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JUDICIAL AND REGULATORY DECISIONS

Department Editor: Amory O. Moore *

ALLOCATION OF AIR TRANSPORTATION COSTS IN DETERMINING DOMESTIC MAIL, PASSENGER, AND CARGO RATES**

INTRODUCTION

RECENTLY several major air carriers have petitioned the Civil Aeronautics Board for increases in their rates of compensation for carrying the mail.¹ These same air carriers have likewise, along with other carriers, filed tariffs with the Board reducing their rates for the transportation of air freight.² For example, it is requested that mail compensation be increased from 45 cents per mail ton-mile to \$1.25 per mail ton-mile while the new tariffs for cargo shipments propose charges as low as 14 cents per cargo ton-mile. The mail rate can become effective only with the Board's approval, while the cargo rates can go into effect in 30 days, provided the Board does not disapprove. A question immediately arises: Should the Board, in complying with its statutory duties under the Civil Aeronautics Act of 1938 and in view of the policies and purposes set forth in the Act, give its approval to these new rates? It is with this question that this paper is concerned. In particular, the factors that the Board must consider in prescribing fair and reasonable rates for the carrying of mail, passengers, and cargo and the relationship that should exist as among the various rates, will be considered.

The Civil Aeronautics Act of 1938, as amended,³ gives the Civil Aeronautics Board the power to regulate the rates of compensation the carriers are to receive, or charge, for the carrying of mail, passengers, and cargo. In the case of mail, the Board is empowered and directed by Section 406(a) to determine "the fair and reasonable rates of compensation for the transportation of mail by aircraft"; the method or methods of ascertaining these are left to the Board. Section 406(b) prescribes the factors that the Board shall consider in determining the rates. In the case of passengers and cargo, the carriers are to determine, in the first instance, the just and reasonable rates; Section 403 provides that tariffs shall be filed with the Board showing all rates. If the Board is of the opinion that these are not just, reason-

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** This comment was placed in the hands of the printer prior to the Board's issuance of its "tentative findings and conclusions" in the "Big 5" Mail Rate Case Dockets 3309 *et al.*, Serial Nos. E-1351-55 (Mar. 29, 1948).

¹ United Air Lines, CAB Docket No. 3014, filed July 1, 1947. United petitioned for a "substantial increase" in its mail rate retroactive from Jan. 1, 1947, and by amendment No. 2 filed November 29, 1947, requested \$2.26 per ton-mile for the year 1947 and \$1.25 per ton-mile on and after Jan. 1, 1948; Eastern A. L., CAB Doc. 3021, filed July 8, 1947, requested 60¢ per ton-mile; National A. L., CAB Doc. 3037, filed July 14, 1947, amended Oct. 10, 1947, requested rate based on minimum poundage factor of 500 lbs. per revenue mile; Mid-Continent A. L., CAB Doc. 3048, filed July 25, 1947, requested 22¢ per airplane mile on stated base; Delta A. L., CAB Doc. 3119, filed Sept. 9, 1947, requested 60¢ per ton-mile based on load factor formula.

² American Airlines, tariffs filed Sept. 4; United Air Lines, tariffs filed Sept. 5. The proposed rates generally reduce present commodity rates of approximately 21 cents per ton-mile to 14 cents per ton-mile, 52 Am. Av. Daily 323. These reductions follow a 25 per cent rate reduction filed for the same and other scheduled carriers July 15, 1947. The CAB allowed the latter to go into effect Aug. 1, 52 Am. Av. Daily 152.

³ 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1946).

able, or equitable, it is empowered by Section 1002 to determine and prescribe such rates. The factors that the Board shall consider in exercising this power are likewise given. Thus, in the final analysis, the Board is authorized to control and regulate the rates of compensation that the air carriers are to receive, or charge, for the carrying of mail, passengers and cargo. While the authority to regulate the several types of rates are set out in separate sections of the Act, the Board must exercise each consistent with the policies of the Act set out in Section 2. The rate-making problem confronting the Board, therefore, is not one of prescribing individual rates for the several types of service rendered by the carriers according to standards set out in separate sections of the Act, but one of prescribing, or assenting to, individual rates only after the Board has determined that, jointly, these rates effectuate, as nearly as possible, the policies of the Act.

AIR MAIL RATES

The Civil Aeronautics Board was not the first governmental agency directed to prescribe rates of compensation paid to the air carriers for carrying the mail. First the Post Office Department, and later, the Interstate Commerce Commission were authorized to do so.⁴

The Post Office Department determined the rates of compensation from 1925 to 1934; these were not related to the individual carrier's cost of rendering the service but were based, at first on the amount of revenue derived from the mail, and later on the types of service rendered by each carrier. When Congress, by the Kelly Act of 1925,⁵ authorized the transportation of the mail by private carriers, the Postmaster General was required to establish services by letting contracts for the several mail routes. The rates under these contracts were determined competitively, but the total payments were not to exceed 80 per cent of the postal revenue on each route. An amendment⁶ to the Kelly Act in 1926 authorized rates of compensation up to \$3.00 per pound for the first 1,000 miles of a route; payments were no longer directly dependent upon the amount of postal revenue. The Air Mail Act of 1928⁷ authorized the Postmaster General to convert the contracts into route certificates and to determine rates by negotiation with the carriers, still subject to the \$3.00 per pound maximum. The Air Mail Act of 1930⁸ provided for a "space-distance" basis of compensation not to exceed \$1.25 per airplane-mile, regardless of the amount of space contracted. The Post Office Department, in administering this Act, based the mail pay on a number of variable factors in an attempt to provide for equitable compensations and, at the same time, to encourage the extension of passenger service and the use of improved operating equipment.⁹ The whole system of variables was abandoned in 1933 and payments were based on a straight per mile basis.

⁴ For a detailed study of air mail rate-making by the Post Office Department from 1925 to 1934, by the Interstate Commerce Commission from 1934 to 1938, and by the Civil Aeronautics Board in its early years, see: GOODMAN, GOVERNMENT POLICY TOWARD COMMERCIAL AVIATION—COMPETITION AND THE REGULATION OF RATES, 59 *et seq.* (King's Crown Press, N. Y., 1944); SPENCER, AIR MAIL PAYMENTS AND THE GOVERNMENT (Brookings Inst., 1941); PUFFER, AIR TRANSPORTATION (Blakiston Co., Phila., 1941) 256 *et seq.*

⁵ 43 Stat. 805.

⁶ 44 Stat. 692.

⁷ 45 Stat. 594.

⁸ 46 Stat. 259.

⁹ The following entitled the carrier to a higher mail rate per airplane-mile: night flying, 15 cents; terrain, 2 cents; fog, 2.5 cents; radio, 3 to 6 cents; passenger equipment, 1.5 to 7.5 cents; and multimotor operation, 13 cents; all in addition to a base rate depending on the amount of space contracted. Post Office Department, 1931 Annual Report 126.

