AVIATION AND ANTITRUST

IN THE UNITED STATES

by

Henry John Prominski

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

Institute of Air and Space Law
McGill University,
Montreal.

April 1, 1961.

TABLE OF CONTENTS

PREFACE

Aviation and antitrust are two fascinating subjects. Their legal facets express more than maximes of justice. They reflect the living law, the philosophical expression of the people in their march of civilization.

With the philosophy of law and the rapid acceleration of civilization in mind, I have attempted to examine the fields of aviation and antitrust law as they clash and fuse to provide for the best interests of the public. Law, as an expression of society for control, includes the philosophy, economics, politics, and sociology of that culture.

I have tried to reveal from the case law of the United States the changing politics and philosophy of this country borne on the wings of the air transportation industry. My object has not been to criticize the increase of government control in industry, but to point out this trend in the light of the prestige position that civil air transportation holds in power politics.

Aviation is a reliable barometer of national prowess, and its regulation an indicator of international tranquillity.

I

INTRODUCTION

Historically the United States has been built upon the principles of free competitive enterprise. Americans pride themselves that rivalry in production and markets has created the richest country in the world. Free competition has directed the essential energies of the workers to world leadership in industrial productivity and technological development. Political and social freedoms are dependent upon a private enterprise economy which has brought about the best possible product at the best margin of profit including the most rapid rate of growth commersurate with the ability of the populous to absorb technological advancement.

The legislature has, however, found it necessary in the growth of the free enterprise system in the United States to impose certain restrictions. Government controls in varying degrees have been substituted for private economy. Legislative history shows that whenever private operators abused their economic power the government responded with a measure of control. Control by a few over many is not the intent of the free enterprise

system. Instead of the buyers controlling the markets and requiring the producer to market a better product, several manufacturers banded together and cornered the market so as to force the public to buy at the price that the few in control of that product had set. This was not free enterprise. This was a return to the regime of the feudal lords. Consequently, Congress stepped in and placed federal regulations on monopolies. In other instances the government has found it necessary for the welfare of the people to exercise control over production. Severe economic crisis presented by depressions required special legislation in order to keep civilization moving forward. Another special field of production which has incurred the necessity of governmental regulation are the business' which have public safety as an integral part.

Knowing that the introduction of governmental controls upon a sector of the economy would restrict expansion and be anti competitive in nature, the considered judgment of the legislature found it necessary to impose such restrictions. Congress has, however, not departed from the general concept of free enterprise and has retained as much as possible the free competitive economic policies. The interest of the public is paramount. The retention of competition is of great importance and a relavant factor in determining the course of procedure in the best interests of the public.

There has been much criticism of the expanding sphere of federal control in industry. It is an undeniable fact that regulation breeds further regulation. Assuming that the United States is to remain a free competitive society, how much or how little federal control shall be tolerated in industry? Can the people now be sure that certain individuals will not attempt to take unfair advantage and control the economy? Are the people sophisticated enough to return to complete private control of industry without governmental interference? In the free enterprise system of today, pure competition is seldom, if ever, to be found.[1] These broad problems will be transposed into the sphere of the air transport industry. Can the aviation industry take control and provide safe, economical air transportation for the American public without governmental control? Will technological advancement continue in the aviation industry and keep the United States in first place in world air transport ? If complete restoration of control to the aviation industry is not feasible at this time, what amount of government control will it take to provide progress, safety, and world leadership in the air transport industry? Will it be best to have the government completely nationalize the airlines? These

---

1. HUGIN, Private International Trade Regulatory Arrangements and the Antitrust Laws, Catholic University of America Press (1949).

are the questions that need to be discussed in the light of the anti trust legislation and government regulations in the aviation industry. Is the present system of control too much, or too little? The Sherman Antitrust Act has been considered by at least one eminent authority to be "a humbug, based on ignorance and incompetence."[2] Is the Sherman Act flexible enough to be subordinated to the needs of the nation in certain instances?

> Congress has shown no disposition thus far to limit the general application of the antitrust laws to foreign commerce except in the one case of export associations, and this was for the avowed purpose of meeting the competition of great aggregations abroad prior to the first World War when American business had not reached its present state of pre-eminence in world markets. (3)

Is it necessary for the United States, in order to maintain its prestige in the world, to have a flag carrier which can compete with the air carriers of other nations? Perhaps the United States

---

2. BOWEN, Yankee From Olympus, the biography of Oliver Wendell Holmes.

3. FRIGATE, Foreign Commerce and the Antitrust Laws. Little Brown & Co., 1958 at page 6, 7. but contrast the policy of the antitrust department of the Department of Justice under Robert A. Bicks. In an address at the University of Miami Law School Homecoming Breakfast, Mr. Bicks outlined his department's enforcement of the Sherman Act to the letter of the law (Nov. 12, 1960)

should retain the safety controls removing all economic restrictions so as to conform to the basic tenet of free enterprise and competition? It is readily apparent that government control and influence is needed at the present time in the development of travel through outer space.

The last forty years have brought the aircraft from the position of an idiosyncrants'toy to a prime mover of politics and a symbol of the global advancement of nations. The last forty years have also increased the pace of progress to an ever quickening tempo. There are turbine engines, mathematical computors that perform elaborate computations, atomic power plants that propel submarines under water for months, and jet aircraft that can take over a hundred persons thirty thousand feet high and deposit them three thousand miles away in five hours. But this is just the beginning. The speed of progress multiplies in a geometric ratio. As atoms and ions are harnessed to serve mankind they affect every type of power plant. Whereas the invention of the steam engine spread the mechanization of the world ten fold, so the harnessment of the atom and ion increases it a hundred fold as it refines on the established and creates new means of propulsion. The increase is in geometric proportion and the speed of progress will accelerate in an almost frightening way.

Granting that education has progressed somewhat along with

technology in civilization, are the people now prepared to cope with the problems facing the world from this industrial leap forward without the aid of government controls and restrictions as to the speed of progress? If we had problems requiring government control in the formation of the industrial empire, can we build upon that empire without the help of the government? The complexity of the world is increasing. The complexity of government is increasing. The Ten Commandments are no longer enough. More laws are needed, or, in the alternative, corresponding development in the human mind to adapt the Ten Commandments in a workable fashion to the technological inventions.

These are hugh problems. There is no better field in which to analyze the question of governmental control in industry than aviation. Aviation typifies the tremendous speed with which the world is going forward. A snake not man was doomed to crawl upon the earth on his belly.[4] Air transportation emphasizes the necessity of safety controls by some responsible body, the adviseability of economic regulations, and the problem of keeping pace with the world industrially and governmentally.

---

4. COOPER, The Right To Fly, (1947).

It is the intent of this paper to set forth the antitrust laws of the United States, explain their impact upon the free enterprise economy and trace their history and interpretations. Then the United States airline industry will be presented and its blend with governmental control sampled. The paper will analyze the need for government control in this industry and the effect that litigation in this antitrust field has had upon the jurisprudence of the United States, as well as the effect this domestic law has upon other nations and world aviation. The Civil Aeronautics Act[5] will be discussed and an analysis made of the coexistence of free competition and government controlled competition and whether the desired end of air transport growth in the best interests of the public has been reached. A prognosis will be made into the future. Can the air transportation industry continue on its present path, or should more and further controls be forthcoming? Is nationalization of the air transport industry or reversion to complete free enterprise and open competition a better course of conduct?

---

5. Now the Federal Aviation Act of 1958, 72 STAT 731.

II

THE STATUTES

There are many federal statutes which infuse antitrust principles into the American economy. These statutes have iterated the necessity of governmental assistance in fostering a competitive economy that will not be repugnant to healthy economic rivalry. Antitrust principles are traditionally manifested in American jurisprudence for the alleged promotion and preservation of competition in free markets. The introduction to the report of the Antitrust Subcommittee published in 1957[1] is especially descriptive of the American free competitive system:

> Congress has repeatedly declared its reliance on a private competitive system as the primary method by which essential energies are released for increased industrial productivity and technological development. Further, Americans generally recognize that their political and social freedoms under representative government in large part are dependent upon opportunity for market access and market rivalries in a private-enterprise economy. (2)

Americans generally believe that for this democracy to be strong, adaptable and progressive, it must be secure in its economic liberties. Therefore, the antitrust statutes are designed to advance healthy competition and promote economic freedom although they do involve

---

1. Report of the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, First Session, 85th Congress, April 5, 1957, G. P. O. no. 90541.

2. Id, At 1. Chairman Emanuel Celler, New York.

the exercise of control in private industry by the federal government. The wide variety of legislative control extends to wool,[3] furs,[4] textiles,[5] banks,[6] water power,[7] atomic energy,[8] and many more.

The foundation for federal legislation in these widely divergent fields has been the Sherman Antitrust Act of 1890.[9] The basic principle of the Sherman Act declares every act in restraint of trade to be illegal.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: (10)

In Section Two of the Sherman Act the creation of monopolies in restraint of trade or commerce is declared illegal:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.... (11)

---

3. Wool Products Labeling Act of 1939, 54 Stat. 1129.

4. Fur Products Labeling Act, 65 Stat. 175.

5. Textile Fiber Products Identification Act, 72 Stat. 1717.

6. Federal Reserve Act, 41 Stat. 379, 380, 381, sec. 25a.

7. Public Law No. 280, Sixty Sixth Congress, 2d session. An Act to create a Federal Power Commission, 41 Stat. 1070, sec. 10 h.

8. Atomic Energy Act of 1954, 68 Stat. 921, sec. 105.

12

The Clayton Act augmented the Sherman Act by adding to the list of illegalities the control of prices and discrimination in order to lessen competition.

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or any other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantitally to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: (13)

---

9. 26 Stat. 209; 15 U.S.C. 1-7.

10. Id. sec. 1. as amended by the Miller-Tydings Act, 50 Stat. 693.

11. Id. sec. 2.

12. 38 Stat. 730; 15 U.S.C. 12ff, (1914).

13. Id. sec. 2, as amended by Robinson-Patman Act, 49 Stat. 1526, and sec. 3, which prohibits the discounting or rebating from a fixed price where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

An equally wide area of government legislation has exempted certain industries from the operation of the antitrust laws. For the same reasons of healthy economic growth and national strength Congress has enacted special controlling legislation which allows certain industries to operate under competitive protection. Segments of the economy so favored are, agriculture,[14] communications,[15] shipping,[16] interstate commerce,[17] and aviation.[18]

The regulation of the airlines by the federal government in many ways typifies the administrative control of private enterprise as it exists in the United States. Because airlines are enterprises in the nature of a quasi public utility, one can easily visualize the susceptibility to government control. The federal government has manifested its control of aviation through the Federal Aviation Act of 1958.[19]

---

14. Cooperative Marketing Act, 44 Stat. 802(1926); Agricultural Adjustment Act, 48 Stat. 34 (1933); Agricultural Marketing Agreement Act of 1938, 50 Stat 248.

15. Communications Act of 1934, 48 Stat. 1064.

16. Shipping Act of 1916, 39 Stat. 728.

17. Interstate Commerce Act, 63 Stat. 485, as amended.

18. Federal Aviation Act of 1958, 72 Stat. 731.

19. 72 Stat 731, formerly the Civil Aeronautics Act of 1938.

The government has expressed its control of civil aviation by requiring certification for air transportation, [20] approval of tariffs, [21] filing of reports and prescribed accounts, [22] approval of mergers, [23] prohibiting interlocking directorships, [24] controlling methods of competition, [25] and pooling agreements. [26] The power of the Civil Aeronautics Board is extensive in the control of this private industry. In order to make such control compatible with the existing antitrust statutes a specific exemption from the operation of the antitrust laws was placed into the Federal Aviation Act:

> Any person affected by any order made under sections 408, 409 or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1941, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. (27)

---

20. Id. sec 401 72 Stat. 731, 754.

21. Id. sec 403, 72 Stat. 731, 758.

22. Id. sec 407, 72 Stat. 731, 766.

23. Id. sec 408, 72 Stat. 731, 767.

24. Id. sec 409, 72 Stat. 731, 768.

25. Id. sec 411, 72 Stat. 731, 769.

26. Id. sec 412, 72 Stat. 731, 770.

Regardless of these rather complete controls in the air transport industry and the exemption from the operation of the antitrust laws, the Civil Aeronautics Board does not regard the two expressions of governmental control to be mutually exclusive. The Federal Aviation Act is in its philosophy complimentary to the Sherman Antitrust Act. Both are pledged to the concepts of healthy expression of competition and that governmental regulation does not necessarily divest industry of competition. Rather there is controlled competition by the government administrative agency. In the declaration of policy of the Board it is stated:

> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the National defense; (28)

The continuing major objective of the Board is to develop and maintain proper competitive relationships in the aviation industry without undue restraints on trade, the creation of monopolies, or conflicts of interest.[29]

---

27. Id. sec 414, 72 Stat. 731, 770.

28. Id. sec 102, 72 Stat. 731, 740.

29. CAB Report, 1958, U.S.G.P.O. No. C31.201:958.

III

WHAT VIOLATES THE ANTITRUST ACTS

A - The Rule of Reason

Victor R. Hensen in his recent article "The Current Federal Policy on Antitrust Matters"[1] states that the best description of the general purpose of the Sherman Act is found in Northern Pacific Railway Company v. United States:[2]

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests in the premise that the unrestrained interaction of competition forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But were that premise open to question, the policy unequivocally laid down by the Act is competition.

This then is the philosophy of the Sherman Act. An additional guidepost for application of the Act, the so called "Rule of Reason", was voiced by Mr. Chief Justice Hughes in the Appalachian Coals case.[3] In that case it was held that coal producers who joined together and formed an exclusive selling agency for the purpose of marketing their output at the best prices obtainable were not violative of the Sherman Act. The Court found

---

1. 4 Antitrust 541 (1959).
2. 356 U.S. 1, 4 (1958).
3. Appalachian Coals v. U.S., 288 U.S. 344 (1932).

that limitation of production was not contemplated and the purpose of the agency was: the stabilization of prices in an industry suffering from over-expansion; loss of markets through the competition of other fuels and greater efficiency in the use of coal. It appeared from the conditions and production of coal that the selling agency would not be able to fix prices of coal in the consuming markets, but would find itself confronted with effective competition from the organized buying power of large consumers. In reaching this conclusion the court stated:

> The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.[4]

Chief Justice Hughes speaking for the Court, affirmed this position in the case of the Sugar Institute, Inc. v. United States.[5] There fifteen companies, controlling 70% to 80% of U.S. Sugar production, promulgated a code of ethics to combat alleged unethical refineries. Chief Justice Hughes said:

> ....., They do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition on a sound basis. (5A)

The Court held it permissable to disseminate information on the trade to all firms as long as no attempt was made to set the prices of sugar.

---

4. Appalachian Coals v. U.S., 288 U.S. 344, 360 (1932).

5. 297 U.S. 553 (1936).

5A. Id. at 598.

Generally speaking, each case in the antitrust field is decided on its own facts. Whereas some concerted actions may be in restraint of trade, other similar acts will not be prosecuted as violative of the Sherman Act. The end result must be measured by the existence of effective competition.

> Effective competition exists where there is business rivalry with reasonable opportunities for freedom of choice of goods and services, without restricting the opportunities for others to engage in such competition.[6]

Monopoly, the power of excluding competition in markets, and oligopoly, the parallel action of manufacturers without agreement to control the competition in markets, are violative of the Sherman Act.[7] Generally, the attempt to control the price of a commodity is a violation of the Sherman Act. The existence of good motives does not justify combinations in violation of antitrust laws.[8] Combinations in restraint of trade are a broad category which need tempering by the "rule of reason".

---

6. Antitrust Handbook, ABA (1955) p. 67.

7. Miller, Kronstein, Schwartz (1958), Modern American Antitrust Law.

8. Paramount Famous Lasky Corporation v. U.S., 282 U.S. 30 (1930); but see , Appalachian Coals v. U.S., 288 U.S., 344 (1932).

The "Rule of Reason" is a changing, living rule which reflects the philosophy of the times in order to arrive at a determination of what actions are combinations in restraint of trade.

B - The Trade Association

"A Trade association has been compared to an airplane because it operates in a dangerous medium, which unless it is properly designed, mechanically sound and skillfully piloted, will result in a disasterous crash."[9]

Statistics of the Department of Commerce show 1,700 national and 12,200 local or regional trade associations, with almost all business belonging to at least one trade association. A trade association is of necessity a combination of competitors. The fact of membership in such a trade association which is charged with a violation of the Sherman Act shifts the burden of proof to the member business to disprove any part in the illegal acts.[10] By the act of membership in the association the business should have had knowledge of the illegal result of the association.[11]

---

9. 4 Antitrust 173, 177 (1959).

10. FTC v. Cement Inst., 333 U.S. 683 (1947).

11. Chain Inst. v. FTC, 246 F. 2d 231 (8th cir 1957).

Since the majority of the antitrust cases are against trade associations, [12] an examination of the leading cases in this area will be indicative of the type of concerted action that is regarded as a violation of the antitrust laws.

The American Hardwood Manufacturers Association, representing one-third of the hardwood trade, produced an open competion plan to disseminate accurate knowledge of production and market to members in order that they might gauge the market and make competition open and aboveboard. The facts showed the "Plan" was to increase prices as a manifestation of a gentlemen's agreement, which was held to be a violation of the Sherman Act as a combination and conspiracy in restraint of trade. [13]

---

12. Before World War II 75% of the cases, during the last three months of 1959, 12 of 15 cases involved trade associations. 4 Antitrust Bulletin 173 (1959).

13. American Column and Lumber Co. v. U.S., 257 U.S. 377 (1921).

In U.S. v. American Linseed Oil Co.,[14] twelve corporations entered into a subscription agreement to obtain data on manufacturing from a bureau. No part of the bureau machinery was to be used to control competition. This was held to violate the Sherman Act, notwithstanding the declared policy was to submerge the competition theretofore existing among the subscribers and substitute "intelligent competition" or "open competition" to eliminate "unintelligent selfishness" and establish "100 per cent confidence," all to the end that the members might "standout from the crowd as substantial co-workers under modern cooperative business methods."

However, where twenty-two corporations banded together to distribute costs, rates, and statistics generally, they were not held violative of the Sherman Act for there was a failure by the government to prove a tendency to cause direct and undue restraint of trade by this association. The court said: "It was not the purpose or the intent of the Sherman Antitrust Law to inhibit the intelligent conduct of business operations..."[15]

---

14. 262 U.S. 371 (1923).

15. Maple Flooring Manufacturers Association v. U.S., 268 U.S. 563, 583 (1925).

Again in Cement Manufacturers Protective Association v. U.S.[16], the Supreme Court reversed a conviction under the Sherman Act for the dissemination of information on closed specific jobs by an association even though such conduct tended to bring about uniformity of price. In Federal Trade Commission v. Cement Institute[17] the concerted maintenance of a paint delivered price system by a trade association was held to be an unfair method of competition. The Associated Press was in violation of the Act when its attempt to withhold news from non-member competitors was held to be illegal.[18] The membership of the association must not exclude firms it purports to represent. A trade association which required prospective customers to submit detailed financial reports so that the association could establish a credit rating was held violative of the Sherman Act. This association controlled 98% of the motion picture distribution which forbid exhibition in theaters listed on their credit reports.[19]

---

16. 268 U.S. 588 (1925).

17. 333 U.S. 683 (1947).

18. Associated Press v. U.S., 326 U.S. 1 (1944).

19. U.S. v. First National Pictures, Inc., 282 U.S. 444 (1930).

Good intentions of the trade association are no defense to its illegal actions. In U.S. v. Socony Vacuum Oil Co.,[20] the court held a combination of oil companies, who wished to eliminate "distress" gasoline by buying the excess of independent refineries, maintaining prices and not eliminating competition, in violation of the Sherman Act notwithstanding the government had previously wanted to stabilize the prices under the National Recovery Act. The Northern Pacific Case[21] held it to be unlawful to have preferential clauses in railway contracts compelling lessee's of land to ship via certain routes, even though the rates and services were equal to competing carriers.

Therefore the manufacturer may associate with his fellow manufacturers for the purpose of creating a better product and higher standards in the industry. However, he must not, intentionally or otherwise, have as a bi-product of the association the control of prices or markets. The Association must represent all businesses which it purports to represent, and be open to all in a like situation. The association cannot bar other manufacturers from entering the field of productivity.

---

20. 310 U.S. 150 (1939).

21. Northern Pacific Ry. Co. v. U.S., 356 U.S. 1(1958).

C - The Effect On Foreign Commerce

The effect of United States industry on the markets of the world cannot be minimized. The air transport industry is a prime example of the increasing extent to which the growth of American business is projected into foreign commerce. The international and overseas airlines increased 600,000 passengers in 1960 over 1959, and 136,000,000 ton miles.[22] With this ever increasing reach of domestic business into international commerce, a reevaluation of existing laws and restrictive business practices in international trade will have to be taken. This problem has been recognized by the United Nations and that body has proceeded to study the situation under article 50 of the Charter of the United Nations.[23] An ad hoc committee has been formed at the 16th session of the Economic and Social Council to report on restrictive business practices in international trade. This report will include the possible harmful effects of such practice on the attainment of higher standards of living and full employment conditions.[24]

---

22. Fort Lauderdale News, Wed. Jan. 4, 1961, p. 5d.

23. 59 Stat. 103 (1945).

24. 4 Int. & Comp. L.Q. 129(1955).

May the Antitrust Laws of the United States extend to restraints of trade made by foreign corporations outside the United States?

