

THE UNIVERSAL AIR TRAVEL PLAN

A CASE STUDY

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ABSTRACT

The Universal Air Travel Plan (UATP) is an air travel credit card plan in which approximately 225 domestic and foreign air carriers participate. It has been in effect since 1936, and is operated pursuant to a multi-carrier agreement approved by the United States Civil Aeronautics Board. That agreement provides for two classes of members, "contractors" and "ticketors". A UATP contractor issues credit cards known as Air Travel Cards to UATP subscribers or customers, and accepts its own and all other contractor Air Travel Cards as payment for airline tickets. Ticketors honor the cards issued by all contractors, but issue no cards on their own. This paper reviews UATP, its forty-five year history, and the rise of credit card use in air travel. It analyzes UATP's regulation by the Civil Aeronautics Board, and describes in detail the final administrative review of UATP by the Board.

Le Plan Universel de Voyage Par Avion (UATP) est une carte de crédit pour voyager par avion dont environ 225 compagnies aériennes domestiques et étrangères y participant. Cette carte est en cours depuis 1936, et fonctionne avec l'accord de plusieurs compagnies aériennes et avec le CAB (Comité Aéronautique Civil). Cet accord comprend 2 classes de participants, "les fournisseurs" et les "agents de tickets". Un fournisseur UATP émet les cartes de crédit appelées "cartes de voyage par avion" aux membres de l'UATP ou clients, et accepte ses propres cartes aussi bien que celles d'autres fournisseurs comme paiement pour les tickets d'avion. Les agents de tickets reconnaissent les cartes de tous les fournisseurs, mais n'émettent aucune carte d'eux même. Ce document révisé l'UATP, ces 45 années d'existence, et l'augmentation de cartes de crédit utilisées pur voyager. Ce dernier, analyse les règles de l'UATP d'après le CAB et décrit en détail la revue administrative finale de l'UATP par le Comité.

ORIGINALITY STATEMENT, HISTORICAL INTRODUCTION
AND DECLARATION OF ASSISTANCE

The "Universal Air Travel Plan - A Case Study" provides for the first time an explanation of why the Air Travel Card, the credit card administered by participants in the Plan, rose quickly as a marketing tool of air carriers, and subsequently declined dramatically. In doing so, the paper identifies those actions, conditions and circumstances, both within and outside the control of air carriers, which brought about the Card's present depressed marketplace position. Also, for the first time the entire Civil Aeronautics Board's review of the Plan is analyzed, including therein an explanation for the positions adopted by the parties in conflict. Finally, the paper offers a critical evaluation of the benefits and liabilities present for air transportation businesses conducted in a highly regulated environment.

The previous relevant works on the subject of air travel credit cards have been provided principally by pleadings of competing parties before the Civil Aeronautics Board. Additionally, court decisions and Orders of the Board have contributed generally to an understanding of the role of a government and its regulatory agency in overseeing the air travel card marketplace. The remaining works were marketing plans of credit card companies involved in air travel intended to advocate and promote their particular interests.

In preparation of this paper, assistance has not been requested or provided by members of the McGill staff, or other staff, or by fellow students or others. However, valuable advice and supervision has been received by the thesis supervisor, whose advice, guidance and patience is gratefully and respectfully acknowledged by the candidate.

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CHAPTER ONE

INTRODUCTION

This paper will examine the Universal Air Travel Plan (UATP) - a joint venture in the air transport industry of unique dimension. We will begin our examination with an overview of the concept of a joint venture, and thereafter examine what UATP is and with whom it competes. After reviewing the nature of the entity, we will look closely at its history. Indeed, the history of UATP reveals much about the regulatory evolution of the commercial air transport industry.

Once having established the framework for UATP, we will review UATP since 1975, the date of its attempted revitalization, and the initiation of the current Civil Aeronautics Board proceeding. In particular, we will look at UATP through the eyes of its supporters and opponents, and through the cautious eyes of its regulator - the Civil Aeronautics Board. We are fortunate that we have the ability to examine a joint venture from more than the traditional author's perspective, and to identify its purported merits from several varying points of view.

Before beginning our review, it may be worthwhile to establish a basic framework. First, while air transportation has been called a quasi public entity, it nevertheless involves significant degrees of private management. Indeed, unlike many other public utilities, air transportation involves an industry deeply concerned with its own commercial success. Although airlines are owned by governments,

governments and private stockholders, or private stockholders alone, each of these forms of ownership permits management to strive for economic success while being directed to satisfy public demands.

Second, many of the joint services performed by the commercial air transport industry are designed to minimize the costs associated with providing these services and concurrently intended to fulfill, to the maximum extent economically justifiable, the varied needs of the air traveler.

Third, unlike many other industries, the commercial airlines are vitally dependent upon satisfactory interrelationships. For example, an automobile manufacturer need not be greatly concerned with its competitors' operations, but need principally be involved in competition with regard to marketing its product. However, because of their interdependence airlines are vitally concerned about each others non-competitive operations. Specifically, the term "interline" has been developed in recognition of this interdependence. A few examples of this interdependence between competitors involves interlining with regard to baggage handling, ticketing, and security.

This paper will examine one interline payment system developed by the airlines to jointly serve their passengers and their own needs. While most interlining arrangements are the product of agreements which do not have their own identity, the Universal Air Travel Plan is a separate entity created by an agreement. Indeed, the UATP agreement

provides for an administrative staff and an operating committee, and is promoted through a marketing subcommittee.

UATP's history reflects the advantages and disadvantages of committee operations, and those facets of it will become evident as we review not only its past but its future as a viable competitive force in the air transportation credit market.

CHAPTER TWO

THE JOINT VENTURE IN THE AIR TRANSPORT INDUSTRY

The term joint venture encompasses many types of commercial arrangements and agreements. In general, a joint venture refers to the collective participation by more than one organization in offering a product or service. Participation in a joint venture, regardless of the nature of the product or service could, because of its relation to the marketplace, result in a violation of United States federal legislation.^{1/}

Because of potential anticompetitive effects associated with joint ventures, they are sometimes reviewed as if they were the product of a merger rather than the creation of a totally new entity. Joint ventures today are no different than similar commercial undertakings hundreds of years ago.

1. See Sections 1 and 2 of the Sherman Act (15 U.S.C. Sec. 1 and 2); Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45) and Section 7 of the Clayton Act (15 U.S.C. Sec. 18).

The four economic functions of modern joint ventures are: (1) to provide the amounts of capital needed for the exploitation of raw material sources, particularly financial resources; (2) to supply security in new industrial development, of borderline concern to the major business of the corporate partners; (3) to establish one large joint facility which is more economical in operation than would be smaller separate installations by the partners; (4) to undertake on a scale too vast to be conducted by single companies.^{2/}

UATP is a joint venture of the airlines in the air transport credit market. However, its legality as a joint venture has been the subject of considerable discussion. Those who oppose the UATP system argue that it is an unlawful joint venture because it violates Section 7 of the Clayton Act, 15 U.S.C. Section 18, as interpreted by the U.S. Supreme Court in United States v. Penn-Olin Chemical Co.^{3/}

The Penn-Olin case is considered one of the more useful Supreme Court decisions on joint ventures and for that reason it is of particular interest to an industry, like that of air transport, which has in the past and may in the future continue to look to the joint venture as a vehicle for resolving industry-wide demands.

The facts giving use to the Penn-Olin case, and the Supreme Court's recognition of the significance of the issues submitted for review are well summarized in the initial paragraphs of the Court's review.

2. Edwin S. Rockefeller, Antitrust Questions and Answers, 40-41 (The Bureau of National Affairs, 1974).

3. 378 U.S. 158 (1964).

Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation jointly formed Penn-Olin Chemical Company to produce and sell sodium chlorate in the southeastern United States. The Government seeks to dissolve this joint venture as violative of both Sections 7 of the Clayton Act and Section 1 of the Sherman Act. This direct appeal ... raises two questions. First, whether Section 7 of the Clayton Act is applicable where two corporations form a third to engage in a new enterprise; and second, if this question is answered in the affirmative, whether there is a violation of Section 1 or Section 7 under the facts of this case. ... In view of the importance of each of these questions in the administration of the antitrust laws, we noted probable jurisdiction. We have concluded that a joint venture as organized here would be subject to the regulation of Section 7 of the Clayton Act and, reaching the merits, we hold that while on the present record there is no violation of Section 1 of the Sherman Act, the District Court erred in dismissing the complaint as to Section 7 of the Clayton Act.^{4/}

While Penn-Olin decided that Section 7 of the Clayton Act applied to mergers principally, the Court's discussion of the joint venture includes initially defining the "line of commerce".^{5/} It is, of course, this fact which bears directly on the legality of the joint venture, and also aids in defining to what extent the joint venture may enter, and possibly dominate a market. That is, the business the joint venture will engage in and with whom it will compete.

With regard to UATP, a definition of the line of commerce is critical. UATP, as we will discuss later, principally enables air travelers to charge, through use of a credit card, air transportation

4. Id., at 160.

5. Id.

and related services. Thus UATP has argued that it is in the business of extending credit for such services, and likewise that it should be compared with other credit providers.^{6/}

Critics of the Plan allege that the line of commerce is considerably narrower. One argument is that since the UATP system requires a substantial deposit, only a certain segment of the credit market is subject to competition with UATP. Obviously, the broader the line of commerce is defined, the smaller the share of the market available to the joint venture. Conversely, the narrower the line of commerce is defined, the larger the share of that market available to the joint venture. During the Administrative Conference established by the Civil Aeronautics Board in Order 78-12-48, dated December 7, 1978, the Board concluded that the line of commerce susceptible to the UATP joint venture was the credit sale of air passenger transportation.

In the Penn-Olin case, the Supreme Court examined in some depth the companies involved in the joint venture.^{7/} Thereafter, the Court examined the nature of the industry affected. Finally, the Court noted that Section 7 of the Clayton Act did apply to joint ventures. However, the test is whether the effect of the joint venture will have significant adverse affects on competition in the identified line of commerce.

6. "Direct Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", (1979).

7. 378 U.S. at 162.

In future sections of this paper we will describe in detail the purpose of the UATP. The reader, as would a trial court, can then determine its legality vis-a-vis Section 7 by measuring this against the following criteria established by the Supreme Court in Penn-Olin.

We note generally the following criteria which the trial court might take into account in assuring the probability of a substantial lessening of competition: the number and power of the competitors in the relevant market; the background of growth; the power of the joint venturers; the relationship of these lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; the joint venture's line of commerce and the relationship thereof to that of its parents; the adaptability of its line of commerce to noncompetitive practices; the potential power of the joint venture in the relevant market; an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered it alone instead of through ... /UATP/; the effect, in the event of this occurrence, of the other joint venturer's potential competition; and such other factors as might indicate potential risk to competition in the relevant market.^{8/}

In addition to a review of UATP, as a joint venture, with regard to Section 7 of the Clayton Act, it may be helpful to note that the Civil Aeronautics Board also must rely upon Section 412 of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, in reviewing UATP.

Section 412 provides that the Board "shall by order approve" any air carrier agreement "that it does not find to be adverse to the

8. Id., at 177.

public interest, or in violation of this Act...."^{9/} It is interesting to note that only if it can first be demonstrated that the UATP Agreement, or any other agreement submitted for review, "substantially reduces or eliminates competition" must the Board then proceed to consider whether the agreement "is necessary to meet a serious transportation need or to secure important public benefits."^{10/}

Proponents of UATP would argue that it is the principal vehicle available for the airlines to compete in the air transportation credit market. Conversely, opponents of UATP would argue that airlines are free to individually compete in this market, and that but for the UATP system each airline would in fact compete individually in this market. This fundamental difference of views must be considered as critical to the success or failure of any joint venture.

When cooperation between and by the joint venturers is essential to produce the goods or offer the service, the courts have traditionally recognized the wisdom of a joint venture.^{11/}

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9. Federal Aviation Act of 1958, as amended.
 10. Id.
 11. See Worthen Bank and Trust Co. v. National BankAmericard, Inc., 485F. 2d 119, 127, 128 n. 7 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974); Mackey v. National Football League, 543F. 2d 606, 619 n. 25 (8th Cir. 1976), reh. denied, cert. dismissed, 434 U.S. 801 (1977); Fisher v. First Nat'l Bank of Omaha, 548F. 2d 255 (8th Cir. 1977).

CHAPTER THREE

THE UNIVERSAL AIR TRAVEL PLAN AND THE RISE OF CREDIT CARDS

In 1975 the Civil Aeronautics Board (Board) issued its first Order which would give rise to the revitalization of UATP. That Order, 75-8-35, dated August 8, 1975, provided a concise statement describing UATP.

UATP is a credit card program established and administered by its airline parties, for use in purchasing air transportation on credit. The approximately 170 air carriers, foreign air carriers, commuter air carriers, intrastate airlines, and other common carriers by air which are parties to the UATP Agreement issue tickets for air transportation upon presentation by a customer of a valid UATP card, known as the Air Travel Card. Those UATP airlines which, in addition to honoring UATP cards, elect to issue such cards to customers (UATP Subscribers) are known as UATP Contractors. Those which only accept UATP cards as payment for tickets are known as Ticketor airlines.

The Plan is administered by the UATP Committee, consisting of eight members. Four are designated by the UATP Contractors which are members of the International Air Transport Association (IATA), and one is designated by each of the four Contractors which are members of the Air Traffic Conference of America (ATC) having the largest number of Subscribers (those who sign contracts with UATP Contractor airlines for receipt and use of UATP cards). No carrier can have more than one member on the Committee. Representation of the UATP Committee must always be equally divided between IATA and ATC carriers. The Committee elects its Chairman and Vice Chairman, employs a Secretary and establishes other details of the Plan, which are contained in sections 2 through 7 of the UATP Manual. The Committee can also recommend changes in the UATP Agreement, which are adopted if no party to the Agreement objects within 90 days. Actions of the UATP Committee require a unanimous vote to pass.

Any carrier legally permitted to engage in air passenger transportation on a scheduled basis to, from or between points in the continental United States can become a Ticketor party to UATP. Airlines can become Contractors if they are certificated by the Board, or, if they are not, if no objection is raised by any other UATP party. Withdrawal from UATP is permitted on ninety days' notice, and is automatic upon bankruptcy, but does not relieve a carrier from obligations incurred while a UATP party. Any claim or controversy or question of interpretation arising from the UATP Agreement is conclusively determined by the UATP Committee as a board of arbitrators, with one neutral person serving with it if a party to the arbitration so requests. The UATP Agreement can be terminated as to a specific carrier by the vote of three-fourths of all members of the board of arbitrators.

Contractors pay Ticketors the full amount of tickets sold on UATP cards, absorbing the costs of processing them. The expenses of the UATP Secretary's office, including publication of the UATP Manual, are shared equally by the UATP parties. Each UATP party is also assessed an amount, set by the UATP Committee, to offset the cost of production of the Loss Prevention Bulletin (a list, published twice each month, of all UATP cards and documents which are not to be honored by Ticketors) and to reduce its bulk subscription rate.

The UATP Subscriber's Contract provides that the Subscriber pay a deposit of \$425. Interest is required to be paid on accounts of Subscribers whose mailing addresses are within the United States, its territories and possessions, and Puerto Rico. The subscriber can designate any individual or individuals to receive its UATP cards, with "P" cards limited to the purchase of air transportation for the holder only, and "Q" cards permitting the holder to buy air transportation for anyone. Cards can be designated for use anywhere in the world over the lines of any UATP Ticketor, or can be limited to North American travel only. The Contractor bills the Subscriber once a month, or more often at the Contractor's election, and the Subscriber must remit in full in 10 days. Subscribers are responsible for sales made using lost or

stolen UATP cards until they notify the Contractor. The UATP Subscriber's Contract can be terminated by either party to it or on 30 days' notice, but the Contractor can terminate it immediately on default by the Subscriber.

The history of the Board's consideration of UATP is a long one. In the Air Passenger Tariff Discount Investigation, 3 C.A.B. 242 (1942), the Board, after a full hearing, indicated general approval of UATP so long as certain modifications were made in the UATP rules. Approval of a later version of the UATP Agreement was granted in the Universal Air Travel Plan case, 12 C.A.B. 601 (1951)

... the Board again approved the use of UATP while ordering some modifications of its rules in the Passenger Credit Plans Investigation, 37C.A.B. 404 (1963), and Passenger Credit Plans Investigation, Reopened, 39 C.A.B. 410 (1963).^{12/}

Having offered a concise description of UATP, it may now be useful to review the overall rise of credit cards as a means of purchasing goods and services before we turn to UATP's own history.

Prior to World War I, the concept of a credit card became a commercial reality with the development and issuance of metal cards. While it is widely disputed as to who issued the first credit card, it is reliably reported that the first gasoline credit cards were issued about 1924.^{13/}

12. Order 75-8-35, at 1-4 (1975).

13. "Facts About BankAmericard", at 1 (March, 1976).

While the credit cards first issued may have had a variety of purposes, in today's environment credit cards are issued for very specific reasons.

A credit card is a plastic credential that verifies that the person presenting the card has a contract with the card issuer under which the issuer will make sure the merchant gets paid, lend the cardholder enough money to cover the transaction, and bill him for the amount he borrows. (And, charge him an appropriate interest in the likely event he is unable to promptly satisfy the debt.) ^{14/}

The first bank credit card program is reported to have been introduced in 1951 by Franklin National Bank. It should be noted here that Franklin National Bank was eventually closed by the United States Government in the 1970's. Nevertheless, BankAmericard, the predecessor to Visa, became the first multi-purpose bank card which offered nationwide acceptance by establishing relationships with other banks located throughout the United States. Surprisingly, it was not until 1966 that Interbank Card Association, a joint venture of banks, began to issue the Master Charge card. ^{15/}

Travel and entertainment cards developed along with bank credit cards but were aimed at a different market and were intended initially for something other than simply a general purpose credit card market. In today's environment the distinctions between the two types of cards

14. United States Department of Justice Memorandum from S. Gearing and M. J. McFadden, at 1 (File: 60-293-23) (1976).

15. "Facts About BankAmericard", at 1 (March, 1976).

have eroded somewhat, but they are still perceived by their users as having distinct benefits.

The differences between bank credit cards and travel and entertainment cards are more noticeable in their financial plans than in their marketing techniques.

T&E companies essentially provide a 30-to-60 day credit service (including float), and assess users a flat annual fee but not a finance charge. Because business firms giving T&E cards to their employees and typically pay the accounts in time to avoid a delinquency charge, the T&E firms rely on merchant discounts and the annual membership fee for income and actively solicit business accounts.

In contrast, bank card plans depend quite heavily on the finance charges received from customers who "revolve" their accounts. Recent data from one bank card organization indicates that about three-fourths of gross revenues are derived from cardholders and one-fourth from merchants. Since business firms would ordinarily not "revolve" their accounts, banks have generally not made an effort to cultivate this market.^{16/}

Today two bank credit card organizations dominate beyond dispute the multi-purpose bank credit card industry. Additionally,

"According to the Department (of Justice) 'Today the two bank cards and Amex account for nearly 98% of the total card volume.' "^{17/}

Moreover, in the area of the travel and entertainment card market,

16. Robert W. Johnson, "Economic Effects of Citicorp's Acquisition of a T&E Card", at 20 (August 16, 1977).

17. Response of Citicorp to Comments Filed by American Express Company in U.S. v. First National City Bank, at 3 (65 Civ. 3963, 1965).

American Express has over 90% of this market.^{18/}

Virtually all multi-purpose credit card programs mandate that merchants pay a "discount" to the credit card organization as part of the agreement to accept the card. While credit cards have grown significantly in their use, and a number of economic theories have been offered to explain their growth, it was the technical development of the "interchange" concept which permitted national bank card systems to grow geometrically. And, it was the interchange concept which permitted one participant in a bank credit card program to charge another member a processing fee for the administration of the program.

The "interchange concept" can best be considered as a system which permits the card issuing bank to charge an administrative fee to other banks which agree to accept the credit card transaction paper generated by a cardholder's purchases using a credit card obtained from the issuing bank.

The growth of the credit card industry has produced a rather interesting credit card industry market share distribution. Surprisingly there are only five U.S. "general purpose credit cards accepted on a national scale by merchants and available to consumers: Master Charge, Visa, American Express, Diners Club, and Carte Blanche."^{19/}

18. Id., at 13-4

19. Citicorp and Citicorp Services, Inc., v. Interbank Card Assn., et al., 1980-1 Trade Cases, 77, 535, at 77, 538 (1979).

Within the travel and entertainment credit card market, American Express has a virtual monopoly. "If its share of U.S. billings is taken as the measure of its market share, it would be greater than the 87% found in United States v. Grinnell Corp., 384 U.S. 563 (1966), to justify the finding of a monopoly."^{20/} Within the general purpose credit card market, American Express, Interbank Card Association, and Visa, U.S.A., Inc. account for nearly 98% of total card volume.^{21/} Additionally, those same organizations clearly account for in excess of 50% of all air transportation credit card sales.

In 1973, UATP initiated an attempt to gain a more favorable share of the air transportation credit market. This attempt resulted in the beginning of UATP's efforts to revitalize. The initial proposal involved the establishment of a UATP SilverCard. The "SilverCard" was to be an additional type of air travel card available for the purchase of travel-related services, i.e., hotel, motel, and car rental. Additionally, the "SilverCard" brought forth the concept of a UATP interchange fee.

After consideration of the filings of the parties which will be discussed in the next chapter, the Civil Aeronautics Board (Board) concluded that it did not have jurisdiction under Section 412 to act with respect to the SilverCard provisions as they related to UATP's expansion

20. Memorandum II from Sorkin, Cahill, Gordon and Reindel to Dussman, Department of Justice, at 11 (1977).

21. Supra, note 17.

into these travel-related markets.^{22/} However, the Board did approve those portions of the SilverCard provisions for payment of a one percent discount by "Ticketor" carriers to "Contractor" carriers, finding that such a discount provided for an equitable apportionment of UATP costs of operation.^{23/}

The initial SilverCard provisions, and thus the plan for a new credit card program, were never implemented because of certain antitrust concerns of the UATP member carriers. In 1976, UATP submitted a revised program to the Board in a final attempt to revitalize the Plan. The outcome of that attempt reveals much about the process of regulating an industry. Indeed, the history of UATP, from a virtual monopolist in the air transportation credit market to a minor factor in this market provides a valuable lesson in governmental intervention in the marketplace.

CHAPTER FOUR

THE HISTORY OF THE UNIVERSAL AIR TRAVEL PLAN

This chapter of the paper will review the history of the Universal Air Travel Plan (UATP) from 1942-1975. As a guide to tracing the history of the Plan, we will use Civil Aeronautics Board (Board) orders which were issued during this period. These orders reveal much of the philosophy of air transportation regulations until its upheaval in

22. Order 75-8-35, at 5-6 (1975).

23. Id., at 6.

1978, and, of equal importance, should disclose both the advantages and disadvantages afforded a regulated industry.

The first Board Order to review UATP was issued on January 6, 1942.^{24/}

This proceeding was instituted by the Board upon its own initiative for the purpose of examining an intercarrier agreement and tariffs providing for discounts which air carriers have been and are offering for the transportation of passengers, particularly the discount available to travelers under the so-called Air Travel Card Plan, and a discount available on travel by personnel of the United States Government on official business.

