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COMPETITION OR CONTROL IV: AIR CARRIERS *

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INTRODUCTION

The initial study in this series surveyed broadly the field of public utilities with the objective of determining in what degree regulated industries must comply with the antitrust laws. Amazingly divergent decisions were discovered. A second study dealt with a specific industry—broadcasting—which is subject to only slight interventionist controls. The conclusion was reached that the antitrust laws do and should apply to that trade. A third project involved motor carriers. Detailed investigation of that form of transport revealed—somewhat surprisingly—that regulation was not sufficiently comprehensive wholly to exclude the application of the antitrust laws to that industry.

* Prior installments in this series appeared in 106 U. PA. L. REV. 641 (1958) (public utilities generally); in 107 U. PA. L. REV. 585 (1959) (radio and television broadcasting); and in 108 U. PA. L. REV. 775 (1960) (motor carriers). The authors gratefully acknowledge the assistance, in gathering materials for the present study, of Bruce L. Bromberg, LL.B. 1960, University of Chicago. They also had the benefit of examining a chapter on aviation from Professor Carl H. Fulda's forthcoming book, *Competition in the Regulated Industries*. The findings with respect to regulation expressed herein are substantially in accord with those of Professor Fulda; there may be, however, a considerable difference in the conclusions drawn therefrom. A prospectus of this study was presented to Professor George J. Stigler's Industrial Organization Workshop at the University of Chicago on February 23, 1960. The helpful suggestions of the seminar members on that occasion are gratefully acknowledged. The courtesy of Messrs. Mayer, Friedlich, Spiess, Tierney, Brown, and Platt in permitting the use of library facilities is also acknowledged.

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We now turn to the field of aviation.¹ Comprehensive regulation of air carriers in the United States dates back only to 1938. The Civil Aeronautics Act of that year provided detailed economic and safety controls,² and vested in the Civil Aeronautics Board power to limit entry into the air transport business, to control the subsidies paid to airlines, and to regulate comprehensively rates and services. No substantial change in the economic controls was made by the Federal Aviation Act of 1958, which was designed to make more effective the regulation of air safety.³

Both statutes contain general policy directives indicating to the Civil Aeronautics Board the factors it should consider in exercising its powers. Among the matters to be considered by the CAB as being "in the public interest" are: the encouragement and development of an air transport system; the regulation of that system in a manner that recognizes its inherent advantages and that fosters sound economic conditions;⁴ the promotion of adequate, efficient service at reasonable rates without unjust discriminations or unfair or destructive competitive practices;⁵ competition to the extent necessary for the sound development of the industry; safety; and the promotion of aeronautics in general.⁶

¹ This study is based upon an examination of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§ 1301-542 (1958), and decisions thereunder; regulations of the Civil Aeronautics Board incorporated in the *Code of Federal Regulations*; a page by page search of the decisions in volumes 17-21 of the *CAB Reports*; a page by page examination of the *CCH Aviation Law Reporter* from May 20, 1959, to May 20, 1960; the annual reports of the CAB since 1938; and appropriate secondary literature and most of the cases cited therein.

² See Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235, 1237-39, 1252-57 (1947).

³ Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. §§ 1301-542 (1958). See generally ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 85TH CONG., 1ST SESS., REPORT ON AIRLINES 48-53 (1957) [hereinafter cited as AIRLINES REPORT]; Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis* (pts. 1-2), 24 J. AIR L. & COM. 410 (1957), 25 J. AIR L. & COM. 148 (1958).

⁴ The exact congressional language is: "The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers" Federal Aviation Act of 1958, § 102(b), 72 Stat. 740, 49 U.S.C. § 1302(b) (1958).

⁵ The exact congressional language is: "The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices" Federal Aviation Act of 1958, § 102(c), 72 Stat. 740, 49 U.S.C. § 1302(c) (1958).

⁶ Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1958); Civil Aeronautics Act of 1938, ch. 601, § 2, 52 Stat. 980. The powers of the CAB over air carriers, while comprehensive, are not unlimited. Thus the CAB has no power to impose on the carrier a scheme for appointing an additional director to break deadlocks on the board. Panagra Terminal Investigation, 4 C.A.B. 670, 678 (1944). Note also that the regulatory scheme for aviation is only loosely correlated with regulation over railroads, motor carriers, and other forms of transport. See

An important question is to what extent Congress intended that the industry be competitive. Some observers have taken the position that regulation was to be minimized and competition emphasized.⁷ In this connection should be noted the exact language of the congressional desideratum: "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense"⁸ This statement of policy obviously leaves many questions unanswered.

Within the body of the statute appear several express exemptions from the antitrust laws. Thus agreements among air carriers must be submitted to the CAB and, if approved by that tribunal, cannot be questioned under the Sherman Act.⁹ The implication is clear that activities not so exempted may be questioned under the antitrust laws.¹⁰

Porter, *Federal Regulation of Private Carriers*, 64 HARV. L. REV. 896, 910-11 (1951). The CAB has only limited authority over international operations. It may issue permits to foreign air carriers to allow them to enter into the United States. Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. § 1372 (1958). Both the issuance of such permits and the issuance of certificates to domestic air carriers to engage in foreign traffic are subject to presidential approval. Federal Aviation Act of 1958, § 801, 72 Stat. 782, 49 U.S.C. § 1461 (1958). International treaties and conventions play a large role in the exercise of both the foregoing powers. MANCE, INTERNATIONAL AIR TRANSPORTATION 25, 38, 42 (1944); AIRLINES REPORT 33-36. Various foreign states have created monopolistic air transport services, sometimes reserving a monopoly of air travel to the state to such local carriers and others authorized by international agreement. *E.g.*, Civil Aviation Act, 1946, 9 & 10 Geo. 6, c. 70, §§ 1, 23.

State regulation has not been important. See generally *S.S.W., Inc. v. Air Transp. Ass'n*, 191 F.2d 658, 662 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); BIGHAM & ROBERTS, TRANSPORTATION 272, 274 (1952); AIRLINES REPORT 50; Keyes, *National Policy Toward Commercial Aviation—Some Basic Problems*, 16 J. AIR L. & COM. 280, 288 (1949); Comment, *Air Law—The Federal Aviation Act of 1958*, 57 MICH. L. REV. 1214-15, 1219 (1959). Air carriers may be includable with other forms of transport in general public utility controls. *E.g.*, ILL. ANN. STAT. ch. 111½, § 10.3 (Supp. 1959). Legislation does exist with respect to the construction of airports and the like. *E.g.*, ILL. ANN. STAT. ch. 15½, §§ 22.1-83 (1957), as amended, ILL. ANN. STAT. ch. 15½, §§ 22.1-83 (Supp. 1959). See WILCOX, PUBLIC POLICIES TOWARDS BUSINESS 639 (1955). A survey of state efforts to impose economic regulation on air carriers will be found in Rhyne, *Federal, State and Local Jurisdiction Over Civil Aviation*, 11 LAW & CONTEMP. PROB. 459, 469-83 (1946).

⁷ AIRLINES REPORT 44; MacLay & Burt, *Entry of New Carriers Into Domestic Trunkline Air Transportation*, 22 J. AIR L. & COM. 131, 133, 135, 137-38 (1955).

⁸ Federal Aviation Act of 1958, § 102(d), 72 Stat. 740, 49 U.S.C. § 1302(d) (1958). The CAB itself has commented upon the subject of competition frequently. Thus in IATA Traffic Conference Resolution, 6 C.A.B. 639, 643-44 (1946), it wrote: "The competition contemplated by the Civil Aeronautics Act is not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation but having the power to provoke subsidy wars among nations. The Civil Aeronautics Act as construed by this Board provides regulated competition which seeks to avoid the stifling influence of monopoly on the one hand and the economic anarchism of unrestrained competition on the other."

⁹ Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1958). See notes 207-12 *infra* and accompanying text.

¹⁰ AIRLINES REPORT 49. Compare Note, *Regulated Industries and the Anti-Trust Laws: Substantive and Procedural Coordination*, 58 COLUM. L. REV. 673, 679-81 (1958).

The issue remains, however, whether any useful purpose is achieved by subjecting such a highly regulated industry to controls designed to foster competition.¹¹

ENTRY

Necessity of License

A prominent feature of the federal legislation is the requirement that a carrier obtain a certificate from the CAB before the commencement of operations.¹² The CAB is directed to issue such a certificate if it finds that the applicant is fit, willing, and able to perform the transportation described in the application and that such transportation is required for the public convenience and necessity.¹³ Economic control over entry, however, reaches only common carriers: private carriers require no certificate.¹⁴ In addition, the CAB is empowered to classify common carriers and to exempt some such carriers from the requirement of certification.¹⁵ In the absence of an exemption, the existence of more than one application for a given route compels the CAB to hold a hearing in which the merits of the respective applications may be compared. In other words, when applications are mutually exclusive, each applicant is entitled to appear before the CAB

¹¹ AIRLINES REPORT 51-53. As to the necessity of regulation, see KEYES, *FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* 331 (1951); WILCOX, *op. cit. supra* note 6, at 619; Nelson, *Patterns of Competition and Monopoly in Present-Day Transport and Implications for Public Policy*, 26 *LAND ECON.* 232 (1950). Many state commissions disavow the notion of competition in regulated industries. They speak instead of regulated monopoly. *E.g.*, Panhandle E. Pipe Line Co., 92 P.U.R. (n.s.) 370, 381-82 (Ill. Commerce Comm'n 1951); Village of Brookfield v. Goldblatt Bros., 33 P.U.R. (n.s.) 82, 92 (Ill. Commerce Comm'n 1940).

¹² Federal Aviation Act of 1958, § 401(a), 72 Stat. 754, 49 U.S.C. § 1371(a) (1958).

¹³ Federal Aviation Act of 1958, § 401(d)(1), 72 Stat. 755, 49 U.S.C. § 1371(d)(1) (1958). Subsection (g) provides that the Board may amend, modify, or suspend certificates. Subsection (k)(4) provides that the holding of a certificate is made conditional on compliance with the Railway Labor Act, tit. II, added by 49 Stat. 1189 (1936), 45 U.S.C. §§ 181-88 (1958). Section 401(e) of the former Civil Aeronautics Act, ch. 61, 52 Stat. 988 (1938), contained a "grandfather" clause whereby carriers previously in operation automatically received certificates.

¹⁴ Pan Am. Ferry Flight, 18 C.A.B. 214, 219-20 (1953); Page Airways, Inc. Investigation, 6 C.A.B. 1016, 1064-65 (1946); Federal Aviation Act of 1958, §§ 101(3), (10), (21), 401(a), 72 Stat. 737, 754, 49 U.S.C. §§ 1301(3), (10), (21), 1371(a) (1958); Neal, *Status of Non-Scheduled Operations Under the Civil Aeronautics Act of 1938*, 11 *LAW & CONTEMP. PROB.* 508, 515-21 (1946).

¹⁵ Federal Aviation Act of 1958, § 416, 72 Stat. 771, 49 U.S.C. § 1386 (1958). See Standard Airlines, Inc., Exemption Request, 9 C.A.B. 583, 585 (1948). *But see* Consolidated Flour Shipments, Inc.—Bay Area Violation, 17 C.A.B. 45 (1953), *aff'd*, 213 F.2d 814 (9th Cir. 1954). Some inadvertent exclusion from the industry may result from the complexity of regulations promulgated by the CAB pursuant to statutory authority. The prescribed content of air carrier tariffs, for example, might discourage would-be carriers. 14 C.F.R. §§ 221.30-41, .121 (1956).

and to contest the fitness and suitability of the other applicants for the route in question.¹⁶

CAB Policy With Respect to Entry

In the past there was much criticism of the CAB on the ground that it pursued a policy of limiting entry and extending the routes of existing carriers rather than licensing wholly new enterprises.¹⁷ In the absence of regulation, entry would be relatively easy and, in the period immediately following World War II, the abundance of former military pilots and equipment provided ample means for the establishment of new and enlarged airlines.¹⁸ But in considering the CAB's policies with respect to entry, care must be taken to focus on specific routes: the total number of air carriers in the United States is not a meaningful figure; the number of certificates is material only in relation to the specific route under consideration.¹⁹

Where no carrier has been authorized to serve a route, the CAB generally issues the first certificate when potential traffic appears adequate to support the services of one carrier.²⁰ But since subsidy payments are usually involved, the CAB will deny such a certificate when it believes that the cost to the treasury will outweigh the public benefits to be derived from the service.²¹ When doubt exists as to the volume of traffic to be expected, the CAB has resorted to the desirable expedient of issuing a temporary certificate on a "use it or lose it" basis so as to determine from actual operations whether points along the route can generate enough traffic to warrant certification of the first carrier.²²

¹⁶ *Delta Airlines, Inc. v. CAB*, 228 F.2d 17, 21-22 (D.C. Cir. 1955); *Northwest Airlines, Inc. v. CAB*, 194 F.2d 339, 343-44 (D.C. Cir. 1952). This is the so-called "Ashbacker" rule, which originated in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

¹⁷ *KEYES, op. cit. supra* note 11, at 8-11, 170-75, 240-41; *Maclay & Burt, supra* note 7, at 131, 132.

¹⁸ Note, *Civil Aeronautics Board Policy: An Evaluation*, 57 *YALE L.J.* 1053, 1058-71 (1948).

¹⁹ See *KEYES, op. cit. supra* note 11, at 47.

²⁰ See *Southeastern Area Local Serv.*, 1A *Av. L. REP.* ¶22342 (C.A.B. Dec. 18, 1959); *Guatemala-Los Angeles-San Francisco Serv.*, 21 C.A.B. 464, 467 (1955); *Ozark Certificate Renewal*, 21 C.A.B. 456, 457 (1955); *Southern Certificate Renewal*, 17 C.A.B. 116, 119-20 (1953); *Trans-Tex. Certificate Renewal*, 12 C.A.B. 606, 614 (1951); *New England*, 7 C.A.B. 27 (1946); *KEYES, op. cit. supra* note 11, at 115; cf. *North Cent. Route Investigation*, 17 C.A.B. 106 (1953).

²¹ *Frontier Airlines, Inc., Temporary Intermediate Points*, 1A *Av. L. REP.* ¶22338 (C.A.B. Dec. 4, 1959); *Renewal of Trans-Tex. Airways' Temporary Intermediate Points*, 1A *Av. L. REP.* ¶22332 (C.A.B. Nov. 13, 1959); *Service to Santa Catalina Island*, 1A *Av. L. REP.* ¶22330 (C.A.B. Nov. 12, 1959); *Pacific Northwest Local Serv.*, 1A *Av. L. REP.* ¶22299 (C.A.B. Aug. 21, 1959); *Braniff Airways, Kansas City-New Orleans Serv.*, 2 C.A.B. 727, 746-47 (1941); *Northwest Airlines, Additional Serv. to Can.*, 2 C.A.B. 627, 641 (1941); *United Airlines, Red Bluff Operation*, 1 C.A.A. 778, 787-90 (1940); *All Am. Aviation, Pick-up, Delivery Serv.*, 2 C.A.B. 133, 149 (1940) (dictum).

²² *Montana Local Serv.*, 1A *Av. L. REP.* ¶¶22290, 22296 (C.A.B. July 29, 1959); *South Cent. Area Local Serv.*, 1A *Av. L. REP.* ¶22292 (C.A.B. July 14, 1959) (sup-

A more difficult question is presented where one carrier has already received a certificate to operate over a route and the CAB must decide whether to license a second airline. In recent years, the carriers have shown increased financial strength and the CAB has exhibited a corresponding willingness to grant second certificates.²³ Furthermore, it is not incumbent upon the second applicant to show that existing service is inadequate, for the Board has indicated that it will consider competition desirable in passing upon applications for second-carrier certificates:

We need not detail the advantages of competition, nor to prove them again in each case. An objective reading of the Civil Aeronautics Act leaves no doubt that the lawmakers consider competition to be a desirable objective which should be established whenever it is economically feasible and will contribute to the development of a sound national air transportation system.²⁴

The phrase "competition for competition's sake" is meaningless, since in every case there are numerous considerations bearing on the public interest. The overall public interest is the principle by which we measure each decision. Public interest can only be determined after the Board has considered all the factors and circumstances surrounding the case, and in such consideration the Board does not give weight to an empty phrase, but rather to such factors as volume of potential traffic, total operating costs, benefits to the public in the form of improved service, financial condition of the carriers, and many other factors which contribute to the constant improvement of air transportation.²⁵

plemental opinon); Braniff Airways, Serv. to Fairmont & Fort Dodge, 20 C.A.B. 720, 738 (1955); Rocky Mountain States Air Serv., 6 C.A.B. 695, 730-32 (1946). The CAB has refused to authorize a new route merely to provide single carrier through service where the existing service is adequate. Braniff Airways, Kansas City-New Orleans Serv., 2 C.A.B. 727, 745-46 (1941). In other cases the Board has said that the importance of a city justified direct service to distant points. Northeast Airlines, Inc., 4 C.A.B. 686, 691 (1944). Compare Portland-Seattle Serv., 17 C.A.B. 682, 683-87 (1953). Often the licensing of a new route requires consideration of competition because the route may parallel an existing flight line. Fairbanks Area, 17 C.A.B. 372, 384, 387, 389 (1953). As to the terminals entitled to service, see text accompanying notes 53-56 *infra*; Southern Certificate Renewal, 17 C.A.B. 116, 177-79 (1953).

²³ See Pacific Northwest-Hawaii Renewal, 1A Av. L. REP. ¶ 22369 (C.A.B. April 1, 1960); Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶ 22270 (C.A.B. May 19, 1959); Western Airlines Serv. to Sioux Falls, 20 C.A.B. 757, 778-81 (1955); Additional Serv. to the Va. Peninsula, 20 C.A.B. 273, 289 (1955); West Coast-Hawaii, 20 C.A.B. 7 (1955); Southern Serv. to the West, 18 C.A.B. 790, 799, *reopened*, 19 C.A.B. 309, 310 (1954); New England, 7 C.A.B. 27, 36 (1946); Rocky Mountain States Air Serv., 6 C.A.B. 695, 740 (1946); Florida Case, 6 C.A.B. 765, 770 (1946); Braniff Airways, Houston-Memphis-Louisville Route, 2 C.A.B. 353, 376-77, 386 (1940). See generally Taaffe, *A Map Analysis of United States Airline Competition*, 25 J. AIR L. & COM. 121, 129-47 (1958). Compare States-Alaska, 20 C.A.B. 791, 801-04 (1955), *with id.* at 819-22 (dissenting opinion).

²⁴ Southern Serv. to the West, 18 C.A.B. 790, 799-800 (1954). See Additional Serv. to Puerto Rico, 12 C.A.B. 430, 485-86 (1951); Hawaiian Intraterritorial Serv., 10 C.A.B. 62, 66 (1948); Mid-Continent Airlines, Kansas City-New Orleans, 6 C.A.B. 253 (1945).

²⁵ Northeast Airlines, Inc., 4 C.A.B. 686, 690 (1944).

There is a strong, although not conclusive, presumption in favor of competition on any route which offers sufficient traffic to support competing services without unreasonable increase of total operating cost.²⁶

In many other instances, however, the CAB has denied a second certificate on a route on the grounds that the traffic is inadequate to support two carriers and that the costs of multiple operation would increase subsidy payments.²⁷ In some instances, the granting of a second certificate has been restricted so as to minimize the fiscal impact on competing carriers.²⁸ On the other hand, the CAB has from time to time used its power to grant a second certificate in order to compel the rendering of adequate service, much in the same manner as does the Interstate Commerce Commission in the motor carrier field.²⁹

²⁶ Colonial Airlines, Inc., 4 C.A.B. 552, 555 (1944). See BIGHAM & ROBERTS, *op. cit. supra* note 6, at 113; KEYES, *op. cit. supra* note 11, at 126-27, 131-32. A temporary certificate of a second line has been renewed despite the offer of the first carrier in the field to operate without subsidy if the second carrier's temporary authority were terminated. Trans-Pac. Airlines Renewal, 21 C.A.B. 253, 266 (1955). It is clear that the CAB may grant a second certificate on a route without finding that the existing service is inadequate; the grant of the second certificate may be upheld simply upon a finding that competition in and of itself is desirable. Eastern Airlines, Inc. v. CAB, 271 F.2d 752, 759 (2d Cir. 1959); Maclay & Burt, *supra* note 7, at 139-41. Compare Coyle Lines, Inc. v. United States, 115 F. Supp. 272, 278 (E.D. La. 1953); Surface-Mail-by-Air Exemptions, 20 C.A.B. 658, 660 (1955); Transcontinental & W. Airlines, Inc., 4 C.A.B. 373, 374 (1943); Continental Airlines, Inc., 4 C.A.B. 215, 234 (1943); Gellman, *supra* note 3, at 174-77.

²⁷ Service to Santa Catalina Island, 1A Av. L. REP. ¶22330 (C.A.B. Nov. 12, 1959); Bristol Bay Area Trunkline, 17 C.A.B. 1109, 1119 (1953); Tulsa, Wichita Falls, & Cent. Serv., 17 C.A.B. 1017, 1083 (1953); Alaska Route Modification, 17 C.A.B. 943, 984-86 (1953); Portland-Seattle Serv., 17 C.A.B. 682 (1953); Southern Serv. to the West, 12 C.A.B. 518, 526-27, 529, 530-35 (1951), *reopened*, 18 C.A.B. 234 (1953), *reopened*, 18 C.A.B. 790 (1954); Great Lakes Area, 8 C.A.B. 360, 370 (1947); North Cent., 7 C.A.B. 639, 643-45, 647-52 (1946); West Coast, 6 C.A.B. 961, 969-72, 976-77 (1946); Florida Case, 6 C.A.B. 765, 772, 774 (1946); Rocky Mountain States Air Serv., 6 C.A.B. 695, 740-41 (1946); Northwest Airlines, Additional Serv. to Can., 2 C.A.B. 627, 633-41 (1941); United Airlines, Red Bluff Operation, 1 C.A.A. 778, 779-80 (1940); Wilcox, *op. cit. supra* note 6, at 640; see AIRLINES REPORT 105; KEYES, *op. cit. supra* note 11, at 131-32, 142, 311; Gellman, *supra* note 3, at 429-30; Maclay & Burt, *supra* note 7, at 136-37. See generally Berge, *Subsidies and Competition as Factors in Air Transport Policy*, 41 PROCEEDINGS AM. ECON. ASS'N 519, 520 (1951). In United Airlines, Inc. v. CAB, 155 F.2d 169, 172 (D.C. Cir. 1946), the Board decided to establish a new route from Denver to Los Angeles. It found the traffic sufficient to support only one carrier and then proceeded to pick that carrier from the applicants for the route. The court appears to have held the procedure proper. Note that competition may also exist along alternate, parallel routes. *E.g.*, Mid-Continent Airlines, Twin Cities-St. Louis Operation, 2 C.A.B. 63, 93 (1940).

²⁸ Additional Serv. to the Va. Peninsula, 20 C.A.B. 273, 286 (1955); Rocky Mountain States Air Serv., 6 C.A.B. 695, 736 (1946); KEYES, *op. cit. supra* note 11, at 307. Additional data concerning the imposition of restrictions will be found in text accompanying notes 57-72 *infra*.

