a competitive environment. In Europe, the concept of antitrust is being used in order to push EEC member governments to introduce a higher level of competition into the system by 1992. Therefore, antitrust is a pre- deregulation concept that is being used as a tool to obtain some form of European liberalization. In Canada neither rationale was used to justify antitrust application to the regulation of the number of air carriers present in the domestic market.

A second significant case where the antitrust process intervened was in the case of the Air Canada and CAIL computer reservations systems (CRS) merger into GEMINI. It is clear that antitrust application has caused significant regulatory action on CRS's with the real threat of merger disallowance being a key factor in the implementation of the controls proposed by the antitrust board. "Last year the Director of Investigation and Research filed an application with the Competition Tribunal to dissolve GEMINI because he believed the merger substantially reduced competition in the CRS industry in Canada....Director had two principal concerns about the merger- (1) the combination of GEMINI's high market share and vertical integration with Air Canada and CAIL would have given it market power over travel agents, other carriers and CRS vendors and (2) the merger created barriers to entry in the CRS and airline markets. The issue was resolved in a negotiated settlement as long as....... The Director is recommending to the Competition Tribunal that it approve the settlement agreement on the basis that the combination of the rules and requirements that Air Canada and CAIL provide other carriers with direct access links to their internal reservations systems eliminates the prospect of a substantial lessening of competition."62

Overall, the Canadian scenario has seen some critical cases decided recently. One wonders whether the biggest cases are now behind us with the industry settling down to one Canadian-owned CRS competing against US imports and two domestic trunk carriers competing against each other. It could be that future market access cases may be decided between Canadian carriers and foreign carriers wanting access to domestic Canadian markets (cabotage) if that ever comes about. Despite industry concentration most Canadian city pair markets have a higher frequency of service and lower fares than was the case 10 years ago. Overall, air fares in Canada had not kept pace with inflation over the last 30 years making it a bargain consumer service.

Europe

Europe is actively using the relevant sections of the Treaty of Rome to insure that a higher level of competition is achieved in community air transport currently in its pre-liberalization form. Legally the European environment is one of the most difficult to track since we are dealing with several legally sovereign jurisdictions that have differing opinions on the interpretation of the Treaty and its applicability to the issue of enhanced competition. The conflict between acceptance of EEC jurisdiction among the parallel domestic legal systems is a key issue. There is no particular conflict, as relates to domestic jurisdictions, over domestic air travel since this is clearly the role of the individual government in question. The issue arises on international air travel that occurs on an intra-Community basis. Conventionally these issues are resolved on a bilateral level between the two states that are involved in the awarding of any air carriage rights between their respective territories. There is an entire body of air law that deals with this process and the rights of carriage that may be accorded between states dealing through the universally accepted principles of international air law. From this system arose a series of freedoms of the air (1 to 5) that countries have based their air relations on for several years. A key assumption has been that the right to fly into one's own country is a thing of value for which like value must be exchanged. Technically each country has an entrenched control over its own airspace and the commercial exploitation thereof. In the U.S. a carrier could gain access to new routes if it was determined that this would serve the criteria "public convenience and necessity".

Under deregulation the legal test shifted to a criteria of "fit willing and able" on the part of the carrier. This meant *"de facto"* that carriers had the opportunity to compete provided they could prove compliance with the Federal Aviation Administration safety standards and that they had adequate financing and insurance to launch a carrier. Therefore when one hears that the EEC is trying to develop one common air transport network by 1992 one wonders at which point member states will wish to lose sovereignty over their valuable inter-EEC route right franchises. "Legal experts in Europe are questioning whether the European Community's intention to create a unified air travel market among member states airlines is in conflict with provisions of the Chicago Convention banning the exchange of exclusive cabotage route authority."63 A corollary to this issue is the system of government- owned carriers that have arisen to take a major share of intra-European markets. These carriers have grown up on the present system which treats all intra-European route rights as international routes, as any route between Canada and Europe would be, for example. What would happen to these government carriers in which various public constituencies, through their domestic governments, have a large equity share. These investments will not be easily dismissed especially in light of the large amounts of money involved. One could say that the public good would best be served by extending the rights of these carriers

Therefore, while all the signatories of the Treaty of Rome are supposedly bound to a common air transport policy and zone of common geography, the reality and praticability of this scenario remains far from resolved. An attendant piece of policy which has been the common domain of individual governments has been the right to designate the carriers that the government desires on the routes that they are able to obtain through inter-government negotiation. Once again with a less regulated intra-European scenario the right to designate carriers may be lost. For example, in the UK there has been a re-distribution of air rights between UK carriers in order to lessen British Airways/BCAL's now dominant position. In fact the UK has designated several carriers on intra-European services where the reciprocal designation clause between the two countries in question permits it. In this instance the right to select carriers for exclusive or restricted designation has allowed UK new entrant scheduled carriers such as Air Europe, British Midland and Dan Air to exploit new commercial opportuinities while blocking BA from these city-pairs. "Capacity shares on most international routes (from the UK) are divided equally between the airlines of the two countries involved and neither country can offer more seats than provided for in its share. If one country authorizes two airlines on the route, the two carriers must divide the country's capacity share between them.

The routes on which capacity has been allocated to other UK carriers include London-Gatwick to several European points (ex BCAI licenses) and continental points from several UK provincial points. The very fact that the government has the exclusive right to designate carriers, therefore, means that free market type competition does not presently exist." 64

Also important is the fact that, despite a hotly contested national debate on the issue, domestic deregulation of air transportation was not applied to key UK airports (Heathrow, Gatwick) due to slot constraints. Upon closer examination one can note that the general application of antitrust is limited in many industry sectors within the EEC. " Four hundred years later, clutching to the illusion of power against all reason, the EEC commission is trying to paper over the basic fault of its competition policy by inventing new, unbelievably complicated but legally ineffective devices: block exemptions with opposition procedures, comfort letters and guidelines. Competition lawyers who for many years have played the Commission's game, are now realising that there are no firm limits to the range of business deals and agreements which, though in no way restricting competition, even promoting it, are subject to the scourge of invalidity. As a result many of their clients may have no remedy against default of their business partners. Where there is no law, one does not need lawyers- a situation which European business lawyers dislike intensely. "65

In analysing the foregoing, it becomes clear that in the industry sectors where normal antitrust is applied there are large inequities. The level of uncertainty that has been created in basic legal areas such as contract law is having implications on the normal conduct of business. Those who are in air transport and consequently not directly involved seem to be wary of falling under some of the existing regimes that apply the law. "These (European lawyers) were taught that Articles 85 and 86 and regulation 17/62 on procedure are divine law on which EEC competition enforcement rests, only to realise that as soon as they entered practice that these are Sunday school commandments, consigned to oblivion during office hours. The real rules, they have discovered, are not rules of law but rules of bureaucratic and political expediency."66

This political lever that seems to be the determining factor in the decision of whether something is in violation of anti-trust or not is politically rather than legally driven. In fact finding specific tests is difficult due to the numerous loopholes that exist in the interpretation of an alleged violation.

"The trouble, and basic fault of the EEC competition policy is caused by a trinity of rules, that of Article 85 which declares that all prohibited restrictive agreements are "automatically void"; that of Regulation 17/62 which gives the Commission the monopoly of power to clear an agreement of the suspicion that it may fall in the prohibited category or to grant it an exemption because it has some redeeming features: and the rule invented by the European Court that all restrictions distorting the structure of competition are deemed to affect trade between member States. This is clearly unworkable, simply because each year many thousands of suspect agreements are concluded and notified while the Commission is capable of deciding on no more than 12. Even so, it takes sometimes up to 10 years to decide."67 The uncertainty about the status of an agreement between firms is not sure even if a ruling has been made or the company in question has been advised that they should not expect any action to be taken in a particular case. "Some of them (cases) are "settled by negotiation in which the Commission officials declare themselves reconciled with the agreement after its modification by the parties. The IBM and Philip Morris cases were thus brought to an end by a process which has no legal basis and which gives little or no legal security. Another product of the commission's desire to keep a foot in the door without having to enter and do much searching and thinking are so-called comfort letters. By these an official (whose power to do so is questioned) informs the parties that there is no intention, for the time being, of adopting any decision on their application for clearance or exemption the file will be closed but may be re-opened later. The European court has held that such comfort letters have no legal effect and national judges dealing with a defaulting party"s defence may only take such letters into account as a matter of fact."68

A second interesting item is the so-called block exemptions that provide for " the confering of the benefit of article 85 (3) on certain categories of distribution co-operation and patent licensing agreements. "69 The system is one which strives to limit the number of routine, or commercially required, agreements that are essential to pass inspection under sections 85 86. There are problems with this however, since many of the decisions as to parameters for these block exemptions are lengthy: " In contrast with negotiated settlements and comfort letters, block exemptions are legally effective. The trouble is that it takes the Commission five to eight years to agree to the white lists of exempted clauses and black lists of prohibited clauses which form the essential part of the instrument and that its interpretation provides lush pastures for lawyers" 70

The article 85(3) defence along with article 3 statements, dealing with developmental good contributed by a specific industry towards the community as reason for special status, have both combined in the past to protect air transport from an antitrust test. There have been and are several challenges in the formative stages, however. One of the more publicized, although perhaps less legally significant in a European legal context, was the Laker case.

In this case it was alleged that price collusion among the major trans-Atlantic carriers eventually forced Laker out of business. A secondary charge alleges that some supplemental aircraft financing, that was to be forthcoming through one of Laker's aircraft suppliers (McDonnell Douglas), was blocked by other major carriers in an effort to cause Laker's demise. On the legal side the major issue that evolved was a question of forum shopping with the Laker liquidator hoping to use a U.S. court, known for their higher awards. Since the case dealt with issues that were occurring in both a U.S. and UK jurisdiction the potential availability of either forum was possible. The U.S., under its extraterritoriality rule, felt it had the competence to hear the case since it dealt with carriers operating into and out of its territory. In addition some of the defendants named in the case were

U.S. carriers. (TWA and PAN AM). The issue still sought resolution in the UK courts and a quasi-final decision handed down by the Master of the Rolls in the London Appeal Court granted British Airways and British Caledonian an injunction against any continuance of prosecution in U.S. courts. The Laker liquidator was refused leave to appeal but was granted a hearing at the House of Lords Appelate Committee. This body ruled in favour of the Laker liquidator and allowed the continuance of proceedings in the U.S under extraterritorial application provisions. Eventually , however, the case was settled out of court. This case had some additional European implications on the tone of protectionism present at that time in an intra-EEC context. A further reason postulated for Laker's demise was the fact that his carrier was prevented from flying on many intra-European sectors. This became an especially hot issue when Laker bought European built Airbus aircraft to fly on intra-European routes before it had received permission to fly the routes. When the aircraft arrived Laker could not utilize them on the routes on which he had planned. This is, of course, very expensive and was thought to be one of the contributing factors to Lakers' demise. After much public airing of differences the result was an out of court settlement for Laker that did not serve to set any new legal precedent. One of the major reasons that Laker was able to achieve a settlement was because the potential of further court proceedings was being held over the head of a British Airways that was trying to privatize itself. It was feared by potential investors that any unfavourable ruling would adversely affect the value of the BA stock offering. Something that did come to light, and that was of interest, was the position of various UK players when faced with the potential collapse of Laker. " The UK government did consider ways of helping Laker before Christmas 1981 but shied away when the open ended nature (severity) of the problem became apparent. The CAA was instrumental in provoking the collapse by insisting on adequate financial 'headroom' (meeting the criteria of financial stability and health in order to operate an airline for public benefit) and believing it less inconvenient to passengers to have failure in January or February rather than July or August. (lower traffic volumes in the off-peak winter months). General Electric (engine manufacturer) and Mc Donnell Douglas (manufacturer of Laker DC-10's) were prepared to provide equity funding but were frightened off by the reaction of other customer airlines." 71

