CONTROL OF AIR CARRIERS

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Introduction

Under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, the Civil Aeronautics Board has broad powers to regulate consolidations, mergers and acquisitions of control of air carriers. The statutory provisions are extensive in scope and intensive in application. Both intra-modal and inter-modal common ownership and control are subject to the Board's approval, and, with the latest amendment, the Board's jurisdiction now extends to approval of a non-carrier acquisition of control of an air carrier.

This paper cannot, of course, deal with all the Board's operations within this statutory framework. We can, however, describe the outlines of Board regulation, and trace some of the major current developments which illustrate the Board's struggles to work with its unusually complete kit of statutory tools.

Issues of carrier control are issues of competition. In common with all American regulatory statutes, the Federal Aviation Act embodies conflicting Congressional directives. Reduced to its lowest terms, the standard Congressional formula is: (1) competition is good and (2) competition is bad. A regulatory agency is then created to apply these two clear legislative directives in the light of the public interest. The Civil Aeronautics Board is the agency charged with this task in the field of air commerce.[1]

The Board's regulatory task is more than usually sensitive because it

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1. "However, the Board, at one and the same time, has to so regulate the carriers that competition is both encouraged and limited. It is encouraged to the extent that it is economically feasible and in the public interest. It is limited to the extent that it is neither economically feasible nor in the public interest." Acquisition of Control of Air Carriers, House Report No. 91-261, 91st Cong., 1st Sess., p.3.

"The doctrine of controlled competition, which seemed to emerge as the theory of the Motor Carrier Act, can also be recognized as the basis of the Civil Aeronautics Act; its contradictory elements are stated in paragraphs (c) and (d) of the policy declaration and recur in the legislative history." Fulda, *Competition in the Regulated Industries: Transportation* (1961), p. 16.

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deals with a rapidly growing industry. One of the Board's principal jobs is to promote and encourage the growth of its industry. In contrast, Interstate Commerce Commission regulation of railroads, for example, does not have as a major goal the building of new railroads.

The Board's promotional aims have a profound influence on its resolution of issues of control. Particularly when surface carriers seek to acquire or control air carriers, the fear that the growth of air commerce may be stunted becomes a principal matter for discussion.[2] The Board's very recent dealings with proposals by motor carriers to enter the business of air forwarding offer an excellent example both of the traditional clash between doctrines of competition and non-competition, and of the influence of promotional aims on the Board's decisions. Thus, after describing the statutory framework and some of the Board's past interpretations and methods, we will consider the Motor Carrier-Air Forwarder controversy as the best current example of the Board's regulation of air carrier control.

I. The Statutory Framework

The Declaration of Policy of the Federal Aviation Act of 1958 appears in Section 102, 49 U.S.C. 1302, which reads:

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (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 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

2. "When Congress enacted the Civil Aeronautics Act of 1938, it intended to prevent the control of the struggling airlines by those engaged in a competing form of transportation."—*Motor Carrier—Air Freight Forwarder Investigation*, Opinion on Remand, April 21, 1969 (Order 69-4-100).

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 promotion of safety in air commerce; and

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

Some of these Congressional directives—such as the preservation of inherent advantages of air transportation—are familiar from other transportation statutes.[3] Others—such as "competition to the extent necessary to assure . . . sound development"—are unusually explicit enunciations of conflicting instructions. It is interesting to note that of the six sub-paragraphs of Section 102, five refer explicitly either to "encouragement and development" or to "promotion".

Section 408 of the Act gives to the Board its plenary powers over acquisitions of control of air carriers.[4] As Section 408(a) now stands, it reads (49 U.S.C. 1378(a):

"(a) It shall be unlawful unless approved by order of the Board 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, 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 thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to

3. For example, the National Transportation Policy, 49 U.S.C.A. note preceding Section 1, begins: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each . . ."

4. The Board deals with "interstate air transportation", "overseas air transportation" and "foreign air transportation", and with trunk carriers, local service carriers, supplemental carriers, all-cargo carriers, foreign air carriers, indirect air carriers and so on. We make no pretense here of complete treatment of regulation of all types of air carriers.

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, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided*, That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

(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."

Section 408(a)(5) is new matter, changed in 1969 by P.L. 91-62, discussed below. Also added at the same time were: (i) a requirement that any person owning more than five per cent of an air carrier report such ownership to the Board (Section 407(b), 49 U.S.C. 1377(b)); and (ii) a new subsection 408(f), 49 U.S.C. 1378(f), creating a presumption that the ability to vote ten per cent of the outstanding voting securities of an air carrier is control of the air carrier.

Section 408(a) differs in several important respects from the less stringent provisions of other transportation statutes. Thus:

(i) Section 408(a) covers not only control relationships among air carriers, but also (a) relationships between air carriers and common carriers by other modes, and (b) relationships between air carriers and any person engaged "in any other phase of aeronautics." "Aeronautics" in turn is defined (Section 101(2), 49 U.S.C. 1301(2)) as "the science and art of flight." Thus, relationships between a motor carrier and an air carrier are covered, as are relationships between an aircraft manufacturer and an air carrier.