> The Laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. (25)

The laws of the United States grant unto a corporation the attributes of an artificial person. This person is a citizen with standing in the courts, and is subject to most of the laws of this country. Therefore, since the United States can control its citizens and require of them to observe its laws when they are within the borders of another country, the United States can request the same of corporations. In Blackmer v. United States,[26] a citizen was convicted of contempt of the United States courts, notwithstanding the fact that he was in France at the time of the contempt. Also in Steele v. Bulova Watch Co.,[27] the court found it proper to enjoin a foreign corporation from unfair labor practices wherein the foreign corporation had used a trade name of a domestic corporation with detrimental effect on the commerce of

---

25. Chief Justice Storg in The Appollon, 22 U.S. (9 Wheat) 362, 370(1824).

26. 284 U.S. 421(1932).

27. 344 U.S. 280(1952).

the United States.

Another case, where the foreign government had an interest in the corporation so as to put that corporation practice under color of the foreign government, was United States v. Sisal Sales Corporation.[28] In that case the Supreme Court reversed a suit to enjoin the defendants, holding, in an opinion by Justice McReynolds, that there was a monopoly on sisal although it was a product of a foreign country and protected by discriminatory legislation there. The Banana case,[29] which held that the Sherman Act did not extend to unlawful acts in a foreign country, was distinguished. The trend now seems clearly to be for the extension of the antitrust laws to foreign corporations wherever the actions of that corporation will or can possibly affect the commerce of the United States.[30] The United States government has jurisdiction over the subject matter when the effect of the foreign corporation is felt upon the commerce of the United States. This line of thinking has been voiced in the recent case of Timken Roller Bearing Co. v. United States.[31]

---

28. 274 U.S. 268(1926).

29. American Banana Co. v. United Fruit Co., 213 U.S. 347(1909).

30. Comment, Wiesner, A Half Century of Jurisdictional Development; From Bananas to Watches, 7 U. of Miami L.Q. 400 (1952-53).

31. 341 U.S. 593 (1950).

The Court, through Justice Black, held that the Antitrust Act covered agreements made in a foreign nation even though no exports or imports into the United States were exercised at the present time. He arrived at this decision from the rationale that the agreements contemplated control with a possible future effect on United States commerce. "Acceptance of the appellate view would make the Sherman Act a dead letter insofar as it prohibits contracts and conspiracies in restraint of foreign trade."[32] The conclusions reached by the Supreme Court do not extend the jurisdiction of the United States into foreign territories. Jurisdiction clearly exists over the domestic corporation and its agreements where the domestic corporation is acting in concert with a foreign one.[33] The foreign flavor of the agreement does not remove it from the control of the Sherman Act when the effect of the agreement will be on the commerce of the United States. The Act covers agreements made with foreign nations intended by the parties thereto to have an effect upon United States imports or exports, and which actually do have an effect on them,[34]

---

32. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599(1950).

33. United States v. Pacific and Artic Ry. Co., 228 U.S. 87(1912).

34. United States v. ALCOA, 148 F. 2d 416(2d Cir. 1945).

or may have an effect on them.[35] This is true even if the corporation has been operating under the protection of the laws of the foreign nation. "When a government becomes a partner in any trading company it divests itself so far as concerns the transactions of that company, of its governmental character and takes that of a private citizen."[36]

In addition to jurisdiction over the subject matter, the United States Courts require jurisdiction over the person. The government has never lost an antitrust suit in the Supreme Court on the issue of whether a defendant foreign corporation was or was not found in the United States.[37] Where a representative of a British company was also president of the American corporation, the British company was found to be in the United States and transacting business so as to be subject to the antitrust laws.[38]

---

35. Timken Roller Bearing Co. v. United States, 341 U.S. 593(1950).

36. Justice Marshall in, Bank of the United States v. Planters Bank of Georgia, 22 U.S. (9 Wheat) 904, 907(1824).

37. 3 Antitrust Bull. 387, 389(1938).

38. United States v. Scophony Corp. of America, 333 U.S. 795(1947); but see, DeBeers Consolidated Mines v. United States, 325 U.S. 212 (1944), and the Swiss Watch Case, 133 F. Supp. 40(S.D.N.Y. 1955).

Section 6 of the Sherman Act[39] provides for seizures of the property of the foreign corporation in order to enforce the Act.[40] Other remedies include injunctions and divestures, treble damages, fines and imprisonment and other sanctions.[41]

It may be concluded that for all practical purposes the Sherman Antitrust Act does extend to activities in foreign lands even though the corporation, the contract, and the purported effect is without the United States, if there is in fact an effect intended or possible in the future on the commerce of the United States.

---

39. 26 Stat. 209; 15 U.S.C. 6 (1890).
"Any property owned under any contract or by an combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law."

40. United States v. Adapter Pipe Co., 175 U.S. 211(1899).

41. Chapter VII, Antitrust Handbook, ABA (1958).

IV

THE AIRLINES AND ANTITRUST

A - THE AVIATION INDUSTRY

I - History

The interest of the United States government in civil aviation antidated the historic flight of the Wright Brothers at Kitty Hawk on December 17, 1903. The government had already made a grant of $50,000.00 to Doctor Samuel Pierpoint Langly for his experiments in flight which ended unsuccessfully on October 7, 1903. The first World War added impetus to the infant aviation industry, and before the end of the conflict Congress had appropriated one and one quarter billion dollars for the purchase of Army aircraft.

Commercial aviation received its nourishment as a result of the government's desire for speedy carriage of the United States mail. The first airmail service was inaugurated in 1918 by the Post Office Department with Army pilots flying the mail. In 1920, a transcontinental route was established between San Francisco and New York. This was followed by night flights in 1921, and in 1924 the pilots were flying along lighted airways with regularity. With the feasibility for transcontinental night flights established, the project was placed into the hands of private industry. The Kelly

Act of 1925[1] authorized the Postmaster General to contract with air carriers. A minimum and maximum rate, as well as competitive bids, were established by the Postmaster General for the air mail contracts. The early air transportation companies showed little interest in passenger travel, being content to let the unsuccessful bidders develop the passenger traffic. By 1927 all airmail was carried by commercial carriers. In 1926 the government had enacted the Air Commerce Act.[2] This Act made it incumbent upon the Secretary of Commerce to foster air commerce through the creation of airports and air navigation facilities. This was the first regulatory attempt in this infant industry. The Secretary had powers to provide for the safety of aircraft, the fitness of pilots, and to investigate and report accidents.

The Lindberg flight across the Atlantic in 1927 percipitated a fever of activity in the industry. Aviation continued expanding on the crest of the economic boom of 1928 and 1929. The public had an unrelenting drive to invest in almost any type of airline stock. This period of growth saw the formation of what has turned out to be some of the largest airlines in the world. However, as the open competition for airmail contracts threatened disaster in the years before the Air

---

1. AIRMAIL ACT of 1925, 43 Stat. 805.

2. 44 Stat. 568 (1926).

Commerce Act of 1926, now monopoly threatened the healthy growth of the industry. There were three main interests at this time in the airline industry: United Airlines, organized in 1928; the North American Holding Company; and, the Cord interests. These large operators underbid the small companies and received the benefit of the airmail contracts, which at that time amounted practically to a subsidy.

In 1934, the President ordered the immediate cancellation of all private airmail contracts and redirected the Army to carry the mail.[3] This was not to last long. The Army was not prepared to undertake such a task.

The Airmail Act of 1934[4] was then enacted to grant private industry the airmail contracts, but with assurance that there would be no more abuses of these contracts. The contracts were awarded on a competitive basis. The Act prohibited the airlines from having interests in other aviation industries, and gave the Postmaster the power to establish routes. The contracts promptly went back to the same carriers who had them before but were now operating under a slightly changed name. The pattern of controls was set, however, and the fault now lay in too little control of competition. That is, the

---

3. Executive Order 6591, Feb. 9, 1934.

4. 48 Stat. 933(1934).

airlines were protected from the competition of non mail carriers in passenger and freight fields.

The Civil Aeronautics Act of 1938[5] was passed in answer to the search for effective centralized authority in civil aviation. The Act created a comprehensive system of economic regulations for civil aviation under an independent agency. Route control, qualification of carriers, safety, airmail, competition, and accident investigation were now firmly placed under federal control. The Civil Aeronautics Board was given the power to set rates for the transportation of mail and thus had control of the indirect subsidy.[6]

2 - Structure

There were originally twenty three grandfather carriers certified by the Civil Aeronautics Board to engage in scheduled airline operations.[7] Only twelve carriers remain

---

5. 52 Stat. 977(1938).

6. See generally, 24 JALC 410, and pages 8-16 of Chapter I of the Report of the Antitrust Subcommittee 85th Congress, First Session, G. P. O. Wash. (1957).

7. American Airlines, Inc., Boston Maine Airways, Inc., Braniff Airways, Inc., Canadian Colonial Airways, Inc., Chicago & Southern Airlines, Inc., Continental Airlines, Inc., Delta Air Corp., Eastern Air Lines, Inc., Inland Airlines, Inc., Marquette Airlines, Inc., Mayflower, Mid-Continent Airlines, Inc., Inter-Island Airways, Ltd., National Airlines, Inc., Northwest Airlines, Inc., Pan American Airways, Inc., Pan American-Grace Airways, Inc., Pennsylvania Central Airlines Corp., Transcontinental & Western Air, Inc., United Airlines Transport Corp., Uraba, Medellin & Central Airways, Inc., Western Air Express Corp., and Wilmington - Catalina Airline, Ltd.

today,[8] with leadership vested in the Big Four: American Airlines, Eastern Airlines, United Airlines, and Trans World Airlines. The Big Four account for approximately 70 per cent of the market. The remaining domestic air transport industry is divided between the middle six: Braniff Airways, Capital Airlines, Delta Airlines, National Airlines, Northwest Airlines, and Western Airlines, and the Small two; Northeast Airlines and Continental Airlines.

In addition to the trunkline carriers, there are a number of feeder airlines which are certified by the Civil Aeronautics Board.[9]

All cargo carriers are also certified by the Civil Aeronautics Board. At the writing of the report of the Antitrust Subcommittee, there were only two domestic all cargo air carriers, Slick Airways and Riddle Airlines.

Pursuant to the Civil Aeronautics Act certain non-scheduled

---

8. American Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., Braniff Airways, Inc., Capital Airlines, Inc., Continental Air Lines, Inc., Delta Airlines, Inc., National Airlines, Inc., Northeast Airlines, Inc., Northwest Airlines, Inc., Western Airlines, Inc.

9. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 23, Footnotes 52, 53, G. P. O. Wash. 1957.

carriers are exempt from the operation of Title IV.[10] There are currently many non-scheduled operators who make up this class of irregular air carriers. Charter operators, crop dusters, military supplemental carriers, and other specialized services comprise this group. Non-scheduled (irregular) carriers play an important part in the development of low cost air transportation.

Supplemental carriers also contribute to the airline structure.[11] These carriers may render regular service between any pair of points up to a maximum of ten flights in each direction per month. The Board may not grant supplemental carriers certificates containing blanket authorization to operate between any two points in the United States in view of the provision that the certificates must specify the terminal and intermediate points.[12]

In addition to the domestic lines, there has been established an international air transportation system of 257,410 miles connecting the continental United States with 256 cities in 63 foreign countries.[13]

---

10. Requirement of certificate of convenience and necessity.

11. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 32, footnote 86, G. P. O. Wash. (1957).

12. United Airlines, Inc., v. CAB, 278 F. 2d 446(D. C. Cir. 1960), 1960 U. S. &C. Av. R. 233(1960).

13. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 38, G. P. O., Wash. (1957).

Since 1938 the Board has certified twenty-one carriers to engage in international air passenger carriage, of which twenty were still in service as of March 31, 1956.[14] Competition to American flag carriers is present in the form of foreign air carriers who have been granted permits by the Civil Aeronautics Board. A total of sixty-nine carriers have been awarded foreign air carrier permits, of which fifty-nine were in business as of September 30, 1956.[15] In addition there are international charter flights by approval of the Board and cargo flights without approval,[16] as well as combinations of passenger and cargo overseas flights.[17]

---

14. American, Braniff, Caribbean Atlantic, Colonial, Delta, Eastern, Mackey, Midet, National, Northeast, Northwest, Pan American, Panagara, Resort, Samoan, South Pacific, Trans World, United, Uraba, Medellin - Central, and Western.

15. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 41, table 14, G. P. O., Wash. (1957)

16. Id. at 42.

17. Id. at 43.

B - REGULATION OF COMPETITION

Justice Black of the United States Supreme Court stated the policy of the Sherman Antitrust Act in Northern Pacific Ry. Co. v. United States:[18]

The declaration of policy of the Civil Aeronautics Board sets out these principles for the guidance of the Board:

> In the exercise and the performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices:

---

18. 356 U.S. 1-4(1938). The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained inter-action of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; (19)

The Federal Aviation Act, depicting the controls for commercial aviation in the United States, must abide by both the declarations of the Board and the philosophy of the Sherman Act.

1. Severance with surface carriers

One of the ways in which the Civil Aeronautics Board controls the competition in the aviation industry is through the requirement of Board approval for the coupling of other aviation interests to airlines.[20] Domination of air carriers by other forms of public transportation appeared particularly offensive to Congress. The steamship lines were especially strong during the early days of the airlines. Congress foresaw the danger of having the airlines become subsidiaries of the steamship lines and provided against this event. Control of transportation, both sea and air, by one company was viewed as inherently monopolistic. In hearings before the Civil Aeronautics Board, proposed control of American Export Airlines by American Export Lines

---

19. Federal Aviation Act of 1958, sec. 102, 72 Stat. 731, 740.

20. Id. sec. 408, 72 Stat. 731, 767.

was denied approval.[21]

A construction of the Federal Aviation Act which rigidly limits the participation of the older forms of transportation in the air transport field is not only sustained by the language of the Act itself, but is also in harmony with well established Congressional policy, and will accomplish the national purposes in the particular manner which is prescribed by the second proviso of section 408.[22] This goal was furthered in American President Lines[23] wherein a petition by the steamship company to enter the air carriage field was denied.

In Boston & Maine R. R. -Control of Northeast Airlines,[24] the Board relented and allowed the railroad who had control of Northeast Airlines to slowly pass out of control. This was permitted because the railroad had exercised control before 1938, the passage of the Civil Aeronautics Act. The court stated:

---

21. American Export Lines-Control of American Export Airlines, 4 CAB 104(1943).

22. "Provided further, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition. 72 Stat. 731, 767, sec. 408(b).

23. 7 CAB 799(1947).

24. 4 CAB 379(1943).

> So strongly did Congress feel that air carriers must be kept free from the domination of other forms of transportation that it inserted the second provision to section 408(b) requiring the Board to disapprove any such transaction when a surface carrier is involved unless such transaction will promote the public interest by enabling such carrier to use aircraft to public advantage in its operation and will not restrain competition. (25)

Extraordinary circumstances, where the airline would not be in competition with the surface carrier but would act more or less as an extension of the existing transportation lines, would be within the realm of approval by the Board. Such a circumstance could be the use of aircraft to transport passengers from the end of the rail line over water to an island. These possibilities were explored by the Board in arriving at their conclusion which allowed the Boston & Maine R.R. to retain some control over Northeast Airlines. The terrain and the transportation systems were considered in determining the best public interest. Another unique situation was presented in Hawaii. The mere organization and control of a subsidiary air carrier by a water carrier for the purpose of having the air carrier transport passengers over water routes substantially parallel to water carrier routes in the Hawaiian Islands did not constitute a violation of the Sherman Antitrust Act. The creation of an air carrier subsiduary to pioneer a virgin field, where there would be no competitors for a long time to come, was neither inherently evil nor prohibited,

---

25. Boston & Maine R.R. -Control of Northeast Airlines, 4 CAB 379, 385(1943).

unless it was accompanied by some unlawful act. Where no such unlawful act was shown the existence of common corporate control was held not to be unlawful.[26]

Generally the Board has held that it is not in the best interests of the public to have land, sea, and air transportation companies under one control. Either the tendency toward a monopoly would be too strong, or the adverse competition between the modes of transportation for the same passengers within one corporation would not be in the best interests of the public.[27]

Not all overlapping industry controls are prohibited by the Board. Only those industries with aeronautical interests or manufacturing may not have interlocking control with an airline. General manufacturing concerns may acquire interests in airlines without Board approval. In Transworld Airlines-Control by Hughes Tool Co. Hearings,[28] Howard Hughes, who was the owner of the Tool Com-

---

26. U.S. v. Inter-Island Steam Navigating Co., CCH. 3 Avi. 17,138 (D. Hawaii 1950). Consideration was given to the special importance of air transportation to compete with water in lieu of normal land transportation.

27. Pan American United States Lines Agreement, 8 CAB 609(1947). An agreement for U.S. Lines to be the general agent representing PAA was disapproved under section 412.

28. 6 CAB 153(1944).

pany, also owned 45.6 percent of the shares of Transworld Airlines. The Board found that this was not inconsistent with the Civil Aeronautics Act or with public interest because Hughes Tool Company did not make aircraft parts and had no interest in aeronautics or in other airlines.

2. Routes

Competition offers greater assurance that the public will receive the quality and quantity of air service to which they are entitled. The Board does not create competition; it permits competition among the airlines. The Board strives to establish a choice of carriers between selected cities that will insure good service and reasonable returns to the airlines.[29] The Civil Aeronautics Board proceeds at great lengths to survey the air traffic potential between selected cities. The Board investigates the area surrounding the cities that are to be served, and the need for air transportation in this area. The Board relies on its own reports as well as those of municipalities and industry. The needs of the military are remembered at all times. A

---

29. Richmond, Creating Competition Among Airlines, 24 JALC 435(1957).

study of pairs of cities is then made to decide how many carriers can serve, and which of the air carriers is best fitted to serve these cities. Having derived the number of carriers that can be sustained by the passenger flow and anticipated increase in air travel, the Board awards the routes to the carriers that can best serve the cities, keeping in mind a national route pattern and connections to foreign cities.[30]

The general policy of the Civil Aeronautics Board is to grant route extensions, to keep subsidies down, to have competition, but control that competition in order to provide better service, to create a network of airline routes which can serve the most number of people at economically feasible rates, and to help the feeder and local airlines whenever possible.[31]

---

30. See,25 JALC 121(1958) for a map analysis of U.S. airline competition. The CAB awarded Florida to California Nonstop Service to National Airlines on March 14, 1961.

31. Gellman, The Regulation of Competition in U.S. Domestic Air Transportation, 24 JALC 410 (1957), 25 JALC 148(1958).

The implementation of the Board's philosophy can be traced through the route case hearings before the Civil Aeronautics Board. The Hawaiian case is an interesting point of departure.[32] At that time there was only one certified carrier from the States to Hawaii. The Board authorized one additional carrier using the following language for justification:

> As the justification for competition in any case does not depend upon the failure or inability of an existing carrier to render adequate service, neither does its ability or willingness to furnish a sufficient volume of service in itself constitute a bar to a competitive service. The greatest gain from competition, whether actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business including the rendering of better service to the customer and the nation and affording the government a comparative yardstick by which the performance of the carrier may be measured. (33)

The Board especially maintains competition in areas where the public is more dependent on air transportation, as for example Hawaii where the chief mode of travel between the islands is via the airways.[34]

The Board follows the policy that a sound competitive system should encourage and give added impetus to air transportation. Stiff multi-carrier competition in major traffic markets benefits the public

---

32. 7 CAB 83(1946); reopened, 11 CAB 1008(1950); amended to include mail, 12 CAB 900(1951).

33. The Hawaiian Case, 7 CAB 83, 103, 104(1946).

34. Trans Pacific Airlines-Certificate Amendment, 12 CAB 900(1951).

in the form of improved quality and quantity of service, insures fully competitive service, and although in the initial period there is too much service, such a result is not contrary to the public interest.[35]

Adhering to this philosophy, the Board has granted Colonial Airlines certification to Nassau,[36] overseas routes to American Export Lines and Transworld Airlines where Pan American had been the sole transocean carrier,[37] and added a whole covey of new routes to Latin American countries.[38] The Board can take away routes as well as grant new ones. In the Caribbean Area Case,[39] the Board deleted Saint Thomas from the routes of Pan American Airways in order to protect local service between the islands. "Hence we cannot permit the forces of unrestrained competition to threaten the destruction of that carrier."[40]

Alaska presented another unusual situation. In Alaska Airplane Charter Co.-Alaska Service Case,[41] an application for scheduled

---

35. Great Lakes-Southeast Service Case, CCH Avi. 22,211, current CAB cases, docket number 2396, Sept. 30, 1958.

36. Colonial Airlines-Atlantic Seaboard Operation, 4 CAB 552(1944).

37. Northeast Airlines-North America Route Case, 6 CAB 319(1945).

38. Additional Service to Latin America, 6 CAB 857(1946).

39. 9 CAB 534(1948).

40. The Caribbean Area Case, 9 CAB 534, 553(1948).

41. 12 CAB 79(1950).

and non-scheduled routes to Alaska was denied to existing carriers because the economic conditions in Alaska were unusual. However, in the States - Alaska Case,[42] routes were certified to Alaska because the national needs so dictated and it was the wish of the President of the United States.

The Congressional policy for domestic service implemented by the Civil Aeronautics Board is best described in Northeast Airlines-Duluth-Twin Cities Operation.[43] Northeast Airlines was applying for a certificate of public convenience and necessity pursuant to section 401 of the Civil Aeronautics Act. Section 401 briefly states that no air carrier shall be engaged in any air transportation unless such a certificate is issued by the Board. The certificate specifies the points that will be served by the air carrier.[44] The Board said in part:

> On the other hand, it is equally apparent that Congress intended the authority to exercise a firm control over the expansion of air transportation routes in order to prevent

---

42. 20 CAB 791(1955).

