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Competition Under the Civil Aeronautics Act†

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I. REGULATED COMPETITION

The ideal of competition, as a regulator of economic enterprise, has long been a part of American political thought.¹ As our economic organization has become more complex, this ideal has undergone a continuous development in the direction of regulated competition.² The development has been the most pronounced in the field of public utilities.³ Within this area the regulation of transportation has become increasingly a matter of public concern. Beginning with the Interstate Commerce Act in 1887,⁴ there has followed a long series of legislative enactments designed to build up a national transportation system founded on a basis of regulated competition.⁵

One of the principal problems in the control of transportation and the regulation of competition between transport enterprises has been that of establishing a service pattern and limiting the number of entrants within that pattern. The administrative device created by legislation for this function has been that of the "certificate of public convenience and necessity." This device

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† The views expressed herein are those of the authors, and are not to be taken as expressions of the Civil Aeronautics Board.

1. While this ideal has not always been met in actual practice, the existence of numerous enactments to enforce competition testify to its force.

2. The various transportation acts culminating in the Transportation Act of 1940, 54 Stat. 890 (1940), 33 U.S.C.A. §§ 491-498 (Supp. 1944); the Public Utility Holding Company Act of 1935, 49 Stat. 838 (1935), 15 U.S.C.A. § 79 (1941); the Federal Communications Act, 48 Stat. 1064 (1934), 47 U.S.C.A. § 152 (Supp. 1944), all bear witness to legislative concern over concentrations of economic power, and its control by regulation of competition.

3. In addition to the statutes cited under footnote 2 above there is the state system of public utility acts.

4. 24 Stat. 379 (1887), 49 U.S.C.A. § 1 (1929).

5. Interstate Commerce Act, amendments thereto, 49 U.S.C.A. § 1 et seq., (Part II, Motor Carriers Act of 1935, 49 Stat. 543, as amended 54 Stat. 919 [1940], 49 U.S.C.A. § 301 et seq. [Supp. 1944]; Part III, Water Carriers, 54 Stat. 929 [1940], 49 U.S.C.A. § 901 et seq. [Supp. 1944]). Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), 49 U.S.C.A. § 401 (Supp. 1944).

has been made a part of federal statutes regulating transportation from the original Interstate Commerce Act down through the Transportation Act of 1940.⁶ Under it, any person who wishes to engage in a particular enterprise subject to such certificates, must make application to an administrative body, and obtain an authorization to engage in the business, based on a finding that the proposed service is in the "public convenience and necessity." The meaning of the use of these certificates and their relationship to the issue of competition has been clearly set forth by Justice Brandeis in his dissent in *New State Ice Company v. Liebmann*:⁷

"The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. . . . The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied

"Long before the enactment of the Oklahoma statute here challenged, a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads; then for street railways; then for other public utilities whose operation is dependent upon the grant of some special privilege. Latterly, the requirement has been widely extended to common carriers by motor vehicle which use the highways."

In the Civil Aeronautics Act of 1938,⁸ Congress extended the application of this administrative device to the field of air transportation.

Under that act an authorization must be secured from the Civil Aeronautics Board in order to engage in interstate, overseas,

6. 54 Stat. 899 (1940) 49 U.S.C.A. § 1 (Supp. 1944).

7. 285 U.S. 262, 52 S. Ct. 371, 76 L.Ed. 747 (1932).

8. 52 Stat. 977 (1938), as amended by the Act of July 2, 1940, 54 Stat. 735 (1940), 49 U.S.C.A. § 401 (Supp. 1944). (Hereinafter called "the Act").

or foreign air transportation.⁹ The Board¹⁰ shall authorize such transportation only after a finding, supported by a record on hearing, that the applicant is fit, willing and able, and that the transportation (in the case of a domestic air carrier) is required by the public convenience and necessity,¹¹ or (in the case of a foreign air carrier) that the transportation will be in the public interest.¹²

The Act sets up certain guides for the Board to follow in determining whether proposed air transportation is in the public interest, and in accordance with the public convenience and necessity.¹³ Among elements which the Board must consider in making such a determination is that of "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."¹⁴ From this general statutory requirement the Board, in the issuance of certificates to engage in air transportation, has developed concepts of competition in such transportation that are here the subject of review.

Although issues relating to competition under the Civil Aeronautics Act have arisen primarily from proceedings involving applications for new routes, other parts of the Act are concerned

9. Section 401 of the Act (49 U.S.C.A. § 481 [Supp. 1944]), requires such a certificate for any domestic air carrier. Section 402 of the Act (49 U.S.C.A. § 482 [Supp. 1944]) requires a permit issued by the Board for any foreign air carrier to engage in foreign air transportation, which is defined by Section 1 of the Act (49 U.S.C.A. § 401 [Supp. 1944]), to mean carriage by aircraft of persons or property as a common carrier between a place in the United States and any place outside thereof.

10. The original Civil Aeronautics Act of 1938 created an agency known as the Civil Aeronautics Authority, composed of five members, and containing an administrator. The power and duty of issuing certificates for air transportation was conferred upon this agency. (49 U.S.C.A. § 481 [Supp. 1944]). Reorganization Plan No. III, submitted by the President to Congress on April 2, 1940, pursuant to the Reorganization Act of 1939 (53 Stat. 561 [1939], 5 U.S.C.A. § 133 [Supp. 1944]), centralized in the administrator those functions of the Civil Aeronautics Authority that are essentially of an administrative character as distinguished from those relating to economic regulation. Plan III left with the five-man Authority all functions relating to economic regulation, which includes the issuance of certificates to engage in air transportation. Reorganization Plan No. IV, transmitted by the President to Congress on April 11, 1940, changed the name of the five-member Authority to the Civil Aeronautics Board, and provided that the Board report to Congress and the President through the Secretary of Commerce. The term "Board" will be used throughout to cover both the powers of the five-man Authority and the later Board.

11. Section 401 (d) (1), 49 U.S.C.A. § 481 (d) (1) (Supp. 1944). Provision is made in Paragraph (2) for the issuance of temporary certificates. 49 U.S.C.A. § 481 (d) (2) (Supp. 1944).