(ii) As amended in 1969, Section 408(a)(5) extends to *any person* acquiring control of an air carrier, whether or not such person has any other surface carrier links.

Since Section 408(a) requires prior Board approval, the Board has developed a "Sherman doctrine" calling for disapproval of any relationship consummated prior to submission to the Board.[5]

While Section 408(a) is broad in scope, the Board's powers to approve are limited by Section 408(b) and its three provisos:[6]

> "(b) Any person seeking approval of a consolidation , merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public

5. "An application under 408 or 409 will not be considered by the Board for approval so long as the action or relationship exists in apparent violation of the Act, whether or not the action or relationship in question would ultimately be found to be consistent with the public interest." *Sherman, Control and Interlocking Relationships,* 15 C.A.B. 876, 881 (1952).

6. Section 408(b) traces back to Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), and its antecedents. Apparently the oldest similar statute is the Panama Canal Act of 1912, 37 Stat. 560, 566, 567, now appearing as Sections 5(14), (15) and (16) of the Interstate Commerce Act, 49 U.S.C. 5(14), (15), (16).

interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction."

In addition to the Section 408 restrictions on control, Section 409 of the Act, 49 U.S.C. 1379, extends the Board's powers to supervision of any interlocking relationships—that is to officers and diredtors common to two air carriers, or an air carrier and a surface carrier, or an air carrier and a person engaged in any phase of aeronautics.

The two major control sections (408 and 409) are supplemented in the Act by section 412 (49 U.S.C. 1382) dealing with agreements among air carriers, and by section 414 (49 U.S.C. 1384) conferring anti-trust immunity. Other sections give the Board extensive powers to require reports (Section 407, 49 U.S.C. 1377). Also under section 416(b) (49 U.S.C. 1386(b)) the Board may exempt air carriers from regulation and under section 101(3) (49 U.S.C. 1301(3)) may exempt indirect air carriers—*e.g.*, air freight forwarders—from the provisions of the Act.

Naturally, these statutory provisions have given rise to extensive Board regulations, appearing in the Board's Economic Regulations as:

— Part 245 and 246 (reports of stock ownership);
— Part 251 (approval under section 409);
— Part 261 (agreements under section 412);
— Part 287 (exemption of certain interlocking relationships);
— Part 299 (exemptions from Section 408).

II. Extension and Limitation of Section 408[7]

A. New Applications

While section 408 is extremely explicit in dealing with control of existing air carriers, there is at least one surprising omission. That is the omission to cover new applications for air carrier authority by those who are already surface carriers. Plainly, the purchase of American Airlines by the Illinois Central Railroad is covered, but a railroad application for a certificate to operate on American's routes at least appears to be omitted.

In 1940, in *American Export Airlines—Certificate,* 2 C.A.B. 16, the Board had before it an application of a subsidiary of a steamship line for operating authority, and granted it in part. One of the issues was the application of section 408, and the Board held section 408 applicable "only when the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier." Pan American appealed the Board's decision, and in *Pan American Airlines v. Civil Aeronautics Board,* 121 F.2d 810 (C.A. 2, 1941), the Court held that the Board had been too literal in its reading of 408(a)(5), remanding for a 408 decision.

On remand, the Board then disapproved the steamship-airline relationship, interpreting the Court's decision to mean that Congress intended section 408 to apply to new applicants: *American Export Lines, Control-American Export Airlines,* 3 C.A.B. 619 (1942). Following a petition for rehearing, the Board issued a supplemental opinion reaffirming its decision: *American Export Lines, Control-American Export Airlines,* 4 C.A.B. 104 (1943). This decision was followed in *Latin American Air Service,* 6 C.A.B. 875 (1946).

Upon petition of nine steamship lines seeking Board reconsideration of its interpretation of section 408, the Board reconsidered, and held in *American President Lines et al.; Petition,* 7 C.A.B. 799 (1947):

> (1) That after further study "we no longer hold" that compliance with section 408 "can be considered a *legal condition* to the grant of a certificate", but

7. See, generally: Travers, "An Examination of the Civil Aeronautics Board's Merger Policy" 15 Kansas L. Rev. 227 (1967); Comment: "Merger and Monopoly in Domestic Aviation" 62 Col. L. Rev. 851 (1962); Allan, "Section 408 of the Federal Aviation Act: A Study in Agency Law Making" 45 Va. L. Rev. 1073 (1959). An extensive memorandum prepared by the Air Transport Association of America, "Adequacy of Existing Antitrust Safeguards in CAB Consideration of Section 408 Acquisitions of Control" appears at page 116 of the Hearings before the Committee on Commerce, United States Senate, on S. 1373, To Amend the Federal Aviation Act of 1958 (March 18, 20, 26, 1969).