²⁹ Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶22270 (C.A.B. May 19, 1959); Las Vegas-Los Angeles Restriction, 17 C.A.B. 23, 24-25 (1953); Caribbean Area, 9 C.A.B. 534, 540-42 (1948); Richmond, *Creating Competition Among the Airlines*, 24 J. AIR L. & COM. 435, 436-37 (1957).

Similar considerations are applicable to the granting of the third and subsequent certificates on the same route.³⁰ Additional certificates were granted by the CAB in three waves, one at the end of World War II, another in 1949, and another in 1954-1956. By 1958 competition had been authorized over eighty-seven per cent of the routes.³¹ In that year twelve routes had five or more carriers and one route, New York to Washington, had nine.³² At the same time, the CAB has denied multiple certificates in numerous cases³³ and occasionally has used its power to restrict licenses in order to lessen the competitive impact of new certificates.³⁴

*Selection of Carrier*³⁵

It appears that there has not been extensive litigation with respect to the fitness of applicants for certificates. Perhaps because subsidies are available, there has usually seemed to be an ample supply of

³⁰ New York-San Francisco Nonstop Serv., 1A Av. L. REP. ¶22304 (C.A.B. Sept. 2, 1959); States-Alaska, 20 C.A.B. 791, 808-09 (1955); Air Freight, 10 C.A.B. 572, 585-86 (1949), *aff'd*, 192 F.2d 417 (D.C. Cir. 1951); Transcontinental & W. Airlines, Inc., 4 C.A.B. 373, 375 (1943); see Milwaukee-Chicago-New York Restriction, 11 C.A.B. 310, 330-31 (1950) (dictum), *rev'd on other grounds*, 194 F.2d 339 (D.C. Cir. 1952); *id.* at 336 (dissenting opinion); *cf.* Taaffe, *supra* note 23, at 136-37.

³¹ Smith, *Regulation of Returns to Transportation Agencies*, 24 LAW & CONTEMP. PROB. 702, 718 (1959); Taaffe, *supra* note 23, at 129-36, 146.

³² See 1957 CAB ANN. REP. 2-3. In at least one instance the CAB appears to have granted a certificate to an additional carrier merely because that carrier was in financial difficulties and might have had to suspend service if it could not obtain additional profitable routes. Service to Puerto Rico, 1A Av. L. REP. ¶22295 (C.A.B. June 25, 1959) (supplemental opinion).

³³ Cleveland-New York Nonstop Serv., 21 C.A.B. 760, 764 (1955); Southern Certificate Renewal, 17 C.A.B. 116, 166-70 (1953); Southern Serv. to the West, 12 C.A.B. 518, 524-25, 529 (1951), *reopened*, 18 C.A.B. 234 (1953), *reopened*, 18 C.A.B. 790, *petition granted*, 19 C.A.B. 309 (1954); Cincinnati-New York Additional Serv., 8 C.A.B. 152, 156-58, 160-61 (1947); North Cent., 7 C.A.B. 639, 652-53 (1946); West Coast, 6 C.A.B. 961, 964-66, 975-76 (1946). Compare Transcontinental Coach-Type Serv., 14 C.A.B. 720, 724-25 (1951).

³⁴ *E.g.*, Cleveland-New York Nonstop Serv., 21 C.A.B. 760, 764 (1955). Occasionally the CAB has used its power to grant certificates to additional carriers in order to compel improvements in existing service. New York-San Francisco Nonstop Serv., 1A Av. L. REP. ¶22304 (C.A.B. Sept. 2, 1959); *cf.* Fairbanks Area, 17 C.A.B. 372 (1953).

³⁵ We have made no study of the international aspects of air carrier regulation inasmuch as they involve considerations not applicable to domestic problems. The CAB, of course, has little control over foreign service, foreign rates, and so forth. Presidential approval is required before the grant of a foreign route to a domestic applicant, but not before the grant of an exemption. Federal Aviation Act of 1958, §§ 416, 801, 72 Stat. 771, 782, 49 U.S.C. §§ 1386, 1461 (1958); Pan Am. World Airways v. CAB, 261 F.2d 754, 756 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959). On the other hand, because of the requirement of presidential approval, there is no judicial review of the award of an international certificate. Chicago & So. Airlines v. Waterman S.S. Co., 333 U.S. 103 (1948). The International Civil Aviation Organization has merely advisory powers over international traffic, so national discretion is paramount. It is often urged that each nation should grant a monopoly of foreign routes to a single carrier. *E.g.*, Latin Am. Air Serv., 6 C.A.B. 857, 861-66 (1946); MANCE, INTERNATIONAL AIR TRANSPORT 44, 60 (1944). But the CAB has rejected this "chosen instrument" concept. Pan Am. Airways v. CAB, 121 F.2d 810, 817 (2d Cir. 1941); Pan Am. World Airways, Damascus & Teheran Serv., 19 C.A.B. 697

qualified applicants for routes.³⁶ But the CAB has, on occasion, denied certificates as punishment for operators who have violated the statute or regulations thereunder.³⁷

In selecting the applicant to whom a route is to be awarded from among those found fit, the CAB gives some weight to historical factors. Thus if one applicant has pioneered the route and developed greater experience on it, the certificate may be awarded to him.³⁸ Another consideration is the interest of the carrier in developing the route to its full potential. Typically, this means that a feeder carrier which has a limited number of routes will secure the award as against a trunk line with numerous longer routes to serve.³⁹ Another factor given

(1954); Latin Am. Air Serv., 6 C.A.B. 857, 860, 864-65, 879-80, 883-85, 889 (1946); Northeast Airlines, No. Atl. Routes, 6 C.A.B. 319, 323, 325 (1945); American Export Airlines, Trans-Atl. Serv., 2 C.A.B. 16, 29-31, 34 (1940), *aff'd in part, rev'd in part on other grounds*, 121 F.2d 810 (2d Cir. 1941); KEYES, *op. cit. supra* note 11, at 127, 132-34; 1942 CAB ANN. REP. 36; Note, 99 U. PA. L. REV. 1195, 1205-06 (1951). Yet it does not necessarily follow that the CAB stands ready to grant second and third certificates on every route. Trans World-Pan Am., London/Frankfurt-Rome Serv., 20 C.A.B. 441, 443 (1955); Chicago & So. Air Lines, Maracaibo Serv., 19 C.A.B. 710, 729 (1954) (dictum); Keyes, *A Reconsideration of Federal Control of Entry into Air Transportation*, 22 J. AIR L. & COM. 192, 195 (1955). Compare Whitehorse Flying Serv., Irregular Canada-United States Serv., 20 C.A.B. 1 (1955); Samoan Airlines, 18 C.A.B. 533 (1954). In choosing among applicants for foreign routes, the CAB has taken account of considerations of economy and of balancing of routes. Northeast Airlines, No. Atl. Routes, 6 C.A.B. 319, 340-45 (1945); Trans World-Pan Am., London/Frankfurt-Rome Serv., 20 C.A.B. 441, 442-46 (1955); KEYES, *op. cit. supra* note 11, at 128-30.

Issuance of American permits to foreign flag carriers is largely controlled by treaty. See Aerovias Venezolanas, Foreign Permit, 20 C.A.B. 746 (1955); Linea Aeropostal Venezolana, Foreign Permit, 20 C.A.B. 419 (1955); Empresa Quatemalteca de Aviacion, Foreign Permit, 19 C.A.B. 834, 837 (1955); Japan Air Lines, Naha, Okinawa-Hong Kong Serv., 19 C.A.B. 378 (1954); Iberia, New York-Madrid Serv., 19 C.A.B. 81, 87 (1954); Taca Int'l Airlines, Foreign Permit, 18 C.A.B. 737, 751 (1954); Airwork Ltd., London-Prestwick-New York Serv., 18 C.A.B. 542, 550-51 (1954); Aerovias Interamericanas, Tocumen-Miami Serv., 18 C.A.B. 510, 518-19 (1954); Japan Air Lines, Foreign Permit, 18 C.A.B. 359 (1953); Rutas, Aereas Nacionales, So. Am., Foreign Permit, 18 C.A.B. 302 (1953); Sabena, Foreign Permit, 17 C.A.B. 1103 (1953); Philippine Air Lines, Foreign Permit Amendment, 17 C.A.B. 361 (1953); Northwest Airlines, Additional Serv. to Can., 2 C.A.B. 627, 630-32 (1941) (dictum). See generally Stoffel, *American Bilateral Air Transport Agreements*, 26 J. AIR L. & COM. 119 (1959).

³⁶ Note, however, the limitation on CAB's powers expressed in Braniff Airways, Inc. v. CAB, 147 F.2d 152 (D.C. Cir. 1945). Note also the objection to the granting of certificate voiced in the dissenting opinion in Trans-Tex. Certificate Renewal, 12 C.A.B. 606, 636-39 (1951).

³⁷ Large Irregular Carriers, Exemptions, 11 C.A.B. 609, 618 (1950); Hawaiian Intraterritorial Serv., 10 C.A.B. 62, 67 (1948). Compare Mansfield Journal Co. v. FCC, 180 F.2d 28, 33-34 (D.C. Cir. 1950). Affiliation with another carrier may disqualify the applicant. *E.g.*, American President Lines Petition, 7 C.A.B. 799, 802-03 (1947).

³⁸ Service to Santa Catalina Island, 1A Av. L. REP. ¶22330 (C.A.B. Nov. 12, 1959). But see Braniff Airways, Houston-Memphis-Louisville Route, 2 C.A.B. 353, 386-87 (1940); All Am. Aviation, Pick-up, Delivery Serv., 2 C.A.B. 133, 146 (1940). The 1938 legislation contained a "grandfather clause" under which many important certificates issued. See note 13 *supra*.

³⁹ Additional Serv. to the Va. Peninsula, 20 C.A.B. 273, 285 (1955); Klamath Falls-Medford Serv., 17 C.A.B. 713 (1953); Continental Airlines, Inc., 4 C.A.B. 1, 18-19 (1942).

weight by the CAB is the relative cost of service. If one of the applicants, for example, already has a base at one or both ends of the route, it may well be preferred over another applicant who would be compelled to establish a base at one or more terminals and thus would be unable to spread the terminal costs over several routes.⁴⁰

The foregoing factors may be considered economic in that they tend to encourage the development of service at the least cost. Perhaps more important, however, are two other considerations. First, the CAB seeks to award routes to the weaker of two or more applicants in order to balance the strength of the various certificated airlines. Thus, in a recent case in which West Coast and Northwest were both applicants for a Spokane to Calgary route, one reason the CAB granted the certificate to West Coast was that Northwest was not on subsidy while West Coast was, and the Board thought the award would result in reducing West Coast's subsidy needs.⁴¹ Again, in the *Norfolk-Atlanta Non-Stop* case, the CAB granted a certificate to Capital Airlines instead of Eastern because Eastern had greater financial and operational resources.⁴²

Second and closely allied is the consideration of avoiding diversion of traffic and thus mitigating the competitive impact of a new certificate. For example, when four airlines applied for a certificate on the Denver to Los Angeles run, the CAB found that only one additional carrier was needed. United, one of the applicants, had lines running east of Denver, but had enabled its customers to secure through service to Los Angeles by means of an interchange arrangement with Western, which was certificated on a Denver-Los Angeles run. The CAB eliminated United from consideration on the ground that to grant the new certificate to that airline would deny Western

⁴⁰ Southeastern Area Local Serv., 1A Av. L. REP. ¶22342 (C.A.B. Dec. 18, 1959); New York-San Francisco Nonstop Serv., 1A Av. L. REP. ¶22304 (C.A.B. Sept. 2, 1959); Montana Local Serv., 1A Av. L. REP. ¶22296 (C.A.B. July 29, 1959) (supplemental opinion); Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶22270 (C.A.B. May 19, 1959); Continental Airlines, Inc., 4 C.A.B. 215, 233-34 (1943); Delta Airlines, Serv. to Atlanta & Birmingham, 2 C.A.B. 447, 479-80 (1941); Mid-Continent Airlines, Twin Cities-St. Louis Operation, 2 C.A.B. 63, 93 (1940). Sometimes the ability of an applicant to render through service affects the CAB's choice of carrier. Hawaiian Case, 7 C.A.B. 83, 109 (1946); Braniff Airways Houston-Memphis-Louisville Route, 2 C.A.B. 353, 386 (1940).

⁴¹ Spokane-Calgary Route, 1A Av. L. REP. ¶22367 (C.A.B. March 2, 1960); see Ozark Certificate Renewal, 21 C.A.B. 86, 90 (1955); Continental Airlines, Inc., 4 C.A.B. 1, 18 (1942).

⁴² Norfolk-Atlanta Nonstop Investigation, 21 C.A.B. 295, 298 (1955). *Accord*, Additional North-South Serv., 17 C.A.B. 1017, 1019 (1953); Florida Case, 6 C.A.B. 765, 773-74 (1946); Colonial Airlines, Inc., 4 C.A.B. 552, 560 (1944). See American Airlines, Chicago-Detroit Local Serv., 20 C.A.B. 565, 584-86 (1955) (dissenting opinion); BIGHAM & ROBERTS, *op. cit. supra* note 6, at 506; Taaffe, *supra* note 23, at 146. Compare Hawaiian Case, 7 C.A.B. 83, 108-09 (1946).

the interchange traffic it previously received from United.⁴³ Here again, the CAB, while ready to permit entry in limited numbers, sought to do so in a manner that would limit competition to a level thought to be desirable.

The CAB has attempted to promote what it believes to be constructive, but not destructive, competition:

If air carriers are to be prevented from inaugurating improvements in existing service solely as a protection to a particular carrier or carriers, the development of an adequate air transportation system will be retarded It is of greatest importance . . . to maintain a properly balanced system of air transportation in every section of the country in order to encourage constructive competition. That healthy competition is presumed to be beneficial to the public may be inferred from various congressional expressions. It represents the economic philosophy underlying the antitrust acts.⁴⁴

In evaluating the extent of competition, we reiterate that conclusions must be based on the number of airlines certificated on specific routes⁴⁵ as opposed to the number of airlines in the entire United States. It is common to complain that the "Big Four" carry some seventy per cent of the domestic traffic,⁴⁶ but unrelated to specific routes such figures are meaningless. Furthermore, account must be taken of the recently granted certificates whereby many routes have acquired the services of two or more carriers.⁴⁷ Nevertheless, the overwhelming weight of informed opinion is that the CAB has been restrictive and that its policies with respect to entry have considerably inhibited competition.⁴⁸

⁴³ Western Airlines, Denver-Los Angeles Serv., 6 C.A.B. 199 (1944), *aff'd sub nom.* United Airlines, Inc. v. CAB, 155 F.2d 169 (D.C. Cir. 1946); see Cleveland-New York Nonstop Serv., 21 C.A.B. 760, 763 (1955); Tulsa, Wichita Falls & Cent. Serv., 17 C.A.B. 1017, 1018-19 (1953); North Cent., 8 C.A.B. 477 (1947) (supplemental opinion); Great Lakes Area, 8 C.A.B. 360, 364-77 (1947); Hawaiian Case, 7 C.A.B. 83, 110 (1946); Continental Airlines, Inc., 4 C.A.B. 1, 17-18 (1942); Mid-Continent Airlines, Twin Cities-St. Louis Operation, 2 C.A.B. 63, 92-93 (1940). See also Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶22270 (C.A.B. May 19, 1959).

⁴⁴ Braniff Airways, Houston-Memphis-Louisville Route, 2 C.A.B. 353, 386 (1940).

⁴⁵ But see Continental Airlines, Inc., 4 C.A.B. 1, 18 (1942); Delta Airlines, Serv. to Atlanta & Birmingham, 2 C.A.B. 447, 480 (1941).

⁴⁶ BIGHAM & ROBERTS, *op. cit. supra* note 6, at 115; WESTMEYER, ECONOMICS OF TRANSPORTATION 543 (1952); Maclay & Burt, *supra* note 7, at 155. Normally, of course, an existing carrier can serve a contiguous new route at lower cost because it need not duplicate terminal and other costs at the junction point, and such overhead can be charged to a greater volume of traffic.

⁴⁷ See AIRLINES REPORT 110-13; EASTERN AIRLINES ANN. REP. 12 (1957). Compare Ozark Certificate Renewal, 21 C.A.B. 86, 99 (1955) (dissenting opinion); Healy, *Workable Competition in Air Transportation*, 35 PROCEEDINGS AM. ECON. ASS'N 229 (1945); Richmond, *supra* note 29, at 436-37.

⁴⁸ BIGHAM & ROBERTS, *op. cit. supra* note 6, at 505-07. See generally KEYES, *op. cit. supra* note 11, at 171-75; WILCOX, *op. cit. supra* note 6, at 641; Adams, *The Role*

SCOPE OF LICENSE

Routes

Certificates granted by the CAB narrowly define the routes over which carriers may operate.⁴⁹ In the recent *Northeastern States Area Investigation*,⁵⁰ for example, a certificate granted to Mohawk to serve Jamestown was specifically restricted against service from New York City to Jamestown, that service already being provided by Allegheny. Carriers who stray from their routes may find themselves the objects of enforcement proceedings.⁵¹ The whole question of conformation of routes is, of course, closely related to the issue of entry. Changes in routes and restrictions thereon cause immediate effects upon competitive situations.⁵²

of Competition in the Regulated Industries, 48 PROCEEDINGS AM. ECON. ASS'N 527, 539 (1958); Durham & Feldstein, *Regulation as a Tool in the Development of the Air Freight Industry*, 34 VA. L. REV. 769, 808-09 (1948); Keyes, *supra* note 6, at 288; Keyes, *supra* note 35, at 192, 194-98; Maclay & Burt, *supra* note 7, at 151-55. But note the contention that economies of scale are present and that small trunk lines in any event could not compete effectively with large ones because their costs are higher. Note, 60 YALE L.J. 1196, 1207-10 (1951). The CAB appears in many cases to have created competition incidentally and not by design. Richmond, *supra* note 29, at 439, 443, 445. Such inadvertent competition may result from extension of routes and the like. As the CAB has no authority to limit the equipment which the carrier may use on a given route, see text accompanying note 73 *infra*, the grant of a second certificate must be intended to create competition and not merely to increase the quantity of service.

⁴⁹ Regulations with respect to charter service will be found in 14 C.F.R. §§ 207.5, .7 (1951).

⁵⁰ 1A AV. L. REP. ¶22357 (C.A.B. Feb. 19, 1960). See Charleston-Columbus, 19 C.A.B. 731, 734-35 (1955); Texas Local Serv., 18 C.A.B. 34, 48-49 (1953); Alaska Route Modification, 17 C.A.B. 943 (1953); Great Lakes Area, 8 C.A.B. 360, 372-77 (1947); Cincinnati-New York Additional Serv., 8 C.A.B. 152, 156, 158, 160 (1947); Latin Am. Air Serv., 6 C.A.B. 857, 918 (1946); Rocky Mountain States Air Serv., 6 C.A.B. 695 (1946). Most of the foregoing cases do not involve the imposition of restrictions but do illustrate the narrow scope of the routes granted by CAB certificates.

⁵¹ Pacific No. Airlines, Inc. v. Alaska Airlines, Inc., 80 F. Supp. 592, 610 (D. Alaska 1948); AIRLINES REPORT 75-76.

⁵² See *Northeastern States Area Investigation*, 1A AV. L. REP. ¶22357 (C.A.B. Feb. 19, 1960); Ozark Certificate Renewal, 21 C.A.B. 86, 91 (1955); Service to Trenton, 20 C.A.B. 290, 311-12 (1955); Trans-Pac. Certificate Renewal, 20 C.A.B. 47, 54-56, 57-62, 65-66, 72, *reopened*, 21 C.A.B. 253 (1955); West Coast-Hawaii, 20 C.A.B. 7, 13 (1955); Trans-Tex. Certificate Renewal, 12 C.A.B. 606, 616-17 (1951) (separate opinion); Northeast Airlines, No. Atl. Routes, 6 C.A.B. 319, 326-27 (1945). The CAB policies thereon and competitive consequences are discussed in FREDERICK, COMMERCIAL AIR TRANSPORTATION 199-200 (1955); GILL & BATES, AIRLINE COMPETITION 3-4, 23, 25, 186-87 (1949); KEYES, *op. cit. supra* note 11, at 109-10, 121-22, 249, 272; Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 20 J. AIR L. & COM. 379, 384-85, 387, 396, 402 (1953); Gellman, *supra* note 3, at 429; Howell, *The Rate of Return in Air Transport*, 24 LAW & CONTEMP. PROB. 677, 687 (1959); Kahn, *Regulatory Agencies and Industrial Relations: The Air Lines Case*, 42 AM. ECON. REV. 686 (1952); Keyes, *supra* note 6, at 280, 289-304; Koontz, *Economic and Managerial Factors Underlying Subsidy Deals of Domestic Trunk Line Air Carriers*, 18 J. AIR L. & COM. 127, 144-45, 149 '51 (1951); Richmond, *supra* note 29, at 435, 438-39, 441, 446; Saunders, *The Airline Flight From Reality*, Fortune, Feb. 1956, pp. 90, 92; Taaffe, *supra* note 23, at 146; Note, *The Economic Regulation of Air Transport*, 5 U. CHI. L. REV. 471, 474 (1938).

Terminal To Be Served

The Federal Aviation Act requires that each certificate specify the terminal points and intermediate points which the carrier is to serve.⁵³ Hence the CAB restricts certificates to specific terminals and does not grant authority to serve general geographic areas.⁵⁴ Indeed, the CAB is apt to insist upon service to specific airports,⁵⁵ a requirement closely allied to its insistence that carriers serve unprofitable as well as profitable routes.⁵⁶

Restrictions

Certificates frequently contain restrictions against various types of service. It is common, for example, for the CAB to issue a certificate permitting flight between points *A* and *E* but prohibiting non-stop service; that is, the certificate requires a mandatory stop at some one or more intermediate points *B*, *C*, and *D*.⁵⁷ Those restrictions are closely related to the status of trunk and feeder carriers: usually feeder carriers may not provide nonstop service between trunk line terminals.⁵⁸ From time to time, mandatory stop restrictions have

⁵³ Federal Aviation Act of 1958, § 401(e), 72 Stat. 754, 49 U.S.C. § 1371(e) (Supp. 1959). An air carrier may change airports at the certified point only by filing notice with the CAB and waiting thirty days. 14 C.F.R. § 202.3 (1956).

⁵⁴ Aerovias Sud Americana, Inc., Certificate Renewal, 1A Av. L. REP. ¶ 22320 (C.A.B. Oct. 29, 1959); Durham & Feldstein, *supra* note 48, at 794-95.

⁵⁵ Flint-Grand Rapids Adequacy of Serv. Investigation, 1A Av. L. REP. ¶ 22377 (C.A.B. April 29, 1960); Washington-Baltimore Adequacy of Serv. Investigation, 1A Av. L. REP. ¶ 22376 (C.A.B. April 29, 1960); Southeastern Area Local Serv., 1A Av. L. REP. ¶ 22342 (C.A.B. Dec. 18, 1959); States-Alaska, 20 C.A.B. 791, 806-08 (1955).

