Predatory Pricing in the Airline Industry: A Case Study — The Policies and Practices of the CAB

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TABLE OF CONTENTS

I. INTRODUCTION

This article examines the policies and practices of the Civil Aeronautics Board (CAB or Board) with respect to complaints involving predatory pricing. Those policies are muddled and the practices unfortunately unsuited to the demands of the air transportation market. The large amount of pub-

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licity engendered by the last several years of price warfare throughout the airline industry, particularly with respect to major or so-called glamour routes, such as the transcontinental and New York/Dallas routes; the precarious financial position of nearly all of the major airlines; and the recent spectacular collapse of Braniff, have all served to focus attention on the issue of predatory practices within the industry. The attitude and practices of the responsible government regulatory body should reflect this concern. Review of recent CAB Orders and Policy Statements, however, leads to the following conclusions:

(1) The concepts of unreasonableness, discrimination, and predation, while analytically discrete, are frequently treated in practice as being synonymous or as close complements;

(2) The CAB is clearly predisposed to find *against* the validity of any complaint charging predatory, discriminatory, or unreasonable pricing. In particular, the standards by which the CAB judges complaints of predatory pricing[1] are, for all practical purposes, nearly impossible to meet;

(3) Finally, we present two theories[2] which support the need for a full and formal investigation involving charges of predatory pricing.[3] The first

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1. As established in Air Florida v. Eastern Air Lines, 85 C.A.B. 2063 (1980) [hereinafter cited as *Air Florida I*].

2. *See infra* Section IV.

3. In analyzing any potential case of predation before the CAB, one must make reference to the various sources of raw data available from the CAB. A short description of the types of documents and their utility to the practitioner follows.

All certified air carriers must file Forms 41 and ER 586 on a monthly basis. Form 41 contains financial and operating data concerning the carriers' 48-state operations. The information is available to the public in printed form. Form ER 586 contains services segment data for each carrier, including the load factors for each route flown. A separate Form ER 586 must be filed every month for each route a carrier services, and individual forms must be filed for each change in the type of service provided on a given route. So, for example, if a carrier operated three different types of aircraft on the same route during a given month, three separate forms would have to be filed. So, too, if a plane was forced to land at an unscheduled point along its normal route, due to inclement weather on a single occasion, a separate form would have to be filed. The data contained in Form ER 586 is available only on magnetic tape; these tapes may be purchased from the CAB, and can be read by an IP Sharp terminal.

The CAB also compiles, on a quarterly basis, Origin and Destination (O&D) Surveys, which are surveys of 10% of all passengers emplaned in all markets (city-pairs) served by certificated air carriers. Included in the Surveys are absolute numerical, and percentage, figures for each carrier's passenger traffic in a given market, both for the current quarter and for year-to-date. Bound volumes of all Surveys are available in the CAB's library. All O&D Survey data is also available on magnetic tape.

A Costing Methodology manual, describing in great detail the current methodology used by the Board in estimating fully allocated and marginal costs for a given market, is available from the CAB's Office of Economic Analysis, as are other useful pamphlets.

The CAB's library contains, among other things, all bound CAB Reports through 1977, the bound O&D Surveys, a full range of industry literature and the legislative history of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. Copies of all CAB publications, including Orders and Regulations issued within the last twenty four months, are availpossibly successful theory focuses on a case in which a competitor targets the complainant's most lucrative markets; the second focuses on the complainant's potential bankruptcy as a result of predatory pricing. The following pages review the history and development of the CAB's policy with respect to predatory pricing and the rationale behind its current position.

II. GOVERNING LAW

Section 1002(d) of the Federal Aviation Act of 1958 (the Act) provides inter alia:

> (1) Except as provided in paragraph (2) or (4) of this subsection, *whenever*, after notice and hearing, upon complaint, or upon its own initiative, *the Board shall be of the opinion that any* individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier . . . *is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate*, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective.
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> . . . .
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> (3) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the *Board shall be of the opinion that any* individual or joint *rate or charge* demanded, charged, collected, or received by any air carrier . . . *is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, or predatory the Board shall alter such rate*, charge, classification, rule, regulation or practice *to the extent necessary to correct such discrimination, preference, prejudice, or predatory practice*. . . .
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> (4) The Board shall not have authority to find any fare for interstate or overseas air transportation of persons to be unjust or unreasonable on the basis that such fare is too low or too high if —
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> . . . .
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> (B) with respect to any proposed decrease filed after October 24, 1978, the proposed fare would not be more than *50 per centum lower than the standard industry fare level* for the same or essentially similar class of service, *except that this provision shall not apply to any proposed decrease in any fare if the Board determines that such proposed fare would be predatory*.[4]

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able from Publications, Room 516. The Briefs, Notices and Orders of all CAB dockets are available in bound volumes from Dockets, Room 710. The CAB's Indices Section, located in Room 510, serves as the Board's in-house headnote-producing and case-digesting system. Orders on a subject may be filed under several different headings and are not effectively cross-indexed in any central location.