12. Section 402(b), 49 U.S.C.A. § 482 (Supp. 1944).

13. Section 2, 49 U.S.C.A. § 402 (Supp. 1944).

14. Section 2(d), 49 U.S.C.A. § 402(d) (Supp. 1944).

with these problems. The most important of these are the provisions of Section 408 which prevent various relationships in the control of air carriers leading to the restraint of competition.¹⁵ Some of the proceedings here reviewed have arisen in the adjudication of issues created by this section.¹⁶

II. REGULATED COMPETITION IN TRANSPORTATION

Previous to the passage of the Civil Aeronautics Act by Congress, there had been a considerable background of experience, both state and national, in the regulation of competition in the field of transportation. This experience has provided concepts and developed principles which could serve as guideposts in

15. 52 Stat. 1001 (1938), 49 U.S.C.A. § 488 (Supp. 1944). Section 408 reads in part as follows:

"(a) It shall be unlawful, unless approved by order of the Authority as provided in this section—

"(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

"(2) For any air carrier, any person controlling an air carrier, or any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part hereof, or any air carrier;

"(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

"(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

"(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

"(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection."

16. Mention should also be made here of Section 411 of the Act (49 U.S.C.A. § 491 [Supp. 1944]) which forbids air carriers or foreign air carriers to engage in unfair methods of competition; Section 409 (49 U.S.C.A. § 489 [Supp. 1944]) which prohibits interlocking relationships except on approval by the Board, and of Section 414 (49 U.S.C.A. § 494 [Supp. 1944]), which relieves any person from the operation of the "anti-trust laws" with respect to certain acts approved by the Board pursuant to the statute. Those relate to control of air carriers, interlocking relationships, and to approval of agreements between an air carrier and any other air carrier, foreign air carrier or other carrier involving enumerated subjects.

formulating the place of competition in air transportation within the statutory standards.¹⁷

In the state regulation of transportation during the two decades preceding the passage of the Civil Aeronautics Act, there was evidenced a trend away from competition. Typical of this view were the declarations of the Supreme Court of Appeals of West Virginia in *Monongahela West Penn Public Service Company v. State Road Commission of West Virginia*.¹⁸ The case involved applications by two subsidiaries of railroads and by two independent bus operators for certificates to operate motorbuses over certain routes. The State Road Commission granted the applications of the independent operators. The decision was reversed by a lower court whose holding was affirmed by the highest court of the state. The latter went largely on the ground that an existing carrier was entitled to protection from unnecessary competition and was to be given an opportunity to provide new services. The court spoke of the changing concepts of competition in our economic life:¹⁹

"Then [i.e. 1837] 'competition is the life of trade' was accepted as a guiding maxim of economics. That maxim has long since been rejected in so far as it applies to public utilities. Uncontrolled competition is now regarded as destructive of such utilities. In 1837 the state watched with

17. The Board properly recognized that its determinations must be largely ascertained with reference to the Civil Aeronautics Act. Thus, in its first new route case the Board declared:

"The phrase 'public convenience and necessity' has long been used as the statutory standard for the guidance of various administrative bodies in connection with the regulation of public utilities. It has been universally recognized that the phrase is susceptible of no exact definition and that its meaning must be largely ascertained by reference to the context and objectives of the particular statute in which it is used." *Northwest Airlines, Inc.-Certificate of Public Convenience and Necessity*, 1 C.A.A. Rep. 573, 576-577 (1940).

However, a brief glimpse at the development of concepts of competition in other transportation previous to the Civil Aeronautics Act gives a clearer picture of the legal atmosphere in which that Act was to operate.

18. 104 W. Va. 183, 139 S.E. 744 (1927). Also illustrative of this trend are *Re Fred Himburg and Re George Davy*, P.U.R. 1927C, 420 (1922-Michigan, Public Utilities Commission); *West Suburban Transportation Co. v. Chicago & W.T. Ry.*, 309 Ill. 87, 140 N.E. 56 (1923). In the latter case, the Illinois Supreme Court declared:

"It is not the policy of the Public Utilities Act to promote competition between common carriers as a means of providing service to the public. The policy established by that act is that, through regulation of an established carrier occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing lines were authorized to serve the public in the same territory. . . ."

19. 104 W. Va. 183, 139 S.E. 744 (1927).

indifference one public utility stifle another. Now the state controls its public utilities, and, as an incident to its regulatory power, acknowledges a duty to protect them."

The same tendency manifest itself in state regulation of air authority to conduct an air taxi and air carrier business, the Pennsylvania Public Service Commission declared:²⁰

"The Commission recognizes that the policy of the nation and state is to foster and encourage aviation. The facts in this case, however, are in the opinion of the Commission convincing that in a community such as Gettysburg the creation of unnecessary and destructive competition could not and would not be a contributing factor in the development of commercial flying service in Pennsylvania, but would be a decided hindrance to its development. Common carrier transportation by aircraft must be developed for some time at least by and through private enterprise which should not be required to struggle for an existence in the competitive field under conditions as existing in this case."

However, the Commission did not foreclose the issue, but indicated that future developments would determine the course of regulation:²¹

"If, however, in any similar proceeding it appears that the application of the noncompetitive principle is not in the interest of and would not foster and encourage aviation, the principle will not control."

Similar results were reached by other state regulatory bodies in dealing with the rising air transport industry.²²

These decisions by the states did not mean, however, that the transportation service patterns were frozen, and that competition

20. *Re Battlefield Airways*, 17 Pa. Corp. Rep. 410, 1930 U.S. Av. Rep. 54, P.U.R. 1929A, 476, 477 (1928).

21. *Ibid.*

22. 83 A.L.R. 338 (*Colorado Public Utilities Commission*, 1930 U.S. Av. Rep. 253); *Re Century Pacific Lines Ltd.*, P.U.R. 1932C, 388. In this latter case the Arizona Corporation Commission refused to pass upon the need for competition, and held that the issue had been settled by legislative action in requiring certificates of public convenience and necessity. In other cases state commissions granted certificates for service. Applications of *Century Air Lines*, *American Airways, Inc.*, and *National Air Transport, Inc.* (*Illinois Commerce Commission*), 1932 U.S. Av. Rep. 197; *Re Francis A. Riordan* (*Nevada Public Utilities Commission*), P.U.R. 1928D 854. In the case of *Re U.S. Airways, Inc.*, 1930 U.S. Av. Rep. 290, the Colorado Public Utilities Commission took the position that, since the proposed operation was interstate, there was no question of public convenience and necessity involved.

was eliminated. It was recognized that under a variety of circumstances new service was both justified and desirable. These included cases where the existing service was inadequate and rendered at high rates,²³ where rates were high or discriminatory,²⁴ where lower rates were proposed for the new service²⁵ (although this ground is generally not regarded as sufficient justification standing alone),²⁶ and where the new service could obtain sufficient business without diverting volume from an existing operator.²⁷ The mere desire to serve is clearly not a basis for a certificate.²⁸

No extended examination of federal regulation of surface transportation will be made here, as this is beyond the scope of the present study, but it should be observed that one of the major purposes of such regulation has been to control competition. Such has been true in the case of both the railroads²⁹ and motor carriers. This purpose has been clearly expressed by the Interstate Commerce Commission:³⁰

"... we believe it to be true that within reasonable bounds competition in transportation is in the public interest. Certainly, however, it cannot be said that the transportation world is at present suffering from any scarcity of competition. On the contrary, it is widely prevalent, and in many situations it has gone beyond reasonable bounds and is both wasteful and destructive in its results. One of the most important present duties of public regulation, indeed, is to bring transportation competition under proper control."