The Air Travel Card Plan provides a means whereby certain persons who have occasion to use air transportation exceeding a specified amount in the course of a year may obtain a discount amounting to 15 percent of the standard one-way fares. The plan is the result of an agreement between a number of the air carriers, which first became effective on January 1, 1936. A copy of the present agreement, which embraces the 18 domestic scheduled air carriers, has been filed with the Board, as required by the Civil Aeronautics Act of 1938, and the application of the plan is covered by appropriate tariff publications. Both the agreement and the tariff set forth the conditions under which the discount will be extended to the public, and the requirements for eligibility; and the agreement also provides the manner in which the carriers will administer the plan. All of the air carriers are listed in the tariff as participating carriers, eight as so-called issuing carriers, and ten as non-issuing carriers. Issuing air carriers are those who enter into contracts with, and issue the necessary credentials to, eligible members of the public, referred to as subscribers. Non-issuing

24. 3 C.A.B. 242 (1942).

carriers participate fully in extending the discount and honoring the credentials, but do not enter into subscriber contracts nor maintain subscriber accounts, which are part of the plan.^{25/}

The first Board review of UATP examined principally the 15% discount provided subscribers and the non-commissionable nature of UATP sales when they were made by travel agents. The 15% discount was available to any person who purchased a minimum of \$300 of air transportation at published one-way rates. Travel agents argued that the denial of issuance of UATP cards to travel agents, and their lack of commissions on such sales, provided an unfair method of competition and retarded the development of air transportation.

Before addressing these two immediate issues, the Board made certain fundamental declarations about the Plan. First, "That the adoption and evolution of the Air Travel Card Plan has stimulated the use of air transportation is clearly manifested by the record."^{26/} Additionally, "From the carriers' standpoint the Plan... has provided an effective selling approach for sales personnel, since it is a means of interesting large groups of prospective travelers through a single contract."^{27/}

This initial recognition of the overall benefits of the Plan made its growth as a sales vehicle possible. Moreover, it established that an industry approach to marketing a product could, if properly structured,

25. Id., at 243.

26. Id., at 249.

27. Id.

pass the Congressional standards mandated for the economic development of an infant industry. Indeed, the Board's review of UATP at this stage set the groundwork for its growth. Had UATP been determined to be adverse to the public interest during its earlier review, the growth of air transportation credit may have manifested considerably different characteristics.

With regard to the first specific issue under review, the 15% discount, the Board determined to modify its preconditions, but concluded that it was not discriminatory.

Considering further that the amount of the discount made available to subscribers is not greatly in excess of that available to non-subscribers who purchase round-trip tickets, and taking into consideration the relatively large average amount of transportation purchased by subscribers as compared with the average amount purchased by non-subscribers, it does not appear that the preference or advantage is undue or unreasonable, nor that the discrimination amounts to an undue or unreasonable prejudice or disadvantage. 28/

The issue of non-travel agent use was to be determined in 1942 for the first time. However, the issue of commissionability of UATP sales for travel agents would have to await a later review. It is interesting, however, to note that it seems now almost absurd to preclude any category of persons from receiving the benefits of the Air Travel Card. Indeed, such discrimination which involves a total class of users, has been repeatedly prohibited in virtually all commercial transactions. Nevertheless, the airlines were determined to argue that travel agents

28. Id., at 250.

should not have the right to use the Air Travel Card for fear that it somehow would be abused. The Board disposed of this shallow argument briefly and succinctly.

Assuming that travel agents are otherwise eligible to become subscribers, their exclusion from the benefits of the plan merely because of the nature of their business constitutes the singling out of individuals within a classification who are entitled to equality of treatment. ^{29/}

The Board would not again review UATP until 1951. However, the Board's enunciations concerning the benefits of the Plan to the public were considered invaluable for the growth of the Plan. Not surprisingly, the initial endorsement became Board policy for more than thirty years, and became an impossible position to alter by opponents of the Plan.

The Board's second review of UATP came in 1951. ^{30/} The period between 1942 and 1951 found the UATP member carriers struggling to devise a plan which would achieve reasonable commercial success, and yet satisfy the Board's standards. The product of that effort was the agreement submitted for the Board review in 1950.

Except for four areas, the Board approved the revised UATP Agreement on February 2, 1951. In approving the agreement, the Board stated the following:

In general, we are in sympathy with the objectives of this agreement. Past experience would indicate that it is a great convenience to the traveling public and provides a

29. Id., at 252.

30. 12 C.A.B. 601 (1951).

means of increasing air transportation. Its adoption by both domestic and international carriers insures a degree of uniformity that is highly desirable. There are, however, some features of the agreement which raise certain problems which are discussed below. ^{31/}

The four areas of concern for the Board involved the committee, expenses of administering the plan, membership and the tariff. With regard to the committee, the Board wanted a more definitive description of the committee's duties, and also a statement as to which of its various powers had been actually exercised and in what manner.

The expenses of the plan were a matter of particular interest to the Board. "It seems to us desirable that in allocating the cost of operating a plan of this kind, the members should arrange, in some manner, to have the costs bear some relationship to the benefits conferred." ^{32/} This requirement was to plague UATP for more than 20 years after the Board's observation.

As we will discuss later, apportionment of costs based upon benefits conferred resulted in Contractors, or those who issue the Air Travel Cards, paying equally among themselves the majority of costs of operating the Plan. It was believed that Contractors benefited principally from the Plan, and therefore should pay for its operations. However, years later this arrangement would return to the forefront of a major dispute both within and without UATP. Contractors began to believe that Ticketors

31. Id., at 601-602.

32. Id., at 603.

also benefited from the Plan, and that apportionment of costs should be shared more equitably by all participants. However, initially Contractors agreed to absorb the vast majority of costs, and the Plan progressed with this underlying concept for more than 20 years.

With regard to the issue of membership, the Board espoused a view that was to appear and reappear with regard to many industry agreements. "The Board in prior opinions has established the principle that cooperative arrangements entered into by several certificated carriers for the conduct of matters of interest to the industry generally should not be restrictive as to membership, but should be open, as a matter of right, to future membership by any other certificated carrier." ^{33/}

Up until this time, carriers maintained the right to veto any potential member. Additionally, this veto power applied to members who wanted to become Contractors. While membership eventually became virtually unrestricted, specific limitations on non-U.S. carriers becoming Contractors would remain for many years. The Board would tolerate this Contractor restriction so long as general membership in the Plan remained wide-open.

With regard to the issue of filing the agreement as a tariff, the UATP members believed that such a requirement would curtail change. The carriers argued that to file the agreement as a tariff would mean that any minor revisions would then require formal tariff changes, and

33. Id.

would thereby impose an undue burden on the operation of the Plan. The Board found this argument not without merit, but contrary to their legal position. "We recognize the merits of this position. However, both legal requirements and public interest considerations lead us to conclude that the basic feature of the plan should be filed as a tariff insofar as air transportation within the meaning of the Act is involved." ^{34/}

It should be noted that the concept of common carriers filing tariffs has a long history in U.S. transportation law. Tariffs are designed to place the world on notice of the practices and responsibilities of common carriers in providing transportation. Accordingly, the Board was of the view that since the Plan clearly affected air transportation, a tariff was required by law and necessary to advise the public of the carriers' credit policies with regard to air transportation sold through the Plan.

All of the changes required by the Board were accomplished by UATP without any great discomfort, and the Plan proceeded until 1956 without any further Board review. However, the year 1956 was to bring forth the first serious battle between travel agents and UATP. That battle would continue on different grounds and in various forums until 1978.

34. Id., at 604.

On July 19, 1956, the American Society of Travel Agents (ASTA) filed a motion pursuant to rule 206(c) of the Rules of Practice for Board review of a determination by the Chief, Office of Compliance, that no enforcement proceeding will be instituted with respect to block ticketing practices.... ^{35/}

The American Society of Travel Agents (ASTA) is a trade and service organization of travel agents located throughout the United States. ASTA contended that the air carriers' block-ticketing practices constituted an undue preference or advantage under Section 404(b) of the Federal Aviation Act, and an unfair method of competition under Section 411 of that Act. The essentials of disputed block-ticketing practices are as follows:

The carrier puts into the hands of participating Universal Air Travel Plan subscribers a stock of blank ticket forms, a validating stamp, reporting and book-keeping forms, and instructions. The subscriber is authorized to issue that carriers' tickets for transportation over the carriers' lines or over the lines of any other carrier and is billed for the amount of tickets so issued through his Universal Air Travel Plan account. Subscribers do not receive favored treatment as to reservations or other services. ^{36/}

The Board found that the block-ticketing program afforded benefits to the carrier and to the public alike by saving the time involved with regard to carrier ticketing facilities. The Board also determined that confining the block-ticketing program to UATP subscribers was not discriminatory because the Plan itself was virtually open to any

35. 24 C.A.B. 817 (1956).

36. Id.

person to become a subscriber. However, the Board reminded carriers that they could not place restrictions on the availability of the block-ticketing program to particular subscribers. Thus, if the block-ticketing program was to be available to UATP subscribers, it would have to be available to all subscribers on equal terms, and a Contractor of such a program would have to offer it to all its subscribers.

One issue again appeared that had previously been addressed by the Board in the 1951 Order. Carriers had not included the block-ticketing program in their tariffs. The Board again reminded the carriers of its view with regard to the tariff matter.

It is our present view that the block-ticketing plan is a service which the carrier undertakes or holds out to perform in connection with air transportation, within the meaning of Section 221.38(a)(13) of the Economic Regulations, and that it should be openly offered to all eligible persons by a tariff filing. Therefore, we are instructing Compliance to institute proceedings against any carrier that does not file the essential features of its block-ticket plan within 90 days from the date of this order.^{37/}

The block-ticketing program has continued as a service to the public and as an extremely economical method for the sale of air transportation. With the exception of accepting the reservation and billing the passenger for the transportation, the carriers are required to perform no other non-transportation service with regard to the sale.

37. Id., at 817 and 818.

In 1958 UATP began to recognize that a credit card plan limited to the sale of air transportation would have a difficult, if not impossible task, to compete with other credit card programs which afforded their cardholders a significantly wider range of services. In an effort to stay competition, and to bolster UATP's position in the marketplace through non-competitive means, the International Air Transport Association, whose members included virtually all the UATP members, adopted the following resolution.

No member shall honour a credit card in settlement of a sale of international air transportation other than a U. A. T. P. card or a Member's credit card and no commission shall be payable to an IATA approved Agent for the sale of international air transportation based on a credit card (other than a U. A. T. P. card or Member's card).^{37a/}

It took the Board little time to recognize precisely the intent of this proposal and in a brief decision in Order No. E-14171, dated July 2, 1959, the Board disposed of this ill-conceived IATA notion of competition.

The amendment, as it is applicable to the United States and to air transportation, as defined in the Act, appears on its face to constitute a restraint on trade and thus involve antitrust considerations in three respects: First, the proposed resolution precludes access by IATA members to air traffic generated under non-IATA (that is to say, "outside" credit card plans). Second, it eliminates access by "outside" credit card companies to the traffic business of IATA members, and thereby restrains competition between IATA credit card plans and "outside" credit card plans. Third, the amendment in effect bars

37a. C.A.B. Nos. 13044, 13046, 13048; IATA No. 810, Sales Agency Rules.

access by IATA travel agents to business generated under "outside" credit card plans because the agent, under the resolution, cannot receive a commission on such traffic. The effect of the foregoing restraints on competition is to deny to the traveling public additional service, which an "outside" credit card plan can offer.^{38/}

In view of the significant antitrust constraints, and the lack of any demonstration of a serious transportation need or the securing of important public benefits, as required by the Board standard established in the Local Cartage Agreement Case, the Board disapproved this proposed resolution of IATA.^{39/} Thus, the first attempt to sustain market share through non-competitive means alerted the Board to the necessity to carefully monitor the entire market for the credit sale of air transportation.

On August 25, 1960, the Board issued three orders concerning UATP. The first two related to UATP's attempt to curtail competition of "outside" credit card plans, and the third order related to UATP's initial attempt to broaden the services for which the Air Travel Card could be used by subscribers.

The first order, Order E-15691, adopted August 25, 1960, involved the Board's review of an agreement entitled "Resolution 870-Extention of Credit". In essence, this agreement provided that "for any transportation sold on credit except that sold under the Universal Air Travel Plan (UATP) or a member's own credit or time payment

38. C.A.B. Order No. E-14171, at 1-2 (1959).

39. 15 C.A.B. 850, 853 (1952).

plan, no compensation of any kind shall be paid by the members to the organization providing credit and that all monies due a member of IATA from such an organization shall be paid within 30 days from the date of the sale. "^{40/} Additionally, by this resolution the IATA members were prohibited from paying commissions to travel agents for sales made on "outside" credit cards.

Even to the most casual reader, this proposal clearly was an attempt to accomplish indirectly that which had been directly attempted in 1959, and subsequently prohibited by the Board.

In essence, the IATA members proposed to honor "outside" credit cards but not to compensate the outside organizations for their services. As the Board noted, under this situation issuers of outside credit cards will clearly not authorize their subscribers to purchase air transportation from IATA members through use of their card.

Indeed, the Board was very candid in noting that this proposed resolution "merely represents another attempt at prohibiting the use of outside credit in the purchase of air transportation, thus restraining the trade of its own members and outside credit companies." Accordingly, as the Board had done the year before, this resolution was disapproved as failing to meet a serious transportation need or securing important public benefits which would justify its approval in view of the obvious antitrust concerns apparent on the face of the resolution.

40. 31 C.A.B. 1041 (1960).

On November 24, 1959, the American Express Company (Express) filed a petition for withdrawal of Board approval of any resolution of the Air Traffic Conference and the International Air Transport Association "insofar as any such provision prohibits, penalizes, or otherwise deters the participation of any air carrier or foreign air carrier in the Express Credit Card Plan with respect to the sale of air transportation." ^{41/}

The Board needed little time to recognize that any anti-competitive restraint on the credit sale of air transportation could not, lacking serious transportation needs, be considered in the public interest. As the Board noted, "The instant ATC resolution, (the one particularly objected to by Express) as interpreted by ATC, appears to be an attempt on the part of the ATC carriers collectively to prevent Express from competing in the credit card field with the carriers' own credit card plans and the credit card plans of its major credit card competitors." ^{42/}

As anticipated, the Board tentatively disapproved those provisions of the ATC and IATA resolutions which precluded the use of the Express Credit Card Plan. However, it should be noted that tentative disapproval was required because the restrictions considered anticompetitive were really the product of an interpretation by ATC

41. Id., at 1043.

42. Id., at 1045.

and IATA, rather than the product of specific language adopted by these two organizations.

The third Order issued on August 25, 1960, involved an attempt by UATP to expand the services available through the Air Travel Card.

The ATC resolutions under consideration provide that UATP shall include the extension of credit to UATP card holders, on a personal credit basis, by hotels, motels, car rental organizations, restaurants, communication services, and nationally recognized business services for travelers. Such credit, if extended, will be without recourse to UATP or ATC Pursuant to the instant resolutions the market development advisory group will endeavor to make formal arrangements with vendors, such as those listed above, so that these organizations will accept the UATP air travel card as a basis for the granting of credit to the card holder and then bill the holder directly for the charges incurred. One reason given by the ATC for the expansion of UATP along the lines indicated is "the possible encroachment of other credit programs on the Universal Air Travel Plan." ^{43/}

At this same time, the International Air Transport Association (IATA) adopted amendments to its sales agency rules which now applied to non-U.S. travel and precluded the use of outside credit cards for the purchase of air transportation on the IATA members. It should be recalled that the Board had already disapproved an identical plan by IATA and ATC as it affected air transportation to, from, or within the U.S. Against this background of desperate anticompetitive activity, the Board was asked to approve the expansion of UATP into non-air

43. Id., at 1047.

transportation matters. A proposal, it should be noted, which UATP would attempt again in 15 years.

The Board disapproved this proposal principally because it was viewed as a further attempt to compete through anticompetitive means. "Rather than facilitating the development of air transportation, which should be the sole objective of the ATC members, these resolutions appear to be designed to aid the carriers in competing with an industry not directly related to air transportation." ^{44/} Additionally, the Board noted that the proposed activity had no apparent relationship to air transportation.

It is interesting to consider whether the Board ever had to review the actual merits of the proposal by UATP to enter the non-air transportation credit market. Specifically, the Federal Aviation Act of 1958 permits the Board to approve agreements when they affect air transportation and when they are not adverse to the public interest or in violation of the provisions of the Act. Thus, the Board could readily have disclaimed jurisdiction over those provisions of the UATP proposal which did not relate directly to the sale of air transportation. However, within the environment in which the resolutions for expansion of UATP were submitted, it clearly appeared more appropriate for the Board not to invite any anticompetitive activities, and therefore rather than disclaiming jurisdiction over the proposed expansion, it disapproved

44. Id., at 1047-1048.

it as anticompetitive on its face, and lacking a demonstration of any serious transportation need.

In 1961, the Board issued three orders affecting directly UATP. In Order E-16517, dated March 15, 1961, the Board was confronted with an obligation to issue a final decision on an attempted boycott.

The agreement, entitled "Resolution 870 - Extension of Credit," provides that for any transportation sold on credit, except that sold under the Universal Air Travel Plan (UATP) or a member's own credit or time payment plan, no compensation of any kind shall be paid by the members to the organization providing credit and that all monies due a member of IATA from such an organization shall be paid within 30 days from the date of the sales. ^{45/}

It should be recalled that the Board initially disapproved this Resolution, but allowed a period of time for comment in order to examine the impact of its disapproval. The credit card organization urged the Board to make final its initial decision, while the air carriers requested deferral of the matter. It should have been obvious to the airlines that the Board could not possibly defer action on a matter as controversial as a total boycott of third party credit card vendors. The Board's response to the comments received can only be described as not unexpected.

Since the carriers have, in effect, combined to boycott the outside plans, the Board cannot properly defer action on the instant resolution.... To do so,

45. 33 C.A.B. 1017 (1961).

under the existing conditions, would be to leave in effect the boycott which the carriers have imposed. It would sharply limit the public's free choice of credit systems in the purchase of air transportation. The Board therefore has no alternative but to act now.

After consideration of the comments filed pursuant to Order E-15691, the Board concludes that no showing has been made that the agreement is required by a serious transportation need or in order to secure important public benefits. The Board cannot therefore grant approval to the concerted action of the carriers in restricting the public from obtaining credit by means other than UATP. Competition among outside credit plans and between all such plans and UATP appears to be in the public interest. It should be made clear that the Board is not requiring individual UATP members to recognize outside credit cards, but is simply preventing such carriers, through their concerted action, from boycotting such cards. ^{46/}

The Board's second order, in docket 11000, Order E-16518 dated March 15, 1961, involved it in another of many direct confrontations between UATP and the American Express Company. As with other orders, the Order involved an airline agreement which required Board approval to implement.

The above agreement, which became effective May 29, 1958, provides: Nothing of monetary value shall be paid or given directly or indirectly by a member to an agent ... excepting as specifically provided for under duly adopted and effective ATC resolutions. ^{47/}

46. Id., at 1018.

47. Id., at 1019.

In its initial but tentative order of disapproval the Board stated that such an agreement was merely an attempt to prevent the American Express Company from competing in the credit card market with the carriers' own credit cards and with UATP. The Board recognized this as a boycott of a competitor and an attempt to eliminate a vital competitive factor in the air transportation credit market.

The Board needed little additional consideration to review the proposed agreement.

Since the carriers have, in effect, combined to boycott Express as well as the other plans, the Board cannot properly defer action on the instant resolution /agreement/ until after its decision in docket 10917. To do so, under the existing conditions would sharply limit the public's free choice of credit systems in the purchase of air transportation. The Board therefore has no alternative but to act now.

In view of the foregoing, the Board finds that agreement C.A.B. 5044-A38, as interpreted by ATC with respect to the honoring of Express credit cards, contravenes the fundamental policies of the antitrust laws; and that there are no countervailing substantial facts which establish that the agreement, as interpreted, meets a serious transportation need or secures important public benefits which would justify approval in the face of antitrust factors. 48/

The last of the Board's 1961 orders affecting UATP related to the expanded use of Air Travel Cards - Order E-16532, dated

48. Id., at 1020.

March 20, 1961. The agreement under consideration by the Board provided for extension of credit to UATP card holders, on a personal credit basis, for sales involving hotels, motels, car rental organizations, restaurants, communication services, and nationally recognized business services for travelers. If this credit were extended by those transportation related organizations, it would be without recourse to UATP or ATC, and the carriers intended to use an advisory group to make the necessary arrangements. This system of promoting the Air Travel Card was somewhat unique because the transportation related organizations would agree to accept the Air Travel Card as a basis for the granting of credit to the Air Travel Card holder, but would then bill the card holder directly for the charges incurred without going through the Contractor or UATP. In essence, the Air Travel Card became a credit verification for these services rather than the actual vehicle for the extension of credit.

The Board initially and tentatively disapproved this proposal for the expansion of UATP because it was interrelated to the two previously described boycott attempts. However, as we noted, the Board struck down the boycott attempts, and therefore the barriers related to disapproval were removed, and the limited expansion of the Air Travel Card could be approved.

Since the Board by its aforementioned decisions has prevented the carriers from taking concerted action, it no longer appears that the instant resolution /agreement/ which standing by itself, merely makes UATP more attractive to those persons interested in utilizing such credit cards would unduly restrict competition. In this context, the Board, therefore, now concludes that the instant resolutions are not adverse to the public interest or in violation of the Act.^{49/}

In 1963 the Board issued a major order involving UATP.- Order E-19197, dated January 16, 1963.^{50/} Indeed, the proceeding encompassed all credit mechanisms for the payment of air transportation. The administrative law judge's opinion contained a summary of the credit mechanism available in 1963, and these mechanisms continue to be utilized today.

The types of credit arrangements utilized by the carriers with respect to passenger transportation can be classified for the purposes of this investigation as (1) installment-plan arrangements, (2) out-for-collection and self-ticketing arrangements, (3) on-line credit plans, (4) the Universal Air Travel Plan, and (5) noncarrier credit card plans.^{51/}

The installment-plan type of arrangement involves a down payment paid to the air carrier and extension of credit by an outside finance company of the balance due in installments over a period which may be from 3 to 24 months after sale.

49. Id., at 1021.

50. 37 C.A.B. 404 (1963).

51. Id., at 419.

Under the out-for-collection and self-ticketing plans, blank ticket stock is issued together with a validating stamp to certain customers, who fill out the tickets and submit periodic reports and payments in cash or are afforded credit under one of the credit plans.

On-line credit plans are offered by quite a few of the air carriers under which the carrier offers credit for air transportation over its own routes.

The Universal Air Travel Plan is an outgrowth of a plan first developed by American Airlines, Inc., under which scrip books were issued at a discount. An air carrier agreement on the volume-discount plan went into effect in 1936. The discount feature was dropped during World War II and the plan has during the postwar years operated as a charge-account type of credit plan.

The plan is an outgrowth of a volume-discount plan and is designed primarily to serve the large-scale users of air transportation. Its benefits to them can be summarized as (1) the ability to provide designated officers, employees, and family members with air travel cards permitting them to purchase air transportation anywhere in the world without the substantial outlay of cash that would otherwise be required; (2) the convenience of a single periodic bill for all air transportation; (3) eligibility to participate in modern programs of transmitting tickets, such as block ticketing and teletype ticketing; and (4) the availability of the air travel card as a personal credit reference honored by many establishments (without cost to the carriers).

The noncarrier credit card plans are part of general-purpose credit plans provided primarily by the American Express Company, Diners' Club, and Hilton Credit Corporation.^{52/}

52. Id., at 420-421.

The investigation was designed to examine, comprehensively, practices respecting the extension of credit in connection with passenger air transportation sales. Principally, the Board was concerned with whether the existing practices were unreasonable, unjustly discriminatory or otherwise unlawful.