4. 49 U.S.C. § 1482(d)(1), (3), (4) (Supp. V 1981) (emphasis added). This portion of the statute was repealed as of January 1, 1983 by 49 U.S.C. § 1551(a) (Supp. V 1981), which states:

> (2) The following provisions of this chapter (to the extent such provisions relate to interstate and overseas air transportation of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on January 1, 1983:

"Predatory" is defined in section 101 of the Act as meaning "any practice which would constitute a violation of the antitrust laws as set forth in section 12 of title 15."[5]

Section 411 of the Act, which was modeled on section 5 of the Federal Trade Commission Act, provides that the CAB has the authority to investigate and resolve complaints involving charges of "unfair or deceptive practices" or "unfair methods of competition."[6] In interpreting section 411 in *Air Florida v. Eastern Air Lines* (*Air Florida II*), the Board stated:

> As a result of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (October 24, 1978), the Board must rely primarily on competition rather than regulation as the means of obtaining the best possible air transportation system. Sections 102(a)(4), (9) of the Act, 49 U.S.C. 1302(a)(4), (9). Accordingly, we doubt that we should use Section 411 as a means of imposing our views of competitive propriety on airline industry fare reductions except where a practice is deceptive, illegal (whether under the antitrust laws, the Act, or another statute), or offensive to a well-established public policy.[7]

The Board went on to cite certain passages of the Senate Report[8] accompanying the Act for the proposition that "Congress did not intend us to hold fare reductions unfair which [do] not violate the antitrust laws."[9] In summary, then, the CAB has attempted to distinguish three analytically distinct types of pricing behavior, i.e., reasonableness, discrimination, and predation. CAB practice in defining each of these areas is discussed below. Unfortunately for certain airlines and for consumers on certain routes, the distinction among the three has not been clearly delineated by the Board.

III. CAB Practice

A. *Reasonableness*

Any fare which falls within the "zone of reasonableness" established by section 1002(d)(4) of the Act is not subject to suspension or to the

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. . . .

(B) Section 1374 of this title (except insofar as such section requires air carriers to provide safe and adequate service).

. . . .

(D) Sections 1482(d)(1) and (d)(2), (e), (g), (h), and (i) of this title.

This termination has not affected litigation in this area of the law. With recent developments litigation has been increasing rapidly. *See generally* Laker Airways v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983) (alleged conspiracy to drive Laker out of transatlantic market); United States v. American Airlines, Inc., 570 F. Supp. 654 (N.D. Tex. 1983) (alleged attempted monopolization and price-fixing in passenger routes served by Dallas/Fort Worth Regional Airport).

5. 49 U.S.C. § 1301(35) (Supp. V 1981).
6. 49 U.S.C. § 1381 (1976).
7. CAB Order No. 81-1-101, at 10 (June 21, 1980) [hereinafter cited as Air Florida II].
8. S. Rep. No. 631, 95th Cong., 2d Sess. 107 (1978).
9. Air Florida II, *supra* note 7, at 10 n.4.

Board's jurisdiction over the justness and reasonableness of fares.[10] The Board implemented the mandate of section 1002 in its Policy Statement 80 (PS-80).[11] Based primarily on the profitable lowfare experiences of Southwest Airlines and Pacific Southwest Airlines, the Board provided that "[e]ach carrier should have the opportunity to set fares in each market [or city-pair] within a zone ranging to 50 percent below the ceiling fare."[12] Furthermore, carriers are allowed to set fares in each market at seventy percent below the ceiling fares on forty percent of their weekly available seat miles (ASM), thus allowing lower prices for "off-peak" periods. No fares set within this zone will be suspended by the Board on account of the fare's reasonableness absent the following extraordinary circumstances:

> (1) The high probability that the fare would be found to be unlawful after investigation;
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> (2) *There is a substantial likelihood that the fare is predatory* so that there would be an immediate and irreparable harm to competition if it were allowed to go into effect;
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> (3) The harm to competition would be greater than the injury to the traveling public if the proposed fare were unavailable; and
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> (4) The suspension is in the public interest.[13]

Obviously, then, absent a clear indication that a challenged fare is predatory, it will never be subject to suspension by virtue of being unreasonable. So, for example, if a carrier were to offer a "substantial" discount fare between Denver and Dallas, similar to that offered by certain carriers periodically during 1981, it would not be subject to suspension or review as long as it fell within the zone of reasonableness.[14] It is approximately 647 miles

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10. Air Florida II, *supra* note 7, at 3.

11. 43 Fed. Reg. 39,522 (1978) (amending 14 C.F.R. §§ 399.31, 399.33).

12. The "ceiling fare," as it is denominated in PS-80, or "standard industry fare level"(SIFL), as it is denominated in § 1002 of the Act, is the lowest unrestricted competitive fare in a given market that was in effect on July 1, 1977, adjusted not less than semi-annually by the "percentage change in actual operating costs per available seat-mile (ASM) for interstate and overseas transportation combined." Establishment of the Interim Industry Fare Level, CAB Order No. 80-12-96 (December 18, 1980) (establishing the SIFL formula effective January 1, 1981).