The Interstate Commerce Commission determined the rates of compensation from 1934 to 1938; these were related to the individual carrier's costs. The Air Mail Act of 1934¹⁰ authorized the Postmaster General to establish mail services by letting one year contracts; the rates were determined by competitive bidding. At the end of the year the contracts were extended indefinitely and the rates under them were determined by the Interstate Commerce Commission. These were to be fair and reasonable, but were not to exceed 33 $\frac{1}{3}$ cents per airplane mile for a minimum load of 300 pounds. By 1938, the total compensation to the carriers was not to exceed the mail revenue.

Section 6(a) of the Air Mail Act of 1934 directed the Commission to fix and determine by order

"the fair and reasonable rates of compensation for the transportation of air mail by airplane and the service connected therewith over each air-mail route. . . ."

This was to be determined, according to Section 6(e), by considering

"the amount of air mail so carried, the facilities supplied by the carriers, and its revenue and profits from all sources. . . ."

The rates were to be established separately for each route; these were related to the costs of the individual carriers.

Each carrier generally operated several routes, only some of which were designated mail routes; over the latter the carrier operated both mail and non-mail schedules and with each schedule provided passenger and cargo services in addition to that of carrying the mail. The Commission was confronted with the problem of determining what portion of these combined services should be compensated through the mail payments.¹¹ The carriers contended that the mail compensation should be determined by deducting from their total costs of operation, plus a reasonable return on their investment, the non-mail revenue; the mail payments should equal the difference between the two.¹² The Post Office Department, on the other hand, advocated that the rates be based on each carrier's cost of carrying the mails only, and that this should be ascertained by allocating the carrier's total costs of operation among the mail, passenger, and cargo services.¹³ The Commission rejected both contentions. The carriers' method would result in fixing rates for carriers, rather than for routes, contrary to Section 6(a) and would absorb in the mail rates the costs of all of the services, other than mail, which the carriers might choose to inaugurate. Over the latter, the Commission could exercise no control, either as to the

¹⁰ 48 Stat. 933.

¹¹ From a cost standpoint, this presented three separate cost accounting problems: (1) the carrier's joint costs of operation had to be allocated between the designated mail and non-mail routes, (2) the costs attributable to the mail routes then had to be further allocated between mail and non-mail schedules, and (3) the costs attributable to the mail schedules had to be allocated to the mail, passenger and cargo services rendered by the carrier. The Commission faced these problems in its first air mail rate case: *Air Mail Compensation*, 206 I.C.C. 675 (1935).

¹² *Ibid.*, at 720. This would be treating, in effect, all non-mail operations and services as by-products of the assumed main product—the mail service. The revenue derived from the by-products would be credited to the total costs of operation to find the net cost incurred by the carrier for carrying the mail.

¹³ The Post Office Department wanted to treat the three services as joint products; the joint costs of operation would be allocated to the three services on a pound-mile basis using as the ratio one of the following: (1) space, reduced to weight, available for each of the three services, (2) actual weight of each of the services, or (3) mail space contracted, reduced to weight, and actual weight for the other services. The cost thus assigned to the mail service would represent that portion of the carrier's operation to be compensated by the mail rate. *Ibid.*, at 722.

types of service or as to charges made by the carriers for such services. The strictness of the Post Office Department method would destroy all incentive for the maintenance and the future development of non-mail services.

The Commission resolved the rate-making problem by fixing the mail rates at a level which would provide each carrier with a fair rate of return on its investment in the mail routes after deducting the non-mail revenues from the total reasonable costs of operating such routes.¹⁴ The Commission insisted that the resulting rates were not a matter of mathematical computations, but involved the exercise of an informed judgment.¹⁵ While the Commission gave consideration to the factors listed in Section 6(e), it gave greater consideration to the carrier's revenue and expenses for each mail route. The "need" of each carrier was the predominant factor in each case; the same has been true for rates determined by the Civil Aeronautics Board under the Civil Aeronautics Act of 1938.

The Interstate Commerce Commission recognized that the carrier's cost of carrying the mail, where passenger and cargo services were also provided, could only be ascertained by some method of cost allocation whereby the carrier's total costs would be assigned to the various services according to some equitable method of allocation. But the Commission further recognized that if the passenger and cargo services were made to bear all of the costs that should be assigned to them, they would disappear from the airways and scheduled air transportation would revert to a contract carrier status—something Congress had been trying to prevent. It had been the policy of Congress to establish a sound air transportation system for passenger and cargo services as well as for mail. For this reason, the Commission refused to base the mail rates on the cost of the mail service rendered by each carrier on each route.¹⁶

Since 1938, the Civil Aeronautics Authority, later the Civil Aeronautics Board, has determined the mail rates. Section 406(a) of the Civil Aeronautics Act of 1938, as amended, directs the Board

"(1) to fix and determine . . . the fair and reasonable rates of compensation for the transportation of mail by aircraft. . . .

(2) to prescribe the method or methods . . . for ascertaining such rates of compensation for each air carrier or class of air carriers. . . ."

¹⁴ The assignment of operating costs among several routes was left to managerial discretion, subject to adjustment by the Commission. *Air Mail Rates for Route No. 6*, 229 I.C.C. 357, at 366 (1938). The Commission approved the allocation of expenses on the basis of scheduled seat-miles, or on the basis of operated engine-hours or airplane-hours. *Air Mail Compensation*, 216 I.C.C. 166, at 175 (1936). The choice among methods depended upon the particular expense to be allocated: depreciation on the basis of engine-hours, traffic and advertising on the basis of seat-miles. *Air Mail Rates for American Airlines, Inc.*, 225 I.C.C. 12 at 20 (1937); *Air Mail Rates for Braniff Airways, Inc.*, 226 I.C.C. 752, at 760, 765 (1938).

¹⁵ ". . . no precise mathematical weight was attached to any of these elements, either for the routes as a whole or for any individual route, nor were these bases and mileages determined as a result of any mathematical formula. Determination of the reasonableness of rates is not a matter of mathematical computation, but involves the exercise of an informed judgment." *Air Mail Compensation*, *supra* note 11, at 726.

¹⁶ "If rates were fixed by the use of cost allocation at this time, all incentive for the maintenance and the future development of passenger traffic might be destroyed, and a tendency to revert to exclusive mail service might follow. The effect of efforts to reduce the cost of mail service by increasing the returns from passenger business would be lost. It is obvious that the time has not yet arrived when the passenger business of the contractors can stand alone." *Air Mail Compensation*, *supra* note 11, at 722.