⁵⁶ South Cent. Area Local Serv., 1A Av. L. REP. ¶ 22292 (C.A.B. July 14, 1959) (supplemental opinion); States-Alaska, 20 C.A.B. 791, 811-12 (1955); Braniff Airways, Serv. to Fairmont & Fort Dodge, 20 C.A.B. 720 (1955); Transcontinental Coach-Type Serv., 14 C.A.B. 720, 723 (1951). Compare Flying Tiger Line, Inc., Air-Truck Serv., 1A Av. L. REP. ¶ 22329 (C.A.B. Nov. 12, 1959); Alaska Route Modification, 17 C.A.B. 943, 945-47 (1953); West Coast, 6 C.A.B. 961, 979-80 (1946); Panagra Terminal Investigation, 4 C.A.B. 670, 673 (1944), *rehearing denied*, 154 F.2d 271 (2d Cir. 1946), *dismissed per curiam*, 332 U.S. 827 (1947). See text accompanying notes 173-80, 192-95 *infra* with respect to CAB's powers to compel service generally.

⁵⁷ Northeastern States Area Investigation, 1A Av. L. REP. ¶¶ 22357, 22341 (C.A.B. Feb. 19, 1960; Dec. 15, 1959); Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶ 22307 (C.A.B. Sept. 15, 1959) (supplemental opinion); Pacific Northwest Local Serv., 1A Av. L. REP. ¶ 22299 (C.A.B. Aug. 21, 1959) (supplemental opinion); Montana Local Serv., 1A Av. L. REP. ¶ 22296 (C.A.B. July 29, 1959) (supplemental opinion); Western Airlines, Inc. v. Frontier Airlines, 1A Av. L. REP. ¶ 22287 (C.A.B. Jan. 24, 1959); Southern Certificate Renewal, 17 C.A.B. 116, 118-19 (1953); New York-Houston Interchange, 16 C.A.B. 603, 630-31 (1952); Continental Air Lines, Route Consolidation, 10 C.A.B. 657, 661-65 (1949); Cincinnati-New York Additional Serv., 8 C.A.B. 152, 162-63 (1947); All Am. Aviation, Pick-Up, Delivery Serv., 2 C.A.B. 133, 146 (1940); GILL & BATES, *op. cit. supra* note 52, at 117-18, 201, 267-69.

⁵⁸ Southeastern Area Local Serv., 1A Av. L. REP. ¶ 22342 (C.A.B. Dec. 18, 1959); Montana Local Serv., 1A Av. L. REP. ¶ 22290 (C.A.B. July 2, 1959).

been lifted by the CAB. In one case, restrictions were removed for all three carriers serving the same nonstop route, the Board saying:

Operating conditions imposed in certificates issued by the Board have played an important part in the early development of a sound air transportation pattern. In the past it has frequently been necessary in authorizing new services where the traffic flow was not unusually heavy to limit their impact upon existing carriers by imposing such restrictions. In the instant case, however, it is apparent that the conditions have outlived their usefulness and are now merely serving unduly to inhibit improved service

. . . .⁵⁹

Lifting of a mandatory stop restriction, however, requires a comparative hearing on the theory that a new route is awarded.⁶⁰ Perhaps as a consequence, in many instances restrictions have remained in the carriers' certificates.⁶¹

Another commonly utilized limitation prohibits "shuttle" or "turnaround" service and is frequently referred to as a "long-haul" restriction. Such a condition was imposed, for example, upon Eastern's certificate to serve Milwaukee, preventing the airline from running a shuttle service between Milwaukee and Minneapolis and requiring it to initiate its flights at Louisville or points south.⁶² Just as the mandatory stop restrictions are designed to protect the trunk lines from the competition of feeder carriers, so the long-haul restrictions are intended to shelter the feeders from trunk line competition on

⁵⁹ Louisville-New York Investigation, 21 C.A.B. 794, 796-97 (1955). *Accord*, Northeastern States Area Investigation, 1A Av. L. REP. ¶¶ 22357, 22341 (C.A.B. Feb. 19, 1960; Dec. 15, 1959); United Restriction, 21 C.A.B. 767, 769 (1955); Portland-Seattle Serv., 17 C.A.B. 682, 687 (1953); Continental Airlines, Route Consolidation, 10 C.A.B. 657, 673 (1949). The procedure for removal of a restriction involves filing a new schedule with the CAB. 14 C.F.R. § 202.2 (1956). See generally FREDERICK, *op. cit. supra* note 52, at 177; Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. AIR L. & COM. 410, 430-31 (1957).

⁶⁰ Northwest Airlines, Inc. v. CAB, 194 F.2d 339, 343 (D.C. Cir. 1952). Examples of such hearings are found in Service to Trenton, 20 C.A.B. 290 (1955); Portland-Seattle Serv., 17 C.A.B. 682, 685-86 (1953).

⁶¹ See Norfolk-Atlanta Nonstop Investigation, 21 C.A.B. 295, 298-99 (1955); Continental Air Lines, Route Consolidation, 10 C.A.B. 657, 663-65, 669 (1949). Compare United Restriction, 18 C.A.B. 17, 18-21 (1953) (dissenting opinion).

⁶² Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶ 22270 (C.A.B. May 19, 1959); see Southeastern Area Local Serv., 1A Av. L. REP. ¶ 22342 (C.A.B. Dec. 18, 1959); Northeastern States Area Investigation, 1A Av. L. REP. ¶ 22341 (C.A.B. Dec. 15, 1959); Cleveland-New York Nonstop Serv., 21 C.A.B. 760, 764 (1955); Columbia-Florence Restriction, 21 C.A.B. 238, 239 (1955); Western Air Lines Serv. to Sioux Falls, 20 C.A.B. 757, 780 (1955); Texas Local Serv., 18 C.A.B. 34, 37-38 (1953); Las Vegas-Los Angeles Restriction, 17 C.A.B. 23, 42 (1953); United Air Lines, Detroit-New York Nonstop, 7 C.A.B. 781 (1947); North Cent., 7 C.A.B. 639, 649-51 (1946); American Airlines, Route Consolidations, 7 C.A.B. 337, 347 (1946); New England, 7 C.A.B. 27, 36 (1946).

their shorter hops.⁶³ Here again, removal of the restrictions is occasionally granted⁶⁴ and occasionally denied.⁶⁵

Other restrictions have been placed in certificates to protect the feeder carriers from the competition of the trunk lines. Thus a trunk line may be prohibited from stopping at both of two named points on a given route; in the alternative, a stop may be allowed but on a "closed door" basis whereby no passengers may be enplaned.⁶⁶ From time to time such restrictions have been found no longer necessary and have been removed;⁶⁷ in other instances they have been retained.⁶⁸ As one acute observer has commented on such restrictions, the CAB never lets competitive factors override its protective function.⁶⁹

With the growth of air transport and changes in technology, the CAB has endeavored to shift some of the trunk lines' shorter hops to the feeder carriers. The courts have sustained the Board's authority to suspend the certificates of the trunk line carriers in order to accomplish this end.⁷⁰ Thus Northwest Airlines lost its authority to serve Kalispell, Montana, and West Coast was substituted for it.⁷¹ In many

⁶³ Caribbean Area, 9 C.A.B. 534, 548, 550-54 (1948).

⁶⁴ States-Alaska, 20 C.A.B. 791, 804-06 (1955); Portland-Seattle Serv., 17 C.A.B. 682, 703-07 (1953); Through Serv. Investigation, 16 C.A.B. 6, 8-10 (1952).

⁶⁵ Milwaukee-Chicago-New York Restriction, 11 C.A.B. 310, 332 (1950), *rev'd on other grounds sub nom.* Northwest Airlines v. CAB, 194 F.2d 339 (D.C. Cir. 1952).

⁶⁶ See Columbia-Florence Restriction, 21 C.A.B. 238, 239 (1955); Additional Serv. to the Va. Peninsula, 20 C.A.B. 273, 274, 287 (1955); Charleston-Columbus, 19 C.A.B. 731, 771 (1955); Southwest Renewal—United Suspension, 15 C.A.B. 61 (1952), *aff'd sub nom.* United Airlines v. CAB, 198 F.2d 100 (7th Cir. 1952); Continental Airlines, Inc., 10 C.A.B. 657, 674 (1949); Caribbean Area, 9 C.A.B. 534, 538-40 (1948); Cincinnati-New York Additional Serv., 8 C.A.B. 152, 162 (1947); Latin Am. Air Serv., 6 C.A.B. 857, 881-82 (1946); Transcontinental & W. Airlines, Inc., 4 C.A.B. 373 (1943); GILL & BATES, *op. cit. supra* note 52, at 186-87. Compare Charleston-Columbus, 19 C.A.B. 731, 735 (1955); Texas Local Serv., 18 C.A.B. 34, 49 (1953); Portland-Seattle Serv., 17 C.A.B. 682, 705 (1953). See Parks Investigation, 11 C.A.B. 779, 795-800 (1950) (dissenting opinion), *aff'd sub nom.* Continental So. Lines v. CAB, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952). An air carrier may not stop more than forty-five minutes at any point on its certificate unless the point is one of origin or termination. 14 C.F.R. § 202.6(a) (1956).

⁶⁷ Columbia-Florence Restriction, 21 C.A.B. 238, 241 (1955); Tulsa, Wichita Falls & Cent. Serv., 17 C.A.B. 1017, 1026 (1953); Las Vegas-Los Angeles Restriction, 17 C.A.B. 23, 25, 27 (1953); Trans-World Airlines, Restriction Removal Route No. 2, 16 C.A.B. 265, 267, 269 (1952); West Coast, 6 C.A.B. 961, 968 (1946).

⁶⁸ Trans-Pac. Certificate Renewal, 20 C.A.B. 47, 64 (1955); Portland-Seattle Serv., 17 C.A.B. 682, 685 (1953).

⁶⁹ Keyes, *National Policy Toward Commercial Aviation—Some Basic Problems*, 16 J. AIR L. & COM. 280, 295 (1949).

⁷⁰ United Airlines, Inc. v. CAB, 198 F.2d 100, 106-08 (7th Cir. 1952); Western Airlines, Inc. v. CAB, 196 F.2d 933, 936 (9th Cir.), *cert. denied*, 344 U.S. 875 (1952).

⁷¹ Montana Local Serv., 1A Av. L. REP. ¶ 22296 (C.A.B. July 29, 1959) (supplemental opinion); see Spokane-Calgary Route, Can., Route, 1A Av. L. REP. ¶ 22367 (C.A.B. March 8, 1960); Southeastern Area Local Serv., 1A Av. L. REP. ¶ 22342 (C.A.B. Dec. 18, 1959); Northeastern States Area Investigation, 1A Av. L. REP. ¶ 22341 (C.A.B. Dec. 15, 1959); Pacific Northwest Local Serv., 1A Av. L. REP. ¶ 22297 (C.A.B. July 30, 1959) (supplemental opinion); Ozark Certificate Renewal, 19

instances, however, such changes involve increases in subsidies or reduced service and the CAB has sometimes thought the price involved too high for the probable results.⁷²

Schedules

Although the CAB has comprehensive powers over the routes which air carriers may follow, the organic statute contains a limitation on its power over scheduling: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require."⁷³

As we have seen, however, many certificates contain conditions requiring carriers to make mandatory stops⁷⁴ and by indirection the CAB appears to have achieved considerable control over scheduling.⁷⁵ The most important facet of CAB control of scheduling is found in the controversy with respect to the "nonskeds." Such carriers, licensed not by certificate but by exemption, were strictly limited as to number of flights in a manner which has given rise to extensive debate.⁷⁶

C.A.B. 95 (1954); Service to Fayetteville, 19 C.A.B. 25 (1954); United Airlines, Rock Springs Suspension, 18 C.A.B. 147, 157 (1953); North Cent. Route Investigation, 17 C.A.B. 106 (1953); Southwest Renewal—United Suspension, 15 C.A.B. 61, 72-73 (1952), *aff'd sub nom.* United Airlines v. CAB, 198 F.2d 100 (7th Cir. 1952). See also KEYES, *FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* 249 (1951).

⁷² Trans-Tex. Segments 2 & 6 Renewal, 17 C.A.B. 257, 259, 278-79 (1953); Southern Certificate Renewal, 17 C.A.B. 116, 196-97, 199-200, 203-04 (1953).

⁷³ Federal Aviation Act of 1958, § 401(e), 72 Stat. 755, 49 U.S.C. § 1371(e) (1958).

⁷⁴ See note 58 *supra* and accompanying text. There are numerous regulations touching on scheduling. The CAB has prescribed procedures respecting applications for change in service pattern, 14 C.F.R. § 202.4 (1956); has required that airlines file their schedules with the CAB, 14 C.F.R. § 231.1 (1956); has prohibited "unrealistic" scheduling by requiring that 75% of all scheduled flights be performed and completed within fifteen minutes of scheduled time, 14 C.F.R. §§ 234.1(d), .3 (Supp. 1960); has directed that advertised schedules conform to those filed with the CAB, 14 C.F.R. § 234.5 (Supp. 1960); and has directed that supplemental air carriers file flight reports, 14 C.F.R. § 242.2 (1956).

⁷⁵ See Ozark Certificate Renewal, 21 C.A.B. 456 (1955); Through Serv. Investigation, 16 C.A.B. 6, 9 (1952); CHERINGTON, *AIRLINE PRICE POLICY* 93-95 (1958). Compare Note, *Adequacy of Domestic Airline Service: The Community's Role in a Changing Industry*, 68 YALE L.J. 1199, 1206 (1959).

⁷⁶ AIRLINES REPORT 81-82, 86. See generally *id.* at 74-110. See also GILL & BATES, *op. cit. supra* note 52, at 186-87. The CAB may order through routes and joint rates. Federal Aviation Act of 1958, § 1002(i), 72 Stat. 790, 49 U.S.C. § 1482(i) (1958); cf. New York-Houston Interchange, 16 C.A.B. 603 (1952); Southern Serv. to the West, 12 C.A.B. 518, 535-38 (1951). Compare Panagra Terminal Investigation, 4 C.A.B. 670, 677-78 (1944); Pan Am. Matson-Inter-Island Contract, 3 C.A.B. 540, 546-47 (1942). Scheduling may have considerable impact upon load densities and hence upon profits or subsidies. Bluestone, *supra* note 52, at 384-91.

STATUS OF CARRIERS

Trunk Lines

The Federal Aviation Act specifically permits the Board to establish classifications of air carriers.⁷⁷ As indicated above, some carriers operate under certificates while others are merely exempted from the requirements of the statute. In the certificated group, the most important commercially are the trunk lines of which some twelve are now in operation.⁷⁸ Among the trunk lines the four largest—the “Big Four”—enjoy a large proportion of the total commercial traffic and their costs may be lower than those of the smaller carriers.⁷⁹ Mention must also be made of the several foreign air carriers which provide service in part competitive with that of the domestic airlines.⁸⁰

Cargo

Unlike other forms of transport, air carriers have never found that freight traffic constituted an important part of their business.⁸¹ As a consequence, the CAB, in awarding routes and imposing restrictions, speaks almost exclusively in terms of passenger traffic.⁸² Nevertheless, freight—chiefly perishable products—has provided a not insignificant fraction of airline revenues.⁸³ Both trunk lines and feeder carriers haul mail and express as well as cargo.⁸⁴ Express, however, has been somehow distinguished from freight, apparently in an effort

⁷⁷ Federal Aviation Act of 1958, § 416(a), 72 Stat. 771, 49 U.S.C. § 1386(a) (1958).

⁷⁸ 1956 CAB ANN. REP. 1. See BIGHAM & ROBERTS, TRANSPORTATION 114-15 (1952); WILCOX, PUBLIC POLICIES TOWARD BUSINESS 638 (1955); AIRLINES REPORT 18-21. See New England, 7 C.A.B. 27, 39-40 (1946); Southern Serv. to the West, 19 C.A.B. 309, 312 (1954); Southwest Renewal—United Suspension, 15 C.A.B. 61, 72-73, *aff'd sub nom.* United Airlines v. CAB, 198 F.2d 100 (7th Cir. 1952); Parks Investigation, 11 C.A.B. 779, 792-93 (1950), *aff'd sub nom.* Continental So. Lines v. CAB, 197 F.2d 397 (7th Cir.), *cert. denied*, 344 U.S. 831 (1952). All Am. Aviation Pick-Up, Delivery Serv., 2 C.A.B. 133, 145-46 (1940). See also Maclay & Burt, *Entry of New Carriers into Domestic Trunkline Air Transportation*, 22 J. AIR L. & COM. 131, 154-55 (1955).

⁷⁹ CHERINGTON, *op. cit. supra* note 75, at 42-43, 51; Koontz, *supra* note 52, at 133-40.

⁸⁰ AIRLINES REPORT 236-64.

⁸¹ WILCOX, *op. cit. supra* note 78, at 638.

⁸² Ozark Certificate Renewal, 21 C.A.B. 456 (1955); Norfolk-Atlanta Nonstop Investigation, 21 C.A.B. 295 (1955).

⁸³ Cf. BIGHAM & ROBERTS, *op. cit. supra* note 78, at 145.

⁸⁴ Considerable controversy has arisen out of CAB actions permitting or not permitting various classes of carriers to handle mail, freight, and express. The CAB allowed the cargo carriers to haul surface mail by air during a post office experiment and its action—though contested by the trunk lines—was approved by the courts. Surface-Mail-by-Air Exemptions, 20 C.A.B. 658 (1955), *aff'd sub nom.* American Airlines, Inc. v. CAB, 231 F.2d 483 (D.C. Cir. 1956). See generally Durham & Feldstein, *supra* note 48, at 775; Gambrell & Moye, *Position of the Certificated Air Carriers in Civil Aeronautics Board Freight Proceedings*, 15 LAW & CONTEMP. PROB. 3, 6, 7, 9, 10 (1950); Wilson, *Air Freight and Air Express*, 15 LAW & CONTEMP. PROB. 37, 42 (1950).

to shelter freight forwarders from the competition of the Railway Express Agency, which has long dominated the air express business.⁸⁵

Considerable controversy has arisen with respect to CAB handling of applications for all-cargo certificates. Ultimately and somewhat reluctantly, the Board has granted such certificates on the theory that the other certificated carriers would not lose much traffic to the all-cargo operators.⁸⁶ Even though the all-cargo carriers receive no subsidy payments, the CAB was hesitant to let them carry express and only recently has allowed them to haul mail on an experimental basis.⁸⁷ Such protection of the trunk and feeder lines has given rise to a substantial amount of adverse comment, particularly by those who claim that the passenger lines have neglected the freight business and that specialized carriers are necessary to develop it fully.⁸⁸

Feeder Lines

Those certificated carriers which do not fall within the category of trunk lines are referred to as feeder, local, or regional air carriers.⁸⁹

⁸⁵ See *Air Freight Forwarder*, 9 C.A.B. 473, 487-88 (1948); *Gambrell & Moye*, *supra* note 84, at 5; *Wilson*, *supra* note 84, at 40-44.

⁸⁶ *Trans-Atl. Cargo*, 21 C.A.B. 671, 679, 682 (1954); *Additional Serv. to Puerto Rico*, 12 C.A.B. 430, 490-91 (1951); *Air Freight*, 10 C.A.B. 572, 588-90 (1949). The CAB, however, may not grant an exception to carry mail across the Atlantic based only on a finding that the applicant is in financial distress. *Pan Am. World Airways, Inc. v. CAB*, 261 F.2d 754, 757 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959). See generally Ailes, *The Position of the Freight Carriers Before the Civil Aeronautics Board*, 15 LAW & CONTEMP. PROB. 17 (1950); BIGHAM & ROBERTS, *op. cit. supra* note 78, at 153-54, 627; KEYES, *op. cit. supra* note 71, at 211-16.

⁸⁷ *American Airlines, Inc. v. CAB*, 231 F.2d 483, 486 (D.C. Cir. 1956). The CAB has always expressed fears lest duplicate services result in "uneconomical" competition; it has forbidden the cargo carriers to render passenger services even on a charter basis. *Flying Tiger Line, Inc. v. CAB*, 204 F.2d 404, 406 (D.C. Cir. 1953); *Air Freight*, 10 C.A.B. 572, 592 (1949), *aff'd*, 192 F.2d 417 (1951). Only after the more important certificated airlines had gone off subsidy did the CAB grant authority to the cargo carriers to include express shipments and mail on an experimental basis. *Delta Air Lines, Inc. v. CAB*, 247 F.2d 327, 330-31 (5th Cir. 1957). Thus, it is apparent that the CAB has been cautiously permitting competition to creep in as the certificated lines gain financial strength and stability. Compare *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956); *Coyle Lines, Inc. v. United States*, 115 F. Supp. 272, 278 (E.D. La. 1953); *Pacific No. Airlines, Inc. v. Alaska Airlines, Inc.*, 80 F. Supp. 592, 601 (D. Alaska 1948); *Texas E. Transmission Corp.*, 19 P.U.R.3d 76, 88-89, 93, 97-98 (FPC 1957).

⁸⁸ Ailes, *supra* note 86, at 19-20, 28; see *Durham & Feldstein*, *supra* note 48, at 786-87, 792, 802.

⁸⁹ See *Continental-Pioneer Acquisition*, 20 C.A.B. 323, 330-31 (1955); *Parks Investigation*, 11 C.A.B. 779, 791-92 (1950), *aff'd sub nom. Continental So. Lines v. CAB*, 197 F.2d 397 (7th Cir.), *cert. denied*, 344 U.S. 831 (1952); *Florida Case*, 6 C.A.B. 765, 785-86 (1946), *aff'd*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952); *Investigation of Local, Feeder & Pick-Up Air Serv.*, 6 C.A.B. 1 (1944); *All Am. Aviation, Pick-Up, Delivery Serv.*, 2 C.A.B. 133, 139 (1940). See text accompanying notes 70-72 *supra* for a discussion of the routes of the feeder lines and their enlargement by a shift from trunk line to feeder service. The status of the feeders is discussed in AIRLINES REPORT 23-24; Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 25 J. AIR L. & COM. 148, 180 (1958); Taaffe, *A Map Analysis of United States Airline Competition*, 25 J. AIR L. & COM. 121, 125-29, 132-36 (1958).

The feeder airlines are designed primarily for shorter hops⁹⁰ and it follows both that they offer fewer attractions to passengers and shippers and that they incur higher relative costs.⁹¹ Most of the trunk lines now operate without subsidy while the opposite is true of the feeder carriers. Furthermore, the effort to render the trunk lines self-supporting has made it expedient to impose restrictions upon the feeder carriers so as to reduce the competition they might otherwise offer the long distance lines.⁹² At the same time the CAB has taken some action looking to the sheltering of the feeder lines from the competition of trunk carriers.⁹³

Nonscheduled Carriers

While the CAB has engaged in many controversial activities, few have inspired so much discussion as its treatment of the "nonskeds." Such carriers were originally refused certificates by the Board, but from time to time and in varying degrees they were permitted to operate under the Board's exemption power.⁹⁴ But that power, the courts have made clear, is not unlimited:

Despite the broad language of Section 416(b) we think it is perfectly clear that the Congress did not set up so elaborate a series of provisions in respect to the certification of carriers, and the public interest, convenience and necessity therein involved, and at the same time grant its administrative agency power to destroy those elaborate provisions. We think there is and must be a boundary to the authority of the Board under its exemption power to impinge upon the certificated service.⁹⁵

⁹⁰ See *Charleston-Columbus*, 19 C.A.B. 731 (1955); *Klamath Falls-Medford Serv.*, 17 C.A.B. 713, 716-17 (1953).