43. 1 CAB 573(1940).

44. Federal Aviation Act of 1958, sec 401, 72 Stat. 731, 754.

> the scramble for routes which might occur under a 'laizze faire' policy. Congress, in defining the problem clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices such as the opening of non productive routes, and other economic results which characterized the development of other modes of transportation prior to the time of their governmental regulations. (45)

The Board has granted additional routes in the Southwestern United States;[46] in the middle Atlantic states;[47] and in the Southeastern area.[48] Routes have also been added to resort areas[49] as well as increased down the length of our coastal resort states.[50]

Services have been logically increased to the major cities in the United States. The Board has realized the need for competition in order to bring frequent and reliable service to the metropolitan

---

45. Northeast Airlines-Duluth-Twin Cities Operation, 1 CAB 573, 578 (1940).

46. Southeastern States Case, 7 CAB 863 (1946); 8 CAB 585(1947).

47. Middle Atlantic Area Case, 9 CAB 131(1948).

48. Southeastern Area Local Service Case, ___CAB____(1959) docket number 7038 Dec. 18. 1959.

49. New York-Florida Case, 24 CAB 94(1956). Northeast airlines was chosen to add the New England area with direct connections to Florida.

50. National Airlines-Daytona Beach, Jacksonville Operation, 1 CAB 612(1940). California had not been forgotten as additional services were approved in that resort state Transcontinental and Western-Additional North and South California Services, 4 CAB 373(1943).

areas which are able to economically support additional airlines. Special recognition has been given to non-stop service,[51] and the metropolitan terminals.[52]

Receiving Board approval is not automatic, New routes are not granted for the sake of creating competition which is not economically sound. In Southern Service to the West Case,[53] the Board found that competition is not needed on every segment of the route structure.

Generally the trend has been for keener competition whenever such competition will be neither destructive nor uneconomical. Competition is influenced by the economic conditions in the industry, as well as by the status of world economy. An area where the Board has seen the need for greater competition, in order to keep pace with the foreign airlines, is in overseas transportation.

Routes have been added to South America[54] in support of this need. In Latin American Air Freight case,[55] a South American air carrier was certified to fulfill the need for competition and to provide a yardstick for the Board. North Atlantic certificates have been re-

---

51. Cleveland-New York nonstop Service, 21 CAB 760(1955).

52. Eastern Airlines-Additional Washington Service, 4 CAB 325(1943); Northeast-Additional Service to Boston, 4 CAB 686(1944).

53. 12 CAB 518(1951).

54. Pan American-Service from New Orleans-Guatamala, 4 CAB 161(1943).

55. 16 CAB 107(1952).

newed for transatlantic competition,[56] as well as certificates for Trans-Pacific routes.[57] A second American flag carrier was certified for around the world routes as an integral part of the Board's established policy of providing for balanced competition by American flag carriers in international air transportation.[58]

The pattern for the issuance of certificates of public convenience and necessity in the establishment of routes which can best serve the public and the industry has been shaped.

> ... Far from abandoning the principle of competition, Congress in the Act expressly directs the Board to consider "competition to the extent necessary to assure the sound development of an air transportation system" as being in the public interest. The policy thus stated, however, is not one of unlimited competition, nor of introducing competition over every route. The Legislative history and the text of the Act demonstrate the purpose of Congress to safeguard the industry equally against the evils of unrestrained competition on the one hand and the consequences of monopolistic control on the other. (59)

---

56. North Atlantic Certificate Renewal Case, 15 CAB 1053(1952).

57. Transpacific Airlines-Renewal Case, 21 CAB 253(1955).

58. TWA - India - Bangkok - Manila Extension, 24 CAB 287(1956). Up to this time Pan American was the only U.S. World Airline.

59. Transcontinental and Western-Additional North South California Service Case, 4 CAB 373, 374(1943).

3 - Extent of Control

The "Big Four" domestic carriers in the United States account for about 75% of the total revenue miles flown.[60] It is the policy of the Civil Aeronautics Board, however, to foster the growth of the small feeder airlines in every conceivable instance.

In the Southeastern Area Case,[61] new routes for the Southeastern United States were certified to Southern Airways, a small carrier, in preference to Eastern Airlines or National Airlines of the "Big Four". An attempt of a feeder airline to acquire control of another small carrier was disapproved by the Board because such approval would violate the whole purpose of feeder airlines and impinge on trunkline certificates.[62]

The competition for these routes which are across state lines is within the control of the Federal Aviation Act. The Federal Aviation Act is founded upon the Commerce clause of the United States Constitu-

---

60. Report of the Subcommittee on Antitrust, 85th Congress, 1st Session, G. P. O. Washington(1957) at 110.

61. ____CAB_____(1959)

62. North Central Airlines, Inc. v. CAB, 265 F. 2d 581 (D. C. Cir. 1959), 1960 U. S. &C. Av. R. 238, cert. denied, June 8, 1959 by U. S. Supreme Court.

tion[63] and it is necessary for the airline to be involved in interstate commerce for the Act to be applicable.

An unusual situation arose in CAB v. Friedkin Aeronautics, Inc.[64] There the defendant, doing business as Southwest Airlines, was operating wholly within the State of California. He successfully contended in the Federal District Court that his business was intrastate and therefore the economic controls of the Federal Aviation Act did not apply. This result was reached notwithstanding the fact that the majority of his passengers would subsequently move in interstate commerce. Southwest Airlines was primarily a connecting carrier for transcontinental airlines. The court said in part:

> Congress may in its discretion occupy the whole field of air transportation, or, if it so desires, may pass legislation which occupies only a part of the field in which the federal regulation is to apply. Congress did occupy the entire field relative to safety regulations. (65)

This case was reversed by the Circuit Court of Appeals[66] and re-

---

63. U.S. Const. art. I, sec. 8.

64. 1954 U.S. & C. Av. R. 367(S. D. Calif. 1954).

65. CAB v. Freidkin Aeronautics, Inc., 1954 U.S. & C. Av. R. 367, 372(S. D. Calif. 1954).

66. CAB v. Freidkin Aeronautics, Inc., 1957 U.S. & C. Av. R. 131 (9th Cir. 1957).

remanded for a determination of public convenience and necessity. The court found that the passengers were in interstate and not intrastate transportation because of the through nature of their flights. Thus Southwest Airlines came under the purview of the Federal Aviation Act and had to comply with the regulations. This is compatible with decisions of the United States Supreme Court in other fields of transportation.[67]

In Mitchell v. Yellow Cab Co.,[68] the court determined that taxi drivers who were carrying passengers from the airport, which was in another state, to El Paso, Texas, were not engaged in interstate commerce. It would appear that the complete journey, of which the taxicabs were an integral part, was in interstate commerce. The court did not discuss the fact that the greater El Paso area included parts of New Mexico, and Mexico as well as Texas. Another case involving a taxicab company was the Great Lakes Area Case.[69] Helicopter service was provided by a cab company and the Board promptly extended its control to the flight downtown from the Cleveland Municipal Airport. This was a local flight but the Board extended control, presumably on the principle that the helicopter ride was a part of the longer flight which was in interstate commerce. The Board was also

---

67. For example see, U.S. v. Capital Transit Co., 325 U.S. 357 (1944). A local bus system was part of interstate transportation.

68. 1958 U.S. & C. Av. R. 175(W.D. Texas 1959), CCH 6 Avi. 17,269.

69. 8 CAB 360(1947).

undoubtedly influenced by the desire to encourage the development of rotary wing aircraft in the best interests of the public.[70] The Board glossed over the principle that a surface carrier should not own or operate an air service.[71] The Board rationalized that most of the airport service surface transportation was already provided by Yellow Cab Company. Since Yellow Cab already had a monopoly on the airport traffic, the helicopter service would not increase it. If the proposed services are "auxiliary, supplementary, and unrelated to" its surface carrier operation, they should be approved under section 408.

The Civil Aeronautics Board has complete control over the safety phase of aviation and has pre-empted that field. In the economic area the Board still has to remain within the bounds of the commerce clause of the United States Constitution. However, the court interpretations have relegated practically all passenger air carriage to the control of the Federal Aviation Act. Theoretically an airline that is operating within the boundaries of the state and carrying only those passengers which are to remain within the state, could escape the economic control of the Federal Aviation Act.

---

70. Chicago Area Service Case, 23 CAB 552(19561). Certification was extended for the operation of helicopters within a 60 mile radius of O'Hare International.

71. Federal Aviation Act of 1958, sec 408(b), 72 Stat. 731, 767 second proviso.

C - Airlines Combinations

1 - Mergers

One of the ways in which the airlines have attempted to solidify the industry and eliminate competition has been to merge. The merging of two airlines most often results in a stronger enterprise both from the monetary aspect as well as the extension of route structure. In certain instances it is to the mutual advantage of a large and a small airline to join forces. The merging airline is able to provide more frequent service to a larger area. However, not all mergers are in the best public interest. When the merging airlines tend only to be self serving while removing a competitor from the industry, the Civil Aeronautics Board does not approve of the proposed merger. Under section 408(a) of the Federal Aviation Act of 1958,[72] the Board must approve all consolidations, mergers, leases, or acquisitions of control.

In order for a consolidation or merger of airlines to be approved by the Civil Aeronautics Board, the proposal must meet two requirements. The new structure must receive its certificate of convenience and necessity. That is, the newly formed airline must be consistent

---

72. 72 Stat. 731, 767.

with the public interest.[73] Secondly, the requirement of section 408 above mentioned must be met. The proposed transfer must not be against the public interest.[74]

Whether the merger of two airlines would be in the public interest or not is dependent upon the specific facts of each case. The Federal Aviation Act declaration of policy is followed.[75] The economic conditions of the respective airlines, the demand for routes and the need for service and competition along the proposed merger routes is considered. After evaluation of all the evidence, the Board, guided by the best public interests and the development of a sound airlines system, either approves or disapproves the merger.

The growth of the airlines in the United States, to the position they occupy today, of necessity included the acquisition of some smaller carriers by the surviving larger air carriers. For the most part these acquisitions were approved by the Board because they were in the best interests of the public. The route structure was strengthened, the service was improved and economically sound carriers were sub-

---

73. Federal Aviation Act of 1958, 72 Stat. 731, 755.

74. Id. section 408(b).

75. Id. section 102.

stituted for ones in precarious economic conditions. These results were achieved without sacrificing the element of competition necessary to bring the quality of service to its peak.

In Western Airlines-Acquisition of Inland Airlines, Inc.,[76] the Board found the purchase of Inland by Western not to be inconsistent with the public interest. Where the routes of a bankrupt airline existed over water, and no other form of transportation was feasible, the Board approved the acquisition of the assets of the bankrupt airline by another financially sound airline which would continue the routes and give service to the public.[77] Approval for the acquisition of an airline that never really got started was granted when this merger did not eliminate any competing carrier, and integrated the services to the affected area.[78] Where the systems to be merged were separate, distinct, and complete and the merger did not eliminate competition, but on the contrary augmented it, the Board has approved the merger.[79]

---

76. 4 CAB 654(1944).

77. Northeast Airlines-Acquisition of Mayflower Airlines, 4 CAB 680(1944).

78. Arizona-Monarch-Merger Case, 11 CAB 246(1950).

79. Delta-Chicago & Southern-Merger Case, 16 CAB 647(1952).

The service of other competing airlines has an influence on the granting or denial of the proposed merger. If the proposed merger is not opposed by other airlines who will be affected by the merger, the Board tends to grant approval.[80] When the merger affects a small segment of the states, the Board approves because, in the best interests of the public, air service in a limited market area can best be served by one airline.[81]

The Board carefully sifts the proposals of merger and not all are approved. Any mergers which would strip normal competition, encourage destructive competition, or tend to retard the development of an air transportation system, properly adapted to the present and future needs of the nation, are not allowed. Following this reasoning the Board disapproved the proposed merger between American Airlines and Mid Continent Airlines[82] because the two systems were uncomplimentary and their joint operation would not contribute to the creation of an ordered overall transportation pattern.[83]

---

80. Braniff-Mid Continent-Merger Case, 15 CAB 708(1952).

81. West Coast-Empire Merger Case, 15 CAB 971(1952); Northern Consolidated Airlines-Consolidation, 8 CAB 110(1947), wherein seven separate airlines were consolidated to concentrate routes.

82. 7 CAB 365(1946).

83. See also United Airlines-Western Air Express, 1 CAB 739(1940).

With regard to overseas routes the Board has also been reluctant in approving the acquisition of a foreign air carrier by an American flag carrier. In National-Caribbean-Atlantic Control Case,[84] the Board denied the acquisition of Caribbean Airways by National Airlines because the routes of the two carriers were widely divergent, and there was no need to integrate.

Merger between Braniff Airlines and its Mexican counterpart was denied for a very different reason.[85] Here the Board found that it would be economically unsound for the American carrier to place large sums of money into the Mexican airline. However, not all mergers affecting foreign routes are disapproved. The acquisition of American Overseas Airline by Pan American was approved under the direction of President Truman.[86]

The Board casts its critical eye in still another phase of control and merger. When stock of one airline is owned by another the Board determines whether this is control by the dominent airline; and if so, whether this control is in the best interests of the public.

---

84. 6 CAB 677(1946).

85. Braniff Airways - Acquisition of Aerovios Braniff, S.A., 6 CAB 947(1946).

86. North Atlantic Route Transfer Case, 11 CAB 676(1950).

If the degree of control is sufficient to eliminate the individuality of the subservient airline, the Board requires a reduction of this control in order to reinstate a competitive system.

When Pan American Airways reduced their stock in Aerovios de Guatamala, S.A. from 40% to 20%, Pan American no longer had sufficient control to require Board approval under section 408 of the Federal Aviation Act.[87] However, Pan American's 40% interest in Aerovios de Mexico, S.A. was considered extensive enough to merit stock control ratification by the Civil Aeronautics Board.[88] Looking further into the foreign air carrier stock control the Civil Aeronautics Board has stated: "However, our experience has demonstrated that ownership or control of foreign air carriers by American air carriers can have a deleterious effect upon the interests of the United States."[89]

Domestic air carrier stock control cases receive the same scrutiny. The Board prepared to investigate the acquisition of National

---

87. Pan American Airways - Acquisition of Aerovios de Guatamala, S.A., 4 CAB 403(1943).

88. Pan American Airways-Acquisition of Aerovios de Mexico, S.A., 4 CAB 494(1943).

89. Havana-New York Foreign Air Carrier Permit, 14 CAB 399, 401(1951). The Board here ordered PAA to divest its holdings in Cubana slowly. See also, Compaign Dominica de Aerovios, 19 CAB 823(1955).

Airlines stock by Pan American Airways, but the proposed transaction did not materialize.[90]

The ever changing conditions in the industry and the economy of the United States, as well as global politics, influence the decisions of the moment. What is now a just reflection of the public interest may not be so tomorrow. The Board must keep in step with, and reflect, the changing times in the approval or disapproval of these mergers. An interesting example of this can be found in Alaska.

In Alaska Airlines, Inc. - Acquisition of Cordova Air Service,[91] the Board denied the proposed acquisition saying in part:

> ...We find that the acquisition of Cordova by Airlines, which already has access to all of interior Alaska except the Copper River district would further increase that carriers' overwhelming competitive advantage in the territory to such an extent as to make the acquisition inconsistent with the public interest by precluding the development of a proper competitive balance,... but rather that we find that approval of the acquisition here proposed at this time would assist in the creation of a competitive advantage to one carrier which would stifle such growth. (92)

---

90. National Airlines - Route Investigation, 12 CAB 298(1951). The CAB nullified the stock swap including the 250,000 share option in July 1960.

91. 4 CAB 798(1944).

92. Alaska Airlines-Acquisition of Cordova Air Service, 4 CAB 708, 712(1944).

Another case[93] saw the Board approve the merger of seven Alaskan Airlines because this would concentrate the routes and offer better connecting service. The Board did not find this merger monopolistic, stating that there would still be competition with three large carriers, and that there was no indication that this merger would give them undue competitive advantage. Of course, these two cases are not based on the same factual situation, but one can see the underlying philosophy of the Civil Aeronautics Board being adapted to the situation.

Generally the proposed merger must contribute to the creation of an overall transportation pattern that is for the benefit of the public at large.[94] The merger of two uncomplementary systems not in furtherance of an overall pattern would not be for the competitive good of the industry. The areas to be tied together in a merger must be related to each other and result in a service by one carrier that extends the transportation system in an overall pattern without extinguishing competition.[95]

---

93. Northern Consolidated Airlines-Consolidation, 8 CAB 110(1947).

94. American Airlines-Acquisition of Mid Continent Airlines, 7 CAB 365(1946).

95. Southwest-West Coast Merger Case, 14 CAB 356(1951).

The changing times can be illustrated by the Eastern Airlines-Colonial Acquisition Case.[96] In the early hearings Eastern was denied acquisition of Colonial. When Colonial could no longer financially extricate themselves the approval for merger was granted. Times, finances, and the world situation change and the Board has to adjust with the best interests of the public.

2 - Pooling and interchange agreements

Another device which the airlines use in order to combine operations and extend their services to areas not originally contemplated by their certificate of convenience and necessity is the interchange of equipment. By interchanging aircraft, an airline may provide continuous through service on the routes of other airlines. This in effect may result in an elimination of competition along the proposed combination of routes. The Federal Aviation Act of 1958[97] requires the Board to approve any contracts or interchange agreements. The Board must find the proposed agreement not adverse to public interest, regardless of whether the agreement specifically states that it is formed for the purpose of eliminating wasteful competition and improving service and safety. The Board is the final judge as to whether or not this is indeed the reason for the agreement, and as

---

96. 18 CAB 453(1954).

97. 72 Stat. 731, 770 sec. 412(b).

such is in the best interests of the public.

The principle concern of the Board has been to create through service and thereby establish more complete facilities for the public. All but two certificated trunkline carriers have such interchange agreements.[98]

An early inroad into interchange agreements was made when the airlines began sleeper service. The planes that were modified for this service were a novation very similar to the Pullman Car in the railroads. The newly formed Civil Aeronautics Board set the theme for the qualification of such agreements to be within the public interest. Quoting in part from the approval to interchange sleeper aircraft under section 412 the Board stated:

> It is concluded therefore, that the word "monopoly" as used in the first proviso of section 408(b), refers to a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country. It follows that restraint of competition is a factor, insofar as the application of the proviso is concerned, only if it results from that degree of control which the authority decides constitutes a monopoly of air transportation. (99)

Here the Board held that there was no monopoly because United Airlines did not receive any control over Western Express or any additional control over air transportation. Jeopardy to other airlines was not a factor to be considered unless it was brought about

---

98. Keefer, Airline Interchange Agreements, 25 JALC 55(1958).

99. United Airlines & Western Express-Interchange of Equipment, 1 CAB 723, 734(1940).

by a monopoly.

Following this rationale the Board in Pan American-Panagra Agreement[100] approved equipment pooling between Pan American and Panagra for Latin American routes, finding that this agreement was not adverse to, nor inconsistent with, the public interest.

Generally, when through service has been under consideration by the Board in pooling or interchange agreements it has been approved.[101] The Board has even instituted proceedings to create voluntary through service.[102] Some of the other through services approved by the Board have been: Saint Louis to Denver with an equipment change at Kansas City,[103] New York to Houston,[104] with interchanges at Indianapolis and Saint Louis, Seattle to Texas,[105] Washington to

---

100. 8 CAB 50(1947).

101. Freight Forwarders also need Board approval for their agreements. Intra-Mar Shipping Corporation-Enforcement Proceeding, CCH Avi. Current Cases 22,215, docket number 7626, Oct. 31, 1958.

102. Through Service Proceedings, 12 CAB 266(1950).

103. Mid Continental & Continental Equipment Interchange, 14 CAB 663(1951).

104. New York Houston-Interchange Case, 16 CAB 603(1952).

105. Braniff-United Equipment Interchange, 17 CAB 618(1953).

Oklahoma, interchanging at Denver,[106] Minneapolis to Miami, with transfer of crews at Chicago,[107] and through service from the north to the south of Washington, D. C.[108]

In New York-Balboa Through Service Reopened,[109] the Board approved Eastern Airlines interchanging with Braniff because this agreement would provide the competition needed in Latin America. At the same time the Board disapproved a Pan American interchange of equipment agreement with Eastern on the grounds that this would create too great a competitive advantage.[110] The central theme of the Board approval may be gleaned from the opinion in Trans World Airways-Delta-Interchange of Equipment.[111]

---

106. Continental-United Interchange, 17 CAB 635(1953).

107. Northwest-Eastern Equipment Interchange, 19 CAB 346(1954).

108. Capital-National Interchange of Equipment, 10 CAB 231(1949), 10 CAB 564(1949).

109. 20 CAB 493(1954).

110. Ibid.

111. 8 CAB 857(1947).

> In the absence of any indication that either air carrier will be controlled by the other, either by stock ownership or through contractual agreement, it must be concluded that there will be insignificant control of air transportation or any phase thereof to constitute a monopoly therein. (112)

Because there may be situations where interchange is for the best interests of the public regardless of the competition factor, the Board decides each case on its own merit. A unique condition could arise in a somewhat isolated air transportation area which nonetheless is essentially best suited for air transportation. Just such a situation was present in Ketchekan Junau Mail Route Case[113] where an agreement between Alaska Coastal Airlines and Ellis Airlines to share personnel and ticket offices was approved.