(2) That "the Board must consider the standards set forth in . . . Section 408(b) in determining the question of public convenience and necessity."

More recently, the Board has reaffirmed and followed this interpretation: *Southeastern Area Local Services*, 30 C.A.B. 1318 (1959). Thus, as matters now stand, the Board will apply the section 408(b) standards in certificate proceedings.

B. Air Carrier Control of Other Carriers

On its face, section 408(a) appears to read only in one direction: control *of* air carriers *by* air carriers, or other common carriers (or others.[8] The section does not, however, appear to restrict acquisitions *by* air carriers of other interests—*e.g.*, purchase by an airline of a railroad. It might be thought that this omission was purposeful and that the statute attempted only to protect an infant air industry from capture, and not to protect others from capture by air carriers. Nevertheless, finding a statutory gap, the Board has filled it by decision.

Thus, in the *Air Freight Forwarder Case*, 9 C.A.B. 473, 504 (1948), the Board said:

> "Nowhere does Section 408 in terms forbid the control of a common carrier by an air carrier. However, for the reasons we have already stated in connection with the cases involving the common control of a surface carrier and an air carrier, we think the situation presented here is not in substance different from that where the surface carrier owns an air carrier."

Following this statement, the Board has repeatedly found jurisdiction over acquisitions by air carriers of other carriers. Thus

> (i) In *Transcontinental and W.A.—Ethiopian Agreement*, 9 C.A.B. 713, the Board found 408(a)(3) jurisdiction over TWA's proposed management of a yet-unformed Ethiopian air line.
> (ii) In *Trans-Caribbean Airways, Interlocking Relationships*, 34 C.A.B. 777 (1961), the Board found jurisdiction over TCA's proposed acquisition of a mass transit bus company operating in and around New York City. The Board said (34 C.A.B. at 779):
>
> "While section 408 of the Act does not *in haec verba* make

8. Board jurisdiction over air carrier mergers is explicit under Section 408, and will not be discussed here. For a major example, see *United-Capital Merger Case*, 33 C.A.B. 307 (1961), aff'd sub nom. *Northwest Airlines, Inc. v. C.A.B.*, 303 F.2d 395 (C.A.D.C., 1962).

unlawful the acquisition of control of a surface carrier by an air carrier without prior Board approval, the Board has held that the plain intent of Congress was to make unlawful, in the absence of Board approval, any acquisition which results in an air carrier and another common carrier becoming subject to unified control [citing the Air Freight Forwarder Case]. We therefore find that the proposed transaction is subject to the provisions of Section 408, unless exempted therefrom."

(iii) When Trans Caribbean Airways proposed to acquire a Central American railroad, the Board quoted and followed the language just recited above—Order E-18893(1962).

(iv) More recently, the Board held section 408 applicable

(a) To Overseas National Airways acquisition of the Greene Line, operating a paddle wheel riverboat—Order 69-10-76 (1969);

(b) To Overseas National Airways acquisition of a passenger cruise ship—Order 69-9-133 (1969); and

(c) To consolidated Freightways' (a motor carrier owning an air forwarder applicant) proposed acquisition of control of Pacific Far East Lines, a major transpacific steamship cargo carrier—Order 69-9-71 (1969).

In short, the Board uniformly holds that section 408 reads both upstream and downstream.

C. *"Use of aircraft to public advantage in its operation."*

The second proviso of section 408(b) requires that the Board disapprove a surface carrier's control of an air carrier "unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." The "use to advantage" clause requires interpretation. If broadly interpreted, almost any surface carrier could claim that control would be to public advantage in the surface carrier's operation. If narrowly interpreted, the proviso would be restricted to operations such as aircraft flying passengers from the deck of a passenger ship. Early in its history, the Board opted for a narrow interpretation.

In the *American Export Lines, Control—American Export Airlines* case cited above, 3 C.A.B. 619 (1942), the Board said of the second proviso:

"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."[9]

But, if the second proviso is this narrow, the Board would have to prohibit almost all surface carrier-air carrier relationships, whatever public advantage might be conferred. In order to have any regulatory room to operate, some means was necessary to permit some reationships. These means the Board has found.

D. Disclaimers and Exemptions

Consider the following situation, presented in *Application of Universal Airlines, Inc.*, Order 68-7-98 (1968):

> —a holding company (UCI) owns 100% of the stock of a supplemental air carrier (UVA);
> —UCI proposes to acquire 21% stock control of Bush Terminal;
> —Bush Terminal owns 100% of the stock of Bush Terminal Railroad Company, a rail common carrier operating solely within 50 miles of New York City.