⁹¹ See *Trans-Tex. Certificate Renewal*, 12 C.A.B. 606, 633-34 (1951) (dissenting opinion); *Arizona-Monarch Merger*, 11 C.A.B. 246, 254-56 (1950); *CHERRINGTON*, *op. cit. supra* note 75, at 53-63; *Koontz*, *supra* note 52, at 140.

⁹² *Western Air Lines, Inc. v. Frontier Airlines, Inc.*, 1A Av. L. REP. ¶22287 (C.A.B. June 24, 1959); *Service to Trenton*, 20 C.A.B. 290, 291-92 (1955); *Service to Fayetteville*, 19 C.A.B. 25, 26 (1954); *Southwest-W. Coast Merger*, 14 C.A.B. 356, 357-58 (1951). But see *Gellman*, *supra* note 59, at 422, 424-26. Compare *Ozark Certificate Renewal*, 19 C.A.B. 95, 105, 108-09 (1954) (separate opinion); *Pioneer Air Lines, Inc., Mail Rates*, 17 C.A.B. 499, 513 (1953).

⁹³ Cf. *Southwest Renewal-United Suspension*, 15 C.A.B. 61, 72-73, *aff'd*, 198 F.2d 100 (7th Cir. 1952); *Trans-Tex. Certificate Renewal*, 12 C.A.B. 606, 617 (1951).

⁹⁴ Such power is vested in the CAB by the Federal Aviation Act of 1958, § 416(b) (1), 72 Stat. 771, 49 U.S.C. § 1386(b) (1958).

⁹⁵ *American Airlines, Inc. v. CAB*, 235 F.2d 845, 850 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 905 (1957). In order to grant an exemption the CAB must make an express finding that certification would involve an undue burden, and would not be in the public interest. A mere finding that the applicant's financial situation is acute and that its existence is in jeopardy is not sufficient to support the grant of an exemption. *Pan Am. World Airways v. CAB*, 261 F.2d 754, 757 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959). Compare applications of various air carriers to carry first class mail in Mail Transp. by Noncertified Carriers, 18 C.A.B. 201, 205-06 (1953); *American Airlines, Route Consolidation*, 7 C.A.B. 337, 348-49 (1946).

We need not review the history of the "nonskeds" in detail. When regulation commenced in 1938, the CAB granted them a blanket exemption for operations not involving the transportation of passengers for hire.⁹⁶ In 1946 the CAB investigated such carriers and determined that no major changes in the scope of the exemptions were required.⁹⁷ In 1948 the "nonskeds"—also referred to as "irregular carriers"—sought extension of their exemptions to permit scheduled operations at low coach fares. Such an extension was denied by the Board,⁹⁸ and in 1949 it withdrew the blanket exemption and required registration by the "nonskeds."⁹⁹ It was found that the route-type operations which they were conducting lay outside the scope of the exemption and caused an unwarranted diversion of traffic from certificated carriers; hence the CAB tightened the exemptions and sought to ensure that only truly irregular service was offered to the public.¹⁰⁰ In addition to being required to register, "nonskeds" were forbidden to attempt to provide regular service to the public by coordinating their flights through a joint ticket agent.¹⁰¹ Collaboration of the "nonskeds" in pooling their services through the joint ticket agent device was resisted by the CAB, which revoked letters of registration where it found that irregular carriers had joined together to furnish what amounted to regularly scheduled flights.¹⁰² The question remained, however, as to whether judicial relief was available against "nonskeds" which overstepped the bounds of their contingent exemptions.¹⁰³

⁹⁶ See Netterville, *The Regulation of Irregular Air Carriers*, 16 J. AIR L. & COM. 414, 415-17 (1949). See generally Moore & Hahn, *Regulation of Irregular Air Carriers*, 35 CORNELL L.Q. 48, 49 (1949).

⁹⁷ Investigation of Nonscheduled Air Serv., 6 C.A.B. 1049 (1946).

⁹⁸ Standard Airlines, Exemption Request, 9 C.A.B. 583 (1948).

⁹⁹ 14 C.F.R. §§ 291.2, .17 (1956). See Moore & Hahn, *supra* note 96, at 56-64. The most recent report of denial of a request for an individual exemption is Irregular Air Carrier Investigation, 1A Av. L. REP. ¶ 22316 (C.A.B. Oct. 12, 1959).

¹⁰⁰ Large Irregular Carriers, Exemptions, 11 C.A.B. 609, 616-21 (1950). See AIRLINES REPORT 28-29, 81. See generally Netterville, *supra* note 96, at 419-23. Compare Pacific W., Irregular Canada-United States Serv., 19 C.A.B. 270 (1954); Bristol Bay Area Bush Proceeding, 17 C.A.B. 1121, 1148 (1953). The related contract carrier problem is touched upon in Moore & Hahn, *supra* note 96, at 46-68.

¹⁰¹ See 14 C.F.R. § 291(8) (1956) (examples of irregular air transportation).

¹⁰² See *North Am. Airlines v. CAB*, 240 F.2d 867 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 941 (1957); *Air Transp. Associates, Inc. v. CAB*, 199 F.2d 181 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

¹⁰³ See *Great Lakes Airlines, Inc., Enforcement*, 1A Av. L. REP. ¶ 22311 (C.A.B. Sept. 28, 1959); *20th Century Air Lines, Compliance Proceeding*, 21 C.A.B. 133 (1955); *American Air Transp., Revocation Proceeding*, 16 C.A.B. 294, 300-03 (1952); *Standard Air Lines, Noncertificated Operations*, 10 C.A.B. 486, 501-02 (1949); *Trans-Marine Airlines, Inc., Investigation*, 6 C.A.B. 1071 (1946); *Page Airways, Inc., Investigation*, 6 C.A.B. 1016 (1946); Moore & Hahn, *supra* note 96, at 56. Compare *Keyes*, *supra* note 69, at 295. Compare *Airline Reservations, Enforcement Proceeding*, 18 C.A.B. 114, 115 (1953), where sale of "exchange orders" which looked like tickets but did not evidence an obligation on the part of the carrier to furnish transportation was held to constitute an unfair and deceptive practice; the proceeding was perhaps aimed at the use by nonscheduled carriers of common ticket agents.

In 1956 the District of Columbia Court of Appeals held that before the CAB could exempt an irregular carrier from the requirement of certification, the Board must comply with the statute by finding that the requirement of certification would impose an undue burden on the carrier—either by reason of the carrier's limited operations or because of other unusual circumstances—and that requiring certification would not be in the public interest.¹⁰⁴ Moreover, the findings of the Board must be stated in sufficient detail for a court to review them and not merely in the conclusory language of the statute.¹⁰⁵ The practical effect of this decision was presumably to deny exemption to the irregular carriers.

Later the CAB embarked on a program of certifying the irregular carriers¹⁰⁶ but sought to retain their "irregular" character by not designating specific termini in the certificate and by limiting therein the number of flights conducted in any month in the same direction between the same two points. But again the CAB's scheme was thwarted by the District of Columbia court, this time on the ground that such certification was extrastatutory.¹⁰⁷ The net result of the two decisions was seemingly that "nonskeds" could be neither certificated nor exempted. Affairs were in this sorry administrative-judicial imbroglio when Congress authorized the CAB to validate for twenty months temporary certificates issued pursuant to its earlier executive orders.¹⁰⁸

Whatever the merits of the controversy, the CAB has long been the target of those who believe that the nonscheduled carriers should have been fostered rather than repressed.¹⁰⁹ Obviously, the Board has been sheltering the certificated trunk and feeder lines from non-scheduled competition.¹¹⁰ Some commentators take the view that the "nonskeds" were the innovators who made low-cost "coach" service

¹⁰⁴ *American Airlines v. CAB*, 235 F.2d 845 (1956), *cert. denied*, 353 U.S. 905 (1957).

¹⁰⁵ 235 F.2d at 851-52.

¹⁰⁶ See *Large Irregular Air Carrier Investigation*, 1A AV. L. REP. ¶22247 (C.A.B. Jan. 28, 1959).

¹⁰⁷ *United Air Lines, Inc. v. CAB*, 278 F.2d 448 (D.C. Cir. 1960). The statute provides that each certificate specify terminal and intermediate points and that no certificate may limit the right of an air carrier to add to or change schedules. Federal Aviation Act of 1958, § 401(e), 72 Stat. 755, 49 U.S.C. § 1371(e) (1958).

¹⁰⁸ Act of July 14, 1960, 74 Stat. 527.

¹⁰⁹ "[T]he Board has looked upon the irregular group of carriers as poachers who have frequently skimmed the cream off the top of the air transportation market." Gellman, *supra* note 89, at 163.

¹¹⁰ See *CAB v. Modern Air Transp., Inc.*, 179 F.2d 622 (2d Cir. 1950); *American Airlines, Inc. v. Standard Airlines, Inc.*, 80 F. Supp. 135, 139 (S.D.N.Y. 1948); AIRLINES REPORT 83. See generally Netterville, *supra* note 96, at 432.

available to the public and therefore deserved better treatment than they received.¹¹¹

Other Categories

By official classification there has been recognized the category of "air taxi operators,"¹¹² whose operations are not tremendously important in the overall air carrier picture. The CAB has also recognized the class of air freight forwarders—these being indirect carriers who may ship only via common air carriers.¹¹³ In licensing the forwarders on an experimental basis, the Board noted that their activities might exert some downward pressure upon the rates of certificated carriers and indicated that it would prevent any drop in rates from reaching ruinous levels.¹¹⁴

COMBINATIONS OF AIR CARRIERS

Transfer of Certificates

No certificate issued by the CAB may be transferred without the approval of the Board.¹¹⁵ The CAB has moved cautiously in considering transfers,¹¹⁶ disapproving or restricting those which might endanger the continuance of service.¹¹⁷

Mergers

Air carrier mergers must be approved by the CAB¹¹⁸ and the Board is directed by statute not to approve those which would result

¹¹¹ See CHERINGTON, *op. cit. supra* note 75, at 189-90; FREDERICK, *COMMERCIAL AIR TRANSPORTATION* 218 (1955); WILCOX, *op. cit. supra* note 78, at 641-42; AIRLINES REPORT 82-83, 87-94, 268-70; Note, *Public Regulation of Domestic Airlines*, 60 YALE L.J. 1196, 1197-99 (1951). But see Transcontinental Coach-Type Serv., 14 C.A.B. 720 (1951); Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 20 J. AIR L. & COM. 379, 384-85, 387, 396, 402 (1953).

¹¹² 14 C.F.R. § 298 (1956). Compare Transatlantic Charter Policy, 1955, 20 C.A.B. 782 (1955); Cariboo Air Charter, Irregular Canada-United States Serv., 19 C.A.B. 671 (1954).

¹¹³ See 14 C.F.R. § 296 (1956).

¹¹⁴ See Air Freight Forwarder, 9 C.A.B. 473, 493-94, 496, 503 (1948), *aff'd sub nom.* American Airlines, Inc. v. CAB, 178 F.2d 903 (7th Cir. 1949), *Nat'l Air Freight Forwarding Corp. v. CAB*, 197 F.2d 384 (D.C. Cir. 1952). As to the nature of a forwarder, see Consolidated Flour Shipments, Inc. v. CAB, 213 F.2d 814 (9th Cir. 1954), *affirming* 17 C.A.B. 45 (1953). Note the protectionism in Air Freight Forwarder Investigation, 21 C.A.B. 536, 546 (1955) (forwarder status denied to joint venture of certificated lines), and Air Freight Forwarder (International), 11 C.A.B. 182, 192-93 (1949) (restrictions to prevent destructive competition).

¹¹⁵ Federal Aviation Act of 1958, § 401(h), 72 Stat. 758, 49 U.S.C. § 1371(h) (1958).

¹¹⁶ *E.g.*, United-W. Acquisition Air Carrier Property, 8 C.A.B. 298, 306 (1947).

¹¹⁷ *E.g.*, Parks Investigation, 11 C.A.B. 779, 785 (1950), *aff'd*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952); *cf.* Bonanza-TWA, Route Authorization Transfer, 10 C.A.B. 893, 895-96 (1949).

¹¹⁸ Federal Aviation Act of 1958, § 408(a), 72 Stat. 767, 49 U.S.C. § 1378(a) (1958); *cf.* Powelson v. National Airlines, Inc., 220 Miss. 595, 71 So. 2d 467 (1954).

in monopoly.¹¹⁹ Whatever effect may be given to the congressional directive as to monopoly, CAB approval renders the transaction exempt from the antitrust laws.¹²⁰

Mergers have been approved by the Board when it appeared likely that costs could be reduced.¹²¹ Large subsidy payments have made opportunities to reduce operational losses attractive, even though the evidence as to overall economies of scale in the industry is conflicting.¹²² A promise of improved service also has proven appealing to the CAB.¹²³ In granting approval the Board is likely to note that the proposed merger will not divert a substantial amount of traffic from other lines—that is, that the merger will have low competitive impact.¹²⁴ Occasionally, however, the Board will explicitly note that competition will not be seriously impaired.¹²⁵ It is worth remarking

¹¹⁹ Federal Aviation Act of 1958, § 408(b), 72 Stat. 767, 49 U.S.C. § 1378(b) (1958). Compare *Minneapolis & S.L. Ry. v. United States*, 361 U.S. 173 (1959). See generally KEYES, *op. cit. supra* note 71, at 72-80; 1 CAA ANN. REP. 17, 23-24 (1939). It is difficult to understand why the CAB is also charged with responsibility for enforcing § 7 of the Clayton Act, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). See Levi, *Section 7 of the Clayton Act and the Regulated Industries*, in N.Y. ST. BAR ASS'N SYMPOSIUM 136, 137 (1959). The language of the latter legislation, however, apparently exempts stock acquisitions from its terms. *Id.* at 138. As to the formation of the joint subsidiary under the Federal Aviation Act, see 20th Century Airlines, Compliance Proceeding, 21 C.A.B. 133, 143 (1955).

¹²⁰ Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1958); Levi, *supra* note 119, at 137. Cf. *United States v. RCA*, 358 U.S. 334 (1959); *State Pub. Util. Comm'n v. Romberg*, 275 Ill. 432, 114 N.E. 191 (1916).

¹²¹ *E.g.*, Continental-Pioneer Acquisition, 20 C.A.B. 323 (1955); Eastern-Nat'l-Colonial, Acquisition of Assets, 18 C.A.B. 781 (1954); Flying Tiger-Slick Merger, 18 C.A.B. 326, 343 (1954); Delta-Chicago & So. Merger, 16 C.A.B. 647 (1952); Braniff-Mid-Continent Merger, 15 C.A.B. 708 (1952); West Coast-Empire Merger, 15 C.A.B. 971, 972-73 (1952).

¹²² See CHERINGTON, *op. cit. supra* note 75, at 42-44; GILL & BATES, *AIRLINE COMPETITION* 417-18 (1949); Healy, *Workable Competition in Air Transportation*, 35 PROCEEDINGS AM. ECON. ASS'N 229, 240-41 (1945); Koontz, *Economic and Managerial Factors Underlying Subsidy Needs of Domestic Trunk Line Carriers*, 18 J. AIR L. & COM. 127, 133-40, 152-56 (1951). Air mail rates are now equal for all the lines so that this element of cost coverage does not vary. See Domestic Trunklines, Service Mail Rates, 21 C.A.B. 8, 41-43 (1955); Gellman, *supra* note 89, at 153-54. In some instances, it appears that the CAB has gone so far as to push airlines into mergers. *E.g.*, Eastern-Nat'l-Colonial, Acquisition of Assets, 18 C.A.B. 781 (1954).

¹²³ *E.g.*, Continental-Pioneer Acquisition, 20 C.A.B. 323, 326 (1955); Arizona-Monarch Merger, 11 C.A.B. 246, 247-48 (1950). The CAB has been known to exhibit concern with respect to the purchase price paid by the acquiring carrier. Apparently the Board is afraid to recognize the value of the certificate issued to the acquired airline and also fearful that good will might be written into the rate base of the acquiring firm. See Acquisition of Marquette by TWA, 2 C.A.B. 409, 411-16 (1940). See also United-W. Acquisition Air Carrier Property, 8 C.A.B. 298, 311-16 (1947).

¹²⁴ *E.g.*, Flying Tiger-Slick Merger, 18 C.A.B. 326, 342-43 (1954); Delta-Chicago & So. Merger, 16 C.A.B. 647, 648-49 (1952); West Coast-Empire Merger, 15 C.A.B. 971, 990-91 (1952); Braniff-Mid-Continent Merger, 15 C.A.B. 708, 730-31 (1952).

¹²⁵ *E.g.*, Transocean-Atlas, 1A AV. L. REP. ¶¶ 22300, 22300.01-02 (C.A.B. Aug. 21, 1959); West Coast-Empire Merger, 15 C.A.B. 971, 992 (1952); Braniff-Mid-Continent Merger, 15 C.A.B. 708, 735 (1952). See also KEYES, *FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* 259 (1951); cf. Collins, *Webb-Pomerene v. Foreign Economic Policy*, 99 U. PA. L. REV. 1195, 1205-06 (1951).

that over the years the CAB has approved mergers which have been responsible in large part for the creation of the present trunk line structure.

Disapproval of a merger has followed a CAB finding of likely substantial impact upon rival carriers; indeed, the CAB hesitates to approve a union whereby the resulting carrier will enjoy an advantage attributable to its size.¹²⁶

The Board has also refused to allow mergers which would change the classification of the carriers: two feeder lines, for example, may not merge on an end-to-end basis whereby the successor would become an additional trunk line carrier.¹²⁷ Note that here the action of the Board is protectionist in character: the existing trunk lines are to be sheltered from new competition. CAB action, however, has not devolved into a consistent pattern.¹²⁸

Interlocking directorships are forbidden by the express and complex terms of the Federal Aviation Act.¹²⁹ The CAB has taken a broad view of the prohibition, applying it in such a manner as to prevent a partnership as well as a natural person from holding seats on the boards of two air carriers.¹³⁰ Oddly enough, the CAB is also directed to enforce the less rigorous prohibitions contained in section 8 of the Clayton Act.¹³¹

Contracts Between Carriers

A specific statutory provision requires the submission for CAB approval of all agreements between air carriers relating to service,

¹²⁶ *E.g.*, American Airlines, Control of Mid-Continent Air., 7 C.A.B. 365, 378-81 (1946). See also AIRLINES REPORT 254-56; 2 CAA ANN. REP. 9 (1940); Gellman, *supra* note 89, at 167-68.

¹²⁷ North Cent. Airlines, Inc. v. CAB, 265 F.2d 581, 583-84 (D.C. Cir.), *cert. denied*, 360 U.S. 903 (1959); Southwest-W. Coast Merger, 14 C.A.B. 356 (1951).

¹²⁸ Gellman, *supra* note 89, at 171-73. Healy, *supra* note 122, at 237. Compare Levi, *supra* note 119, at 144-45. See generally FREDERICK, *op. cit. supra* note 111, at 223-24. The CAB enjoys and exercises extensive powers to protect employees from the adverse impact of a merger or transfer of certificate. Kent v. CAB, 204 F.2d 263, 265 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953); Western Air Lines v. CAB, 194 F.2d 211, 213-14 (9th Cir. 1952); Kahn, *Regulatory Agencies and Industrial Relations: The Airlines Case*, 42 PROCEEDINGS AM. ECON. ASS'N 686, 689, 691, 693 (1952). Note the minimum pay requirement for pilot and co-pilot contained in Federal Aviation Act of 1958, § 401(k), 72 Stat. 756, 49 U.S.C. § 1371(k) (1958).

¹²⁹ Federal Aviation Act of 1958, § 409(a), 72 Stat. 768, 49 U.S.C. § 1379(a) (1958). Note that each air carrier must annually disclose to the CAB its roster of shareholders holding 5% or more of its capital stock. Federal Aviation Act of 1958, § 407(b), 72 Stat. 766, 49 U.S.C. § 1377(b) (1958).

¹³⁰ Lehman Bros. Interlocking Relationships, 15 C.A.B. 656, 658-60 (1952), *aff'd*, 209 F.2d 289, 294 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 916 (1954). *But see* Eastern-Colonial Control, 20 C.A.B. 629, 641-50 (1955) (mere ownership of stock by shareholder or employee of another airline does not establish unlawful control).

¹³¹ Clayton Act § 8, 38 Stat. 732 (1914), as amended, 15 U.S.C. § 19 (1958). The provision charging the CAB with enforcement of § 8 is Clayton Act § 11, as amended, 52 Stat. 1028, 15 U.S.C. § 21 (1958), as amended, 15 U.S.C. § 21(a) (Supp. 1959).

equipment, rates, schedules, and many other topics. If approved, such contracts are exempted from the antitrust laws.¹³²

A common form of agreement between carriers involves interchange of equipment for through service.¹³³ If it does not appear that the effect of the contract will be "diversionary"—that is, likely to divert traffic from some third airline—the CAB is apt to approve.¹³⁴ Diversion may, of course, result because the third airline will no longer interchange passengers with the parties to the agreement along the route involved. On the other hand, where the CAB finds that the agreement will result in undue diversion of traffic, disapproval will follow—almost any arrangement calculated to gain a competitive advantage over a third party will be found adverse to the public interest.¹³⁵ Approval of a through service agreement may result in varied effects upon competition: potential competition between the parties is eliminated but more vigorous competition may be offered to other airlines.¹³⁶

Agreements establishing joint sales staffs have, with limitations, sometimes been approved by the CAB.¹³⁷ Similarly, after effecting some changes in the form of contract, the CAB has approved arrange-

¹³² Federal Aviation Act of 1958, § 414, 72 Stat. 770, 49 U.S.C. § 1384 (1958) (formerly Civil Aeronautics Act of 1938, ch. 601, § 414, 52 Stat. 1004). See *Putnam v. Air Transp. Ass'n*, 112 F. Supp. 885 (S.D.N.Y. 1953); AIRLINES REPORT 187; 1942 CAB ANN. REP. 29; Kahn, *supra* note 128, at 693; Levi, *supra* note 119, at 138.

¹³³ Note that by virtue of § 404(a) of the Federal Aviation Act of 1958, 72 Stat. 760, 49 U.S.C. § 1374(a) (1958), an air carrier is under a duty to furnish reasonable through service in connection with other air carriers.

¹³⁴ Northwest-E. Equip. Interchange, 19 C.A.B. 346, 355-56 (1954); Southern Serv. to the West, 18 C.A.B. 234, 239 (1953); Continental-United Equip. Interchange, 17 C.A.B. 635, 654-57 (1953); Braniff-United Equip. Interchange, 17 C.A.B. 618, 631-33 (1953); New York-Houston Interchange, 16 C.A.B. 603, 630-31 (1952); Capital-Nat'l Equip. Interchange, 10 C.A.B. 231, 243-44 (1949); American Airlines Route Consolidation, 7 C.A.B. 337, 340-41 (1946). *But see* Through Serv. Investigation, 16 C.A.B. 6, 36-37 (1952).

¹³⁵ New York-Balboa Through Serv., Reopened, 20 C.A.B. 493, 498-500, 501, 504-05, 512 (1954); Southern Serv. to the West, 18 C.A.B. 234, 237-39, 282-86 (1953).