13. 14 C.F.R. § 399.32(b) (1983) (emphasis added).

14. The stark SIFL "50%" rule represents a legislated figure which is completely detached from any consideration of an individual firm's marginal, average variable, or average total, costs. Moreover, it ignores the fact that "a detailed case-by-case analysis associated with a rule-of-reason approach permits consideration of the variety of specific structural and behavioral aspects of the particular dominant firm's situation that are relevant to a determination of whether the firm was violating the antitrust laws. The rule-of-reason approach . . . allows the decisionmaker to go beyond loose language and mechanical rules to the specific conduct of the dominant firm and the implications of that conduct for economic efficiency and other goals of antitrust law." Joscow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 216-17 (1979) (footnote omitted) [hereinafter cited as Joscow-Klevorick]. *See* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976) [hereinafter cited as Scherer]; Scherer,

between Denver and Dallas. Utilizing the prevailing SIFL formula,[15] we find that the current SIFL for the Denver/Dallas city-pair is $108.57 (rounded to the nearest penny); fifty percent of the SIFL is approximately $54.29, or less than any of the seemingly ultralow fares, including Delta's $59.00 fare, that were offered, one-way during 1981.[16] Accordingly, a discount fare, absent clear evidence of predation or discrimination, would not be subject to a charge of unreasonableness. Furthermore, pursuant to ER-1072,[17] any carrier establishing a fare within the zone of reasonableness need not submit economic data in justification of the new fare.

B. *Discrimination*

Policy Statement 93 (PS-93)[18] establishes the CAB's policy on price discrimination. To begin with, discrimination is defined in PS-93 as "the act of charging different customers prices that differ by varying proportions from the costs of serving them." The Board then goes on to state:

> In our notice, we recognized the fact that the industry's existing fare structure may contain elements of price discrimination for a variety of reasons which include regulatory considerations as well as the economic conditions of supplier market power and differing consumer price sensitivity. Among the regulatory factors are the Board's willingness to permit discounted fares that may not correspond to airline cost savings, so long as they are available to any passenger who complies with ticketing restrictions, and the Board's decision to construct the Standard Industry Fare Level on a system basis without taking into account factors other than mileage that affect costs.[19]

Accordingly, the Board announced that it would find a fare to be unreasonably discriminatory only if:

> (1) There is a reasonable probability that the rate will result in *significant long-run economic injury to passengers or shippers*;

Some Last Words on Predatory Pricing, 89 Harv. L. Rev. 901 (1976); Borden, Inc., 1978 Trade Reg. Rep. (CCH) ¶ 21,490 at 21,518, 21,523 (Nov. 7, 1978) (Pitofsky, Comm'r, concurring).

By coupling the statutorily-mandated 50% rule with the impossibly high predatory pricing test adopted in *Air Florida II, discussed infra*, the CAB has succeeded in creating a decisional abstract in which the offense is virtually defined out of existence, thereby castrating a critical consumer and economic protective portion of the Act. This operative *theory*, represented as being derived from the Areeda-Turner model, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975) [hereinafter cited as Areeda-Turner] and, accordingly, as having the benefits of limiting the complexity of case-by-case inquiries, easing administrative difficulties, generating accurate and consistent results, and providing clear signals to firms as to the parameters of the offense, more nearly represents the absence of any predatory pricing rule. *See* Joskow-Klevorick, *supra* at 216; McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289 (1980); and R. Bork, The Antitrust Paradox 145-55 (1978).

15. The 1981 SIFL used in the example consisted of a flat terminal charge of $24.97, plus $.1366/mile for each of the first 500 miles, plus $.1041 for each of the next 147 miles.

16. *Cf.* the discussion of promotional pricing in Areeda-Turner, *supra* note 14, at 713-15.

17. 43 Fed. Reg. 39,536 (1978) (amending 14 C.F.R. § 221.165(d)(4)).

18. 45 Fed. Reg. 36,058 (1980) (amending 14 C.F.R. pt. 399).

19. PS-93, *supra* note 18.

(2) The rate is in fact discriminatory according to a reasonable cost allocation or other rational basis;

(3) The rate does not provide transportation or other statutorily recognized benefits that justify the discrimination; and

(4) Actual and potential competitive forces cannot reliably [sic] be expected to eliminate the undesirable effects of the discrimination within a reasonable period.[20]

In essence, therefore, a complainant must show not only that a rate or fare is discriminatory, but also that injury results from the discrimination and that the situation will not be corrected by the action of competitive market forces alone. The necessary injury must be to the public ("passengers" or "shippers") or to the forces of competition generally; one carrier's loss is probably insufficient. The CAB, in adopting this policy, rejected the argument that legitimate low-fare pricing would be frustrated due to cross-subsidization of discriminatory rates by revenues from supra-normal fares established elsewhere, on the following basis:

> It is assumed that a large carrier will set prices above cost in markets where it enjoys market power in order to underwrite markets where it competes against a smaller low-fare innovator. However, in the competitive environment which our policies are fostering, this source of funds would evaporate as the new competitors are attracted into high profit markets. Furthermore, the incentive for such predatory pricing, the prospect of charging substantially higher fares after the smaller competitor is driven from the market, will also be reduced as entry freedom increases the likelihood that a new competitor would enter the market to undercut the excessive fares.[21]

This decision was predicated on an assumption that after deregulation, entry could be presumed to be free enough so that competitors would arise to fill the vacuum created by departure of a carrier from a market.[22]

The leading CAB decisions in the area of discrimination involve complaints stemming from the *Transcontinental Low-Fare Route Proceeding*.[23] The complaints filed pursuant to *Transcontinental* were instituted by World Airways, World Transport Development Cooperative, and Amos E. Heacock, d/b/a Air Transport Association, challenging the new discount fares between New York/Newark and Los Angeles/San Francisco, which were approved by the Board for Pan American, American, United, National and TWA in direct competition with World's standard low fare. The complaints involved charges both of predation[24] and of discrimination. Complainants' primary discrimination arguments were addressed by the Board in *New*

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20. 14 C.F.R. § 399.36 (1983) (emphasis added).

21. PS-93, *supra* note 18, at 36,061.

22. *Cf.* Areeda-Turner's analysis of discrimination and cross-subsidization in Areeda-Turner, *supra* note 14, at 720-22, 724-28.

23. 80 C.A.B. 316 (1979) [hereinafter cited as Transcontinental].

24. *See infra* text accompanying notes 26-34.

York-Los Angeles Fares of Pan American World Airways (*Pan American*).[25]

Based on PS-93 and *Pan American*, it is unlikely that a complaint based on a claim of discrimination would be subject to a full formal Board investigation to the extent that it relied on theories of cross-subsidization or of impermissible travel restrictions that affected only certain classes of passengers or certain routes. Furthermore, it would be extremely difficult to prove the probability of significant long-run economic injury to passengers or shippers, as opposed to injury to a competitor, in the absence of evidence of predation. Accordingly, only the third and crucial area of our analysis, predation, remains as a potentially viable cause of action.

C. Predation

The CAB is predisposed to find against claims of predation.

> Predatory pricing would . . . be impossible under airline reform. Such pricing tactics by the larger airlines are only sensible if a competitor, once driven out of a market, cannot reenter it. Only then can the predator raise his prices (and his profits) after the competition is gone. This cannot be the case in the deregulated environment because carriers could always enter new markets at will aided by the most mobile capital investment in industry today — the modern jet aircraft.[26]

In accepting the basic validity of Senator Percy's analysis[27] that preda-

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> 25. First, the suggestion that all discount fares offered on multi-class flights unjustly discriminate against those who cannot meet their travel restrictions would, if accepted, define discount fares out of existence. Obviously, this result is not required by the Act. As a matter of policy, the Board looks favorably upon discount fares that are freely available to all classes of person who can meet their restrictions. These restrictions, so long as they relate to conditions of carriage or to other factors specified by Congress, render discount fare services "unlike" normal fare services and therefore raise no discrimination issues under Section 404(b) of the Act. Second, the contention that the magnitude of the discount from normal fares must be closely related to differences in cost of service was rejected outright by the Board in *Phase 5* of the DPFI [Domestic Passenger Fare Investigation] and has even less validity today in light of the new statutory mandate favoring low fares. Finally, discount fares with travel restrictions and restricted introductory fares, are unlikely to attract traffic that would otherwise travel on unrestricted low-fare services, especially if the discount fares are higher priced (as they are in this case) and if their restrictions were as "artificial" and "unreasonable" as complainants contend.

CAB Order No. 79-4-57 at 2-3 (April 6, 1979) [hereinafter cited as Pan American].

26. 124 Cong. Rec. 10,654 (1978) (remarks of Sen. Percy), *quoted in* Air Florida II, *supra* note 7, at 10.

27. Senator Percy's premise has two basic defects. First, certain types of aircraft can only fly certain routes on a long-term profitable basis, *e.g.*, wide-bodied craft are only suited to lengthy, transcontinental-type trips. For that matter, larger aircraft cannot be accommodated at some airports, such as National Airport in Washington, D.C.

More importantly, while aircraft may be physically mobile, the acquisition of terminal space at airports is frequently not obtainable on nondiscriminatory terms and has often been a subject of controversy and litigation. *See*, *e.g.*, Brief of the Bureau of Consumer Protection, Southwest Airlines Automatic Market Entry Investigation, CAB Docket No. 34582 (May 17, 1979); City of Dallas v. Southwest Airlines, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (*Southwest I*); Southwest Airlines v. City of Dallas, No. CA 3-3-74-

tory pricing is unlikely in a deregulated environment, the Board, in *Air Florida II*, adopted four criteria for determining whether it would initiate an investigation of predatory pricing in a given case. Those criteria are as follows:

(1) Did the competition set fares below marginal cost in any city-pair at any time?[28]

(2) If so, did the competition persist in losing money after the fares had been shown to be unprofitable?