Where the Board has disapproved of interchange and pooling agreements, there has been usually one strong reason why such disapproval was forthcoming. In Trans World Airways-Delta-Interchange Reopened,[114] the interchange of equipment at Cincinnati was disapproved because the stop over was for one hour. The Board concluded that this was a termination of the flight at Cincinnati and not an

---

112. Trans World Airways-Delta-Interchange of Equipment, 8 CAB 857, 871(1947).

113. 10 CAB 476(1949).

114. 10 CAB 527(1949).

interchange for through service. Unlimited transcontinental service was sought in Transcontinental Coach Type Service Case.[115] Approval was denied, notwithstanding the Board policy of developing an air transportation system. The Board has refused approval where the proposed interchange agreement would upset the bilateral treaties of the United States.[116] When the economy, market, and conditions have changed so as to place an interchange agreement contrary to the public interest, the approval of the agreement has been rescinded.[117]

For the most part the agreements to interchange and pool equipment have been approved. The cases where they have not been approved were based on an outstanding factor which would preclude the agreement from being in the best interests of the public. The protracted philosophy of the Civil Aeronautics Board can be illustrated by the opinion in Pan American-Panagra Agreement Case:[118]

---

115. 14 CAB 720(1951).

116. Chicago & Southern-PAA Interchange Agreement, 15 CAB 686 (1952). Through service from Chicago, Saint Louis to Mexico.

117. National Panagra-Interchange agreement, 14 CAB 320 (1951).

118. 8 CAB 50(1947).

> We have previously indicated in the United-Western Interchange Agreement, that the restrictions in section 408(b) against creating a monopoly is inapplicable to mere improvements in existing service whereby connecting service is better able to compete against one carrier or other connecting services. It is clear in this instance that the competitive situation is not changed in such a way as to result in the creation of a monopoly. (119)

3 - Interlocking Directors

"It (interlocking relationships) shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby." So reads section 409(a) of the Federal Aviation Act of 1958.[120] The Act continues to enumerate six types of interlocking directorships and officerships between air carriers which require Board approval. Interlocking directorships or stock controls are another way in which air carriers can exercise common policy and effectively limit competition. Taking cognizance of this the legislature inserted section 409 into the Federal Aviation Act. By requiring approval of interlocking rela-

---

119. Pan American-Panagra Agreement, 8 CAB 50, 57(1947).

120. 72 Stat. 731, 768.

tionships, the Board can effectively reduce the possibility of one interest controlling air carriage competition.

Following the Board policy that air carriers must be kept free from the domination of other forms of transportation unless such transportation is in the extension of the surface carrier in an area not competitive to the airlines,[121] the Board has disapproved the directors of a surface carrier also being directors in an airline.[122] Approval with certain restrictions has been given for the creation of a holding company of several transocean air carriers with interlocking directors.[123]

When a manufacturing concern controls the majority of stock in an airline, the Board must look closely to see whether the manufacturer would be able to extend his influence into the policy and service of the air carrier. In Trans World Airlines-Control by Hughes Tool Company,[124] the Board found that Hughes Tool was not manufacturing aircraft parts and had no interest in aeronautics. Thus the control by Hughes Tool was not inconsistent with the public interest.

---

121. Boston & Maine-Main Central - Control by Northeast Airlines, 4 CAB 379(1943).

122. Pioneer Airline-Campbell-Interlocking Relationship, 12 CAB 326(1950).

123. Transocean Airlines-Interlocking Relationships, 23 CAB 439 (1956).

124. 6 CAB 153(1944).

In certain instances the Board has approved the interest of one man in two aeronautical businesses. Where the combination of airlines does not tend to form a monopoly or to restrict competition, control by a single person may be approved. The Board approved just such a combination in Robert Dollar-Acquisition of South Pacific.[125] A fixed base operator who was also in charter and airport limosine service required Board approval.[126]

Particularly in the combination of air freight forwarders with air carriers the Board has been prone to approve interlocking relationships in order that there may be a better service to the public from the smooth continuous flow of freight from the shipper to the consumer. In Gilbert Air Transport Corporation Interlocking Relationship,[127] the Board granted Milton Gilbert, the president of Air Transport, permission to also have controlling interest in Air Transport Freight forwarders. The Board did not find this combination

---

125. 12 CAB 497(1953).

126. Modern Air Transport, Inc. & John P. Becker-Control & Interlocking Relationship, CCH Avi. current cases 22,349, docket numbers 10501, 10602, Feb. 9, 1960.

127. 17 CAB 558(1953).

monopolistic.[128] The Board approved the interlocking directorship between Pacific Air Freight and Pacific Forwarding Corporation,[129] stating in part:

> The Board has held that the clear policy of section 408(a) 5 is to make unlawful, in the absence of Board approval, the unified control or certain types of enterprises. (130)

The Board found no conflict of interest between surface and air transportation, in fact, they found that the forwarding by water to supplant the air carrier led to better service to the public. This position has been followed in Empire Household Company-Interlocking Relationships Case,[131] and in Republic Air Freight Interlocking Relationships,[132] where the Board said:

> In the opinion of the Board the existence of a large number of independent air freight forwarders would act as a detriment to the surface freight forwarders or air freight forwarders controlled by them from diverting any substantial amounts of traffic from the air to surface transportation. [133]

---

128. Also see, 19 CAB 78(1954).

129. Pacific Air Freight-Interlocking Relationships, 17 CAB 561(1953).

130. Id. at 563.

131. 18 CAB 485(1954).

132. 18 CAB 643(1954).

133. Republic Air Freight-Interlocking Relationships, 18 CAB 643, 646 (1954).

Thus in this area the Civil Aeronautics Board attempts to limit the possibility of undue restraint on trade and competition while at the same time exercising the least amount of legislative control consistent with the public interest.

D - FREIGHT

The Federal Aviation Act includes within its control the air freight forwarders and air express shippers. A unique fiction classifies the freight forwarders as carriers so that their activities come under the purview of the Civil Aeronautics Board. By classifying the air freight forwarders as indirect air carriers, the Board exercises control over the forwarders and requires them to comply with the policy standards set out for the air transportation industry.

However, the indirect carriers do not have to comply with the rigid application of regulations that are imposed on direct air carriers. They are not required to show public convenience and necessity for their services or future willingness to serve.

In American Airlines, Inc., v. Civil Aeronautics Board,[134] the court also concluded that the Board may not control the mergers of

---

134. 178 F. 2d 903(7th Cir. 1949), 1950 U.S. & C. Av. R. 11.

indirect air carriers. The requirements of section 408(b)[135] were obviously framed with reference to direct carriers. Freight forwarders, as indirect carriers, do come within the broad range of the Federal Aviation Act which includes the antitrust exception of section 414.[136] Therefore if an agreement concerning an air forwarder is approved by the Civil Aeronautics Board, it acquires immunity from the antitrust laws of the United States.

A cooperative air freight forwarding organization must submit to Board regulation.[137] There is no special exemption because the freight forwarder is a cooperative or agricultural organization. An air freight forwarder has the standing of an indirect carrier and may sue the Civil Aeronautics Board in the federal courts.[138]

Control by the Board extends to approval of activities overseas. Railway Express Agency was approved as an indirect to engage in foreign air transportation carrier.[139] Board control in foreign rates is limited to that exercised through the International Air Transport Association. International Air Transport Association encompasses

---

135. Federal Aviation Act of 1958, 72 Stat. 731, 767, Sec. 408(b), requires Board approval of consolidations, mergers and acquisitions of control.

136. Federal Aviation Act of 1958, sec. 414, 72 Stat. 731, 770.

137. Consolidated Flower Shipments v. CAB, 213 F. 2d 814 (9th Cir. 1954). 1954 U.S. & C. Av. R. 171.

138. Airborn Freight Corporation v. CAB, 257 F. 2d 210 (D. C. Cir. 1958), 1958 U. S. & C. Av. R. 655.

139. Air Freight Forwarders Case, 11 CAB 182(1949).

certified carriers only, leaving the government without control over foreign rates for irregular carriers.

One of the duties placed on the indirect air carrier is compliance with section 412 of the Federal Aviation Act.[140] This section requires every air carrier to file with the Board a true copy of every agreement affecting air transportation. The Board approves or disapproves these agreements in the best public interest consistent with the general law of the land. A petition by Eastern Airlines and United Airlines to remove conditions in air forwarding contracts for their services to be open to all certificated carriers was denied.[141] To be consistent with the Sherman Antitrust Act, Air Cargo, Inc., a cooperative air freight ground facility, could not be selective and exclude certain carriers. The Board stated:

> The Supreme Court has held that in confirming authority similar to that exercised by us under section 412, Congress neither made the antitrust laws wholly inapplicable nor authorized the administrative agency to ignore their policy. Also since our approval of cooperative agreements between air carriers gives such agreements immunity under the Federal Antitrust laws, we must be concerned with the objectives of those laws as interpreted by the courts. (142)

---

140. 72 Stat. 731, 770.

141. Air Cargo, Inc. -Agreement, 9 CAB 468(1948).

142. Id. at 470.

In the Local Cartage Agreement Case,[143] an agreement to terminate the practice of advancing to independent truckers charges for services to air freight shippers was disapproved as adverse to public interest.

> The approval of an agreement under section 412 exempts the agreement from the operation of the anti-trust laws by virtue of section 414. While this exemption demonstrates the Board's power to approve agreements which otherwise would violate the anti-trust laws, it also imposes upon the Board, in determining the effect on the public interest of agreements for which approval is sought, the duty to evaluate such agreements in the light of antitrust policy and principles. Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits. (144)

Generally the policy of the Civil Aeronautics Board has been to encourage the certification of direct air freight carriers. The reason for this has been that air freight cargo specialists do not compete with certified passenger carriers. The Board reached this conclusion regardless of the fact that the passenger carriers do a certain amount of air cargo carriage and the new "specialists" would be able to place themselves in a more favorable position with the shippers.[145]

---

143. 15 CAB 850(1952).

144. Local Cartage Agreement Case, 15 CAB 850(1952).

145. Air Freight Case, 10 CAB 372(1949). The Board approved Flying Tigers and Slick Airlines for freight only.

In Latin American Air Freight Case,[146] the Board approved a South American carrier for a Latin American cargo route because the Board needed a yardstick as well as competition in this area.

Where the result is better service to the public and there is no conflict of interests between a surface carrier and an air carrier, the Board has approved interlocking directorships between the two.[147]

When an existing carrier could no longer economically compete in the air cargo specialty, the Board approved merger with another air cargo carrier. The Board noted that there was still competition between the survivor and the passenger carriers for the freight.[148]

In order to create better service to the public the Board has approved connecting air carriers with air forwarders and surface transporters. On this premise interlocking relationships was approved in Braungart-Interlocking Relationships[149] between a surface carrier and air freight forwarder. The Board did not find the interlocking

---

146. 16 CAB 107(1952).

147. Pacific Air Freight-Interlocking Relationships, 17 CAB 561(1953); Gilbert Air Transport Corp-Interlocking Relationships, 17 CAB 558(1953).

148. Flying Tigers-Slick-Merger Case, 18 CAB 326(1954).

149. 19 CAB 456(1954).

relationships between a surface carrier and an air freight forwarder to be either a monopoly or in restraint of competition.[150] In the opinion of the Board the existence of a large number of independent air freight forwarders would act as a deterent to the surface freight forwarders or air freight forwarders controlled by them from diverting any substantial amounts of traffic from air to surface transportation.[151]

The Civil Aeronautics Board has recognized the need for growth in the air freight field through certification of all cargo carriers to compete with the passenger carrier both in domestic[152] and trans-ocean[153] air cargo carriage. Special consideration has been given to the potential for air freight, the compatibility with the passenger carriers, healthy competition, and the needs of national defense. The Board has also taken cognizance of the fact that the public can be better served with a smooth flow of air freight from sender to receiver. In order to implement this the Board has created the status of indirect air carrier for the freight forwarder.

---

150. Republic Air Freight-Interlocking Relationships, 18 CAB 643(1954).

151. Id. at 646, also see, Empire Household Co. -Interlocking Relationships, 18 CAB 485(1954).

152. Air Freight Case, 10 CAB 372(1949).

153. Transatlantic Cargo Case, 21 CAB 671(1954).

Interlocking directorships between air carrier and indirect air carrier are approved to further aid the continuous flow of cargo in transit from air to surface carriage. The affiliation of air freight forwarders with surface carriers, and agreements between air carriers and forwarders which may provide for a rate differential, will not be disapproved solely on these grounds.[154]

E - TICKETS AGENTS

Whereas the freight forwarders have been designated indirect carriers in order to be placed within the scope of the Federal Aviation Act, the ticket agents have been specifically excluded from the regulatory powers of the Civil Aeronautics Board. The Board has no direct power to regulate entry into the travel agency business:

> The term "air transportation" does not include the sale of air transportation or ticket agency services, and, accordingly, there is nothing in the Civil Aeronautics Act which prohibits a ticket agent from engaging in such business without first securing prior Board authorization therefore. Any person is free to act as a ticket agent for any airline which cares to use his services without securing Board approval. In this sense, the Board does not have jurisdiction to "license" travel agents. (155)

Before a travel agent is eligible to act as an agent for a certified carrier, he must be accredited by the air traffic conference of the Air Transportation Association of America.

The Air Transportation Association has established a set of standards to which a ticket agent must conform before he is permitted

to serve the air industry. The air traffic conference carriers have uniformly agreed to the imposition of these standards upon the ticket agents. ATA in turn through mutual agreement controls the air carriers through a system of sanctions and penalties.

This, standing alone is in violation of the antitrust laws of the United States. The concerted action of a group to set rates and regulations with which the ticket agents have to conform is repugnant to the antitrust laws. One further link in the chain places the traffic conference resolutions, to which the carriers are parties, within that class of agreements that require Board approval under section 412 of the Federal Aviation Act of 1958.[156]

Ticket agents are not air carriers within the meaning of the Federal Aviation Act and they do not receive the attendant immunity from the antitrust laws. The system of control created by the ATA for ticket agents, which requires approval of traffic conference resolutions by the Board under section 412, incurs the antitrust immunity granted to Board approved agreements under section 414.

---

154. Air Freight Forwarders Investigation, 21 CAB 536(1955).

155. Report of the Antitrust Subcommittee of the 85th Congress, First Session, page 189, GPO, Washington, D. C. (1957).

156. 71 Stat. 731, 770.

This system has been in operation since April, 1941 and has persisted without substantial alteration until the present time.[157]

In Putnam v. Air Transport Association,[158] a ticket agent filed suit to enjoin the ATA from refusing to allow member carriers to sell tickets through his agency, and for treble damages under the antitrust laws. Quoting the Board approval of the ATA agreement to appoint and remove travel agents, the court stated: "This approval of the arrangement exempted it and the action here complained of from the operation of the antitrust laws."[159]

Through this indirect method the Board has some measure of control over the ticket agents and the incidents of competition that are a part of the marketing of tickets. The controls are real and arbitrary under the assumption that the agreements of the air carriers embodied in the ATA resolutions are for the betterment of the air industry and in the best interest of the public. In this way the removal of the ticket agent from the regulation of the antitrust laws is justified.

---

157. Report of the Antitrust subcommittee of the 85th Congress First Session, page 190, G. P. O. Washington, (1957).

158. 112 F. Supp. 885(S. D. N. Y. 1953), 1953 U. S. & C. Av. R. 388.

> It is the national policy that unbridled competition in that industry is not in the national interest, and the CAB has been entrusted with the responsibility of making the accommodation between monopoly and competition in the public interest. (160)

Travel agents who sell tickets on international flights are subject to a similar set of controls through the International Air Transport Association. IATA is the trade association for all certificated carriers engaged in foreign air transport. IATA has a similar air traffic conference whose rate resolutions are in turn approved by the Civil Aeronautics Board. Generally speaking the Federal Aviation Act does not extend extraterritorially to foreign air carriers. In order to have to have some basis of control over the agreements between foreign and United States carriers, the Board requires approval of such agreements. This is an indirect extension

---

159. Putnam v. Air Transport Association, 1953 U.S. & C. Av. R. 388, 391 (S. D. N. Y. 1953).

160. Apgar Travel Agency v. IATA, CCH 3 Avi. 18,003, 1952 U.S. & C. Av. R. 364 (S. D. N. Y. 1952). Wherein a ticket agent complained that there was a conspiracy between the scheduled airlines to boycott his agency because he represented non scheduled carriers and was not sanctioned by IATA. Non scheduled carriers are not members of or need IATA approval.

of the Federal Aviation Act to foreign air carriers and foreign agreements. Once the Board approves the agreement under section 412, the agreement is released from the operation of the United States antitrust laws by virtue of section 414. Thus, in exchange for control in oversea rates, which are normally beyond the purview of the Federal Aviation Act, the Board has traded the restrictions which would apply to these agreements under the antitrust laws.[161]

The IATA resolutions on ticket agents and the percentage that they may charge have generally been approved by the Board. Again the primary factor is that it not be adverse to public interest.

> The fact that an agreement may be inconsistent with the antitrust laws of the United States does not necessarily require a finding that it is adverse to the public interest. It must be conceded that section 414 contemplates that certain agreements will be entered into which in the absence of the Board's approval, would violate the antitrust laws. (162)
>
> Thus the extent to which a resolution may conflict with the objects of these laws is an element to be considered in determining whether it is adverse to the public interest. (163)

---

161. IATA Traffic Conference Resolution, 6 CAB 639 (1946).

162. IATA Agency Resolution Proceeding, 12 CAB 493, 499 (1951).

163. Id. at 500.

The Board approved of an IATA rate resolution for first class fares across the Atlantic but disapproved a reduced fare for IATA general agents as well as fares on polar routes. [164] Disapproval was also forthcoming on an IATA resolution that provided for no compensation to be paid air carriers for credit plan air transportation except under the IATA sponsored Universal Air Travel Plan. The Board noted that the agreement contravened the fundamental policy of the antitrust laws because it tended to prohibit the use of outside credit in the purchase of air transportation and thus restrain trade. [165]

Ticket agent commissions formulated by IATA resolutions have been approved by the Board. A commission of 6% was approved for Trans-Atlantic flights instead of the ASTA asking commission of 7 1/2% in North Atlantic Tourist Commission Case.[166] A 5% commission for other than first class fares was approved in Trans-Atlantic Charter Policy Case. [167]

---

164. Pan American World Airways-Rate and Traffic Matter, 23 CAB 275 (1956).

165. IATA Traffic Conference Meetings, CCH Avi. current cases 22, 431, docket number 10946, August 25, 1960.

166. 16 CAB 225 (1952).

At the hearings the Board took the position that it is "not adverse to the public interest" to approve industry agreements under which the Air Traffic Conference Carriers have the power by collective action to: (1) Establish "standard commission rates"; (2) "Limit the number of travel agents" with the concurrent "elimination of non productive agents"; and (3) "Limit the number of travel agents in each area to economic levels". [168]

The airlines feel that the ticket agent is a subagent of the carrier and represents the carrier in the eyes of the public. To administer this, the carriers control this independent industry and do so in a manner that is violative of the antitrust laws and repugnant to the case history interpreting the Sherman Act. Board approval of these resolutions has placed them beyond the prosecution of the antitrust laws. The resolutions of the traffic conference now become agreements of the carriers and as such are entitled to immunity from the antitrust laws by application of section 414 of the Federal Aviation Act. The power of the air carriers over the ticket agents is absolute.

---

167. 20 CAB 782 (1955).

168. Paraphrased from the Report of the antitrust Subcommittee of the 85th Congress, First Session at page 196, G.P.O. Washington, D. C. (1957).

The livelihood of the ticket agents is controlled primarily by ATA or IATA, and secondarily by the Civil Aeronautics Board. Whether or not this is a healthy situation is not in discussion here. However, it should be pointed out that the extension of this philosophy could place all kindred aviation industry under the regulation of the Civil Aeronautics Board. The powers of the Board could embrace the entire air industry in every phase that has an effect upon the air carrier and his peculiar problems. [169]

---

169. Id. at 213. The subcommittee concluded that the CAB should withdraw its approval of agency resolutions.

F - ASSOCIATION

> A trade association has been compared to an airplane because it operates in a dangerous medium, which, unless it is properly designed, mechanically sound and skillfully piloted, will result in a disastrous crash.[170]

This comparison is more than apt for the airline trade associations. The operation of the associations representing the air transportation industry borders closely upon special privilege. A trade association in itself is of necessity a combination of would be competitors. The general business associations, as we have seen in chapter three,[171] have been allowed to operate when it has been shown that their concerted action is not regulating prices or restraining trade.

The trade associations for the air carriers certainly do not remain within these narrow confines. The agreements restricting competition and regulating the prices for air transportation must receive immunity from the antitrust laws. This immunity is secured when the Board approved the agreements under section 412 of the Federal Aviation Act.[172]

---

170. Withrow, Trade Associations, 4 Antitrust 173, 177 (1959).

171. Chapter Three, supra.

172. 72 Stat. 731, 770, section 412 (b).

But does the subsequent Board approval of these agreements absolve the trade associations themselves from the application of the antitrust laws of the United States? The trade associations are still acting in restraint of trade, regardless of whether the final agreement is exempted from the operation of these laws. The trade associations are not within the scope of the Civil Aeronautics Board and consequently are not clothed with immunity from the antitrust laws. Therefore, the trade associations must indeed tread skillfully through the negotiations of the air transport industry. Criticism from the general industry or the public may cause this protective veneer to be removed. By implication the trade associations have been exempted from the antitrust laws on the assumption that they are the alter ego of the air carriers. Once the public interest establishes that the air transportation industry does not need the associations to represent them, the veneer will peel off and section 414 [173] will provide immunity only to agreements among the air carriers and will be strictly construed to remove peripheral agreements from the sanctity of the Federal Aviation Act.