¹³⁶ Southern Serv. to the West, 12 C.A.B. 518, 535, 548-49 (1951), *reopened*, 18 C.A.B. 790, 796-99 (1954), *reopened*, 19 C.A.B. 309, 310 (1954). A description of the interchange activity together with a list of approved agreements and their contents will be found in Keefer, *Airline Interchange Agreements*, 25 J. AIR L. & COM. 55 (1958). The author concludes that the CAB has usually approved interchange of planes despite protests of other carriers to the effect that traffic diversion would result. *Id.* at 65. Accord, Gellman, *supra* note 89, at 174-75; see Netterville, *supra* note 96, at 429-31. Interchange agreements, of course, affect the award of competitive routes. See Note, *Public Regulation of Domestic Airlines: A Proposal for Structural and Policy Reform*, 60 YALE L.J. 1196, 1210-11 (1951).

¹³⁷ Independent Airlines Ass'n Commercial Charter Exchange, 1A AV. L. REP. ¶ 22331 (C.A.B. Nov. 12, 1959); Northwest Airlines, Inc., 1A AV. L. REP. ¶ 22301 (C.A.B. Aug. 28, 1959); 1942 CAB ANN. REP. 29. Note the dissimilar result reached in *Volumair-Agreement* C.A.B. 13204, 1A AV. L. REP. ¶ 22370 (C.A.B. Aug. 6, 1960).

ments with respect to the joint selection and recognition of travel agents.¹³⁸

COMBINING MODES OF CARRIAGE

Statutory Provisions

In language reminiscent of the Interstate Commerce Act but more sweeping in its prohibitions, the Federal Aviation Act seeks to assure the independence of the airlines from other forms of transport.¹³⁹ While the CAB is empowered to approve combinations between different methods of transportation,¹⁴⁰ approval is rarely forthcoming. In this respect, CAB action is analogous to that of the Interstate Commerce Commission, which has substantially precluded railroad entry into motor carriage.¹⁴¹

Steamship Operators

In many instances economies may be achieved by affiliation of air and water carriers. Sales of tickets in joint offices, for example, may combine efficiency with convenience to the patron. In a few cases, such advantages have led the CAB to approve affiliation.¹⁴² More frequently, however, the CAB has disapproved. In some instances it has expressed fears that established steamship operators might stifle the growth of air transport to benefit their more traditional mode of carriage.¹⁴³ In other instances the CAB has voiced apprehension lest the combined resources of air and surface carriers prove unduly weighty to competitive air operations: that is, that steamship financing would

¹³⁸ ATC Agency Resolution Investigation, 1A Av. L. REP. ¶22282 (C.A.B. June 10, 1959). Recently six major air carriers entered into an agreement providing for mutual aid in the event of strikes. Those not subject to the strike are to turn over their increased revenues less costs to the carrier burdened with the labor difficulty. The CAB approved the agreement after deleting a term whereby the struck carrier agreed to divert traffic solely to the other signatories to the agreement. Six Carrier Mutual Aid Pact, 1A Av. L. REP. ¶22269 (C.A.B. May 20, 1959).

¹³⁹ Federal Aviation Act of 1958, §§408(a), (b), 72 Stat. 767, 49 U.S.C. §§1378(a), (b) (1958).

¹⁴⁰ The powers of the CAB have been broadly interpreted by the courts. See *Continental So. Lines v. CAB*, 197 F.2d 397, 400 (D.C. Cir.), cert. denied, 344 U.S. 831 (1952); *Pan Am. Airways Co. v. CAB*, 121 F.2d 810, 816 (2d Cir. 1941).

¹⁴¹ *American President Lines Petition*, 7 C.A.B. 799, 804-07 (1947); cf. *Fulda, Rail-Motor Competition: Motor-Carrier Operations by Railroads*, 54 Nw. U.L. Rev. 156 (1959).

¹⁴² *Northwest Airlines-Am. President Lines Agreement*, 9 C.A.B. 336, 338 (1948); *American President Lines Petition*, 7 C.A.B. 799, 801, 804 (1947); cf. *Baggett, Are Surface Carriers Grounded by Law?*, 31 VA. L. Rev. 337, 342 (1945).

¹⁴³ *Pan Am. Airways-United States Lines Agreement*, 8 C.A.B. 609, 613-15 (1947), *aff'd*, 165 F.2d 849 (2d Cir. 1948); *Pan Am.-Matson-Inter-Island Contract*, 3 C.A.B. 540, 546-48 (1942); 1942 CAB ANN. REP. 28, 30.

build air carriage up to a level of service which rival firms operating only in air carriage could not achieve.¹⁴⁴

Railroads

The CAB has long permitted the railroad-owned Railway Express Agency to conduct an indirect air carriage traffic (air express); and in some instances rail subsidiaries have been allowed to act as forwarders of air freight.¹⁴⁵ Obvious economies are involved in warehousing, local delivery, and record-keeping when a freight forwarder is allowed to offer air as well as rail service. For that very reason, however, the CAB has often denied entry into the air field to railroad-affiliated forwarders. Such firms would have a competitive advantage over forwarders offering only air service. Fears have also been expressed that heavy investment in established railroad facilities would lead affiliated forwarders to divert traffic away from the airlines.¹⁴⁶

Motor Carriers

For reasons far from clear, similar fears have not been apparent with respect to motor carrier affiliation. In most instances, the CAB—finding economies and service benefits in air and motor affiliation—has approved such arrangements.¹⁴⁷

Independent Forwarders

Surface carrier forwarders who are not affiliated with a railroad or other direct carrier have generally been granted entry into the air

¹⁴⁴ *Hawaiian Case*, 7 C.A.B. 83, 107-08 (1946); *Pan Am-Matson-Inter-Island Contract*, 3 C.A.B. 540, 547 (1942); Hickey, *Surface Carrier Participation in Air Transportation*, 36 GEO. L.J. 125, 139 (1948). Compare *United States v. Inter-Island Steam Nav. Co.*, 87 F. Supp. 1010, 1018-19 (D. Hawaii 1950); *Hawaiian Airlines, Ltd. v. Trans-Pac. Airlines, Ltd.*, 78 F. Supp. 1, 8 (D. Hawaii 1948); *Trans-Pac. Airlines, Ltd.*, 21 C.A.B. 253, 255 (1955); *American President Lines Petition*, 7 C.A.B. 799 (1947); *Latin Am. Air Serv.*, 6 C.A.B. 857, 905-07 (1946); *Northeast Airlines, Inc.*, 6 C.A.B. 319, 341-42 (1945); *Lake Line Application Under Panama Canal Act*, 33 I.C.C. 700 (1915).

¹⁴⁵ Compare *National Air Freight Forwarding Corp. v. CAB*, 197 F.2d 384, 389 (D.C. Cir. 1952), with *id.* at 392 (dissenting opinion). See *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 545 (1955); *Air Freight Forwarder*, 11 C.A.B. 182, 197 (1949).

¹⁴⁶ *National Air Freight Forwarding Corp. v. CAB*, 197 F.2d 384, 387-88 (D.C. Cir. 1952); *American Airlines, Inc. v. CAB*, 178 F.2d 903, 909 (7th Cir. 1949); *Air Freight Forwarder*, 9 C.A.B. 473, 485, 509-11 (1948); KEYES, *op. cit. supra* note 125, at 225-26. Compare *American Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133 (1958); *Railroad Control of Northeast Airlines*, 4 C.A.B. 379, 381-82, 385-86 (1943); *Railway Express Agreements*, 4 C.A.B. 157 (1943).

¹⁴⁷ *Consolidated Air Freight, Interlocking Relationships*, 20 C.A.B. 740 (1955); *Braungart, Interlocking Relationships*, 19 C.A.B. 456, 461 (1954); *Gilbert Air Transp., Interlocking Relationship*, 17 C.A.B. 558 (1953); *Great Lakes Area*, 8 C.A.B. 360, 403-05 (1947). Note the contrary result in *Southeastern Area Local Serv.*, 1A AV. L. REP. ¶22342.03 (C.A.B. Dec. 18, 1959). Compare *Parks Investigation*, 11 C.A.B. 779, 787, 789 (1950), *aff'd*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952).

transport field. The CAB, in approving affiliation, has pointed out that such forwarders have no substantial investment in surface carriage facilities; therefore, the CAB reasons, they will not be tempted to divert traffic from air transport.¹⁴⁸

A policy whereby operators of railroads, steamship lines, and other forms of surface transport are denied entry into aviation transport imposes additional costs upon patrons, and perhaps upon taxpayers.¹⁴⁹ It constitutes still another device whereby certificated airlines are sheltered from vigorous competition. Like a protective tariff, it is designed to soften the cradle of an "infant industry." Such a policy cannot be reconciled with the theory of "hard" competition which many observers find in the Sherman Act.

Affiliation with Suppliers

In parallel fashion, legislation has long prohibited the affiliation—without CAB approval—of airlines and persons otherwise engaged in aeronautics.¹⁵⁰ Perhaps to prevent the "unloading" of planes upon subsidized carriers, aircraft manufacturers were apparently the principal targets of such prohibitions. The CAB has carefully scrutinized such situations, sometimes approving common control on the condition

¹⁴⁸ Republic Air Freight, Interlocking Relationships, 18 C.A.B. 643, 646 (1954); Empire Shipping, Interlocking Relationships, 18 C.A.B. 485 (1954); Pacific Air Freight, Interlocking Relationship, 17 C.A.B. 561 (1953); Air Freight Forwarder, 11 C.A.B. 182, 198-99 (1949). In some of the cases the CAB has taken the position that other freight forwarders are so numerous that competition would suffice to prevent the "diversion" about which it is so concerned. That reasoning, however, is equally applicable to the case of the rail-affiliated forwarder whose entry the CAB has so often blocked. Compare Air Freight Forwarder, 9 C.A.B. 473, 502-03, 511-12 (1948); Local, Feeder, & Pick-up Air Serv., 6 C.A.B. 1, 7-8 (1944).

¹⁴⁹ See Nelson, *Effects of Public Regulation on Railroad Performance*, 50 PROCEEDINGS AM. ECON. ASS'N 495, 504 (1960). There is a popular misconception to the effect that a firm which has invested in a given machine will not replace it with a new type of device until it is worn out, unless compelled to do so by competition or otherwise. Economists take a different view of the problem. The amount of investment in the old machine is irrelevant. The orthodox view is that the entrepreneur should consider only the additional profit which he can obtain by purchasing and installing the new machine. In other words, the new device should be installed if its total costs are less than the operating costs of the existing machine. LUTZ & LUTZ, *THE THEORY OF INVESTMENT OF THE FIRM* 113-14 (1951). In the reports of the CAB itself there appears considerable evidence to the effect that operators of steamships have fostered the development of air transportation. *E.g.*, Trans-Pac. Certificate Renewal, 21 C.A.B. 253, 254, 264 (1955). It is also apparent that the Railway Express Agency, owned by proprietors of railroads, has vigorously promoted air express service. *Cf.* National Air Freight Forwarding Corp. v. CAB, 197 F.2d 384, 390 (D.C. Cir. 1952), *affirming* 9 C.A.B. 473, 485 (1948). Nonetheless, observers continue to argue that surface carriers would be under a strong incentive to protect their existing investment in surface transportation. *E.g.*, Hickey, *supra* note 144, at 143. See generally FREDERICK, *op. cit. supra* note 111, at 188-89. Compare Baggett, *supra* note 142, at 347.

¹⁵⁰ Federal Aviation Act of 1958, §§ 408-09, 72 Stat. 767, 49 U.S.C. §§ 1378-79 (1958); see *Hutcheson v. O'Carroll*, 251 F.2d 144 (7th Cir. 1958); *cf.* 14 C.F.R. § 245.1 (1949).

that there be no dealings between the firms.¹⁵¹ The statutory prohibitions extend to diversification upon the part of air carriers. Thus a certificate as an air carrier could be granted the proprietor of a flying school only upon a CAB finding that the combination would not be deleterious to public service.¹⁵² Here again, the policy is inconsistent with that applied in the free sector of the economy, where cash subsidies are not paid and rates not fixed.¹⁵³

FINANCE

Payment of Subsidies

Air transport is one of the few regulated industries to receive cash subsidies. Subsidies were long paid as part of the airlines' compensation for carriage of mail.¹⁵⁴ In recent years, however, payments have been clearly divided into "service" and "subsidy" elements.¹⁵⁵ Regional and lesser airlines are generally still on subsidy, but beginning about 1951 most of the trunk lines gradually achieved subsidy-free status, thereafter receiving only service pay.¹⁵⁶

Subsidies have been paid on the basis of the carriers' needs. Thus the profitable domestic operations of a carrier are set off against losses in foreign flights so as to reduce the amount of the subsidy to a figure that matches the overall need of the carrier.¹⁵⁷ This policy obviously

¹⁵¹ See *Atlas Corp., Control Relationships*, 21 C.A.B. 425, 427 (1955); *Seaboard & W. Agreements*, 18 C.A.B. 726 (1954); *Trans-Tex. Control & Interlocking Relationships*, 18 C.A.B. 570, 571-74 (1954); *Lehman Bros. Interlocking Relationships*, 15 C.A.B. 656 (1952); *Air Freight Forwarder*, 9 C.A.B. 473, 505-06 (1948), *aff'd*, 178 F.2d 903 (7th Cir. 1949), 197 F.2d 384 (D.C. Cir. 1952); *North Cent.*, 7 C.A.B. 639, 673 (1946).

¹⁵² *Rocky Mountain States Air Serv.*, 6 C.A.B. 695, 735-36 (1946). *Accord*, *West Coast*, 6 C.A.B. 961, 1000 (1946). In *Midet Aviation Corp.*, 21 C.A.B. 950, 959 (1955), the CAB renewed the certificate of a single line resort air carrier and praised the carrier for having taken over the operation of a defunct resort hotel and developed it in order to stimulate traffic.

¹⁵³ *But see* Healy, *supra* note 122, at 230, 238.

¹⁵⁴ Federal Aviation Act of 1958, § 406, 72 Stat. 763, 49 U.S.C. § 1376 (1958). See *Capital Airlines, Inc. v. CAB*, 171 F.2d 339, 340 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 961 (1949); *Pan Am. Airways, Inc. v. CAB*, 171 F.2d 139, 140 (D.C. Cir. 1948); *American Airlines, Mail Rates*, 3 C.A.B. 323 (1942); *WESTMEYER, ECONOMICS OF TRANSPORTATION* 547 (1952); *AIRLINES REPORT* 8-17.

¹⁵⁵ See *Domestic Trunklines, Serv. Mail Rates*, 21 C.A.B. 8 (1955); *American Airlines, Mail Rates*, 14 C.A.B. 558, 569-70 (1951). Compare *Mail Transp. by Noncertified Carriers*, 18 C.A.B. 201, 206-07 (1953); *WILCOX, PUBLIC POLICIES TOWARD BUSINESS* 637-38 (1955).

¹⁵⁶ Howell, *The Rate of Return in Air Transport*, 24 LAW & CONTEMP. PROB. 677, 678, 681 (1959). Subsidies in general are discussed in Gellman, *The Regulation of Competition in Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. AIR L. & COM. 410, 426 (1957); Koontz, *supra* note 122, at 129-31. See *WILCOX, op. cit. supra* note 155, at 642.

¹⁵⁷ *Delta Air Lines, Inc. v. Summerfield*, 347 U.S. 74, 78-79 (1954); *Braniff Airways, Inc.*, 1A AV. L. REP. ¶22305 (C.A.B. Sept. 4, 1959); *cf. American Overseas Airlines v. CAB*, 254 F.2d 744, 750 (D.C. Cir. 1958).

may encourage uneconomic routings and has caused the whole subject of subsidy to be subjected to anxious scrutiny.¹⁵⁸

Administration of Subsidy Payments

One interesting feature of the subsidies is that they may be paid on a retroactive basis. It is not necessary, therefore, to estimate future costs: actual figures may be used.¹⁵⁹ This method, unlike that commonly employed in utility ratemaking, avoids many speculative pitfalls but does not, of course, eliminate the tangled problem of allocating common costs.¹⁶⁰ Cost, plus a rate of return, is the CAB's touchstone in granting subsidies.¹⁶¹

Rates of return have been more generous than in public utility regulation generally, as the CAB has believed that the carriers needed additional profit as an incentive to the rapid development of air transport.¹⁶² To the extent that rates are fixed retroactively, however, the profit allowed has been lower on the theory that risks have been eliminated.¹⁶³

In the administration of the subsidies, the CAB has achieved considerable control over decisions otherwise within the purview of management. It has reviewed carrier equipment, eliminating costs as an element in subsidy calculation when planes were found excessive in

¹⁵⁸ A leading observer has complained that the nation's air transportation needs have never been formulated and hence no useful guides have been created as to the extent of subsidy which should be paid. Keyes, *National Policy Toward Commercial Aviation—Some Basic Problems*, 16 J. AIR L. & COM. 280, 281, 283-86, 297 (1949). It has been suggested that the "needs" of the carriers, however formulated, are not a satisfactory basis for the payment of subsidy in that the carriers are thus deprived of an incentive to furnish more efficient and better service. Note, *supra* note 136, at 1216. One writer complains that there is a curious feeling in government and industry circles that an airline cannot be allowed to go bankrupt, whereas there appears to be no basis in public policy for such an attitude. Koontz, *supra* note 122, at 156. The relationship of subsidy to the conflict between the certificated and the exempt carriers also has caused concern. See AIRLINES REPORT 94-110; Keyes, *A Reconsideration of Federal Control of Entry into Air Transportation*, 22 J. AIR L. & COM. 192, 193-94 (1955).

¹⁵⁹ *American Overseas Airlines v. CAB*, 254 F.2d 744, 747, 749 (D.C. Cir. 1958).

¹⁶⁰ See *Domestic Trunklines, Serv. Mail Rates*, 21 C.A.B. 8, 37 (1955); *American Airlines, Mail Rates*, 14 C.A.B. 558, 571-72 (1951). The CAB exhibits a rather extravagant caution lest its orders with respect to mergers, acquisitions, and the like be deemed approval of various costs entering into rate and subsidy problems. See, e.g., *Trans-Tex. Control & Interlocking Relationships*, 18 C.A.B. 570 (1954).

¹⁶¹ Ballard, *Federal Regulation of Aviation*, 60 HARV. L. REV. 1235, 1261-62 (1947); Keyes, *supra* note 158, at 282-84.

¹⁶² *Pacific Airlines, Inc., Mail Rates*, 1A AV. L. REP. ¶ 22278 (C.A.B. June 9, 1959); *American Airlines, Mail Rates*, 3 C.A.B. 323, 346-47 (1942); Barnes, *Airline Subsidies—Purpose, Cause and Control*, 26 J. AIR L. & COM. 311, 316 (1959); Howell, *supra* note 156, at 681. See generally Burt & Highsaw, *Regulation of Rates in Air Transportation*, 7 LA. L. REV. 378-93 (1947); Koontz, *supra* note 122, at 128-32.

¹⁶³ See *Delta-C & S Mail Rate, Reopened*, 1A AV. L. REP. ¶ 22318 (C.A.B. Oct. 20, 1959). Questions have arisen as to whether subsidy payments should be uniform for carriers serving the same or comparable routes. *Pan Am. World Airways v. CAB*, 256 F.2d 711, 712 (D.C. Cir.), cert. denied, 358 U.S. 836 (1958); *American Airlines, Mail Rates*, 14 C.A.B. 558, 565-69 (1951); *American Airlines, Mail Rates*, 3 C.A.B. 323, 341 (1942). Sometimes the CAB varies the amount of carriers' subsidies according to their respective "means"; on other occasions, it makes the subsidy uniform for a group of carriers.

number or scale. Thus, in a recent case, the expense of maintaining one DC-3 aircraft was eliminated from the computations.¹⁶⁴ Operations, too, fall under CAB scrutiny. When load factors are low, the Board disregards costs thought to arise from "over-scheduling."¹⁶⁵ Various other expenses, principally those connected with sales efforts, are also examined by the CAB and sometimes disallowed.¹⁶⁶

Furnishing of Facilities

Almost all forms of transport have been subsidized in kind. It is common, for example, to dredge harbors for the benefit of water carriers. Airlines are usually supplied with airports and associated facilities and with elaborate navigational aids.¹⁶⁷ It would be hard to compute the total amount of subsidy thus paid and comparison of the facilities furnished various modes of transport is similarly difficult.

SERVICE

Safety

The Federal Aviation Act states that it shall be the duty of every air carrier to provide safe and adequate service.¹⁶⁸ Although the CAB

¹⁶⁴ Pacific Airlines, Inc., Mail Rates, 1A Av. L. REP. ¶22278 (C.A.B. June 9, 1959). *Accord*, Pan Am. World Airways, Latin Am. Mail Rates, 17 C.A.B. 775, 799-800 (1953); Southwest Airways, Mail Rates, 17 C.A.B. 301, 303-04 (1953); Capital Airlines, Mail Rates, 10 C.A.B. 705, 718-19 (1949); Alaska Airlines, Mail Rates, 10 C.A.B. 160, 173-74 (1949); Wilcox, *op. cit. supra* note 155, at 642; Gellman, *The Regulation of Competition in Domestic Air Transportation—A Judicial Survey & Analysis*, 25 J. AIR L. & COM. 148, 161-62 (1958). In other instances, the CAB has reviewed managerial decisions with respect to equipment and allowed the expense thereof as an element in the computation of subsidies. See Central Airlines, Mail Rates, 21 C.A.B. 67, 70 (1955); American Airlines, Mail Rates, 10 C.A.B. 341, 343-44 (1949). The CAB is not unaware of the competitive impact of so-called "excess" equipment. See Trans-Pac. Airlines, Hawaiian Airlines, Mail Rates, 20 C.A.B. 668, 670-77 (1955). In this case, the CAB imposed harsh strictures on an airline which had secured better equipment than its rival; the Board found that there had been an attempt to "throttle" the competitor by providing uneconomic capacity. *Id.* at 676.

¹⁶⁵ Pacific Airlines, Inc., Mail Rates, 1A Av. L. REP. ¶22278 (C.A.B. June 9, 1959); American Airlines, Mail Rates, 14 C.A.B. 558, 566-67 (1951); Capital Airlines, Mail Rates, 10 C.A.B. 705, 711-17, 734-37 (1949); Pioneer Airlines, Mail Rates, 8 C.A.B. 175, 192-95 (1947). Compare Northern Consol. Airlines, Mail Rates, 21 C.A.B. 243, 245 (1955); Central Airlines, Mail Rates, 21 C.A.B. 67, 71 (1955).

¹⁶⁶ Transatlantic Final Mail Rates, 19 C.A.B. 464, 483 (1954); Wien Alaska Airlines, Mail Rates, 18 C.A.B. 130, 134 (1953). The CAB has also eliminated entertainment expenses, club dues, and donations. See Continental Airlines, Mail Rates, 21 C.A.B. 811, 825 (1955); Wilcox, *op. cit. supra* note 155, at 642; 1941 CAB ANN. REP. 6-7; 1 CAA ANN. REP. 21 (1940). Note the stay of order in Flint-Grand Rapids Adequacy of Serv. Investigation, 1A Av. L. REP. ¶22377 (C.A.B. April 29, 1960). There the CAB had directed Capital Airlines to provide more service but stayed the effect of the order pending resolution of the carrier's financial plight.