As with other major investigations, an administrative law judge was assigned the task of conducting the proceeding. Thereafter, the judge issues a decision and the Board reviews it, adopts those portions it accepts, and rejects those aspects which are unacceptable. Interestingly, like a court of appeals, no additional evidence is accepted after the judge's decision is issued. The Board merely reviews the record in the proceeding and the findings of the judge. In this case the administrative law judge was Ralph L. Wiser and his findings are themselves worthy of note before considering the final position adopted by the Board.

The judge concluded that (1) UATP, carrier on-line plans, and noncarrier credit card plans operated in violation of Section 403(b) of the Federal Aviation Act of 1958 (Act, because they permitted credit to be extended at less than cost, and thus provided a rebate or discount from the established tariff fare; (2) the plans were unjustly discriminatory because they provided credit passengers a valuable service, at no charge, constituting an undue preference; (3) the out-for-collection

and self-ticketing plans were unlawful also because the delay in payment constituted an undue preference; and (4) the \$425 deposit required by UATP was unlawful unless interest were paid to customers by Contractors on their deposit.

Based upon the above, the judge concluded that (1) carriers should be required to collect charges for the extension of credit, e.g., interest; (2) carriers should have to collect the full tariff fare from outside credit card plans and thereby could not pay a discount; and (3) carriers should pay 5% interest on the \$425 UATP deposit requirement.

Not unexpectedly, the Board rejected portions of the judge's conclusion and adopted only those aspects it believed were consistent with the public interest and the economics involved in air transportation credit sales.

The judge concluded that the extension of credit without a charge violated Section 403(b) of the Act because this section provides that carriers can charge and collect only the tariff fare. They may not charge or collect a lesser or greater amount. The Board concluded that as long as the tariffs contained the credit provisions, as they did, then there was no tariff violation or break of the Act. Accordingly, if the tariff provided for free credit, that is, credit without a charge, whether in the form of interest or otherwise, then the carriers were

not violating the Act by adhering to their tariff. Additionally, the Board noted that it controls, through its suspension powers, what tariffs the carriers may implement.

The next logical although more difficult question involved the issue of whether the extension of credit without a charge involves unjust discrimination or undue preference. The underlying principle in support of the discrimination argument is that all passengers eventually pay for the free credit provided only a limited number of passengers. The Board examined the issue from the prospective of the welfare of the air carriers and the air travelers rather than following a strict construction of the Act. "And when all the relevant factors are taken into account, we are unable to find that the extension of credit under the plans at issue results in unjust discrimination or undue or unreasonable preference or prejudice."^{53/}

Among the factors the Board considered in reaching this conclusion were the following: (1) the plans conform to general business practices; (2) the free credit provision had been a long established carrier practice; (3) the promotional value of the various plans; (4) the enforcement and administration associated with requiring a credit charge; and (5) the evidence as to the cost of credit.

53. Id., at 408.

With regard to the general purpose credit card plans, the judge had concluded that these plans should have to pay the air carriers the full tariff fare. That is, the carriers could not pay credit card organizations a discount fee on air transportation sales. Not surprisingly, a number of air carriers endorsed this conclusion believing that in the absence of any legal ability to pay outside credit card plans for their services, these plans would redirect their attention to non-air transportation credit sales. The result, of course, would be the market for air transportation credit sales would be left to the air carriers exclusively.

The Board, however, did not accept this self-serving argument. "In our view, the principles as to the extension of credit by the carriers themselves, ... are applicable whether the carrier handles the credit transactions itself or employs an outside company for that purpose."^{54/} The Board noted that if the costs for carriers to operate their own plans did not unduly discriminate against non-credit passengers, then the carriers' costs associated with general purpose credit card vendors should be equally acceptable.

Additionally, the Board noted the problems incurred if passengers were limited to obtaining credit from only one source for air transportation purchases. Moreover, it recognized that the infrequent traveler could be placed at a distinct disadvantage if the general credit card

54. Id., at 412.

plans were not available and, at the same time, carriers were permitted to be the sole source for the extension of credit for air transportation sales.

The last major item addressed involved the \$425 deposit requirement of UATP. The judge found that the deposit requirement was unlawful unless interest were paid, and the Board concurred. "Since all subscribers lose an equal amount of interest on the monies tied up in their deposits, the deposit requirement under the present rules discriminates in favor of high-volume users against low-volume users."^{55/}

Although requiring interest on the deposit, the Board did not believe that a \$425 deposit requirement was unreasonable. The Board stressed that the deposit served a useful function as a partial insurance against credit losses and as a vehicle to insure that UATP's resources were only expended upon those who frequently utilize air travel.

The Board noted in concluding its review of the credit practices that certain parties had objected to the Board's assertion of jurisdiction over the subject of air transportation credit practices. The Board responded tersely to these criticisms by referring to Section 404(b) of the Act which precludes discrimination in the sale of air transportation, and Section 1002(d) of the Act which specifically grants to the Board the power over any "practice affecting such rate, fare, or charge, or the value of service thereunder."

55. Id., at 413.

While the Board made clear that it believed the Act specifically provided it jurisdiction over the credit practices of the air carriers, this issue would resurface ten years later as a major area of controversy. Indeed, we will see that it was this very issue, jurisdiction, which leads to the demise of the UATP "SilverCard." Throughout this review it may be worthwhile to recall that we are considering credit practices affecting the sale of air transportation. Just what activities fall within the parameters of this provision will have to await our review of the Board's orders in the 1970's.

A minor dispute arose in the 1963 investigation with regard to what extent credit practices would have to be identified in tariffs. The judge concluded that the details of each credit plan, including any discount paid by carriers to general credit card plans, should be incorporated in the tariffs. The Board strongly disagreed, and noted that as long as the general credit terms were contained in the tariffs in such detail as to reasonably inform the passenger, the specific terms of any credit plan need not be included in the tariffs. To require otherwise was considered of no value to the passenger and merely created an undue burden on the carriers.

Interestingly, if the Board required carriers to file tariffs containing the amount they paid general credit card plans, i.e., the discount rate, and the amounts all eventually became alike, the government

would have created the mechanism for price fixing. That is, no carrier would be likely to accept knowingly a less favorable business arrangement with the same general purpose credit card plan than that provided its competitors. Moreover, general purpose credit card plans would likely find that a uniform rate would be the only acceptable course to follow. Additionally, if the product of the discount negotiations became public knowledge, that is, the discount rate, how could general credit card plans ever compete among themselves for air carrier customers. If for no other reason, it seems clear that individual business arrangements must always remain outside the scope of tariffs if the antitrust laws are not to be violated -- intentionally or otherwise.

After the massive 1963 review of UATP, Passenger Credit Plans Investigation, 37 C.A.B. 404 (1963), the Board, by Order E-19878, dated August 5, 1963, reopened the record to permit a review of a very narrow issue only addressed generally in the earlier proceeding. "Whether there should be substituted for the uniform interest on the full \$425 deposit of each depositor prescribed under Order E-19197 a requirement that would take account of possible differences in the positions of various depositors." 56/

56. 39 C.A.B. 410 (1963).

As a consequence of the Passenger Credit Plans Investigation, supra, the UATP members were instructed to amend the agreement to provide for the payment of interest on deposits maintained for 12 months after January 1, 1963. However, it became apparent after a careful review of this requirement, and the payment period of subscribers, that "a depositor whose account would regularly show unpaid transportation charges outstanding in an amount greater than the \$425 deposit would, in effect, have no monies due from the carrier." 57/ Additionally, the effect of various large and small transactions by subscribers would mean that the loans to the carriers, the deposits, could vary between \$0 and \$425, depending upon the amount of an unpaid transaction.

It should be recalled that interest was required only to the extent of the difference between an unpaid transaction and the deposit. Where unpaid transactions exceeded deposits, the UATP members had, in essence, provided the subscriber with an interest free loan, and were not obligated to pay interest. "A precise method of recognizing the differences between depositors would be to require payment of interest on the amount by which the particular deposit should exceed average credit outstanding to the depositor." 58/

57. Id., at 411.

58. Id.

Based upon the statistics submitted by the UATP members, the Board concluded that credit is extended to subscribers for approximately 54 days, or one-seventh of a year for each sale. By subtracting this one-seventh of the subscriber's annual billings from the \$425 deposit, you obtain the amount, if any, that the subscriber has loaned the carrier. For this reason, the Board accepted as reasonable the following proposal of the UATP carriers for the payment of interest on deposits.

Each airline holding a deposit on a Universal Air Travel Card Plan account will credit to the account interest at a rate of 5 percent per annum on the amount by which \$425 (the amount of the deposit) exceeds one-seventh of the annual billings of such account. ^{59/}

From 1963 through 1968 the Air Travel Card expanded substantially in use by the public for the purchase of air transportation. What was evident in 1963 and before, began in 1968 to be of significant concern. That is -- free credit is not free to the lender, but only to the borrower. Credit extended by the airlines for periods of at least 30 days without charge to their subscribers may have a promotional value, but that value must be measured against the cost of extending such credit. Additionally, along with the growth of the Air Travel Card, the use of non-carrier credit plans required the carriers to pay substantial fees, in the form of discounts, to these credit plan operators.

59. Id., at 412.

For example, where a passenger purchased a ticket for \$1,000 from X airline using a non-carrier credit card, the credit card company would receive the full \$1,000 from the passenger, and the airline would then be paid by the credit card company \$1,000, minus the service fee or discount. If the discount rate were 3%, the airline would only receive \$970, on a sale of \$1,000, and might not be paid immediately by the credit card company. Thus, the airlines were extending credit at no charge to customers, and paying a service fee to general credit card plan operators.

By 1968, the above situation was becoming more and more acute as credit card sales grew. Not surprisingly, the airlines determined that relief from this unfavorable economic situation was needed. As a result of their recognition of this situation, certain airlines determined to ask the Board for authority to engage in joint discussions with respect to shifting the cost of credit for air passenger transportation sales to either the passenger or the credit card company and from the air carriers.

The petitioners state that the use of credit plans has increased enormously since the Board issued its decision in the Passenger Credit Plans Investigation and that the cost of 30-day credit to the carriers has become of substantial significance. They estimate that the total cost of 30-day credit used by air passengers in 1967 was over \$9,000,000, of which approximately \$8,700,000 represented the cost of non-carrier credit plans to the carrier.^{60/}

60. Order 68-8-119 (1968).

The airlines argued that the aforementioned involved an industry-wide problem which was not subject to a unilateral solution. Additionally, the airlines argued that the continuing rise of credit would have an adverse affect on the fares charged to the traveling public.

Opponents of the requested discussion authority, which included the major credit card companies, alleged that any solution to this situation would result in a boycott of non-carrier credit card plans, and that unilateral action would be more appropriate. The opponents argued that carriers set credit terms individually, and that they negotiated discounts individually. It was contended that unilateral solutions to the problem, if it was a problem, should be the only course of action condoned by the Board.

The Board correctly perceived that where competition demanded the extension of credit, only competition could control properly such credit policies. For that reason, the Board concluded that collective action with regard to the terms to be utilized for the extension of credit was inappropriate. Moreover, the Board was reluctant to sanction an activity in the area of fares which would directly involve significant antitrust concerns without a demonstration of a serious transportation need or a significant public interest benefit.

Had the carriers been permitted to have the requested discussions, it would appear that credit sales would have no longer continued to be unencumbered from credit service fees. Moreover, there clearly was a present danger of a boycott of non-carrier credit plans which the Board had previously rejected as being adverse to the public interest.

UATP began long before the airlines developed fully their relationship with travel agents. However, once that relationship was nurtured to its maturity during the late 1950's and early 1960's, it became increasingly apparent that the UATP members and their respective travel agents could not agree on one basic issue -- the commissionability of sales paid for with the Air Travel Card.

Airlines contended that sales made against the Air Travel Card did not involve any creative effort by agents, and did not require any promotional activities by travel agents. Therefore, it was considered proper not to pay agents a commission on UATP sales. Conversely, agents argued that sales against the Air Travel Card were no different than sales made against any other credit card, and therefore agents should receive a like commission on such sales. Moreover, agents argued that the form of payment could not properly be considered determinative of their creative efforts.

While millions of dollars may have been saved by the airlines not paying commissions on UATP sales, the Air Travel Card became the most despised form of payment accepted by travel agents. Indeed, acceptance of an Air Travel Card by agents for the sale of air transportation was vigorously discouraged, and use of any other commissionable form of payment was encouraged.

In 1970⁶¹, this disagreement came to the forefront with the Board's review of a number of air carrier resolutions relating to travel agents and the level of commission to be paid on air transportation sales made by such agents.

Order 70-12-165, dated December 31, 1970, discussed fully this dispute:

A consistent area of dispute between the carriers and their agents concerns the refusal of the carriers to pay commissions for point-to-point sales made to customers who participate in and utilize the carriers' collective credit plan, the Universal Air Travel Plan (UATP). ... It may be noted that in many instances a travel agent who refuses to write a ticket under the UATP because no commission will be paid to him for the sale can persuade his client to utilize one of the numerous commercial or carrier credit plans accepted by the airlines. Ironically, this involves no charge to or imposition on the traveler, although it does cost the carriers the amount which the commercial credit plan "discounts" the ticket to the carrier.^{61/}

The airlines contended that the role of the travel agent involves the promotion of air transportation and the development of new traffic.

61. Order 70-12-165, at 26-27 (1970).

In the event the agent seeks the customer who must travel, the carriers argued that the agent was exceeding the market presented to it. Agents argued that no area of the air transportation market should be excluded from their efforts to promote and sell.

The Board sided with the airlines in determining that UATP sales are unique, and therefore did not necessarily require the payment of commissions to agents.

UATP is a promotional tool used extensively by the carriers in marketing their services to their volume users, an area where the carriers, with their large sales forces, are singularly more adept than the agents. The carriers may utilize such a tool themselves so long as it does not produce a demonstrably adverse effect on the agents. While the carriers' decision not to make travel agent UATP point-to-point sales commissionable may be a dubious one in terms of their relations with their agents, it is not a determination which works a substantial hardship on the agents or the public, and overall is not adverse to the public interest or in violation of the Act. ^{62/}

While it may not be surprising to note that airlines did not want to pay commissions on UATP card sales, the business wisdom of such a decision seems questionable. As agents began to make greater inroads into the marketing of air transportation, UATP sales increasingly declined. For example, while agents made only 10% of the sales, UATP was eliminated from only 10% of the market. However, as travel agents gained marketing strength, and began to be responsible for as much as 50% of air carrier sales, UATP began to be excluded from 50% of the

62. Id., at 28.

market.

It is worthwhile to note that in 1979 UATP sales became commissionable for agents. However, by 1979, more than 50% of all air transportation sales were being made by travel agents, and UATP had long lost any chance of gaining a favorable position with the travel agent community. Indeed, agents had traditionally operated to encourage their customers not to use the Air Travel Card. By 1979, most travel agent customers were well trained, and UATP was well on the road to its demise.

Whether or not the decision not to pay commissions was the only factor to injure UATP is uncertain, however, it is certain that the failure to pay commissions on travel agent sales against a UATP card eliminated UATP from participating in an enormous sales vehicle of the carriers.

Had UATP been commissionable, as were other commercial credit cards, it may have continued its prominent place in the marketing of air transportation. As carriers continued to market their own product less vigorously than in earlier years, UATP was also promoted with less vigor. While no one knows for certain what amount of dollars was saved between 1970 and 1979, the period of travel agent growth and UATP's demise, it is clear that the amount saved cost the carriers significantly in terms of their position in the air transportation credit

card market. Indeed, there would appear to be a logical correlation between the growth of these savings and the decrease in UATP sales.

Between 1970 and 1973, a number of intrastate carriers sought permission to join UATP. Included among those carriers was Southwest Airlines Company. Pursuant to the UATP membership rules, specifically Section 17(b), each intrastate carrier which applied could be objected to by a competitor and, not surprisingly, each intrastate carrier could then individually be rejected for membership in UATP.

Section 17(b) of UATP Agreement - 1948 provided that any member could object to any other carrier becoming a participant in the Plan. However, the objection could not preclude membership of an interstate carrier. Thus Section 17(b) effectively could be used to preclude membership of any intrastate carrier in UATP. This ban on intrastate carrier participation came to the attention of the Department of Justice in 1973.

Pursuant to Rule 4(a) of the Board's Rules of Practice, the Department of Justice petitioned the Board to withdraw its approval of, or to disapprove, or to require modification of Section 17(b), the then existing membership provision for UATP. By Order 73-4-129, dated April 8, 1973, the Board deferred action on the Department's petition in order to permit the UATP members to amend voluntarily their membership provision.

Shortly thereafter, Section 17(b) was amended to permit intrastate carrier participation in UATP.

UATP has now filed with the Board this agreed-upon amendment... pursuant to Section 412(a) of the Federal Aviation Act. In response to inquiry, UATP has said that the new Article 17(b) language will permit any certificated air carrier, foreign air carrier which operates to and from points in the United States on a scheduled basis, air taxi operator which is legally permitted to operate on a scheduled basis, commuter air carrier, or intrastate air carrier which operates scheduled services between points within a state in the United States pursuant to state certification, to become a Ticketor party to the UATP Agreement notwithstanding any objection that may be raised by any party to the Agreement. Carriers which still will be barred from UATP if objection is raised are carriers authorized to perform charter services only, including supplemental air carriers and foreign charter carriers, foreign air carriers operating under temporary authority granted by the Board pursuant to Section 1108 of the Act, commercial operators not engaged in scheduled air passenger transportation, and carriers performing all cargo services. ^{63/}

As a result of this revision to the UATP, the Board dismissed the Department's petition. However, it should be noted that the issue of commissions and the matter of Contractors charging Ticketors for their services was raised in reply comments by the American Society of Travel Agents. The Board, however, rejected these issues as improper in view of the narrow nature of the Department's petition.

As UATP membership grew arithmetically in the 1960's, its inability to compete grew geometrically. While more and more

63. Order 73-7-124, at 1 (1973).

carriers began to participate in the Plan, many of the Plan's underlying precepts began to balkanize. In particular, two fundamental features of the Plan had become the foundation for its stagnation. Those features, along with a lack of demonstrated marketing achievements, began to be reflected in various member comments. This situation, along with others to be noted later, precipitated the 1973 discussions. While the discussions and actions we will describe in detail below were begun in 1973, they remain today significantly unfinished.

In the early part of 1973, Trans World Airlines, Inc., requested that the Board issue an order authorizing the UATP members to engage in discussions aimed at the establishment of a new commercial credit card program. It was anticipated that this new program would replace, in its entirety, the existing Universal Air Travel Plan agreement.

To support its application, TWA states that UATP, also sometimes referred to as the Plan, a credit program which in many respects preceded adoption of the Civil Aeronautics Act of 1938, has become obsolete; that as UATP is constituted today, certain participating carriers do not equitably share in defraying the cost of the plan thereby placing the largest financial burden upon certain "contractor" carriers; and that efforts to modernize the plan through a modest expansion of benefits and a proposal which would put the distribution of the Plan's costs among the UATP members on a more equitable footing have been defeated since any member no matter what the level of its participation in the plan, may veto final passage of an amendment to the agreement. ^{64/}

64. Order 73-8-74, at 1 (1973).

TWA argued that the present obstacles could not be overcome under the existing framework, and that a new commercial credit card program would appear to be the only means towards overcoming these obstacles. TWA contended that three areas required immediate and substantial change if the carriers were to continue to fulfill their goal with regard to serving their commercial accounts.

Principally, TWA sought to have the new plan provide for a more equitable distribution of costs for operation of the industry's commercial credit card plan, a revised voting formula for carrier members which more accurately reflected their actual participation in the plan, and third, an expansion of the plan to include non-air transportation travel-related services. Each of these areas requires further explanation before we proceed to look at that carriers' attempt to progress these matters.

First, under UATP, contractors, as distinguished from ticketors, absorb the full cost of processing interline tickets. Contractors, it should be recalled, issue Air Travel Cards, while ticketors agree to accept such cards. All contractors are also ticketors, but only about 30 ticketors are also contractors. For example, when a ticket is sold against an Air Travel Card on carrier A, a Contractor, and the ticket provides for air transportation on ticketor carriers B and C, the ticketors send their lift "coupon", or segment of the ticket of carrier A

and receive full payment for their segment of the air transportation provided. The contractor member, carrier A, receives no economic assistance for the processing of this ticket. Indeed, with over 200 ticketors and only about 30 contractors, the economic costs borne by the contractor carriers is not insignificant. Moreover, interline air transportation sales are themselves not insignificant.

This system worked well as long as contractors believed that having their names on the Air Travel Card had a marketing advantage which outweighed the costs associated with the processing of interline sales on Air Travel Cards. However, once they, the contractors, determined that their name on the Air Travel Card had less and less value, they began to want some financial assistance for processing tickets on behalf of the ticketor members.

Second, with regard to the issue of voting, this became the principal vehicle used to preclude any economic assistance to contractors. Specifically, use of a unanimous voting rule produced the effect that any ticketor could preclude change to the plan. Each time a contractor sought economic relief, at least one ticketor voted against it. Thus the system of unanimous voting had been the vehicle used to preclude any redistribution of costs, and was used to frustrate the repeated efforts of the contractors.

The third area of concern, and that which may have been most significant in terms of competition, involved TWA's belief that the new

UATP program should be expanded to include travel-related services.

United Airlines endorsed TWA's efforts but wanted to go even further.

In addition to expressing support of TWA's proposal, United requests that the permissible scope of any discussion authority granted by the Board be expanded somewhat beyond that defined by TWA, stating that an obvious corollary to a new commercial credit program would be an industry-wide personal credit card program to replace the numerous individual carrier programs now in effect.^{65/}

The Board's receptive response to the initiative of TWA and United must have seemed at that time to be indicative of more than would become evident later. The Board granted both TWA's and United's request. It noted that the existing UATP system may have become somewhat obsolete, and that there may be just cause to believe that a more equitable distribution of costs would be in the public interest. Additionally, the Board appeared not to be adverse to the argument that industry economics may justify a system of a common personal credit card program.

This Order must have given the carriers the type of false sense of security that only can be measured by the subsequent years of frustration. To take comfort in the Board's initial decision is to be lured into a belief that change would and could be made with little effort. As we will discern later, these changes have been developing for seven years with little if any success. Indeed, if time were to be used to measure

65. Id., at 2.

the level of success in accomplishing those changes, then actual failure would have to be reported with regard to the carrier efforts. Nevertheless, the carriers moved on with their discussions, having received Board approval.

On September 6, 1973, UATP filed with the Board amendments to the Agreement which were designed to permit UATP to expand, and about which the carriers requested expedited consideration from the Board.

The "Silver Card" amendments were adopted by all Parties to the Universal Air Travel Plan on September 1, 1973, to become effective upon Board approval. The principal features of these amendments are (1) to establish an additional type of UATP card - the "Silver Card" - which would enable subscriber cardholders to purchase travel-related services (hotels, motel and car rental) as well as passenger air transportation, thereby increasing the utility and growth of the plan and (2) to provide for service charges payable by vendors (airlines and others) to Contractors for sales on the "Silver Card", thereby enabling the Contractors to recapture part of their administrative costs. ^{66/}

As a consequence of the Secretary's request, the Board issued Order 73-9-81, dated September 21, 1973. The Board's Order sought comments from interested persons with regard to the "Silver Card amendments". However, the actual Silver Card amendments themselves require further explanation.