If section 408 applies and particularly if the second proviso of section 408(b) applies—then the acquisition may be barred. But, quite plainly, a terminal railroad and a supplemental air carrier do not compete, and there is no logical reason why the acquisition should not be permitted. Faced with these facts, the Board decided "to disclaim jurisdiction over UCI's common control of UVA and Railroad and the interlocking relationships described herein." While noting that it had held that "in appropriate circumstances it will disregard the separate corporate entities where failure to do so might defeat the legislative purpose of sections 408 and 409" the Board achieved its disclaimer of jurisdiction by deciding "to recognize and respect the several corporate entities involved." In other words, if section 408 is read literally, and no corporate veils are pierced, the Board would have no jurisdiction.

The Universal Airlines disclaimer is not unique. For example, in *Studebaker Corporation, Disclaimer*, 37 C.A.B. 738 (1962), the Board considered the application of section 409 (interlocks) to Studebaker's directors who were also directors of a railroad, a pipeline, and aviation

9. Accord, *Parks Investigation Case*, 11 C.A.B. 779, 787-89 (1950) aff'd sub nom. *Continental Southern Lines v. C.A.B.*, 197 F.2d 397 (C.A.D.C., 1952), cert. denied 344 U.S. 831.

equipment manufacturers. Studebaker proposed to acquire all the stock of Trans International Airlines, a supplemental. If Studebaker's control of Trans International made Studebaker an air carrier, Section 409 applied. The Board noted its power to "disregard the corporate entity and treat Studebaker as TIA's *alter ego*." But, under the circumstances it determined "to recognize and respect the corporate entities," and disclaimed jurisdiction.

As a procedural device, the disclaimer of jurisdiction is a workable means of disposing of trivial control problems without hearings. Still, there is not much intellectual satisfaction to be found in a procedure which works only by determining the transparency of corporate veils. Thus, in several recent cases the Board has firmly refused to disclaim jurisdiction, and has instead granted exemptions pursuant to section 416 of the Act.

For example, in *Trans Caribbean Airways, Interlocking Relationships*, 34 C.A.B. 777, where TCA proposed to acquire a local bus company, the Board found "that enforcement of Section 408 would be an undue burden upon TCA by reason of the limited extent of its operations, and is not in the public interest." TCA was then "exempted pursuant to section 416(b) of the Act from the provisions of Section 408 thereof to the extent necessary . . ."

In another TCA case the Board examined TCA's proposed acquisition of International Railways of Central America. Holding section 408 applicable, the Board found "that the transaction does not involve an undesirable combination, restraint of competition or conflict of interest." An exemption pursuant to section 416(b) was granted—Order No. E-18893 (1962).

Disclaimers and exemptions are not the only routes to approval without hearing. When Consolidated Freightways, owning both a motor carrier and an air forwarder applicant, proposed to acquire Pacific Far East Lines, a steamship company, the Board issued an "order of Tentative Approval"—Order 69-9-71 (1969). In this order, the Board recites a number of contentions as to the difference between carriage of cargo by sea and by air, including cargo weight, transit time, frequency of service, and so on. It concluded: "There appears to be no reasonable expectancy of effective competition in the immediate future between PFEL's operations and those of [air forwarder]." The tentative order of approval (permitting an opportunity for those objecting to file comments or seek a hearing) was then issued under the third proviso of section 408(b).

None of the foregoing should be taken to mean that the Board is

currently applying section 408 so flexibly as to permit all kinds of common control. For example, in *Acquisition of Los Angeles Airways, Inc. by Westgate-California Corporation*, Docket 19855 (Order 69-141 (1969), affirming Examiner Stodola's decision of October 14, 1968), the facts were:

> (i) Westgate-California, a conglomerate holding company, owned 90% of the taxicabs in Los Angeles, provided airport limousine service, and engaged in air freight trucking.
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> (ii) Westgate proposed to purchase
>
> (a) control of Los Angeles Airways, a helicopter carrier, and
>
> (b) all of the property of an air taxi operator.

The Examiner's decision begins by finding Westgate a common carrier and "the real party in interest." As a common carrier, Westgate had to meet the stiff terms of the second proviso of 408(b). This it failed to do, because it did not show it would use aircraft to public advantage in its operations. On the contrary, the Examiner felt that "common control of competing transportation activities would give rise to conflicts of interest that might impair the development of the kind of transportation LAA was certificated to provide." Application denied.

Throughout the disclaimers, exemptions, grants and denials under section 408 there runs a common thread: the protection of the air carrier from adverse outside influences, particularly the noxious influence of surface carriers. Where the surface and air carriers involved in the control relationships are in no way competitive, the Board very practically finds a way to approve.

There is a certain paradox in application of the second proviso of section 408(b). The proviso permits surface carrier control only of an air carrier it can use to advantage in its operations. Yet, once the surface carrier approaches a close working relationship with an air carrier, the spectre of competition is raised and denial is highly likely. At the same time, very remote competitive relationships (where aircraft could not possibly be used to advantage in running a belt railroad) are approved. This is not to say the Board was wrong, but only that sensible results do not fit well with the statutory language.