However, the Commission has equally made clear that Congress did not intend to eliminate competition in the motorbus or railroad field, and that while competition should not be

23. *Re T. R. Rex*, P.U.R. 1920B, 675 (Cal. 1919).

24. *Re Thorneville*, 31 Cal. R.C.R. 598 (1928).

25. *Re Oakland-San Jose Transportation Co.*, P.U.R. 1920A, 920 (Cal. 1919); *Re Hatchell*, P.U.R. 1923D, 543 (1923). *Contra: Re Pickwick Stages, Inc.*, P.U.R. 1929D, 647 (1929).

26. *Re Lampson*, 32 Cal. R.C.R. 185 (1928); *Illinois Commerce Commission v. Chicago Motor Coach Co.*, P.U.R. 1929A, 96 (1928).

27. *Re Grady Harrison's Freight Service*, P.R.R. 1931D, 241 (1931); *Re Missouri Pacific Transp. Co.*, No. 6996 (Mo. 1930); *Re Oyster and Watson*, 15 Ann. Rep. Ohio P.U.C. 92 (1927).

28. *Re Highway Transp. Co.*, P.U.R. 1926D, 594 (1926).

29. *Texas & Pac. Ry. Co. v. Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578 (1926).

30. *Missouri Pacific Co. Extension-Natchez-New Orleans*, 9 M.C.C. 712, 717, 718 (1938); *Consolidated Motor Lines, Inc., Extension of Operations*, 18 M.C.C. 35, 46 (1939).

allowed to run riot, it is the best known spur to the improvement of service.³¹

In line with the development of regulated competition briefly reviewed, the legislative history of the Civil Aeronautics Act reveals that its primary purpose was protection of the air transportation industry from excessive competition. This was clearly brought out by Representative Lea in his explanation of the proposed legislation to the House:³²

“At the present time there is no control by the Federal Government that can assure to one of these companies security of route or any protection against cutthroat competition. Now, when the airplane is about to engage successfully in passenger and express business, the field is open to destructive cutthroat competition unless we have legislation such as is proposed here. . . .”

“Part of the proposal here is that the regulatory body created by the bill will have authority to issue certificates of convenience and necessity to operators. This will give assurance of security of route. The authority will also exercise rate control, requiring that rates be reasonable and giving power to protect against cutthroat competition. In my judgment, those two things are the fundamental and essential needs of aviation at this time, security and stability in the route and protection against cutthroat competition.”³³

With this background Congress wrote into law the Civil Aeronautics Act of 1938, which set forth as one of its declarations of policy the concept of “competition to the extent necessary to assure the sound development of an air-transportation system.”³⁴ The Board, in its decisions, which we shall now examine, has given practical effect to the policy thus declared.

III. COMPETITION AND THE AIR TRANSPORTATION SYSTEM

In its first new route proceeding,³⁵ the Board set forth the general principles which would guide it in determining the

31. See Pan American Bus Lines Operation, 1 M.C.C. 190.

32. H.R. Rep. 9738, 83 Cong. Rec., May 7, 1938, at 6406-6407.

33. See also H.R. Rep. 2254, 75th Cong., 3d Sess. (1938) 2, which expresses the same points of view.

34. Section 2 of the Act quoted in full above. 49 U.S.C.A. § 402(d) (1944).

35. Under Section 401(e) of the Civil Aeronautics Act of 1938 (49 U.S.C.A. § 481 [1944]), existing air carriers continuously operating were entitled to

"public convenience and necessity" in a particular case.³⁶ It was recognized that although "a fixed and rigid concept of the term" could not be evolved, there were certain sources which indicated the bounds of the problem. These were the declaration of policy set forth in Section 2 of the Act,³⁷ and the sections thereof relative to the financial responsibility of the government resulting from the issuance of certificates for new routes.³⁸

As has already been noted, Section 2 directed the Board to consider "competition to the extent necessary to assure the sound development of an air transportation system." This, said the Board, constituted a clear departure from a "laissez faire" concept of competition in the field of air transportation. In its place was to come a firm control to avoid wasteful competitive practices. This did not mean, however, that the existing pattern of routes and carriers was to be frozen. It was to develop, but under a guidance, which would avoid the errors that had occurred in the growth of other modes of transportation:³⁹

"The declaration of policy of the Act thus sets out the broad standards which the Authority is to apply to the facts of any given case in determining whether the 'public convenience and necessity' requires the issuance of a certificate authorizing an air carrier to engage in air transportation over a new route. Obviously in the light of these standards, it was

certificates of public convenience and necessity for such operations. These were the so-called "grandfather rights" similar to those found in the Motor Carrier Act. Under this section, the Board received and passed on numerous applications. This study is not concerned with such cases, which did not involve the problems of competition here considered. The place of existing carriers in the air service pattern was determined by Congress insofar as their operations at the time of passage of the Act were concerned. We are here considering the new route cases under Section 401 of the Act.

36. Northwest Airlines, Inc.—Certificate of Public Convenience and Necessity (Duluth-Twin Cities Operation)—Docket No. 131-1 Civil Aeronautics Authority Rep. 573 (1940). This proceeding involved application of Northwest Airlines for a certificate to engage in scheduled air transportation (1) between Milwaukee, Wisconsin, and Minneapolis, St. Paul, Minnesota, and (2) between Milwaukee, Wisconsin, and Marquette, Michigan.

37. For the purposes of this study we are primarily concerned with the provisions of Section 2 (d), 49 U.S.C.A. § 402 (1944), relating to competition, which has previously been quoted.

38. Section 406 (a) (49 U.S.C.A. § 485 (a) [1944]) of the Act and (b) provide for the determination of rates of compensation for the transportation of mail by air carriers, and the taking into consideration of the "need" of a carrier in establishing such rates. These are the so-called "subsidy" provisions of the statute and are of only incidental concern here.

Section 302 (a) (49 U.S.C.A. § 452 [1944]) of the Act provides for the establishment and maintenance of civil airways and air navigation facilities by the Civil Aeronautics Administrator.