In fixing and determining fair and reasonable rates, the Board is directed, by Section 406(b), to take into consideration, among other factors

"(1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail;

(2) such standards respecting the character and quality of service to be rendered . . . and

(3) the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such services, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

In addition to the factors enumerated in Section 406(b), the Board must take into consideration the policies of the Act set out in Section 2; the need provision of Section 406(b) includes certain of the policy provisions of Section 2.

The provisions for rate-making in the present Act differ from those in the Air Mail Act of 1934 in that no top limit is placed on rates,¹⁷ the Board is to fix rates for each carrier or carriers, rather than for each route,¹⁸ and the Board is to take into consideration the interests of the air transportation industry and of the public in general in addition to the particular needs of the individual carrier.¹⁹ The Board, as the Commission before it, has insisted that rate-making is not the result of a mathematical formula, but is the exercise of an informed judgment.²⁰ The relative weight given to each of the factors enumerated in Section 406(b) is difficult to determine; the Board has regarded the matter to lie solely within its discretion.²¹ The Board decisions, however, indicate rather clear cut trends in the Board's handling of its rate-making duties.

Prior to 1942, the cases before the Board represented fact situations similar to those faced by the Commission: each carrier's operating costs exceeded its non-mail revenue. The need provision of Section 406(b) was the basis for offsetting this deficit with mail payments. In ascertaining, for each carrier, the "need" that should be allowed, consistent with Section 406(b) and required to carry out the policies of Section 2, the Board confined its investigation principally to three considerations: (1) the scope of the carrier's operations that should be included, (2) the amount of the carrier's costs that should be recognized, and (3) the amount of profit that should be allowed.

¹⁷ 1938 Act, §406, 49 USCA §486 (Supp. 1946). 1934 Act, §3(a) authorized rates not exceeding 33½ cents per airplane-mile for a mail load not exceeding 300 pounds with an additional payment equal to 1/10 of the base rate for each additional 100 pounds; total payments were not to exceed 40 cents per airplane-mile. §6(e) required that the rates "shall be designed to keep the aggregate cost of the transportation of air mail on and after July 1, 1938, within the limits of the anticipated postal revenue therefrom."

¹⁸ 1938 Act, §406, *supra* note 17. *Chicago and Southern Airlines, Mail Rates for Route Nos. 8 and 53*, 3 CAB 161, 189 (1941).

¹⁹ *American Airlines, Mail Rates*, 3 CAB 323, 335 (1942), "The use of the mail payments is a statutory device for the accomplishment of national objectives that transcend the interests of the postal service."

²⁰ *American Airlines, Mail Rates*, 3 CAB 770, 790 (1942).

²¹ *Pan American Airways, Transatlantic Mail Rate*, 1 CAA 220, 253 (1939).

In the first cases handled by the Board, the mail rates were established for each designated mail route separately.²² Where a carrier operated more than one mail route, it was necessary to allocate the joint costs of operation and non-mail revenue between the two or more routes. The non-mail revenue for each route has been assigned without difficulty. The costs that could be identified with each particular route have been assigned to those routes while the joint costs have been allocated to the routes according to the relative importance of the routes.²³ However, where a carrier inaugurated a service over a new mail route, the joint costs with another established route, for which the mail rate had already been determined, were not allocated to the two routes; instead, the Board considered only the additional costs in determining the mail rate for the new route.²⁴

Where a carrier has operated both mail and non-mail schedules over a designated route, the Board has included the total cost of operating the route where the non-mail schedules were in the interest of commerce and the national defense, even though such schedules were not required in the interest of the Postal Service.²⁵ If, however, the Board thought that the added schedules were not necessary and did not meet any of the requirements of Section 406(b), the costs and the revenue of the non-mail schedules have been excluded for the purpose of determining the mail rate.²⁶ Where the cost of operating the non-mail schedules has been small, the Board has treated such schedules as by-products and only the out-of-pocket costs have been assigned to such schedules while the other costs have been recognized for rate-making.²⁷

The problem of estimating the costs that a carrier will incur in operating the approved schedules over a mail route has involved no special consideration of cost allocation. The Board has based its estimate generally on the costs incurred in the past, projected into the future, and adjusted for

²² This was true for 18 decisions rendered prior to 1941. In *Continental Air Lines, Mail Rates for Route Nos. 29 and 43*, 2 CAB 683 (1941) the Board stated that "no good purpose would appear to be served" by considering separately the two routes. Later, in *Chicago and Southern Air Lines, Mail Rates for Route Nos. 8 and 53*, 3 CAB 161 (1941) the Board, following its authorization under the Civil Aeronautics Act of 1938, discarded the route concept and established the air carrier as the primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation. The transition from the route concept to the carrier concept was completed in *American Airlines, Mail Rates*, *supra* note 19.

²³ *Pan Am. Case*, *supra* note 21 (system expense allocated on basis of number of airports utilized by each route); *Western Air Express, Mail Rates*, 1 CAA 341 (1939) (indirect expenses allocated on basis revenue plane-miles and seat-miles flown); *Pennsylvania-Central Airlines*, 1 CAA 435 (1939) (direct expense allocated on basis of revenue-miles flown); *United Air Lines, Mail Rates*, 1 CAA 752 (1940) (variable expense allocated on basis of passenger revenue estimated). The several routes have generally been regarded as joint products. "The two services should be treated as coordinate and, as far as possible, the rate to be fixed for each service should take into consideration the proper apportionment of joint costs. Thus, the savings resulting from the operations of the two services at an aggregate cost less than the sum of the costs which would be incurred in two completely separate operations will be equitably apportioned." *Pan Am. Case*, *supra* note 21.

²⁴ *Mid-Continent Airlines, Mail Rate for Route No. 48*, 2 CAB 392 (1940).

²⁵ *Pennsylvania-Central Airlines, Mail Rate*, 1 CAA 435 (1939); *United Air Lines, Mail Rate*, 1 CAA 752 (1940). In 1942 all schedules were designated as mail schedules. *Braniff Airways, et al., Automatic Rate Adjustment*, 3 CAB 420 (1942).

²⁶ *Braniff Airways, Mail Rate*, 1 CAA 353 (1939); *Braniff Airways, Mail Rate*, 3 CAB 300 (1942).