In short, if for no other reason than to codify the Board's doctrines, section 408 could undergo some legislative tightening. The latest changes in the section, which we next consider, did not do this, but did add a remarkable new area to the Board's jurisdiction.

III. The 1969 Amendments

Formerly, section 408(a) of the Act extended only to acquisitions of control of an air carrier by another air carrier, another common carrier, or a person engaged in a phase of aeronautics. Since August 20, 1969, when P.L. 91-62 was approved, subsection (a)(5) extends to control of an air carrier by "any other person."

The legislative history of the 1969 amendments reveals considerable concern over takeovers of certain airlines by "undesirable" interests such as gamblers and rumored underworld interests.[10] In the face of this threat, the existence of loopholes in the regulatory power of the Board to deal with airline takeovers possibly harmful to the airline industry were brought to Congressional attention. Section 408 offered no protection, since it covered only acquisitions by other air carriers, other carriers or other persons concerned with aeronautics. Section 401, 49 U.S.C. 1371, restricting the transfer of operating certificates without Board approval, was no help, since it was not applicable where control was effected by transfers of stock ownership. As a result, the Board's only remedy lay in the difficult and time-consuming procedure of attempting to revoke the operating certificate under Section 401 in the event it felt the new management posed a threat to the public interest. In the interim, the new management might do considerable damage to the carrier. Moreover, there was considerable doubt of the Board's practical ability to revoke certificates since Section 401(g) provides that a certificate can be revoked only after notice and hearings, and only when a carrier intentionally fails to comply with the statute, or Board orders, rules or regulations.

10. The legislative history includes: Report of the Senate Committee on Commerce to Accompany S. 1373, No. 91-185, May 22, 1969; 1969 U.S. Code Cong. and Admin. News 1208 et seq. (hereinafter *Senate Report*); Conference Report No. 91-426. Statement of the Managers on the Part of the House, 1969 U.S. Code Cong. and Admin. News, 1220 (hereinafter *Conference Report*); "Acquisition of Control of Air Carriers" Report of the House Committee on Interstate and Foreign Commerce to Accompany H.R. 8261, No. 91-261, May 20, 1969 (hereinafter *House Report*); Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, 91st Congress, March 25 and 27, 1969, No. 91-7 (hereinafter *House Hearings*); Hearings before the Committee on Commerce, United States Senate on S. 1373, 91st Congress, March 18, 20 and 26, 1969, No. 91-14 (hereinafter *Senate Hearings*); Congressional Record, Vol. 115, July 2, 1969) (Senate passage) p. 7519 et seq., July 17, 1969 (House passage) p. 6039 et seq., and August 7 and 8, 1969.

By the time the Bill had emerged from Conference, the particular situations of threatened acquisitions which had lent urgency to the measure were resolved. Congressional Record, Vol. 115, August 7, 1969, p. H7156.

Public Law 91-62 also reflects the growing Congressional concern over the activities of acquisitive corporate conglomerates. The Senate report noted that the "trend toward acquisition of control of many diverse economic interests by single-corporate entities has accelerated markedly in recent months."[11] Congressman Brock Adams summarized the possible dangers to the health of the air industry posed by conglomerate acquisition as follows:

> "[R]aiders on the air-carriers . . . buy out a company in a particularly good cash position, drain the cash and use the cash for other of their operations. This is the traditional attack of the conglomerates on companies in cash positions. And we understand the air carriers are in a vulnerable position because they must accumulate large amounts of cash in order to update their equipment."[12]

Congress might have attacked the problem of corporate takeovers by conglomerates as a whole, rather than proceeding piecemeal, beginning with a regulated industry. In enacting P.L. 91-62, Congress decided to move ahead at once with respect to air transportation with the stated reasons being the government's "investment" of subsidy in the industry, and the longstanding public concern with fostering the industry's development.[13] In this view, conglomerate takeovers posed exactly the sort of danger to air carriers that regulation had been designed to prevent—i.e., control of air carriers by those without single-minded dedication to promoting air commerce.

One of the chief fears reflected in the Congressional hearings on the legislation were that the CAB would find itself in the business of regulating conglomerates as well as airlines. This might conflict with the Board's traditional regulatory role as an agency protecting and regulating air commerce exclusively. Moreover, there was considerable discussion as to whether the new amendments provided the Board with the needed standards. As Senator Pearson pointed out:

> ". . . the bill does not provide any criteria for weighing public interest in the acquisition of an air carrier by a noncarrier not engaged in any phase of aeronautics. While the Federal Aviation

11. *Senate Report* at 1211.

12. *House Hearings* at 17.

13. "To further such development [of air transportation], we have not only regulated the economic activity of carriers, but have, as well, extended subsidies and other aids to facilitate appropriate development. The interest and investment of the public in our transportation system must be protected." *Senate Report* at 211.

> Act of 1958, as amended, does provide criteria for measuring the public interest, those criteria were specifically designed for determining only the merits of acquisitions involving two or more carriers, or a carrier and one engaged in a phase of aeronautics."[14]

This concern was intensified by discussions as to the effect of Board approval of conglomerate acquisitions of control under Section 414, 49 U.S.C. 1384.