---

173. Federal Aviation Act of 1958, 72 Stat. 731, 770, section 414.

1 - American Air Transport Association of America

The trade association representing the domestic scheduled air carriers is the Air Transport Association of America (ATA). As of 1956 [174] the ATA had forty operating members and four associate members who do not have voting rights.

ATA, interested in all phases of domestic and international air transportation, has sponsored development of navigational and meterological aids, developed safety and operational standards, systemized airline accounting and cost controls, as well as prepared institutional advertising for the certificated industry. In addition, the ATA has served to unite the industry in joint programs designed to protect air transportation from outside competition. ATA has participated in agreements relating to interchange of passengers and freight, uniform ticketing arrangements, restrictions on meals, and consolidating tariffs filed with the Civil Aeronautics Board, achieving almost the status of a rate bureau. [175]

---

174. Report of the Antitrust Subcommittee of the 85th Congress, First Session. U.S. Gov. printing office, Washington, D.C. 1957 at page 116.

175. Id. at 126.

ATA strives for an "industry position" through reports and discussions with the airlines. Expulsion from the association may be exercised against a member not agreeing with the industry position.

The action of ATA through its large departments, of which there are seven dealing with engineering, economics, air traffic, and so on, borders closely on a per se violation of the antitrust laws. The immunities from the antitrust laws extend only to the agreements that are filed with and approved by the Board pursuant to section 412.

The Articles of Association for ATA have been approved by the Board. However, special pains were taken to point out that no antitrust immunity was granted to the officers of ATA or to its member carriers for any subsequent contract or agreement or any specific action pursuant to the Articles:

> It is ordered, that said agreement be and the same is approved as between the above named parties thereto, provided that by approving said articles of association as an agreement between said parties, the Board does not approve or disapprove any subsequent contract or agreement entered into, or any specific action taken pursuant to said articles of association. [176]

---

176. CAB order serial No. 704, CAB contract No. 105.

The antitrust subcommittee recommended that the immunity given to the articles of association be removed because it creates confusion regarding the extent of the immunity to activities that are not approved under section 412 by the Board.[177]

The immense influence of the ATA in the air transportation industry can easily be seen. In addition to working with the government on air regulations the ATA is a registered lobbyist working toward legislation most favorable to the air transport industry. ATA works closely with the Civil Aeronautics Board and represents the airlines at hearings before the Board. Its action to prevent new competition in the field is intense.

It is conceded that the ATA has done much good for the air transportation industry. Safety standards, economic representation, and interests of national defense have been championed. However, many of the agreements and concerted actions have been in violation of the antitrust laws and were not approved by the Civil Aeronautics Board.

---

177. Report of the Antitrust Subcommittee of the 85th Congress, First Session, G.P.O. Washington, D.C. (1957) Page 136.

Insofar as domestic airline operations are involved no antitrust proceedings have been brought by the Department of Justice to determine the applicability of the antitrust laws to the activities of ATA and its member carriers. Many of ATA's agreements and joint activities with its member carriers were challenged, however, in a private antitrust action instituted by Slick Airways,[178]

> The gravamen of the complaint is that the defendents and other airlines, since 1946 "have conspired to monopolize, monopolized and attempted to monopolize air freight transportation and have unlawfully controlled, combined, and conspired to restrain trade or commerce among the several states in air freight transportation" with the design of driving the plaintiff and other freight carriers from the business, and that the following means and methods have been utilized in pursuance thereof:
> "(a) A deliberate attempt, through predatory rate policies and a process of attrition, to waste the resources of the plaintiff and other freight carriers, and to cause them to operate at a substantial loss;
> (b) The abuse of the privilege of intervention and participation in CAB proceedings controlling plaintiff's legal rights and authority to engage in the air freight business;
> (c) A campaign of unfair competitive practices designed to appropriate the business." [179]

---

178. Slick Airways, Inc., v. American Airlines, Inc., 107 F. Supp. 199 (D.N.J. 1951), appeal denied, 204 F. 2d 230 (1953), Cert. Denied, 346 U.S. 806 (1953).

179. Id. at 203. The case was settled before trial of the antitrust allegations.

It would appear that the public interest still favors a strong position for the ATA in the air transportation industry. Neither the Justice Department nor the Civil Aeronautics Board have found it advisable to test the self-determined antitrust immunity of the ATA. Perhaps the ATA should be afforded this special privilege which is not granted to other trade associations. It would appear that if the ATA is to be allowed immunity from the antitrust laws, it should receive this from the legislature. The intention, at present, of Congress is to have competition in the airline industry. This competition is to be controlled by the Civil Aeronautics Board only, and not by the industry.

2 - INTERNATIONAL AIR TRANSPORT ASSOCIATION

Air carriers that have been authorized to operate scheduled air services by member nations of the International Civil Aviation Organization (ICAO) belong to this private trade association. IATA immerged from the Chicago multilateral convention on civil aviation in 1944,[180] after the convention failed to provide the necessary measures of economic and political control in international civil aviation.

---

180. Proceedings of the International Civil Aviation Conference, Dept. of State Pub. 2820, G.P.O. Wash.

IATA has substituted agreements among the international air carriers for multilateral government action.

The Civil Aeronautics Board does not have direct authority over rates and fares of United States carriers engaged in international air transportation. The Board, however, did approve the incorporation of IATA[181] under section 412 of the Federal Aviation Act and has periodically approved agreements promulgated by IATA members which establish world wide rates and fares. These agreements, when approved by the Board grant the Board some control in the international rate structure. The approval removes the agreements from the operation of the antitrust laws.[182]

It is no secret that IATA is a trade organization of cartel proportions. IATA is the collective personality of some 73 companies.[183] The Civil Aeronautics Board had the choice of not recognizing the IATA rate structure and excluding itself completely from the international field, or passing approval on the rate resolutions under section 412 and thus exercising some measure of influence in the important international air market. As a result, international air transportation has become subjected to a method of rate determination that is in fundamental

181. IATA articles of incorporation were approved by the Canadian Parliment and the offices are in Montreal. 20th Parliment, 1st Session, 9 George VI, 1945.

182. Report of the Antitrust Subcommittee, 85th Congress First Session, page 217ff, G.P.O., Wash., D.C. (1957).

183. 21 IATA Bul. 16 (10th Anniversary number).

conflict with the American concept of competition and free enterprise.[184]

IATA members account for approximately 90% of the total international air traffic and 95% of the world's scheduled international air traffic. Twelve of the IATA members are United States flag carriers.[185]

IATA accomplishes much toward the development of international air carriage. Similarly to the ATA, IATA promotes navigation, technology, standardization of customs and air systems, meterology, and other functions. The establishment of rates for international air transportation has been among the prime objectives of this international collaberation. A conference system of rate fixing has been created. "The conference structure, by putting an effective floor under fares and freight rates, has eliminated the unhealthy competition and rate warfare which was characteristic of the prewar period."[186]

---

184. See N 182, supra.

185. Report of the Antitrust Subcommittee, 85th Congress, First Session, Page 219, G.P.O. Washington, D.C. (1957).

186. Cribbett, IATA's Quasi Public Role, 21 IATA Bul, 92 (10th Aniversary Number).

It is admitted that international aviation has progressed in service and safety through advancements triggered by IATA. Notwithstanding this, the conference system, setting the rates for international air carrage, conflicts with the Board's obligation to utilize the forces of competition in the development of the United States in international air transportation.

The Board approved the IATA rate making machinery for the first time in 1946.[187] However, the board would not accept without proof that the proposed machinery would be inconsistent with the Act's policy of controlled competition, nor would the Board declare, without proof, that the full benefits of competition, including rates geared to the costs of the most efficient operator, would be realized through IATA's agreements.[188] The Board has recognized the defects in the IATA resolution approval method as an effective control for United States international aviation, and has repeatedly asked Congress to empower it with control similar to that exercised over domestic air transportation. The experience with IATA carriers over the last decade has demonstrated that the Board's power to disapprove conference

---

187. IATA Rate Conference Resolution, 6 CAB 639 (1946).

188. Id. at 644.

rate agreements is ineffective to insure a sound international rate structure.[189]

With this as the only weapon, the Board has continued to approve rate resolutions.[190] The Board has also approved other IATA resolutions, thus making them immune from the operation of the antitrust laws. Approval was forthcoming for IATA resolutions involving ticket agents;[191] tourist ticket commissions;[192] uniform tickets, baggage and air waybill.[193] Disapproval was received for a reduced fare for IATA general agents,[194] and a resolution setting procedures for carriers to enter interline agreements.[195]

With the establishment of the conference rate-making procedures, competition among the international carriers has been restricted to rivalry in the services offered, and a service rivalry tends merely to divert traffic from one carrier to another, rather than to enlarge the overall market.

---

189. Report of the Antitrust Subcommittee, 85th Congress, 1st Session, page 225, G.P.O., Wash., D.C. (1957).
190. CAB order E-10017, 1956; 9 CAB 221 (1948).
191. IATA Agency Resolution Proceedings, 12 CAB 493 (1950).
192. North Atlantic Tourist Commission Case, 16 CAB 225 (1952); Transatlantic Charter Policy, 20 CAB 782 (1955); North Atlantic Conference Resolution, 1946 U.S. & C.Av.R. 321 (1946).
193. IATA Traffic Conference Resolution, 1949, U.S. & C.Av.R. 362 (1949).
194. Pan American World Airways-Rate and Traffic Matters 23 CAB 275 (1956).
195. Investigation Relating to the Regulation and Conduct of the Regional Traffic Conferences of IATA, 24 CAB 463 (1957).

"In the absence of effective governmental control, the substitution of the IATA machinery for price rivalry has resulted in industry agreements to increase rates without adequate justification.[196]

Whether the Board would be justified in withdrawing the requisite approval for IATA rates and place these rates under the operation of the antitrust laws is debatable. The rate conference system is not exactly against the antitrust policies; it is competition by consent.[197] The development of the air industry must be considered. If the protection of immunity is needed to foster the growth of the air transporation industry, it should be granted. Would competition without control throw the air transport industry into competitivechaos? The Board does not permit open competition in domestic air transportation. It requires rigid conformation to ethereal standards of public interest. How can the Board insist on open competition in the international field?

---

196. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 229, G.P.O. Wash. (1957).

197. Babchick, IATA and CAB, 25 JALC 8 (1958).

> They (traffic resolutions) do not restrict competition: I think it is generally recognized within IATA that competition is a good thing, provided it is maintained at a high ethical level and does not become destructive in nature. 197A

This is the same philosophy that the Civil Aeronautics Board operates under in domestic air transportation. The Board feels that it is justified in the public interest in controlling competition in domestic air carriage; and indeed, wishes to extend this control to international carriage as well. If antitrust immunity from approval of rates is justified in domestic transportation, this same immunity must be extended to international air carriage and to all participating nations. The only question to be discussed here is whether the control and immunity from antitrust laws is justified at all.

---

197 A. 21 IATA Bul. 116 (10th Anniversary Number).

G - UNFAIR COMPETITION

The airline industry is a relatively recent one, and in addition it is closely regulated by the government. For these reasons unfair competition problems have been few, and not altogether unique, although the facts have evolved from the new transportation medium.

When a surface transportation company quoted special rates and acted in concert to secure a large block of the traveling public,[198] the airlines attacked this as unfair practice designed to eliminate air competition. The practice of special fares, arrived at through mutual agreement among the railroads, was illegal per se under the antitrust laws unless section 5a of the Interstate Commerce Act,[199] which gave the railroads the same immunity from antitrust laws as did section 414 of the Federal Aviation Act, applied.[200] Determination first has to be made under the Interstate Commerce Act whether the agreement was valid

---

198. This was a discount to the military personnel.

199. 49 F.C.A. sec. 5a.

200. Aircoach Transport Association v. Atchison Topeka & Santa Fe, , CCH 5 Avi. 17,742 (D.D.C. 1957), 1957 U.S. & C. Av. R. 187; Appeal 253 F. 2d 877 (D.C.Cir, 1958), CCH 5 Av. 17,792 (D.C.App. 1958), 1958 U.S. & C.Av. R. 95.

and approved under section 22.[201] If unfair competition was found, then the federal district courts would receive the case for further prosecution. Recommended reduced military rates by the airlines was not adverse to public interest or in violation of the Federal Aviation Act. A need to compete with railroad discounts did not violate the antitrust laws.[202]

In an alleged case of unfair competition through infringement on the good name of another air carrier, the courts held that one carrier must desist from using a name that can be confused with another established carrier. North American Airlines, an irregular carrier, was forbidden to use the name North American by the Civil Aeronautics Board on complaint by American Airlines.[203] The circuit court reversed[204] and found that the word "American" used by the defendant had not acquired a secondary meaning among the air carriers. The court further determined that North American had not adopted

---

201. Aircoach Transport Association v. Atchison T. &S. F., 1959 U.S. &.C.A. R. 279 (D.D.C. 1959), CCH 6 Avi. 17,397.

202. Certificated Air Carrier-Military Tender Investigation, CCH Avi. current case CAB, docket No.9 0 36, 22,248, Feb. 25, 1959.

203. North American Airlines-Sec. 411 Proceedings, 18 CAB 96 (1953). North American was ordered to cease using any name with the combination of the word "American". see also, Air

the word American with intent to deceive the public or trade unfairly on the good will of American Airlines. On appeal to the Supreme Court, [205] the case was again reversed and sent back for further proceedings. Justices Douglas and Reed, in their dissent, failed to find evidence of unfair competition in North American's use of the word "American." The circuit court on remand reinstated the decision that North American Airlines was guilty of unfair competition.[206] At this point, North American Airlines changed their name to Trans American Airlines and the case was sent back to the Civil Aeronautics Board for determination of unfair competition under section 411 of the Federal Aviation Act. [207] A violation under the Federal Aviation Act would have to be established before the case went to the courts for prosecution under the antitrust laws.

America-Sec. 411 Proceedings, 18 CAB 810 (1954). Air America ordered to cease using any name, containing the word "American" as unfair practice.

204. North American Airlines v. American Airlines, 1955 U.S. & C. Av. R. 230 (D.C.Cir. 1955).

205. 351 U.S. 791 (1956), 1956 U.S. & C. Av.R. 163.

206. 1956 U.S. & C.Av. R. 173 (D.C.Cir. 1956).

207. Federal Aviation Act of 1958, sec. 411. 72 Stat. 731,769 (methods of competition).

In a similar case but dealing with a ticket distributor and an airplane manufacturer the courts held that a non-scheduled air coach system, which was in reality only a ticket agent for other carriers, should be enjoined from using the name North American and the slogan the "North American Way". This was found to encroach upon the good will of North American Aviation, even though the manufacturer had nothing to do with air transportation or tickets, and was engaged soley in the manufacturing of airplanes.[208]

Ticket sellers, who represented themselves as air carriers, were restricted from advertising that could be construed by the public to be that of a direct air carrier. In Airline Reservation-Enforcement Proceedings,[209] the Board ruled that section 411 was meant to cover unfair practices to the general public as well as to air transportation competition. The Board found the representations of reservationists as air carriers a violation of section 411.

> Thus, from the legislative history of the pertinent amendment it is clear that Congress intended and did make agents selling tickets for interstate air transportation subject to the act. (210)

---

208. North American Aircoach v. North American Aviation, 1955 U.S. & C. Av. R. 486 (9th Cir. 1955), cert. denied, 351 U.S. 920 (1956), 1956 U.S. & C. Av. R. 257.

209. 18 CAB 114 (1953).

The practice of airlines giving their employees free rides when dead-heading has always been one of the fringe benefits from airline employment. However, riding passengers free of charge in order that they can connect with a paid portion of a flight was held to be a violation of the Federal Aviation Act.[211] Just a free ride cannot be criticized. But when the free ride became a part of a longer paid journey, it was considered an inducement for the paid portion and unfair competition: [212]

> However, we believe that in most cases an established practice of providing for the free carriage of guests on ferry flights would, in all of the circumstances of the particular case, be so closely related to and interwoven with the carrier operations in air transportation as to warrant a conclusion that the practice itself is "in air transportation" within the meaning of section 411 (213). (. .)

The Board did not find that the free guest rides alone were unfair competition, but concluded that they could be if specific evidence were presented. Ending with a note that the problems of the air carriers are unique, and do not necessarily follow the unfair competition cases of ordinary business, the court commented:

---

210. Airline Reservations-Enforcement Proceedings, 18 CAB 114, 121(1956).

211. Section 404b, 72 Stat. 731, 760. No air carrier shall discriminate.

212. Pan American Ferry Flight Case, 18 CAB 214 (1953).

> Thus, it is entirely possible that a particular practice found not to be an unfair trade practice or an unfair method of competition when indulged in by an ordinary business enterprise will nevertheless constitute an unlawful activity under section 411 if practiced by an air carrier. (214)

A common problem has been the attempt to get different models of the same airplane under different rate classifications. Airlines have attempted to be placed in lower rate designations because the plane flown was an older model. In States-Alaska Fare Case,[215] the Board did not consider it unfair competition to charge the same rates for DC-4 equipment as for DC-6B, although the latter was a newer configuration. The Board did find it unfair for an airline to designate its service freighter class in order to justify lower fares, when the equipment flown was substantially the same and the services similar to the regular carriers. Other disputes have arisen concerning the seating arrangements,[216] the sale of block tickets,[217] unrealistic schedules,[218] overbooking,[219] and special contests.[220]

---

213. Id. at 225.

214. Id. at 226.

215. 21 CAB 354 (1955).

216. If two abreast was unfair when normally three abreast was used in tourist class.

217. Block ticketing pursuant to the Universal Travel Plan was not unfair competition under section 411. American Airlines Ticket Complaints, 24 CAB 817 (1956).

An interesting case arose only a short time ago[221] when one of the airlines accused Eastern Airlines of unfair competition through advertisement implying that they were using a more modern jet. Because Eastern had entered the jet market with a later production model with some modifications they called it a DC-8B in their ads. The manufacturer had not designated a model change.

The Civil Aeronautics Board regulates the fares for domestic air travel and the IATA traffic conferences decree the rates for international flights. The remaining method of competition for the airlines is through services.

The airlines have met this challenge by offering the passenger sumptuous meals, champagne and other services. The airlines began the only competition they could, that of providing plan and service competition.[222]

---

218. NAL Unrealistic Schedules Enforcement Proceedings, CCH Avi. current cases 22, 286, June 24, 1959. Unrealistic schedules were considered deceptive and unfair competition.

219. EAL Overbooking Enforcement Proceedings, CCH Avi. current cases 22, 359, Docket No. 8726, Feb. 26, 1960. The records failed to establish a practice of overbooking and it was deemed to be human error in this case, not unfair competition.

220. NAL Enforcement Proceedings, CCH Avi. current CAB cases 22, 358, docket No. 9528, Feb. 24, 1960. NAL conducted an essay contest with prizes, but no rebate on the ticket price. This was not held to be unfair competition but the Board did not look with favor upon such contests and they should not be encouraged.

When Capital Airlines alleged that Northwest was guilty of unfair competition for serving liquor on board in violation of state laws, the Civil Aeronautics Board refused to take jurisdiction, leaving the violation of state liquor laws to the states.[223] This situation did not last long. The government, through new FAA regulations, limits the consumption of alcohol on most flights. Indirectly the ATA agreements on service are approved by the Board, resulting in comprehensive control of competition through services.

International air traffic has been subjected to even more rigorous controls as to services. IATA discussed long and loud how many sandwiches the airlines could give away. The danger sought to be prevented was the conferring of fringe benefits with the price of the ticket which would be tantamount to a lower air fare.

---

221. In early 1960 just after the commercial jets began scheduled service on most airlines.

222. Gellman, The Regulation of Competition in U.S. Domestic Air Transportation, 25 JALC 148 (1958).

223. Capital Airlines v. Northwest Airlines, 18 CAB 145 (1953)

Just recently IATA ordained that only one slice of bacon, one egg, and one roll may be served for breakfast to the passengers on the 88 airlines that are members. No sausages, no ham - and no seconds.[224] This appears to be a most severe control of service competition.

Under the provisions of section 416,[225] the Board may establish a class of carriers exempt from the requirements of Title IV of the Federal Aviation Act. The non-scheduled carriers are such a class and the Board does not have rate control over them. Their fares in many cases are lower to entice the trade away from the regulated scheduled carriers. On the other hand, the non-scheduled carriers bring service to areas that did not have previous air connections, and tap new markets. The non-scheduled operators now play an important part in the air transportation industry.

The Board conducted an investigation of the non-scheduled air carriers,[226] and noted that the prewar incidental air transportation which marked the early years was now changed

---

224. Weller, Miami Herald-Chicago News Wire, Jan. 4, 1961.

225. Federal Aviation Act of 1958, sec. 416, 72 Stat. 731, 771 (exemption of carriers).

226. Investigation of Non Scheduled Air Services, 6 CAB 1049 (1946).

to services comparable to those offered by the certified industry. The Board did not, however, make more than minor changes in the regulations for the non-scheduled carriers. The criteria is still no schedule, irregularity, and not more than a certain number of point to point flights in any one month. The irregular carriers are now divided into large and small carriers with appropriate regulations. [227]

In the Transcontinental Coach Type Service Case, [228] the Board denied the application for certificates of public convenience and necessity for large irregular carriers to engage in special low fare passenger service between the coasts because this would subject the certified industry to competition. The fact that the low coach fare would bring into existence an additional market composed of people who had not been previously able to travel by air, was considered. The Board also concluded in the Large Irregular Air Carrier Investigation, [229] that the irregular carriers had not diverted the cream of the air traffic from the trunkline carriers, but on the contrary, generated new traffic of benefit to the trunklines. [230]

---

227. Report of the Antitrust Subcommittee, 85th Congress, First session, at page 78ff, G.P.O. Wash. (1957).

228. 14 CAB 720 (1951).