(3) Could the competition reasonably have hoped to attain and maintain a position of monopoly power?

(4) Did the competition accompany its fare reductions with increased flight schedules in order to gain market share?[29]

544-C (N.D. Tex. 1974); Southwest Airlines v. Texas Int'l Airlines, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (*Southwest III*); Evansville Airport v. Delta Air Lines, 405 U.S. 707 (1972); City and County of San Francisco v. Western Airlines, 204 Cal. App. 2d 105, 22 Cal. Reptr. 216 (1962), *cert. denied*, 371 U.S. 953 (1963); Southern Airways v. City of Atlanta, 428 F. Supp. 1010 (N.D. Ga. 1977). Also, *see generally Justice Does Not Oppose Allocation of Airport Slots*, 43 ANTITRUST & TRADE REG. REP. (BNA) 1092 (Dec. 16, 1982); Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319 (1983); *Antitrust Division Urges End to Airline Slot Allocations*, 44 ANTITRUST & TRADE REG. REP. (BNA) 1088 (June 2, 1983); *FTC Report on Airport Access Stresses Market Approach*, 44 ANTITRUST & TRADE REG. REP. (BNA) 1088 (June 2, 1983). These factors all point to both legislative and administrative use of an incorrect model of the air transportation market and thus to a faulty analytical basis for deregulation.

28. In footnote 2 of Swift Aire v. Golden Gate, 87 C.A.B. 1823, 1824 (1980) the Board provided the caveat that, where predatory intent is well-established, predation may exist even where fares are set above marginal cost. Presumably, such intent will only be well-established prior to formal investigation in situations similar to the *Air Florida* series of cases, where the propriety — and legality — of Eastern's so-called "tag-end" fares, there in issue, previously had been the subject of several formal proceedings and investigations by both the Board and the Justice Department.

29. *See* Air Florida II, *supra* note 7. In sum, the Board essentially adopted the Areeda-Turner "AVC" (average variable cost) test, first articulated in Areeda-Turner, *supra* note 14, despite the fact that, as we have seen, the overarching 50% SIFL Rule is completely divorced from Areeda-Turner's concept of average variable cost. The Areeda-Turner article was the first attempt to develop a *per se* legal standard designed to distinguish predatory conduct from competitive conduct based solely on cost-price analysis suggested by economic theory. It proposed the Average Variable Cost rule; setting price at or above a firm's average variable cost of production is considered competitive; setting price below this point is *per se* illegal. *But see* Shimer, *Predatory Pricing: The Retreat From the AVC Rule and the Search for a Practical Alternative*, 22 B.C.L. REV. 467, 469 (1981). *See generally* Hay, *The Economics of Predatory Pricing*, 51 ANTITRUST L.J. 361 (1983).

The Board, however, has adopted and persistently applied the AVC test at a time when the test was coming under increasingly strong and persuasive criticism in both judicial and academic circles. *See, e.g.*, Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d 1377 (9th Cir. 1983) (prices exceeding average total cost may be predatory and so presumption of legality should be rebuttable; rejects *per se* test); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981) (rejecting *per se* rule and instead imposing burden-shifting procedure); D.E. Rogers Assocs. v. Gardner-Denver Co., 718 F.2d 1431 (6th Cir. 1983) (adopting test set forth by Ninth Ciruit in *William Inglis & Sons Baking Co.*, and permitting "the introduction of any evidence, in addition to cost price figures, to illuminate the rationale behind the

In addition, the Board will only suspend a fare challenged on the basis of predation, pending investigation, if a four-part test is met:

> (1) The high probability that the fares would be found unlawful after investigation;
>
> (2) The substantial likelihood that the fare is predatory so that there would be an immediate and irreparable harm to competition if it were allowed to go into effect;
>
> (3) The harm to competition would be greater than the injury to the traveling public if the proposed fare were unavailable; and
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> (4) The suspension would be in the public interest . . . .[30]