Section 414 provides for relief from operation of the antitrust laws for persons affected by CAB orders under section 408 "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." Thus, not only on issues of approval of a takeover but also possibly on questions as to what constituted "control", the CAB might move far into the antitrust field.[15]

Although not persuaded that the standards of sections 102 and 408(b) were ideal, the Department of Justice declined to recommend amendments to the substantive standards of the Act in light of "the precedent and the record which the Board has established in administering the criteria." This was coupled with an expression of faith "that the CAB [would] continue to be properly attentive to competitive considerations in evaluating future acquisitions subject to Section 408."[16]

Most of the standards of section 102 speak towards the promotion of air transportation. Section 102(d), which does mention competition, likewise puts it in the context of the development of an air transportation system. In Section 408(b) the first proviso requires that the Board shall not:

> "approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition. . . ."

14. Individual views of Mr. Pearson included in *Senate Report* at 1219.

15. Congress did not insert a proviso in PL-91-62 as urged by the Justice Department explicitly stating that CAB orders approving acquisitions should not preclude action under other anti-trust laws dealing with the effects of the acquisitions in industries outside air transportation. However, the House, Senate and Conference Reports all included strong statements that the new legislation was not intended to either diminish or increase the scope of relief then afforded by § 414 or the coverage of other anti-trust laws. See *Senate Report* at 1212; *House Report* at 4-5; *Conference Report* at 1221-22.

16. Letter to Congressman Staggers from Richard W. McLaren, Assistant Attorney General Anti-trust Division, April 4, 1969, *House Hearings* at 63-64.

but this is followed by the language:

> "[which would] . . . jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control."

Thus, although on balance the Justice Department expressed agreement with the legislation, during the Senate hearings Mr. McLaren, Assistant Attorney General, Antitrust Division, was concerned that:

> "[U]nder such legislation anticompetitive effects outside the air transportation industry either would receive no scrutiny at all or would be considered only by an agency with no experience in, or responsibility for the maintenance of competition outside of air transportation. Moreover, even if the CAB did scrutinize the competitive effects in other markets it would do so under a "public interest" standard of the Aviation Act. The result would be the application of different legal tests to transactions having identical efforts in nontransportation markets, depending on whether an air carrier was collaterally involved."[17]

Again in the House hearings, Mr. McLaren said:

> "[T]he CAB Act contains an antimonopoly proviso and that to me may fall short of standards that ought to be applied in such cases."[18]

Some nice problems in this field will arise if the new provisions of § 408(a)(5) are integrated into the line of Board cases which read air carrier acquisitions of other carriers to be within the purview of Section 408. If the other parts of 408 apply both upstream and downstream, then the Board might argue that 408(a)(5) now affords a basis for review of acquisitions by air carriers of any other concerns.[19]

During the hearings, there was considerable Congressional concern that the new provisions would inhibit the financial security and growth of air carriers, especially the smaller carriers, the air-taxi operators, etc. Under these provisions such carriers might have difficulty securing investments or raising needed capital. The resulting tension between this

17. *Senate Hearings*, at 76-77.

18. *House Hearings* at 62.

19. A related question as to whether the legislation would cover the establishment of a holding company by an airline was briefly touched upon in an exchange between Senator Cotton and Mr. Tipton, President, Air Transport Association, during the *Senate Hearings* at page 69.

policy and the determination to prevent takeovers of air carriers by undesirables is reflected in the proviso to 408(a)(5) allowing the Board to exempt acquisitions of a noncertificated air carrier from requirements of approval.[20] This same concern also figured largely in the debates as to the percentage of voting securities or capital to which the presumption of control would attach.

In addition, the hearings raise a number of other interesting questions sure to receive Board attention in the next few years. Even without the presence of the new amendment, the Board has had no dearth of major questions of control policy. And, as we next show, in the latest decisions there are indications of a lessening fear of the dangers of intermodal control.

IV. The Motor Carrier-Air Freight Forwarder Investigation[21]

Air freight forwarders consolidate air cargo shipments and forward them under their own air waybills in the aircraft of direct air carriers. They are thus the airborne equivalent of freight forwarders regulated by Part IV of the Interstate Commerce Act,[22] or the "non-vessel operating common carrier by water" under the Shipping Act.[23]

While air freight forwarders are not specifically mentioned in the Federal Aviation Act of 1958, they are treated as "indirect air carriers" defined in section 101(3), 49 USC 1301(3). The Board's jurisdiction over air forwarders has been judicially approved: *American Airlines et al. v. Civil Aeronautics Board*, 178 F.2d 903 (C.A. 7, 1949).