²⁷ *United Case*, *supra* note 25; *TWA, Mail Rate*, 2 CAB 226 (1946).

changes that can be foreseen. The costs allowed have been only those that are necessary and reasonable.²⁸

Where the Board excludes, for rate making, a part of the carrier's operations, the investment base, to which is applied a rate of return to determine the amount of the profit, is determined by allocating the carrier's total investment between the approved and non-approved operations. The mail rate is so determined to provide the carrier with earnings sufficient to yield a fair rate of return, after federal income taxes, on the recognized investment.²⁹

In 1942 the Board had its first opportunity to apply the principle of cost allocation to a carrier's joint costs of operation in order to ascertain the cost of the mail service as distinguished from the commercial services rendered by the carrier.³⁰ The Board found that the carrier under consideration could be expected to cover more than 98 per cent of its total operating costs by non-mail revenue. Since the carrier's "need" for mail revenue was at a minimum, the Board used the carrier's cost of the mail service as one of the factors upon which it based the mail rate. All costs relating only to commercial services were assigned directly to those services and all remaining costs were allocated between commercial and mail services on the basis of the relation of the number of pounds of commercial and mail services, respectively, to the total number of pounds carried. The carrier's pound-mile cost for all services was estimated to be .243 mill; of this, the pound-mile cost of the mail was found to be .205 mill, while that for the other services .246 mill. The Board then set the mail rate at 12 cents per pound-mile for a base load of 300 pounds of mail to be computed on the direct airport-to-airport mileage. This would compensate the carrier for its mail service at the average rate of .358 mill per pound-mile for the total volume of mail traffic anticipated.

In this manner, the Board developed its rate-making procedure for a carrier no longer in need of governmental assistance in subsidy proportions. For this near self-sustaining carrier the Board shifted its primary concern from total costs, non-mail revenue, and investment to costs and investments allocable to the mail service.³¹ Even though the need element was negligible, the Board could not establish a mail rate less than that required by the Constitution as the reasonable rate for the performance of the mail service.³² The Board continued, however, its former application of Section 406(b) for the carriers less fortunate financially.

Soon thereafter, the Board was confronted with the problem of determining a mail rate for a carrier where the non-mail revenue exceeded the carrier's total costs of operation.³³ Here the Board again placed the primary emphasis on the cost of the mail service. By allocating the carrier's total costs, which averaged .176 mill per pound-mile for all services, between the mail and commercial services on the basis of the ratio existing between

²⁸ For a treatment of this subject, see: Vanneman, *Recent Trends in Domestic Air Mail Rate Cases*, 14 JOURNAL OF AIR LAW AND COMMERCE 254 (1947).

²⁹ *Ibid.*

³⁰ *American Case*, *supra* note 19.

³¹ "While the imperfections and inequalities in cost allocation have been universally recognized in the field of public utility regulation, and although neither the carrier nor Public counsel attempted in the instant proceeding to develop a basis for determination of the separate cost of transporting the mail, the record contains data upon which such a determination can be made with a sufficient degree of reasonableness to warrant its consideration along with other factors in our determination of the fair and reasonable rate to be paid the carrier." *Id.*, at 359.

³² The minimum rate guaranteed the carrier by the Federal Constitution is based on the reasonable cost of rendering the service. *Id.*, at 334.

³³ *Eastern Airlines, Mail Rate*, 3 CAB 733 (1942).

the pound-miles of mail service and the pound-miles of commercial services rendered, after first charging to the commercial services those expenses attributable to those services only, the Board found that the cost would be .128 mill and .182 mill per pound-mile respectively; on the basis of direct airport-to-airport distances the estimated operating costs applicable to the mail service would be .132 mill per pound-mile. With this as the cost basis, the Board set the mail rate at .3 mill per pound-mile, or 227 per cent of cost. The Board gave as its reasons for fixing the mail rate so far in excess of the cost ascertained by a weight allocation that (1) the Post Office Department revenue from air mail exceeded the payments to carriers, (2) the priority and special nature of mail required a higher rate of return for its service, (3) the carriers had no control over the development of the mail service, (4) the rate of compensation for the mail services had been lowered progressively since the inauguration of air mail, and (5) the high degree of managerial economy warranted a higher rate of compensation to the carrier than normally would be required.

This decision drew the criticism of one of the Board members.³⁴ He considered the high rate of return that would accrue to the carrier from the .3 mill per pound-mile rate to be a Government subsidy for a carrier no longer in the "need" class; this he argued was not only contrary to the intent and spirit of the Civil Aeronautics Act, but was an unsound policy as well.

The Board used a similar cost analysis in determining the mail rates for other carriers which had reached, or were near, the self-sustaining status. Within two years, the Board established a uniform rate of .3 mill per pound-mile, or 60 cents per ton-mile, for eleven carriers,³⁵ even though the actual cost of the mail service, for the various carriers, computed on a cost allocation basis, varied from .128 mill to .234 mill per pound-mile.³⁶ The reason the Board gave for a uniform rate was that it hoped this would provide added incentive for economy and efficiency among carriers.³⁷

In 1945, the Board moved away from the principle of basing the mail rates, for self-sustaining carriers, on the cost of the mail service; the mail rates for the four major carriers, previously set at 60 cents per ton-mile, were reduced to 45 cents per ton-mile.³⁸ The basis of the new rates, how-

³⁴ Mr. Harllee Branch.

³⁵ *Eastern Case*, *supra* note 33; *American Case*, *supra* note 20; *PCA, Mail Rate*, 4 CAB 22 (1942); *United Air Lines, Mail Rate*, 4 CAB 128 (1943); *TWA, Mail Rate*, 4 CAB 139 (1943); *Chicago and Southern Air Lines, Mail Rate*, 4 CAB 419, 529 (1943); *Western Air Lines, Mail Rate*, 4 CAB 441 (1943); *Hawaiian Airlines, Mail Rate*, 4 CAB 463 (1943); *Delta Air, Mail Rate*, 4 CAB 501 (1943); *Northwest Airlines, Mail Rate*, 4 CAB 515 (1943); *Braniff Airways, Mail Rate*, 4 CAB 588 (1944).

³⁶ The Board ascertained the costs, based on actual airplane-miles as follows:

Eastern .....	.128 (mill)	Chicago & So. ....	.170 (mill)
American .....	.136	Western .....	.174
United .....	.137	Northwest .....	.177
Delta .....	.143	P. C. A. ....	.204
Braniff .....	.159	Hawaiian .....	.234
T. W. A. ....	.163		

"The 'service' as opposed to the 'need' mail rate is not designed to meet the financial need of the individual carrier, but rather it is intended to be fair and reasonable in terms of both the quality of the service and the reasonable and necessary costs under conditions of economical and efficient management." *Eastern Air Lines, Mail Rate*, 6 CAB 551, 555 (1945).