There are other legal challenges that deal more squarely with a singular European context. Going back to 1979 the Commission of European Communities published a document that dealt with the state of air transport in the community., entitled Air Transport: A Community Approach (supp. 5/79) it proposed positions on a number of issues ranging from safety to antitrust considerations. " The rules of competition (articles 85-90) form part of the general provisions of the Treaty that apply to air transport without any Council decision being necessary. The Competition Title lays down procedures for adoption of other rules."72

This being a departure from all the other actual events that have transpired aimed at instilling a sense of practicable jurisdiction for the Community. " The Commission lacked the practicable means to ensure that the airlines regularly and effectively complied with the rules of competition. In air transport there were no regulations, as there are for other industries, providing for an investigations procedure and penalties for conduct causing distortion of competition."73 Yet there are few hard reasons to comply with the standards set out in articles 85-90. " A transitional provision (article 89) empowers the commission , acting at the request of a Member State of its own initiative, to investigate suspected infringements of the competition rules and to issue a reasoned decision finding if an infringement has been committed. But if it is to pursue worthwhile investigations the Commission generally depends on the cooperation of the authorities of the Member States, which are required to come to its assistance. All the Commission could do in the past was authorize the Member States to take the necessary measures. Whether action can be taken to investigate and terminate an infringement largely depends on the goodwill of the governments of Member States. The Commission can, in certain cases, however, take action directly in relation to the Member States on the basis of certain autonomous powers (article 90) to enforce compliance with the competition rules by the Member States, where necessary by issuing directives or decisions."74

Thus, in 1979, the system depended largely on a Member State honour system.

The next significant document of a more current nature is the Memorandum #2 which was produced by EEC's Economic and Social Committee in 1984. While the document reviewed a great many aspects of European air transport it had several comments on the antitrust issue. Its opinion on the issue included the following "In general, the Committee acknowledges that the rules of competition should apply to Community air transport. However, it recalls the views expressed in its opinion of Jan. 27. 1983 on the earlier commission proposals regarding the application of the rules of competition. (In summary these views were: the dual legal basis (articles

84(2) and 87); rules to ensure orderly competition; special account be taken of the specific problems of international aviation; the extraterritorial effects of EEC law noted; a balance to be made between various interests ...)."75 Additional items that the Memorandum proposes include: "states should not intervene to influence or predetermine airline market shares. Governments should allow more flexibility in the setting of regulations for air fares. For a limited period (pre-1987) airlines should be allowed to continue capacity sharing, pooling of revenues and consulting on fares. The commission will review the granting of subsidies to airlines to make sure greater competition does not lead to what it calls "a subsidy race". The reforms should be viewed as interdependent and should be implemented as " a package". In return it will be agreed that air transport falls within the jurisdiction of the Treaty of Rome. One of the reasons why the commission was keen on a standstill period was that the member states might have been tempted to make the system even more rigid. While discussions are in progress, the Commission may take "direct action against practices of airlines which in its view are in violation of the competition articles of the Treaty of Rome."76

While it seemed plain to many observers that the legalities of the issue were not reflected in the commercial and operating realities of the European air transport system, there were to be forces of change that would go far beyond previous proposals.

"The Common Market has warned that unless there is headway in its attempts to liberalize air travel in Europe by next June, the community will initiate a full-scale legal drive to force change upon foot-dragging government airlines. The ultimatum was issued by Stanley Clinton Davis, EEC Commissioner for Transportation ....It appeared to indicate that the Common Market was poised to launch legal proceedings far in excess of what it has already undertaken against airlines and governments it deems to be standing in the way of free and fair competition..... " Let me make it abundantly clear that the Commission prefers a settlement by negotiation" said Mr. Davis. He added that if deregulation had to be brought about through the courts, it would necessarily be a piecemeal and unpredictable process."77

Two other issues should be touched upon and these include the issue of subsidy and the interaction of national legal regimes and the EEC body of laws Examining the French situation we already note some overlap of jurisdictions.
"Under decree No. 76-711 of July 23, 1976 concerning the approval of air fares, French airline fares should be submitted for approval to the Minister of Transport who is entitled to accept or refuse them."78 This decree in and of itself is in concert with normal

bilateral process and in fact domestic air policy which allows government to approve or disapprove tariffs that are submitted by carriers under its jurisdiction, national or foreign. With the EEC this process is not as simple, however, "The air fare approval mechanism set up by the French Government is, therefore, said to be incompatible with these Community provisions , particularily those in articles 85,86,90 of the EEC Treaty defining the Community rules on competition. The case made out by representatives of the airlines being prosecuted seemed sufficiently sound for the French national courts to decide to suspend judgement and ask the court of Justice of the European Communities for an interpretation on the basis of article 177 of the EEC treaty."79 This example is applicable to most EEC member states who have similar provisions relating to tariff filing. The resolution of the issue clearly depends on the Court deciding whether the antitrust portions of the treaty apply in this case. (see Nouvelles Frontieres Case in following pages) "Thus part two of the Treaty itself includes a title IV relating to the common transport policy and part three of title 1 defining the Community rules on competition with the previously quoted articles 85,86 and 90. Although article 61 of part two of the Treaty states that "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport ", article 84, which concludes this latter set of provisions, draws a distinction between two categories of transport, i.e.- overland transport on the one hand and sea/air transport on the other. It is worded as follows:

1- The provisions of this Title shall apply to transport by rail, road and inland waterways.

2- The Council may, acting unanimously, decide whether, to what extent, and by what procedure, appropriate provisions may be laid down for sea and air transport."80

From the foregoing, tour wholesalers have found a way to say that the Treaty applies in this instance thus prohibiting carriers from meeting the French government requirement for filing tariffs. The general application rule is, therefore, taken to mean that all forms of transport are generally bound by the Treaty. However, there are other interpretations. Several more precise precedents serve to bolster their case, including:

"Firstly, the arguments given by the texts. In particular, article 87 of the EEC Treaty which invites the Council- acting unanimously- to adopt any appropriate regulations to permit application to the transport sector of the rules on competition. These regulations have been issued, particularily No.17 of 6 February 1962. But shortly afterwards another regulation, No. 141 of 26 November 1962, excluded the application of Reg. No. 17 to air and sea transport-for an indefinite period of time." 81

The applicability of Reg. No. 17 effectively exempts air transport from any collusionary, price fixing, or "dominant-position" type prosecutions. Secondly, an argument based on decisions by the Court of Justice of the EC which include a number of verdicts supporting the thesis that Community rules on competition are not applicable to air transport. In particular a decision of 6 July 1982 in which the Court confirmed that the transport sector was excluded from the scope of the directive of 25 June 1980 relating to the transparency of financial relations between member states and public undertakings. (government carriers).

The directive was based on article 90 of the EEC treaty which forms part of the Treaty's rules of competition. It can thus be inferred that these rules on competition do not apply automatically to the transport sector, and even less to air transport which comes under a specific system."82 Therefore, if the Treaty is interpreted as being inapplicable then national law could stand. The issue then became how to reconcile the differences between the Chicago Convention (1944) which states that all nations are "sovereign over the air space adjacent to their own territory" and the rule of the EEC over that airspace. In this instance the French Court decided that they should defer to the EC Court for a ruling on the applicability of the Treaty of Rome.

The Nouvelles Frontieres Case which was decided on April 30, 1986 made the following statements in its decision:

" The European Court of Justice declared that the EEC Competition Provisions apply to air transport in principle but that direct application is left to Member State authorities until the Council of Ministers issues a Competition Regulation.....additional points include.... the ruling avoids direct applicability of Competition Rules which could have entailed discontinuance of tariff coordination and other airline cooperative activities..... it leaves the present system of bilateral/multilateral agreements intact....it makes clear that there is no retroactive effect possible in respect of any future Member State action and that past and present agreements between carriers will not be challenged...the role of Member States authorities is recognized and it is specifically stated that national courts are not competent in the first instance to rule on the admissibility of airline cooperative agreements under Article 85. Only if a Member State's authorities would have taken action under Article 88 would the Court then be competent to enforce the effects of such a decision." 83

Heeding the pronouncements of the Court, on Dec. 7,1987 the EEC Council of Ministers of Transport did agree to a package of liberalization measures. (summarized on next page).The paragraphs dealing with capacity, air fares and the applicability of the Treaty of Rome have helped spur competitive initiative on the part of some new entrants. Subsequenlty, several other challenges and threatened challenges have served to open up the EEC market a little more to competition. The European court of Justice delivered on April 11, 1989 its decision on the "Saeed" Case. involving the cross-border selling of airline tickets and was sued for allegedly infringing on German Federal Law. The court ruled that:

" bilateral or multilateral tariff agreements for routes within the EEC are void unless specifically cleared by the EEC Commission.........tariff agreements for international routes between an EEC and a non-EEC country remain valid for the time being....airlines may be charged for abuse of a dominant position if they force competitors to apply excessively high or low prices or to apply a single tariff on the same route."84

The "Package"

The EEC Council of Ministers of Transport unanimously approved on 7 December 1987 - and formally adopted on 14 December - the "Package" of liberalisation measures for European air transport on which it had reached a consensus in June 1987 (see Regulatory Affairs Review, Vol.16, No.4: June-July 1987; and No.6: October-November 1987).