39. 1 C.A.A. Rep. 577, 578. In the particular case the Board denied the application except for a route between St. Paul—Minneapolis, Minnesota, and Duluth, Minnesota—Superior, Wisconsin.

not the congressional intent that the air transportation system of the country should be 'frozen' to its present pattern. On the other hand, it is equally apparent that Congress intended the Authority to exercise a firm control over the expansion of air transportation routes in order to prevent the scramble for routes which might occur under a 'laissez faire' policy. Congress, in defining the problem, clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices, such as the opening of nonproductive routes, and other economic results which characterized the development of other modes of transportation prior to the time of their governmental regulation."

In the United Air Lines-Western acquisition case,⁴⁰ the Board developed more fully its concept of the meaning of "a firm control over the expansion of air transportation" in relation to competition, as expressed in the first Northwest route case.⁴¹ It was here that the Board laid down the principle of a "reasonably balanced system of air transportation."

This case did not involve a new route proceeding, but rather an application to the Board by United Air Lines for approval of the acquisition of control by United of Western Air Express pursuant to Section 408 (b) of the Act.⁴² The question of competition was squarely raised since the Board could not approve the acquisition if it would "result in creating a monopoly or monopolies and thereby restrain competition."⁴³ The decision on this issue, declared the Board, must be reached by an examination of the proposed merger in the light of the standards of public interest set forth in Section 2 of the Act.⁴⁴ These standards are the same as those governing in the new route cases.

The Board found that the acquisition of control of Western by United and the subsequent proposed merger or purchase of assets would so increase the size of United and its control of

40. United Air Lines Transport Corporation—Acquisition of Western Air Express Corporation—Docket No. 270—1 C.A.A. Rep. 739 (1940).

41. 1 C.A.A. Rep. 577 (1940).

42. As previously noted, Section 408 of the Act (49 U.S.C.A. § 488 [1944]) makes it unlawful, unless approved by the Board, for any air carrier to acquire control of any air carrier in any manner whatsoever.

43. Section 408 (b) of the Act (49 U.S.C.A. § 488 (b) [1944]).

44. 1 C.A.A. Rep. 739, 745 (1940): "Thus, as we have noted, section 2 of the Act provides, among other things . . . criteria of public interest: . . . 'Any merger or other form of acquisition, therefore, which, by stifling normal competition or by encouraging destructive competition, would tend to retard or prevent the development of an air transportation system properly adopted to the present and future needs of the nation must be deemed inconsistent with the public interest. . . .'"

traffic in the area west of the Rocky Mountains as to adversely effect the existing competitive opportunities for western business.⁴⁵ It also found that, if the acquisition were approved, Western's route, which was the only north-south route west of the Rockies independent of the transcontinental air carriers would become a part of United's system. Such a result was felt to be undesirable at the existing stage in the development of a properly balanced system of air transportation.⁴⁶ The Board thus determined that the factors opposed to the public interest in the acquisition outweighed the considerations urged in support and denied the application. The decision was based on the concept of "balanced competition" which would be destroyed if the acquisition were approved. Such a concept was summed up in these words:⁴⁷

"In reaching a judgment on the soundness of the present proposal of the applicant, we recognize the fact that air transportation in the United States, despite its remarkable advance in the short period of its existence, is still in a stage of rapid development and expansion, and that neither the limits of that expansion nor the ultimate design of the national air map can at this time be safely predicted. The regulatory policy set forth in the Act indicates that Congress was fully aware of this fact. Past experience in the air transport industry, as in other industries affected with a national public interest, presented abundant evidence of the harmful effects of uneconomic duplication of services, unsound combinations, and undue concentration of economic power. Reference to both the legislative history and to the text of the Act demonstrates the congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the Nation against the evils of unrestrained competition on the one hand, and the consequences of monopolistic control on the other. In attaining this objective the Act seeks a state of competition among air carriers to the extent required by the sound development of the industry. The maintenance of such a constructive competition, we believe, will be best served at the present state of the industry's development by a reasonably balanced system of air transportation in every section of the country."

45. *Id.* at 745.

46. *Id.* at 746, 747.

47. *Id.* at 749.

The Board then went on to find that concentration of control would be fatal to such a competitive system.⁴⁸

"It is the concentration of ownership and control which is fatal to the operation of a competitive economy. To allow one air carrier to obtain control of air transportation in the West Coast area greatly in excess of that possessed by competitors would, in our opinion, seriously endanger the development of a properly balanced air transportation system in this region; and the elimination of the only independent north and south air carrier west of the Rocky Mountains might be expected to retard the promotion of air travel in this direction."

This decision furnished a general framework of a concept of competition within which our air transportation system could grow. It stressed two factors: (1) the gaining of an undue advantage which would retard competition, (2) the elimination of a competition as a brake on air travel. It definitely indicated that the "public interest"⁴⁹ demanded competition. There remained the practical application of the general principle of "balanced competition" to particular situations, and it is to these that we now turn our attention.

The first group of such cases involves issues of monopoly and competition arising from attempts of one air carrier or other carrier to control another air carrier.

In an opinion handed down the same day as the United-Western acquisition decision, and involving the same two parties, the Board further defined its views as to the meaning of a "monopoly" prohibited under the Act.⁵⁰ The decision in the acquisition case was founded on a broad consideration of "public interest" factors. Now the Board specifically passed upon the scope of the prohibition in Section 408(b) of the Act against a monopoly which would restrain competition or jeopardize another air carrier.⁵¹ The case involved an application filed with the

48. *Id.* at 750.

49. The case was decided on the basis of the provision in Section 408(b) of the Act requiring a finding that a proposed acquisition of control "will not be consistent with the public interest" for disapproval.

50. *United Air Lines Transport Corp. and Western Air Express Corp.—Interchange of Equipment* (Docket No. 215), 1 C.A.A. Rep. 723 (1940).

51. In order to approve a consolidation, merger, purchase, lease, operating contract, or acquisition of control under Section 408(b), the Board must not only find it consistent with the public interest, but must find that a "monopoly" is not created, thereby restraining competition or jeopardizing another air carrier not a party to the transaction.

Board asking for approval of an agreement between United Air Lines Transport Corporation and Western Air Express Corporation for the interchange of certain planes at Salt Lake City, Utah. United operated Route No. 1 from New York to San Francisco. At Salt Lake City, it connected with Western's Route No. 13 extended from that point to Los Angeles and San Diego. The two lines had maintained connecting schedules which involved a change of planes at Salt Lake City. The proposed agreement provided for the interchange of sleeper planes so as to provide a through service over the two routes. The Board approved the agreement with a minor condition.⁵² The proposal was found to be not adverse to, or inconsistent with, the public interest, and would not result in creating a monopoly.