³⁷ "... a uniform service mail rate provides added incentive for increased operating efficiency by making the rate of profit directly dependent upon each carrier's competitive performance as measured by the relation of its costs to the costs of other carriers..." *Ibid.*

³⁸ *Eastern Air Lines, Mail Rate*, 6 CAB 551 (1945); *American Airlines, Mail Rate*, 6 CAB 567 (1945); *United Air Lines, Mail Rate*, 6 CAB 581 (1945); *TWA, Mail Rate*, 6 CAB 595 (1945).

ever, was not the revised cost of the mail service for each carrier, or even the average cost of the mail service for the four carriers, but rather the "informed judgment" of the Board; the Board thought the dynamic conditions through which the air transport industry was passing required that the rates be the result of "judgment" rather than of allocated costs.³⁹

PASSENGER AND CARGO RATES

The Civil Aeronautics Act of 1938, as amended, gives the Board the power to regulate the fares and charges the air carriers may receive for the passenger and cargo services, in addition to the power to fix and determine the rates for the mail service. The carriers are to establish such charges in the first instance; these are to be just, reasonable and equitable, and are to be set out in tariffs published and filed with the Board thirty days before such charges are to go into effect.⁴⁰ The Board is empowered, upon complaint or upon its own initiative, to investigate such charges and to suspend the operation of the tariffs during such investigation.⁴¹ If the Board should be of the opinion that any charge does not comply with the Act, it shall determine and prescribe just and reasonable rates. In exercising this power, the Board is directed by Section 1002(e) to take into consideration, among other factors

- (1) The effect of such rates upon the movement of traffic;
- (2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
- (3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
- (4) The inherent advantages of transportation by aircraft; and
- (5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

The Board's control is patterned after similar provisions of the Interstate Commerce Act.⁴²

The power given the Board to regulate the passenger and cargo rates has never been exercised directly,⁴³ nor has the Board undertaken a com-

³⁹ "Under existing circumstances, it would appear that the over-all costs provide a better basis for judgment in setting the mail rate than allocated costs. . . . We therefore conclude that no useful purpose will be served at this time by allocation of the over-all costs between the mail and the non-mail services." *Eastern Air Lines, Mail Rate*, 6 CAB 551, at 557 (1945). Mr. Branch concurred only in the new rates. He expressed approval of the reduction in mail rates, but criticized the manner in which the reduction was reached. He thought allocated costs should serve as the basis for determining the rates, and that the Board should shift from the reasonable costs of individual carriers to the reasonable average costs of the group as a unit.

⁴⁰ §§403, 404, 49 USCA §§ 483, 484 (Supp. 1946).

⁴¹ §1002, 49 USCA §642 (Supp. 1946).

⁴² INTERSTATE COMMERCE ACT, §15(a) (2), 54 Stat. 912, 49 USCA §15(a) (2) (Supp. 1946), MOTOR CARRIER ACT, §216(i), 54 Stat. 924, 49 USCA §316(i) (Supp. 1946).

⁴³ In 1940 a rate conference between the Board and the carriers was scheduled, but was eventually abandoned after the carriers requested an indefinite postponement; subsequently, the carriers did file briefs. SPENCER, *op. cit. supra*, note 4. In 1943 the Board issued an order directing 11 domestic carriers to show cause why the passenger rates should not be reduced 10 per cent. Docket No. 850, Serial No. 2164 (Feb. 27, 1943). Following a voluntary reduction in rates, the order was finally dismissed. Serial No. 2302 (June 15, 1943); Serial No. 5102 (Aug. 21, 1946). The passenger rates were subsequently increased 10 per cent. Order Approving Agreement Relating to Passenger Fares, Agreement No. 996, Serial E-389 (Mar. 21, 1947).

prehensive investigation of such rates, even though it expressed an intention to do so as early as 1942.⁴⁴ Recently the Board did suspend certain cargo tariffs and promised to investigate air cargo rates and costs.⁴⁵ The Board has stated that the rates established by the carriers should bear some relation to the cost of rendering such services, but prior to its recent action, has made no effort to see that this principle is followed.⁴⁶ The control the Board has maintained has resulted indirectly from the consideration the Board has given to the non-mail revenue of a carrier in ascertaining the need of the carrier for mail compensation.⁴⁷ The discretion exercised by each carrier in fixing its fares and charges in order to maximize its non-mail revenue has been considered to reflect on its efficient management.⁴⁸

CONCLUSION

Congress has given the Civil Aeronautics Board the power to fix and determine, or approve of, the rates the air carriers may receive, or charge, for the mail, passenger, and cargo services. In exercising this power Section 2 of the Civil Aeronautics Act requires that the Board consider as being in the public interest

"The regulation of air transportation in such manner as to . . . foster sound economic conditions in such transportation. . . .

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. . . ."

The Board can "foster sound economic conditions" in the air transportation industry only by requiring that each of the three types of service bears its proper share of the total cost of operation of the industry.⁴⁹ The allocation of the total costs to the three types of service and the establishing of

⁴⁴ "The matter of passenger rates, of course, cannot be acted upon in this proceeding, but we bring it forward for attention and it should have early consideration." *Eastern Case*, *supra* note 33 at 757. Also: *American Case*, *supra* note 20; *PCA, Mail Rate*, 4 CAB 22 (1942); *United Air Mail Rate*, 4 CAB 128 (1943). Mr. Branch dissented to the dismissal of the 1943 show cause order, note 43 *supra*, on the grounds that all rates—mail, passenger, and cargo—should be considered in a comprehensive investigation. Serial No. 2302 (June 15, 1943).

⁴⁵ Petitions of *Slick Airways, Inc., et al.*, Docket Nos. 3170, 3178, Serial No. E-916 (Oct. 24, 1947); *Investigation of air freight rates*, Consolidated Docket, Serial No. E-1016 (Nov. 20, 1947).

⁴⁶ The Board disapproved the trans-Atlantic rates since they were not related to cost, *Resolution of North Atlantic Traffic Conference*, 6 CAB 845 (1946). The Board previously approved the Conference assuming that the rates it would establish would relate to costs and would be reasonably and economically sound, *International Air Transport Association Traffic Conference Resolution*, 6 CAB 639 (1946). Mr. Branch dissented from the Board's order cancelling Pan American Airways reduction in travel discounts for Government employees on the ground that the cost of transporting a Government employee is the same as the cost of carrying any other person; each receives the same service; the discounts discriminated against non-government employees, *Government Travel Discount Tariff Investigation*, Docket No. 1941 (Apr. 18, 1946).

⁴⁷ *Western Air, Mail Rate*, 1 CAA 341 (1939) (reduction in local passenger fares held constructive experiment).

⁴⁸ "Though it is far from our intention to disapprove or discourage a reasonable amount of experimentation with the effect of fares upon traffic, in the endeavor to discover the rates of fares and tariff practices which will give the air transport industry its soundest economic position, any unreasonable course in that regard must have an important bearing upon the appraisal of the commercial requirements of the service involved, and upon the appraisal of the managerial economy and efficiency displayed by the carrier." *Northwest Air Lines, Mail Rate*, 1 CAA 259, at 283 (1939).