The "Package" - which applies only to Intra-European air transport and is reproduced at **Document 6** - can be summarised as follows:

a) Council Regulation on the Application of the Competition Rules (procedural provisions)

This Regulation:

- lays down detailed rules for the application of the Competition provisions in Articles 85 and 86 of the Rome Treaty to air transport, including procedures for complaints, objections, decisions and liaison with the authorities of the Member States;

- empowers the Commission to obtain information, undertake investigations, issue decisions, impose fines, etc.;

- establishes an Advisory Committee on Agreements and Dominant Positions to be consulted by the Commission when exercising certain of its powers; and
- excepts from the prohibitions in Article 85(1) of the Rome Treaty certain technical agreements such as arrangements for interlining, clearing and settling of accounts, etc.

b) Council Regulation on the Application of Article 85(3) of the Rome Treaty (group exemptions)

This Regulation authorises the Commission to issue regulations - usually referred to as "Implementing" Regulations - granting, subject to specific conditions, block exemptions under Article 85(3) of the Rome Treaty to certain types of agreements and concerted practices such as consultations for joint preparation of proposals on passenger fares, airport scheduling, joint purchase, development and operation of CRS's, etc.

c) **Council Directive on Scheduled Air Fares**

This Directive:

- allows carriers to file their fares for approval by aeronautical authorities either individually or following consultations with other air carriers;

- provides for automatic government approval of discount fares falling within 90% and 65% of a reference fare and deep discount fares falling within 65% and 45% of such reference fare; and

- establishes simplified procedures for consultation and arbitration when a State concerned is not satisfied with a proposed fare.

d) **Council Decision on Capacity Sharing and Market Access**

This Decision:

- allows Third and Fourth Freedom carriers to modify, without government intervention, the traditional 50/50 sharing of capacity on a route to 55/45 until 30 September 1989 and to 60/40 thereafter (subject to Commission review in the latter case, if a carrier already suffered serious financial damage from the change to a 55/45 regime);

- allows multiple designation of carriers on a country-pair basis and, depending on the number of passengers carried in the previous year, on a city-pair basis; and

- provides, subject to many exceptions and limitations, for Third and Fourth Freedom operations between hub airports in one State and regional airports in another, combination of points and grant of Fifth Freedom rights under specific conditions.

The "Package" entered into force on 1 January 1988 and the Council will have to decide on the revision of all its components, except the Regulation referred to in a) above, by 30 June 1990 on the basis of a Commision proposal to be submitted by 1 November 1989. As regards the "Implementing" Regulations granting block exemptions as mentioned in b) above, the Commission intends to develop them before July 1988 and give them retroactive effect to 1 January 1988, thus providing legal protection to the airlines concerned in so far as they have complied as from that earlier date with the conditions set forth in the Regulation referred to in b) above.

SOURCE - IATA REGULATORY AFFAIRS REVIEW - DEC, '77 - JAN, '88

Overall in summarizing the European situation, we note that a real evolution in policy and applicability have occurred over the last 3-4 years. How far it will go ?, is another question, and many still wonder whether complete liberalization will happen by 1992 or even later.

<u>The United States</u>

As the only environment that has had over 10 years experience in being a deregulated market, the U.S. provides a fertile ground for potential application of antitrust law. Over the course of the last 11 years the U.S has gradually tackled many issues that were previously thought to be anticompetitive in nature.
The fear may now be that over compensation will occur, thus causing carriers to compromise their optimal business strategies for fear of prosecution. Starting with the introduction of deregulation we note that all of the antitrust issues that followed were derived from a common wish to ensure that the free market which evolved could remain competitive. Part of the impact of deregulation was that the agency which had formerly been responsible for the regulation of air transportation, the Civil Aeronautics Board, was to be abolished or "sunset" by 1985. As such the authority to adjudicate issues with antitrust implications would be passed on to another body of government. The big issue quickly became who ? There

were three possibilities which emerged as clear alternatives. The first was that a new regulatory body would be created to regulate all modes of transport with a much-reduced complement of employees. The benefit of this approach is that the independence of the regulatory body from government was assured. The major drawback was that the general board would lose the specialization that the CAB had previously accumulated in the air transport mode. The development of an agenda across various modes might be responsible for the comparative suffering of air-related issues. A second suggestion had the Department of Transport, who was to inherit the rest of the CAB functions, controlling antitrust issues as well. The advantage of this approach was that a centralization of air related functions could occur but since the DOT was run by appointees the feeling was that the level of antitrust enforcement could be influenced by political considerations. The third and final option was that the Department of Justice be allowed to inherit the antitrust powers previously held by the CAB. The pro for this option was that the greatest legal expertise resided at justice and that this would ensure proper application of the law as it had been intended. It is this strict and perhaps annoying interpretation of the law that had many industry groups worried. There was also a second negative factor, that being that the DOJ is also run by appointees and not totally impartial career civil servants. This issue was allowed to take on significant proportions before its eventual resolution.

Before discussing the eventual outcome of this issue we should touch upon some of the antitrust issues that the CAB was forced to rule upon before its eventual sunset. As we will note in examining the many issues that have arisen since 1978, the period of time required to resolve them has been rather long. The one issue that did receive much immediate attention during the CAB's post-deregulation rule was the issue of international fare agreements and the organizations that were responsible for so called "fare-fixing". The International Air Transport Association, a worldwide airline industry association, was the accused in many instances. Prior to deregulation U.S carriers had been allowed to participate in the so-called traffic conferences. These conferences had as a major aim the establishment of common fares on international routes, thus providing the consumer with a standard set of tariffs and accompanying rules that allowed complete interchangeability between carriers. Constructed on a geographical zone concept (for example the North Atlantic) the conferees met at regular intervals to set common fare levels and conditions of sale for those fares. These activities applied to inter-country travel and as such did not impact exclusively on any singular domestic jurisdiction *per se*. Prior to 1978 the U.S. carriers who participated in these conferences had CAB immunity from antitrust prosecution. Domestic US deregulation among other factors led the CAB to launch a "Show-Cause" procedure against IATA. Exclusivity of the IATA travel agency system and the club-like exclusivity that resukted from the IATA interline system were among those itmes challenged as anti-competitive. "The trade associations have played a significant role in many aspects of the aviation industry. The Air Traffic Conference (ATC), composed of most U.S. domestic carriers and IATA have been involved in regulating many aspects of the aviation industry. It is in the areas of trade associations and their activities that significant antitrust risks exist and where substantial and significant changes will have to occur. Under section 412 of the Civil Aeronautics Act the ATC and IATA filed agreements affecting air transportation with the CAB. The CAB has traditionally granted antitrust immunity to such pursuant to its authority under section 414 of the Act."85 "The principal danger of trade association membership and activity is the potential for a determination that the trade association and its members are engaged in a price-fixing conspiracy. Statistical reports by the association concerning disclosure of prices may have the effect of fixing prices."86

The disclosure of current or estimated cost data and price statistics, or estimated future transactions, may furnish the basis for a determination of an unspoken price-fixing transaction. "87

Despite the fact that the CAB did not come to a conclusion on the show-cause action the structures of both the ATC and IATA were eventually modified. In the case of IATA nothing untoward occurred until their previously granted antitrust immunity expired in the early 1980's. Immunity was subsequently extended but only for a period not to exceed 18 months. Previously both the association member functions and the traffic conferences (pricing related) had been united activities to which all carriers intending to be members had to adhere. Subsequent to the US challenge the traffic conference broke away from the other association groups and, therefore, allowed U.S. carriers to be members of the association without being members of the traffic conference.

As far as the ATC was concerned, it was completely replaced by ARC (the Airline Reporting Corporation) with the net result that all the potentially antitrust violating activities that the organization may have carried on previoulsy were abolished. It remained as a sort of clearing- house bank between airlines and travel agents in order to centralize and speed up the process of funds exchange. Other reporting duties relating to tariffs were no longer mandatory. So, overall, the organizations that had been responsible for standardizing industry tariff activity, travel agency accreditation and the facilitation of the exchange of data in the interests of uniformity and continuity, now had their roles modified. Carriers from other countries continued to deal with IATA in the same way they always had. The U.S. then sought other multilateral fora such as the ECAC (European Civil Aviation Council) through which to negotiate international tariff levels on a multilateral basis. The accepted international process that had been used for the setting of fares, capacity, competition/route and route awards could, of course, not be changed unilaterally even though many of these bilaterally-regulated issues could have been construed as being in conflict with antitrust application.

In a general sense the U.S. found out that it experienced competitive difficulties whenever it tried to extend its domestic deregulation philosophy to the international markets that it served. The U.S. "open skies" policy was aimed, in its simplest expression, at a complete freedom of competition between the U.S. and its air bilateral partners. Freedom to set capacity, fares, route exit/entry and route designation for carriers was to be liberal. After the successful signing of several of these liberal agreements the U.S quickly found that the market share obtained by U.S. international carriers decreased in the face of competition from the other nations' carriers. (e.g.-US -Singapore, US-Netherlands) As such the U.S. changed its outlook and continued to try to liberalize agreements with other countries but on a far smaller scale.

Other antitrust issues of a domestic nature were not resolved fast enough to have been completed under CAB jurisdiction. Thus we return to the outcome of the fight between U.S. government branches to secure the antitrust jurisdiction over domestic air transport. " First came the freedom to enter and exit markets at will. Next, as of (Jan. 01, 1985), the airlines will have freedom to violate the nations antitrust laws. This is raising a lot of concern in these, the last few months before the industry's immunity from general antitrust prosecution disappears along with the CAB sunset."88

In fact the political battle was to be a lengthy one, "there has been some skirmishing between Justice and the DOT over future responsibilities.......the airlines, taking a look at the often-confusing DOJ interpretation of antitrust policy for other industries, figured that they would be better off under the DOT's umbrella."89

The airlines began to examine precedent in the area and found little consistency. For an industry which had predicated itself on predictable commercial agreements this could prove devastating. Even the allies at the DOT looked for a time as if they had given up on the issue. "....... Justice and the DOT struck a bargain. Justice would receive all antitrust matters, with the exception of the tariffs filed by international airlines. At the end of February (1984) the DOT was beginning to crumble vis-a-vis this position."90
In fact the Federal Aviation Act, sections 408,409 and related 414 powers in addition to section 412,414 powers as related to domestic air transport were to be phased out. The antitrust chief usually set the tone of the administration who appointed him/her. Thus we note that the political umbilical cord between antitrust enforcement and the political process was far from severed. " Under former antitrust chief, W. Baxter, there seemed to evolve a more benevolent attitude toward business combinations and joint activities. Justice dropped the antitrust cases against IBM, launched primarily because of the company's bigness . It permitted Pratt & Whitney and Rolls-Royce to move ahead with a joint aero engine development. It approved establishment of a joint research and development venture by a batch of big electronics companies. Recently over at the Federal Trade Commission, an agency which sometimes

takes the lead in antitrust matters, both the General Motors-Toyota link-up in California and the Texaco takeover of Getty Oil were approved. Justice even slapped Chryslers' hands for complaining about the auto agreement. Then came Justice's new antitrust chief, P. Mc Grath, and his mouth-opening decision not to permit the LTV-Republic Steel merger, which was supposed to be a sure thing."91 Looking beyond the weight of an unpredictable historical precedent the legal decisionmaking parameters in the antitrust cases did not appeal to air carriers either. " Justice has left some room for manouvering. In cases "where such an agreement is filed and unsettled issues of antitrust law are raised, the agreement will be granted immunity if its potential competitive disadvantages are outweighed by its social and economic benefits.
That's fine for the Air Transport Association. But look at the record. The industry association says Justice hasn't supported the granting of antitrust immunity for anything (air related) since 1978."92
Additional carrier complaint about the DOJ's jurisdiction was forthcoming from when they questioned the DOJ's impartiality. " Countering arguments that the agency that prosecutes companies for possible antitrust violations should not also be the unit that bestows antitrust immunity on industry agreements, Justice said it can "effectively compartemetalize" so