In the realm of public interest factors, the Board held that the interchange would offer a kind of competition that was contemplated by the Act. In speaking of the requirements of Section 2 of the statute, the Board declared:⁵³

"If, in the ordinary case, competitors are to be prevented from inaugurating improvements in service solely as a protection to a particular air carrier, the development of an adequate air transportation system in this country will be retarded rather than assured. The improvement of a connecting service afforded by two air carriers would appear to be just as desirable as improvements in service which can be made by the carriers individually, and under the express terms of section 2(b) of the Act, the coordination of air transportation is to be encouraged."

Having determined the agreement to be consistent with the transportation. In denying an application of an "air utility" for public interest, the Board went on to find that, since no additional control over air transportation was involved, the agreement would not result in creating a monopoly.⁵⁴ It was concluded that the word "monopoly," as used in Section 408(b) of the Act, means the control of a particular business or article of trade, without regard to the results which may flow therefrom.⁵⁵ As applied to air transportation, it has reference to a particular degree of control of such transportation, or any phase thereof,

52. The condition required the insertion of a provision in the agreement relating to a depreciation charge on planes leased under the agreement.

53. 1 C.A.A. Rep. 723, 731 (1940).

54. *Id.* at 737.

55. *Id.* at 733.

in any territory or section of the country.⁵⁶ "It follows that the restraint of competition is a factor, insofar as the application of the proviso⁵⁷ is concerned, only if it results from that degree of control which the Authority decides constitutes a monopoly of air transportation."⁵⁸ Such a degree of control was missing in the case at bar.

Subsequent cases have indicated that the competitive situation will be examined closely to determine whether the proposed acquisition of control will result in a monopoly, which will restrain competition. Thus, the Board found that such a monopoly would not result from the acquisition of Marquette Airlines by Transcontinental & Western Air where TWA would have competition from at least one of its two transcontinental competitors at every point on the route, if the acquisition were approved,⁵⁹ nor from the acquisition of Mirow Air Service by Wien Alaska Airlines which, although it would make Wien Airlines the largest operator in the Seward Peninsula area, would leave several competitors handling a substantial volume of business.⁶⁰ On the other hand, the Board disapproved an agreement between Pan American, Matson Navigation Company and Inter-Island Steam Navigation Company, relating to a joint operation of local air service between the United States and

56. *Id.* at 734.

57. The proviso in Section 408(b) (49 U.S.C.A. § 488 [1944]) directed against monopolies which restrain competition or jeopardize another air carrier.

58. 1 C.A.A. Rep. 723, 734 (1940).

59. Acquisition of Marquette by TWA (Docket No. 315), 2 C.A.A. Rep. 1 (1940). In this proceeding, the acquisition was disapproved because of the excessive purchase price to be paid. A supplemental opinion on December 18, 1940, approved the acquisition pursuant to a supplemental agreement reducing the purchase price. This opinion was conditioned on a deposit of payments in escrow pending a determination of Marquette's "grandfather" rights. The condition was terminated by decision of Oct. 17, 1941, settling Marquette's rights. Marquette Airlines, Inc.—Certificate of Public Convenience and Necessity—Acquisition by TWA (Docket No. 7-401 (E)-1), 3 C.A.B. Rep. 111 (1941).

60. Wien Alaska Airlines, Inc., Sigurd Wien & Mirow Air Service—Acquisition of Mirow Service (Docket No. 552), 3 C.A.B. 207 (1941). But the Board denied the proposed acquisition of Cordova Air Service by Alaska Airlines because it "would further increase that carrier's [i.e., Alaska Airlines] overwhelming competitive advantage in the territory to such an extent as to make the acquisition inconsistent with the public interest by precluding the development of a proper competitive balance." Acquisition of Cordova Air Service, Inc. by Alaska Airlines, Inc. (Docket No. 930) June 27, 1944.

See also Pan American Airways, Inc.—Acquisition of Pan-American Airways—Africa, Ltd., 3 C.A.B. 32 (1941); Lockheed Aircraft Corp.—Acquisition of United Airports Co., 2 C.A.B. 328 (1940); Pan American, Inc.—Merger, 2 C.A.B. 503 (1940) for other cases where acquisitions or combinations were held not to create monopolies restraining competition.

Hawaii, and certain traffic and agency matters, on a finding that the pooling of resources and interests by the three companies would stifle competition in air transportation between the West Coast and Hawaii.⁶¹

One other unusual type of case has arisen under Section 408 (b) of the Act, which has an important bearing on the question of competition. This case relates to attempts of other carriers to enter into the field of air transportation.

The second proviso of Section 408 (b) provides that where approval is sought for an acquisition of control of an air carrier by another carrier, the Board must find that the transaction will promote the public interest by enabling such other carrier to use aircraft to public advantage in its operation and will not restrain competition. The problem posed by this proviso came before the Board as a result of the relationship between American Export Airlines and American Export Lines, a steamship company. The steamship company created the airlines in 1937, and owned seventy per cent of its stock. In 1939, Export Airlines applied to the Board for a certificate to engage in air transportation between the United States and Europe. The proceeding also involved an application of Export Airlines for approval under Section 408 of the Act of its control by the steamship lines. Export Airlines was granted a temporary certificate to engage in air transportation across the Atlantic, as hereinafter discussed, but the application for approval of control by the steamship company was dismissed by the Board for want of jurisdiction.⁶² The Board construed the provisions of Section 408 as applying only to the acquisition of air carriers actually engaged in air transportation, and as not therefore applying to subsidiaries created for the purpose of initially developing an air transportation enterprise.⁶³ An appeal from the decision of the Board was taken to the courts by Pan American. The United States Circuit Court of Appeals (Second Circuit) reversed the Board as to its view of jurisdiction under Section 408, and remanded the question of the control of Export Airlines by Export Steamship lines to the Board for a determination on the merits.⁶⁴

In the subsequent reopened proceedings the Board found that the control of American Export Airlines by American Export

61. Pan American Airways, Inc.—Pan American-Matson-Inter-Island Contract (Docket No. 544), 3 C.A.B. 551 (1942).

62. American Export Airlines, Inc.—Certificate of Public Convenience and Necessity (Docket No. 238) 2 C.A.B. Rep. 16 (1940).

63. *Id.* at 46.