⁴⁹ The carriers have consistently denied their ability to make such cost allocations and have refused to submit data. *American Airlines, Mail Rate*, 3 CAB 770 at 790 (1942). In *Eastern Air Lines, Mail Rate*, 3 CAB 733, at 753 (1942),

rates related to costs is likewise necessary to prevent "unjust discriminations" against any class of user of the various services.⁵⁰ The method of allocation that the Board should eventually follow can only be determined by conducting a comprehensive investigation of the three services to ascertain the nature of each service and how each is affected by economic factors of supply and demand, the relation that each service bears to the others and to the industry as a whole, the effect of the rate level upon the movement of each class of traffic and the effect different methods of cost allocation may have on the development of the industry.⁵¹

The Board, on occasions, has treated the mail, passenger, and cargo services as joint products of the transportation industry.⁵² In determining the mail rates for carriers no longer in the "need" class, the Board has allocated the total costs of the joint services on the basis of ton-miles of service rendered by the mail and commercial services, to determine the cost of the mail service; the cost thus obtained was a factor the Board considered in fixing the rates for the mail service.

In establishing the mail rates for carriers still in the "need" category, the Board has treated the commercial services as by-products of the carriers with the mail service designated as the main product.⁵³ The revenue from the commercial services has been applied against the carrier's total costs of operation to ascertain the "need" of each carrier for mail compensation. In following this practice, required by Section 406(b), the

the carrier's assistant secretary-treasurer testified that "it is not at all feasible and practically impossible" to make an allocation of joint costs. But the carrier's system for allocation of joint costs has been explained at other occasions. T. J. Dunnion (Vice-Pres., Treasurer for American Airlines, Chicago), *Accounting For Air Transportation*, 19 Nat. Cost Accts. Ass. Bull. 1352 (1938); M. W. McQueen (Auditor, Trans. & Western Air, Kansas City, Mo.), *Accounting For Air Transportation*, 23 Nat. Cost Accts. Ass. Bull. 345 (1941). Also see: Baily, *Specialized Accounting Systems*, p. 408 *et seq.*, Wiley & Sons, New York (1941).

⁵⁰ A comparison of rates, fares, and charges of domestic air carriers per ton-mile of mail, passenger, and cargo from 1940 to 1946 is as follows:

Year Ended June 30	Mail	Passengers	Cargo*
1940	\$2.09	\$0.51	\$0.60
1941	1.88	.51	.59
1942	1.51	.50	.55
1943	.79	.55	.59
1944	.66	.52	.49
1945	.58	.52	.49
1946	.54	.47	.42

* Includes express cargo only; freight cargo for 1946 was 34 cents.
Source: CAB Annual Report, 1946.

⁵¹ The need for relating rates, fares, and charges to costs of the services has been suggested by others: PUFFER, *op. cit. supra* note 4 at 365; SPENCER, *op. cit. supra* note 4; Neal, *Some Phases of Air Transport Regulation*, 31 Geo. L.J. 355 (1943); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 378 (1946, 47). "I believe that a sound permanent policy requires that service mail rates be closely related to the costs of the mail service . . ." Mr. Branch, concurring in *Eastern Air Lines, Mail Rate*, 6 CAB 551, at 560 (1945). "Control of passenger and express rates has been left largely in the hands of the air lines and many inconsistencies have resulted. Yet the rates which the carrier charges the public for other classes of service cannot be disassociated from the problem of fixing air-mail rates. They are alternative methods of effecting gross income and must be made to work harmoniously. Consideration should be given to fixing passenger and express rates at optimum levels consistent with the basic policy for the industry." *Transportation and National Policy*, National Resources Planning Board, p. 357, May, 1942.

⁵² For a treatment of joint product accounting, see: DOHR, INGRAM AND LOVE, *COST ACCOUNTING* (1935), 446 *et seq.*; VAN SICKLE, *COST ACCOUNTING* (1938), 542 *et seq.*

⁵³ For a treatment of by-product accounting, see DOHR, INGRAM AND LOVE, *Id.* at 440 *et seq.*; VAN SICKLE, *Id.* at 549 *et seq.*

Board has called attention to the fact that the mail rate thus established included a government subsidy in addition to compensation for the mail service.⁵⁴ Congress enacted Section 406(b) specifically for this purpose.

In determining if it should grant the recent request of a major carrier for a mail rate of \$1.25 per ton-mile while the same carrier intends to charge as little as 14 cents per ton-mile for its cargo service, the Board must decide whether the two services should be regarded as joint products of the carrier or whether the cargo service should be considered a by-product of the carrier's main services.

Here, the method of performing the cargo service is important. To the extent that the cargo service can be maintained in conjunction with and subsidiary to the regularly required mail and passenger services, the former could be regarded a by-product of the latter. As long as the cargo revenue exceeds the additional cost incurred in rendering the cargo service, the mail and passenger services would not be affected adversely and incentive cargo rates would appear proper. But, where the cargo service constitutes an important phase of the air transportation industry, and is carried in part by separate cargo aircraft, it should be required to bear its share of the total cost. The savings that result from rendering the mail, passenger, and cargo services jointly should benefit all services; the reduction in the cost of rendering these services should result, eventually, in lower rates and charges to the users of these services. Since weight is generally regarded to be the limiting factor in rendering services by air, all other factors being equal, the cost and the resulting rates for the different services should approximate one another. Since the mail must be given expeditious handling and schedules must be maintained to meet the needs of the Post Office Department, notwithstanding the decreasing percentage mail bears to the total air lift, a higher rate per ton-mile for mail service may continue to be justified and these factors will have to be considered by the Board, along with others, in determining whether a mail rate twice that charged for the passenger service and nearly nine times that charged for the cargo service could be found to constitute a burden and discrimination against the government.

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PRACTICAL VALUE OF AN APPEAL UNDER SECTION 1006(e) OF THE CIVIL AERONAUTICS ACT

Section 1006(e) of the Civil Aeronautics Act of 1938¹ provides that, on judicial review of a Civil Aeronautics Board order, ". . . findings of facts by the Authority (the Board), if supported by substantial evidence, shall be conclusive." The meaning of "substantial evidence" has been set forth as "more than a mere scintilla . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² Section 1006(e) has been tested only four times in the ten-year life of the Civil Aeronautics Act, twice in cases involving violations of the Civil Air Regulations³ and twice in economic cases.⁴

⁵⁴ *Chicago and Southern Air Lines, Mail Rates for Route Nos. 8 and 53*, 3 CAB 161, 188 (1941).

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¹ 52 Stat. 1024 (1938), 49 USCA §646(e) (Supp. 1947).