66. Letter of the Secretary, UATP, to Civil Aeronautics Board, at 1 (1973).

These amendments maintained the existing UATP mechanism, but included within that mechanism a "Vendor Program". Hotels, motels and car rental companies would be permitted to enter into "Vendor Contracts" with UATP. These Silver Card vendors could then honor Silver Card and bill contractors for the charges on such cards. Silver Card contractors would be separate from UATP contractors in that the latter did not have to be the former, while the former would always have to be a UATP contractor. The Silver Card contractors were known as Central Settlement carriers. Vendors would receive payment for the charges incurred less a discount established by the UATP Committee, which would be specified in the Vendor Contract. The vendor discount would be established by the Committee and not by individual carriers, although the carriers would determine individually whether they wanted to be Central Settlement carriers.

The operating expenses of the Vendor Program were to be paid for on a prorated basis among Contractor parties in proportion to their number of outstanding Silver Cards. The administration of the Vendor Program would be accomplished by the UATP Committee.

The Silver Card amendments also provide for a major change in the internal settlement of charges with UATP. The Plan now provides for Contractors to pay Ticketors the full amount of tickets sold on UATP cards. The Silver Card amendments provide that the Contractors pay Ticketors a discounted amount (set by the UATP Committee) from that of the total on tickets sold on Silver Cards. In an editorial note to appear in the UATP Agreement, it is

said that the discount rate has been established by the Committee at 1 percent, this amount to remain in effect until December 1975. Ticketor parties to UATP are to agree to discount their billings on Silver Card tickets by the percentage established by the UATP Committee. 67/

After discussion authority had been granted by the Board, the American Express Company requested that the Board amend its initial discussion order, Order 73-8-74, to require that a transcript of the discussions be maintained and filed with the Board. The basis for this request was that the discussions had potential anticompetitive effects. By Order 73-11-60, dated November 14, 1973, the Board ordered that a transcript of any further discussions be maintained.

While the discussions progressed during 1973, it became clear that further time would be required to complete the task. By Order 74-1-67, dated January 10, 1974, the Board extended the discussion authority for 120 days, or until April 30, 1974. The extension was requested by United Airlines, a vitally interested party at that time in adoption and implementation of the Silver Card amendments.

Before discussions had been completed, but while UATP had become the subject of discussions by numerous interested persons, the American Society of Travel Agents (ASTA) again raised the issue of the prohibition of commission payments on UATP sales.

67. Order 73-9-81, at 2 (1973).

The American Society of Travel Agents, Inc. (ASTA) has petitioned the Board to disapprove or require the modification ... of that part of the Air Traffic Conference of America (ATC) Sales Agency Agreement which proscribes the payment by carriers of commissions to travel agents for sales of point-to-point air transportation made to customers using Universal Air Travel Plan (UATP) credit cards for payment. ASTA also petitions the Board to disapprove and order the amendment of that part of the UATP Agreement which, it asserts, also prohibits the payment of commissions to travel agents for UATP sales of domestic point-to-point transportation.^{68/}

ASTA argued that the prohibition of commissions on point-to-point air transportation sales made under the UATP program constituted an unreasonable and illegal restraint of trade. Additionally, ASTA argued that the prohibition was an attempt to monopolize sales by the carriers in a substantial segment of the air travel market. It was noted that UATP sales dominate the business air travel market, and the prohibition of commissions for UATP sales was an attempt by the carriers to control, through noncompetitive means, the business air travel market, and eliminate competition from travel agents in this market. ASTA also stated that the lack of commissions was a substantial disincentive to travel agents to sell air transportation against the Air Travel Card.

The travel agents contended that agents are sometimes required to accept the UATP card and receive no remuneration for their services. In effect, they claimed that such activities were subsidizing air carriers

68. Order 74-4-30, at 1 (1974).

who competed with them in the sale of air transportation. ASTA further argued that business travelers are injured by the reluctance, justifiable or otherwise, of travel agents to serve this segment of the traveling public. Moreover, each time customers are dissuaded from using the UATP card by travel agents, and in lieu thereof use commercial credit cards, the carriers are compelled to pay an expense that would not otherwise be incurred if the customer used the Air Travel Card. The American Automobile Association vigorously supported ASTA's position and reiterated these same arguments.

ATC takes the position that the payment of travel agent commissions on domestic point-to-point UATP sales would be a more costly and inefficient method of servicing the non-discretionary travel requirements of UATP accounts than having the airlines do this themselves. It estimates that the payment of such commissions would result in additional expenses of \$20-\$25 million, which would have to be borne by the air carriers from their already inadequate earnings or by the public. ATC also argues that there is no reason for the air carriers to pay travel agents commissions on sales of this type of air transportation because travel agents do not generate or promote the non-discretionary air travel of businessmen, whose travel comprises most of the UATP domestic point-to-point sales.

ATC further contends that travel agents are not really harmed by the commission prohibition since they are neither required nor encouraged to sell domestic point-to-point air transportation on UATP cards, and they can receive commissions for the sale of such travel on many other credit cards. ATC says the air carriers should not be expected to allow travel agents to make use of the air carriers' credit in order for the agents to

serve the UATP commercial accounts which now deal directly with the carriers. Finally, ATC asserts that no evidence has been presented which would warrant a reversal of the Board's view, expressed in previous orders, that the UATP sales commission prohibition is not adverse to the public interest. ^{69/}

Against this background, the Board stated that it remained unconvinced that the air carriers' determination not to make point-to-point UATP sales commissionable creates an undue hardship on the agents or public. The Board noted that travel agents are not excluded from the business air transportation market. They can ticket point-to-point travel and receive a commission by using any form of payment other than the UATP card. Additionally, travel agents are not restricted from attempting to demonstrate to the business traveler that more is to be gained from use of the travel agent than an Air Travel Card and receive commissions when business-connected pleasure travel was involved.

Agents, of course, fully compete for travel-related services which cannot be paid for with the Air Travel Card. Indeed, the travel agent organizations were unable to demonstrate that they would be harmed since a customer's choice of payment form could be influenced directly by the agent. "Also, we have previously conditioned the ATC Sales Agency Agreement to provide that travel agents are not required to make non-commissionable UATP sales, and it has not been shown

69. Id., at 4.

that this condition is being violated." 70/

It is worthwhile to note that the Board recognized fully that the opposing views of these parties, the travel agents and the air carriers, had become the subject of ill-feelings between these groups. Indeed, the non-commissionable nature of UATP had, until 1979, been a matter of serious contention between these two groups. The nature of this contention can probably best be demonstrated by merely recalling that at each opportunity for exchange the agents pleaded with the carriers to make UATP sales commissionable, and the carriers, from a business perspective, responded by noting that from their position it could not be economically justified.

By Order 74-4-116, issued under a delegated authority April 23, 1974, discussions were authorized among the scheduled certificated air carriers concerning possible proposals to jointly eliminate the payment by air carriers of credit card discounts on non-air transportation charges (principally third party vendor tour packages). The discussion authorization was made subject to the Board's usual discussion conditions: observers to be permitted, discussions to be held in Washington, D.C., notices, agenda, and minutes to be filed with the Board and made available to interested persons, and any resulting agreements to be filed for prior Board approval. 71/

The Air Transport Association of America (ATA), the trade and service organization of the U.S. scheduled air carriers, requested

70. Id., at 6.

71. Order 74-11-126, at 1 (1974).

reconsideration of that order, and sought to have it modified by not permitting observers, except Board personnel. ATA argued that the presence of interested nonparticipants at such discussions would inhibit the ability of the participants to engage in frank discussions. ATA also argued that the interests of the nonparticipants was adequately protected by the other conditions imposed by the Board.

While the position of ATA is not without merit, the Board was troubled by permitting such discussions and simultaneously precluding from attendance those who might be most affected. It should, however, be obvious that in any meeting of one group convened for the purpose of discussing their dependence upon other groups, the presence of the other groups will have a stifling effect. However, it is also equally obvious that whenever one group seeks the permission of a government agency to meet, the agency is likely to authorize such a meeting only if it can adequately be assured that all interested persons may attend. Accordingly, the Board denied ATA's petition for reconsideration. It noted that those who could be most directly affected should not be precluded from obtaining observer status at such a meeting.

Again, to the extent any industry is dependent upon government approved meetings, that industry will invariably find the benefits of such a meeting limited by government conditions. Thus, to the extent

an industry can legally conduct meetings without government authorization, it ought to proceed accordingly. Indeed, what government grants by approving discussions, it often takes away as a consequence of the conditions it imposes upon such discussions. Such was the fate of the ATA discussions.

By the end of 1974, the UATP members had filed with the Board a revised Plan. This filing was the foundation for what would in 1976 become an entirely new UATP. Of principal concern in the 1974 filing was the establishment of a UATP Silver Card program.

The arguments in support of the Silver Card amendments are, generally, that UATP is in the public interest; that the Silver Card program is necessary in order to assure the continuance of UATP because the large Contractors might abandon UATP if they do not find a means of defraying costs, and because UATP is in a deteriorating market position; that the Ticketor discount is justified; that the arguments in opposition are outside the scope of this proceeding or are unfounded; and that the credit card companies wish, unjustifiably, to exclude UATP from the hotel, motel, and car rental credit markets. The arguments presented in opposition to Board approval of the Silver Card amendments are, generally, that these are not Section 412 agreements; that a hearing should be held before they can be approved; that they are contrary to antitrust policies and therefore are adverse to the public interest; that the information submitted with the amendments is not sufficient to justify their approval; that they would adversely affect other credit card companies and travel agents; that they are not necessary to accomplish their stated purposes; and that they would adversely affect UATP Ticketor parties.^{72/}

The filings on behalf of both the proponents and opponents of the new agreement were extensive. However, while the vast majority of

72. Order 75-8-35, at 4 (1975).

pleadings relate to the merits of the Silver Card program, they also involve a much more fundamental issue -- jurisdiction.

As any first year student of the law learns quickly, jurisdiction is required to be established before swords can be drawn. A judgment may always be attacked for lack of jurisdiction, and while jurisdiction may seem readily established in most cases, it proved to be fatal for UATP.

Principally, Section 412 of the Federal Aviation Act, the legislation giving use to the jurisdiction of the Board, permits the Board to review any agreement, or portion of an agreement, which affects air transportation. Therefore, an essential issue with regard to the Board's jurisdiction involves whether or not the agreement affects air transportation. A matter, it should be noted, which will become a major concern as the air transport industry continues down the road of deregulation. That is, to the extent that the matter of what actually affects air transportation can be more and more narrowly construed, the easier it will be for certain parties to effect the goals of deregulation.

"Section 412 does not require the filing or approval of agreements that do not 'affect air transportation', and it is said by some of the opponents of these UATP agreements that they do not affect air transportation and therefore are not within the Board's Section 412

jurisdiction." ^{73/} The Board responded to this attack on its jurisdiction by recalling that it had always considered the UATP payment system as affecting air transportation.

However, while the UATP system was considered to affect air transportation because it was a method of payment for air transportation, the Silver Card provisions involved a method of payment for non-air transportation services. Accordingly, to the extent that the Silver Card provisions related to hotel, motel and car rental services, the Board had serious reservations about its jurisdiction over such matters.

It should be recalled that one of the principal benefits of Board approval of an agreement is that with that approval exemption from the antitrust laws is automatically granted. This aspect of the Board's review has forced the Board, where appropriate, to carefully examine its assumption of jurisdiction. To this end, the Board is called upon to balance a number of factors before asserting jurisdiction over an agreement which on its face does not directly affect air transportation. "In the past, the Board has asserted jurisdiction only in circumstances where the non-air transportation activities involved had a substantial effect on air transportation rather than merely a peripheral or incidental impact." ^{74/} This test becomes difficult only when the non-air transportation matters cannot be readily separated from those

73. Id.

74. Id., at 5.

which clearly affect air transportation. However, when the non-air transportation matters can be readily distinguished from those which affect air transportation, the Board is more likely to review the former, and to disclaim jurisdiction over the non-air transportation matters.

Against this background, the Board, with little difficulty but considerable stated reluctance, disclaimed jurisdiction over the Silver Card provisions to the extent that they affected hotel, motel and car rental services. The Board noted, however, that it did not want to discourage the carriers from progressing this aspect of the agreement if it was determined to be in their best business interests. But, they would be required to do so without Board approval -- and of much more importance, without antitrust immunity. While the Board stated gratuitously that no showing of a violation of the antitrust laws had been made concerning the non-air transportation Silver Card provisions, it could not properly assert jurisdiction, and thus not grant the parties antitrust immunity.

Turning now to the Ticketor discount portion of the Silver Card amendments, the Board long ago required that the UATP members allocate the costs of operating the Plan in such a way that the portion of the costs borne by each member would bear a reasonable relation to the benefits conferred. The provision in the Silver Card amendments for a Ticketor discount meets this requirement, is not adverse to the public interest, and, in fact, appears to be necessary to the proper administration of UATP. It will be approved. ^{75/}

75. Id., at 6.

The arguments against the Ticketor discount were less intense than those with regard to the issue of jurisdiction, but they needed to be properly responded to by the Board. In essence, the opponents contended that the Ticketor discount would be an unnecessary expense to Ticketors, and could go beyond the ability of the Board to control.

The Board responded to these attacks by noting that without the discount, Ticketors received an unfair benefit. A ticketing airline derives a marketing benefit from the ability to offer another company's credit to its own customers, and like commercial credit cards, it should expect to pay a reasonable charge for that benefit. The Ticketor discount merely required Ticketors to pay the same type of charge to contractors that they were already paying commercial credit card companies. Additionally, to the extent that the rate charged for the Ticketor discount needed unanimous approval of all Ticketors, adequate protection from an excessive charge was evident.

One concern which had little interest to the Board involved the matter of price fixing. The Ticketor discount established a single price for the same service to all Ticketors regardless of their size, or ability to otherwise negotiate. The Board noted that while certain antitrust concerns were possible, the public interest benefits in permitting the Plan to respond fairly to the needs of its members outweighed the "technical" antitrust violations for which immunity would be granted.

Interestingly, with the exception of the Silver Card provisions relating to non-air transportation services, the carriers had been favorably treated by the Board. Unfortunately, what had on its face appeared to be a victory, was, in reality, a staggering defeat.

The UATP carriers had lost the ability to expand the Air Travel Card, and with it the ability to successfully compete in the marketplace. Additionally, lacking antitrust immunity, UATP was unable or unwilling to venture into a new area of marketing. Thus, the 1975 Order of the Board, while initially hailed as a victory for the airlines, proved to give rise to insurmountable obstacles. Indeed, with the abandonment of the Silver Card provisions for non-air transportation services came the inability to implement the Ticketor discount provisions. Indeed, by 1976 UATP had begun to struggle for its very survival and its opponents, recognizing fully its weaknesses, began to expand more and more into areas previously of little interest to them.

UATP worked during the period of August 1975 through 1976 to attempt to salvage the damage of the Board's order. That effort was fruitless. By the end of 1976, it became evident to UATP that lacking a new effort it would soon fade in its entirety from the marketplace.

CHAPTER FIVE

THE CURRENT REVIEW OF THE UNIVERSAL AIR TRAVEL PLAN

As we noted in Chapter IV of this paper, the 1975 effort of the UATP members produced an empty victory. Against this agony of

frustration, UATP attempted once again, and possibly for the last time, to revitalize itself. In order to understand fully the workings of an industry operated in a regulated environment, and particularly its affect on the Air Travel Card, we will review those recent efforts of UATP.

In February 1977, UATP filed with the Board an "Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976" hereinafter referred to as Application. The Application placed before the Board a revised UATP system, styled as the Universal Air Travel Plan Agreement - 1976 hereinafter referred to as Agreement. The Agreement differs from the earlier UATP system, Universal Air Travel Plan Agreement - 1948, in four areas - three of which are critical.

The Agreement revised the UATP system by eliminating the unanimity rule (Section 3(d) of Agreement - 1948), establishing a 1% discount proviso between Ticketors and Contractors applicable to the sale of air transportation on all Air Travel Cards (Section 8 of Agreement); establishing a "Silver Card Vendor Program" (Section 23 of Agreement); and revising the number of signatures required on the Agreement before it could be filed with the Board.

The first change revised the procedures for adopting amendments to the Agreement. UATP Agreement - 1948 required a unanimous

recommendation by the UATP Committee as well as unanimous support by all members before a change could be effected. The revised voting formula maintained the unanimity rule for the Committee's recommendation, but introduced a limit on the individual members' control. Unanimous recommendations of the Committee were to be adopted unless 10% of the parties, representing 10% of the outstanding subscriber contracts, objected. Thus, a single member could no longer halt the desires of the remaining 200 members.

The second major change involved the establishment of a 1% Ticketor discount on all Air Travel Cards. This long sought after change reflected the members' concern that "when a card issuing carrier's card is accepted by a ticketing airline for purchase of air transportation the ticketor is reimbursed for the sale at face value. The card issuing carrier must then absorb the cost of billing and collecting the sale. Non-contractor carriers do not absorb any of these costs."^{76/}

The proposed discount would require all UATP members to share in the administrative costs of the Plan on a more equitable basis. The discount would provide financial assistance to Contractors who, heretofore, were required to absorb a disproportionate share of the administrative costs associated with Air Travel Card sales. The Board had previously approved the discount in its earlier decision on UATP, Order 75-8-35, supra, but for the reasons already discussed, the

76. Order 73-8-74, at 1, note 3 (1973).

carriers had been unable to implement this aspect of the earlier order.

The third area of change related to the establishment of the Silver Card Vendor Program. This Silver Card program differed from the earlier proposal in that it provided that each "Central Settlement Carrier" would individually be responsible for developing its own "vendor contracts." UATP, as an entity, would be limited to establishing only the general rules on regulations associated with the new Silver Card program.

It may be easiest to perceive the differences between the two Silver Card proposals by noting the stated aspect of the initial proposal which was rejected.

In light of the foregoing considerations, the Board has decided to disclaim jurisdiction over the Silver Card amendments to the extent that they would permit UATP to sign contracts with hotels, motels and rental car companies which would permit UATP Silver Card holders to bill charges at such establishments to their UATP accounts, and to reject the request of the opponents to the extent that they want the Board to disapprove the proposal because of added competition or alleged abuses which may run afoul of the antitrust laws. 77/

The new Silver Card proposal removed UATP from negotiating with vendors, and placed that responsibility on individual carriers. Clearly, the new proposal was an attempt to respond to the perceived concerns of the Board about the potential undue power of an entity representing over 200 airlines negotiating, on behalf of all its members,

77. Order 75-8-35, at 6 (1975).

with a single vendor.

The last change made permitted the agreement to be filed with less than full participation by all the signatories to UATP Agreement - 1948. This proposed change appears to have been intended to reflect the reservations of certain UATP members with regard to the amended voting formula and revised cost sharing proposal.

Simultaneous with the filing of the new agreement - UATP Agreement - 1976 - the signatories to the revised agreement filed with the Board an "Application of the Universal Air Travel Plan for Authority to Discuss Paragraphs 3(d) and 8(b) of the Universal Air Travel Plan Agreement - 1976".

This Application for discussion authority reflects the difficulties associated with operating a joint venture. Each individual party must be satisfied that the particular activities of the joint venture are both in the interest of the entity and in the joint venturers' own interest.

This situation was summarized in diplomatic terms in the request for discussion authority.

While over half of the Parties to UATP Agreement - 1948 have executed UATP Agreement - 1976, over 90 parties have not done so. Some of the latter airlines have advised the UATP Secretary that, although they generally support UATP Agreement - 1976, they have certain reservations with regard to the voting formula contained in Paragraph 3(d) and/or the requirement to discount airline billings contained in Paragraph 8(b) thereof. Some of these carriers have requested the UATP Secretary to

provide a forum for discussion of those two provisions and the Proponent of UATP Agreement- 1976 supports their request. ^{78/}

On February 24, 1977, The American Express Company (AMEXCO) filed comments with the Board in opposition to the requested discussion authority. AMEXCO put forth three principal arguments against granting discussion authority. First, AMEXCO argued that approval of the discussions would be construed as approval of any agreement developed from the discussions. Second, AMEXCO charged that the carriers in favor of the existing UATP Agreement would be coerced by those who wanted the new agreement. Third, AMEXCO stated that UATP had requested discussion authority, but had not provided adequate protection for interested third parties. UATP responded to these concerns on March 2, 1977.

UATP argues that approval of the discussions could not properly be construed as approval of any agreement which might be a product of the discussions. The two matters were totally distinct according to UATP. Second, UATP contended that it would be virtually impossible for two equal groups of air carriers to engage in coercive activity. With more than 50 carriers on each side of the discussions, coercion would simply not be possible. Third, UATP argued that adequate

78. "Application of the Universal Air Travel Plan for Authority to Discuss Paragraphs 3(d) and 8(b) of Universal Air Travel Plan Agreement - 1976", at 2-3 (1977).

safeguards for third parties existed since the minutes of the discussions would be filed with the Board and would be served on interested third parties.

In Order 77-4-72, dated April 15, 1977, the Board approved the requested discussion authority, but conditioned its approval upon the carriers' adherence to the discussion safeguards generally recommended by AMEXCO. Additionally, the Board made clear in that Order that it was only approving the discussion, and that such approval in no manner should be considered as an endorsement of any agreement coming forth from the discussions. Subsequently, the discussions occurred in May 1977, with AMEXCO, and other third parties, present.

Paragraph 3(d) of the Agreement originally provided for adoption of a unanimous Committee decision unless the UATP Secretary received notice from at least 10% of the parties to the agreement, representing at least 10% of the outstanding subscriber contracts, objecting to the recommended change. Initially, Paragraph 8(b), like 3(d), was the subject of considerable discussion. Paragraph 8(b) provided that all parties honoring tickets which were paid for with an Air Travel Card agree to discount their billings in the interline settlement of such tickets by 1%. That is, when an American Airlines' Air Travel Card is used to purchase air transportation on Eastern Airlines, the latter sends the flight coupon to American for payment. American then pays Eastern the face value of the ticket, less 1%, and then bills the subscriber for

the full fare. Thus, American receives a 1% service fee for processing the transaction which involved transportation on Eastern, and revenue earned by Eastern against American Airlines' Air Travel Card.

While the minutes of the May 17, 1977, UATP meeting are fourteen pages in length, and reflect considerable discussion by all UATP parties, in the presence of representatives of non-airline credit card vendors, the outcome of the meeting demonstrates that reason and compromise eventually prevailed. ^{79/}

The minutes reflect that the UATP members desired a more equitable voting formula than that provided in Paragraph 3(d) - the 10% objection formula. The compromise eventually agreed upon was a 7.5% objection formula. This provided that fewer UATP members could present a change, but that a single member alone could not preclude the remaining members from adopting a revision.

With regard to Paragraph 8(b), the discount provision, discussions focused on the desire of some carriers not to use a discount under any circumstances and regardless of the percentage. As a consequence, the parties agreed to permit the discount of 1% to continue; but, bilateral agreements between parties could be used for a waiver.

79. Minutes of Discussions of Paragraph 3(d) and 8(b) of Universal Air Travel Plan Agreement - 1976, May 17, 1977 - Washington, D. C., filed with the Civil Aeronautics Board in the Application for Prior Board Approval of Amendments to Universal Air Travel Plan Agreement - 1976 (July 15, 1977).

Thus, if American and Eastern agreed, no discount would be used. However, lacking agreement the 1% discount fee would be operable. Supporters of the 1% discount fee prevailed to the extent that it would be required unless both affected parties agreed to waive the discount. Had the 1% been made optional only upon bilateral agreement, then, of course, those who opposed the discount fee would have prevailed in the entirety. This compromise was described by UATP as a significant indication that the Committee structure, and the joint venture, could operate in a responsive fashion to the needs of all the members. Both of these revisions enabled a greater number of signatories to UATP Agreement - 1948 to also execute UATP Agreement - 1976. As a consequence of this accomplishment, a number of parties filed comments with the Board both supporting and attacking UATP, and these comments, while addressing UATP in particular, can be considered to reflect the views of opponents and supporters of any airline joint venture.