64. Pan American Airways Co. v. C.A.B., 121 F.(2d) 810 (C.C.A. 2d, 1941).

Lines (the steamship company) would not promote the public interest by enabling the latter to use aircraft to public advantage in its operation.⁶⁵ The Board determined that, although the principles which govern the Interstate Commerce Commission in its determination of cases involving railroad control of motor carriers⁶⁶ should not be strictly applied under Section 408 (b), the latter proviso was extremely restrictive:

"This proviso is extremely restrictive, and only those limited air transport services which are auxiliary and supplementary to other transport operations, and which are therefore incidental thereto, can meet the conditions laid down by that proviso. . . ."⁶⁷

The operation of air services by Export Steamship Company was found not to fit within this tight glove. Therefore, the Board ordered a divestiture of control.⁶⁸ As a result of this decision, it will be difficult for a steamship company or other type of carrier to acquire control of an air carrier. This fact appears also from the decision of the Board denying to Export Airlines permission to acquire substantially all of the outstanding stock of TACA, a Panamanian corporation holding the stock of various airlines operating through Central America.⁶⁹

Of additional significance in the question of other forms of transportation engaging in air operations is that part of the Board opinion in the *American Export* control case⁷⁰ relating to the effect of the decision of the Circuit Court of Appeals upon applications of carriers engaged in other forms of transportation for certificates of public convenience and necessity under Section 401. The Board has held that, as a result of the construction placed upon the Act by the courts, a carrier other than an air carrier, applying for a certificate of public convenience and necessity under Section 401 of the Act, must show that the provisions of Section 408 (b) are met, i.e., it must show that the granting

65. *American Export Airlines, Inc.—American Export Lines—Control—American Export Airlines* (Docket No. 319), 3 C.A.B. Rep. 631 (1942).

66. Under Section 213 of the Interstate Commerce Act (49 U.S.C.A. § 313 [1944]) no common or contract carrier may consolidate or merge with another carrier, or may acquire control of another carrier, without the specific approval of the Commission. Where the controlling carrier is other than a motor carrier, the same general test set up in the second proviso of Section 408(b) (49 U.S.C.A. § 488 [1944]) of the Civil Aeronautics Act is applicable.

67. 3 C.A.B. Rep. 631, 636 (1940).

68. *Id.* at 638.

69. *American Export Airlines, Inc.—Acquisition of TACA, S.A.* (Docket No. 491), 3 C.A.B. 216 (1941).

70. 3 C.A.B. Rep. 631 (1940).

of the certificate will promote the public interest by enabling the other carrier to use aircraft to advantage in its operation. Translated into the language of the Board decisions, such carrier must show that the proposed air transport services are "auxiliary and supplementary" to its other transport operations. This result narrowly delimits the entrance of other forms of transportation into the field of air operations. The reasoning of the Board on this issue is fully set forth in the *American Export* control case.⁷¹ The Board, before the court decision, as pointed out above, had construed the pertinent provisions of Section 408 (b) as applying only to the acquisition of air carriers actually engaged in air transportation. Under this view the Board would not regard as inconsistent with the intent of Congress the entrance by other types of carriers into the air transportation field by the establishment and development of new air transportation services.⁷² The decision of the Circuit Court of Appeals necessitated a change in this view, declared the Board.⁷³

"However, the decision of the Circuit Court of Appeals remanding this matter to the Board for consideration on its merits gives a broad and comprehensive interpretation to the provisions of the section in question, which now makes clear that it must have been the purpose of Congress to prohibit, unless the conditions of section 408, including its provisos, were met, the entry of carriers engaged in other forms of transportation into the air transportation field through wholly-owned subsidiaries irrespective of whether this was accomplished through the acquisition of a corporation engaged in an existing operation or of one about to inaugurate a new air transport service.

"Under this construction of the statute no sound basis appears for distinguishing between an undertaking of a carrier engaged in another form of transportation to engage in air transportation through a subsidiary and its undertaking to engage in the air transportation field directly. Of course, the acquisition referred to in section 408 could apply only to the case where the air transportation is conducted through some business enterprise separate from the carrier engaged in another form of transportation. However, as indicated above, it seems clear that Congress must have intended the

71. *Id.* at 636, 637.

72. *Ibid.*

73. *Ibid.*

same principles to apply to both situations because there is no sound basis for distinguishing between these situations so far as the public interest is concerned.

"In determining whether the 'public convenience and necessity' require the granting of an application for a certificate by a carrier from another field of transportation, the Board must give substance to that term in accordance with the policy laid down by the Act as a whole. Therefore, in considering an application under section 401 filed by a carrier other than an air carrier, we would not construe the public convenience and necessity as requiring the issuance of a certificate to such carrier unless the evidence indicates that the provisions of section 408 (b) are met."

In application of the principle of "balanced competition" to domestic new route proceedings the Board has been faced with the question of the entrance of new carriers into the field of air transportation. On this issue the Board has indicated that the field is not closed, although the need for such carriers must be clearly shown. In the *All-American Aviation* case, the Board showed that it was not sympathetic to the view that existing carriers had a right of precedence in the development of new services:⁷⁴

"Such an assertion of a preemptive right ignores the fact that applicant is a pioneer in a type of service which the established carriers have made no attempt to develop. . . .

"Any such theory as advocated by the interveners, which would result in reserving solely for existing air lines the privilege of providing all additions to the present air-transportation system of the United States, is untenable. Our adoption of such a policy would certainly not be consistent with a sound development of air transportation. . . ."⁷⁵

In the *Additional Service to Atlanta and Birmingham* case,⁷⁶ the Board pointed out some of the difficulties in the way of a new carrier entering into the field of regular air transportation. That case involved in part applications by Pennsylvania-Central, an established carrier, and Dixie Airlines, a newly organized company, for a route between Pittsburgh and Birmingham. The

74. *All American Aviation, Inc.—Certificate of Public Convenience and Necessity* (Docket No. 363, 2 C.A.B. 133, 145, 146 (1940)).