The proviso to section 101(3) gives the Board power to relieve indirect air carriers from the provisions of the Act. Utilizing this proviso, the Board' economic regulations, Part 296, relieve air forwarders from the requirements of notice and hearing prior to receiving a certificate of public convenience and necessity, and forwarder operating authorizations may be issued without hearing (Part 296.43). Air forwarders are not, however, exempted from most of the other regulatory provisions of Title IV of the Act, including sections 408 and 409.

The natural question is, if section 408 applies to air forwarders,

20. This provision also reflects a concern that the Board should not be overburdened with hearings on acquisitions of control. *Conference Report* at 1221.

21. Readers of this section are warned of a possible conflict of interest on the part of the authors, whose firm has represented and does represent surface carrier applicants for air forwarder authority.

22. 49 U.S.C. 1001 et seq.

23. Determination of Common Carrier Status, 6 F.M.B. 245 and 287 (1961).

whether the second proviso of section 408(b) applies to surface carrier acquisition of air forwarders? If so, a surface carrier would have to demonstrate that it would use aircraft to public advantage in its operations. In the original *Air Freight Forwarder Case*, 9 C.A.B. 473, 502 (1948), the Board held the second proviso inapplicable to acquisitions of forwarders. The natural reason for the holding was that the proviso was not intended to apply, because a forwarder cannot itself use aircraft in *its* operations. The Board's interpretation was upheld in *American Airlines v. Civil Aeronautics Board*, 178 F.2d 903, 909 (C.A. 7, 1949), and the Board reaffirmed in it the *Air Freight Forwarder Investigation*, 21 C.A.B. 536, 545 (1955) and 23 C.A.B. 376, 378 (1956).

In its first *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948),[24] the Board applied the policy of section 408 to air forwarder applications and approved four surface forwarder applicants. At the same time, control of an air forwarder by a surface forwarder was held subject to section 408 (with the second proviso of 408(b) not applying) and 408 approvals were issued. Ten air freight forwarder applicants in the case were related to motor carriers (only three of which were Class I carriers, and those with geographically limited operations); these 10 prevailed.[25] The railroad-controlled applicants were not as fortunate, and on the reasoning that railroads would protect their large fixed investments instead of promoting air forwarding, their applications were denied "particularly in the light of the provisions of section 408."

Railroad affiliates were successful one year later in the *Air Freight Forwarder Case (International)*, 11 C.A.B. 182 (1949), and again in the *Air Freight Forwarder Investigation*, 21 C.A.B. 536 (1955). In contrast, the Railway Express Agency was unsuccessful: *Railway Express, Airfreight Forwarder Application*, 27 C.A.B. 500 (1958).

In 1964, motor carriers of household goods received authorization to forward such goods by air in *Airfreight Forwarder Authority Case*, 40 C.A.B. 673 (1964). The Board noted that it had prohibited entry by surface carriers into air forwarding "where it appeared that such conflicts of interest would arise between air and surface operations as to result in material diversion of traffic from air to surface

24. Affirmed sub nom. *National Air Freight Forwarding Corp. v. C.A.B.*, 197 F.2d 384 (C.A.D.C., 1952).

25. *The Air Freight Forwarder Case* was followed in *Braungart et al., Interlocking Relations*, 19 C.A.B. 456 (1954). Examiner Keith interpreting the precedent as holding that "motor carrier affiliates, especially those of a local pickup and delivery character, would be useful to the applicants in bringing cargo to their consolidation points and in distributing shipments from break-bulk points" (19 C.A.B. at 461).

transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding." Finding no such elements present, it granted the applications.

Next, in 1965, the Board's staff, acting under delegated authority, disapproved common control of a motor carrier of refrigerated commodities and an air forwarder applicant: *Telstar Air Freight, Inc.*, Order E-22479 (1965). Reading the Board's precedents restrictively, the staff was "unable to find that approval of the relationships would not be inconsistent with the public interest."

Meanwhile, the rapid yearly growth of air cargo had stimulated truckers' interest. Denied access to direct control of air carriers by the second proviso of section 408(b), four long-haul truckers sought air forwarding authority. The stage was thus set for a major battle, with the stated issue: "whether long-haul motor carriers of general commodities should be granted entry into the airfreight forwarding field" (Order E-23117 (1966)).

Round one went to the applicants. The April 27, 1967 Initial Decision of Examiner Ruhlen in *Motor Carrier—Air Freight Forwarder Investigation* considered the number of existing forwarders (137 in 1967), the growth of air cargo, unused air freight capacity, and the proposals of the various applicants to establish new forwarder service, either themselves or through subsidiaries. He concluded that the "well-financed" organizations of the applicants "would contribute a substantial benefit to the public", that existing forwarders would suffer only "minor losses" from diversion, that conflicts of interest would not divert air cargo to surface transport, and that the applicants would not dominate direct air carriers. The Initial Decision would have granted all applications, together with all section 408 and 409 approvals required.