that it can handle both functions. One source said that the Justice argument was not acceptable because they have " an institutional bias against granting any antitrust immunity."93 Eventually the DOT did receive the antitrust exemption authority for all domestic aviation issues."In addition section 411, 412 and 414 powers in relation to foreign air transportation remained with DOT." 93A The DOJ could, of course, bring complaint against various air transport activities. "Provisions of the Deregulation and (CAB) Sunset Act's transferred the CAB's authority over air carrier mergers, acquistion and interlocking directorships under sections 408, 409 and 412 to the DOT".93B Subsequently DOT issued their guidelines as to how the issues that had specific air transport ramifications would be handled. " DOT says that most mergers and acquisitions will be processed under expedited procedures without a formal hearing, but those that raise significant competitive issues will go to hearings before administrative law judges detailed from the Federal Trade Commission, DOT or other relevant bodies..... concurrently the DOJ intended to " exempt all interlocking relationships from the requirements " of section 408, but those that raise competitive issues could still be considered under section 8 of the Clayton Act...... all authority to regulate international fares and rates will rest with the DOT and only IATA's basic

agreements , bylaws and amendments will be subject to review." 94 Finally the issue of inter-carrier pacts on any issue ranging from fares to commercial agreements was dealt with by the DOT; " Carriers will be encouraged not to file arrangements under section 412 dealing with domestic inter-carrier pacts. " In cases where such pacts are filed and unsettled issues of antitrust law are raised, the agreement will be granted immunity except in those cases where the conduct has been or is likely to be the object of frivolous antitrust litigation. In such cases, the immunity granted by the department may be limited so as to apply to treble damage actions only."95
With this issue resolved, the continuing of antitrust evaluation for most industry practices was intensified. This was particularily evident among agreements that had been previously granted immunity and were now subject to review. As we shall examine in the coming pages there are many such issues and a brief look at several of them will serve to highlight the tenuous nature of any agreements perceived to be in violation. In the running of deregulated air transportation, the keystone to industry practice was the allowance of unfettered competition.
Unfortunately, the air transport infrastructure was not always able to handle the volume of competition that the free market allowed.

After the President had fired all the air traffic controllers, who failed to return to work after the preset deadline, there was a problem in accomodating the rapidly increasing number of aircraft movements that were occurring at the nations major airports. As such, a system had to be developed in order to apportion the limited resources of landing and parking slots at major airports that were experiencing congestion. Because major carriers of longstanding had developed hubs at certain airports which required the performance of many landings and takeoffs in close time proximity to each other, the congestion at major centers was accentuated at the best traditional operating times during the day. Further to this the major carriers had historically been the biggest operators to certain airports and, therefore, had built up what they considered to be grandfather operating rights. New entrant carriers complained that their ability to compete would be hopelessly hampered by these grandfather rights if accorded to the older carriers. The resolution of this issue has the potential to create antitrust infringement. There were perceived to be two basic methods for resolving the fair redistribution of the rare resource of airport access. The first involved airport scheduling committees which implied carriers and the airport administration got together to repartition any slots carriers did not want or to divide any new slots that had become available. By definition this system required a certain amount of collusion between parties to come to some form of agreement. The second solution would try to use free market forces to buy and sell slots between carriers. "In comments filed at the CAB, the Dept. of Justice said airlines should be free to acquire or dispose of airport slots, as are competitors in other unregulated industries, and without benefit of antitrust immunity. Free exchange in the open market is the most efficient method for allocating a scarce resource...... by testing such a free and open exchange in an experimental setting, the carriers can gain experience which can be employed in easing the transition from the committee process now being used to allocate slots to a full market mechanism at all high-density airports. The department argued against CAB conferring antitrust immunity on the proposal, saying that a free and open exchange market for slots functioning properly, is not inconsistent with the Clayton or Sherman Acts."96 The big proviso is that the system works properly. In each of these options there are problems. In either case there is the opportunity to conspire between current operators to restrict access for newcomers. Furthermore, in the free market access option there is the legitimate possibility that all carriers that operate into a congested airport are actually using all the available slots. This would preempt any new entrant from commencing operations. Another problem is that carriers who originally obtained slots were granted these access rights by the CAB in the days of regulation and did not pay anything for them. In the open market slot trading option proposed by the DOJ there would be a cash price for slots given by one carrier to another thereby granting the selling carrier a windfall profit for selling something that was not theirs to start with. Furthermore these trades cannot confer right of ownership since carriers do not have the right of property in slots, only the right to use them. Therefore the buying carrier can only hope to obtain the right of lease based on uncertain terms at best. Another supplemental issue deriving from the free market option is the issue of price/slot. Can selling carriers charge exorbitant prices or should there be a ceiling? Can the larger carriers charge a price in excess of what the smaller new entrants can pay thus constraining competition? The answer to these, and many other similar issues, revolving around the fairness of slot trades (sloteries) eventually resolved themselves. "According to the DOJ, "the marketplace can be relied upon to resolve most of the problems ...... the DOJ believes that government intervention is more costly and less efficient than requiring the users of aircraft and airports to balance costs and benefits of access to what are, in essence, As time went on the problem became bigger and bigger in that the congestion escalated. The Federal Aviation Administration, who is in charge of maintaining the operating air transport infrastructure in the U.S, then felt that action should be taken to reduce activity during certain peak times at the busiest airports. "Six airports singled out by the agency would have the following operational limits: Newark- between 8am and 9.59 and 1700 and 1859 69 operations/hour, not to exceed 33 arrivals" with similar restrictions at Atlanta, Denver, Chicago and both Kennedy and Laguardia airports at New York,..........." The petition asked for antitrust immunity for one year for discussions under FAA auspices."98 As the problem escalated antitrust immunity was granted until the end of 1984 in order to allow carriers to discuss among themselves the resolution of the overcrowding issue. In granting immunity concerns were repeated regarding a preference in favour of buying and selling airport slots as a long term solution to the issue of airport congestion. A second mechanism that emanated from the antitrust exemption was that carriers who were major operators at certain airports began to feel that they could get together with one or two other carriers to resolve congestion by juggling schedules among themselves. " Delta and Eastern won acclaim this week for the fast work they did in spreading out their operations at Atlanta Hartsfield

Airport to reduce congestion and delays there. The action came on the first day of negotiations among airlines aimed at relieving delays at six major airports."99 In the end similar negotiations resulted at all congested U.S. airports. The long term future of the issue was again dealt with when an additional order was put forth stipulating that the free buy/sell rule should be used to resolve all further transactions. At this point in time it looked as though this proposal would clear all the relevant legislative hurdles and would be the designated system used to deal with airport congestion. There are other attendant rules, however, which would seek to safeguard against some of the earlier discussed flaws in the free market system. New entrants and commuter type carriers are guaranteed a certain percentage of available slots in order to ensure access to congested airports. There have not, however, been any restrictions placed on the upper limits of slot price that a selling carrier can charge. In addition the concept of carriers selling something to which they have no rights of ownership, or even perpetual lease, is inconsistent with legal practice in other fields and may cause future problems. In concluding on this particular application of antitrust law, we note that the realities of deregulation have caused some problems that are not always solved in an equitable fashion. However there have evolved two options to resolve the issue of congestion both of which were eventually exploited. It is, therefore, appropriate that the correct mechanisms be put in place to pre-empt would-be misusers. The fact remains that not all legal ramifications implicit in the slot issue have been adequately explored and future experience will no doubt modify the system accordingly.

A second major issue that has always had potential antitrust implications in other industries has been mergers and acquisitions. Now that air transport had had regulation removed from its infrastructure, it was normal that regular generic application of antitrust concerns to undue and anticompetitive concentrations in the industry should be looked at. There was an attendant philosophy that stated that air transport could get a temporary special status because it was an industry in economic flux. The major reason for this flux was that in going from a regulated to deregulated structure there were bound to be large redistributions of power amongst the industry players. This redistribution was due to the entry of new kinds of airlines into the system. (see Chapt. 2- US section) Unlike their older carriers that had grown top heavy and inefficient through competitive protection from newer entrants, the new competitors were cost effective and used new, previously unexplored ways to serve the market. As such there began to be a differentiation in the kind of air carrier structures that evolved in the U.S. industry. Instead of an industry that was characterized by very few outright winners and consequently very few outright losers the rate of bankruptcy went up and the less efficient airlines who were unable to adapt now had to contend with the real thought of bankrupcy. As a result the option of buying failing carriers as they appeared to be on the brink of bankruptcy for a fraction of the real carrier value, was increasingly attractive to the survivors.

The trend towards buying out your competition began in earnest soon after the advent of deregulation in 1978. In the late 1970's the authority to decide issues of antitrust jurisdiction still resided at the Civil Aeronautics Board. (prior to Sunset) The early rationale for merging or acquiring carriers was reminiscent of business strategies that had been useful during the regulated era. Best described as the "big is beautiful" viewpoint, carriers felt that the bigger they could grow the better off they would be. In order to gain an advantage over their competition many carriers thought that they could grow more effectively by acquiring others than by growing internally. As a result two mergers, one between Pan Am and National and second between North Central/Hughes Airwest and

Southern Airlines went through relatively unopposed. In a primary sense these mergers created very little duplication of route network and, therefore, did not create any specific route or market monopolies for the carriers concerned. Unfortunately for the surviving carriers that evolved, the result was not very positive in a commercial sense. In the case of Pan Am, they are still plagued by serious financial difficulty and Republic (ex-North Central) went through a rather lengthy recovery period. Be that as it may, the early acquisitions were not really the stuff from which legal precedent are made. However, there was one merger action between two all-cargo carriers that had the potential to create anticompetitive implications. It revolved around two carriers that had large international all cargo operations. The number one carrier decided that it wished to buy out the number two competitor and between themselves they reached a takeover deal. Unfortunately, even though they were not directly responsible, the Department of Justice intervened with its own opinion of the transaction. "The DOJ has asked the CAB to reverse the recommended decision of the Board law judge to approve the Tiger International /Seabord World merger calling the decision a "serious departure from Board precedent and policy."[100] The basic issue revolved around the undue concentration of market power that would reside in the new combined airline.