¹⁶⁷ See Ozark Airlines, Davenport/Moline Serv., 21 C.A.B. 874, 881 (1955); Henry, *The Impact of Air Freight on Surface Transportation*, 15 LAW & CONTEMP. PROB. 47, 56 (1950); Note, *supra* note 136, at 1201-02. Somewhat oddly the CAB appears to have no control over the issuance of securities by airlines.

¹⁶⁸ Federal Aviation Act of 1958, §404(a), 72 Stat. 760, 49 U.S.C. §1374(a) (1958). An airline passenger, complaining of the cancellation of a scheduled flight,

is charged with the investigation of accidents,¹⁶⁹ current statutes provide that safety controls are to be exercised by an Administrator.¹⁷⁰ The Administrator licenses pilots and aircraft, prescribes flight procedures, and sets operational patterns, particularly near busy airports.¹⁷¹ While such matters are not of central concern here, it should be noted that safety regulation may have an economic impact.¹⁷²

Schedules

In several ways, the CAB enjoys considerable authority over the operational aspects of the air carriers' business. In the first place, like the Interstate Commerce Commission, it has the power to certificate a second carrier on a route in the event that the first does not perform satisfactorily.¹⁷³ Such a threat may well affect management thinking on scheduling and similar matters. Second, as we have seen, subsidized airlines are subject to disallowance of costs if they disregard CAB "suggestions" with respect to scheduling,¹⁷⁴ equipment,¹⁷⁵ selling expenses, and the like.¹⁷⁶ And finally, reading the

must allege exhaustion of his remedies before the CAB before proceeding in court. "Cancelling" a scheduled flight is a "practice" under the jurisdiction of the CAB. *Adler v. Chicago & So. Air Lines, Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941). Compare *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380 (9th Cir. 1953).

¹⁶⁹ Federal Aviation Act of 1958, § 701, 72 Stat. 781, 49 U.S.C. § 1441 (1958).

¹⁷⁰ Federal Aviation Act of 1958, §§ 307, 601, 72 Stat. 749, 775, 49 U.S.C. §§ 1348, 1421 (1958).

¹⁷¹ See 1 CAA ANN. REP. 31-37 (1940); Kahn, *supra* note 128, at 688-89.

¹⁷² Development of coach service, for example, was affected by fire hazards by reason of the high density of the seating in the aircraft. *CHERRINGTON, AIRLINE PRICE POLICY* 215 (1958).

¹⁷³ *Chicago-Milwaukee-Twin Cities*, 1A Av. L. REP. ¶ 22270 (C.A.B. May 19, 1959); *Ozark Certificate Renewal*, 21 C.A.B. 86, 87 (1955); *Parks Investigation*, 11 C.A.B. 779 (1950), *aff'd*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952). Note the explicit discussion of this topic by way of dictum in *Flint-Grand Rapids Adequacy of Serv. Investigation*, 1A Av. L. REP. ¶ 22377 (C.A.B. April 29, 1960).

¹⁷⁴ *Trans-Pac. Airlines, Hawaiian Airlines, Mail Rates*, 21 C.A.B. 933, 935, 937 (1955); *Trans-Pac. Airlines, Hawaiian Airlines, Mail Rates*, 20 C.A.B. 668, 677-78 (1955); *Pan Am. World Airways, Latin Am. Mail Rates*, 17 C.A.B. 775, 803, 808 (1953); *Capital Airlines, Mail Rates*, 10 C.A.B. 705, 708-15 (1949). Increasing the frequency of airlines' schedules may both attract traffic and at the same time decrease load factors. See Howell, *supra* note 156, at 694. Note the fixing of rates for deferred service and the initial establishment of passenger coach transportation in the night hours only. *Railway Express Agency, Inc. v. CAB*, 243 F.2d 422 (D.C. Cir. 1957); *CHERRINGTON, op. cit. supra* note 172, at 188-92.

¹⁷⁵ *Pacific Airlines, Inc., Mail Rates*, 1A Av. L. REP. ¶ 22278 (C.A.B. June 9, 1959); *Southwest Airways, Mail Rates*, 17 C.A.B. 301, 303-04 (1953). Another means whereby the CAB can control equipment is afforded by § 408 of the Federal Aviation Act. See Allen, *Section 408 of the Federal Aviation Act: A Study in Agency Law-making*, 45 VA. L. REV. 1073, 1094-96 (1959).

¹⁷⁶ *Braniff Airways, Inc.*, 1A Av. L. REP. ¶ 22305 (C.A.B. Sept. 4, 1959); *Northern Consol. Airlines, Mail Rates*, 21 C.A.B. 243, 247 (1955). See also text accompanying notes 164-66 *supra*. As to revocation of certificates as a means of controlling service, see text accompanying notes 196-98 *infra*.

statute in a broader fashion, the CAB has recently decided that it may directly order that specific services be rendered, and it has issued such orders with respect to schedules. Finding, for example, that commuting service was not available from Baltimore to New York, it directed a revision of schedules to permit Baltimore citizens to fly to Manhattan in the morning and return late in the day.¹⁷⁷ It has issued similar orders with respect to terminals. Finding that Toledo service to several destinations was inadequate in volume and scheduling, it directed sweeping changes.¹⁷⁸ It has acted, too, with respect to equipment. Finding service from Flint-Grand Rapids to New York inadequate in equipment, it directed the carrier to install jet-prop planes on the route.¹⁷⁹ Most such direct orders have been issued only recently; one such order has been sustained by the courts.¹⁸⁰ Should the CAB be thus encouraged to enter similar orders in the future, the discretion formerly vested in management will be vastly reduced.

¹⁷⁷ Washington-Baltimore Adequacy of Serv. Investigation, 1A Av. L. REP. ¶22376 (C.A.B. April 29, 1960). In the same case, the CAB required additional morning flights from Baltimore to Richmond and objected to the scheduling of Baltimore-Chicago flights because there was no arrival in Baltimore prior to 2:10 p.m. Furthermore, it directed each of three airlines (Eastern, National, and Northeast) to provide a round trip daily to Florida from Baltimore. *Accord*, Flint-Grand Rapids Adequacy of Serv., 1A Av. L. REP. ¶22377 (C.A.B. April 29, 1960). In the latter case, the CAB, finding that Capital Airlines had shown serious deficiencies with respect to adherence to its schedules, required the filing of on-time reports with respect to the Flint-Grand Rapids destination.

¹⁷⁸ Toledo Adequacy of Serv. Investigation, 1A Av. L. REP. ¶22325 (C.A.B. Nov. 10, 1959). *Accord*, Washington-Baltimore Adequacy of Serv., 1A Av. L. REP. ¶22376 (C.A.B. April 29, 1960). See also Braniff Airways, Serv. to Fairmont & Fort Dodge, 20 C.A.B. 720 (1955); Service to Ely, 20 C.A.B. 402 (1955).

¹⁷⁹ Flint-Grand Rapids Adequacy of Serv. Investigation, 1A Av. L. REP. ¶22377 (C.A.B. April 29, 1960). In the same case, the airline was required to use pressurized equipment on runs to Flint and Grand Rapids. *Accord*, Washington-Baltimore Adequacy of Serv., 1A Av. L. REP. ¶22376 (C.A.B. April 29, 1960). In the latter case, however, the CAB declined to direct United Airlines to provide coach service to Toledo. Note, however, that the CAB declined to intervene in the famous "cocktail" dispute over the serving of alcoholic beverages. Capital Airlines, Inc. v. Northwest Airlines, Inc., 18 C.A.B. 145 (1953).

¹⁸⁰ Capital Airlines, Inc. v. CAB, 281 F.2d 48 (D.C. Cir. 1960). Compare *Bluestone, The Problem of Competition Among Domestic Trunk Airlines*, 20 J. AIR L. & COM. 379, 398 (1953), with *Keyes, supra* note 158, at 288-93. At one time it was believed that the airlines were free to indulge in service competition without interference by the CAB. See Gellman, *The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 25 J. AIR L. & COM. 148, 156-57 (1958); Note, *supra* note 136, at 1200-01. When a destination is found to require additional service, the CAB considers that it has power to single out one carrier authorized to haul traffic to that point and place the burden of additional service upon it. In choosing such a carrier, it takes account of several factors, including the relative amount of traffic enjoyed, the amount of restrictions on carriers' routes, failure to provide service, and the historical status of the carrier in the market. Washington-Baltimore Adequacy of Serv., 1A Av. L. REP. ¶22376 (C.A.B. April 29, 1960). In that case, however, the burdens imposed on Capital Airlines were suspended in view of that carrier's precarious financial condition. Note also the decision in Seven States Area Investigation, 1A Av. L. REP. ¶22326 (C.A.B. Nov. 10, 1959), where the CAB imposed employee protective conditions on the airlines; trunk lines terminating service at various destinations were required to pay the expenses of moving employees to new places of work.

Service and Competition

Impressive evidence supports the thesis that service standards have been raised by permitting competition among airlines. Capital Airlines, for example, was granted a second certificate on the Chicago-Twin Cities route and immediately Northwest Airlines, the holder of the original certificate, increased its scheduling.¹⁸¹ A careful study of the role of competition along many routes led to the conclusion that "competition has been and continues to be an important force in assuring the traveler a high standard of schedule service."¹⁸²

This conclusion, however, is limited to the entry of a second carrier. Addition of third, fourth, and subsequent airlines to a route appears not to improve service;¹⁸³ indeed, deterioration in service may occur when three or more carriers are granted certificates for the same run. In some areas, even granting a second certificate may result in lower service standards.¹⁸⁴

Equipment, as well as scheduling, benefits from some degree of competition—innovation in general is in some measure a product of competition.¹⁸⁵ And, in passing, we may note that innovation—and particularly the introduction of faster planes—has a marked impact upon competitive volume.¹⁸⁶ While in general the CAB has not

¹⁸¹ Chicago-Milwaukee-Twin Cities, 1A Av. L. REP. ¶22307 (C.A.B. Sept. 15, 1959) (supplemental opinion). The beneficial effects of competition upon service have frequently been noted by the CAB. See Through Serv. Investigation, 16 C.A.B. 6, 39-40 (1952); Additional Serv. to Puerto Rico, 12 C.A.B. 430, 482-83 (1951); Hawaiian Airlines Ltd., 7 C.A.B. 83, 103-04 (1946); Colonial Airlines, Inc., 4 C.A.B. 552, 554-55 (1944); Transcontinental & W. Airlines, Inc., 4 C.A.B. 373, 375 (1943).

¹⁸² GILL & BATES, *AIRLINE COMPETITION* 109 (1949). Other comments to the same effect are found in *id.* at 155, 157-58, 183-85, 201-02, 205-13, 218-25, 228-29, 245-46, 275, 287-88, 296, 317, 324; CHERINGTON, *op. cit. supra* note 172, at 12, 14, 208-09, 215-16; Gellman, *supra* note 180, at 155; Hector, *Problems in Economic Regulation of Civil Aviation*, 26 J. AIR L. & COM. 101, 105 (1959); Taaffe, *A Map Analysis of United States Airline Competition*, 25 J. AIR L. & COM. 121, 147 (1958).

¹⁸³ GILL & BATES, *op. cit. supra* note 182, at 219-21, 234, 238, 266-69, 293, 333, 344. But there is also evidence to the effect that competition is relatively unimportant with respect to service standards. *Id.* at 122, 156, 157, 160-62, 174, 308-09; CHERINGTON, *op. cit. supra* note 172, at 224; Keyes, *supra* note 158, at 196.

¹⁸⁴ See Bristol Bay Area Trunkline, 17 C.A.B. 1109, 1115 (1953); Bluestone, *supra* note 180, at 393; Richmond, *Creating Competition Among the Airlines*, 24 J. AIR L. & COM. 435, 447 (1957).

¹⁸⁵ GILL & BATES, *op. cit. supra* note 182, at 3. See CHERINGTON, *op. cit. supra* note 172, at 11; GILL & BATES, *op. cit. supra* note 182, at 64-66, 73, 76, 85-87, 91, 133-46; Hector, *supra* note 182, at 104; Maclay & Burt, *Entry of New Carriers Into Domestic Trunkline Air Transportation*, 22 J. AIR L. & COM. 131, 147-49 (1955). It has been intimated that the grant of a temporary certificate to another carrier pushed its rival into obtaining better airships. Trans-Pac. Airlines Ltd., 21 C.A.B. 253, 167-69 (1955). Forces other than competition also give rise to innovation. CHERINGTON, *op. cit. supra* note 172, at 290-94; GILL & BATES, *op. cit. supra* note 182, at 67-68; 1956 EASTERN AIRLINES ANN. REP. 18; Bluestone, *supra* note 180, at 400. The foregoing do not indicate that competition has no role whatever in causing innovation. They do suggest, however, that factors other than the immediate competition of other airlines have been responsible for some changes.

¹⁸⁶ See generally CHERINGTON, *op. cit. supra* note 172, at 11; GILL & BATES, *op. cit. supra* note 182, at 267-69, 307-08; Taaffe, *supra* note 182, at 147; *International Airlines: The Great Jet Gamble*, Fortune, June 1958, pp. 120, 124.

blocked technological change,¹⁸⁷ instances can be found where it has at least failed to encourage the introduction of new equipment.¹⁸⁸ Of course, it can never be conclusively demonstrated whether air transport would have advanced more rapidly had the industry not been regulated.¹⁸⁹

Whether CAB-type competition has been a favorable factor in the development of traffic remains open to question.¹⁹⁰ But however measured, from whatever cause, and regardless of what might have happened in the absence of either regulation or a measure of competition, air traffic has grown rapidly.¹⁹¹

Abandonment and Revocation

The act requires certificate holders to render service¹⁹² and forbids abandonment of a route without CAB approval.¹⁹³ The Board follows no rigid pattern: abandonment is often allowed¹⁹⁴ but on occasion the carrier is compelled to continue service.¹⁹⁵

The CAB also enjoys express statutory power to revoke the certificates it has granted.¹⁹⁶ It may not, however, even go so far as to

¹⁸⁷ See, e.g., *Continental Airlines, Inc.*, 4 C.A.B. 215, 234 (1943); *KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* 243-45, 308-09, 310-11 (1951).

¹⁸⁸ *Trans-Pac. Airlines, Hawaiian Airlines, Mail Rates*, 21 C.A.B. 933, 934-35 (1955); *Pan Am. World Airways, Latin Am. Mail Rates*, 17 C.A.B. 775, 801-02 (1953); *Pioneer Airlines, Mail Rates*, 17 C.A.B. 499, 512-13 (1953); *Transcontinental Coach-Type Serv.*, 14 C.A.B. 720 (1951); *Capital Airlines, Mail Rates*, 10 C.A.B. 705, 715-16 (1949); *American Airlines, Mail Rates*, 10 C.A.B. 341, 344-45 (1949); *All Am. Aviation, Pick Up, Delivery Serv.*, 2 C.A.B. 133 (1940). See *Transcontinental Coach-Type Serv.*, *supra* at 728 (dissenting opinion).

¹⁸⁹ The casual observer might well believe that the airlines had been slow to adopt the jet engine used by the military in World War II. There is, however, no way to establish that the CAB was in any way responsible for the delay.

¹⁹⁰ *CHERINGTON, op. cit. supra* note 172, at 16-18; *GILL & BATES, op. cit. supra* note 182, at 31-32; *Bluestone, supra* note 180, at 299, 393-94; *Taafe, supra* note 182, at 402, 407, 409, 420.

¹⁹¹ See *BIGHAM & ROBERTS, TRANSPORTATION* 115 (1952); *GILL & BATES, op. cit. supra* note 182, at 18-19; *AIRLINES REPORT* 68, 236-37; *Smith, Regulation of Returns to Transportation Agencies*, 24 *LAW & CONTEMP. PROB.* 702, 711 (1959).

¹⁹² Federal Aviation Act of 1958, § 404(a), 72 Stat. 760, 49 U.S.C. § 1374(a) (1958).

¹⁹³ Federal Aviation Act of 1958, § 401(j), 72 Stat. 756, 49 U.S.C. § 1371(j) (1958). Interruption of service because of adverse weather conditions does not require CAB approval. 14 C.F.R. § 206.1 (1956). The procedure whereby an air carrier may secure authority for temporary suspension of service is outlined in 14 C.F.R. §§ 205.1-6 (1956); 14 C.F.R. § 205.7 (1959).

¹⁹⁴ See *American Airlines, Inc.*, 20 C.A.B. 565 (1955); *Service to Trenton*, 20 C.A.B. 290, 312 (1955); *Northwest Airlines, Suspension of Aberdeen Serv.*, 19 C.A.B. 773 (1955); *Texas Local Serv.*, 18 C.A.B. 34, 55 (1953).

¹⁹⁵ *Northwest Airlines, Elimination of Kalispell Serv.*, 21 C.A.B. 114, 125-26 (1955); cf. *KEYES, op. cit. supra* note 187, at 258. See generally *Keyes, supra* note 158, at 199-200. Compare *West Coast*, 6 C.A.B. 961, 978-79 (1946).

¹⁹⁶ Federal Aviation Act of 1958, § 401(g), 72 Stat. 756, 49 U.S.C. § 1371(g) (1958); *American Air Transp. Revocation Proceeding*, 16 C.A.B. 294, 300 (1952); *aff'd*, 206 F.2d 423 (D.C. Cir. 1953). See generally *Netterville, The Regulation of Irregular Air Carriers*, 16 *J. AIR L. & COM.* 414, 439-42 (1949). Compare *Ryan, The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 *J. AIR L. & COM.* 377 (1948).

suspend a letter of registration without affording the carrier a hearing.¹⁹⁷ Revocation proceedings are commonly based upon failure to furnish certificated service or willful violation of regulations.¹⁹⁸ Here, then, is another indirect method of compelling carriers to render service.

Unfair Practices

In language obviously reminiscent of section 5 of the Federal Trade Commission Act, the CAB is empowered to "investigate and determine whether any air carrier . . . has been . . . engaged in unfair or deceptive practices or unfair methods of competition" If such practices are found to exist, the Board may enter a cease and desist order.¹⁹⁹ It seems to follow that air carriers are not subject to the Federal Trade Commission Act.²⁰⁰ The CAB in fact enjoys primary jurisdiction in antitrust matters pertaining to airlines, except perhaps in those as to which it cannot grant an appropriate remedy.²⁰¹

¹⁹⁷ *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir.), *reversing* 10 C.A.B. 486 (1949). Compare 14 C.F.R. § 291.21(b) (1956).

¹⁹⁸ *Alaska Route Modification*, 17 C.A.B. 943, 947 (1953); *American Air Transp., Revocation Proceeding*, 16 C.A.B. 294, 301 (1952), *aff'd*, 206 F.2d 423 (D.C. Cir. 1953); *Parks Investigation*, 11 C.A.B. 779, 783-84 (1950), *aff'd*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952); *Standard Airlines, Noncertified Operations*, 10 C.A.B. 486, 503-04, *rev'd on other grounds*, 177 F.2d 18 (D.C. Cir. 1949); *Tri-State Aviation Corp.*, 4 C.A.B. 100 (1943). See generally Keyes, *supra* note 158, at 202. In at least one instance the CAB refused to revoke a certificate in order to maintain existing competition. *Through Serv. Investigation*, 16 C.A.B. 6, 31, 34 (1952).

¹⁹⁹ Federal Aviation Act of 1958, § 411, 72 Stat. 769, 49 U.S.C. § 1381 (1958).

²⁰⁰ *Levi, Section 7 of the Clayton Act and the Regulated Industries*, in N.Y. ST. BAR ASS'N SYMPOSIUM 136, 138 (1959).

²⁰¹ *S.S.W., Inc. v. Air Transp. Ass'n*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); *Apgar Travel Agency, Inc. v. International Air Transp. Ass'n of America*, 107 F. Supp. 706 (S.D.N.Y. 1952). In the *S.S.W.* case the court wrote: "[If the antitrust laws apply to public utilities] we might have the spectacle [sic] of courts throughout the country enjoining practices as violations of the antitrust laws even though the agency specifically authorized to deal with them has determined or may decide, subject to judicial review, that such practices serve the interests of the national air transportation policy." 191 F.2d at 663. In the *Apgar* case, the court wrote: "The action directly involves the economic conduct of air carriers, a matter subject to the 'detailed and comprehensive' regulation by the [Civil Aeronautics] Board The air transportation industry is a regulated industry which, in the considered judgment of Congress, has been given a special status with relation to the antitrust laws. It is the national policy that unbridled competition in that industry is not in the national interest, and the CAB has been entrusted with the responsibility of making the accommodation between monopoly and competition, in the public interest." 107 F. Supp. at 709. Compare *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953); *Hawaiian Airlines, Ltd. v. Trans-Pac. Airlines, Ltd.*, 73 F. Supp. 68 (D. Hawaii 1947), *rev'd*, 174 F.2d 63 (9th Cir. 1949). As to the doctrine of primary jurisdiction, see generally DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 19.01-.07 (1958). A different viewpoint was taken in *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), *aff'd on other grounds sub nom. American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). In that case the plaintiff sought treble damages by reason of an alleged conspiracy to drive it out of business. In the course of the opinion the trial court wrote: "The essence of the complaint is that the defendants, in violation of the anti-trust laws, have conspired to exclude plaintiff

Somewhat surprisingly, the CAB's principal utilization of its powers against unfair practices is found in the area known to the common law as unfair competition. Thus, the Board has required several airlines to change their names so as not to be confused with established carriers.²⁰² Proceedings have also been initiated against various forms of misrepresentation, such as the issuance of documents resembling tickets but not actually entitling the patron to carriage.²⁰³

As intimated above, the CAB has encouraged competition in service among the carriers. Accordingly, it has rarely attacked the rendering of extra services as an unfair practice. Capital Airlines complained that its rival, Northwest, had engaged in unfair competition in that it was serving liquor on first-class flights in violation of state law. The CAB declined to act, suggesting that the remedy lay in the courts of the several states involved.²⁰⁴ And despite adverse congressional comment,²⁰⁵ the CAB appears to have taken little interest in various exclusive agreements which carriers have entered into with noncarriers.²⁰⁶

from the field of air freight transportation. Normally, the jurisdiction of such a charge rests with the courts under the anti-trust laws. To a certain extent the anti-trust laws have been superseded by legislation in regulating specific fields of activity. But, regulated industries are not per se exempt from the Sherman Act . . . With regard to the type of relief prayed for in the form of damages, there appears to be nothing in the Civil Aeronautics Act which indicates a suspension of the anti-trust laws." 107 F. Supp. at 206-07. It is interesting to note the assumption in the foregoing language that the regulatory statute has the same substantive provisions as the antitrust laws and that the only question is an adjective one of choice of forum. Compare *McCrea v. Detroit City Gas Co.*, 24 P.U.R. (n.s.) 225, 227 (Mich. Pub. Util. Comm'n 1938); *Illinois Coal Operators' Ass'n v. Peoples Gas Light & Coke Co.*, 7 P.U.R. (n.s.) 403, 423 (Ill. Commerce Comm'n 1934).