Expanding the philosophy of aiding the irregular carriers, the Board has approved an agreement to exchange charter flights. This proposed charter clearing house would intensify competition and serve as a yardstick for the Board.[231]

The certificated industry has charged that the "non-skeds" were not controlled by the Civil Aeronautics Board and were operating at an advantage in rates and services. The irregular carriers charged the Board and the certificated industry with conspiring to put them out of business. The Board found neither accusation true. The need of the irregular non-scheduled carrier as an implement for the growth of a sound air transportation system in the United States is recognized. In the words of the Board:

---

229. 22 CAB 838 (1955), 1955 U.S. & C. Av. R. 559 (1955).

230. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 91, G.P.O. Wash., D. C. (1957).

231. ACTA-IMATA-Commercial Charter Exchange Investigation, 22 CAB 760 (1955). As long as the exchange was not binding to eliminate competition from other carriers.

It is generally recognized economic regulation alone cannot be relied upon to take the place of the stimulus which competition provides in the advancement of techniques and service in air transportation. Competition invites comparison as to equipment, costs, personnel traffic, and the like, all of which tend to insure the development of an air transportation system as contemplated by the Act. That the domestic air transportation system of this country has reached its present position of pre-emminence is in large part due to the competitive spirit which has existed throughout its development. (232).

---

232. Colonial Airlines-Atlantic Seaboard Operation, 4 CAB 552 (1944).

H - FOREIGN AIR CARRIAGE

The Federal Aviation Act in section 101 (10)[233] includes interstate, overseas or foreign carriage in its definition of air transporation. The Board imposes the requirements of a certificate of public convenience and necessity for airlines that wish to make commercial flights to points abroad. Foreign air carriers that desire to make flights into the United States also have to obtain the required permit from the Board: "No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage."[234] Certificates for foreign air transportation are reviewed and approved by the President of the United States:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transporation, or air transportation between places in the same territory or possession, or any permit issuable to any foreign air carrier under section 402 shall be subject to the approval of the President. (235).

---

233. 72 Stat. 731, 737.

234. Federal Aviation Act of 1958, 72 Stat. 731, 757, section 402 (a).

235. Id. section 801, 72 Stat. 731, 782.

Under international law each nation is deemed to have sovereignty of the air space above its territory.[236] United States carriers must abide by the laws of the nation into which they are flying, and foreign air carriers entering the sovereign airspace of the United States must conform to the Federal Aviation Act. In most instances the rights of the air carriers are established through bilateral agreements between the countries. The treaties and executive agreements governing international air carriage become the general law of the land.[237]

Domestic laws of the United States, particularly the Federal Aviation Act, extend to foreign air carriers. Foreign carriers must conform to the regulations of the Board for aircraft worthiness, certificates and licenses for the foreign pilots, as well as other regulations, before they can be certificated to fly in the United States.

As we have seen in Chapter Three,[238] the laws of the United States can and do extend to foreign commerce. If the

---

236. Slotmaker, Freedom of Passage for International Air Services, (1932).
237. International Acts as Law, an unpublished paper by this author on file at the Institue of Air & Space Law, McGill University, Montreal, Canada. (1959).
238. Chapter Three, supra.

proposed international agreement may have an effect on the commerce of the United States, then it falls within the purview of the United States antitrust laws. This is true even when the agreement is concluded completely within the foreign country, or even when the foreign country extends the protection of its laws to such agreements. If the result is the unlawful objective of conspiracy, the collaborators will be punished, although they arrived at this result in a legal manner. The problems in this field have become acute in the post war period. The latest element seems to require more than the possible effect on the trade of the United States. Proof is needed of intent to control the foreign commerce of the United States.[239]

Agreements between United States air carriers and United States and foreign air carriers are subject to the antitrust laws. The Sherman Act, by its very terms, applies to foreign as well as domestic commerce.[240] Adhering to the court interpretations, the agreements between foreign air carriers are subject to the

---

239. U.S. v. ALCOA, 148 F. 2d 416, 421 (2d Cir. 1945); Comment, Extraterritorial Antitrust, 70 Y.L.J. 259 (1960).

240. 26 Stat. 209, 15 U.S.C. sec 1&2 "... or with foreign nations,"

antitrust laws if such agreements affect the commerce of the United States:[241]

> The vital question in all cases is the same: is the combination to so operate in this country as to directly and naturally affect our foreign commerce? The prohibition of the antitrust statutes apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce and if it unlawfully restrains it, it comes within the statue. We see nothing to warrant the contention that the Act should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the U.S. nor if it were for us to consider any reason for concluding that a broader construction would lead to international complications.
> Exemptions of U.S. air carriers from the operation of the antitrust laws must be secured in the precise manner and method prescribed by Congress. No exemptions are provided for foreign air carriers. (242)

Thus the United States can control the agreements between foreign air carriers and U.S. carriers that affect the foreign commerce. When the Board grants approval to these agreements they are exempt from the operation of the antitrust laws. When the foreign air carriers make agreements among themselves, there is no method for immunization from the antitrust laws.[243]

---

241. 40 Op. Att. Gen 85, 1954 U.S. & C. Av. R. 114 (1954).

242. Id. at 115.

243. Id. at 116.

As of March 31, 1956, there has been established an international air transportation system of 257,410 route miles connecting continental United States with 256 cities in 63 foreign countries.[244] This is a tremendous network and it can only grow larger. The burden of ministering to such a vast system is gigantic. The inclinations of attempting to control international aviation in antitrust matters through the United States antitrust laws is over-bearing. The present extensive program of bilateral agreements on aviation is becoming cumbersome.[245] As of November 30, 1956, bilateral agreements had been negotiated with 46 countries, plus 35 amendatory actions.[246] As long as the nations retain their sovereignty in the air space above their national territory, little can be done to reduce the influence of the large nations on the progress and growth of international aviation. With the concept of sovereignty in adjacent airspace reaffirmed in international conferences,[247] the control must come from

---

244. Report of the Antitrust Subcommittee, 85th Congress, First Session, at page 38, G.P.O. Wash., D. C. (1957).
245. See, Stoffer, American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age, 25 JALC 119 (1959).
246. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 35, G.P.O. Wash., D. C. (1957).
247. Convention on International Civil Aviation, Chicago, 1944, Came into force April 4, 1947. Art. I "The contracting States recognize that every state has complete and exclusive sovereignty over the airspace above its territory."

the individual nations. More extensive controls for international civil aviation is needed, whether they come from IATA,[248] from a new more comprehensive multilateral agreement to replace ICAO,[249] or from the international ownership of world air transport.[250] There is much at stake in the future development of international civil air transportation.

---

248. Cohen, IATA, The First Three Decades, Montreal Canada 1949.

249. Cooper, The Proposed Multilateral Agreements on Commercial Rights in International Civil Air Transport, 14 JALC 125 (1947).

250. Cooper, International Ownership and Operation of World Air Transport (1948); Cooper, Air Transport and World Organization, 55 YLJ. 1191 (1946).

V

R E M E D I E S

A- PRIMARY JURISDICTION IN THE CIVIL AERONAUTICS BOARD

In 1948 the Federal District Court in Hawaii held that an antitrust complaint may be maintained by one air carrier against another without prior recourse to the Civil Aeronautics Board. The case involved an injunction suit by plaintiff, Hawaiian Airlines, against Trans-Pacific Airlines, a non-certificated carrier. The defendant counterclaimed alleging that the plaintiff and an ocean carrier, Inter-Island Steamship Company, were violating the antitrust laws. The motion to dismiss the counter-claim was denied and the matter found not to be within the sole jurisdiction of the Civil Aeronautic Board.[1]

. This position was reversed by the Court of Appeals, where it was held that a certificated carrier complaining of the "too" regular competition of a

---

1.Hawaiian Airlines v. Transpacific Airlines, 78 F.Supp 1 (D.Hawaii 1948), 1948 U.S. & C. Av.R,509. The plaintiff was allowed one million dollars triple damages

registered irregular carrier must first present its complaint to the Civil Aeronautics Board where primary jurisdiction is exclusive.[2] Inter-Island Steamship Company and Hawaiian Airlines separated and reorganized into Overseas Terminal Ltd. and Inter-Island Resorts, Ltd.[3] The New entities were expressly forbidden to suppress competition.[4]

It is generally true that a person must first exhaust his administrative remedies before he may seek assistance from the federal courts.[5] Following this rule of administrative law the courts have almost uniformly held that the complainant must first receive a decision from the Civil Aeronautics Board on the alleged unfair competition. Although the Board does not have the power to award damages for unfair competition, it may determine if in fact there was unfair competition under the provisions of the Federal Aviation Act. Then the case will be taken to the district court where the measure of damages for violation of the antitrust laws will be assessed.

So in SSW v. ATA,[6] complaint of the plaintiff, a large irregular carrier suing ATA for unlawfully conspiring to restrain competition and monopolize airborne trade and commerce, was dismissed because the Civil Aeronautics Board had primary jurisdiction. On appeal this case was returned to have the Board determine whether or not there was a violation of the antitrust laws under the provisions of the Act. The action in the district court adjudicating damages was stayed until such determination was made.[7]

---

2. 174 F. 2d 63 (9th Cir. 1949), 1949 U.S.& C. Av.R.196.

3. 87 F. Supp. 1010 (D.Hawaii 1950), U.S.& C. Av.R. 182.

4. 1951 U.S.& C. Av.R.121, CCH 3 Avi. 17, 433. (D. Hawaii 1951)

5. U,S. Navigation Co., v. Cunard, 284 U.S. 474 (1931). Under the Shipping Act, the courts were without jurisdiction to enjoin an alleged combination in violation of the Sherman Act.

6. 91 F. Supp.269 (D.D.C. 1950), 1950 U.S.& C. Av.R. 410, CCH 3 Avi. 17,211.

7. 1951 U.S.& C. Av.R. 289, CCH 3 Avi. 17,629.

This rationale was followed in Apgar Travel Agency Inc., v. IATA.[8] There the court held that a complaint alleging a conspiracy among scheduled air carriers to destroy the business of a ticket agent representing non-scheduled carriers must be taken to the Civil Aeronautics Board first. The Board has jurisdiction over agreements among air carriers and may exempt such agreements from the operation of the antitrust laws. The avowed purpose of this power is to foster competition and growth in the air transportation industry.

The fact that the Board has no authority to award damages does not alter the fact that the court is in no position to exercise its jurisdiction under the antitrust laws until the Board has adjudicated a violation.

The Court of Appeals reversed[9] a lower court[10] which held that allegations of special rates and conspiracy to eliminate air competition were not under the primary jurisdiction of the Interstate Commerce Commission. A motion to vacate judgment was denied. This court must wait until the Interstate Commerce Commission holds hearings on the antitrust

immunity issue.[11]

When the alleged violations of the antitrust laws transcend the type of agreements that the Board may give immunity to under the Civil Aeronautic Act, the complainant may go directly to the federal courts. There is no question of excluding from the operation of the antitrust laws agreements beyond the approval power of the Board.

In Slick Airways v. American Airlines,[12] the defendant's motion to dismiss, where an air carrier alleged violations of antitrust laws and sought treble damages and injunctive relief in the federal courts without prior Board determination, was denied.

An appeal to dismiss because the primary jurisdiction was in the Civil Aeronautics Board was denied. When the district court had not yet decided the jurisdiction to be in the district court or in the Board and as yet had not assumed jurisdiction wrongfully.[13.]

A conspiracy to drive a competitor out of

business is not the type of agreement encompassed within the Civil Aeronautics Act. It is not subject to the primary jurisdiction of the Board for approval or disapproval, or for immunity consideration from the antitrust laws. It is not necessary for the air carrier first to prove before the Board a conspiracy to restrain trade and then have the Board disapprove the agreement before seeking treble damages in the federal courts.

An injunction and damages against Dade County Port Authority for alleged discrimination in rates was dismissed because the plaintiff had not exhausted his administrative remedies with the Civil Aeronautics Board. However, an equity court could not be

---

8. 1952 U.S.& C. Av.R. 364(S.D.N.Y.1952), CCH 3 Avi. 18, 003.

9. Air Coach Transport Asso. v. Atchison, Topeka, & S.F., 253 F.2d 877 (D.C. Cir.1958), 1958 U.S.& C. Av.R. 95, CCH 5 Avi. 17, 792.

10. 1957 U.S. & C. Av.R.187 (D.D.C. 1957), CCH 5 Avi.17,742.

11. CCH 6 Avi. 17, 397 (D.D.C. 1959).

12. 1951 U.S. & C. Av.R.300(D.N.J. 1951), CCH 3 Avi. 17,641.

13. 1953 U.S.& C. Av.R. 93 (3rd Cir. 1953), CCH 3 Avi. 18, 153, Cert. denied, CCH, 4 Avi. 17,219.

deprived of its jurisdiction where the administrative agency could not grant adequate relief to the plaintiff.[14]

B- SANCTIONS OF THE CIVIL AERONAUTICS BOARD

The Civil Aeronautics Board has power to issue cease and desist orders against unfair competitors.[15] The Board, in combination with section 7 of the Clayton Act,[16] may order the cease and desist of unapproved mergers. Section 11 of the Clayton Act further authorizes the Board to conduct hearings, make findings, and issue a cease and desist order against mergers found to violate the Act.[17] The Board approves all applications for financial aid from the United States or any of its agencies to or for the benefit of any carrier.[18] The Board requires all agreements affecting air transportation to be filed;[19] inquiries into the management of air carriers;[20] prohibits interlocking relationships without approval;[21] compels the filing of reports and disclosures of stock ownership;[22] as well as approves tariffs[23] and issues certificates of convenience and necessity.[24]

The primary weapon of the Civil Aeronautics Board for enforcing its edicts is the cease and desist order. Failure of the defendant to obey empowers the Board to seek further injunctive relief in the federal district courts.

In Modern Air Transport v. CAB,[25] an air carrier who only had letters of registration, was ordered to cease and desist from operating a type of service that required a certificate. The

---

14. Northeast Airlines v. Weiss, 113 So.2d 884 (Fla. App. 3rd Dist. 1959), 1960 U.S.& C. Av.R. 324, cert. denied, 116 So.2d 772 (Fla.1959)

15. Federal Aviation Act. of 1958, Sec.411, 72 Stat. 731, 769.

16. 52 Stat. 1028, 15 U.S.C. 31, Section 7.

17. Id Section 11, 15 U.S. C. 21, FAA Sec. 408.

18. Federal Aviation Act. of 1958, section 410, 72 Stat. 731,769.

19. Id. section 412, 72 Stat. 731,770.

20. Id section 415, 72 Stat. 731,770.

21. Id. section 409, 72 Stat. 731,769.

22. Id. section 407, 72 Stat. 731,766.

23. Id. section 403, 72 Stat. 731,758.

24. Id. section 401,402, 72 Stat. 731, 754, 757.

doctrine of exhausting administrative remedies before resorting to the federal court did not prevent immediate court consideration of such an alleged violation upon complaint by the administrative agency itself.

In the name infringement cases,[26] the federal courts upheld the orders of the Board requiring a second air carrier to cease and desist from using the word "American" in their names. The North American Combine Case,[27] found the court upholding the right of the Board to revoke letters of registration from a carrier which failed to comply with a cease and desist order to refrain from regular and frequent service.

Refusal of the Board to approve mergers and pooling agreements under the provisions of the Federal Aviation Act subject these mergers to prosecution under the antitrust laws.

---

25. 179 F. 2d 622 (2d Cir. 1950), 1950 U.S.& C. Av.R. 38, CCH 2 Avi. 15,131. affirming, 81 F. Supp. 803(S.D.N.Y.1949), 1949 U.S.& C. Av.R. 84 CCH 2 Avi. 811.

26, North American Airlines v. American Airlines, 1955 U.S.&C Av.R.230 (D.C.Cir.1955)and North America Aircoach v. North American Aviation, 1955 U.S.& C. Av.R. 486 (9th Cir. 1955).

The Board may also exercise its influence to bring about the voluntary transfer of property from one control to another, although the Board may not force one carrier to transfer its stock to another.[28] In Summerfield and Western v. CAB, the Board said:

> The Board acted upon the premise that it has no power to force a carrier against its will to transfer property to another carrier; its only power to influence such transfers is the power of inducement. (29)

In addition to the negative controls, the Federal Aviation Act provides for additional penalties.[30] Section 901 states that violators of Titles III, V, VI, VII or XII of the Act may be subjected to a civil fine of not more than $1,000.00, and (b) this penalty may be enforced by a lien against the aircraft.[31] In section 902, criminal penalties are provided for violations of the Act except for Titles III, V, VI, VII and XII.

---

27. 1956 U.S.& C. Av.R. 422,(D.C. Cir.1956).

28. 1953 U.S.& C. Av.R. 184, (D.C. Cir. 1953)

29. Id. at 185.

30. Federal Aviation Act of 1958, section 901, 72 Stat. 731,783.

There are other specific provisions for enforcement, but it is important to note that the provisions of Title IV are enforceable, not civilly, but as a misdemeanor. The Air Commerce Act of 1926 and like statues are only regulatory and do not provide a federal cause of action in tort for violations of its provisions.[32]

The Board has wide visatorial powers to inspect the books and papers of any air carrier. The power of the Board to take evidence is also extensive. The Board may subpoena[33] anywhere in the United States, cite for contempt, and require the production of all books and records pertaining to the investigation. The Board may apply to the federal district courts for the enforcement of violations of the provisions of the Federal Aviation Act.[34]

---

31. Id. section 902, 72 Stat. 731,784.

32. Godinez v. Jones, 179 F. Supp. 135(D.Puerto Rico 1959), 1960 U.S.& C. Av.R. 387.

33. Federal Aviation Act of 1958, section 1004, 72 Stat. 731, 792.

34. Id. section 1007, 72 Stat. 731, 796.

A recent ruling of the Federal Aviation Agency requiring the compulsory retirement of pilots at the age of 60 was held within its powers to promote safety in air commerce.[35]

C- OPERATION OF THE LAWS

The Federal Aviation Act receives its power from the Commerce clause of the United States Constitution.[36] In order for this power to be exercised the air transportation must be in interstate commerce. Modern flying in certified operations is invariably connected with an interstate flight.

This interesting problem developed in CAB v. Freidkin Aeronautics, Inc.[37] The defendant carrier averred that he was operating wholly within the State of California and was exempt from the economic rules of the Civil Aeronautics Board. The lower court held that Congress could have preempted the whole field of air transportation. Congress did occupy the entire field relative to safety regulations but economic regulations of the FAA applied only in interstate commerce. The air carriage here was found to be intrastate. On appeal to the circuit

court,[38] the case was remanded with a finding that the transportation provided by this carrier was a part of an integrated interstate journey. The airline was a connection between two transcontinental airlines, and the majority of the passengers were already in interstate travel.

Local helicopter service particularly comes under the purview of the Board although their services are intrastate only. Presumably it is in the best interest of the public for federal control and encouragement in development of rotary wing aircraft.[39]

---

35. Chew v. Quesada, 182 F. Supp. 231 (D.D.C.1960), 1960 U.S. & C. Av.R. 92, CCH 6 Avi. 17,895; ALPA v. Quesada, 182 F. Supp. 596 (S.D.N.Y.1960), 1960 U.S.& C. Av.R. 99, CCH 6 Avi. 17,914 aff'd. 276 F. 2d 892 (2 Cir. 1960), 1960 U.S.& C. Av.R.107, CCH 6 Avi. 18,021.

36. U.S. Const. art I, sec. 8.

37. 1954 U.S. & C. Av.R. 367 (S.D. Calif.1954).

38. 1957 U.S. & C. Av.R.131 (9th Cir. 1957).

39. Chicago Area Service Case, 23 CAB 552(1956) includes an extended discussion on helicopters and their services. For more complete analysis in this area see, Chapter Four-B-3, supra.

Jurisdiction over the parties and the subject matter is always a requirement for the function of the courts. Airlines which do not operate in certain states, but maintain agents there for the purpose of selling tickets, are not doing business in such state. An antitrust action brought against such parties on the ground they conspired to prevent the plaintiff from becoming an agent cannot be maintained in states where the airlines are not doing business.[40] Where state laws are violated, the action must be commenced in accordance with state jurisdictional requirements.[41]

The Federal Aviation Act is a legislative Congressional act for regulation of the air transportation industry. This legislation takes its place along with the general laws of the land subject only to later laws and treaties that affect the Act.[42]

---

40. McManus v. Capital Airlines, 166 F. Supp.301 (E.D.N.Y.1958), 1958 U.S. & C. Av.R. 574, CCH 5 Avi. 18,204.

41. Capital v. Northwest, 18 CAB 145(1953).

42. See N 237, Chapter IV-H supra.

This basic law governing the air transportation industry in the United States does not supersede the antitrust laws. In the declaration of policy,[43] the Board is to maintain the competition necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States. The decisions of the Board and the courts in applying the Federal Aviation Act give prime effect to the antitrust laws of the United States.

The Sherman Act, no matter how poorly thought of,[44] is the legislative philosophy of the United States; and as such, is adhered to. The decisions have born out that the Board and the courts are promoting competition, even though in some cases restricting unbridled competition. It is a controlled competition that the Board and the courts do not feel contravenes the basic intent of the Sherman Act.