The DOJ went on to say "An alleged need to meet strong international competition is not a valid justification for an anticompetitive merger...........(contrary to a similar Canadian rule)"Tiger and Seabord are the nation's largest all-cargo carriers. Their independence and spirited growth must be preserved...........(the merger) would mean that one carrier would own 40% of the domestically owned 747 freighters and over 80% of the DC-8-60 series aircraft in service."101 Although the battle raged between both parties, the final result was that the President (Carter) approved the initial CAB decision over DOJ protest. (Interestingly, the subsequent joint carrier that the Flying Tigers/Seabord merger created was recently bought out by Federal Express, the largest small package carrier in the US). The fact that the market was deregulated meant that new entrants could still come into the market and, after all, the market still had six other major competitors and therefore on balance it was determined as being acceptable. Other mergers that were attempted or actually took place were less controversial because they did not represent any significant concentration in any single or set of markets. In addition the other mergers that occurred in this time period were usually trying to save a weak partner and rarely were marriages of strength. Starting in 1980, however, the DOJ tried to change the data requirements for merger or acquisition filings. "DOJ asked the Board (CAB) to make three changes in the rule: 1) to make clear that the data requirements must be met for mergers involving interstate/ intrastate carrier combinations , and for mergers involving more than two carriers; (2) to require that applicants submit studies of all prospective mergers completed within the previous three years-not just studies involving the two applicants, and (3) to require that information be required on applicants' single-plane services as well as nonstop operations. The department pointed out that in some cases single-plane services were competitive with nonstop."102 By 1982 the process of determining the investigative antitrust guidelines for the DOT had begun. " Any proposed merger between an industry leader with at least a 35% market share and a firm with more than 1% of the market that also is twice the size of its next rival is likely to be challenged by the DOJ .... mergers should not be permitted to create or enhance market power or to facilitate its exercise."103 By and large very few cases even caused a ripple although several were investigated. In fact, given the relatively minimal commercial advantage that was perceived, these cases could hardly be cause for concern to those who felt that mergers or acquisitions would lessen competition. Shortly after the final approval of these mergers, and before any other

similar major events occurred, the worst economic recession since the last depression intervened.
As a result any carriers that had been anticipating major buyouts soon found that they had to conserve funds in order to maintain their own internal operations. This policy remained in effect until the owner of one airline, Texas International, decided to try and buy out a much larger carrier that was failing quickly. The ailing carrier, Continental, was losing hundreds of millions of dollars when it was bought out by the Texas Air group. Certainly the merger of these two carriers did not create a strong competitor nor did it prevent others from competing nor unduly raising the barriers to entry. And so it went for several years, every time a merger was contemplated the match was usually between a weaker and a stronger carrier with disparate route structures and minimal competitive impact. This changed as soon as the economic tide turned and carriers started making money again. By the time late 1984 and 1985 rolled around several carriers were gaining strength and looking for quick ways to grow.

There are two basic approaches to growth including internal growth and acquisition. As the cash and profit situation at the U.S.'s largest carriers improved they were now able to pay the admission fee into the merger game. Enter the game they did, with many of the larger U.S. carriers having been recently involved in takeovers of other carriers. The issues in these take-overs vary but the key concerns for the legal analyst are the implications on competition that the consumation of any merger or acquisition would cause. In this area of antitrust practice the recent precedents are mixed. In the case of the Southwest Airlines'/Muse Air merger .."the DOT approved the merger last year despite the fact that Muse was Southwest's only jet competitor at Dallas Love Field and the only competitor on the heavily travelled Dallas Love-Houston Hobby route that some liken to New York-Boston routes in the East."104 One may compare this case to one which was then going on involving Continental and Eastern Airlines. "Opinion is divided on the antitrust implications of Eastern's continuing to operate its Air-Shuttle in the Washington-New York-Boston corridor along with (Texas Air's) New York Air. Each offer hourly services under different service concepts and occupy slots at La Guardia and Washington National Airports, both of which are high density airports with restricted slot allocations."105 In these high density business markets between New York, Boston and Washington the combined Eastern/ Texas Air group would have upwards of 70% to, in some cases, 80% market share. Since the incremental new access to the two above mentioned airports (La Gaurdia and National) is limited the potential for other carrier entry is reduced. This would allow the dominant carrier to raise fares and control the market with little fear of competitive retribution. This is yet another example of a merger that had the potential to unduly constrain competition. Other than on these eastern seabord corridors, the Eastern/Texas Air merger had little additional anti-competitive impact since the other operations of these carriers sport no other significant overlaps. Other carriers operating in the eastern seabord corridor have already made application to have part of the merged Texas Air/ Eastern route network subject to divestiture in order to preserve competition. Eventually, a DOT decision on this merger allowed it to go through as long as another carrier (Pan Am) was given some of the Texas Air slots in order to allow it to operate a competitive shuttle product. Today we have witnessed that in the present Eastern Chapt. 11 bankruptcy hearings the former Eastern Shuttle has been sold to a new entrant (TRUMP AIR). Other contemplated mergers or acquisition proposals do have other anti competitive components. One of the key operational strengths that a carrier can have in the U.S. is a so-called "hub" of operations. A hub is a central point in any carrier's operations where a majority of flights connect to each other and provide an intra-carrier ability to exchange passengers between flights. Most larger and medium-sized U.S. carriers have at least one major hub, 200-400 departures a day from a hub, where they dominate operations. The fact that there tend to be more airlines than available major traffic points (hubs) means that there is bound to be some overlap and that at several hubs two carriers compete with each other for dominance into and out of that hub.(Chicago) In these instances the result tends to become the top two carriers gaining upwards of 75- 90% of the total market from these points. Consequently, when any two of these carriers contemplate a merger it immediately raises antitrust concerns of dominance at that hub. We have seen several instances of this type of activity over the last number of years. The first was the merger that was allowed to occur at St. Louis Lambert airport. The two carriers involved include TWA, itself having been recently bought out by Carl Icahn, and Ozark airlines, a regional airline with its center of operations at St. Louis. " Ozark Airlines accepted a $224 million takeover bid last week from TWA, a merger long sought by TWA to control traffic feed at the St. Louis hub the two carriers share.........the two carriers represent 79% of the revenues and 81% of the people working at St. Louis.......consolidation of the two carriers has been a strategic objective of TWA since 1984. Initial talks ended abruptly in the summer of that year.....airline officials have attached significance to the failure of those talks, which resulted in continued costly competition between the two carriers." 106 While not debating the fact that competition can be expensive to the combatants, can one assume that its elimination will be beneficial to all ? Again the preservation of competition has certainly led to lower prices for St. Louis consumers and if the largest competitors are amalgamated then the ability for any other carrier to compete will be limited and the prices will probably go up. While St. Louis is not one of those airports whose operating capacity has peaked, the market synergy of TWA and Ozark provide a formidable obstacle for any new carrier. This has already been validated by a new entrant airline , Air One, that sought to become a major force in St. Louis and got caught in the cross-fire between Ozark and TWA. The result was that both TWA and Ozark lost money, and Air One went bankrupt. There were moves by the DOJ to try and get the DOT to hold hearings on this merger and to quantify the actual impact on competition in the St. Louis market. The potential argument for the defence seems to center around the fact that most of TWA's operations are international in nature while Ozark's are domestic.As such it could be argued that, by buying Ozark, TWA was simply strengthening the domestic feed to its international with foreign airline concerns. This argument has been successfully used in several other cases including the Seabord World/Tiger Air case we looked at earlier. " (the proposed merger).... would position TWA as one of the top five largest U.S. carriers in passengers carried. The initial agreement proposed operation of Ozark as a separate subsidiary." 10/ This latter statement presents another potential loophole for would be acquisitors wishing to buy out other carriers. They simply operate the other carrier as a separate operating unit. The practical competitive implication in this scheme remains the same as an amalgamated operation, however. Even though the two airlines are not together, they inevitably operate joint schedules at similar fares which are the key competitive variables in most markets.

Another case that got the DOJ up in arms is very similar in situation and potential competititve constraint concerns. This time the hub in question was Minneapolis/St. Paul. The airlines involved, Northwest and Republic once again had uncertainty added to their contemplated transaction by antitrust concerns. "DOT noted that the Northwest/ Republic merger application raises a number of issues which might ordinarily prompt it to set the case immediately for an oral hearing. The transaction will eliminate head-to-head competition in over 40 nonstop city pairs, most of which are centered in one hub. Combined Northwest/Republic share of capacity and enplanements at Minneapolis/St Paul will be greater than any single carrier share at any other large hub except Pittsburgh (US Air by growth not acquisition), and the combined entity's share of capacity and enplanements at Detroit will be roughly 60%."108

Therefore in approving this merger the DOT would be creating a new standard for dominance in a hub market. Despite DOT jurisdiction the DOJ made very substantive comment on this case. Comment enough to lead any observer to believe that there could have been a long fight on this particular merger attempt."The DOJ yesterday came out against the proposed Northwest/Republic merger, saying that the transaction creates a significant risk to competition in most city-pair markets that have Minneapolis/St Paul as a terminus. " We know of no way to remedy the competitive problems created by this merger. DOT should therefore disapprove it". .... At issue is the DOJ's analysis of 42 markets where Northwest and Republic now provide a 'large share' of the competing nonstop service. ....in 26 markets, all competition would be eliminated by the consolidation of the only two carriers providing nonstop service. Merger would also reduce competition in city-pairs having Minneapolis as a starting point, where either Northwest or Republic now offers the only nonstop flights, by removing the only uniquely, well positioned competitor to enter 18 of those city-pairs immediately."109 This last comment represented a DOJ perception that the future competitiveness in these markets, over the long term, was limited. Given the present trend towards concentration this would appear to be true. " In 29 city-pairs, the combined Northwest/Republic would have more than 80% of the capacity, and in 24 of those markets 100% of the capacity.........if one carrier had a monopoly over nonstop service on any city-pair at issue, that carrier could raise fares by at least 5% without losing passengers to one-stop or other alternative services . A key element in the DOJ's negative opinion was its conclusion that carriers without a Twin Cities (Minneapolis/St. Paul) hub are unlikely to enter the adversely affected city-pairs having Minneapolis/St. Paul as a terminus. The DOJ interviewed carriers it believed likely to be interested in a Twin Cities hub. All but one dismissed out of hand Minneapolis/St. Paul as a potential post-merger hub site, citing the "cities' geographic handicap" and the dominance of the merged Northwest/Republic. In addition, the DOJ said it would take more than two years for another carrier to build a hub at Minneapolis/St. Paul in response to a significant fare increase in some or all of the affected markets."110

In this case the new test is the likelihood of future competition. It could seem that potential dominance would prohibit any significant competitive thrust being exercised by a new carrier. In fact, the difficulty of penetrating the Minneapolis market had already been brought home to People Express who fought a fare war with Northwest between New York and Minneapolis, and lost. Fortunately, the fate of People Express was not as drastic as that which befell Air One in the St. Louis market. People's (at that time) simply retrenched in other markets but was given an indication of the already dominant status of Northwest in Minneapolis linked markets. The issue that came from this evaluation of future competition in Minneapolis was whether a carrier could compete in a hub dominated by other carriers. The DOJ question of trying to ascertain who would build a hub at Minneapolis may not have been fair in that one could compete in markets without having to build a hub there. Many other U.S. carriers do that today. While there can be no question that the newly merged carrier would represent a dominant force, can we also draw from this that there would not be any competition at Minneapolis ? The carriers, for their part, had already responded with arguments of their own...." In 38 of the city-pairs, Northwest and Republic did compete (then), and Justice feared that eliminating one of the merged partners as a potential competitor might diminish competition. Justice was also concerned that Northwest's hub at Minneapolis and its presence at Detroit would give it an advantage over the other potential new entrants. But Northwest and Republic, in a DOT filing, said Northwest could not be considered a potential entrant in many of the city-pairs because of its lack of twin engine equipment."111