After UATP filed the amendments to the new Agreement, the Board had before it for review a revised credit payment system which the airlines alleged merely made participation in the Plan more equitable for the carriers, and would enable the UATP members to better serve the public. However, a number of parties held somewhat differing views on the benefits of the new Plan - UATP Agreement - 1976.

On August 5, 1977, the American Express Company filed with the Board the "Answer of American Express Company in Opposition to Application of the Universal Air Travel Plan for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976", hereinafter referred to as "AMEXCO Answer⁸⁰". In the AMEXCO Answer it stated the reasons for its interest, and the reasons other commercial credit card companies were vitally concerned with this proceeding.

As the issuer of the American Express Card, AMEXCO has a direct and substantial interest in the proposed agreement. Of course, AMEXCO has an interest in ensuring that the substance and procedures of any airline credit card plan do not afford the carriers an unfair competitive advantage, that the plan allows AMEXCO to compete and that the plan does not otherwise promote practices and conditions in the credit card field that do not serve the public interest. But in this case UATPA - 1976 poses a special threat. With this program the carriers seek to engage in the general purpose credit business. Under these circumstances AMEXCO must ensure that carrier competitors operate by the same rules as other competitors, that the new UATPA - 1976 in its entirety is tested by the same antitrust standards that govern AMEXCO and others, and that in any event, the regulatory criteria that the carriers are obligated to follow. For these reasons, AMEXCO attended the authorized discussions on May 17, 1977, and is filing this Answer. ⁸⁰/

Prescinding from its interest in the proceeding, AMEXCO directed its comments to the new or revised UATP system. It began by pointing out that the Silver Card program was an attempt by the airlines to enter

80. "Answer of American Express Company in Opposition to Application of the Universal Air Travel Plan for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976", at 3-4 (1977).

into the general purpose credit card business and to merely ignore the differences in markets between air transportation alone, and air transportation and extended services.

AMEXCO pointed out that the Board had not fully reviewed UATP in over 30 years, and that air travel has changed considerably since it was first reviewed. Indeed, UATP began as the only credit card available for air transportation. By 1977 over 17,000 banks issued more than 75 million bank credit cards, and over 11 million travel and entertainment cards were issued, and all of these cards, without exception, could be used for the purchase of air transportation. ^{81/}

AMEXCO also argued that the commercial air transport industry had also dramatically changed in 30 years, and that the Board clearly needed a hearing if it were going to properly review this new system. Along with these sweeping generalizations, AMEXCO made four specific arguments against approval of UATP Agreement - 1976.

First, AMEXCO contended that the Agreement sets a standard and uniform price for discounts, and requires all subscribers, those who are provided with the Air Travel Card, to execute an identical contract with uniform credit terms and conditions. Next, the interrelationship between the airlines and hotels, and the Silver Card program could provide the UATP member carriers with an unfair advantage in negotiating

81. Bishopru, Visa, Interbank Balances Increased 21.5% in 1st Qtr. from '76; Cards in Use Jump, American Banker, at 2 (July 8, 1977).

acceptance of the Silver Card with various non-air transport entities. Third, UATP Agreement - 1976 did not permit one carrier to issue a card to a subscriber who was in default to another carrier. And, fourth, the joint venture was described as nothing less than an attempt by UATP to regain a position in the market which had been lost on competitive grounds. The last argument, of course, was not totally without merit.

With these four specific arguments as a background, AMEXCO went on to note that UATP could not establish that it was not adverse to the public interest. That is, with the absence of UATP, more individual carriers would issue their own credit cards and the public would have a wider variety of available credit services. Moreover, because of the alleged antitrust concerns, UATP also would have to meet a Board-created standard. That is, in 1952 the Board stated its standard for determining whether agreements which had substantial antitrust concerns should be approved. In such cases, the Board can approve such an agreement only where it finds that "there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits." ^{82/}

It was further argued that previous Board decisions could not be considered dispositive of the issues in the existing case because both

82. Local Cartage Agreement, 15 C.A.B. 850, 853 (1952). See IATA Credit Agreements, 30 C.A.B. 1553, 1555 (1960); and United States v. C.A.B., 511 F. 2d 1315, 1320 (D.C. Cir. 1975).

times and facts had been so greatly changed. Interestingly, AMEXCO also attacked the voting formula by alleging that unanimity as a voting procedure had on more than one occasion been strongly endorsed by the Board.

In addition to promoting workable compromise, unanimity is valuable in that it is more likely to protect a member against forced participation in onerous industry-wide agreements than any other proposed voting system. Indeed, reduced to its essentials, unanimity means that no carrier may be bound by a collective agreement unless it agrees with its provisions or at least does not find them objectionable. Consequently, unanimity provides a procedural safeguard against undue group encroachment on individual carrier initiatives and business judgments. On the other hand, it is clear that under other proposed voting plans, which would permit binding Conference action with less than unanimous approval, individual airlines may be subjected to the will of the group regardless of their objections and problems with the agreement. ^{83/}

While most of AMEXCO's objections seemed to be of secondary importance to the Board's review, their principal argument about the Agreement offending antitrust policies must be perceived as the one most dangerous to UATP. In essence, AMEXCO contended that notwithstanding the merits of the Agreement, the Board was obligated to look closely at its anticompetitive aspects.

First, AMEXCO argued that several aspects of UATP - 1976 contain arrangements among otherwise independent suppliers of air travel credit services to fix prices or to fix the terms and conditions by which the carriers deal with purchasers of credit card services.

83. Investigation of the Bylaws of the Air Traffic Conference of America, Order 75-6-49, at 13 (June 10, 1975).

Included in this argument is the power of the UATP to direct carriers' credit activities, the limitations the Agreement itself places on the services cardholders can receive, and the uniform nature of a standard discount charge.

AMEXCO goes on to note that the prohibition on dealing with a defaulted subscriber constitutes a concerted refusal to deal activity prohibited by the antitrust laws.^{84/} Additionally, AMEXCO attacks the alleged self-imposed restriction among the carriers not to seek to obtain another carrier's subscriber, but only to pursue new subscribers.

Utilizing its basic antitrust arguments, AMEXCO moves on to question not only the alleged anticompetitive aspects of the Silver Card Program, but also the Board's jurisdiction over the program. AMEXCO notes, as this paper does in its prior chapter, that the Board disclaimed jurisdiction over the original Silver Card proposal because it went beyond the area of air transportation. However, it is argued that merely by changing the character of those who will negotiate with hotels and motels does not change the underlying deficiency in the proposal. That is, the proposal goes beyond matters which affect air transportation, and it matters little as to how the airlines intend to reach this market. What AMEXCO argues is that while the goal may be permitted, in the abstract, the Board does not have jurisdiction over the nature of their transactions, and therefore cannot approve them.

84. See, e.g., Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959).

Following AMEXCO's arguments were the Comments of Carte Blanche Corporation, filed with the Board on August 5, 1977. Unlike AMEXCO, Carte Blanche elects to avoid sweeping attacks and focuses directly on provisions of UATP Agreement - 1976 which it argues are significantly anticompetitive.

Carte Blanche argues that the Silver Card provision of UATP Agreement - 1976 should not be approved by the Board because the provisions did not relate to matters which "affected air transportation", as required by Section 412 of the Federal Aviation Act. Additionally, it noted that the Silver Card provisions were in direct conflict with anti-trust policies.

It also argued that the basic Agreement should not be approved because it also had provisions in conflict with established antitrust policies and that no service transportation need could be shown for the Air Travel Card. Finally, it contended that even if the Board elected to approve UATP Agreement - 1976, it should prohibit the use of the standard subscriber contract and the settlement procedures for the Silver Card provisions.

With regard to the issue of jurisdiction, Carte Blanche stated the following:

The jurisdiction of the Board to approve or disapprove air carrier agreements under Section 412 of the Federal Aviation Act is limited in these specific manners: the agreement filed for Board consideration must be between an air carrier and another carrier; the agreement must be

one "affecting air transportation"; and the agreement must have been "entered into for at least one, if not all, of the specific purposes enumerated in Section 412". Pan American-Matson-Inter-Island Contract, 3 C.A.B. 540, 545 (1942); see 49 U.S.C. Sec. 1382 (a). The purpose of these limitations on the Board's jurisdiction is to ensure that Board approval of carrier agreements - which has the effect of immunizing the agreements from the operation of the antitrust laws - is limited to those situations where the agreements involved are vitally connected with, and made necessary by, the nation's air transportation policy. 85/

From this stated position, Carte Blanche argued that the basic agreement fulfills the jurisdictional criteria. However, measured against this same criteria, it contended that the Silver Card provisions clearly were outside the Board's jurisdiction. Principally, it was argued that the Silver Card provisions do not affect air transportation, and that the Board's earlier disclaimer of jurisdiction was not premised upon who negotiated with the non-air transportation vendors, but was based upon the nature of these vendors.

Like AMEXCO, Carte Blanche argued that even if the Board decided to assert jurisdiction, the provisions should not be approved. Relying upon the Local Cartage Agreement Case, 15 C.A.B. 850 (1952), supra, Carte Blanche contended that there were elements of the Silver Card provisions which were clearly repugnant to established antitrust policies, and no showing could be made for a serious transportation need.

85. Comments of Carte Blanche Corporation, 15-16 (August 5, 1977).

Prescinding from the jurisdictional question, Carte Blanche noted that in 1936, when UATP began, it had a virtual monopoly in the air transportation credit market and that no evidence had been offered to demonstrate that this monopoly did not continue in 1977. This argument, while later to be proven erroneous, was on its face persuasive to the Board. That is, the initial pleadings of all parties lacked one essential element for the construction of a proper and sound order -- statistics.

Carte Blanche noted that UATP's efforts to expand were merely the efforts of a monopolist to broaden its market share. It then noted that the joint venture had used and continued to use methods generally prohibited by the antitrust laws. In particular, it was concerned with the standard subscriber contract, the alleged "boycott" of delinquent subscribers, and the fact that the right to participate in UATP was not totally free from membership restrictions. However, of greatest concern to Carte Blanche was the standard discount of 1%, which it charged not only involved price fixing, but also was designed to unfairly compete with other credit card organizations. In essence, it contended that the 1% discount was a charge which was below market cost, and designed not to recover costs but to provide an undue advantage to UATP members who would otherwise have to fairly compete in the marketplace with regard to credit card discounts.

While the travel and entertainment credit card issuers were opposed to UATP, the bank credit card issuers also were disturbed by

UATP Agreement - 1976. Indeed, on August 1, 1977, the Board received the "Statement of Visa, U.S.A., Inc. In Opposition to Approval of the Universal Air Travel Plan Agreement - 1976".

Visa explained its participation in the proceeding by establishing its concern with the Silver Card provisions.

Visa's members consist of approximately 8,500 financial institutions in the United States which engage in the bank card business and compete in the provision of bank card services by issuing cards and contracting with merchants to honor such cards. The Visa card program within the United States currently serves over 34 million cardholders and approximately one million merchants with more than 1.4 million merchant outlets including stores, restaurants, hotels, motels, automobile leasing companies, service stations, airlines, medical facilities and other consumer facilities. A significant portion of the revenues of the program is derived from the sale of air transportation and other travel-related services. Consequently, this organization is vitally interested in those provisions of the Universal Air Travel Plan Agreement - 1976 relating to the establishment of a Silver Card Vendor Program to the extent that they will establish a credit card program with great potential for anticompetitive impact on the bank card industry.^{86/}

Visa argued against approval of UATP Agreement - 1976 for four separate reasons. The Board lacked jurisdiction over the "Silver Card Vendor Program", the Silver Card Vendor Program would have serious anticompetitive effects on other card issuers, the ramifications of approval would be grave with regard to continuing Board administration, and approval of the Silver Card Vendor Program was not warranted in

86. Statement of Visa, U.S.A., Inc., in Opposition to Approval of the Universal Air Travel Plan Agreement - 1976, at 3 (August 1, 1977).

the absence of a full evidentiary hearing.

Visa argued that the Silver Card Vendor Program described in UATP Agreement - 1976 could not be significantly distinguished from the similarly styled proposal previously reviewed by the Board. That is, while individual Contractors would be negotiating with non-transportation vendors, as contrasted to UATP, the entity negotiating with those vendors, this was not a sufficient change in the purpose or intent of the Silver Card Vendor Program to justify the Board's assertion of jurisdiction. In particular, to the extent that the Board may have been requested to assert jurisdiction over non-transportation matters which did not significantly affect air transportation, it simply could not do so because of the statutory limitations contained in Section 412.

Visa was also concerned with the anticompetitive effects on other card issuers because of the Board's possible grant of antitrust immunity to UATP. That is, to the extent that the activities of the joint venture received antitrust immunity, and thus could engage in activities not permissible by other card issuers, the joint venture clearly would be provided with an unfair competitive advantage granted by government action. With regard to the ramifications of Board approval, it was noted that the Board would have to develop a sufficient degree of expertise in a non-transportation area in order to properly regulate the anticipated activities of UATP. Such an expertise would be costly for the Board, and was clearly not anticipated in its legislative mandate.

In addition to the substantive arguments offered by Visa, it also contended that UATP Agreement - 1976 could not be reviewed properly without a full evidentiary hearing. Visa noted that the record was distinctly devoid of statistics with regard to the size of card issuers, and with regard to the share of market maintained by competitors in the air transportation credit area. It was pointed out that the Board review of UATP Agreement - 1976 involved a massive investigation, and that legal arguments alone were not sufficient to establish a proper record for Board review. This argument, unlike those which were directed at the lack of merits of the joint venture, clearly must have raised serious questions for the Board. Similar to courts of law, administrative agencies do not like to be reversed and remanded because they did not have a proper basis upon which to issue an opinion, and thus failed to obtain all the necessary information required for a sound decision.

Following behind Visa, Master Charge also was disturbed by UATP Agreement - 1976. Thus, on August 4, 1977, the Board had filed with it the "Statement of Interbank Card Association in Opposition to Approval of the Universal Air Travel Plan Agreement - 1976". While many of the arguments raised by Visa were also discussed by Interbank, the two card issuers did have somewhat distinguishable remarks about their concerns, and Interbank explained its interest as follows:

The Interbank Card Association ("Interbank") is a not-for-profit membership corporation composed of the over 8,500 financial institutions participating in the Master Charge card system. Simply stated, the Master Charge system enables a cardholder, who has been issued a Master Charge card by an Interbank member to use his card at merchant establishments which have entered agreements, for this purpose, with Interbank members. A merchant may or may not have a contract with the bank that the cardholder has contracted with. Each member is free to decide whether or not to engage a merchant to participate in the Interbank system and to determine the terms and conditions of those merchant agreements. Similarly, each card-issuing member determines the nature of the credit relationship to be established between it and the cardholder. In most market areas, Interbank members compete among themselves as well as against other credit card systems; and the competition is keen. Interbank establishes rules of procedure for its members but those rules are kept to an absolute minimum and are addressed to those aspects of the program which are deemed to be essential and necessary to maintain an efficient national and international interchange of information among the various Master Charge program participants. ^{87/}

Interbank opposed UATP Agreement - 1976 on three separate fronts - the lack of jurisdiction, anticompetitive considerations, and the lack of public interest. With regard to jurisdiction, or the lack thereof, Interbank stated that the issue of jurisdiction was not discretionary but statutory, and even if the Board wanted to assert jurisdiction over the Silver Card provisions, it could not do so because it lacked the statutory authority to so act.

87. 'Statement of Interbank Card Association in Opposition to Approval of the Universal Air Travel Plan Agreement - 1976', 1-2 (August 4, 1977).

The issue of anticompetitive considerations is approached by Interbank from a somewhat different prospective than that of the previously described UATP opponents. Because much of that which on its face appears anticompetitive is also followed by Interbank, it could not readily attack directly these so-called anticompetitive features of UATP Agreement - 1976. Rather, Interbank argued that the joint venture, if approved by the Board, would have antitrust immunity, and therefore would not be burdened with the risks customarily associated with like activities. Accordingly, Interbank argued that antitrust immunity itself was an anticompetitive benefit which should not be granted to the signatories.

Clearly, if this program is a viable and lawful one under general legal standards it would not need the automatic immunity of CAB approval and, thus, the Silver Card Vendor Program would have been commenced in 1975 and should not be contingent on CAB jurisdiction, as it seems to be.... The fierce competitive environment in which credit card issuers now operate demand /sic/ that one credit card issuer should not be given preferential protections over another. To do otherwise would upset the delicate posture of the existing competing interests which have served the consuming public so well in such a short span of time, and would grant to the Vendor Program an almost automatic superiority and relegate other companies to a position of inferiority in the industry. ^{88/}

The argument of anticompetitive advantage through government intervention on behalf of one party could certainly not go unheeded by the Board. When government action will alter the natural market

88. Id., at 5-6.

environment, such action is likely to be carefully considered, and not undertaken lightly. Certainly, in the area of credit, with billions of dollars involved, the Board was confronted with a matter of the gravest concern to the airlines and to their competitors in the area of air transportation credit.

Interbank's third concern involved the lack of any identified public interest benefits: Putting aside the dispute between commercial competitors, it was argued that no public or consumer interest was to be served by Board approval of UATP Agreement - 1976. Moreover, the public was being adequately served by the existing credit card vendors, and no showing had been made that the public preferred the Air Travel Card to any other source of available credit, or that the entry of another credit alternative was required by the public, or would enhance competition in the air transportation credit market.

On August 19, 1977, the Department of Justice submitted to the Board "Comments of the United States Department of Justice" on UATP Agreement - 1976. The Department of Justice ("Justice") noted that it was "the executive agency charged with responsibility for enforcing the antitrust laws and representing the public interest in allowing competitive forces full play throughout the economy."^{89/}

89. "Comments of the United States Department of Justice", at 1 (August 19, 1977).

Justice argued that the Board should reaffirm its earlier decision and decline to assert jurisdiction of the Silver Card provisions of UATP Agreement - 1976. It was noted that Justice viewed the Board's decision not to assert jurisdiction as in no way detracting from the commercial merits of the Silver Card program. Rather, Justice opined that the Silver Card program should compete with other commercial credit card programs unaided by antitrust immunity. That is, since antitrust immunity was not available to other commercial credit card programs, it should not be available to UATP.

In support of its argument for the Board to disclaim jurisdiction, Justice focused both on the Board's statutory limitations and on the anti-trust immunity which would flow from approval of the Silver Card program.

Even if the Board could somehow shed its duty to regulate airline-vendor relations after approving this proposal, policing the remaining aspects of the credit card plan and the relations between airlines in implementing it would require that the Board develop an expertise alien to its jurisdiction. Until now the UATP has been a not-for-profit venture to facilitate the airlines' extension of their own credit to purchase their own services. The principle guiding the determination of inter-airline payments was relatively simple: the costs of operating the plan should be borne in proportion to the benefits received. The proposed program on the other hand, would operate in markets not directly related to air travel, would furnish profits to airlines that contract with outside vendors, and would be capable of blossoming into a general purpose credit card. In such a setting the antitrust ramifications of the inter-airline arrangements proposed by the plan may make a simple rule of cost benefit proportionality inappropriate. At the very least, the Board would have to carefully

examine the economics of the credit card industry, an extremely complex area which the Antitrust Division is currently investigating. ^{90/}

Six members of UATP, all signatories to UATP Agreement - 1976, submitted comments in support of the Agreement. On July 25, 1977, there was filed with the Board the "Answer of American Airlines, Inc. in Support of Application for Prior Board Approval of Amendments to Universal Air Travel Plan Agreement - 1976."

American argued that the 1% Ticketor discount had been approved by the Board in 1975 for charges incurred on the Silver Card only, and that the same rationale relied upon by the Board for that approval also applied to extending the Ticketor discount to all Air Travel Card sales. American noted that because the Board had disclaimed jurisdiction over the initial Silver Card Program, the carriers never implemented the Silver Card Program and that therefore Contractors had never been afforded the benefits of the Ticketor discount.

American went on to state that "One of the defects corrected by UATP Agreement- 1976⁷ is the requirement for unanimous approval of amendments, an absurd anachronism in view of the number of parties and the nature of some Ticketors which have recently been allowed to join the Agreement." ^{91/} Additionally, American described the amendments as minor in nature, and not ones that should be properly considered as adverse to the public interest.

90. Id., at 6.

91. "Answer of American Airlines, Inc., in Support of Application for Prior Board Approval of Amendments to Universal Air Travel Plan Agreement - 1976", at 2-3 (July 25, 1977).

It was argued that the Board should approve UATP Agreement - 1976 in its entirety and not disclaim jurisdiction over any part of the Agreement. American noted that the Silver Card Program only would be subject to limited antitrust immunity. That is, "the Central Settlement Carrier /the carrier negotiating with vendors and executing vendor contracts/ would not have immunity regarding its dealings with Vendors or with other members of the UATP with respect to rates to be charged Vendors or competition between carriers to secure Vendor agreements."^{92/} Thus, it was contended that antitrust immunity would only be granted to the limited extent necessary for functioning of the air transportation-related matters.

The last major argument put forth by American involved a somewhat unique argument not previously addressed. American believed that Board approval of UATP Agreement - 1976 should also carry with it the Board's withdrawal of its approval of UATP Agreement - 1948. It was opined that the two Plans could not operate simultaneously, and that the new Agreement better reflected the needs of the air carriers and the public alike. It would appear that at least one carrier was of the view that to permit both Plans to go forward together would result in neither being able to fully respond to the public's needs. That is, the presence of two universal plans, with divergent members, would

92. Id., at 4-5.

result in neither Agreement actually having the type and number of members necessary to fulfill the universal nature of the system.

Indeed, while this argument may have substantial merit, it also would result in carriers otherwise disposed being forced to participate in the larger Plan - UATP Agreement - 1976.

On August 5, 1977, there was filed with the Board the "Comments of Continental Airlines in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976." Continental's comments focused on its belief that UATP is a credit vehicle which is sorely needed in the marketplace and that it was the potential cost associated with the inevitable antitrust allegations and litigation which precluded implementation of the Silver Card Vendor Program.

Continental, like American, argues that the new UATP Silver Card Program responds fully to the concerns addressed previously by the Board in its determination not to assert jurisdiction. Moreover, Continental describes the difficulty associated with the unanimous voting procedure in very practical terms. "In Lewis Carroll's Through the Looking Glass II, the Queen tells Alice, 'Now, here, you see, it takes all the running you can do to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that.' "^{93/}

93. "Comments of Continental Airlines in Support of the Application for Prior Board Approval of the Agreement - Universal Air Travel Plan Agreement - 1976", at 3 (August 5, 1977).

As Continental described the unanimous voting procedure, UATP had to operate with optimum efficiency merely to stay in the same place, and the unanimous voting procedure did not permit it to run twice as fast as it could. In essence, Continental's Comments are a plea to set UATP free from further antitrust allegations, and let it enter the marketplace through the means which will permit it to compete - Board approval.