75. *Ibid.*

76. *Delta Air Corp.—Certificate of Public Convenience and Necessity* (Docket No. 162), 2 C.A.B. 447 (1941).

route was awarded to Pennsylvania-Central largely on the ground that it is undesirable to increase the number of instances in which connections between two carriers would be necessary by authorizing a new carrier, when the service could be provided as well as part of the system of an existing carrier. The Board recognized the implications of this decision as to the certification of new carriers:⁷⁷

"In reaching this conclusion we recognize the fact that the considerations which lead us to this determination would be equally applicable in any case in which an existing carrier is competing with a company without operating experience for a new route or service. The number of air carriers now operating appears sufficient to insure against monopoly in respect to the average new route case, and we believe that the present domestic air-transportation system can by proper supervision be integrated and expanded in a manner that will in general afford the competition necessary for the development of that system in the manner contemplated by the Act. *In the absence of particular circumstances presenting an affirmative reason for a new carrier there appears to be no inherent desirability of increasing the present number of carriers merely for the purpose of numerically enlarging the industry. . . .*"

The need for a new carrier may be shown to exist, however, as is witnessed by the grant of a temporary certificate to Essair, Incorporated, such a carrier, to operate an air transportation service between Amarillo and Houston.⁷⁸ This was essentially a "feeder" type of operation, as distinguished from a trunk line service, and may indicate, along with the *All-American* case, that the future of the newly organized carrier in the air competitive picture lies in such new and specialized types of service.⁷⁹

In the area of international operations, the opinions of the Board have thus far shown a belief in the need for competition between American flag carriers and a willingness to issue a certificate to a new carrier in order to supply such competition. This

77. *Id.* at 480.

78. *Essair, Inc.*, Docket No. 206 (Nov. 5, 1943). This decision of the Board was appealed to the courts by Braniff Airways. The United States Court of Appeals for the District of Columbia remanded the case for a hearing on the narrow issue going to the "fitness, willingness, and ability" of *Essair*. *Braniff Airways, Inc. v. C.A.B.*, No. 8722 (U.S.C.A., District of Columbia, 1945).

79. The Board has before it numerous applications for "feeder" type service by new carriers.

was illustrated by the decision of the Board in granting a temporary certificate to American Export Airlines to operate over the Atlantic.⁸⁰ The Board was clear in expressing a need for competition.⁸¹

"It is therefore apparent that the fundamental issue is whether a second United States air carrier should be authorized to provide additional air transportation service over the North Atlantic trade route or whether the opportunity of furnishing all such additional United States in transportation service should be reserved exclusively to intervener . . . [i.e. Pan American].

"We are unable to find that the continued maintenance of an exclusive monopoly of trans-Atlantic American flag air transportation is in the public interest. . . ."

In its application of the principle of "balanced competition" to the certification of new services, the decisions of the Board demonstrate a belief in the need for direct competition in the advancement of air transportation. It has established the view that the operation of a new route should not be undertaken by a carrier operating a competing service, as an intensive development of the new route is not likely to follow if one carrier serves both routes.⁸² The question of the effect of diversion of a new route upon an existing operator is given due weight, but is not controlling in every case. Where the public advantage outweighs the loss to the existing carrier, the competing service will be certified.⁸³ This position was summed up in the case of *Braniff Airways, Memphis-Oklahoma City-El Paso Service*:⁸⁴

80. American Export Airlines, Inc.—Trans-Atlantic Service (Docket No. 238), 2 C.A.B. 16 (1940).

81. *Id.* at 29, 34. The Board has on file about 100 applications by American citizens to operate international routes. The Board has divided the world into four areas for purposes of hearing these applications. Such proceedings are in process. They "will require the determination of many important issues such as the question of whether there should be more than one American flag carrier in the international field; if so, whether they should operate as much as possible in different world areas or whether there should be competition between American flag carriers; whether, if there is to be more than one, there should be any prohibition against a domestic carrier proposing to operate beyond the borders of the United States; and many related questions of an economic and political nature."

82. *Braniff Airways, Inc.—Houston-Memphis-Louisville Route* (Docket No. 1-401 (b)-1) 2 C.A.B. 353, 386 (1940).

83. *National Airlines—Daytona Beach-Jacksonville Operation* (Docket No. 5-401 (b)-1), 1 C.A.A. Rep. 612 (1940); 2 C.A.B. 353, 386 (1940).

84. Docket No. 503 (Decided November 10, 1944), Supplemental Opinion May 8, 1945.

"It is to be expected that as the national air transportation system grows it will become less and less possible to authorize new services without affecting in some degree the services of other carriers. In the present case the competitive disadvantage which would result to TWA from the addition of Tulsa and Oklahoma City to American's trans-continental route is not of such magnitude as to affect seriously its financial position or to impair its ability to render service to the public, nor does it outweigh the public advantage which will result from the transcontinental service by American at these two points. . . ." ⁸⁵

One of the most serious problems as to competition arising from the certification of new routes, is that of providing additional service over a route. The Board early laid down the rule that there was to be no wastefully duplicating, competitive service over a route. In denying an application of Eastern for a route between Miami and Tampa already served by National, the Board declared: ⁸⁶

" . . . it is apparent that excessive competition may prove as detrimental as an inadequate amount of competition. . . ."

A corollary of this doctrine was the concept that normally where air transportation service is needed on a route already served, the public interest requires that additional service be provided by the existing carrier rather than by authorization of competing service. The Board has not in terms recognized this doctrine though decisions point in that direction, ⁸⁷ and its existence in the public utility field was noted by the Board in the *American Export Airlines, Incorporated (Trans-Atlantic Service)* case. ⁸⁸

"It is true that where territory is served by a utility which (1) has pioneered in the field, (2) is rendering efficient service, (3) is fulfilling adequately the duty which, as a public utility, it owes to the public and (4) the territory is so generally served that it may be said to have reached the point of saturation as regards the particular service which the

85. *Id.* at 6.

86. 1 C.A.A. Rep. 612, 617 (1940).

87. Northwest Airlines, Inc.—Certificate of Public Convenience and Necessity—Additional Service to Canada (Docket No. 327), 2 C.A.B. 627 (1941); In Pan American Airways, Inc.—Los Angeles-Mexico City Operation (Docket No. 318), 2 C.A.B. 807 (1941), the doctrine was offered, but was not passed upon by the Board.

88. 2 C.A.B. 16, 34.

utility furnishes, the trend today is to protect the utility within such field. . . .”

In this case the Board seems to indicate that where the available business is ample to support another operation, and there is lacking any worthy competition for an existing operator, a new carrier may be placed in the field.⁸⁹ Yet, in the *Additional Services to Canada* case, the Board expresses the view that “the contention that there should be competing, duplicating services between two points merely to prevent one government regulated carrier from dominating that field is unimpressive.”⁹⁰ The issue would appear to have been resolved in favor of additional service and competition where there is sufficient traffic to support it by more recent cases of the Board.⁹¹ This trend toward greater competition was begun in the *T.W.A. North-South California* case⁹² where the doctrine of the right of an existing carrier to furnish new service was thrown completely over for the principle of competition:⁹³

“This case raises again the fundamental question of the proper role which competition should play in the development of our air transportation system. . . .