This case, after having been heard, was allowed by DOT to go through. It was a difficult case for the reasons mentioned. Overall, the Detroit and Minneapolis markets have belonged to the merged Northwest/Republic combine since then. Because most of the remaining big carriers have developed their own dominated hubs, one could today construe the need for mergers as essential if any larger-sized carrier wishes to survive on a national basis. Once again the precedents set in previous cases have had little bearing in these cases since the environment has changed significantly and many mergers are now between two relatively healthy carriers. In other countries such as Canada, we noted limited objection to mergers which created carriers with in excess of 45% domestic market share. In the U.S. we speak of carriers who, for the most part, have U.S. domestic market shares approaching 15-18% and yet we see swift action in cases where dominance of particular city markets is contemplated, even if the market share is somewhat less than 2%. One can draw attention to the fact that the U.S. and Canadian markets are very different in size yet one wonders whether size of market should be a controlling factor in antitrust determinations ? Certainly the gauging of competitive opportunity and the potential for its extinction should not be connected to size of individual markets. The area of mergers was one of the first to undergo rigorous examination, through case application, as the economic health of industry improved. The accuracy of this brand of law is still rather suspect because of the lack of previous application. It is clear that the opportunity for development of antitrust law has clearly presented itself. Many subsequent mergers (US Air bought Piedmont & PSA, American Airlines bought Air Cal, Continental bought Eastern, etc) have created a collection of competing hubs. Many carriers have at least 2 or 3 hubs where they dominate (see economics section- chapt. 2), it has become a commercial fact of survival. Despite all of these mergers a recent ATA study concluded that: "contrary to popular belief, passengers in hub origin-destination (O&D) markets generally enjoy greater freedom to select service from competing airlines........the study found that 4/5 ths of all O&D traffic at hub airports is in city-pair markets having more than one airline providing nonstop service, and connecting service provides even more competitive benefits and substantial savings..........

study also found that average fares at hub airports were approximately equal to industry average fare levels in 1980 and 1984, and were 1.5% above industry average in 1988. Almost 2/3's of all hubs studied experienced a decline in average fare levels over the past four years. By 1988, on-line O&D service had increased 102% to 224 markets and competitive online O&D markets had increased 217% to 133 markets. In short these findings that ATA will present at the hearing strongly suggest that anecdotal evidence aside, the hub-and-spoke system has evolved into a highly competitive national transportation system, ATA said."112

Leaving this specific area of antitrust, we note that there are several examples of contested dominance which bear mentioning. Once again the quandary of whether the parties involved are simply capitalizing on smart business related decision-making or abusing the system is at issue. Actual practice of antitrust law in the U.S. since the early 1980's has shown that all major mergers/buy-outs have been allowed to proceed with few restraints, thus creating a very much more centralized U.S. domestic industry. This is normal given corporate merger/buyout trends in various phases of the economic cycle. (see chapt. 2) A key concern in a similar area has been the traditional concentration among various forms of distribution channels within the industry. The two main systems are the travel agency network that, as we have previously discussed, has undergone some significant change and the airline owned computer systems. (CRS). The CRS issue is so key since a great majority of travel agents rely upon the information in these systems to book trips for clients. Since the two major systems are owned by American Airlines and United Airlines, the fear is that these airlines will seek to dominate the distribution chain for air travel in the U.S. Since roughly 80% of all air travel in the U.S,. is booked from information contained on the first page of a product display of flights between any two points, the issue is one of significant commercial impact. The carriers who felt discriminated against in these systems have been voiciferous in their representation that these quasi- distribution cartels should be broken up and managed in some more equitable fashion. The competitive carriers feel that the displays are biased against their flights and, therefore, many agents book their passengers on the flight of the carrier who owns the computer system. The carriers in question simply retort that their systems are not biased and provide equal opportunity to any carrier wishing to pay the access fee to be fairly displayed in their system. In fact the government had already said that vertical intergration among various facets of airline operations should not be allowed.

The Computer Reservations System (CRS) isue has been a subject of much antitrust activity over the past several years. Traditionally, DOT and others had suggested that single ownership and control of the major CRS's was anti-competitive. Several carriers thought that by spreading the ownership the antitrust threat would be reduced. A recent action by the DOJ, however, has rejected this theory. "DOJ's opposition to the proposed American/Delta CRS merger may signal a shift to more critical antitrust review of airline industry-related mergers than was the case during the Reagan years. American and Delta scratched plans to merge their CRS's into a joint single venture company after DOJ announced it would file suit to block the proposed merger. American-Delta proposal would have merged the smallest domestic system (Delta's DATAS II) with the largest, American's SABRE. This caused industry speculation that other smaller systems (System ONE) Continental, and PARS (Northwest/TWA) would also have had to merge just to keep up."113 A further contention of the carriers who are the most dominant in CRS is that they are so because of good business sense. By deciding in the 1970's that computer distribution systems would be important to the future of the industry these carriers invested before the others and as a result became dominant because they guessed correctly and invested accordingly. Because the other carriers had not done so they found themselves at a comparative disadvantage.

Discriminatory practice by the dominant carriers was not a factor when one used this logic. In an overall sense we note that the criminal variety of antitrust offence is rare in the air transport industry. In fact only several cases, which were quietly resolved, even dealt with deliberate attempts to unduly restrain competition. One revolved around the obtaining of taped copies of a telephone conversation between the then Presidents of American and Braniff airlines. This occurred before the latter had failed and was an attempt on American's part to try and stem price competition on overlapping routes from Dallas, American's and Braniff's (then) operating hub. Despite a full tape of the conversation the case was dropped after a settlement. For the DOT the big future challenge would seem to be deciphering the difference between good business sense, and a possible resulting reduction of competition and a real conspiracy to unduly reduce competition while trying to keep a balance between DOJ opinions and productive industry practice.

CONCLUSIONS

Having started with the premise that the role of the regulator would entail several inalienable duties including: (1) The development of comprehensive safety regulations and the ability to monitor their enforcement. (2) The development of the air transport infrastructure and the rules governing their use. Traditionally, the third area of regulation that was administered by government agency was that of economic regulation. With the advent of deregulation or liberalization this bundle of responsibility reverted to market control. Another way that government agencies exerted some control over activities in the system was by ownership in air carriers. With the evolving trend towards air carrier privatization this lever has also dissipated in effectiveness.

Despite the reduced opportunity to regulate air transport market activities through the traditional methods, regulators must still have the ability to fulfill the public mandate of maintaining a viable system for use by consumers. Even though deregulation has changed the market test of fit, willing and able from public convenience and necessity, the need for a reliable air transportation system will not diminish. Therefore the role of regulating competition, as antithetical as that may sound, is one which is gaining importance in many jurisdictions including the ones evaluated in this paper.

The critical changes that have taken place in the market have forced air carriers into a dramatic learning experience. The pressure from shareholders for more profit increases, especially at newly privatized airlines. Therefore the strategies adopted tend to reflect maximum commercial advantage for the carriers involved. In many ways air transportation is becoming like most other domestic lines of business. As such it makes sense that the regulation used to judge the legality of competitive practices be similar to that applied in other businesses.

In Canada we have seen some important antitrust cases decided recently. In some instances the action not taken (CAIL/Wardair case) has set as important a precendent as the cases where action or agreements were reached which significantly modified the original transaction. (Gemini CRS case). With two major carriers (with strong affiliated regional carrier networks attached) one could justifiably wonder whether some of the biggest cases are now in the past. In the Canadian context one thing seems certain and that is with the advent of the new Act and the seemingly more aggresive enforcement thereof, that antitrust will play a larger role in Canadian air transportation than it has in the past.

" The European Commission's overall responsibility for competition within the EEC is largely a sham. How else to explain, for example, Europe's cartelised airline industry ? Or the way merger policy still remains a matter of national sovereignty for member countries." 114 This was the perception not so long ago in many quarters in Europe. Some activity since the mid-1980's has led to change in the level of competition fostered by the regulatory system.And indeed certain antitrust trends are building in individual EEC nations. Despite EEC initiatives the individual carriers are still subject to various jurisdictions with different legal obligations and requirements.

In looking at the state of antitrust in Europe we note that most of the criteria revolve around determining whether or not a specific merger will have a detrimental national impact even though the overall competitive impact on the EEC zone could be minimal. Another item to be looked at in the future is the development of the antitrust issue and the continuing move towards global or multinational aviation companies. By blocking large local firms, a specific nation could be slowing a bid by one of its own companies to achieve global status in a given industry.

There are no major moves afoot to change relevant statute. " In West Germany, however, few businessmen want the Cartel Office to ease its rule to help them to be stronger internationally. ....If anything, the mergers spate (recent) is prompting West Germans to wonder if the existing system needs strengthening."115

" In Britain, merger policy is more politically controversial. The opposition Labour party wants most takeovers banned unless they can be proved in the public interest....... In reality, the British government makes up policy as it goes along. On wider competitive grounds, it has gradually ceased to give special protection to Scottish firms (the so-called tartan ring-fence) and has encouraged a takeover approach by General Motors for BL's lorry division in the belief that bigger means more internationally competitive. Yet it has referred the bid by the General Electric company for Plessey to the monopolies commission, even though in the world league the merged firm would not be a giant."116

".......France seems to have abandoned anti-merger policy, though it keeps reserve powers to break up cartels. From this month the anti-trust aspects of domestic takeovers will be judged by a panel from the stockbrokers association. ......It can refer what it thinks dubious to the Commission de la Concurrence. Previously, only the

Finance Ministry could make the referral. Since 1977, it has made only eight; only one caused a proposed acquisition to be stopped. 117

Certainly these records do not militate in favour of stiff antitrust adherence. Indeed in many EEC nations it is more important to ensure that the ownership of major national firms does not fall into the hands of foreign companies. The British government demonstrated this with great success during the sale of BCAL. With SAS in the running to buy BCAL, the rules as to what constituted effective national control seemed to change almost daily. Many observers agree that the UK tried to make sure that BA was finally successful in its takeover bid so as to preserve UK control of its international carriers.

Other European countries have even less concern for the anti-competitive activities that may be going on in their own jurisdiction. " Italy, which has no antitrust law, (except for newspapers) has no fixed limits on percentage of foreign investment. In Spain, the attitude to foreign investment has become more relaxed, although it can be banned to stop a monopoly." 118 Despite these precedents it seems that more and more cases are being brought by upstart scheduled carrieres such as Air Europe, UIA and others. The issue of the overall effectiveness of antitrust in the EEC does remain questionable however.