On August 5, 1977, there was also filed with the Board the "Comments of Lufthansa German Airlines in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976." Lufthansa's Comments were generally in line with those of Continental. However, it was noted that "Lufthansa is a participant in the European air carrier community and is convinced that the European business traveler will particularly benefit from the UATP 'Silver Card'." ^{94/}

Additionally, Lufthansa focused on the global nature of UATP as a justification for Board approval of the Agreement. Lufthansa, like the others who filed comments, criticized the unanimous voting procedure as a stagnant system which did not permit worldwide cooperation between and among carriers. It was also noted that with the optional

94. "Comments of Lufthansa German Airlines in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976", at 2 (August 5, 1977).

system of recovery of the discount that members who did not wish to participate in the sharing of costs could mutually agree not to do so. Like Lufthansa, Swissair also filed with the Board on August 5, 1977, the "Comments of Swiss Air Transport Co., Ltd. (Swissair) in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976." Swissair's Comments followed closely those of Lufthansa on the subject of UATP Agreement - 1976.

On July 25, 1977, the proponent of UATP Agreement - 1976, Trans World Airlines, filed with the Board the "Answer of Trans World Airlines, Inc., to Application of Universal Air Travel Plan for Prior Board Approval of an Agreement." TWA's Answer noted that with only three substantive changes, UATP Agreement - 1976 was virtually identical to UATP Agreement - 1948.

Interestingly, TWA stated that the revision to the voting formula was, in its view, the most significant amendment. It was noted that the unanimity rule often resulted in one carrier controlling the destiny of hundreds, and also acted contrary to the best interests of the Plan. TWA was of the view that the Air Travel Card could not be competitive unless it could operate in a more flexible environment.

Of less importance to the UATP entity, but possibly of more importance to the individual Contractor carriers, was the so-called "Ticketor discount". When costs are not shared equitably, parties to

a joint venture are likely to act less and less in the interest of the joint venture. Thus, TWA contended that competition between the Air Travel Card and other commercial credit card programs would be enhanced with Board approval of the "Ticketor discount". TWA also noted that the 1% "Ticketor discount" did not totally offset all Contractor costs, but was the product of a compromise which took into account recognition of the benefits afforded Contractors whose names appear on the Air Travel Card.

The last area addressed by TWA related to the Silver Card Program. With regard to this feature of UATP Agreement - 1976, TWA cited the Board's initial 1975 finding of no serious antitrust concerns having been established by opponents of the Plan as the basis for the Board to approve the revised Silver Card Vendor Program.

The final direct comment filed with the Board was the Answer of United Air Lines, Inc. in Support of the Application for Prior Board Approval." United took note of the fact that the original unanimity voting procedure was intended to ensure that UATP was endorsed fully by its members. However, United pointed out that when membership rules were eased, carriers with disparate interests joined the Plan. Accordingly, the unanimity rule no longer had the utility originally intended, and that it had become a liability rather than an asset to the Plan.

United observed that unanimous voting procedures are an acceptable condition when joint venturers involve smaller groups with generally

consistent views. However, when the Board mandated that any carrier be permitted to participate, regardless of its size or views, it simultaneously cast aside the justification for the unanimity rule. As had TWA, United noted that the revised voting formula reflected a compromise among the carriers and one which permitted the Plan to be directed by the vast majority of carriers rather than by a few airlines.

Along with supporting the revised voting formula, United strongly endorsed the "Ticketor discount" as long overdue. Indeed, United stated that the discount would merely provide compensation to Contractors, and its absence had proved to be a disincentive to marketing the Air Travel Card. "The Contractor must bill the subscriber and perform all collection functions. The Contractor must bear all collection risks and costs. All of these tasks are performed even though the Contractor may not receive any revenue from the transaction."^{95/} To deny compensation to Contractors for these services would mean that Ticketors would continue to be unjustly enriched at the expense of Contractors. Indeed, United's comments made clear that Contractors could not and would not continue to participate in the Plan if it required them to unreasonably subsidize Ticketors. As United could have noted, Contractors and Ticketors are competitors for the sale of air transportation, and there

95. "Answer of United Air Lines, Inc. in Support of the Application for Prior Board Approval", at 4 (August 5, 1977).

are limitations to the benefits of any cooperative arrangement involving competitors.

In any Board proceeding involving a Section 412 agreement, such as UATP Agreement - 1976, parties are permitted to submit comments in support or opposition to the agreement, and then reply comments are authorized. While occasionally a party may elect not to submit reply comments, such was not the case with UATP Agreement - 1976.

On September 2, 1977, there was filed with the Board the "Reply Comments of the Parties to the Universal Air Travel Plan Agreement - 1976, as Amended." UATP noted that the principal arguments of the commercial credit companies against Board approval of the Agreement were threefold: (1) the lack of jurisdiction; (2) the anticompetitive aspects; and (3) the absence of public interest benefits. Additionally, UATP stated that the Department of Justice did not oppose the Agreement, but merely encouraged the Board to reaffirm its disclaimer of jurisdiction to the extent that it did so in Order 75-8-35.

UATP argued in its Reply that the credit card companies had misconstrued the Board's 1975 Order - Order 75-8-35, dated August 5, 1975. According to UATP, that Order approved UATP Agreement - 1948, the UATP Manual, or its operating guidelines, and the initial Silver Card amendments, except to a limited extent.

As to the Silver Card Amendments to the extent that they would permit UATP to sign contracts with hotels, motels, and rental car companies which would permit UATP Silver Card holders to bill charges at such establishments to their UATP accounts, there is a serious jurisdictional question. ^{96/}

In order to respond to this partial disclaimer, UATP contended that the Silver Card Vendor Program had been completely restructured. In essence, the commercial relationships between carriers and vendors were completely removed from the Agreement, and did not require Board review or approval. That is, whereas the 1973 Silver Card program permitted UATP, as a single entity, to negotiate contracts with hotel, motel and car rental companies, the revised Silver Card program completely eliminated that possibility. Additionally, UATP noted that "this restructuring of the Silver Card Vendor Program will not foreclose 'ordinary antitrust remedies, should they be deemed appropriate by the opponents of the program, ' and would not 'obligate the Board to police commercial relationships and practices as to which it had little regulatory experience.' " ^{97/}

UATP argued that the only aspect of the Silver Card Program which was submitted for Board consideration and approval involved the carriers exchange of "settlement documents", or Silver Card transaction records, and that such an exchange had no antitrust concerns but required

96. Order 75-8-34, at 5 (1977).

97. "Reply Comments of Parties to the Universal Air Travel Plan Agreement - 1976", as Amended, at 8 (September 2, 1977).

Board approval for purposes of implementation.

As noted earlier, one of the major criticisms of the Silver Card Program was that it was an attempt, by the air carriers, to enter the general purpose credit card market. UATP explained that unlike the general purpose credit card, the Silver Card was severely restricted in use, and was specifically limited to travel-related services, i.e., hotel, motel and car rental. Moreover, UATP argued somewhat artfully that "under UATP Agreement - 1948 a cardholder can purchase hotel, motel, and car rental services in connection with the purchase of an air tour. Therefore, although the opponents of the Agreement foresee it as a major change, the only real difference is the removal of the 'package tour' aspect from the 'Air Travel Card', and thereby making freely available the 'extended services' of 'Silver Card'." 98/

UATP took considerable solace in noting that the Department of Justice, the antitrust watchdog, had not raised any concerns about alleged antitrust restraints, but had merely been concerned about the Board's assertion of jurisdiction over the Silver Card Program. This position by the Department of Justice must surely have raised a question during the Board's consideration of UATP as to whether the myriad of antitrust attacks by opponents of UATP Agreement - 1976 were merely self-serving "red herrings", designed to thwart a potential competitor. Indeed, the lack of antitrust concerns by the Department of Justice with regard to

UATP Agreement - 1976 was a major focal point in UATP's Reply Comments.

In recognizing the potential of the Board disclaiming jurisdiction over the Silver Card Program, UATP itself described a specific course of action for the Board as to the issue of jurisdiction. "If the Board should determine that the vendor program goes beyond its jurisdiction to the extent that the program relates to arrangements between carriers and vendors, it should approve the entire Agreement and disclaim jurisdiction only over such arrangements." ^{99/} This proposal was designed to provide antitrust immunity to those who participated in UATP, but chose not to participate in the Silver Card Program. UATP apparently had serious reservations that unless the Board were specific in describing that portion of UATP Agreement - 1976 over which it was disclaiming jurisdiction, and thereby not granting antitrust immunity, the entire UATP would be subject to antitrust litigation.

As to the issue of UATP attempting to further its alleged monopolistic position in the air transportation credit market, the carriers offered some interesting statistics. In 1976 there were 2 million cardholders of the Air Travel Card and 8 million cardholders of the American Express Card. ^{100/} While American Express appeared considerably larger than UATP, the bank cards actually dwarf UATP. In 1976, Visa

99. Id., at 13.

100. Id., at 8. See, "American Express Company Annual Report - 1976," at 3.

and Interbank Card Association (Master Charge) had in excess of 75 million credit cards in circulation available for, among other items, the purchase of air transportation. ^{101/} As of December 1976, the number of outstanding cards of the four major opponents to the UATP Agreement - 1976, was over 83 million.

In responding to the repeated antitrust allegations, which principally focused on unfair competition, attempted monopoly and price fixing, UATP offered statistics which indicated that while its billings were less than \$2 billion in 1976, the bank card companies and AMEXCO had annual billings in excess of \$35 billion. However, there was no indication as to what percent of the \$35 billion actually represented air transportation sales as compared to UATP's \$2 billion.

The credit card companies have composed a litany of antitrust arguments to persuade the Board that the antitrust laws should be interpreted and relied upon to exclude UATP from the marketplace, and thereby preclude competition. In so arguing, the credit card companies have convoluted the underlying precepts of virtually every antitrust law, and have contorted their intent. "The sole aim of antitrust legislation is to protect and promote competition... and not competitors." Furthermore, the Sherman Act in particular, which here has been distorted to argue against competition, was specifically "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." ^{102/}

101. American Banker, at 2 (July 8, 1977).

102. "Reply Comments of Parties to the Universal Air Travel Plan Agreement - 1976, as amended" at 17-18 (September 2, 1977). (Footnotes omitted.)

UATP argued that the only restraint of trade involved the attempt by the commercial credit card companies to have the Board eliminate UATP as a competitive force in the marketplace. Along this line, UATP reiterated that the Department of Justice had raised no antitrust objections to the UATP Agreement - 1976.

With regard to engaging in unfair competition and attempted monopoly, UATP turned to the statistics it had not previously relied upon to support its attempt to demonstrate that the very growth of the opponents of the Agreement refuted these allegations, and that the price fixing allegation, which involved compensation for services required by the joint venture's operations rather than the selling of services, mischaracterized the 1% discount. In fact, UATP argued, lacking a 1% discount, the same price fixing argument would apply to the current UATP system which involved a zero percent discount.

UATP explained for the first time in any detail the public interest benefits of the Air Travel Card in its Reply Comments. First, the Air Travel Card is designed to serve only the air traveler, and is intended to fulfill the air traveler's particular needs. Second, there is no interest charge associated with sales against the Air Travel Card, and third, the subscriber receives interest on the required deposit, which itself is refundable upon demand of the subscriber. Lastly, UATP noted that its availability for the purchase of air transportation on over 200 airlines

worldwide should not itself be considered insignificant. Thus, UATP contended that "air transportation's most important component, the air traveler, is clearly the primary beneficiary of the new Agreement." ^{103/}

In addition to the Reply Comments of UATP, there was filed with the Board on September 2, 1977, the "Reply by Lufthansa German Airlines to Answers filed in Opposition to Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976" [hereinafter referred to as Lufthansa Reply]. Lufthansa was particularly concerned "with the public need in the international market for a competitive credit program aimed at serving the needs of the international business community." ^{104/} Indeed, Lufthansa commented that its ability to serve the international business traveler through use of the Air Travel Card had declined in the face of rapidly expanding services offered by non-national commercial credit card companies.

It is important that the Board not lose sight of the needs of the international business traveler and the international aspect of the service offered by the Universal Air Travel Plan. Of the 205 airlines that participate in the plan, over half, or 107 are foreign airlines such as Lufthansa. The plan itself is designed to serve the needs of the international business traveler, needs that are often different from those of the tourist who traditionally relies on Travel/Entertainment credit card programs. In a rapidly contracting business world, the business traveler in any country needs a travel card that is acceptable in every country. UATP exists to fulfill that need, and it is a need that has changed substantially since the UATP - 1948 program was begun. ^{105/}

103. Id., at 28.

104. "Reply by Lufthansa German Airlines to Answers filed in Opposition to Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976", at 2 (1977).

105. Id., at 4.

Lufthansa stated that the expansion of UATP merely ended an artificial distinction between tourists and business travelers because travel-related items could, under UATP Agreement - 1948, be purchased in conjunction with air tours. While business travelers generally did not purchase air tours, they also required the specific travel-related items available through UATP Agreement - 1976. Additionally, Lufthansa noted that the Air Travel Card was unique in that it did not intend to expand the services available for purchase beyond those directly related to travel.

With regard to the revised voting formula, Lufthansa stated that the rights of the Ticketors were protected because all Contractors were also Ticketors, and therefore would not attempt to act against their own pecuniary interests. As to the issue of jurisdiction, Lufthansa was concerned that should the Board disclaim jurisdiction over any portion of UATP Agreement - 1976, that it simultaneously make clear those aspects which were approved, and therefore subject to antitrust immunity.

There was also filed with the Board on September 2, 1977, the Reply of United Airlines, Inc., hereinafter referred to as United's Reply. United noted that UATP Agreement - 1948 establishes a Ticketor discount of zero percent, and that such a system had been approved repeatedly by the Board in earlier orders, and never opposed by the Department of Justice. Thus, it was argued, a mere change in the rate of discount

should not require a change in policy by the Board. Moreover, United argued that the 1% Ticketor discount reflected the type of service charge imposed by commercial credit card organizations for like reasons. Additionally, it was noted that the use of varying service charges or Ticketor discounts between 200 air carriers would be impossible if an efficient interline billing system were to continue.

United argued that the recovery of administrative costs was necessary for the survival of UATP, and of equal importance, reflected a reasonable business judgment of the participants in the Plan. In addition to specifically commenting on the Ticketor discount, United's Reply Comments singled out the unanimous voting procedure as the principal stumbling mechanism to the growth of UATP. United contended that once the Board made UATP a credit program open to all air carriers, it made unanimity an "absolute impossibility". That is, continued unanimity within UATP would mean self-destruction because change could almost never be accomplished. Moreover, as long as an air carrier could withdraw from UATP as readily as it could join the Plan, it could always withdraw from participation if a change adopted by the majority was repugnant to its particular interests.

Customarily, reply comments are the last pleading filed by any party. However, of equal custom is the practice of each party in an adversary proceeding to attempt to offer the last word on the subject. Not surprising, this practice is not limited to administrative reviews,

but is also readily found in judicial proceedings.

On September 15, 1977, there was filed with the Board the "Motion of Carte Blanche Corporation for Leave to File an Otherwise Unauthorized Document" and the "Response of Carte Blanche Corporation to the Reply Comments of the UATP Participants." Carte Blanche argued in its motion that the pleadings of the parties thus far, which included Carte Blanche's Answer to the Application for Board Approval of UATP Agreement - 1976, were clouded and required further clarification. Accordingly, Carte Blanche's Reply was alleged to be directed at clarifying the issues for the Board's consideration.

The Carte Blanche Response does appear to focus attention on certain matters not previously addressed by the Board. First, Carte Blanche argues that unlike the extended services purchased in connection with the air tours, UATP Agreement - 1976 permits the purchase of extended services, i.e., hotel and motel services, wholly without regard to whether air travel is involved with the sale.

Second, Carte Blanche points out that while hotel, motel and car rental services are described as the immediate subject of the Silver Card Program, the proposed UATP Agreement authorizes the Committee to expand the program into any commercial area related or unrelated to air transportation. Third, Carte Blanche raises the concern that limited approval of the Silver Card Program, as suggested by UATP, would

have the effect of approving the essential elements of the program and thus accomplish for UATP indirectly that which the Board previously refused to do directly. Fourth, it is argued that the Silver Card Program so violates the antitrust laws that Board approval, under any circumstances, cannot be justified.

Eleven days later, there was filed with the Board the "Motion of Parties to the Universal Air Travel Plan Agreement - 1976, as Amended, to File an Otherwise Unauthorized Document" and "Answers of the Parties to the Universal Air Travel Plan Agreement - 1976, as Amended, to the Response of Carte Blanche Corporation to the Reply Comments of the UATP Participants."

UATP justifies its filing by stating in the Motion that Carte Blanche mischaracterizes what has been submitted to the Board for approval, and that UATP believes it only proper to advise the Board of its view as to the intent of the Agreement.

The Answer to Carte Blanche's Response describes the latter as a mere restatement of earlier attacks from a different prospective. UATP noted that any further expansion of the Silver Card Program, beyond that specifically described in the pleadings would clearly require further Board review and approval. Moreover, UATP invites the Board to approve the Agreement and limit its approval to only those aspects of the Silver Card Program specifically described in the pleadings.

UATP then reargues its earlier contentions about the lack of antitrust violations, and notes that the vigorous opposition to UATP Agreement - 1976 should be viewed in a business as well as in a legal context. That is, UATP advises the Board that opposition to the Agreement from the other credit card companies should be considered a reflection of their concern that competition in the air transportation credit market not be encouraged by the Board's action. In essence, UATP argues that the Board cannot overlook the nature of the opponents to the Agreement, and the fact that they would be the principal beneficiaries of a Board order which disapproved UATP, or which imposed conditions upon the Plan which substantially impaired its ability to compete.

The last argument of UATP made the Board's decision even more difficult. While antitrust concerns clearly involved UATP Agreement - 1976, were those concerns of such an overriding magnitude that the Board should disapprove UATP, and thereby eliminate a competitor from the marketplace. To do so would appear to run afoul of the intentions of the same antitrust laws invoked against UATP. Consequently, the Board was faced with a decision involving balancing a strict interpretation of the antitrust laws against their long established intent - the fostering of competition.

On December 7, 1978, the Board issued its long awaited order, Order 78-12-48, styled "Order Instituting Proceeding and Disclaiming Jurisdiction." The Board's Order summarizes in general terms the arguments offered by both proponents and opponents of UATP Agreement - 1976. Thereafter, it notes that it will disclaim jurisdiction over those portions of the Silver Card Program which do not affect air transportation. In essence, the Board concluded that its statutory mandate simply did not permit it to go forth in the manner requested by UATP. However, it did affirmatively respond to UATP's request that should it disclaim jurisdiction, it enunciate the specific terms of the disclaimer.

More specifically, we disclaim jurisdiction over the Silver Card Program to the extent it would authorize the use of the UATP Air Travel Card for the non-air transportation purchases discussed in Article 23 of UATP - 1976. In particular, we disclaim jurisdiction over the Silver Card Program to the extent it authorizes individual carriers to enter into contracts with non-carrier Vendors; governs contractual relations between carriers and non-carrier Vendors; and establishes and governs the Central Settlement Carrier-Contractor relationship with respect to charges accepted by non-carrier Vendors. We do not, however, disclaim jurisdiction over the UATP Agreement to the extent it provides for the use of the Silver Card in purchasing air transportation from UATP members and to the extent it establishes rules governing intercarrier settlement of such transaction. 106/

With regard to the remainder of UATP Agreement - 1976, the Board responded by acknowledging that the existing pleadings were inadequate for purposes of issuing a definitive decision. However, they

106. Order 78-12-48, at 8 (1978).

did raise issues which warranted further review by the Board. Moreover, the Board reserved the right to disclaim jurisdiction over additional aspects of UATP Agreement - 1976 should it be determined subsequently that these aspects also did not significantly affect air transportation.

Between the time the Agreement was filed with the Board, and the issuance of Order 78-12-48, the United States Congress passed the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (October 25, 1978). Among other changes, the new Act eliminated the provision of the Federal Aviation Act of 1958 which afforded participants in an agreement automatic antitrust immunity upon Board approval of the agreement. As a consequence, the Board also lacked specific arguments on whether antitrust immunity, as distinguished from approval, should specifically be afforded the participants in UATP Agreement - 1976.

Faced with the parties' pleadings, which were described as inadequate, the Board determined that it would utilize a flexible procedure to obtain the necessary facts not contained in the pleadings. Accordingly, the Board instructed its Bureau of Pricing and Domestic Aviation to convene an administrative conference to obtain the additional facts. This flexible procedure was selected rather than use of a formal proceeding in the hope that it would expedite the Board's review. However, the Board reserved the right to use formal proceedings if the flexible procedure did not elicit from the parties the information necessary for issuance of a well-reasoned and sound order. The Board noted, however, that it would

also seek briefs from the parties on issues it determined needed further exploration.

In an effort to avoid having the parties address matters of little interest to the Board, it used the text of the Order to indicate the issues and subissues of particular concern to it. Specifically, whether the UATP was an illegal joint venture and whether UATP's practices were seriously anticompetitive. In addition, it was concerned with the following specific allegations by UATP's opponents concerning the effects of the UATP system on competition in the air transportation credit market.

1. That the non-price terms of the standard subscriber contract are unreasonable restraints of competition in the non-price terms of credit.
2. That the standard Ticketor discount is an agreement to fix the price of credit management services in restraint of trade.
3. That the rule that a new Contractor cannot issue an Air Travel Card to any subscriber who is in arrears to a previous Contractor and the rules governing accreditation and termination of Ticketors and Contractors are anticompetitive group boycotts.
4. That the current UATP program is a conspiracy to monopolize the air transportation credit market. ^{107/}

In addition to the above specific issues, the Board required comments from the parties as to the identity, the nature, and the extent of any injury to any person should the Board approve the remaining provisions of UATP Agreement - 1976. Moreover, the Board requested

107. Id., at 12.

that the parties submit specific arguments on whether antitrust immunity should be granted, and whether the Board should modify specific terms of the Agreement before it approved it.

Upon reflection, the Board's Order most certainly would have had to be viewed as offering the potential of favorable consideration for both the opponents and proponents of the Agreement. What is somewhat interesting about the Order is that the issues framed for review in no way indicate a disposition by the Board. That fact clearly is indicative of the work that went into drafting the Order. No doubt, however, both parties sought solace from whatever favorable inferences could be drawn from the Board's evasive language.

In summary, the Board's Order recognized that legal arguments alone are not sufficient where a sound factual basis is mandatory. That is, the initial pleadings were for the most part devoid of facts necessary to establish a foundation for the legal arguments. For example, an allegation of attempted monopoly without any indication of market share is inadequate on its face. Moreover, arguments in support of the presence of benefits to the public, without specific examples, are also equally inadequate. However, the Board fully recognized this situation, and as we will examine now, the subsequent pleadings provided additional factual evidence as well as legal arguments. Indeed, the Board was to be offered considerable detail about UATP, its activities in the market, and the position of its competitors in the same marketplace.

After the December 7 Order, the Board's Bureau of Pricing and Domestic Aviation (Bureau) issued a Statement of Issues and Request for Information on May 4, 1979. Thereafter, the parties submitted information responses to the Bureau and direct and rebuttal exhibits. Because of the nature of certain material provided by the parties, a number of direct and rebuttal exhibits were provided as "confidential" and are not available to the public. However, the direct and reply briefs of the parties are available, and they disclose considerably more information about UATP, and the nature of the air transportation credit market.

As we noted earlier, the initial opponents of UATP Agreement - 1976 consisted of American Express Company, Carte Blanche, Interbank Card Association, and Visa, U.S.A., Inc. Additionally, the Department of Justice filed comments concerning the Board's jurisdiction. After the Bureau issued the information requests, which sought statistics concerning the nature of UATP and the nature of its opponents, Carte Blanche, Interbank Card Association, and Visa, U.S.A., Inc., filed motions for leave to withdraw as parties. Thereafter, the Board granted these motions. During the interim, however, the American Society of Travel Agents, Inc., and the National Passenger Traffic Association, Inc., requested leave to become parties, and their motions were granted by the Board. It is not quite certain as to why the three

opponents to the Agreement decided not to participate in the further proceeding. However, the Board must have concluded that their participation was no longer required.