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defendant's pricing policy"); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980) (explicitly rejecting an absolute cost rule by indicating an intent to consider other factors in evaluating the establishment of a *prima facie* case); California Computer Prods., Inc. v. International Business Machines Corp., 613 F.2d 727, 743 (9th Cir. 1979) (expressing reluctance to apply test in all cases); Transamerica Computer Co. v. International Business Machines Corp., 481 F. Supp. 965, 995 (N.D. Cal. 1979) (explicitly rejecting test as incorrect when applied to most cases of alleged predatory pricing); O. Hommel Co. v. Ferro Corp., 472 F. Supp. 793 (W.D. Pa. 1979) (same); *Clanton Frames Issues in Predatory Pricing Law*, 44 ANTITRUST & TRADE REG. REP. (BNA) 1042 (1983); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); R. BORK, *supra* note 14; Joscow-Klevorick, *supra* note 14; McGee, *supra* note 14; Scherer, *supra* note 14; Shimer, *supra*; Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions on Predatory Pricing*, 51 ANTITRUST L.J. 401 (1983); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977). *Cf.* Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90 (3rd Cir. 1982) (Third Circuit assumes, without deciding, that Areeda-Turner test is appropriate standard, but endorses *William Inglis & Sons Baking Co.* about validity of conflicting methods of accounting); MCI Telecommunications Corp. v. American Tel. & Tel., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) (Seventh Circuit adopts longrun incremental cost as the appropriate standard for judging predatory pricing). *But see* Barry Wright Corp. v. ITT Grinnell Corp., 46 ANTITRUST & TRADE REG. REP. (BNA) 6 (Jan. 5, 1984) (First Circuit, rejecting Ninth Circuit's rule that certain price cuts are unlawful even when resulting revenues exceed total costs, adheres to traditional test for predation).

So, for example, the *Transamerica* court stated:

> A conclusive presumption of the legality of an unprofitable low price, merely because it is above marginal cost, a cost which is all but incapable of proof, would truly be a "defendant's paradise." This court rejects it.

Transamerica, 481 F. Supp. at 995 (footnote omitted).

The NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAW AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GEN. 149, 151, 166 (1979) concluded that the AVC rule was too restrictive in its exclusions of such considerations as intent and market power, and recommended amending the Sherman Act to include a standard for production that took intent and market power into account. *See* Shimer, *supra*, at 493.

The rationale behind the Commission's position has been well articulated elsewhere:

> [Areeda-Turner] rely exclusively on economic cost data to indicate the existence of predation. While objective cost data may be all that is required to solve what is strictly an economic problem, predation is not strictly an economic problem. It is a violation of the Sherman Act. Predatory pricing involves a price reduction with the aim of driving competitors out of business, so as to enjoy large profits in the long run. Proof of predatory pricing may be used to infer the specific intent required as part of an attempt to monopolize case. Thus, an examination of the intentions or reasons behind management's decision to make the price reduction is relevant in identifying predation.

Id. at 481.

30. Reduced Fares Between New York/Newark and Los Angeles/San Francisco Proposed

It should be noted that this four-part test is the same test used to determine whether a fare should be suspended on reasonableness grounds pending investigation if the fare is otherwise within the zone of reasonableness established by section 1002 of the Act.

In light of the above, therefore, it will be difficult for any complainant to make out even a *prima facie* case of predation, sufficient to warrant fare suspension and a formal investigation by the Board. This conclusion is borne out by the fact that only once in recent years has the CAB found a situation to involve predation. That was the pre-deregulation case of *Hughes Airwest, Competitive Fares (Airwest)*.[31] Airwest proposed to establish round-trip discount fares in the Yuma/Los Angeles and Yuma/Phoenix markets. The Yuma/Phoenix market was one of only two profitable routes in the system of Cochise Airlines, an exempt commuter carrier. The Airwest discount involved a thirty percent fare reduction to nine percent below the prevailing DPFI standard on the affected routes.[32] On all other routes Airwest set fares at one hundred thirty percent of DPFI. In finding predation with respect to the proposed Yuma/Phoenix fare, the Board focused on the following facts: (1) Airwest had narrowly targeted its price reduction at two Cochise markets, one of which was crucial to Cochise's survival; (2) Airwest would be subsidizing its losses on the two Yuma routes with income from its other profitable markets; and (3) if Airwest was successful in driving Cochise out of the Yuma/Phoenix market, it would have an effective monopoly therein.[33]

From a careful reading of *Airwest* it is apparent that under the Board's *current* policy the case most likely would be decided differently. First, the proposed Airwest price of ninety-one percent of DPFI is clearly within the "zone of reasonableness" established by section 1002(d)(4)(B) of the Act. Second, the discrimination component of *Airwest*, i.e., the charge of cross-subsidization, was firmly rejected after deregulation in *Pan American*.[34] Third, Airwest's flights apparently may have been operating at above marginal cost; only passengers willing to accept a three-day maximum stay restriction would have qualified for the discount. We can assume that at least a significant portion of Airwest's passengers would have been full-fare customers. Finally, with deregulation, barriers to entry on the local Yuma/Phoenix route presumably would be quite low. In view of the philos-

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by American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., 82 C.A.B. 1826, 1833 (1979) [hereinafter cited as Reduced Fares] (citing PS-80, supra note 11, and 14 C.F.R. § 399.32(b) (1983)).

31. 74 C.A.B. 926 (1977) [hereinafter cited as Airwest].

32. Domestic Passenger Fare Investigation (DPFI). The DPFI standard was the pre-deregulation SIFL equivalent.

33. *See* Airwest, *supra* note 31; *Swift Aire*, supra note 28, at 1828; *Air Florida I*, supra note 1, at 2069 n.6.