² *Consolidated Edison Co. of New York v. National Labor Relations Board*,

³ *Cameron v. Civil Aeronautics Board*, 140 F. 2d 482 (C. C. A. 7th, 1944); *O'Carroll v. Civil Aeronautics Board*, 144 F. 2d 993 (App. D. C. 1944).

⁴ *Braniff Airways, Inc. v. Civil Aeronautics Board (Essair, Inc., Intervenor)*, 147 F. 2d 152 (App. D. C. 1945); *United Air Lines v. Civil Aeronautics Board*, 155 F. 2d 169 (App. D. C. 1946).

Of the two safety cases, only one evoked much in the way of discussion of the evidence by the reviewing court. In *Cameron v. Civil Aeronautics Board*,⁵ an Army test pilot, accused of "buzzing" the control tower of the Indianapolis Airport, waived his right to a hearing, preferring to rely on written statements. His evidence consisted of statements by him and two other officers, passengers in his plane, that the maneuver was merely a standard technique for informing the tower operator of radio trouble, and requesting landing instructions, and his record of thirteen years of flying, including 3,700 airline hours. The Board relied on the statements of the Chief Airport Traffic Controller and a CAA Inspector that the plane came in cross-wind across the airport at an altitude of less than 500 feet. This was substantial evidence in the court's opinion, particularly since the final determination of credibility of testimony is made by the administrative board.⁶ In the other case, *O'Carroll v. Civil Aeronautics Board*,⁷ the pilot had taken off while another pilot was taking off ahead of him on the same runway. Appeal from the board's suspension of his commercial certificate was based on two grounds, the first of which was lack of substantial evidence. The court's discussion was as follows, "As to the first point we have examined the record and find ample evidence to support the Board's finding of negligence." The case was fairly clear, since the Board had in support of its order the testimony of the other pilot and several disinterested eye witnesses. The appeal seems to have been ill-advised, since the case apparently was not even close.

In the first of the economic cases, *Braniff Airways v. Civil Aeronautics Board (Essair, Intervenor)*,⁸ occurred the only reversal; and that came about only as a result of special conditions incident to World War II. The Board's finding that the Essair company, a competitor of Braniff for west Texas feeder service, had the proper organizational basis for the conduct of air transportation was based on the presence of its president. Shortly after the granting of the certificate, he was called into the Air Force. Braniff, when apprised of this, sought a rehearing, which was denied. By the time the appeal was finally heard, the former president was serving overseas. The court held that the finding, while supported by substantial evidence when made, had to be put upon some other foundation, since the evidence had been rendered unavailable for the duration. This case, then, was clear, and was not complicated by the interplay of issues of policy and expertise.

United Air Lines v. Civil Aeronautics Board,⁹ which was argued on the questions of the sufficiency of the findings and the evidence supporting them, presented the typical problem in economic cases—can a finding of fact be considered purely as such, without regard to its context? Here four air carriers had applied for the new Denver-Los Angeles route, and the selection of a carrier was narrowed to United or Western Air Lines. The trial examiner awarded the route to United, but the Board reversed him, awarding it to Western,¹⁰ and the Board was affirmed on appeal. It was conceded by the Board that the public interest would be served by single-plane service, *i. e.*, through service between Los Angeles and the eastern cities through Denver. The transcontinental route through Denver followed the great circle intersecting New York and Chicago, which United

305 U.S. 197, 229 (1938).

⁵ 140 F. 2d 482 (C. C. A. 7th, 1944).

⁶ *National Labor Relations Board v. Link-Belt Co.*, 311 U.S. 584, 597 (1941).

⁷ 144 F. 2d 993 (App. D. C. 1944).

⁸ 147 F. 2d 152 (App. D. C. 1945).

⁹ 155 F. 2d 169 (App. D. C. 1946).

¹⁰ *Western Air Lines, Inc., et al., Denver-Los Angeles Service*, 6 CAB 199 (1944).

already operated as far as Denver, while the only two existing transcontinental through routes to Los Angeles (TWA and American) went far to the south. The Board, however, subordinated this consideration to that of maintaining Western as a strong regional carrier. United's bid for a single transcontinental service accordingly was rejected.

The Board's reasoning was that an award to United would divert so much traffic from Western's Los Angeles-Salt Lake City route, sustained mainly by a connecting service with United, that its solvency would be threatened.¹¹ Further, it found that an award to Western would keep it in a healthy financial state.¹² Both of these findings, which were necessarily predictions, were challenged by United. The former finding, on which the concurring member disagreed, was based on the fact that about 80% of the Western traffic between Los Angeles and Salt Lake City originated or terminated in cities east of Denver,¹³ and on an estimate by Western that United's operations would divert over 40% of Western's total revenue passenger mileage.¹⁴ United questioned this estimate with some vigor, but its main attack was directed at the finding that Western could operate the route at a profit. Here the complexities of the facts were most manifest.

United and Western had operated an interchange service at Salt Lake City from 1940 to 1942, when war conditions required its termination. The parties agreed that the arrangement was no longer binding, and the service had not been renewed. While the Board denied that it was relying on an interchange arrangement at Denver, suggested by Western, to accommodate the 80% through passengers,¹⁵ its finding that Western would thrive with the new route was based on an estimate by Continental (one of the four applicants) of profits to be made by Continental from a Kansas City-Los Angeles route, via Denver, with a connecting service at Denver with United's existing Chicago-Denver route,¹⁶ and on actual records of Western's Salt Lake City-Los Angeles operations.¹⁷ United on appeal argued that the evidence offered by Continental proved nothing as to Western, since Continental's estimate assumed that most traffic would pass through Denver from Kansas City to Los Angeles and vice versa, with the United connecting service at Denver only incidental, and further

¹¹ "On the basis of the evidence of record we conclude that award of the new route to United would divert so much traffic from Western as to seriously impair that carrier's ability to continue as a strong independent air carrier in a position to compete for traffic in the western section of the country." 6 CAB at 210.

¹² "An examination of these estimates leads to the conclusion that any one of the applicants should be able to conduct the proposed service in conjunction with its system operation on an economically sound basis and without need of Government aid in the form of mail payments in excess of a compensatory rate." 6 CAB at 206.

¹³ ". . . about 80% of the total traffic which may be expected to move over the Los Angeles-Denver route will be destined to or will originate at points east of Denver on United's transcontinental route." CAB at 209.

¹⁴ "On this basis Western estimated that United would divert 48.9% of its revenue passenger mileage from route 13 (Los Angeles-Salt Lake City) and 41.7% from its system." 6 CAB at 210.