On August 13, 1979, there was filed with the Board the "Direct Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", [hereinafter referred to as Direct Brief - UATP]. The information responses submitted by the parties, along with their direct and rebuttal information, appears to have provided the Board with its long sought after statistics. Included in the information submitted was a list of the 100 different credit cards accepted by the UATP member carriers, and documents indicating that the major credit card organizations had approximately 70% of the air transportation credit market. If nothing else, this statistic alone indicated that UATP's alleged attempt to monopolize the air transportation credit market had met with little success.

Interestingly, the Department of Justice submitted information responses which reflected that a new entrant into the credit card market was not likely. Indeed, according to the Department, "since we may be stuck with only two national bank credit card systems, we should not take any steps that might result in diminution of competition between them." ^{108/} Moreover, the chief of the antitrust division of the

108. Department of Justice Memorandum from S. Gearing and J.J. McFadden, at 21 (File: 60-293-23) (January 7, 1976).

Department had himself concluded that the current competitors in the credit card market were not likely to encounter a new competitor for some time. "Faced with the history of the T & E card business since 1965, it is almost too obvious to mention that there is no likelihood of de novo entry by anyone else. There has in fact been no such entry since Carte Blanche's entry prior to 1965." ^{109/}

As we noted, the Board's first inquiry related to a fundamental issue -- whether the Universal Air Travel Plan program was an illegal joint venture. In its Direct Brief, UATP reminded the Board that the joint venture issue had to be reviewed in accordance with the standards established in Section 412 of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. That is, "if it is first demonstrated that the agreement 'substantially reduces or eliminates competition,' the Board must then proceed to consider whether the agreement 'is necessary to meet a serious transportation need or to secure important benefits.' " ^{110/} Moreover, UATP argued that while antitrust principles are relevant, they are not controlling of the Board's review.

Against this background, UATP argued that the Board did not have to address the matter of serious transportation need or important

109. Shenefield, J., "Competition Through Change: A Positive Force in the Banking Industry", at 13 (September 12, 1977).

110. "Direct Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", at 28 (1979).

benefits because UATP Agreement - 1976 did not reduce competition. UATP supported this argument by alleging that the airlines accepted over 100 different credit cards for the purchase of air transportation, and that UATP's share of the transportation credit market had declined consistently since the 1960's. Moreover, UATP argued that individual airlines could not effectively establish a credit card program which would substantially compete in the marketplace with the major commercial credit card companies.

However, to the extent that the Board may have considered UATP as reducing competition, it should also recognize that the Plan served the public interest. UATP contended that it was an economical form of credit, and one which did not involve interest charges to the air passenger. Moreover, UATP noted that unlike the travel and entertainment credit cards, the UATP service charge was refundable upon demand to the customer. Additionally, to the extent that de novo entry into the market was not possible, the Board should not eliminate one of the few remaining competitors.

As we noted earlier, the Board was particularly concerned with the requirement that UATP members use a standard subscriber contract. "The basic reason for requiring use of the uniform subscriber contract is that such a contract is essential to achieve the purpose of the UATP joint venture in establishing and maintaining a universal plan

for the credit sale of air passenger transportation and related services on a worldwide basis." 111/

UATP argued that the standard subscriber contract was necessary in order to permit subscribers to utilize their Air Travel Cards on any UATP member carrier, and that agreement on the terms of the contract was necessary to accomplish this goal. Lacking a uniform subscriber contract, UATP stated that each Contractor would have to negotiate with each Ticketor for acceptance of its Air Travel Card, and that such a system would invariably curtail the worldwide nature of the Air Travel Card. Moreover, UATP argued that a uniform subscriber contract not only insures a reasonable administration of UATP, but also avoids the potential of discrimination between classes of users of the Air Travel Card.

The subscriber contract provides for an initial cash deposit of \$425 to open the account and payment of interest on the deposit under certain circumstances, the charge of purchases against the account and the billing, payment and crediting of the account, the types of Air Travel Cards and permissible areas of their use, eligibility for issuance and delivery of Air Travel Cards, and conditions of use of Air Travel Cards for credit purchases from the contractor or any other UATP party. It further establishes the terms and conditions relating to responsibility for acceptance and use of Air Travel Cards, limits the liability of the contractor to its own acts and omissions, and provides for refunds and for termination and settlement. 112/

111. Id., at 44.

112. Id., at 46.

UATP explained that the initial cash deposit is of historical origin, and constituted a reasonable deposit to secure payment for Air Travel Card credit sales. Moreover, it was noted that American Express and Carte Blanche employ uniform subscriber or customer contracts which establish standard conditions on use of their cards. To the extent that issuers of bank cards also required that their respective participating banks include in their customer contracts particular terms and conditions, the net effect was similar to that of UATP's use of the standard subscriber contract. Additionally, during the information request portion of the Board proceeding, UATP was able to elicit from AMEXCO a statement that the UATP standard subscriber contract had no affect upon the terms and conditions contained in the AMEXCO uniform customer contract and, of equal importance, no other party to the proceeding was able to demonstrate a different affect on their customer contracts.

While AMEXCO had argued that certain provisions of the uniform subscriber contract adversely affected competition, i. e., block ticketing and teleticketing, UATP was able to respond by simply noting that these procedures were not uniformly established by UATP, but rather were the result of individual carrier marketing practices. Additionally, UATP noted that its own members had stated that to the extent that they issue personal credit cards, they are not influenced by the terms of the UATP subscriber contract.

UATP argued that the standard subscriber contract contained nothing more than reasonable contractual terms established by persons furthering their common enterprise. ^{113/} Moreover, at least one court recognized the necessity for requirements that were similar to those contained in the UATP standard subscriber contract.

Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate, the decision is not determined by a per se rule. The doctrine of ancillary restraints is to be applied. It permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the marketplace; and (3) is not imposed by a party or parties with monopoly power. ^{114/}

UATP further supported the Ticketor discount by alleging that it merely allocated administrative expenses more equitably between members. However, as we noted, opponents of the Ticketor discount described it as price fixing in its most elementary form. Indeed, the opponents contended that Contractors have agreed with Ticketors on the price for credit management services. That is, the credit card companies argued that any negotiated agreement among buyers and sellers on the price buyers must pay involves price fixing.

The courts have not necessarily agreed upon this somewhat simplistic approach. "Not all arrangements among actual or potential competitors

113. See, e.g., Drayer v. Krasner, 572 F. 2d 348 (2d. Cir. 1977) cert. denied, 436 U.S. 948 (1978).

114. United States v. Columbia Pictures Corp., 189 F. Supp. 153, at 178 (S.D.N.Y. 1960).

that have an impact on prices are per se violations of the Sherman Act or even unreasonable restraints." ^{115/} That is, the particular type of conduct which has been held to be price fixing involves several essential characteristics. First, it generally must involve an agreement to fix the price charged in transactions with third parties, and not between contracting parties. ^{116/} That is, price fixing is not involved when A agrees to sell at one price, and B agrees to buy the product or service at that price. Otherwise, of course, all contracts to sell would involve price fixing.

Second, and of more significance, the price fixing agreement must have been made between competitors dealing in competing products. ^{117/} Clearly, where buyers and sellers are not competitors, as is more often than not the case, their agreement on the purchase price does not involve price fixing. Third, and somewhat esoteric, the challenged practice must have been imposed for the purpose of stifling competition. ^{118/} It would, however, certainly appear that upon a successful demonstration of the presence of the first two elements, the third element, the

115. Broadcast Music, Inc. v. Columbia Broadcasting Sys. Inc., 99 S. Ct. 1551, 1564 (1979).

116. Sitkin Smelting & Refining Co. v. FMC Corp., 575 F. 2d. 440 (3d Cir. 1977).

117. Evans v. Kresge Co., 554 F. 2d 1184 (3d Cir. 1976).

118. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

anticompetitive intent of the activity, would be almost an assumable element. That is, where the transaction adversely affects a third person, and those who brought about the effect were competitors, their activity would likely be burdened with the presumption that it was of an anticompetitive nature.

Against this background, UATP contended that no third party was affected by the Ticketor discount, that the service subject to the Ticketor discount did not involve participating competitors, and that the intent of the Ticketor discount was clearly not anticompetitive. Indeed, the Board's 1975 Order, described in detail earlier, also found like conclusions applicable to the Ticketor discount.

Article 5 of the UATP Agreement - 1976 provides that "in no event shall any Party hereto enter into a contract with any subscriber whose contract with another party has been terminated or cancelled, unless all sums owing thereunder to such other party have been paid." However, UATP Agreement - 1976 contains no provision for supplying the requisite information upon which to act in accordance with Article 5 as regards terminated subscribers. Moreover, the UATP Committee had eliminated the requirement of advising parties of terminated subscribers. Accordingly, while both proponents and opponents of UATP Agreement - 1976 argued extensively about the delinquent subscriber provision, in effect it was moot.

The only substantive membership restriction to becoming a participant in UATP Agreement - 1976 is contained in Article 17(b) of the Agreement. In order to obtain full Contractor status no other participant must have objected to the application for such status. That is, any airline can become a Ticketor, and thus accept the Air Travel Card for the sale of air transportation, but the issuance of Air Travel Cards by Contractors is subject to the approval of the UATP members.

UATP explained this restriction by noting that it was required to insure all members of the financial responsibility of any card issuing carrier. Such assurance is necessary because all parties are dependent upon each Contractor making payment for any transportation provided its subscribers. Moreover, under UATP Agreement - 1976, each Contractor is responsible for payment to the UATP members for any transportation provided its subscribers, and the default of a subscriber does not relieve a Contractor from its obligation to the airline providing the transportation. Therefore, UATP asserted that it had a substantial interest in insuring that Contractors could properly hold out to the other members that they could meet fully the obligations of their subscribers under all circumstances.

Each UATP contractor thus has a fiduciary relationship with all other UATP parties, and a very substantial amount of money is necessarily involved in such relationship. Every UATP member therefore must reserve the

right to object to persons becoming a contractor, because it must extend credit for all purchases of air transportation and related services on Air Travel Cards of such contractor and rely upon it to pay for such purchases. Applications for contractor membership in UATP must include a copy of the most recent balance sheet of the applicant, and this information is provided to all parties to UATP.

If any carrier engaged in scheduled air passenger transportation could become a full UATP contractor party as a matter of right, each UATP member would be forced to either assume any risk which it might perceive from its fiduciary relationship with such contractor, or terminate its membership in UATP. Either result would defeat the objective of UATP to establish and maintain a universal plan to provide credit for the purchase of air transportation and related services on a worldwide basis. 119/

Prescinding from the specifics of UATP Agreement - 1976, the parties to the Board proceeding were required to address a fundamental issue of the Board's review. Specifically, whether the UATP program is a conspiracy to monopolize the air transportation credit market, or any other relevant market. This issue was of significant import because even if UATP Agreement - 1976 had no anticompetitive elements, if the plan itself had an anticompetitive effect it could not readily be approved by the Board. Moreover, the earlier Board proceeding had lacked any substantial evidence addressing this overriding issue.

UATP argued that it was not a conspiracy to monopolize for a number of reasons. First, UATP noted that individual participants in the joint venture had very little market power. Second, there was simply

119. Supra, note 110, at 76-77.

no proof of a specific intent to monopolize. That is, intent to gain a sufficient control of the market in order to control or preclude competition.^{120/} Moreover, UATP argued that proof of intent to compete was not to be equated with intent to monopolize. Indeed, the antitrust laws are themselves designed to promote competition.

UATP then turned to the long-overdue statistical evidence to establish that it has no intent to monopolize. "Since 1970 UATP's share of air travel credit card sales has declined more than 50% and its share of air travel total credit sales has declined more than 25%." ^{121/} Moreover, the opponents of UATP Agreement - 1976 had more than 70% of the air travel credit card sales market. These statistics alone demonstrated, according to UATP, that it not only had no monopoly share of the air transportation credit card market, but that it had no intent to do anything but improve its ability to compete in the market. It should be noted that without this type of empirical data, UATP may have had a much more difficult time in responding to the conspiracy allegation.

UATP proceeded from the conspiracy argument to urge the Board to approve UATP Agreement - 1976 even if certain elements of the Agreement reduced competition. In support of this contention, UATP called upon the Board to recognize that disapproval of the Agreement would eliminate from the marketplace a competitor with more than 30 years' experience. Moreover, UATP stated that UATP Agreement - 1976

120. United States v. Grinnell Corp., 384 U.S. 563 (1966).

121. Supra, note 110, at 92.

responded to established serious transportation needs of the public.

"The principal transportation need met by the UATP credit card system is that it enables the airline industry to extend credit in the sale of air transportation on a worldwide basis in the most economic and efficient manner." ^{122/} That is, the cost of air transportation credit is borne by the public. Thus, to the extent that airlines are able to control the costs of providing such credit, the public or air traveler is a direct beneficiary. Indeed, disapproval of UATP Agreement - 1976 would, it was argued, raise the cost of air transportation credit and thereby raise the overall cost of air transportation. Specifically, all or most Air Travel Card sales would be transferred to commercial credit card companies whose "discount" rates would not longer be subject to competition from UATP.

In addition to the serious transportation needs served by the Air Travel Card, UATP argued that there were further public benefits to be achieved through implementation of UATP Agreement - 1976. First, the Air Travel Card was alleged to be more economical to the air traveler than either the travel and entertainment credit cards or the bank credit cards. "The measurable cost savings result from the annual service charge fees UATP subscribers would be required to pay for the T&E cards if the UATP credit card system were abolished." ^{123/}

122. Id., at 96.

123. Id., at 100.

Moreover, UATP contended that subscribers receive additional benefits from use of the Air Travel Card, and these benefits, while not readily measurable, are not insubstantial. Specifically, the limited use of the Air Travel Card insures cost control. Additionally, many Contractors offer their subscribers unique billing services which are designed as further cost savings.

UATP contended that the Air Travel Card provided one of the most convenient credit systems available. First, the Air Travel Card generally has no floor limit or restricted line of credit so that the air traveler is free to purchase whatever amount of air transportation is required. Moreover, unlike most commercial credit cards, the Air Travel Card is honored by virtually every airline worldwide. In particular, it was argued that this feature of the Air Travel Card made it particularly convenient to the international air traveler.

As to the issue of antitrust immunity, UATP stated that the public interest required the Board to grant immunity from the antitrust laws to those airlines which participated in UATP Agreement - 1976. "Board approval of the UATP Agreement - 1976, after detailed review of the antitrust issues in this proceeding, would not accomplish the purpose of Section 412 unless accompanied by antitrust exemption under Section 414." ^{124/}

UATP argued that without antitrust immunity the airlines would eventually have to re-argue the entire case in a court of law because

124. Id., at 105.

the credit card companies would attack UATP Agreement - 1976, on the same antitrust grounds, in the courts. Thus, UATP contended, such a result would completely frustrate the Board's finding that the Agreement was in the public interest. Moreover, it was noted that the expense associated with providing the Board the information required for its review was not insubstantial, and that to undertake such costs again might not be possible by the airlines. Indeed, UATP implied that without antitrust immunity, the airlines might not be willing to implement UATP Agreement - 1976, and that the Board would have done for the commercial credit card companies that which the marketplace had not - eliminated any significant airline participation in the air transportation credit market.

While most of the commercial credit card companies withdrew from participation in the Board's review of UATP Agreement - 1976, UATP's major opponent remained, and on August 13, 1979, there was filed with the Board the "Brief for American Express Company" hereinafter referred to as Direct Brief - AMEXCO⁷.

American Express Company's basic position in this proceeding can be stated simply. When large numbers of competitors join together in a single organization to "coordinate" their activities, antitrust principles are necessarily called into play. To the extent that joint activity by UATP members can be justified, that activity must be limited to those areas which are essential to the provision of air travel credit services, such as the operation of a mechanism which will allow Ticketors to honor cards

issued by all Contractors and to collect funds through an appropriate interchange system. Since the new UATP Agreement is not limited in this fashion, the Board must limit or modify it. Certainly, the provision of antitrust immunity to such an Agreement cannot be justified. 125/

In essence, AMEXCO called upon the Board to approve only the barest essentials of UATP Agreement - 1976, and to deny parties participating in that aspect of the Agreement antitrust immunity. AMEXCO then identified the following provisions of the Agreement which it specifically opposed: the uniform subscriber contract, the Ticketor discount, the default subscriber provision and the limitations or restrictions on a party to UATP Agreement - 1976 becoming a Contractor.

After establishing its basic position in the proceeding, AMEXCO made two major arguments. First, it contended that the Agreement contained provisions which substantially reduced or eliminated competition. And, second, it argued that no public purpose had been identified which could not be satisfied through less anticompetitive means.

As to the argument about reducing or eliminating competition, AMEXCO stated that the parties to UATP Agreement - 1976 are competitors, and that they should be compelled to more vigorously compete in the extension of air transportation credit services. Moreover, AMEXCO stated that "The information supplied by UATP confirms that

125. "Brief for American Express Company in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", at 3 (1979).

it is both the purpose and the effect of the UATP Agreement to fix the price of competing credit services among carriers and to depress the prices which the carriers are required to pay for credit services."^{126/} Specifically, AMEXCO argued that innovative credit practices by airlines could not develop because of UATP, and that UATP Agreement - 1976 was intended to restrain the ability of commercial credit card companies from allowing their discount rates to accurately reflect the marketplace.

AMEXCO then described the use of a standard or uniform subscriber contract as a further vehicle for precluding competition in the air transportation credit market. It was AMEXCO who stated that the uniform subscriber contract has no relation to the joint venture, but merely restricts, unnecessarily, the activities of the joint venturers. That is, even in a joint venture the participants remain competitors, and to the extent that joint venture restricts unnecessarily the competitors' activities, it should not be condoned.

The Ticketor discount was the element of UATP Agreement - 1976 which AMEXCO most objected to in its Direct Brief. It was argued that the Ticketor discount was intended to suppress, artificially, the prices Contractors would otherwise charge for their services. Moreover, to the extent that the Ticketor discount also adversely affected commercial

126. Id., at 8.

credit card discount rates, it involved a conspiracy between competitors to injure third parties.

AMEXCO stated that the price each Contractor charges a Ticketor for processing should not be dictated by the joint venture, UATP, and that no justification could be offered for not permitting competition between and among Contractors with regard to the Ticketor discount. Indeed, AMEXCO stated that the Ticketor discount should vary because the costs incurred by each Contractor's processing of tickets vary, and that no matter how UATP described the Ticketor discount, it could not escape the fact that it involved a bold price-fixing activity.

As to its second major argument, the absence of a public purpose which could not be achieved through less anticompetitive means than that of UATP Agreement - 1976, AMEXCO only briefly expanded upon this issue. However, its brief argument raises matters not previously addressed by the parties. Among other matters, AMEXCO stated that there were alternatives to the Air Travel Card which did not require antitrust immunity and which could equally serve the public and air traveler alike.

Moreover, AMEXCO argued that the Air Travel Card requires only an interchange, and that to go beyond that aspect of UATP Agreement - 1976, forces the Board to approve anticompetitive practices not required by the public interest. Indeed, AMEXCO contended that even if the Air Travel Card were necessary, the vast majority of alleged

anticompetitive practices were not so required, and that the existing commercial credit card plans operated without such anticompetitive aspects.

As noted earlier, the Department of Justice is considered the watchdog of the antitrust laws, and not unexpectedly there was filed with the Board on August 13, 1979, the Brief of the Department of Justice hereinafter referred to as Direct Brief - DOJ. In fairness to the Department of Justice, it should be noted that to the extent any area of commerce is exempt from the antitrust laws, it not only eliminates a subject for review by the Department, but inherently makes its Congressional mandate more difficult to achieve. That is, enforcement of the antitrust laws against one area of commerce may give the appearance of discrimination where a like area has been legislatively exempted from the operations of the antitrust laws.

The view of the Department of Justice on UATP Agreement - 1976 can be summarized as follows:

1. The Agreement is not an agreement "affecting ... air transportation" within the meaning of Section 412(c)(1) of the Act and the Board should disclaim jurisdiction over it.

The principal business of the members of UATP is providing passenger air transportation. UATP is not directly involved with any aspect of the providing of airline flights. UATP is a credit card service that is only one of many forms of payment for air transportation which is accepted by UATP members. It is a payment mechanism which does not have any affect on the provision of air transportation services.

2. If the Board rejects our position and asserts jurisdiction over the agreement, it should condition approval on the deletion of certain unnecessarily anti-competitive provisions.

3. If the Board approves the Agreement it should not grant antitrust immunity. In applying the statutory standards of Section 414 of the Act, the Board must find that antitrust immunity is both "necessary" and "in the public interest." We have seen nothing in the information and documents submitted by the parties to this proceeding that would sustain their burden of showing that antitrust immunity is "necessary" for the operation of UATP or "in the public interest." 127/

The argument that the entire UATP Agreement - 1976 does not affect air transportation was for the first time raised by the Department of Justice. In support of this contention, the Department alleged that the primary business of the UATP members involved providing air transportation, and that the presence or absence of UATP did not materially affect this endeavor. In essence, the Department of Justice argued that the non-existence of UATP Agreement - 1976 would have no impact on the safe and efficient operation of air transportation. Notably, they did not address the potential impact on the economic operation of air transportation.

Additionally, the Department of Justice contended that the form of payment is relatively unimportant to the airline selling the transportation. According to the Department, as long as the form of payment is valid, and can ultimately be converted into cash, the availability or use

127. "Brief of Department of Justice in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", at 2-3 (1979).

of one credit card or form of payment over another should be of no import to the airlines. Thus, the Department argued that a joint payment/billing mechanism involving the sale of air transportation does not sufficiently affect air transportation for the Board to assert jurisdiction.

After arguing that the Board should not assert jurisdiction over UATP Agreement - 1976, the Department of Justice contended that if the Board elected to assert jurisdiction, it should condition approval of the Agreement on the elimination of certain alleged anticompetitive provisions. Interestingly, the Department at no time suggested that the Board should simply disapprove the Agreement in its entirety. Additionally, the Department stated that "we pause to note that to the extent this joint venture permits the airlines to offer the traveling public a convenient alternative to other forms of payment for air travel, such as the major credit cards and traveler's checks, it would appear to be in the public interest." ^{128/}

The Department was of the view that three provisions of UATP Agreement - 1976 were improper, and should be eliminated from the Agreement. First, the Department of Justice opposed the standard subscriber contract because it allegedly affected the cost of the Air Travel Card to the subscribers, and therefore involved an element of competition between Contractors. Second, the Department opposed the default

128. Id., at 7.

subscriber provision of the Agreement because it involved joint pressure to force payment from subscribers if they wanted to use any other source for obtaining an Air Travel Card. Third, the Department opposed that provision of the Agreement which related to the payment of commissions to travel agents. It was argued that the decision not to pay commissions to travel agents was a matter which was not properly the subject of joint action.

While generally not opposing the Agreement, the Department of Justice was firm in arguing that the Board should not grant the participants antitrust immunity. The Department contended that exemptions from the antitrust laws should always be read as narrowly as possible in favor of competition. Accordingly, the Department opined that antitrust immunity should be granted only if UATP could establish that the Agreement was likely to violate the antitrust laws, and that it would result in significant and demonstrable benefits to the public.