34. *See supra* text accompanying note 25.

ophy of deregulation, the CAB most likely would trust the action of competitive market forces to bring about new entrants if and when Airwest began to reap monopoly profits.

The only solace that can be reaped from *Airwest* is the Board's focus on the targeting of a particular competitor for below-cost pricing. The Board stated that Airwest had proposed "this particular discount in only two markets in its entire system, one of which is the backbone of Cochise's system."[35] It is unclear whether Airwest had proposed or instituted other types of discounts elsewhere in its system, although it is implicit from the Board's statement that it had not. Exactly what the Board intended in *Airwest*, however, will remain uncertain; the analysis presented therein is very muddy. At best, the *Airwest* analysis appears most appropriate in a regulated environment.

D. PREREQUISITES TO PROVING PREDATION BEFORE THE BOARD

The leading post-deregulation decisions on predation are *Swift Aire*,[36] *the Air Florida* cases,[37] and the *Transcontinental Low-Fare Route Proceeding* cases.[38] These decisions establish that three major problems exist in showing predation before the CAB.

First, as the Board stated in *Air Florida III*: "Eastern correctly points out that the test is not harm to an individual carrier but whether there is substantial likelihood of immediate and irreparable harm to competition in the marketplace."[39] Therefore, a carrier has the burden not simply of showing that *it* will be injured, but rather that overall competition will be injured. This test establishes an extremely high threshold level of proof.[40] As an example of the difference between the two analyses, consider a hypothetical major market where the second largest carrier has over forty percent of total passengers emplaned on that route. If that carrier were to withdraw from the market, overall market concentration ratios might in fact be improved, thus giving passengers greater choice and enhancing "competition."[41]

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35. Airwest, *supra* note 31, at 928.

36. *See supra* note 28.

37. *Air Florida I*, *supra* note 1; Air Florida II, *supra* note 7; and Eastern Air Lines, Tag End Fares, 78 C.A.B. 965 (1978) [hereinafter cited as Air Florida III].

38. Reduced Fares, *supra* note 30; Transcontinental, *supra* note 23; and Pan American, *supra* note 25.

39. Air Florida III, *supra* note 37, at 966 n.4.

40. Both McGee and Bork espouse and would approve of such an unreachable threshold. Both commentators suggest that predatory price cutting is unlikely ever to exist and, therefore, any rule prohibiting it is likely to harm consumers more than the absence of legal sanctions.

41. Compare Joscow-Klevorick:

> [A] private predatory pricing action is often motivated by the plaintiff's understandable concern for its own preservation. Such suits tend to confuse the preservation of particular competitors and the corresponding private benefits with the preservation of competition and its attendant social benefits. The natural working of competitive market

Second, as the Board stated in *Pan American*:

> Both the Board and Congress, however, have recognized and accepted the validity of marginal cost pricing, *i.e.*, setting fares, in appropriate circumstances, without regard to assigning fixed per-passenger costs. Marginal cost pricing is especially useful in evaluating the cost of airline services in competitive operations. In this instance, Pan Am's introductory and discount fares appear in line with short-run marginal costs and are otherwise consistent with a marginal cost pricing strategy. Moreover, there is no outward evidence that the $99 introductory fare is designed to drive competitors from the market, because it is very restricted and carries an expiration date that virtually precludes the opportunity to inflict any significant competitive damage on other carriers.[42]

As long as it is clear that the flight in question would be flown anyway and that the discount fares are only being utilized to increase load factors and fill up otherwise empty seats, marginal cost pricing will be applied. Theoretically, marginal cost pricing equates the value of the resources used to produce the good (in this case, air transport) with the utility of the good produced to the consumer. Marginal costs for airlines will always be very low,[43] consisting of such items as additional food, beverages, baggage handling, ticketing, reservations and the fuel needed to move the bodyweight of the extra discount passengers.[44] In the *Transcontinental* cases, the routes would have been flown anyway, with normal coach and first class fares, as part of an overall national route system;[45] the discount fares were capacity limited and intended only to fill up otherwise empty

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> forces often causes the erosion of particular firms' profits as a result of price competition. Indeed particular firms may be driven out of business. Because preserving particular competitors may well be in conflict with the good of preserving and fostering competition, private predatory pricing actions carry with them the seeds of protectionist abuse.

Joscow-Klevorick, *supra* note 14, at 221 (footnote omitted). *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Janich Bros. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

42. Pan American, *supra* note 25, at 3 n.8.

43. The use of a marginal cost standard will be highly misleading over time:

> Areeda and Turner incorrectly viewed short-run costs as the sole indicator of efficiency. . . . The Areeda-Turner approach allows firms to price at AVC, but since AVC is below ATC [Average Total Cost] this implies that a firm pricing at the legal minimum will not cover fixed costs with the revenue generated by sales of this product.

Shimer, *supra* note 29, at 485. *Cf.* Areeda-Turner, *supra* note 14, at 711. In both *Air Florida* and *Transcontinental*, the results, which in the former situation had previously attracted Justice Department attention, might well have been different if a more realistic, ATC-based yardstick had been utilized.