---

43. Federal Aviation Act of 1958, section 102 (d). 72 Stat. 731,740.

44. Oliver Wendell Holmes called it a "humbug, based on ignorance and incompetence" Footnote 2, Chapter I, supra.

> The Supreme Court has held that in confirming authority...., Congress neither made the antitrust laws wholly inapplicable nor authorized the administrative agency to ignore their policy. (45)

Economics play an important role in antitrust enforcement. The courts reflect the current acceptable economic reasoning.[46] This can be readily seen from the recent enforcement of antitrust articles against this nation's largest electrical equipment manufacturers.[47]

Government controlled competition in aviation is only one more step beyond the control of free enterprise exercised through the Sherman and Clayton Acts. The two acts, as expressions of Congressional policy, can hardly be said to be in opposition.

---

45. Air Cargo, Inc.-Agreement, 9 CAB 468,470 (1948). See generally, Chapter IV-B supra.

46. Kozik, Oligopoly and Concepts, 21 U. of Pitt.L. Rev. 621 (1959-60).

47. The Justice Department early in 1961 convicted the major electrical manufacturers for conspiring to regulate prices in heavy equipment. Several top officials drew jail sentences.

Economists today point out that there is an unmistakeable decline of competition.[48] This is a result of the "rule of reason" which reflects the public interest and wipes out the strict effect of the Sherman Act. The full power of the government has not yet been mobilized against monopoly.[49]

---

48. Burns, The Decline of Competition (1936).

49. Jackson-Dunbauld, Monopolies and the Courts, 86 U.of P.L. Rev. 231(1938).

VI

R E S U L T S

A- GROWTH OF THE INDUSTRY IN THE UNITED STATES

In execution of the declaration of policy,[1] the decisions of the Civil Aeronautics Board have defined regulation of competition[2] and set a yard-

---

1. Federal Aviation Act of 1958, Section 102, 72 Stat. 731,740. (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense:

2. Transcontinental & Western-Additional N.S. Calif. Service, 4 CAB 373,374(1943). This case raises again the fundamental question of the proper role which competition should play in the development of our air transportation system... Far from abandoning the principle of competition. Congress in the Act expressly directed the Board to consider "competition to the extent necessary to assure the sound development of an air transportation system" as being in the public interest. The policy thus stated, however, is not one of unlimited competition, nor of introducing competition over every route. The legislative history and the text of the Act demonstrate the purpose of Congress to safeguard the industry equally against the evils of unrestrained competition on the one hand and the consequences of monopolistic control on the other." See also, Richmond, Competition among Airlines, 24 JALC 435 (1957).

stick[3] for additional services in the best interests of the national welfare.

The exercise of controlled competition in the air transport industry does not seem to have a deterrent affect on its growth. In spite of the comprehensive and complicated system of controls enacted in 1938 and revised in 1958,[4] the commercial air transport industry has experienced phenominal growth. There were 345 airplanes in service in 1938. By 1955 the certificated industry had expanded its

---

3. "As the justification for competition in any case does not depend upon the failure or inability of an existing carrier to render adequate service, neither does its ability and willingness to furnish a sufficient volume of service in itself constitute a bar to a competitive service. The greatest gain from competition, whether actual or potential, is the stimulus to devise and experiment with new operating techniques and new equipment, to develop new means of acquiring and promoting business including the rendering of better service to the customer and the nation and affording the government a comparative yardstick by which the performance of the carrier may be measured." The Hawaiian Case, 7 CAB 83, 103, 104(1946).

4. Civil Aeronautics Act of 1938, 52 Stat. 977; Federal Aviation Act of 1958, 72 Stat. 731.

fleet to 1,454 aircraft - a gain of 321 percent. The industry as a whole operated 1,571 aircraft of all types. In 1938 the air transport industry flew a total of 533 million passenger miles. In 1955, the industry accounted for 21.9 billion passenger miles, an increase of 4,000 percent.[5] Twenty years ago, the airlines served less than 2 million passengers. In 1959, the airlines carried 55.9 million passengers, a number equal to about 33 percent of the population.[6]

Attending this increase in size and activity has been a corresponding advance in technology and flight safety. 1959 was the eighth consecutive year in which the domestic airlines' rate of safety was less than one passenger fatality per 100,000,000 passenger miles. And it was the seventh consecutive year of similar achievement in the international field.[7] The improvements in air frames, aircraft engines, and operating equipment, not to mention the modernization of passenger facilities, has been

---

5. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 265, G.P.O., Wash. D.C., 1957.

6. Stuart G. Tipton, President, Air Transport Asso. Speech at the Aviation Forum of the National Federation of Financial Analysts Societies, N.Y. May 16,1960.

nothing short of astounding. One has only to compare taking a flight in a Ford Tri-motor from a grass runway to departure in an intercontinental jet from Idlewild or Miami International Airports. "As a result of this growth and development, the United States air transport industry has no peer in any other country of the world."[8]

From these results it might be surmised that the air transportation industry in the United States is well served by the Civil Aeronautics Board; that government participation in private enterprise, at least to the extent of remaining within the dictates of "competition to the extent necessary to assure the sound development of an air transportation system.", is the ideal solution for the industry. Although it may not be inductively concluded that the air transport industry would not have had this phenominal

---

7. Ibid.

8. Report of the Antitrust Subcommittee, 85th Congress, First Session, page 265, G.P.O., Wash. D.C. 1957. For example, the air traffic at Tampa, Florida, a relatively unimportant city in the United States, in 1954 exceeded that of London for 1955.

growth under a free competitive system, this possibility may be projected. With unbridled competition in the industry the cut-throat action witnessed before the enactment of the Civil Aeronautics Act would undoubtedly have continued for a few more years. The survival of the strong corporations would have been hampered by the antitrust laws.[9] The industry needed some governmental assistance, and if the government is to give aid, it will express control over the monies introduced into the industry. "Exclusive of the sums expended for construction and maintenance of the airlines, their weather stations, and airports, the federal government has paid to the certificated air carriers between 1938 and 1956 a total of $1,337,966,000.00 in mail payments..."[10] It may be concluded that the air transportation industry hampered by open competition, antitrust laws, lack of governmental control and pecuniary assistance would have had a somewhat less spectacular growth than it now possesses.

Nor could it be said that complete government control would have given this country a more spectacular growth in air transportation. The nationalization of the air carriers would, of course, eliminate any deterring effect of competition. It would correspondingly eliminate the stimulus to develop the industry. It would be difficult for the legislature to allocate even larger sums of money to the development of the air transport industry than it has earmarked for mail contracts under the present system. The hue and cry is to do away with the subsidy. There is concern over the rising subsidy trend,[11] and it is feared that the necessary funds, as in the missile race, would come after the United States had lost the lead in the air transport field.

These are but some of the considerations in light of the almost unbelievable progress that has

---

9. Comment, Fifty Years of Sherman Act Enforcement. 49 Y.L.J. 284(1939). "Almost 50 years after the passage of the Sherman Act, the President has reported to Congress that the protection furnished by the antitrust laws is so negligible that it renders the system of free private enterprise still virtually untried.

10. Report of the Antitrust Subcommittee, 85th Congress, First Session, G.P.O. Page 266, Wash.(1957).

been made in aviation. Barring some unknown calamity, this phenominal growth will continue. The development of a 2,000 mile-per-hour airliner, which would be substantially a civilian version of the B-70 bomber, is expected in the near future.[12]

---

11. Barnes, Airline Subsidies-Purpose, Cause and Control, 26 JALC (1959), 27 JALC 29 (1960).

12. 55 Trends 1(1961).

B- GEOPOLITICAL IMPLICATIONS

"There is only one thing more fantastic than modern air power, that is tomorrow's air power."[13] It is duplicious to say that a large civil aviation industry does not have military potential. The vast air transport system, by its very speed and nature, is of tremendous military and political importance. The United States is the only important air power in the world whose government has no direct share in the ownership or management of commercial air transport enterprises. Even so, the display of modern commercial aircraft by the United States flag carriers brings to the world reflection of military power through aircraft design, technological advancement and pilot ability. The Kennedy Administration is expected to speed development of a 2,000 mile-per-hour airplane which would be, substantially, a civilian version of the B-70 bomber. The White House, it is said, wants America to be the first nation with such a passenger plane for prestige reasons.[14] "Air transport, owing to its intrinsic qualities - speed and relative independence of natural barriers - lends itself in a peculiar degree to use as a tool

or weapon in the international struggle for survival and power."[15]

There are many problems facing the international aspect of civil aviation. The prestige and propaganda relative to a large and powerful commercial air transportation system is feared by the world at large. Sovereignty in the airspace above the national territory is being strengthened with the growth of air transport. There is no freedom of the airlanes. Permission from the foreign nation is needed before transiting the national territory.[16] Other problems presented are the legal status of the aircraft, and the civil and criminal jurisdiction aboard the aircraft.[17] These questions at present are dealt with through international treaties. This system of multilateral and bi-lateral treaties and executive agreements is unwieldy. International jealousies continue to be complicated and strong.

---

13. Foundations of Air Power, G.P.O., 1958.

14. 55 Trends 1 (1961).

15. Lissitzyn, International Air Transport and National Policy, Council of Foreign Relations, N.Y., 1942 page 15.

Bargaining for landing rights generally retards the growth of world air transportation. In the United States the international agreements concluded by the Civil Aeronautics Board and the State Department have come under criticism. Many United States flag carriers feel that more is given to the foreign carriers, who are taking more and more business away from the United States, than is received here from the foreign carriers. It is becoming more difficult to compete with the subsidized foreign airlines.[18] International travel is a major industry in the United States.

In 1957 about 10 million United States residents spent almost two billion dollars on international travel, of which about one-sixth was paid to U.S. carriers.[19] The increase in 1958 over 1957 in the amount paid to foreign carriers was 22.6 percent, while the United States air carriers

---

16. Slotemaker, Freedom of Passage for International Air Services, (1932).

17. Honig, The Legal Status of Aircraft, (1956).

18. See for example, Time, Aug. 17, 1959.

increase was 12.2 percent.[20]

The European nations have long become aware of the need to cooperate and have international ownership and operation of world air transport.[21] This thought was presented to the Chicago Conference on Civil Aviation. The proposal failed, although international control to some extent over the facilities of air travel was provided through the International Civil Aviation Organization (ICAO).[22]

Many feel that aviation must perforce be of an international scope. "It must above all be aimed at the natural development of international civil air traffic throughout the world and of the civil aviation industry in general."[23] No less a personality than Sir Winston Churchill has said that civil aviation is the greatest instrumentality for international

---

19. International Travel, Message from the President of the United States, G.P.O. May 12, 1958.

20. United States Participation in International Travel, 1959 supplement, G.P.O. Wash., 1959.

21. Tombs, International Organization in European Air Transport, Columbia University Press, 1936.

22. Cooper, International Ownership and Operation of World Air Transport, 1948.

23. Wassenberg, Post War Civil Aviation Policy and the Law of the Air, the Hague, Martin Nijhoff, 1957, page 5.

solidarity.[24] The future of international air transport is closely linked with the future of world order. International air transport may lead to the establishment of a world order, either by the sword or by peaceful conference.[25] The time may soon be here when nations will have to surrender sovereignty in airspace to an international control. Freedom of the air must be defined in the space age.

> Does not the freedom of the air, as a principle of universal scope, and over support of it, depend in the last analysis upon the establishment of a world security superior to any that so far has been devised? And if such a system should mean the supersedence of national sovereignty by a higher entity, would "freedom of the air" in the international sense retain any meaning.(26)

At present a world air transportation system which would eliminate the applicability of national antitrust laws is not established. The major powers are, on the contrary, reaffirming, not surrendering, national sovereignty.[27]

---

24. Quoted by U.S. delegate LaGuardia at the Chicago Conference, Vol.I, Proceedings of the International Aviation Conference, U.S. Dept. of State pub. 2820 page 466.

25. Lissitzyn, International Air Transportation and National Policy, Council of Foreign Relations, N.Y. 1942, at 96,97.

In deference to the nationalistic trend, incongruous as it is with the expansion of air transportation in the world, national laws augmented by treaties will have to control the international carriage of air passengers. Provisions for this are made in the Federal Aviation Act in section 1102:[28]

> In the exercising and performing their powers and duties under this Act, the Board and the Administrator shall do so consistently with any obligations assumed by the United States in any Treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries...

The national defense and the public interest demands a flexible application of the antitrust laws to aviation, and in particular to international aviation. The development of a sound air transportation system and the prestige position of an international air system second to none cannot be subordinated to hard and fast domestic laws.

---

26. Id. at 415.

27. USSR has claimed soverignty to at least 70,000 feet in the recent shooting down of an American plane. (U-2 incident, 1960). Prior to this (Nov.1959) the United States and Russia signed a two year agreement contemplating the inauguration of direct flights between Moscow and New York.

28. 72 Stat. 731, 797.

C- RETREAT FROM FREE ENTERPRISE

No matter how favorable the result has been in the air transportation industry during the last two decades, there is no escaping the conclusion that this industry has not grown in the culture of free competition. The Sherman Act itself is a restraint on free enterprise. Not all combinations in industry are bad for the consumer. The basic fear is not the size of the corporation but the exploitation of the consumer after the ability to control the market has been established. In many instances a large vertically controlled company dictating the market may produce the best article at the lowest price. One area where monopolies exist is the field of public utilities. Public utilities have long been under rigid government controls in the best interests of the public. Competitive telephone services without complicated interchange of equipment agreements, which would be virtually concerted action, would be chaotic. Government rate boards are almost mandatory in public services. However, a government ceiling of

of a six percent mark-up on all manufactured goods is unreconcilable with the capitalistic economy. The government cannot guarantee all industry a safe and secure future, any more than it can dictate production costs.

It is difficult if not impossible to civilize a world by legislation. Yet from the Sherman Act forward, the position of the United States government has become more and more authoritative in business. War powers invoked in times of national emergency have given the federal government more than a taste of regulatory control. The government, through social legislation both in Congress and the Supreme Court of the United States, is decreeing what is good for the citizens of the United States and, in fact, the world.

The Federal Aviation Act of 1958 is government control of the civil aviation industry in the United States. Through the provisions of the Act the government controls the rates,[29] competition, safety and practically all phases of the air transport industry. The motives of the Civil Aeronautics

Board are praiseworthy; the administration commendable. The Antitrust Subcommittee had this to say about the achievements of the Board:

> It is the view of the committee, however that there is yet much to be done by the Board to bring about the more balanced route structure and the greater participation by the small carriers in major traffic markets that is needed for effective competition. (30)

Others have been more critical of the Board activities. Louis J. Hector, former member of the Civil Aeronautics Board, has been particularly critical. An article based upon his comments has focused a growing belief that over the past quarter of a century many of the regulatory bodies have become so emeshed in their own complex procedures that they can no longer effectively carry out their duties. "There is also a strong suspicion that many of them have ceased to function in the public

---

29. Early in 1961 the Board ordered a capital return on airline investments reduced from an unprecedented 10%.

30. Report of the Antitrust Subcommittee, 85th Congress, First Session, G.P.O. Wash. 1957 Page 270, (1957).

interest and have become, in effect, Washington branch offices of the industries that they are supposed to regulate."[31] A Washington reporter labeled the speed of the Board as that of a tortoise in the jet age. He cited a decision within twenty nine months as one pushed with "extraordinary" haste.[32]

The air transportation industry today is not a free enterprise business. It is a quasi public utility. The principles of the Sherman Act do not conflict with, but are merged into, the government regulation of this industry. There is no authoritative basis to conclude that if government controls were lifted from all industry, including the air transport industry, there would be utter chaos. The free enterprise system has always been the backbone of the economy of the United States, and there is every indication that this country would be prosperous if the government had never controlled business.

---

31. Martin, How Hector Heckles Washington, Colliers, June 6, 1960.

32. Oberdorfer, Miami Herald, March 13, 1961, page 1.

As a result of the present development government control is needed in public utilities. The air transport industry is regulated with respect for lawful competition. Government immunity for aviation must take precedence over the general antitrust laws. The philosophy of public interest must be the same whether expressed in the general laws or in quasi-government industry. The problem is not justifying antitrust immunity, but delineating the limits of the legislative control in aviation. There is no need to justify a quasi-government function within the principles of free enterprise. The Democratic system has resulted in legislative controls for business. However, this must not be misnamed a special type of free enterprise - it is a form of nationalism.

VII

C O N C L U S I O N

The tremendous growth of the aviation industry in the United States is the product of the combination of free enterprise and government control. The Board conscientiously refrains from interfering with management of airlines[1] and manufacture of aircraft. All industries must have a dual purpose in the years ahead. "Not only must we attain a sufficient growth so as to meet the aspirations of our people, but we are also involved deeply in a world contest between the communist and capitalist economic systems."[2] The jet revolution is a dynamic impact on the air transportation industry. Competitive business is responsible for developing the world shrinking jet fleet. The very great speed and carrying capacity of civil jet planes will stimulate the domestic and international economy of this country.

---

1. Boyd, (member of CAB) Speech to Aviation Forum of the National Federation of Financial Analysts Societies, New York, May 16, 1960.

2. Tipton, (President of ATA) Remarks at the Air Transportation Forum, Eleventh Annual Convention of the National Federation of Financial Analysts Societies, May 19, 1958, Los Angeles.

The government, on the other hand, through the Federal Aviation Act, has monitored the sound development of air transportation by controlled competition and route expansion. The Board has generally stimulated the development of competition and insured safe, economically sound growth in the air transportation industry.

The immediate future will bring supersonic jets. Competition will force airlines to leap the sound barrier whether they want to or not. Bigger and faster planes that will be able to cross the Atlantic in two hours will enable companies to slash fares.[3] However, the industry is not ready to invest the billions of dollars that will be needed to make this equipment change. It will take many years for the airlines to be financially able to pay for the recent change over to jet aircraft. They cannot afford to make another vast equipment change to keep abreast of world prestige. Federal aid is needed in order for the aviation industry of the United States to remain the frontrunner in the world ideological

struggle. Federal aid will also be needed to provide the necessary safeguards for the supersonic fleet in air navigation, radar, and airports.

Private industry and management will have to work hand in hand with the government in the supersonic age.

The era of individual effort is over. The trend is toward more and more centralization of control in the government. The rapid acceleration of civilization and the complexity of the space age does not make the return to individual enterprise forseeable. As a result of the gradual infusion of government control into every phase of life, a turning away from the paternal protection of the government would be at this date, unless extremely gradual, catastrophic. A return to completely uncontrolled free enterprise and open unbridled competition is not feasible in this age. The world and domestic situation has laden the government with increased responsibility.

---

3. De Kupsa,(Managing Director, Orbitair International) Magic Carpet, The American Weekly, March 19, 1961.

The stimulus and criticism of private industry is needed, however, in order to achieve the highest production from factories and corporations. The pride of accomplishment must somehow be nurtured in the wake of increasing government controls.[4]

Because of its inherent link with world power the air transportation industry must of necessity be a quasi government agency. The aviation industry reflects the progress of this country and maintains prestige in global power politics. The air transportation industry is still in the growing process; and, in order to foster its sound development and to insure the highest safety standards, government monitoring is necessary.

As long as the control of air transportation conscientiously follows the Federal Aviation Act, the results will be in the best public interests. The fusion of the Federal Aviation Act with the antitrust laws cause no particular problem. The Sherman Act and the Federal Aviation Act are complimentary and not mutually exclusive; both

---

4. Price, Cold War Costs, Fort Lauderdale, Sun Sentinel, Sunday, Feb. 26, 1961, p. 2C. The cold war costs the world 14 million dollars an hour. There must be a strong central government to fight such a costly cold war.

profess to aid the healthy growth of the industry. The end result is to encourage business and to provide competition that will produce for the consumer the best item at the lowest price.

However, increasing government control in the air transport industry should not result in complete nationalization for aviation. Although a nationalized air transport industry would solve some of the problems now present in competition and world prestige, it would create others far more onerous. Stimulus and growth would have to be kindled by the legislature. From the past record it would appear that this would be a poor substitute for the present system. Growth would be hindered as a result of political emphasis. Most important of all, nationalization would defeat the basic tenets upon which this country was built. This foothold, once obtained, would be the final step for the decline of the Democratic Society.

Therefore the present system, retaining the best aspects of government control and free enter-

prise, appears to be the correct solution. In the public interest the government controls the safety standards in the air transportation industry. For the sound growth of the air transport system the government monitors competition and economic returns. The industry holds the reins for sound management. Stimulus for growth is provided by the retention of free enterprise principles. Animation in the industry results from the criticism that is a part of the capitalistic democratic society.

As long as the criterion of the best public interests is judiciously applied, the present system is sound. The regulation of the air transportation industry must also remain flexible enough to reflect the subjective intent of the people in harmony with the other laws of this nation. The spectacular growth and the high position that aviation holds in this country today is living proof of the success of the present system.

The shrinking world presents problems for control over international air transportation.

The extension of domestic laws into the international medium is not the best solution. In addition the nations have inexorably drawn adjacent airspace into the shell of sovereignty.

There is fear that civil air transports will be used for military purposes. It is unfortunate that aircraft development has been primarily initiated upon military configurations. The introduction of the Intercontinental Ballistics Missile and the thought of space platforms that could control the world skies has left the civil aircraft far behind as a potential war weapon. Nations must face the realization that civil air transports are not a threat to their sovereignty. Once this barrier is hurdled then it will be possible for the nations of the world to join together in the formation of an international civil aviation board. This board would be in a position to control the safety and economics of international air travel. Individual world prestige would take second place to the development of a sound international air transport system.

Aviation like the airplane can only remain afloat by going forward. The next step after the achievement of a sound domestic system is the establishment of a world wide air transportation system. Such a system will be the basis for international cooperation and world solidarity.[5]

The conclusion reached is for a continuation of the blending of free enterprise and government control in aviation. As this dynamic industry outstrips domestic influence there will be further control through the sanctions of an International Civil Aeronautics Board.