²⁰² *Air America*, Section 411 Proceeding, 18 C.A.B. 810, 813-14, 826-29 (1954); *North Am. Airlines*, Section 411 Proceeding, 18 C.A.B. 96, 98-103 (1953), *aff'd*, 351 U.S. 79, 86 (1956), *reversing* 228 F.2d 432 (D.C. Cir. 1955). Compare *Aerovias Venezolanas*, Foreign Permit, 20 C.A.B. 746, 747 (1955); *Pacific W., Irregular Canada—United States Serv.*, 19 C.A.B. 270, 273 (1954).

²⁰³ *Airline Reservations*, Enforcement Proceeding, 18 C.A.B. 114, 121 (1953). Comparable cases are *Eastern Airlines Overbooking Enforcement Proceeding*, 1A Av. L. REP. ¶ 22359 (C.A.B. Feb. 26, 1960); *Standard Airlines, Noncertified Operations*, 10 C.A.B. 486, 502, *rev'd on other grounds*, 177 F.2d 18 (D.C. Cir. 1949). See also Gellman, *supra* note 180, at 162-63.

²⁰⁴ *Capital Airlines, Inc. v. Northwest Airlines, Inc.*, 18 C.A.B. 145 (1953). Generally in accord are *National Airlines Enforcement Proceeding*, 1A Av. L. REP. ¶ 22358 (C.A.B. Feb. 24, 1960); *States-Alaska Fare*, 21 C.A.B. 354, 362 (1955); *Pan. Am. Ferry Flight*, 18 C.A.B. 214, 226 (1953). The *National Airlines* case involved an essay prize contest among passengers. It was held not to constitute an unfair method of competition. The *States-Alaska Fare* case involved operation of DC-6B equipment at the same fare as the older, slower DC-4 plane operated by a rival. Again, no unfair competitive practice was found. See also Gellman, *supra* note 180, at 155-58. Compare *City Ice & Fuel Co. v. Consolidated Edison Co.*, 29 P.U.R. (n.s.) 193 (N.Y. Dep't Pub. Serv. 1939); *Groggins v. N.Y. Edison Co.*, 16 P.U.R. (n.s.) 365 (N.Y. Dep't Pub. Serv. 1936) (promotional campaign by public utility companies to encourage sale of appliances).

²⁰⁵ AIRLINES REPORT 251-53, 256-60, 262-64, 277-78.

²⁰⁶ Compare *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950); *Tampa Elec. Co. v. Nashville Coal Co.*, 168 F. Supp. 456 (M.D. Tenn. 1958), *aff'd*,

TRADE ASSOCIATIONS

Joint Activity with Respect to Rates

Air carriers must submit agreements with other airlines to the CAB for approval,²⁰⁷ and it thus follows that trade association activity generally is under Board control. Among the most important of joint programs are those relating to rates. The CAB has approved an agreement providing for uniform classification of freight and voluntary advance notice of rate changes. It required elimination, however, of a provision for mandatory advance notice of tariff alterations on the ground that it would deprive carriers of opportunities to gain competitive advantage. The Board has also required that all carriers desiring to do so be permitted to participate in the joint filing of rates.²⁰⁸ For reasons of economy and clarity the CAB looks with marked favor upon collaboration in the mechanical consolidation of tariffs into a single document.²⁰⁹ Many observers have complained that the CAB allows the carriers too much collaboration in the important matter of pricing. It requires no involved calculation to demonstrate that such activity is incompatible with a full measure of competition.²¹⁰

Other Joint Activity

Airlines collaborate also in other respects. A principal activity has been the selection, compensation, and control of travel agents. Here the CAB has found the trade associations' actions to be in the public interest notwithstanding adverse comment from outside sources.²¹¹ Airline trade associations, like those in other industries, also engage in lobbying, public relations, and similar activities.²¹²

276 F.2d 766 (4th Cir.), cert. granted, 363 U.S. 836 (1960) (No. 931); Standard Airlines, Noncertified Operations, 10 C.A.B. 486, 502, *rev'd on other grounds*, 177 F.2d 18 (D.C. Cir. 1949).

²⁰⁷ Federal Aviation Act of 1958, § 412(a), 72 Stat. 770, 49 U.S.C. § 1382(a) (1958).

²⁰⁸ Air Freight Tariff Agreement, 14 C.A.B. 424, 428-31 (1951). The CAB has not, however, encouraged domestic carriers to engage in general discussion with respect to rates. Burt & Highsaw, *Regulation of Rates in Air Transportation*, 7 LA. L. REV. 1, 14-15 (1946); Gellman, *supra* note 180, at 176-77. Compare TAFF, COMMERCIAL MOTOR TRANSPORTATION 627, 629 (1955). International rates are set by IATA under no such limitations. IATA Traffic Conference Resolution, 6 C.A.B. 639, 641-42, 644-45 (1946); AIRLINES REPORT 196, 217-18, 224-26; Burt & Highsaw, *supra* at 4-5, 14-16; *Can Airlines Compete?*, 180 THE ECONOMIST 51-53 (1956); *International Airlines: The Great Jet Gamble*, Fortune, June, 1958, pp. 120, 228.

²⁰⁹ Air Freight Tariff Agreement, 14 C.A.B. 424, 427-28 (1951); 14 C.F.R. § 221.10(a) (1956); 1942 CAB ANN. REP. 27; 2 CAA ANN. REP. 8 (1940).

²¹⁰ KEYES, *op. cit. supra* note 187, at 325; AIRLINES REPORT 212, 226-27; Durham & Feldstein, *Regulation as a Tool in the Development of the Air Freight Industry*, 34 VA. L. REV. 769, 801-02 (1948).

²¹¹ AIRLINES REPORT 189-216, 273-75.

²¹² *Id.* at 114, 125, 134, 159, 164, 170-79. Note the proceedings entitled Air Transp. Ass'n Inspection, 1A AV. L. REP. ¶ 22280 (C.A.B. June 10, 1959). Complaints are

Participating in CAB Proceedings

A striking feature of the regulatory pattern—striking in contrast to the free sector of the economy but similar to practice before the FCC and ICC—is the freedom of third parties to appear and be heard in regulatory proceedings. This right is evidenced in the act²¹³ and has received a generously broad construction.²¹⁴ In practice, almost anyone may participate in a CAB proceeding. One city, for example, may appear to contest the grant of a route to another municipality.²¹⁵ Carriers may, of course, protest the grant of certificates to rivals.²¹⁶ Trade associations, too, participate in CAB proceedings, albeit not without complaint from some quarters.²¹⁷

RATES

The Statutory Scheme

Airline pricing falls within a pattern familiar to public utility regulation. Initiation of rates and rules is left to the carriers, which must file tariffs with the CAB.²¹⁸ Deviation from the published tariffs is, of course, forbidden, and they may normally be changed only upon thirty days' notice.²¹⁹ Full power over the rates is vested in the CAB:

recorded in AIRLINES REPORT 270-73. Compare *id.* at 280-83 (minority views); *International Airlines: The Great Jet Gamble*, Fortune, June, 1958, pp. 120, 227.

²¹³ Federal Aviation Act of 1958, §§ 401(c), (g), 1009, 72 Stat. 754, 796, 49 U.S.C. §§ 1371(c), (g), 1489 (1958). Compare 14 C.F.R. § 202.3(b) (1956).

²¹⁴ Eastern Air Lines, Inc. v. CAB, 243 F.2d 607, 609 (D.C. Cir. 1957); Railway Express Agency, Inc. v. CAB, 243 F.2d 422, 424 (D.C. Cir. 1957); Seaboard & W. Airlines, Inc. v. CAB, 181 F.2d 515, 519 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 963 (1950); *cf.* Pacific No. Airlines, Inc. v. Alaska Airlines, Inc., 80 F. Supp. 592, 607 (D. Alaska 1948); American Airlines, Inc. v. Standard Air Lines, Inc., 80 F. Supp. 135, 136 (S.D.N.Y. 1948). Compare *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940); *Philco Corp. v. FCC*, 257 F.2d 656, 658 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959); *Carolina Power & Light Co. v. South Carolina Pub. Serv. Authority*, 94 F.2d 520, 523 (4th Cir.), *cert. denied*, 304 U.S. 578 (1938); *Kansas Gas & Elec. Co. v. City of Independence*, 79 F.2d 32, 35 (10th Cir. 1935); *Arkansas-Missouri Power Co. v. City of Kennett*, 78 F.2d 911 (8th Cir. 1935). Proceedings before the CAB are, with some limitations, subject to the "Ashbacker" rule. *CAB v. State Airlines, Inc.*, 338 U.S. 572, 578-79 (1950); *Eastern Air Lines, Inc. v. CAB*, 271 F.2d 752, 757 (2d Cir. 1959), *cert. denied*, 362 U.S. 970 (1960); *National Airlines, Inc. v. CAB*, 249 F.2d 13, 15 (D.C. Cir. 1957); *Eastern Air Lines, Inc. v. CAB*, 247 F.2d 562, 565 (D.C. Cir. 1957).

²¹⁵ Greensboro-High Point Airport Authority v. CAB, 231 F.2d 517, 521-22 (D.C. Cir. 1956).

²¹⁶ Transatlantic Cargo, 21 C.A.B. 671, 674 (1954); Trans-Pac. Certificate Renewal, 21 C.A.B. 253, 257 (1955). The point appears to have been assumed in *Braniff Airways, Inc. v. CAB*, 147 F.2d 152 (D.C. Cir. 1945). Compare *Southwest Airways, Mail Rates*, 17 C.A.B. 301 (1953).

²¹⁷ AIRLINES REPORT 160, 168, 171, 183.

²¹⁸ Federal Aviation Act of 1958, § 403(a), 72 Stat. 758, 49 U.S.C. § 1373(a) (1958).

²¹⁹ Federal Aviation Act of 1958, §§ 403(b), (c), 72 Stat. 759, 49 U.S.C. §§ 1373(b), (c) (1958). Under the provisions of § 404(a), air carriers are under a duty to establish joint rates with other carriers.

it may set maximum *or* minimum, or maximum *and* minimum levels, altering the tariffs according to a somewhat elaborate set of statutory standards.²²⁰ In part, the CAB has exercised its powers through the promulgation of regulations.²²¹ One interesting provision allows the changing of tariffs without thirty days' notice to correct clerical and similar errors, but not to meet the lower rates of a competing carrier.²²²

Supplementary provisions authorize the CAB to prescribe the form of the carrier's accounts and to call upon the airlines to render reports.²²³ Regulations have been promulgated implementing the statute and a perusal of them leaves the impression that the airlines are tightly bound in red tape.²²⁴ In these circumstances, one may conclude that—while some exceptions exist, notably in respect to international routes²²⁵—the CAB exercises exclusive jurisdiction over the tariffs of air carriers.²²⁶

²²⁰ Federal Aviation Act of 1958, §§ 1002(d), (e), 72 Stat. 789, 49 U.S.C. §§ 1482(d), (e) (1958). In fixing rates the Board is directed to take into consideration their effect on the movement of traffic; the need of adequate transportation at the lowest possible cost; standards with respect to quality of service; the inherent advantages of air transport; and the need of the carrier for revenues to provide adequate service. There is nothing to indicate which of the foregoing considerations is to be given greater weight in the event of conflict among them. In *Capital Airlines, Inc. v. CAB*, 171 F.2d 339 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 961 (1949), the court made the following comment with respect to rate-fixing provisions of the former statute: "The [Civil Aeronautics] Act, with its regulatory provisions, is not intended to underwrite profitable operation of a carrier's business, any more than statutes imposing regulation of public utilities are intended to insure them a net revenue." 171 F.2d at 340.

²²¹ 14 C.F.R. §§ 207.4, 221.38(a) (1956); 14 C.F.R. § 221.3 (Supp. 1960). See generally *Air Freight Tariff Agreement*, 14 C.A.B. 424, 426-27 (1951).

²²² 14 C.F.R. § 221.190(a) (1956). See generally 1942 CAB ANN. REP. 27; 1 CAA ANN. REP. 22 (1939); Burt & Highsaw, *supra* note 208, at 3. The tariffs filed by the carriers are rigidly binding upon them and the shippers. *Rosch v. United Airlines*, 146 F. Supp. 266, 267 (S.D.N.Y. 1956); *Furrow & Co. v. American Airlines*, 102 F. Supp. 808 (W.D. Okla. 1952); *New York & Honduras Rosario Mining Co. v. Riddle Airlines, Inc.*, 3 App. Div. 2d 457, 461-64, 162 N.Y.S.2d 314, 319-21 (1957), *aff'd per curiam*, 4 N.Y.2d 755, 149 N.E.2d 93, 172 N.Y.S.2d 168 (1958). Compare *Pan Am. Ferry Flight*, 18 C.A.B. 214, 215-17, 219-20 (1953); *Continental Charters, Tariff Rule*, 16 C.A.B. 772, 774 (1953).

²²³ Federal Aviation Act of 1958, §§ 407(a), (d), 72 Stat. 766, 49 U.S.C. §§ 1377(a), (d) (1958). The CAB also controls the length of time the records must be kept. 1942 CAB ANN. REP. 33.

²²⁴ *E.g.*, 14 C.F.R. § 242.2 (Supp. 1960); 14 C.F.R. §§ 248.1, .3, 249.7 (1956).

²²⁵ *Furrow & Co. v. American Airlines*, 102 F. Supp. 808, 809 (W.D. Okla. 1952). Compare *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-70 (1956); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951); *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co.*, 184 F.2d 552, 565 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950); *Natural Gas Pipeline Co. v. Federal Power Comm'n*, 141 F.2d 27, 30 (7th Cir. 1944); *Consolidated Gas, Elec. Light & Power Co. v. Siggins*, 99 F. Supp. 151, 154 (M.D. Pa. 1951); *Mandel Bros. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E.2d 774 (1954); *Trienens, Types of Questions Subject to the Primary Jurisdiction of Administrative Agencies*, 13 ABA ANTITRUST REP. 42, 44 (1958).

²²⁶ *Troxel, Economics of Transport* 35 (1955); *AIRLINES REPORT* 229, 231, 234, 276; *IATA Traffic Conference Resolution*, 6 C.A.B. 639, 642-46 (1946); Burt

CAB Policies

The tendency of the Board has been to hold maximum rates down when the airlines have been profitable and to permit increases in less happy circumstances.²²⁷ In 1942 traffic had increased and the CAB pushed rates down by informal procedures. In 1945 profits were again large and the CAB reduced service mail pay. After the end of World War II, however, traffic slumped and two rate increases were allowed. In 1952 the airlines again were unprofitable and the CAB permitted the addition of one dollar per ticket to all fares.²²⁸ A general passenger fare investigation followed but was not completed.²²⁹ In 1956 rates stood at levels only slightly higher than those prevailing in 1942.²³⁰ Yielding to congressional pressure, the CAB in that year initiated a second general passenger fare investigation, premised on the theory that rates were too high. By January 1957, however, circumstances had changed and the carriers sought an increase which the CAB tentatively denied in September of that year. Deterioration of earnings continued and in February 1958, the CAB authorized upward adjustments of tariffs. In October of that year elimination of round-trip and similar discounts effected another increase.²³¹ The general fare investigation continued and finally, in June 1960, rates went up again about five per cent.²³² Presumably another period of profits would again induce the CAB to order reductions.

On the minimum side, the CAB has employed its powers vigorously to protect the revenues of carriers against the "erosion" of "de-

& Highsaw, *supra* note 208, at 4, 5-6, 18; Stoffel, *American Bilateral Air Transport Agreements on the Threshold of the Jet Transport Age*, 26 J. AIR L. & COM. 119, 134 (1959). Note that the CAB has no power of reparation: it cannot award damages for breach of air tariffs. *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 502 (2d Cir. 1956). Its control over some accounting methods, e.g., depreciation charges, is confined to ratemaking proceedings. *Alaska Airlines v. CAB*, 257 F.2d 229, 230 (D.C. Cir.), *cert. denied*, 358 U.S. 881 (1958). The Board also lacks direct authority to fix rates for exempt and private carriers. Federal Aviation Act of 1958, §§ 101(21), 401(a), 1002(b), 72 Stat. 738, 754, 788, 49 U.S.C. §§ 1301(21), 1371(a), 1482(b) (1958). See generally *Mail Transp. by Noncertified Carriers*, 18 C.A.B. 201, 206 (1953); Burt & Highsaw, *supra* note 208, at 19-21; Netterville, *supra* note 196, at 435-37.

²²⁷ Southern Serv. to the West, 12 C.A.B. 518, 534 (1951); CHERINGTON, *AIRLINE PRICE POLICY* 74-89 (1958); Burt & Highsaw, *Regulation of Rates in Air Transportation*, 7 LA. L. REV. 378, 379 (1947); Hector, *supra* note 182, at 103-04.

²²⁸ CHERINGTON, *op. cit. supra* note 227, at 102; Howell, *The Rate of Return in Air Transport*, 24 LAW & CONTEMP. PROB. 677, 681-82 (1959).

²²⁹ General Passenger-Fare Investigation, 17 C.A.B. 230 (1953); AIRLINES REPORT 267-68; Hector, *supra* note 182, at 106-07; Howell, *supra* note 228, at 682.

²³⁰ Smith, *supra* note 191, at 712.

²³¹ Hector, *supra* note 182, at 101-02; Howell, *supra* note 228, at 683-84; Smith, *supra* note 191, at 716.

²³² Some general discussion of the proceedings will be found in Altschul, *Buoyant Airlines*, *Barron's*, June 22, 1959, pp. 5, 17.

structive" competition.²³³ Its orders have met a mixed reception.²³⁴ The CAB has not, however, been wholly inflexible: price reductions have occasionally been approved,²³⁵ "coach" service was reluctantly authorized,²³⁶ and the airlines were allowed to experiment with "promotional" pricing.²³⁷

What emerges most clearly is a picture of informal pressures upon carriers which are more important and more pervasive than rate-fixing orders.²³⁸ Though the airlines enjoy a legal right to initiate new prices by filing tariffs,²³⁹ in practice it appears that the CAB maintains a firm grip on all carriers' rates.²⁴⁰

Ratemaking Theories

As indicated above, the CAB seems to vary its ceiling on rates in accordance with rough notions of proper profits for the carriers. At

²³³ *Railway Express Agency, Inc. v. CAB*, 243 F.2d 422, 424-25 (D.C. Cir. 1957); *States-Alaska Fare*, 21 C.A.B. 354, 362-63 (1955); *Air Freight Rate*, 18 C.A.B. 22 (1953); *Air Freight Rate Investigation*, 9 C.A.B. 340, 350-52 (1948); 1 CAA ANN. REP. 2 (1939).

²³⁴ *CHERINGTON, op. cit. supra* note 227, at 114-15; *MUND, GOVERNMENT AND BUSINESS* 538-39 (1955); *Burt & Highsaw, supra* note 227, at 394-97; *Durham & Feldstein, supra* note 210, at 783-86; *Gambrell & Moye, Position of the Certificated Air Carriers in C.A.B. Freight Proceedings*, 15 LAW & CONTEMP. PROB. 3, 15 (1950); *Note, Civil Aeronautics Board Policy*, 57 YALE L.J. 1053, 1069-71 (1948). There is evidence to indicate that airlines can be operated profitably on lower fares. *WESTMEYER, ECONOMICS OF TRANSPORTATION* 544 (1952). Compare *Maxwell, Regulation of Motor Carrier Rates*, 36 LAND ECON. 79, 90-91 (1960).

²³⁵ *Air Freight Rate Investigation*, 11 C.A.B. 228 (1950); *CHERINGTON, op. cit. supra* note 227, at 340-42; *Ailes, The Position of the Freight Carriers Before the Civil Aeronautics Board*, 15 LAW & CONTEMP. PROB. 17, 23, 25 (1950).

²³⁶ *Pacific Airlines, Inc., Mail Rates*, 1A AV. L. REP. ¶ 22278.02 (C.A.B. June 9, 1959); *Transcontinental Coach-Type Serv.*, 14 C.A.B. 720, 721 (1951); *National Airlines, Inc., DC-6 Daylight Coach*, 14 C.A.B. 331 (1951); *CHERINGTON, op. cit. supra* note 227, at 93, 195, 204-07, 216. Note the cautious attitude of the Board expressed in *General Passenger-Fare Investigation*, 17 C.A.B. 230, 233 (1953).

²³⁷ *CHERINGTON, op. cit. supra* note 227, at 148-49; *Gellman, The Regulation of Competition in United States Domestic Air Transportation: A Judicial Survey and Analysis*, 25 J. AIR L. & COM. 148, 149-50 (1958). See generally *States-Alaska Fare*, 21 C.A.B. 354, 365, 391 (1955); *Tour Basing Fares*, 14 C.A.B. 257, 259-60 (1951); *Investigation of Eastern Airlines Air-Coach Fare*, 12 C.A.B. 511, 515 (1951).

²³⁸ *Hawaiian Intraterritorial Serv.*, 10 C.A.B. 62, 66 (1948); *Air Freight Rate Investigation*, 9 C.A.B. 340, 358 (1948); *CHERINGTON, op. cit. supra* note 227, at 5, 132-33, 449; 1 CAA ANN. REP. 22 (1939); *Burt & Highsaw, supra* note 227, at 7.

²³⁹ *CHERINGTON, op. cit. supra* note 227, at 83-84, 135, 160. *Cherington* complains that the airlines have not performed their price initiation functions in a scientific manner. *Id.* at 160-61, 164.

²⁴⁰ *Id.* at 69, 453; *Gellman, supra* note 237, at 180. But see *KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION* 312-16 (1951). Whether a "zone of reasonableness" exists for airline rates may be open to question. *Air Freight Tariff Agreement*, 14 C.A.B. 424, 429 (1951); *Hawaiian Common Fares*, 10 C.A.B. 921, 927 (1949) (indications that such a zone does exist). Compare *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 460-61 (1945).

the same time, there is evidence that the CAB has sometimes left the details of ratemaking to the competitive impact of other modes of transport.²⁴¹ Over a considerable time, for example, first-class railroad passenger fares played an important role in determining the level of airline charges.²⁴² As the description of minimum rate orders suggests, however, the CAB has not abdicated its role as price fixer in favor of the forces of the market place.²⁴³

Important illumination on the CAB's ratemaking theories is derived from the subsidy cases. It is apparent that the controlling theory is that of a return after meeting full costs.²⁴⁴ We need not here determine precisely how costs are ascertained: so far as the rate of return is concerned—and here perhaps costs become irrelevant—the CAB appears to be moved by the necessity of attracting new capital.²⁴⁵ It cannot be said, however, that the Board has developed a clear and coherent theory of price control for air carriers.²⁴⁶

²⁴¹ *E.g.*, Tour Basing Fares, 14 C.A.B. 257, 258 (1951).

²⁴² BIGHAM & ROBERTS, TRANSPORTATION 507 (1952); CHERINGTON, *op. cit. supra* note 227, at 2, 149-50, 343-44, 374; TROXEL, *op. cit. supra* note 226, at 737, 739-40; WILCOX, PUBLIC POLICIES TOWARD BUSINESS 659 (1955); Dearing, *The Reorganization of Transport Regulation*, 40 AM. ECON. REV. 261, 266 (1950); Gellman, *supra* note 237, at 153; Hector, *Problems in Economic Regulation of Civil Aviation*, 26 J. AIR L. & COM. 101, 106 (1959). See also Note, 50 YALE L.J. 875, 884-86 (1941). Several of the foregoing authors indicate that competition—whether from other scheduled airlines, nonscheduled carriers, or other modes of transport—is an important force affecting airline rates.