Clearly, the criteria established by the Department would have required UATP to argue that the Agreement violated the antitrust laws. However, to do so would have forced UATP to risk a denial of antitrust immunity although it had itself admitted to potential violations of the antitrust laws. In essence, UATP would have been compelled to plead guilty to a violation of the law in order to achieve exemption from the same law. Clearly, such a risk was too great for UATP to undertake.

As with the 1976 pleadings, the parties continued in 1979 to have the right to file reply comments and, not unexpectedly, on August 27, 1979, there was filed with the Board the "Reply Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", hereinafter referred to as Reply Brief - UATP⁷. This was to be UATP's final effort to persuade the Board to adopt a favorable position.

UATP began its Reply Brief with the most critical issue - jurisdiction. It was noted that UATP Agreement - 1976 was filed with the Board in 1977, and at that time, as we noted earlier, the Department of Justice merely requested the Board to continue its previous disclaimer. Moreover, during the Administrative Conference convened to set forth the issues, no party raised the issue of the Board's jurisdiction over the air transportation related matters contained in the Agreement. Yet, in its Direct Brief, and for the first time, the Department of Justice contended that the Board lacked jurisdiction over any aspect of the Agreement.

UATP argued bitterly that the Department had reversed its earlier position without cause, and had put forth an argument which was sophomoric at best.

The Department argues that the Plan is a Payment/billing mechanism in which the form of payment is relatively unimportant. Given the nature of UATP's past and present opponents, the documentation submitted by all parties, and UATP members' \$100 million annual discount payment to several commercial credit card

companies, the Department is clearly incorrect. The form of payment is an integral element of the sale of passenger air transportation, and directly affects the costs of providing such air transportation. Indeed, the form of payment is critical to the sale of air transportation because it may very well affect the actual price of that service. ^{129/}

In concluding its argument about jurisdiction, UATP cited the specific statutory language of Section 412, and noted that the Board had repeatedly relied upon that language to establish its jurisdiction to approve and disapprove various provisions of a like agreement - UATP Agreement - 1948.

UATP then proceeded to explain that the standard subscriber contract was not anticompetitive, and clearly not in violation of the antitrust laws. It was argued that any joint venture requires a degree of uniform conduct by the participants, and that the standard subscriber contract was an integral element of the joint venture. "An inherent feature of this and any other joint venture is that the parties necessarily cooperate with each other, instead of competing, to achieve their mutual goal." ^{130/} Moreover, UATP argued that the standard subscriber contract was not the vehicle used to compete in the sale of air transportation and that it was the sale of air transportation itself, and not the vehicle of payment, which involved the market properly the subject of competition.

129. "Reply Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", at 7 (1979).

130. Id., at 12.

In its last argument about the Ticketor discount, UATP contended that the discount did not violate the antitrust laws, and noted that the Department of Justice had at no time alleged that the Ticketor discount was improper. Indeed, UATP correctly stated that only AMEXCO, a competitor of UATP, had objected to the Ticketor discount during the final pleadings.

Interestingly, AMEXCO did not object to the establishment of the interchange system, but had contended that the use of a standard or uniform discount could not be justified. Moreover, UATP noted that no party had denied that Contractors had a valid claim for reimbursement for their interline processing, and that it was only the method through which their claims were to be satisfied which had caused objection to the discount fee.

Principally, AMEXCO had contended that the standard Ticketor discount would adversely affect competition, and thereby restrain trade in the air transportation credit market. UATP responded to this by stating that the Ticketor discount did not involve a matter subject to competition because the joint venture required Ticketors to accept Air Travel Cards issued by all Contractors. "The universally accepted UATP Air Travel Card is a unique service which individual carriers are unable to provide, and competition among UATP Contractors in providing such a card is impossible." ^{131/} Indeed, UATP noted that

131. Id., at 18.

Contractors sought no profit in the Ticketor discount, but merely were attempting to recover a proportion of their costs. Thus, where profit is not a motive, UATP argued, competition is not a valid consideration.

AMEXCO argued that the one percent Ticketor discount would result in all commercial credit card companies lowering their discount rates as to UATP members. Thus, AMEXCO argued that Board approval of a uniform UATP Ticketor discount would impose an artificial restraint on commercial credit card plan discount rates. Conversely, UATP responded by contending that if competition from UATP brought down discount rates, and thereby such rates were subject to greater and greater competition, the Board's approval of the uniform UATP Ticketor discount would, in effect, result in a furtherance of competition in a market not otherwise subject to significant competition.

Finally, UATP addressed the 1% figure, the amount agreed upon as the standard Ticketor discount, and stated that the 1% figure represented a good faith attempt to approximate contractor administrative costs. The 1% figure was described as having not been established for predatory reasons, and therefore was not on its face in violation of the antitrust laws. "Indeed, if the one percent Ticketor discount could be considered as predatory, the zero percent discount under UATP Agreement - 1948 would be far more predatory." ^{132/}

132. Id., at 23, n. 5.

UATP had an easier time establishing the public interest benefits during the 1979 proceeding than it had during the 1977 proceeding. First, by this juncture, even the Department of Justice had conceded that if the Board asserted jurisdiction, it should then find the Agreement, as modified by the Department's recommendations, to be in the public interest. Moreover, by this time even AMEXCO had acknowledged that the Board could approve UATP Agreement - 1976, simply by eliminating those provisions of the Agreement which AMEXCO had characterized as anticompetitive. "With regard to serious transportation needs and important public benefits met and secured by the UATP credit card system, UATP has submitted in this record over 100 pages of statements from various UATP subscribers located throughout the world, setting forth the reasons why they use the UATP credit card system and why other existing credit card systems fail to meet their air transportation credit card requirements." ^{133/}

UATP now was able to argue, based upon the factual evidence disclosed during the proceeding, that termination of UATP would eventually cost consumers, i.e., airline passengers, \$230 million per year. This additional cost would be a direct consequence of increased airline credit card discounts occasioned by the absence of the Air Travel Card from the air transportation credit card market.

133. Id., at 27.

The last major area of concern addressed in UATP's Reply Brief concerned the question of immunity from the antitrust laws. UATP attempted to distinguish the litany of cases put forth by the Department of Justice as the rationale the Board should adopt in denying antitrust immunity. However, of more interest was the last explanation or justification offered for the grant of antitrust immunity to the UATP member carriers.

In very terse terms, UATP argued that the purpose of the antitrust immunity provision was not only to insure immunity from prosecution for violations of the antitrust laws, but to avoid frivolous litigation designed to enrich the coffers of lawyers and wear down the economic resources of those who would otherwise participate in an arrangement designed to serve the public interest. UATP challenged the Board to recognize that its approval of UATP Agreement - 1976 without a grant of antitrust immunity would be self-defeating. In essence, the lack of antitrust immunity could result in all airlines participating in the Agreement withdrawing from it regardless of a Board determination that the Plan served the public interest. Such a result would certainly make a mockery of the Board's proceedings, and have a net effect of eliminating competition - the exact opposite of which was the principal stated purpose of the Board's review.

As with earlier proceedings, there was also submitted to the Board on August 27, 1979, the "Reply Brief of American Express Company" hereinafter referred to as Reply Brief - AMEXCO.

Unlike some of AMEXCO's earlier statements to the Board, its Reply Brief was specific in describing those matters of most concern to AMEXCO. In essence, AMEXCO argued that for the reasons it had stated earlier, the Board should disapprove the uniform subscriber contract and fixed Ticketor discount. AMEXCO argued that the elimination of these two provisions would strike from UATP Agreement - 1976 those aspects of the Agreement most repugnant to the antitrust laws. Moreover, AMEXCO contended that neither provision was required to serve any serious transportation need or public interest and therefore simply could not be justified in the face of their clear affront to the antitrust laws.

Along with UATP and AMEXCO, there was filed with the Board on August 28, 1979, the "Reply Brief of the United States Department of Justice" hereinafter referred to as Reply Brief - DOJ. The Reply Brief of the Department of Justice was principally a response to the arguments put forth in Direct Brief - UATP. The Department reminded the Board of the requirement to encourage competition and the underlying reasons for the Airline Deregulation Act of 1978 - to promote more competition between and among the airlines. The Department then

proceeds to vigorously attack the standard subscriber contract by noting that while such a vehicle is permissible when used by single entities such as AMEXCO or Carte Blanche, it becomes clearly impermissible when invoked by a joint venture involving many parties. "The ways in which a single competitor can legally carry on its business and the legal joint activities of horizontal competitors under the antitrust laws are quite different," ^{134/}

Thereafter, the Department suggests that the delinquent subscriber rule is on its face so repugnant to the antitrust laws that the Board should summarily strike it from the Agreement.

Prescinding from the specific matters of concern to it, the Department wields two final blows at UATP Agreement - 1976. It states that upon a full review of all information responses and exhibits, it is not persuaded that UATP Agreement - 1976 meets a serious transportation need, or serves important public benefits, and that the participants have not established a justification for receiving antitrust immunity. The Department states that it has concluded that other commercial credit card companies equally serve the air traveler, that the Air Travel Card does not meet a serious transportation need not otherwise provided, and that the Air Travel Card does not serve an important public benefit not otherwise available. Moreover, to the extent that the Air Travel Card

134. "Reply Brief of the American Express Company in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation", at 5 (1979).

benefits the public, its benefits simply have not been shown to be of such a magnitude as to require antitrust immunity. And, UATP is advised that to compete in the market, it must accept the risks associated with that competition. Specifically, all who compete are equally subject to frivolous litigation, and no reason has been shown, according to the Department, why UATP is in a worse position to defend itself against this litigation than its competitors.

With this final submission, the formal Board review of UATP Agreement - 1976 ended in terms of party participation. What remained after August 1979 was issuance of a final Board order.

On June 12, 1980, the long awaited Board Order, 80-6-66, was issued. While only time will tell as to which of the parties prevailed, the Order itself clearly resolved a number of matters. However, the marketplace and not the Board will be the final arbitrator between the battling credit card interests.

In essence, the Board decided to take jurisdiction over UATP, and concluded that UATP - 1976 does not substantially reduce or eliminate competition. "Indeed, we believe that UATP actually promotes competition in the highly concentrated air travel credit market and that it constitutes an important competitive alternative to the three commercial credit cards which, along with UATP, dominate that market." ^{135/} However, the Board found that certain aspects of the

135. Order 80-6-66, served June 8, 1980, at 4.

standard subscriber contract, and particular membership restrictions unnecessarily restricted competition and therefore had to be disapproved.

Significantly, the Board concluded that the 1% Ticketor discount was essential to the operation of the joint venture and did not substantially reduce or eliminate competition. The Board did, however, provide that private interchange arrangements should also be permitted. Additionally, the Board required certain revisions to the participation rules, and also broadened the standards for carrier entry into the Agreement. Finally, it was decided that an Agreement revised in accordance with the Order did not require antitrust immunity, and so the carriers' urgent request for such immunity was denied.

In examining the issue of jurisdiction, the Board overruled the objections of the Department of Justice and accepted jurisdiction. "We believe it fully consistent with our past actions and with the 1978 and 1979 amendments to Section 412 to take jurisdiction over an agreement such as UATP - 1976, which involves the marketing of air transportation services and establishes an internal method for allocation of the costs of those sales among the airline members." 136/

In addressing the procompetitive nature of the joint venture, the Board considered the strength of UATP's competitors, and the purposes

136. Id., at 7.

of the joint venture. It recognized that individual air carriers simply were not effective competitors with the major commercial credit cards. The statistics submitted indicated that UATP had not restrained competition, or entrance into the credit card market. As noted, the record could not and did not support a finding of an anticompetitive purpose by UATP. "Today, UATP's purpose is to provide a universally accepted air travel credit card which minimizes process costs to air carrier members and acts as an effective check on the costs of air travel credit extended by the major commercial credit card companies." ^{137/}

As to the standard subscriber contract, the Board concluded that the credit terms established by the contract were not required for the joint venture. While it did not object to the non-credit terms, it disapproved the \$425 deposit, the minimum billing requirement, and the fixed remittance dates.

In addressing a critical issue, the 1% Ticketor discount, the Board concluded that it did not involve illegal price-fixing as traditionally applied in antitrust cases. Rather than finding the discount to have an anticompetitive effect, it was concluded that "the proposed discount is a legitimate method of apportioning expenses among UATP members which has the reasonable purpose of correcting the current inequitable situation in which UATP contractors absorb all processing costs related to Air Travel Cards." ^{138/}

137. Id., at 4.

138. Id., at 25.

The Board continued its findings concerning the discount, and correctly noted that it was critical to the functioning of the joint venture. The 1% discount represented no anticompetitive purpose, and the Board acknowledged that full competition in negotiating discount rates would adversely affect the universal nature of UATP. Indeed, with an unrestrained discount rate, smaller carriers might not be able to justify economically their participation in the Plan, and the public would be directly injured in such a situation.

As to the rules governing entry and termination of participants, the Board provided that an expansion of those rules would not adversely affect the joint venture, and could significantly benefit the public by permitting greater participation in the Plan. Having addressed the above issues, the Board was left to resolve the two issues about which much dispute had existed - the allegation of monopolization by UATP, and the need for antitrust immunity.

About the issue of an attempt to monopolize, the Board was brief and firm. The record, which included thousands of pages of exhibits, provided no evidence which would prove a conspiracy to monopolize charge. The market share information demonstrated without question that UATP neither monopolized nor was attempting to monopolize the air transportation credit card market.

With regard to antitrust immunity, no issue was as fully argued, debated or briefed. Indeed, virtually every pleading of the parties directly or indirectly addressed whether antitrust immunity should be granted. In the end, antitrust immunity was denied UATP for several reasons. It did not substantiate "its contentions that the credit card companies will litigate antitrust issues in the federal courts, nor has it presented any evidence to support its claim that members will drop out of the Plan if subjected to such lawsuits." ^{139/}

The Board rationalized that UATP would have to compete fully in the marketplace if it wished to exist, and that to do so would require that it assume the risks associated with an unrestricted market. While the Board was not convinced that the members of UATP would abandon it because it lacked antitrust immunity, it did take cognizance of that possibility. Accordingly, it invited UATP to resubmit a request for antitrust immunity should the members withdraw from the Plan because of the lack of antitrust immunity or in the event any person brought an antitrust action against the Plan based upon issues resolved by the Order. Thus, while not granting the requested immunity, the Board placed the credit card companies on notice that further like attacks on the Plan could be the justification for subsequent immunity. That warning eventually became one factor considered by the members in going ahead with the Plan absent antitrust immunity.

139. Id., at 5.

While all the parties had the right to request reconsideration of the final Order, or to seek a reversal in the courts, none have elected to do so. Although it took the Board several years to issue its final Order, it was clear from the text of the Order that each of the parties was treated fairly, and that considerable research had been required by the Board staff in arriving at a decision. If any single major criticism remains of the Board's action, it is that having taken so long to decide this case, it effectively placed one competitor outside the marketplace. To that degree, the public was served poorly, and that fact was not changed by the final Order on UATP - 1976.

CHAPTER VI

CONCLUSION

The various services provided by members of UATP, because of their participation in the Plan, should not be underestimated. On the other hand, the ability of commercial credit card companies to adequately and fully replace the Air Travel Card service is uncertain, but it will become less and less so as time erodes the interest of the airlines in marketing their credit services. In that regard, the future success of UATP remains principally within the control of its members. Their goals and interests will determine its future.

Before concluding this paper, it is worthwhile to consider the potential future impact of recent credit control policies of the U. S. Government on the Air Travel Card. On March 14, 1980, the Federal

Reserve Board announced a series of monetary and credit actions as part of a general program of the U.S. Government to help curb inflation. While the details of the recent monetary and credit actions are of little import to this review, the distinction between business and consumer credit is paramount in terms of application of the controls. That is, credit extended for consumer purposes will be limited in the future, while business credit, in terms of the extension of business credit through the use of credit cards, will remain unlimited and not subject to government control. Federal Reserve Press Release, March 14, 1980. What remains to consider for the future is whether the Air Travel Card, a form of credit generally associated with the extension of business credit, will be assisted substantially by the government's determination to limit consumer credit. That answer shall be available to us by the end of 1980 - UATP will either begin to grow or it will disappear totally.

We have looked in some detail at a method used by one industry to solve its so-called industry problems - airline agreements. Whether this method will be appropriate for future industry problems seems unlikely. However, our concern was whether this method remains viable for current industry matters. To the extent that UATP is established as a system of universal air transport credit and thereby requires an agreement to serve the public, it may still be viewed by the Board

as in the public interest. However, the future of airline agreements seems bleak, and many problems which would otherwise be solved by agreements, will clearly require unilateral action in the future. To that extent, UATP's approval by the Board may be of benefit to its future, but the future of like programs seems questionable.

In conclusion, it would be unfortunate if UATP Agreement - 1976 would have been dissolved because of one government's refusal to act. It would be even more regrettable if UATP fails because of its members' inaction. But, that is certainly not an impossible scenario. The fate of UATP is now resting with its members and the marketplace. As we noted in the beginning, reliance upon government approval of industry action may seem desirable, but because of the conditions associated with seeking such approval, i.e., unlimited delay, the price of such approval may be devastating. UATP's response to the lack of government control may reveal much about the future of deregulated industries.

BIBLIOGRAPHY

I. Civil Aeronautics Board Filings

Answer of American Airlines, Inc., in Support of the Application for Prior Board Approval of Amendments to Universal Air Travel Plan Agreement - 1976 (1977).

Answer of the Parties to the Universal Air Travel Plan Agreement - 1976, as Amended, to the Response of Carte Blanche Corporation to the Reply Comments of the Universal Air Travel Plan Participants (1978).

Answer of Trans World Airlines, Inc., to Application of Universal Air Travel Plan for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Answer of United Airlines, Inc., in Support of the Application of Universal Air Travel Plan for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Application of the Universal Air Travel Plan for Authority to Discuss Paragraphs 3(d) and 8(b) of Universal Air Travel Plan Agreement - 1976 (1977).

Application for Prior Board Approval of Amendments to Universal Air Travel Plan Agreement - 1976 (1977).

Answer of American Express Company in Opposition to Application of the Universal Air Travel Plan for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Brief for American Express Company in Opposition to Universal Air Travel Plan Agreement - 1976 (1979).

Comments of Carte Blanche Corporation in Opposition to Universal Air Travel Plan Agreement - 1976 (1977).

Comments of Continental Airlines in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Comments of Lufthansa German Airlines in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Comments of Swiss Air Transport Co., Ltd. (Swissair) in Support of the Application for Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1977).

Comments of the United States Department of Justice Concerning Universal Air Travel Plan Agreement - 1976 (1977).

Direct Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of Issues of the Bureau of Pricing and Domestic Aviation (1979).

Letter of the Secretary, UATP, to Civil Aeronautics Board (1973).

Minutes of Discussions of Paragraphs 3(d) and 8(b) of Universal Air Travel Plan Agreement - 1976 (1977).

Motion of Carte Blanche Corporation for Leave to File an Otherwise Unauthorized Document (1978).

Motion of Parties to the Universal Air Travel Plan Agreement - 1976, as Amended, to File an Otherwise Unauthorized Document (1978).

Statement of Interbank Card Association in Opposition to Approval of the Universal Air Travel Plan Agreement - 1976 (1977).

Statement of Visa, U.S.A. Inc., in Opposition to Approval of the Universal Air Travel Plan Agreement - 1976 (1977).

Reply Brief of American Express Company in Opposition to Universal Air Travel Plan Agreement - 1976 (1979).

Reply Brief of the Department of Justice on Universal Air Travel Plan Agreement - 1976 (1979).

Reply by Lufthansa German Airlines to Answers Filed in Opposition to Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1978).

Reply of United Airlines to Answers Filed in Opposition to Prior Board Approval of an Agreement - Universal Air Travel Plan Agreement - 1976 (1978).

Reply Brief of the Universal Air Travel Plan in Response to the Request for Information and Statement of the Issues of the Bureau of Pricing and Domestic Aviation (1979).

Reply Comments of the Parties to the Universal Air Travel Plan Agreement - 1976, as Amended (1977).

Response of Carte Blanche Corporation to the Reply Comments of Universal Air Travel Plan Participants (1978).

II. Civil Aeronautics Board Orders

3 C. A. B. 242 (1942).

12 C. A. B. 601 (1951).

15 C. A. B. 850 (1952).

24 C. A. B. 240 (1956).

Order No. E-14171 (1959).

Order No. E-15691 (1960).

30 C. A. B. 1553 (1960).

31 C. A. B. 1041 (1960).

Order No. E-16517 (1961).

Order No. E-16518 (1961).

Order No. E-16532 (1961).

33 C. A. B. 1017 (1961).

Order No. E-19197 (1962).

Order No. E-20280 (1963).

37 C.A.B. 404 (1963).

39 C.A.B. 401 (1963).

39 C.A.B. 410 (1963).

Order No. 68-8-119 (1968).

Order No. 70-12-165 (1970).

Order No. 73-4-129 (1973).

Order No. 73-7-124 (1973).

Order No. 73-8-74 (1973).

Order No. 73-9-81 (1973).

Order No. 73-11-60 (1973).

Order No. 74-1-67 (1974).

Order No. 74-4-30 (1974).

Order No. 74-11-126 (1974).

Order No. 75-6-49 (1975).

Order No. 75-8-35 (1975).

Order No. 77-4-72 (1977).

Order No. 78-12-48 (1978).

Order No. 80-6-66 (1980).

III. Cases

Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.,
99 S. Ct. 1551 (1979).

Citicorp and Citicorp Services, Inc. v. Interbank Card Assn.,
et al, 1980-1 Trade Cases, 77535 (1979).

Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

Dreyer v. Krasner, 572 F. 2d 348 (1977).

Evans v. Kresge Co., 544 F. 2d 1184 (1976).

Fisher v. First National Bank of Omaha, 548 F. 2d 555
(8th Cir. 1977).

Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207
(1959).

Mackey v. National Football League, 543 F. 2d 606 (8th
Cir. 1976).

Sitkin Smelting and Refining Co., v. FMC Corp., 575 F.
2d 440 (1977).

United States v. C.A.B., 511 F. 2d 1315 (1975).

United States v. Columbia Pictures Corp., 189 F. Supp. 153
(1960).

United States v. Grinnell Corp., 384 U.S. 563 (1966).

United States v. Penn-Olin, 378 U.S. 158 (1964).

Worthen Bank and Trust Co. v. National BankAmericard, Inc.,
485 F. 2d 119 (8th Cir. 1973).

IV. Legislation

Clayton Act (15 U.S.C. Sec. 18).

Federal Trade Commission Act (15 U.S.C. Sec. 45).

Federal Aviation Act of 1958, as amended by the Airline
Deregulation Act of 1978.

Sherman Act (15 U.S.C. Sec. 1 and 2).

V. General

American Express Company Annual Report - 1976.

Bishopric, "Visa, Interbank Balances Increased 21.5% in 1st Qtr. from '76, Cards in Use Jump, American Banker, (1977).

C.A.B. Nos. 13044, IATA No. 810, Sales Agency Rules.

"Facts About BankAmericard" (BankAmericard, 1976).

Johnson, Robert W. "Economic Effects of Citicorp's Acquisition of T & E Cards" (Fortune 1977).

Memorandum II from Sorkin, Cahill, Gordon, and Reindel, to Dussman, Department of Justice (1977).

Response of Citicorp to Comments Filed by American Express Company in U.S. v. First National City Bank (65 Cir. 3963, 1965).

Rockefeller, Edwin S., Antitrust Questions and Answers (The Bureau of National Affairs, 1974).

Shenefield, J., "Competition Through Change: A Positive Force in the Banking Industry."

United States Department of Justice Memorandum from S. Gearing and M.J. McFadden (File: 60-293-23, 1976).