The Board's decision of September 22, 1967 (Order E-25725) affirmed the Examiner, Vice Chairman Murphy dissenting. The Board opinion is short (10 pages) and notes (1) trucker incentive to ship by air if forwarder authority is granted; (2) the incentive for intermodal air-truck carriage; (3) the availability of the applicants' "traffic generating capabilities" to stimulate air transportation, thus filling available air cargo space; and (4) the development of new markets aside from the major cities. In his dissent, the Vice Chairman advised "that one does not send a rabbit to market for lettuce" and that the "clearly defined conflicts of interests" of truckers "may bring about anti-competitive results rather than free competitive benefits." Round two to three of the four applicants.[26]

26. One of the four applicants was unsuccessful, the Board deciding to await further proceedings dealing with control of the applicant by a motor carrier holding company.

Round three went to the existing forwarders. On appeal, *ABC Air Freight Company v. C.A.B.*, 391 F.2d 295 (C.A. 2, 1968), the Court reversed. Judge Friendly's opinion holds:

> 1. The Board decision did not "measure up to the standards required by Section 8(b)" of the Administrative Procedure Act. The most serious deficiency found was the ambiguity of the decision—whether it merely granted four applications, or whether it "established a policy of entry for all truckers."
> 2. Until the Board decision under review, the Board's policy was to study particular applications to assure no material air-to-surface traffic diversion, and to assure conscientious promotion of air cargo. This policy was reversed without adequate explication.
> 3. The Board failed to make adequately supported findings as to conflict of interest, or as to public advantages anticipated.

Judge Moore, concurring reluctantly, was willing to have the case sent back to resolve any ambiguity (he seeing none), and to have the Board "buttress its position with further facts and findings."

Round 4 found the case back at the Board, with a 37-page Opinion on Remand (Order 69-4-100, April 21, 1969). Finding first a need for a new policy, the Board then noted the "alarming" increase in excess air carrier freight capacity and the need for a "dramatic" air freight breakthrough. Many existing air forwarders were found to lack necessary capital, while the applicants were large and well-financed, able to penetrate secondary markets, and capable of stimulating "an immense growth in air freight." Reconsidering the conflict of interest problem, the Board found that each of the three successful applicants met the test of conscientiously promoting air transport and indeed were anxious to shift small shipments to air. Then, announcing a controlled experiment, the Board said:

> "The time has come, the Board believes, to test the conflicts hypothesis in a controlled experiment. . . . During the experimental period, the Board will receive from the applicants special reports showing whether the applicants are stimulating off-line business, increasing traffic from outside present terminal areas, and receiving new traffic. . . ."
>
> "If other trucking-related enterprises can show that they are equally dedicated to air cargo promotion, they too will be eligible to participate in the experiment under the terms of the proposed regulations issued today."[27]

27. The proposed regulations appeared in the Board's April 21, 1969 Notice of

Finally, the Board reviewed possible impact on existing air forwarders and concluded "the case for protectionism is far more speculative than the case for competition. And to the extent necessary, competition is also the preferred statutory goal."

Vice Chairman Murphy again dissented, urging that "the trucker applicants are not essential to the continued healthy growth and expansion of the air freight market . . . . the monitored entry procedure is to all intents and purposes free entry upon recital of the required incantation."

Round 5, and thus far the last round, again went to the applicants. The second Court of Appeals decision in *ABC Air Freight Company v. Civil Aeronautics Board*, (C.A. 2, October 25, 1969, Docket No. 33623), considers both the Board's Opinion on Remand and the rule-making proceeding instituted by the Board. The Court declared itself satisfied with the Board's opinion, warning that it expected the Board to demand the promised performance, and to "take the condition of the independent forwarders into proper account." As for the proposed rule-making, the Court declined to interfere.

Thus, after two Board and two Court opinions, the controlled experiment is about to begin. Judging from a number of recent public expressions by Department of Transportation officials and others, the *Motor Carrier—Air Forwarder Case* may be only the first of several efforts to extend the bounds of permissible common control of air and surface carriers.[28] If nothing else, the *Motor Carrier—Air Forwarder Case* is evidence that the infant industry is growing up.

Proposed Rule Making. These were adopted November 12, 1969, to be effective January 5, 1970, Regulation ER-593, Regulation PS-40. These regulations provide generally for:

(1) a showing by long-haul motor carrier applicants for air forwarder authority or for acquisition of control of existing air forwarders that:

(a) The applicant is capable and will conscientiously promote air cargo,

(b) No monopoly, restraint of competition, or jeopardy of another air carrier will result; and

(2) new reporting requirements requiring motor carrier/air forwarders to disclose small shipments and off-line business traffic. Specific reporting schedules are provided.

28. In a recent speech before the Traffic Club of New York City, Paul W. Cherington, Assistant Secretary of Transportation, urged that:

"Common ownership should be permitted where improved performance characteristics of the integrated firm can be reasonably demonstrated in application for common ownership."

This speech was reported in *Traffic World*, November 22, 1969 at pages 24-25.