²⁴³ Investigation of Eastern Airlines Air-Coach Fare, 12 C.A.B. 511, 514 (1951); Air Freight Rate Investigation, 9 C.A.B. 340, 343-44, 348 (1948); FREDERICK, COMMERCIAL AIR TRANSPORTATION 174-75 (1955); Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 20 J. AIR L. & COM. 379, 394-96 (1953). Compare Kentucky-Tenn. Light & Power Co., 41 P.U.R. (n.s.) 65, 74 (Tenn. Comm'n 1941); Service Gas Co., 15 P.U.R. (n.s.) 202, 206-07 (Pa. Pub. Serv. Comm'n 1936), *aff'd*, 126 Pa. Super. 381, 190 Atl. 653 (1937).

²⁴⁴ Pan Am. Airways, Inc. v. CAB, 171 F.2d 139, 142 (D.C. Cir. 1948); American Airlines, Domestic Trunklines, 21 C.A.B. 8, 35 (1955); Air Freight Rate Investigation, 9 C.A.B. 340, 344-45 (1948). See also General Passenger-Fare Investigation, 17 C.A.B. 230, 234 (1953). In merger cases the CAB has insisted upon the writing off of "excessive values," meaning the amount by which the purchase price exceeds the original cost to the selling carrier. *E.g.*, Continental-Pioneer Acquisition, 20 C.A.B. 323, 332 (1955); Trans-Tex. Airways, 20 C.A.B. 257, 258 (1955); Acquisition of Marquette by TWA, 2 C.A.B. 409, 415 (1940). Such action suggests that the CAB is proceeding on original cost as a basis of ratemaking. Reproduction cost as a basis has been rejected. 1943 CAB ANN. REP. 17-18. Compare Burt & Highsaw, *supra* note 227, at 380, where it is indicated that the fundamental policy of the CAB is to maintain revenues adequate to insure the maintenance of service.

²⁴⁵ FREDERICK, *op. cit. supra* note 243, at 164-65; Howell, *supra* note 228, at 697-99. Query whether the CAB employs the "operating ratio" method of fixing prices. See Investigation of Eastern Airlines Air-Coach Fare, 12 C.A.B. 511, 514 (1951); Smith, *Regulation of Returns to Transportation Agencies*, 24 LAW & CONTEMP. PROB. 702, 710 (1959).

²⁴⁶ See General Passenger-Fare Investigation, 17 C.A.B. 230, 235-36, 240-42 (1953) (dissenting opinion); CHERINGTON, *op. cit. supra* note 227, at 5, 73; KEYES, *op. cit. supra* note 240, at 175, 318, 326; Gellman, *supra* note 237, at 159-60, 181.

DISCRIMINATION

Statutory Prohibitions

Public utility legislation generally prohibits discrimination in no uncertain language,²⁴⁷ and the Federal Aviation Act is no exception. It declares that no air carrier shall give any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic, or subject any person to any unjust discrimination.²⁴⁸ One court has said that the primary purpose of the Act is to assure uniformity of rates and services to all persons using the carriers' facilities.²⁴⁹ Nevertheless, airlines may be compelled to render some services at a "loss" provided their overall operations are not unprofitable.²⁵⁰

Against Persons

Deferring to the general legislative proscription, the CAB has often disapproved rates and services of a preferential character.²⁵¹ In some instances, orders have prohibited comparatively simple types of personal discrimination.²⁵² More difficult of treatment, however,

²⁴⁷ ILL. ANN. STAT. ch. 111½, § 38 (Smith-Hurd 1954).

²⁴⁸ Federal Aviation Act of 1958, § 404(b), 72 Stat. 760, 49 U.S.C. § 1374(b) (1958).

²⁴⁹ *N.Y. & Honduras Rosario Mining Co. v. Riddle Airlines, Inc.*, 3 App. Div. 2d 457, 462, 162 N.Y.S.2d 314, 319 (1957), *aff'd per curiam*, 4 N.Y.2d 755, 149 N.E.2d 93, 172 N.Y.S.2d 662 (1958). Note, however, the language in *United Airlines, Inc. v. CAB*, 198 F.2d 100 (7th Cir. 1952), wherein it was said: "The Civil Aeronautics Act was enacted at a critical stage in the air transport industry, struggling to survive in the face of excessive competition and a number of other adverse factors. The Act was designed to bring out of chaos a system of regulated competition and the encouragement and promotion of civil aviation, not only in the interests of commerce but also in the interests of national defense." *Id.* at 105.

²⁵⁰ *Pan Am. World Airways v. CAB*, 256 F.2d 711, 712-13 (D.C. Cir.), *cert. denied*, 358 U.S. 836 (1958). The court said that the carrier may be required to charge a rate for particular service that is not "fully compensatory." What that language means is not clear. See generally *Burt & Highsaw*, *supra* note 227; *Gellman*, *supra* note 237. Compare *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 493 n.14 (1958); *Produce Terminal Co. v. Illinois Commerce Comm'n*, 414 Ill. 582, 593, 112 N.E.2d 141, 146 (1953). As noted in note 226 *supra*, the CAB has no power to effect reparation if unlawful rates have been charged. As to the effect thereof on antitrust enforcement, see *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 453 (1945) (dictum). Some late views with respect to the theory of discrimination by public utilities will be found in *DAVIDSON, PRICE DISCRIMINATION IN SELLING GAS AND ELECTRICITY* (1956); *Hirshleifer, Peak Loads and Efficient Pricing*, 72 Q.J. ECON. 451 (1958). In this connection, of course, the reader should bear in mind that most discriminations arise out of competition.

²⁵¹ Note the regulations embodied in 14 C.F.R. §§ 223.2, 225 (1956). Discrimination is, of course, related to fare changes affecting the entire rate structure. See *CHERRINGTON, op. cit. supra* note 227, at 399. See generally *TROXEL, op. cit. supra* note 226, at 741-68.

²⁵² A fairly clear-cut case is *Shulman, Inc. Enforcement Proceeding*, 1A Av. L. REP. ¶ 22327 (C.A.B. Nov. 10, 1959). See *States-Alaska Fare*, 21 C.A.B. 354, 361, 370 (1955); *Continental Charters, Tariff Rule*, 16 C.A.B. 772, 774 (1953); *Air Passenger Tariff Discount Investigation*, 3 C.A.B. 242, 251-54 (1942).

are promotional features offered by the carrier as a justification for reduced rates. An airline serving southern resorts, for example, may offer excursion fares during summer months.²⁵³ Or an airline may prepare a tour "package" whereby hotel and other accommodations are included with transportation in a single price.²⁵⁴ Despite the obvious possibility that such pricing might stimulate traffic, the CAB has often disapproved the rates on the ground that discrimination would result.²⁵⁵ In other instances, however—and the rationale of distinction is far from clear—the CAB has allowed promotional pricing. A discount was long available, for example, to passengers who purchased round-trip tickets.²⁵⁶ Similarly, reduced "coach" fares have been approved for service at off-peak hours and with less comfortable accommodations.²⁵⁷ It should be noted that promotional pricing will not assist carriers to meet their total costs unless demand for their services is elastic;²⁵⁸ and the evidence may indicate only a small degree of elasticity.²⁵⁹

Against Places

The statute also prohibits preferences against places. On occasion, the CAB has carried this prohibition to almost pious extremes: it insisted, for example, that fares from the mainland be lower to the nearer of the Hawaiian Islands, saying that a flat rate to all points in the group was discriminatory.²⁶⁰ Other decisions, however, have

²⁵³ Summer Excursion Fares, 11 C.A.B. 218 (1950).

²⁵⁴ Tour Basing Fares, 14 C.A.B. 257 (1951).

²⁵⁵ Pacific Northwest-Alaska Tariff Investigation, 17 C.A.B. 903, 907-08 (1953). Compare Air Freight Tariff Agreement, 14 C.A.B. 424, 429 (1951); Investigation of Accumulation, 12 C.A.B. 337, 343 (1950). See also CHERINGTON, *op. cit. supra* note 227, at 158-59; Gellman, *supra* note 237, at 154-55. If the reduced rate can be justified on a cost basis, no real issue arises and the CAB will grant its approval. See, e.g., Pacific Northwest-Alaska Tariff Investigation, 17 C.A.B. 903, 906 (1953).

²⁵⁶ States-Alaska Fare, 21 C.A.B. 354, 364 (1955). Comparable decisions are reported in National Airlines Enforcement Proceeding, 1A Av. L. REP. ¶22358 (C.A.B. Feb. 24, 1960); Air Passenger Tariff Discount Investigation, 3 C.A.B. 242, 248-54 (1942). See Gellman, *supra* note 237, at 149-50.

²⁵⁷ See States-Alaska Fare, 21 C.A.B. 354, 363 (1955); National Airlines, Inc., 14 C.A.B. 331 (1951); TROXEL, *op. cit. supra* note 226, at 738. See also CHERINGTON, *op. cit. supra* note 227, at 117. Compare DAVIDSON, *op. cit. supra* note 250, at 96.

²⁵⁸ See TROXEL, *op. cit. supra* note 226, at 159-63, 169-93, 615-38.

²⁵⁹ See CHERINGTON, *op. cit. supra* note 227, at 155-56, 390-91, 437; TROXEL, *op. cit. supra* note 226, at 159-63, 169-93. *Contra*, FREDERICK, *op. cit. supra* note 243, at 166-67.

²⁶⁰ Hawaiian Common Fares, 10 C.A.B. 921 (1949). *Accord*, Pacific Northwest-Alaska Tariff Investigation, 17 C.A.B. 903, 906-07 (1953). See CHERINGTON, *op. cit. supra* note 227, at 295, 305. Compare Pacific Northwest-Alaska Tariff Investigation, 18 C.A.B. 481-83 (1954); Summer Excursion Fares, 11 C.A.B. 218, 222 (1950); Air Freight Rate Investigation, 9 C.A.B. 340, 348-49 (1948). There must, of course, be findings by the CAB on the issue of discrimination. Greensboro-High Point Airport Authority v. CAB, 231 F.2d 517 (D.C. Cir. 1956).

looked in precisely the opposite direction.²⁶¹ In addition, the CAB has authorized reduced rates on "back-haul" flights²⁶² and sometimes has increased rates by x dollars per ticket²⁶³—which, of course, constitutes another departure from pricing on a strict mileage basis. Even more striking are orders requiring airlines to render service at terminals where traffic is insufficient to induce voluntary scheduling of flights. Northwest Airlines, for example, was directed to continue to serve Kalispell, Montana, despite the out-of-pocket losses it had incurred in landing at the low traffic terminal.²⁶⁴ Kalispell passengers were thus subsidized by those originating at other points and the latter were subject to a form of discrimination.²⁶⁵

Against Commodities

In most modes of transport, discrimination against high-value commodities is open, admitted, and unquestioned. Rail and motor freight, for example, is "classified": commodities with a high ratio of mass to value, such as coal, stone, and wheat, move at far lower rates than more valuable goods such as diamonds, machinery, and whiskey.²⁶⁶ CAB regulations clearly contemplate the possibility of similar discrimination in air freight movements.²⁶⁷ On the other hand, the CAB's stand on rates only slightly above out-of-pocket costs is equivocal: sometimes such pricing has been permitted²⁶⁸ and in other

²⁶¹ Pacific Northwest-Alaska Tariff Investigation, 18 C.A.B. 481, 482-83 (1954); Pacific Northwest-Alaska Tariff Investigation, 17 C.A.B. 903, 905 (1953); West Coast Common Fares, 15 C.A.B. 90 (1952).

²⁶² Air Freight Rate Investigation, 11 C.A.B. 228-36 (1950). Compare Air Freight Rate Investigation, 20 C.A.B. 622, 624 (1955); Capital Airlines, Inc., Mail Rates, 18 C.A.B. 457 (1954); Transcontinental Coach-Type Serv., 14 C.A.B. 720, 722-24 (1951); National Airlines, Inc., DC-6 Daylight Coach, 14 C.A.B. 331, 348-49 (1950). See BIGHAM & ROBERTS, *op. cit. supra* note 242, at 384; CHERINGTON, *op. cit. supra* note 227, at 149, 331-32, 339; TROXEL, *op. cit. supra* note 226, at 740.

²⁶³ CHERINGTON, *op. cit. supra* note 227, at 370, 379. On the procedural problem of the right of various persons to be heard, see *Eastern Airlines, Inc. v. CAB*, 271 F.2d 752, 760 (2d Cir. 1959).

²⁶⁴ Northwest Airlines, Inc., 21 C.A.B. 114, 125 (1955). In subsequent proceedings, a feeder carrier replaced Northwest at the terminal in question. Cf. *Washington-Baltimore Adequacy of Serv.*, 1A Av. L. REP. ¶22376 (C.A.B. April 26, 1960). Compare Air Freight Rate Investigation, 20 C.A.B. 622, 624 (1955); Air Freight Rate Investigation, 11 C.A.B. 228, 236 (1950).

²⁶⁵ Keyes, *A Reconsideration of Federal Control of Entry into Air Transportation*, 22 J. AIR L. & COM. 192, 197-98 (1955); Note, 60 YALE L.J. 1196, 1211 (1951).

²⁶⁶ See Hale & Hale, *Competition or Control III: Motor Carriers*, 108 U. PA. L. REV. 775, 825-26 (1960).

²⁶⁷ 14 C.F.R. § 221.39 (1954).

²⁶⁸ *Railway Express Agency, Inc. v. CAB*, 243 F.2d 422, 425 (D.C. Cir. 1957); *Rates for Transp. by Air of Nonpriority Mail*, 1A Av. L. REP. ¶22368 (C.A.B. March 25, 1960).

instances it has been roundly condemned.²⁶⁹ On occasion, patent forms of discrimination have been prohibited.²⁷⁰ Circumstances have probably played an important role in minimizing the amount of discrimination against commodities: air freight supplies only a small fraction of the carriers' revenues and the number of commodities hauled is relatively small.²⁷¹

Quantity Discounts and Preventive Action

The CAB has been ready to recognize the cost savings inherent in large volume shipments. It has permitted those savings to be reflected in rates, provided that the discounts are closely related to the savings.²⁷² Furthermore, it does not appear that the CAB has gone to the extravagant lengths of the ICC in taking preventive action against potential discrimination. Perhaps the CAB has not been faced with problems comparable to the "dual status" of common and contract carriers.²⁷³ And while the Board has forbidden an air freight forwarder to act as the agent of a direct air carrier,²⁷⁴ it does not otherwise seem to have insisted upon a rigid separation of functions.

²⁶⁹ See Air Freight Rate, 18 C.A.B. 22, 26 (1953); Air Freight Tariff Agreement, 14 C.A.B. 424, 426 (1951); Air Freight Rate Investigation, 9 C.A.B. 340, 344-46 (1948). Compare Produce Terminal Corp. v. Illinois Commerce Comm'n, 414 Ill. 582, 112 N.E.2d 141 (1953); BIGHAM & ROBERTS, *op. cit. supra* note 242, at 384.

²⁷⁰ American Airlines Enforcement Proceeding, 1A Av. L. REP. ¶22339 (C.A.B. Dec. 8, 1959). But cf. Air Freight Rate, 1A Av. L. REP. ¶22303 (C.A.B. Sept. 2, 1959) (modification).

²⁷¹ Needless to say the foregoing decisions of the CAB are scarcely compatible with enforcement of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §§ 13, 13(a), (b) (1958). Note also the adverse comment in AIRLINES REPORT 53, 268. On the general subject of discrimination Professor Clements has been quoted as follows: "price discrimination and multiple product production are not exceptions to general practice, but are rather the essence of customary action. The distinction between a producer selling a single product at different prices and one selling different products in varying markets at different percentages of profit is a distinction of degree only Whatever the amount of profit, it is obtained only by constant manipulation of the price and product line. The theory of price discrimination must be viewed as the heart of price-cost theory rather than a peripheral case. The firm that does not discriminate in its pricing policy, or differentiate in its product line, or invade new markets, dies in the competitive struggle" Marx, *Group or Conference Rate-Making and National Transportation Policy in the United States*, 24 LAW & CONTEMP. PROB. 586, 592 (1959).

²⁷² Investigation of Accumulation, 12 C.A.B. 337, 341-44 (1950); Air Freight Rate Investigation, 9 C.A.B. 340, 349-50 (1948); 14 C.F.R. § 221.71 (1954). Compare Air Passenger Tariff Discount Investigation, 3 C.A.B. 242, 251 (1942).

²⁷³ Hale & Hale, *supra* note 266, at 826.

²⁷⁴ 14 C.F.R. § 296.3(a) (1956). But see Air Freight Forwarder, 11 C.A.B. 182, 190 (1949) (international). See text accompanying notes 140-53 *supra* with respect to the enforced separation of air carriers from persons operating various other modes of transport.

CONCLUSIONS

Under existing legislation only a small residue of discretion remains in the management of the airlines. The CAB determines who shall enter the business and assigns entrants their routes. While the carriers enjoy some discretion with respect to scheduling, the Board controls the equipment they utilize, the rates they charge, and the service they render. Airlines on subsidy do not even enjoy freedom to choose their own methods of sales promotion. The CAB's powers, in short, are so comprehensive and pervasive as almost to amount to governmental operation.

Payment of cash subsidies is another factor which might affect the application of the antitrust laws. Undeniably, the subsidy feature tends to "even up" the results of operations and therefore to remove both the carrot and the stick often thought necessary to goad competitors into action.²⁷⁵ The ruthless weeding out of inefficient firms contemplated by a regime of "hard" competition is thwarted by the payment of cash subsidies. But subsidies are not, as yet, a permanent characteristic of regulation: some airlines have been off subsidy for several years, and it is contemplated that others will follow. Accordingly, the payment of subsidies may have little impact upon the long-run performance of the industry and may be disregarded for present purposes.²⁷⁶

In considering whether the antitrust laws should be applicable to airlines, we should note that the CAB itself is engaged in a considerable amount of "supplementary" antitrust enforcement under its organic act. It may proceed against "unfair practices" much in the same manner as does the Federal Trade Commission; it surely can and does attempt to exorcise the demon of discrimination just as energetically as if the strictures of the Robinson-Patman Act were applicable to the carriers under its supervision.²⁷⁷ The Supreme Court has said that in fully regulated industries, whose members are forced to charge only reasonable rates approved by appropriate commissions, the doctrine of primary jurisdiction requires that antitrust complaints be referred to the administrative tribunal:²⁷⁸ "That some resolution is necessary when the antitrust policy of free competition is placed

²⁷⁵ Keyes, *National Policy Toward Commercial Aviation—Some Basic Problems*, 16 J. AIR L. & COM. 280, 291-92 (1949).

²⁷⁶ KEYES, *op. cit. supra* note 240, at 345-46.

²⁷⁷ Sections 2 and 3 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 13, 13a (1958), apply only to the sale of commodities and not to the rendering of services. *Fleetway, Inc. v. Public Serv. Transp. Co.*, 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935).

²⁷⁸ *United States v. RCA*, 358 U.S. 334, 346-47 (1959).

beside a regulatory scheme involving fixing rates is obvious. . . . Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction" ²⁷⁹ In these circumstances, it is surprising that deference has not always been paid to the primary jurisdiction of the CAB and that antitrust actions against airlines have been entertained in the federal courts. ²⁸⁰

Of course, an argument can be made to the effect that the public should have a double protection against high rates and poor service by applying to air carriers both the antitrust laws and the regulatory legislation. ²⁸¹ And no doubt some peripheral matters beyond the scope of regulation—such as purchases of fuel by an unsubsidized carrier—should remain subject to antitrust sanctions. The price of double protection, however, is contradiction and confusion. Interventionist commands will frequently conflict with Sherman Act policy. ²⁸² Until each situation is examined, at considerable expense, by the courts, no one will know which doctrine is paramount. We have here, indeed, the makings of a truly chaotic situation. It follows

²⁷⁹ *Id.* at 348. Compare *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 496 (1958); *Atlantic C.L.R.R. v. Riis & Co.*, 267 F.2d 657, 658-59 (D.C. Cir. 1958); *Atchison T. & S.F. Ry. v. Air Coach Transp. Ass'n*, 253 F.2d 877, 886 (D.C. Cir. 1958); *Pacific Northwest Pipeline Co.*, 31 P.U.R.3d 456, 460 (F.P.C. 1959); DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 19.06, .08 (1958); Mitchell, *Primary Jurisdiction*, 13 ABA ANTITRUST REP. 26, 29, 38 (1958).

²⁸⁰ *Slick Airways v. American Airlines*, 107 F. Supp. 199, 209 (D.N.J. 1952), *aff'd sub nom. American Airlines v. Forman*, 204 F.2d 230, 233 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). Compare *Atlantic C.L.R.R. v. Riis & Co.*, 267 F.2d 657 (D.C. Cir. 1958). In some cases the CAB's lack of reparation power has been found an adequate ground to sustain treble damage suits under the antitrust laws. *S.S.W., Inc. v. Air Transp. Ass'n*, 191 F.2d 658, 661 (D.C. Cir. 1951); *Hawaiian Airlines, Ltd. v. Trans-Pac. Airlines, Ltd.*, 78 F. Supp. 1, 8 (D. Hawaii 1948). Compare *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499 (2d Cir. 1956); *Carolina Motor Serv. v. Atlantic C.L.R.R.*, 210 N.C. 36, 185 S.E. 479, 481 (1936).

²⁸¹ At times the CAB has indicated that it thought a measure of competition was desirable to supplement regulation. *Colonial Airlines, Inc.*, 4 C.A.B. 552, 555 (1944); *Transcontinental & W. Air, Inc.*, 4 C.A.B. 373, 374-75 (1943). Compare *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99 (1960); *California League of Ind. Ins. Producers v. Aetna Cas. Co.*, 179 F. Supp. 65 (N.D. Cal. 1959); *Bennett v. Southern Ry.*, 211 N.C. 474, 191 S.E. 240 (1937); Hector, *supra* note 242, at 104-07.

²⁸² *Apgar Travel Agency, Inc. v. International Air Transp. Ass'n*, 107 F. Supp. 706, 711 (S.D.N.Y. 1952). Compare *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960); *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65 (1958); *FCC v. RCA*, 346 U.S. 86, 92 (1953); *United States v. Canfield DriveAway Co.*, 159 F. Supp. 448 (E.D. Mich. 1958). A leading student of economics, Professor Fritz Machlup, has testified as follows: "There is hardly a field in the American Economy that is worse with regard to monopolistic restraints than transportation We have been regulating freight rates since 1887 We have suppressed competition, we have prevented prices from getting lower, and we are still doing it. We enacted later the Motor Carriers Act [N]o industry . . . is worse than our transportation industry, so far as monopolistic restrictions and suppression of competition are concerned." *Hearings Before the Antitrust Subcommittee of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. pt. 10, at 4965 (1959).

that airlines should be almost totally exempted from the sweep of anti-trust legislation—or, in the alternative, that regulation should be limited to the protection of public safety.²⁸³

²⁸³ Becker, *Competition and Democracy*, 1 J. LAW & ECON. 105, 109 (1958); Healy, *Workable Competition in Air Transportation*, 35 PROCEEDINGS AM. ECON. ASS'N 229, 241 (1945).