In the U.S. we find an economy that has a substantive trade deficit with the rest of the industrialized world because of a strong dollar. As such, the issue of allowing domestic industries to become stronger by merging and creating more internationally competitive corporations is one that is gaining in acceptance among the legal theorists. There was even a Presidential commission (during the Reagan era) that sought to find various ways of modifying the present legislation. While the actual statute was not changed radically, the level of enforcement did. In the U.S., as in most other jurisdictions that have a serious antitrust law, challenges to mergers or acquisitions come from both private and government sources and thus many corporations are subject to intense scrutiny in any attempt at takeover. The high level work group on antitrust was co-chaired by the Treasury Secretary and the Attorney General and was looking for new ways to improve the antitrust system in the U.S. " Reagan's Justice Department has already relaxed its merger guidelines. The government used to focus on size-big was bad. Now the Department considers other questions, such as whether the merged entity will compete more effectively............at the same time, the Justice Department and Federal Trade Commission have paid little attention to price and territorial arrangements between manufacturers and distributors",119 typically one of the relationships that is more vulnerable to antitrust analysis. Interestingly, the U.S. trend seems to be bucking the trend experienced in Europe and Canada in that the Americans were seeking to loosen the antitrust laws while Canada and Europe are just starting to test domestic antitrust statute and its applicability to air transport. The Reagan Administration was seeking to rewrite the law and several potential ammending formula are possible.

"Baldridge (former U.S. Commerce Secretary) has called for a repeal of Section 7 of the Clayton Act, which prohibits mergers that "may...substantially lessen competition...or tend to create monopoly." In 1914, when the Clayton Act passed, U.S. producers dominated domestic markets. But now that U.S. companies face cutthroat foreign competion, Baldridge insists, the Clayton Act is "stopping the kinds of efficiency-creating mergers we need to be internationally competitive."120

In trying to apply this general dictum to air transport however it became a little more difficult to justify the logic. Most of the large U.S. carriers , until recently, had rather small international operations. In fact Pan Am, TWA and Northwest were the only ones to have significant international operations. As time has gone on, other carriers have added large chunks to their international networks. (American, United)Such being the case they may now have the opportunity of claiming that they must acquire local U.S. carriers in order to build up their feed potential to their international networks, where they compete with subsidized national airlines of other countries.

It is, in fact, the continued amalgamation of U.S. carriers that has created new, more vital, international U.S. carriers. (e.g.-TWA's buying of Ozark airlines to gain that feed for their international network and build a St.Louis hub). United's purchase of Pan Am's Pacific route network that can now be matched up to their huge U.S.domestic route network for traffic feed. Similarily the Northwest purchase of Republic helped Northwest compete with Asian carriers across the Pacific. So the intra-U.S. carrier competition has heated up as well. Continental's purchase of Eastern, Delta's purchase of Western are among some of the larger mergers to occur. These mergers have had the net effect of building a small number of large dominant mega-carriers in the U.S.. As a result the remaining players have been more effective in competing in international markets. While several of the transactions have been questioned by antitrust enforcers none were rejected, although a few mergers had conditions placed on them to encourage competition in markets that may otherwise have been unduly dominated by a single carrier.

"Another Baldridge proposal under consideration by the Administration's study group called for the reform of U.S. trade rules, which allowed companies to petition for relief when they felt that imports were unfairly damaging them. If the ITC found injury, the President could impose quotas, tariffs, other forms of protection, or do nothing. Baldridge proposed still another option for the President: the right to grant an industry antitrust exemption from most antitrust laws, allowing companies to consolidate freely.......such solutions would not be protectionist because markets remain open. (This could be a potential anti-trust shield for air transport) And it would not be industrial policy because the decisions would be made in the boardrooms, not by government. Another proposal would remove treble damages for all but the most severe offenses, such as price-fixing and bid-rigging. Reducing the potential payoff in suits, they reason, would discourage private antitrust actions and reduce the chilling effect they now have on companies contemplating mergers or joint ventures."121 Overall therefore, the future of the U.S. scenario seemed to be leaning towards the reduction of antitrust interference in mergers and acquisitions while maintaining the full weight of statute on the so-called hard core abuses.Since the airlines have been indulging in merger fever over the last 36 months, one wonders whether the new proposals will have any impact on an industry that has systematically reduced the number of weaker sister airlines by merging them with their stronger competition. In fact the advent of deregulation and the unbridled competition which resulted has produced many of the desired results. However, generally, speaking the U.S. antitrust situation with its far more sophisticated antitrust statute, backed by a wealth of interpretive case law is well entrenched conceptually and practically. There will, no doubt, be some fluctuations in detail and the level of enforcement but despite this the U.S. system remains the most used and useful of the ones which we are looking at in this study. With the new Bush administration now in place in Washington it is difficult to conclude which way antitrust enforcement will go. The threatened blocking of the Delta/American CRS merger could indicate a new turn in the severity of enforcement action. Similarily, the refusal by the DOI of the sale of Eastern Airlines' Philadelphia assets (slots,gates,routes, etc) to US Air on grounds of unecessary concentration may also signal a tougher regime. The assets were evetually sold to Midway Airlines, a relatively small and 1978 new entrant carrier. Overall, the tendency towards heavier enforcement may be coming about.

In a general context the attributes of various antitrust systems are as varied as the geographic regions that they are designed to serve. Because of the general industry trend towards globalization and the development of multinational mega carriers in the medium term, the regulations used to regulate and monitor these carriers may also be forced to undergo a globalization process of their own. " Conflicting approaches to enforcement of competition laws could create a chaotic "tower of babble" among the major antitrust regulators in the world, especially as more and more international business transactions take place.....Competition laws have always had strong implications for the airline industry, which is a highly international business and already has seen the problems associated with the application of differing perspectives on antitrust laws in the Laker case.....ICAO recently published its own guidelines intended to head-off conflicts between countries on competition rules through the regular bilateral process..... The US DOJ issued its own policy guidelines which warned that government overseers of competition policy in the U.S. Europe and the Far East have yet to reconcile their philosophies with regard to the protection of competition, raising the possibility of conflict if one side finds an arrangement between companies acceptable while another forbids it."122

It would seem that antitrust regulation may, therefore, have to be homogenized to a certain extent to take into account the growing globalization of the industry. The precedent for this in other industries seems poor because global application of antitrust to other industries has not yet yielded much international standardization. Trying to implement the single EEC standard of the Treaty of Rome will serve as a good test case for multi-jurisdictional application of a single statute.

As the industry evolves into a more commercially oriented one that seeks growth to multinational proportions, the biggest challenge for the regulator will be to evolve with industry trends. Clearly, antitrust remains one of the key areas for the regulator to continue to enforce. The actual implementation of antitrust statute to air transport become much more complicated due to the increased frequency of its enforcement in the zones studied as well as its future internationalization .

Footnote Guide/1

1- The Airline Builders, Time Life, Alexandria Virginia, P-17.

2- Meyer/Oster/Morgan/Berman/Strassman, Airline Deregulation, The Early Experience, Boston, P-13.

3- The Airline Builders, Op. cit., p-19.

4- Ibid., p24.

5- Ibid.

6- Payne, L.G.S., Air dates, Toronto, p-39.

7- Ibid., p-52.

8- Ibid., p-52-53.

9- Taneja, N.K., The Commercial Airline Industry, Lexington Books, p-1.

10- Regulation and Competition in Air Transport, Richmond, p-4.

11- Commercial Airline Industry, op. cit., p-12.

12- Regulation and Competition, Op. cit., p-4.

13- Commercial Airline Industry, op. cit., p-2.

14- Regulation and Competition, op. cit., p-6.

15- Ibid.

16- Ibid.

17- Commercial Airline Industry, op. cit., p-6.

Footnote Guide/2

18- Institute of Air & Space Law, Casebook- Government Regulation of Air Transportation, 1981-'82, McGill University, p-743.

19- Ibid.

20- Ibid., p-744.

21- Ibid., p-744.

22- Main, J.R.K.," Civil Aviation in Canada, " Queens Quarterly, VOL XXXVI, No.2, Spring, 1929, p-294-312.

23- Glazebrook, G.A., A History of Transportation in Canada, Vol II, Toronto, Ryerson Press, 1938 (reprint 1964-p 256-276.)

24- Molson, K.M., Pioneering Canadian Aviation (2nd Ed.) Toronto, U Of Toronto Press, 1960, p-59.

25- Idem.

26- Molson, Op. Cit., p-187.

27- Main, Op. Cit., p-140.

28- Ibid, p-140.

29- Ibid, p-140.

30- Perspectives on Canadian Airlines Regulation. Edt. Roberts & Reschentaler, p-19.

31- Ibid, p-20.

32- Airline Industry Seminar, Facing the Challenges of Deregulation, Lehman Brothers/KuhnLoeb Research, Fall, 1986. P-7.

Footnote Guide/3

33- Competition Law Service, May 1989- p I-1

34- The Montreal Gazette. Dec 14, 1985, page F-3.

35- Canadian Combines Investigation Act. Part 5 subsection 32(1).

36- Ibid- 32 (2).

37- Ibid- 32(3).

38- Op cit note #33 page I-3.

39- Bulletin of the European Communities Supplement 5/79-p-11.

40- Ibid- p.11.

41- The Globe & Mail- June 3, 1989.

42- Op cit note #39- p.11.

43- Treaty of Rome, EEC Treaty Series- Article 85.

44- Ibid- Article 86 & 87.

45- Ibid- Actricle 87.

46- Aviation Daily, June 26,1989- P-599

47- U.S. Statute, Sherman Antitrust Act, section 1 (A).

48- Standard Oil V. United States, 221, U.S. 1, (1911).

49- 15 U.S.C sub. 2 (1976).

50- U.S. v. Grinnel Corporation, 384, U.S. 563 (1966).

Footnote Guide/4

51- American Tobacco Co vs U.S., 328 U.S. 781, 811 (1946).

52- United States v. Paramount Pictures Inc. 334 U.S. 131 (1948).

53- Op. cit., note 11, section 1 (a).

54- Ibid- Section 7.

55- Ibid- Section 8.

56- U.S. Air Deregulation Act, 1978, section 1302, sub. 4.

57- Ibid- Sub- 7.

58- U.S.C.A. Sec. 1378 (supp. 1979).

59- Ibid- sec. 1378, (b) (1).

60- Ibid- sec. 1578 (b) (1).

61- Aviation Daily, April 21, 1989. p-150.

62- Aviation Daily, April 19, 1989. p-127-28.

63- Aviation Daily, June 26, 1989. p-599.

64- Aviation Week And Space Technology, Aug, 1985- P-125.

65- Financial Times, Thurs. Nov. 14, 1985- P. 11 "Business Law" by A.H. Hermann.

66- Ibid- P. B-11.

67- Ibid- P. B-11.

68- Ibid-P. B-11.

Footnote Guide/5

69- Ibid-P. B-11.

70- Ibid-P. B-11.

71- Lloyd's Aviation Economist, October 1983- P.16.

72- Op. cit., Note 5, P.19.

73- Ibid- P-19.

74- Ibid- P. 20.

75- EEC Air Transport Policy- EC- Economic and Social Committee- Civil Aviation , Memorandum #2. P-6.

76- Lloyd's Aviation Economist, April 1984- P-16.