> As we begin to write a new chapter in the fundamental law of the air, let us all remember that we are engaged in a great attempt to build enduring institutions of peace. These peace settlements cannot be endangered by petty considerations, or weakened by groundless fears. Rather with full recognition of the sovereignty and judicial equality of all nations, let us work together so that the air may be used by humanity to serve humanity. (6)

---

5. Prominski, International Control Of Civil Aviation-Inevitable? Unpublished paper on file in the Institute of Air and Space Law, McGill University, Montreal, 1960.

6. Address of President Roosevelt opening the Chicago Conference on Civil Aviation, 1944.

A U T H O R I T I E S

United States Constitution

United Nations Charter, 59 Stat. 103.

FOREIGN STATUES

Canada, IATA Articles of Incorporation, 9 George VI, 1945.

UNITED STATES STATUES

Air Commerce Act of 1926, 44 Stat. 568.

Airmail Act of 1934, 48 Stat. 933.

Airmail Act of 1925, 43 Stat. 805.

Act to Create a Federal Power Commission, 41 Stat. 1000.

Agricultural Adjustment Act, 48 Stat. 34.

Agricultural Marketing Agreement Act, 50 Stat. 248.

Atomic Energy Act of 1954, 68 Stat. 921.

Civil Aeronautics Act of 1938, 52 Stat. 977.

Clayton Act, 38 Stat. 730.

Communications Act of 1934, 48 Stat. 1064.

Cooperative Marketing Act, 44 Stat. 802.

Federal Aviation Act of 1958, 72 Stat. 731.

Federal Reserve Act, 41 Stat. 379.

Fur Products Labeling Act, 65 Stat. 175.

Interstate Commerce Act, 63 Stat. 485, 49 F.C.A.

Miller-Tydings Act, 50 Stat. 693.

Robinson-Patman Act, 49 Stat. 1526.

Sherman Act of 1890, 26 Stat. 209.

Shipping Act of 1916, 39 Stat. 728.

Textile Fiber Products Identification Act, 72 Stat. 1717.

Wool Products Labeling Act of 1939, 54 Stat. 1129.

SUPREME COURT CASES

American Banana Co. v. United Fruit Co. 213 U.S. 347(1909).

American Column & Lumber v. U.S., 257 U.S. 377(1921).

Appalachian Coals v. U.S., 288 U.S. 344(1932).

Appollon, The, 22 U.S. (9 Wheat) 362(1824).

Associated Press v. U.S., 326 U.S. 1(1944).

Bank of U.S. v. Planters Bank of Georgia, 22 U.S. (9 Wheat)904(1824).

Blackmer v. U.S., 284 U.S. 421(1932).

Cement Manufacturers Protective Asso. v. U.S., 268 U.S. 588(1925).

De Beers Consolidated Mines v. U.S., 325 U.S. 212(1944).

F.T.C. v. Cement Institute, 333 U.S. 683(1949).

Maple Flooring Mfgrs. Asso. v. U.S. 268 U.S. 563 (1925).

North American Aircoach v. North American Aviation, 351 U.S. 920(1956).

North American Airlines v. American Airlines, 351 U.S. 791(1956).

Northern Pacific Ry. Co. v. U.S., 356 U.S. 1(1958).

Paramount Famous Lasky Corp. v. U.S., 282 U.S. 30 (1930).

Slick Airways v. American Airlines, 346 U.S. 806 (1953).

Steele v. Bulova Watch Co., 344 U.S. 280 (1952).

Sugar Institute v. U.S., 297 U.S. 553 (1936).

U.S. v. Adapter Pipe Co., 175 U.S. 211(1899).

U.S. v. American Linseed Oil Co., 262 U.S. 371(1923).

U.S. v. Capital Transit Co., 325 U.S. 557(1944).

U.S. v. First National Pictures, Inc., 282 U.S. 444 (1930).

U.S. v. Pacific & Artic Ry. Co., 228 U.S. 87(1912).

U.S. v. Scophony Corp. of America, 333 U.S. 795 (1947).

U.S. v. Socony Vacuum Oil Co., 310 U.S. 150(1939).

U.S. v. Sisal Sales Corp., 274 U.S. 268(1926).

U.S. Navigation Co. v. Cunard, 284 U.S. 474(1931).

FEDERAL COURT OF APPEALS

Airborn Freight Corp. v. CAB, 257 F. 2d 210 (D.C.Cir.1958).

Aircoach Transportation Asso. v. Atchison, Topeka & Santa Fe R.R., F.2d 877(D.C. Cir.1958).

ALPA v. Quesada, 276 F.2d 892(2d Cir.1960).

American Airlines v. CAB, 178 F.2d 903(7th Cir.1949).

Chain Institute v. FTC, 246 F.2d 231(8th Cir.1951).

Consolidated Flower Shipments v. CAB, 213 F.2d 814(9th Cir.1954).

Hawaiian Airlines v. Transpacific Airlines, 174 F.2d 63(9th Cir.1949).

Modern Air Transport v. CAB, 179 F.2d 622(2d Cir.1950).

North Central Airlines v. CAB, 265 F.2d 581 (D.C. Cir.1959).

Slick Airways v. American Airlines, 204 F.2d 230 (1955).

United Airlines v. CAB, 278 F.2d 446(D.C.Cir.1960).

U.S. v. ALCOA, 148 F.2d 416(2d Cir. 1945).

FEDERAL DISTRICT COURTS

ALPA v. Quesada, 182 F. Supp. 596(S.D.N.Y.1960)

Chew v. Quesada, 182 F. Supp. 231(D.D.C. 1960).

Godinez v. Jones, 179 F. Supp. 135(D.Puerto Rico 1959).

Hawaiian Airlines v. Transpacific Airlines, 78 F. Supp. 1(D.Hawaii 1948).

McManus v. Capital Airlines, 166 F. Supp. 301 (E.D.N.Y. 1958).

Modern Air Transport v. CAB, 81 F. Supp. 803 (S.D.N.Y. 1949).

Putnam v. ATA, 112 F. Supp. 885(S.D.N.Y.1953).

Slick Airways v. American Airlines, 107 F. Supp. 199(D.N.J.1951).

SSW v. ATA, 91 F. Supp. 269(D.D.C.1950).

Swiss Watch Case, 133 F. Supp. 40(S.D.N.Y.1955).

U.S. v. Inter-Island Steamship Co., 87 F. Supp. 1010(D.Hawaii 1950).

CUSTOM CLEARING HOUSE AVIATION REPORTER

Aircoach Transport Asso. v. Atchison, Topeka & Santa Fe R.R., CCH, 6 Avi. 17,397(D.D.C.1959).

Certificated Air Carriers-Military Tender Investigation, CCH, Current Cases, 22,248(1959).

Eastern Airlines-Overbooking Enforcement Proceedings, CCH, Avi. Current Cases, 22,359(1960).

Great Lakes-Southeast Service Case, CCH, Avi. Current Cases, 22,211(1958).

IATA Traffic Conference Meeting, CCH, Avi. Current Cases, 22,431(1960).

Inter Mar Shipping Corp.-Enforcement Proceeding, CCH, Avi. Current Cases, 22,215(1958).

Modern Air Transport & John P. Becker-Control & Interlocking Relationships, CCH, Avi. Current Cases, 22,349(1960).

National Airlines-Enforcement Proceedings, CCH, Avi. Current Cases, 22,358(1960).

National Airlines-Unrealistic Schedules Enforcement Proceedings, CCH, Avi. Current Cases, 22,286 (1959).

U.S. v. Inter-Island Steam Navigating Co., CCH, 3 Avi. 17,138 (D. Hawaii).

UNITED STATES & CANADIAN AVIATION REPORTER

Aircoach Transport Asso. v. Atchison, Topeka & Santa Fe R.R., 1957 U.S.& C. Av.R.187(1957);1959 U.S.& C. Av.R.279(D.D.C.1959).

Apgar Travel Agency v. IATA, 1952 U.S.& C.Av.R. 364(S.D.N.Y.1952).

CAB v. Freidkin Aeronautics, 1954 U.S.& C.Av.R. 367(S.D.Calif.1954);1957 U.S.& C.Av.R.131 (9th Cir.1957).

Hawaiian Airlines v. Transpacific Airlines, 1951 U.S.& C. Av.R. 121(1951).

IATA Traffic Conference Resolution,1949 U.S.& C. Av.R.362(1949).

Mitchell v. Yellow Cab Co., 1958 U.S.& C. Av.R.175 (W.D.Tex.1959).

North American Aircoach v.North American Aviation, 1955 U.S. & C.Av.R. 486(9th Cir.1955).

North American Airlines v. American Airlines, 1955 U.S.& C.Av. R. 230(D.C.Cir. 1955);1956 U.S.& C. Av.R 173 (D.C.Cir.1956).

North American Combine Case, 1956 U.S.& C. Av.R. 422(D.C.Cir.1956).

North Atlantic Conference Resolution, 1946 U.S.& C. Av.R. 321(1946).

Opinion of the Attorney General, 1954 U.S.& C. Av.R 114(1954).

Slick Airways v. American Airlines, 1951 U.S.& C.Av.R. 300 (D.N.J. 1951); 1953 U.S.& C.Av.R.93(3rd Cir.1953).

SSW v. ATA, 1951 U.S.& C. Av.R. 289(1951).

Summerfield & Western v. CAB, 1953 U.S.& C. Av.R 184(D.C.Cir.1953).

STATE COURT CASES

Northeast Airlines v. Weiss, 113 So.2d 884 (Fla. App.3rd Dist.(1959), cert. denied, 116 So.2d 772(Fla.1959).

CIVIL AERONAUTICS BOARD CASES

ACTA - IMATA-Commercial Charter Exchange Investigation 22 CAB 760(1955).

Additional Service to Latin America, 6 CAB 857(1946),

Air America-Sec. 411 Proceedings, 18 CAB 810(1954).

Air Cargo, Inc.-Agreement, 9 CAB 468(1948).

Air Freight Case, 10 CAB 372(1949).

Air Freight Forwarders Case, 11 CAB 182(1949).

Air Freight Forwarders Investigation, 21 CAB 536 (1955).

Airline Reservation-Enforcement Proceedings, 18 CAB 114(1955).

Alaska Airlines-Acquisition of Cordova Air Service, 4 CAB 708(1944).

Alaska Airplane Charter Co.-Alaska Service Case, 12 CAB 79(1950).

American Airlines-Mid Continent-Merger, 7 CAB 365 (1946).

American Airlines-Ticket Complaints, 24 CAB 817 (1956).

American Export Lines-Control of American Export Airlines, 4 CAB 104(1953).

American President Lines-Control Case, 7 CAB 799 (1947).

Arizona-Monarch-Merger Case, 11 CAB 246(1950).

Boston & Maine R.R.-Control of Northeast Airlines, 4 CAB 379(1943).

Braniff-Acquisition of Aerovios Braniff, S.A., 6 CAB 946(1946).

Braniff-Mid Continent-Merger Case, 15 CAB 708(1952).

Braniff-United-Equipment Interchange, 17 CAB 618 (1953).

Braumgart-Interlocking Relationships, 19 CAB 456 (1954).

Capital Airlines-National Airlines Interchange of Equipment, 10 CAB 231(1949).

Capital Airlines v. Northwest Airlines, 18 CAB 145 (1953).

Cargo Irregular Carrier Investigation, 22 CAB 838 (1955).

Caribbean Area Case, 9 CAB 534(1948).

Chicago Area Service Case, 23 CAB 552(1956).

Chicago & Southern-PAA Interchange Agreement, 15 CAB 686(1952).

Cleveland-New York-Non Stop Service, 21 CAB 760(1955).

Colonial Airlines-Atlantic Seaboard Operation, 4 CAB 532(1944).

Compaigne Dominica de Aerovios, 19 CAB 823(1955).

Continental Airlines-United Airlines-Interchange of Equipment, 17 CAB 635(1953).

Delta, Chicago & Southern-Merger Case, 16 CAB 647(1952).

Eastern Airlines-Additional Washington Service, 4 CAB 325(1943).

Eastern Airlines-Colonial Acquisition, 18 CAB 453 (1954).

Empire Household Co.-Interlocking Relationships, 18 CAB 485(1954).

Flying Tigers-Slick Merger, 18 CAB 326(1954).

Gilbert Air Transport Corp.-Interlocking Relationships, 17 CAB 558(1953).

Great Lakes Area Case, 8 CAB 360(1947).

Havana-New York-Foreign Air Carrier Permit, 14 CAB 399(1951).

Hawaiian Case, The, 7 CAB 83(1946); 11 CAB 1008 (1950); 12 CAB 900(1951).

IATA-Agency Resolution Proceeding, 12 CAB 493(1951).

IATA-Traffic Conference Resolution, 6 CAB 639(1946).

Investigation of Non Scheduled Service, 6 CAB 1049 (1946).

Investigation relating to Regulation and Conduct of the Regional Traffic Conference of IATA, 24 CAB 463(1959).

Ketchekan-Juneau-Mail Route Case, 10 CAB 476(1949).

Latin American Air Freight Case, 16 CAB 107(1952).

Local Cartage Agreement Case, 15 CAB 850(1952).

Mid-Continent-Continental Equipment Interchange, 14 CAB 663(1951).

Middle Atlantic Area Case, 9 CAB 131(1948).

National Airlines-Daytona, Jacksonville Operation, 1 CAB 612(1940).

National-Carribean-Atlantic Control Case, 6 CAB 677(1946).

National Airlines-Panagra-Interchange Agreement, 14 CAB 320(1951).

National Airlines-Route Investigation, 12 CAB 298 (1951).

New York-Balboa-Through Service Case, 20 CAB 493 (1954).

New York-Florida Case, 24 CAB 94(1956).

New York-Houston-Interchange Case, 16 CAB 603(1950).

North American Airlines-Sec.411 Proceedings, 18 CAB 96 (1953).

North Atlantic Route Transfer Case, 11 CAB 676 (1950).

North Atlantic Certificate Renewal Case, 15 CAB 1053(1953).

North Atlantic Tourist Commission Case, 16 CAB 225 (1952).

Northern Consolidated Airlines-Consolidation, 8 CAB 110(1947).

Northeast Airlines-Additional Service to Boston, 4 CAB 686(1944).

Northeast Airlines-Acquisition of Mayflower Airlines, 4 CAB 680(1944).

Northeast Airlines-Duluth-Twin Cities Operation, 1 CAB 573(1940).

Northeast Airlines-North American Route, 6 CAB 319(1945).

Northwest Airlines-Eastern Interchange of Equipment, 19 CAB 346(1954).

Pacific Air Freight-Interlocking Relationships, 17 CAB 561(1953).

Pan American-Acquisition of Aerovios de Guatamala, S.A., 4 CAB 403 (1943).

Pan American- Acquisition of Aerovios de Mexico, S.A. 4 CAB 494(1943).

Pan American-Ferry Flight Case, 18 CAB 214(1953).

Pan American-Panagra Agreement, 8 CAB 50(1947).

Pan American Rate and Traffic Matter, 23 CAB 275(1956).

Pan American Service from New Orleans-Guatemala, 4 CAB 161(1943).

Pan American-United States Lines Agreement, 8 CAB 609(1947).

Pioneer Airlines-Campbell-Interlocking Relationships, 12 CAB 326(1950).

Republic Air Freight-Interlocking Relationships, 18 CAB 643(1954).

Robert Dollar-Acquisition of South Pacific, 12 CAB 497(1953).

Southeastern Area Local Service, Case_____CAB_____(1959).

Southeastern States Case, 7 CAB 863(1946).

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

Southwest-West Coast Merger Case, 14 CAB 356(1951).

States-Alaska Case, 20 CAB 791(1953).

States-Alaska Fare Case, 21 CAB 354(1955).

Through Service Proceedings, 12 CAB 266(1950).

Trans-Atlantic Cargo Case, 21 CAB 671(1954).

Trans-Atlantic Charter Policy Case, 20 CAB 782 (1955).

Transcontinental & Western-Additional North South California Service, 4 CAB 373(1943).

Transcontinental Coach Type Service Case, 14 CAB 1120(1951).

Transocean Airlines-Interlocking Directorships, 23 CAB 439(1956).

Transpacific Airlines-Certificate Amendment, 12 CAB 900(1951).

Transpacific Airlines-Renewal Case, 21 CAB 253 (1955).

Trans-World Airlines-Control by Hughes, 6 CAB 153 (1944).

Trans-World Airlines-Delta Interchange of equipment, 8 CAB 857(1947).

Trans-World Airlines-India-Manila Extension, 24 CAB 287(1956).

United Airlines-Western Air Express, 1 CAB 739 (1940).

Western Airlines-Acquisition of Inland Airlines, 4 CAB 654(1944).

West Coast-Empire Merger Case, 15 CAB 971(1952).

B O O K S

American Bar Association, Antitrust Handbook,(1953).

American Bar Association, Antitrust Handbook,(1958).

Burns, The Decline of Competition(1936).

Cooper, The Right To Fly(1947).

Cooper, International Ownership and Operation of World Air Transport(1948).

Foundation of Air Power, Government Printing Office(1958).

Frigate, Foreign Commerce and the Antitrust Laws (1958).

Honig, The Legal Status of Aircraft(1956).

Hugin, Private International Trade Regulatory Arrangements and the Antitrust Laws(1949).

International Civil Aviation Conference; Proceedings of, U.S. Dept. of State. Publication 2820.

Lissitzyn, International Air Transport and National Policy(1942).

Miller-Kronstein-Schwartz, Modern American Antitrust Law(1958).

Slotmaker, Freedom of Passage for International Air Services(1932).

Tombs, International Organization in European Air Transport(1956).

Wassenberg, Post War Civil Aviation Policy and the Law of the Air(1957).

A R T I C L E S

Babcheck, IATA & CAB, 25 JALC 8(1958).

Barnes, Airline Subsidies, Purpose, Cause and Control, 26 JALC ____(1959); 27 JALC 29(1960),

Cohen, IATA, the first three decades(1949). (Phamplet) Montreal.

Cooper, The Proposed Multilateral Agreements on Commercial Rights in International Air Transport, 14 JALC 125(1947).

Cooper, Air Transport and World Organization, 55 Y.L.J.1191(1946).

Cribett, IATA's Quasi Public Role, 21 IATA Bul.92.

Gellman, The Regulation of Competition in Domestic Air Transport, 24 JALC 410(1957); 25 JALC 148(1958).

Hensen, The Current Federal Policy on Antitrust Matters, 4 Antitrust Bul. 541(1959).

Jackson-Dumbauld, Monopolies and the Courts, 86 U. of P.L. Rev. 231(1938).

Keefer, Airline Interchange Agreements, 25 JALC 55(1958).

Kozik, Oligopoly and Concepts, 21 U. of Pitt. L. Rev. 621(1959-60).

Richmond, Creating Competition among Airlines, 24 JALC 435(1957).

Stoffer, American Bilateral Air Transport Agreement on the Threshold of the Jet Age, (25 JALC 119(1959).

Wiesner, From Bananas to Watches, 7 U. of Miami L.Q. 400(1952-53).

Withrow, Trade Associations, 4 Antitrust Bul. 123 (1959).

Fifty Years of Sherman Act Enforcement, 49 Y.L.J. 284(1939).

Extraterritorial Antitrust, 70 Y.L.J. 259(1960).

21 IATA Bul.(10th Anniversary Number).

Airline Map analysis, 25 JALC 121(1958).

3 Antitrust Bul. 387(1958).

4 Int. & Comp. L.Q. 129(1955).

55 Trends 1(1961).

MISCELLANEOUS

Bicks (Chief of Antitrust Division of Dept. of Justice) Address at homecoming breakfast U. Of Miami Law School, Nov. 12, 1960, Miami, Florida.

Boyd (Chairman of CAB), Address at the Aviation Forum of National Federation of Financial Analyst Societies, N.Y., May 16, 1960).

Martin, How Hector Heckles Washington, Colliers, June 6, 1960.

De Kupsa, Magic Carpet, American Weekly, March 19, 1961.

Price, Cold War Costs, Ft. Lauderdale News, Feb. 26, 1961. P.2C.

Prominski, International Acts as Law, Unpublished paper on file at the Institute of Air and Space Law, McGill University, 1959.

Prominski, International Control of Civil Aviation-Inevitable? Unpublished paper on file Institute of Air and Space Law, McGill University,Montreal, 1960.

Roosevelt (past President, U.S.) Address at opening of International Civil Conference on Aviation, Chicago, 1944.

Tipton (President ATA), Remarks at the Air Transportation Forum, May 19, 1958, Los Angeles.
Speech at Aviation Forum of National Federation of Financial Analysts Societies, May 16, 1960, New York.

Weller, Miami Herald-Chicago News Wire Service, Miami Herald, Jan. 4, 1961.

Miami Herald, March 13, 1961, p.1.

Civil Aeronautics Board Order No. E-10017(1956)

Civil Aeronautics Board Order No. 704.

Executive Order No. 6591, Feb. 9, 1934.

Civil Aeronautics Board Report, 1958, G.P.O. No. C31.201.958.

Report of the Antitrust Subcommittee, 85th Congress, First Session, G.P.O. Wash. 1957.

40 Opinion of Attorney General 85.

Chicago Convention on Internation Civil Aviation.

Time Magazine, August 17, 1959.

International Travel, Message from the President of the United States G.P.O. May 12, 1958.

U.S. Participation in International Travel, 1959 Supplement, G.P.O. Wash. 1959.