“In considering the extent to which competition is necessary to assure the sound development of an air transportation system . . . its justification does not depend upon the unwillingness of an existing carrier to render adequate service. The carriers’ failure in this regard may evidence a need for competition, but its ability and willingness to furnish a sufficient volume of services does not, of itself, constitute a bar to the authorization of a competitive service. Otherwise, no competition would ever be authorized for there is no limit to the extent to which an existing carrier could expand to meet increased demand. Adequate service . . . is but the minimum standard fixed by the Act, but considerations of national policy require much more.

89. *Id.* at 34, 35.

90. *Northwest Airlines, Inc.—Certificate of Public Convenience and Necessity—Additional Service to Canada* (Docket No. 327), 2 C.A.B. 627, 652 (1941).

91. On December 12, 1941, the Board announced that no further action would be taken in proceedings involving applications for new certificates of public convenience and necessity. An exception was made as to applications involving special considerations of national interest. On August 29, 1942, the Board resumed consideration of new route applications.

92. Docket No. 314, May 10, 1943; Supplemental Opinion (August 13, 1943).

93. *Id.* at 4-5 of supplemental opinion.

"The Act thus implies the desirability of competition in the air transportation industry when such competition will be neither destructive nor uneconomical and the Board is directed to implement such competition as will fulfill the purposes of the Act."

The Board then went on to declare that "there would be a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost." The same principles were enunciated in two later cases of the Board instituting additional service between New York-Miami and New York-Boston.⁹⁴

CONCLUSION

This brief review of concepts of competition in air transportation developed by the Board in its administration of the Civil Aeronautics Act shows that the Board has a firm belief in the function of competition to develop an air system in the public interest.⁹⁵ The Act was designed to prevent cutthroat competition in the air, which has proved disastrous in surface transportation. The Board decisions have carried out that purpose. At the same time, it has made clear that the public interest will best be served by the spur of competition, and its decisions have been directed toward providing such competition. Its views may best be summed up in the Board's own language. "It is of the greatest importance . . . to maintain a properly balanced system of air transportation in every section of the country in order to encourage constructive competition."⁹⁶

It is worth noting that the Board has been swinging towards more competition in air transport. In the early cases the language and the decisions of the Board tended to preclude additional competition. Recently the Board has indicated a willingness to permit more competition within the industry. This early attitude restrict-

94. Colonial Airlines, Inc.—Atlantic Seaboard Operation (Docket No. 445, Serial 2699), Feb. 19, 1944. Northeast Airlines, Inc.—Additional Service to Boston (Docket No. 13-401-B-1, Serial 2903), June 12, 1944.

95. As the Board declared in the Export-Trans-Atlantic Service Case, 2 C.A.B. 16, 32: "Competition invites comparisons as to equipment, costs, personnel, methods of operation, solicitation of traffic, and the like, all of which tend to assure the development of an air-transportation system properly adopted 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."

96. Braniff Airways, Inc.—Certificate of Public Convenience and Necessity, 2 C.A.B. 353, 386 (1940).

ing competition is understandable when it is remembered that in the period from 1938 to 1941, airlines were substantially subsidized through air mail payments. It was naturally felt that to permit additional competition and additional carriers might weaken the existing airlines, and throw a heavier burden of subsidy on the government. Services and facilities were certainly ample to meet the requirements of air transportation at that time. In the period from 1941 to 1943, there was an understandable hesitancy to grant new routes to carriers in competition with existing service because planes were not available to service new competitive routes. Moreover, the extent of post war competition could be better determined in the later stages of the war than the early stages. Of course, in the case of international routes, competition from foreign air carriers has forced an earlier decision in the assignment of new routes.⁹⁷

The Board's language in recent cases has indicated a desire for substantial competition in air transport. It must be pointed out, however, that its decisions have been more conservative than its language. In the period from 1938 to 1943, not only were no new carriers authorized to enter the domestic air transport field, but in only nineteen cases involving seventeen thousand route miles⁹⁸ did the Board permit service over new routes by an existing carrier. During the year ending June 30, 1944, moreover, only one additional carrier, Essair, Inc., was admitted to the domestic field, and that carrier was admitted on the rationale that it was performing a feeder service.⁹⁹ In addition in eight cases involving approximately 3,500 route miles, the routes of existing airlines were developed to afford competition with other airlines.¹⁰⁰ In view of the potential of air transport in the post war period, the development of competitive routes in these decisions is extremely conservative.

It is felt, however, that the language of the Board indicates a willingness to permit a far greater competition among carriers in the future. This attitude has been most noticeable in the recent cases. It is believed that the conservative action of the Board to date has not been occasioned by any lack of understanding of the

97. Board tentative pattern of international routes issued on June 14, 1944. Hearings are in progress on applications filed on the basis of this pattern.

98. See Board Annual Reports for 1939 (p. 19), 1940 (p. 4), 1941 (p. 13), 1942 (p. 22), 1943 (p. 28).

99. The certificate of Essair, Inc., was affirmed by the Board on April 27, 1945, after a remand by the circuit court. It was originally granted on November 5, 1943.

100. Annual Report of the Civil Aeronautics Board—1944.

value of competition in developing a sound air transport system. This hesitancy has been based upon the desire to develop the air transport system slowly rather than permitting a haphazard expansion. It is felt that the Board believed that since the routes were primarily for use in the post war period, decisions affecting these routes should be made as near to the post war period as possible. Under war time conditions with the lack of equipment to deal with the routes it was virtually impossible to develop an intelligent competitive route plan. There was no compelling necessity to decide domestic route cases, as in most cases there was no operating equipment. There is a strong indication in the opinions of the Board that, when the post war factors affecting air transportation become clearer, it will lean toward far more competition in the air transport industry than it has in the past. The conviction of the Board of the desirability of competition is well established.¹⁰¹ This conviction will take shape in the form of substantial competition on domestic routes as soon as the pattern for post war air transport is more clearly discernable. Moreover, in view of the Board's decision in the American Export case, it is believed that not only will existing carriers be brought in competition with each other by an extension of their routes, but that additional air carriers will and should be permitted to enter the field.¹⁰²

101. T.W.A., Detroit-Memphis Service (Docket 303) August 3, 1944; Northwest Airlines, Inc., Chicago-Milwaukee-New York Service (Docket No. 629), December 16, 1944; Western Air Lines, Inc., Denver-Los Angeles Service (Docket No. 519) November 14, 1944; Mid-Continent Airlines, Inc., Kansas City-Tulsa-New Orleans Service (Docket No. 651), January 15, 1945.

102. While the opinion of the Board in the Essair case, *supra*, is cautious, it is nevertheless an opening wedge that indicates new airlines might well be permitted new routes in future cases.