77- Travel Trade Gazette, Europa. Dec, 1985.

78- ITA Magazine no. 0-18. Sept, 1984. P-17.

79- Ibid, P 18.

80- Ibid, P 19.

81- Ibid, P 20.

82- Ibid, P 21.

83- IATA Regulatory Affairs Review Apr. May '86 p 218

84- Ibid- Apr. May 89- p-553.

85- U.S.C.A.Sub. 1382 (Supp) 1979.

86- American Column & Lumber Co v. U.S., 257 U.S. 377. 1921.

Footnote Guide/6

88- Air Transport World- April, 1984- P.27.

89- Ibid- P-27.

90 - Ibid- P-27.

91- Ibid- P.27.

92- Ibid- P.27.

93- Aviation Daily- Dec. 30, 1983- P-315.

93A- Aviation Antitrust, Kluwer, New York. P-34.

93B- Ibid- P-34.

94- Op Cit, note- 93, Feb. 17,1984- P-267.

95- Ibid- P-269.

96- Ibid- Dec 4, 1982, P-164.

97- Ibid- Mar. 17, 1983. P-100.

98- Aviation Week & Space Technology- Aug. 20, 1984. P-30.

99- Aviation Daily, Sept. 7, 1984. P-25.

100- Ibid- Feb. 5, 1980. P-196.

101- Ibid- P-196

102- Ibid. P-140.

103- Ibid- Jul. 9, 1982. P-45.

104- Aviation Week & Space Technology- Mar. 3, 1986. P-30.

105- Ibid- P-30.

Footnote Guide/7

106- Ibid- Mar. 31, 1986. P-32.

107- Ibid- P-32.

108- Aviation Daily, Mar. 5. 1986. P-348.

109- Ibid- March. 31, 1986. P-1.

110- Ibid- P-1.

111- Ibid- P-1.

112- Aviation Daily, June 6, 1989- P-463.

113- Aviation Daily, June 27, 1989. P-611.

113- The Economist, March 8, 1986- p-63.

114- Ibid- P-63.

115- Ibid- P-63.

116- Ibid- P-63.

117- Ibid- P-64.

118- Ibid- P-64.

119- Ibid- P-64.

120- Ibid- P-64.

121- Ibid- P-64.

122- Aviation Daily, Apr. 14,1989- P-99.

BIBLIOGRAPHY

1- Allen, O.E., (eds), The Airline Builders, Time-Life Books, Alexandria, VA., 1987.

1A- Barlow, P.M., Aviation Antitrust, The Extraterritorial Application of Antitrust Laws and International Air Transport, Kluwer Publishing, Boston, 1988.

2- Carlzon, J., Moments of Truth, Ballinger Publishing, Cambridge , MA. 1987.

3- Courtney, J.L. "Third Level Air Carriers in Canada", Canadian Transport Commission, Economics Branch, Ottawa, October, 1972.

4- Davies, R.E.G., A History of the Word's Airlines, Oxford University Press, Toronto, 1964.

5- Galbraith, J.K., A Theory of Price Control, Harvard University Press, Cambridge, MA. , 1952.

6- Glazebrook, G.A., A History of Transportation in Canada, Vol II,, Ryerson Press, Toronto, 1938 (re-print) 1964.

7- Janisch, H.N., and Pierie, A.J., The Regulatory Process of the Canadian Transport Commission, Administrative Law Series, Law Reform Commission of Canada, Ottawa, 1979.

8- Jordan, W.A., "Performance of Regulated Airlines in Domestic and Transborder Operations," Consumer and Corporate Affairs Canada, Ottawa, Ontario, 1983.

9- Kirk, R., An Airline Fare Structure for Tommorow, Transport Research Forum, Vol. 18, No.1., 1979.

10- Lehman Brothers, Kuhn Loeb Research, Facing the Challenges of Deregulation,(Airline Industry Seminar), New York, Feb. 1982.

11- Main, J.R.K., Civil Aviation in Canada, Queens Quarterly, Vol xxxvi, No.2., Kingston, Spring, 1929.

Bibliography/2

12- Meyer, Oster, Morgan, Berman, Strassman, Airline Deregulation, the Early Experience, Auburn House Publishing Co., Boston, 1981.

13- Molson, K.M., Pioneering Canadian Aviation, (2nd ed.), Toronto, University of Toronto Press, 1960, p.59.

14- Recshentaler, G.B. and Roberts, B. Eds, Perspectives on Canadian Airline Regulation, Butterworth & Co. (Canada) Ltd, Montreal, 1979.

15- Richmond, S.B., Regulation and Competition in Air Transport, Columbia University Press, New York, 1961.

16- Spencer, F.A., A Reappraisal of Transport Aircraft Needs 1985-2000, (prepared for NASA), Northwestern University, Chicago, Jan.1982.

17- Taneja, N.K., The Commercial Airline Industry, Lexington Books, (DC Heath Co.), Toronto, 1976.

18- Wilson, J.A., Aviation in Canada, prepared for the Journal of the Engineering Institute of Canada, March 31, 1937, and published in Development of Aviation in Canada, 1879-1948. Dept. of Transport Air Services Branch, p.p. 1-13.

19- Whitehouse, A., The Sky's the Limit, MacMillan & Co., New York, 1971.

20- Wyckoff, O.D., and Maister, P.H., The Domestic Airline Industry, Lexington Books,(DC Heath & Co.) Toronto, 1971.

Government Documents and Treaties

CANADA

21- Domestic Air Policy Document, House of Commons, 9th Report of the Standing Committee of Transport, 32nd Parliament, Ottawa, March,1982.

22- Minutes of the Proceedings and Evidence of the Standing Commitee on Transport, Second Session, 33rd Parliament Ottawa, 1986-87.

23- Bill C-18- A Bill Regarding changes to the Canadian National Transportation Act, 33rd Parliament, Ottawa, 1986-1987.

24- Air Transport Committee, Policies and Practices in the Regulation of Air Fares, Air Transport Committee of the Canadian Transport Commission, Ottawa, Jan, 1984.

25- Unit Toll Licenses And Airline Conduct, The Extent of Competition, CTC, Research Branch, Ottawa, No-40-81-07, June 1981.

26- An Analysis of Air Transport Committee Decisions 1973-1978, Research Branch, Ottawa,1979.

27- Economic Council of Canada- Study of Regulation in Canada, Ottawa, 1980.

28- Canada Year Book, 1967, Ottawa, Ministry of Trade and Commerce.

29- The following Decisions,

a) Air Transport Committee decision No.6099- Appendix A, April 9,1980.

b) Privy Council Decision- P.C. 1980-1749, June

c) CTC Review Committee Decision No. 1982-02
File: 2-c576-1- March 5, 1982.

d) CTC decision No. 7700 ref. file No. 2-F200-3a
(189/82) Dockets No. 5739, 6023.

e) New operating Rules of the CTC -Sept., 1983.

f) The Regulation and Control of Aeronautics in Canada, (1932), as per Lord Sankey, L.C. see part 2.

30- The Combines Investigation Act. (1910, 1923)

31- The Competition Act- June 19, 1986.

32- Ministry of Transport (Canada), Press Releases, 7 Nov. 1987, 14 Aug. 1981.

32A-Competitive Law Service, G. Addy & W. Vanveen, Canada Law Book Inc.; Aurora, Ontario. May 1989.

Europe

33- Bulletin of the European Communities, supplement 5/79. Air Transport : A Community Approach.

34- Commission of European Communities Com(81) 396, Final. Proposal for a Council Regulation (EEC) Applying Articles 85, 86 of the Treaty to Air Transport.

35- European Parliament- Working Document 1-286/82 corr. Re-Application of Art. 85, 86. M.G. Schwartezberg.

36- EEC Bulletin EC7/8-1981. Application of the Rules of Competition to Air Transport.

37- Economic and Social Consultative Assembly. EEC Air Transport Policy- Memorandum. (*2 Economic and Social Committee.)

Bibliography/5

Government Documents and Treaties.(con't)

United States.

39- Sherman Anti-Trust Act.

40- Clayton Anti-Trust Act, 1914.

41- Airline Deregulation Act, 1978.

42- Proposed Ammendments of Presidential Committee on Antitrust.

43- Federal Aviation Act- 1958, 72, Stat 731 (Ammended).

44- FAA Proposal for Government Control of Slots- DOT. FAA14 CFR Part 93.

45- DOT Proposal to Implement Transfer of CAB Antitrust Authority, DOT-14 CFR - Parts 251,261,287,291,296,298 299,303,380. Docket #42825 Notice 85-1.

46- Agreements Among Members of the International Air Transport Association. Involving Agency Matters. CAB Docket No. 28, 672.

Bibliography/6

Periodicals

1- Airline Business, following editions:

August to December 1987.

2- Airline Executive, following editions:

Nov. 1982, Jan. 1983.

3- Air Transport World, following editions:

June 1976
June 1977- November 1977
January 1978-December 1978
January 1979-December 1979
January 1980-December 1980
May 1981- September 1981
March 1983
June 1986, and June 1987.

4- Aviation Daily, following editions:

16, 23 April 1982
23 June 1982
19, 28 July 1982
23 August 1982
24 September 1982
12, 28 October 1982
9, 10, 15, 28 February 1983
All issues for 1986 & 1987, 1988, 1989.

5- Aviation Week & Space Technology, following editions:

6, 20 March 1978
16, 30 August 1982
24 January 1983
28 February 1983
7 March 1983

6- Business Week- following editions:

8, 15 November 1982
13,27 December 1982
7, 14, 28 February 1983
4, 18, 25 April 1983
2, 16 March 1987

7- The Economist, following editions:

13 November 1982
4 December 1982
15 January 1983
5, 26 February 1983
12, 26 March 1983
16 April 1983

8- Fortune Magazine, following editions:

29 November, 1982
10 January, 1983
11, 25 May, 1987

9- IATA-Regulatory Affairs Review- IATA-Geneva- All volumes 1986-89.

10- Harvard Business Review, following editions:

July/August, 1982
Jan./Feb., 1983

11- ITA Magazine, July/August 1987
ITA Newsletter, January, 1985

12- US News &World Report, following editions:

13, 20 December 1982
21 March, 1983

13- Travel Trade Gazette/Europa, Dec, 1985

14- Competitive Measures and Competition Facts, The US Conference Board/ Conference Transcript. Mar. 1972 (H.J. Aibel)

15- Conference Board Bulletin, Antitrust Forum, 1981 (#112)

Newspapers

16- The Montreal Gazette, 24 Feb. 1983

17- The Washington Post, 31 Oct. 1982

18- New York Times, 3 April, 1983

Additional sources include the following publications:

a- ITA Newsletter- Jan, 1985.

b- Aviation Daily- 1980-1986.

c- The Economist

d- Fortune Magazine- selected entries- 1985-86.

e- Aviation Week and Space Technology.

f- Air Transport World.

g- Lloyd's Aviation Economist

h- Interavia.

i- The Financial Times.

j- The Globe and Mail.