¹⁵ The Board in its opinion said, "These estimates were based on the assumption that interchange arrangements would be made. The record contains no estimate of revenues and expenses for a connecting service. However, in view of the fact that such a service is much less attractive than the through service that would be available by other routings, it is certain that the volume of traffic and expenses would be considerably less than that estimated by Western." 6 CAB at 205. In its brief on appeal, however, the Board stated that it had found that connecting service would be profitable, and that it could make such a finding because of its expert knowledge, without specific evidence on the point. Brief of Respondent, Civil Aeronautics Board, at p. 29.

¹⁶ Brief for Respondent, Western Air Lines, Inc., p. 42.

¹⁷ 6 CAB at 204; Brief for Respondent, Western Air Lines, p. 42.

that Western's evidence of its own operations in connection with United included the period in which the interchange operation was in effect. Thus, the appeal presented two alternative interpretations of the Board's opinion: (1) Western would prosper in a connecting service with United at Denver—although no evidence indicated this; or (2) Western would prosper in an interchange service with United at Denver—although there was no evidence that an agreement for such service would be entered into. The conjectural aspect of the findings is highlighted by the frequent reference by the Board in its briefs to expert knowledge or the equivalent.¹⁸

The court, emphasizing "the paramount public interest" in the case,¹⁹ held that the Board's findings, though general in terms, were sufficiently clear, were supported by substantial evidence, and were adequate to sustain the award of the certificate to Western. As to United's argument²⁰ that Continental's estimate of profitable operation of the route did not apply to Western's situation, since Continental based its figures in considerable part on traffic using its existing Denver-Kansas City operation (a route which neither Western nor United had) the court said merely, "Continental's traffic estimate was based on a connecting service."²¹ United pressed the point²² that Western's own estimate that it could operate the route profitably was based upon results of the earlier interchange operation between Western and United at Salt Lake City, whereas there was no evidence that a like interchange arrangement between the two would recur at Denver, particularly since interchange required consistent duplication of equipment, a condition almost impossible to maintain. This, too, the court disregarded, despite the fact that it noted that Western's figures were "heavily weighted with the (Salt Lake City) interchange operation, August, 1940, to May, 1942."²³ This represented virtually all of the attention which the court gave to the substantial evidence argument made by United. The greater part of the opinion was devoted to an emphasis upon the paramount public interest in the case as exemplified by Section 2 of the Act,²⁴ and the "general nature of the problem" as presenting essentially "a

¹⁸ Brief for Respondent, Civil Aeronautics Board, pp. 14, 15, 21, 29; Memorandum in Response to Point II of Reply Brief of Petitioner, p. 2 (twice).

¹⁹ 155 F. 2d at 173. For a discussion of paramount public interest in new route cases see Note, 14 J. Air L. & C. 117 (1947).

²⁰ Reply Brief for Petitioner, United Air Lines, Inc., pp. 5, 14.

²¹ 155 F. 2d at 174.

²² Brief for Petitioner, United Air Lines, Inc., pp. 18, 36, 37, 41.

²³ 155 F. 2d at 174.

²⁴ "Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such a 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;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

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

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

task for administrative judgment."²⁵

In other fields of Federal regulation, the mixed question of law and fact has opened the door to the reviewing court to evaluate the validity of the administrative action,²⁶ where a pure finding of fact would have imposed the substantial evidence rule²⁷ or complete finality of the findings.²⁸ In only one instance has there been a weighing of evidence of a nature similar to that involved in the *United* case. In *Courier Post Publishing Co. v. Federal Communications Commission*,²⁹ the Commission had considered an application for a broadcasting license in a growing city, and had denied it. Against a considerable body of evidence showing need for such a service, the Commission had relied on the contrary testimony of an officer of a radio station of limited capacity in a small neighboring town—the only station of any kind within 50 miles. The reviewing court reversed, finding that, though the Commission had based its finding of absence of need on some evidence, that evidence was not substantial. Interestingly enough, this also was evidence of a speculative or conjectural type.

To what extent may the substantial evidence rule be used as a vehicle for appeal under Section 1006(e) of the Act? It appears clear that the Board will be treated in safety cases just as a lower court would be (these are actually no more than misdemeanor trials). As for economic cases, the *United* opinion indicates that there will be a mixture of fact and law in any finding in a certification proceeding. It seems that section 2 of the Act is inextricably interwoven into all Title IV deliberations of the Board, and that all fact findings are also findings of public convenience and necessity, set out so carefully in section 2.

Unhappily for the air carrier litigant seeking judicial review, a distinction, made obvious in the *United* case, can be drawn between Civil Aeronautics Act cases and decisions under most other Federal legislation. The distinction is found in the court's reaction to the careful spelling out of the meaning of public convenience and necessity in that Act. All other federal legislation leaves that work to the administrative process. The appellant of Board decisions is faced with a specific legislative mandate, not open to judicial construction, but to be implemented and interpreted solely by the special body appointed to administer it. Therefore, it is reasonable to conclude that the ubiquity of section 2 in economic cases, and the aura of legislative finality which surrounds it, make the substantial evidence rule under the Act almost, if not entirely, a rule of administrative finality. This provision in the Civil Aeronautics Act means, further, that the Administrative Procedure Act³⁰ probably effects no change in economic cases.³¹ Only a complete revision of the Civil Aeronautics Act, including elimination of section 2, would broaden the scope of judicial review; and such a revision does not seem probable.³²

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²⁵ 155 F. 2d at 175.

²⁶ *Dobson v. Commissioner*, 320 U.S. 489 (1943) (Tax Court fact findings are conclusive; no review at all); *Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 Harv. L. Rev. 753 (1944); *United States v. Idaho*, 298 U.S. 105 (1936) (ICC).

²⁷ *New York v. United States*, 331 U.S. 284 (1947). Expert knowledge has its effect at p. 326: "We could not disturb its (ICC's) findings on the facts of this record without invading the province reserved for the expert administrative body."

²⁸ *Dobson v. Commissioner*, 320 U.S. 489 (1943), note 23 *supra*. But see *Lincoln Electric Co. v. Commissioner*, 162 F. 2d 379 (C. C. A. 6th, 1947); Note, 42 Ill. L. Rev. 794 (1948) (Administrative Procedure Act may now apply the substantial evidence rule to Tax Court findings).

²⁹ 104 F. 2d 213 (App. D. C. 1939).

³⁰ 5 USCA §§1001-1011 (Supp. 1947), 60 Stat. 237 (1946).

³¹ There is tacit approval of §1006(e) in the legislative history, in that there is no mention, much less criticism, in Administrative Procedure in Government Agencies, Sen. Doc. 10, 77th Cong., First Sess. (1941).

³² The latest word on revision of the law, contained in the Congressional Air Policy Report, calls for organizational changes, but says nothing about deleting §2. Sen. Rep. 949, 80th Cong., Second Sess., March 1, 1948; Comment, 15 J. Air L. & C. 208, 217-224 (1948).