44. *See Air Florida I*, *supra* note 1, at 2066. *But see Swift Aire*, *supra* note 28, at 1827 n.21.

45. Of course, this argument ignored the fact that the market service, defined by the city-pair or transcontinental routing involved, was only viable due to the fact that the difference between marginal costs and average total costs was being made up by cross-subsidization from other, less competitive routes. This is merely the same problem of cross-subsidization faced when analyzing

spaces. In the *Air Florida* cases, Eastern would have been flying its "tag-end" segments anyway, both to provide service equivalent to that of its other long-haul competitors, and to re-position its "aircraft and personnel for purposes of maintenance and system-wide scheduling."[46] Therefore, unless the airline is charging only a single, low discount fare for a route which is itself not merely the "short segment[s] at the end or beginning of a longer-haul flight," (the definition of "tag-end" segments),[47] marginal costs,[48] and not fully allocated costs, will be utilized for assessing charges of predation.

Third, the Board defined predation as occurring "when a firm charges a price for a product that is below cost, with the expectation that by doing so it can drive its rivals out of the marketplace and subsequently raise its price to a monopoly level, recouping its previous losses and earning additional monopoly profits."[49] The Board went on to state that, though predation was possible, sustaining any level of monopoly profits was unlikely due to the increased costs of the additional market share.[50]

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the practices of any multi-product or multi-market firm. Analytically, the Board's rationale was a make-weight. *See* Joskow-Klevorick, *supra* note 14, at 252-53.

Interestingly, in order to avoid ongoing fare wars, American Airlines, an industry leader, recently attempted to link price and distance on all flights, charging passengers by the mile. Lindsay, *Some Airline Fares May Double*, Wash. Post, March 16, 1983, at D7, col. 3.

46. *Air Florida I*, *supra* note 1, at 2064; *see also* Air Florida II, *supra* note 7, at 5.

47. *Air Florida I*, *supra* note 1, at 2064.

48. It should be noted that the Board alternately uses the phrases "out-of-pocket," "cash," and "variable" costs to denominate the concept of "marginal" costs.

49. *Air Florida I*, *supra* note 1, at 2064.

50. Although there is disagreement among the courts and legal and economic scholars concerning the precise standard to be employed, most today recognize that predation is an irrational — and therefore unlikely — strategy in situations where the predator cannot reasonably expect to reap monopoly profits for a sustained period after driving the target company from the market, because of the high cost of predation. The predatory firm not only incurs losses along with its rivals, but, as its market share increases, its proportion of total industry losses tends to increase accordingly.

> Consequently, the barriers to entry and exit in a market must be significant in order for predation to be a rational strategy. A firm that monopolizes a market in which entry barriers are low will be constrained from charging monopoly prices by the threat of entry. If exit is also easy, in the sense that a firm with an investment in a particular market can move its capital investment into other markets without substantial costs arising from such a redeployment, a firm will not be deterred from entering the market by the mere threat of predation. It loses nothing if the threat is carried out, and it can always re-enter once the threat is past.

Id. at 2065. The Board's emphasis on the comparative magnitude of losses between predator and victim adopts the same avoidance of both the question of comparative "staying power" by reason of differing financial resources and capital reserves, and the question of actual real-world re-entry and restart-up problems faced by potential successor firms, reflected in Areeda-Turner, *supra* note 14, at 698, 704, 709 and in McGee, *supra* note 14, at 296-97. Areeda-Turner, in fact, seem strongly skewed to favor the continued dominance of larger firms with such "staying power." *See* Shimer, *supra* note 29, at 480, 485; *cf.* Joscow-Klevorick, *supra* note 14, at 227-31.

McGee implicitly assumes that the victim has both the capital and foresight to "stick it out," *i.e.*, is not in an already (or initially) weakened—although still competitive—position. To use one

In any major market, it is unlikely that even a strong competitor could ever hope to achieve a monopoly position. Under deregulation, even if such a position was temporarily achieved, re-entry would presumably be so attractive to new competitors as to foreclose the possibility of intermediate or long-term monopoly pricing.

Since deregulation, no complainant has been able to overcome the three hurdles enumerated above. In the *Swift Aire* case, Swift alleged that its competitor, Golden Gate Airlines, had been offering below-cost fares for unreasonably long periods of time in an effort to drive Swift out of the San Francisco/Bakersfield and Los Angeles/Bakersfield markets. The Board estimated Golden Gate's marginal costs by taking the sum of its operating and direct maintenance expenses.[51] The Board found no predation in light of the following facts. First, in the two pertinent markets, both airlines had willingly engaged in "a fierce competition struggle;" such competition was necessary not just in relation to the other but also to attract travelers who were currently using alternate modes of surface transportation. Second, Bakersfield's air transport services were currently under-utilized. Third, barriers to entry were and would remain low even though Golden Gate was in fact operating at below marginal costs. Finally, the Board also emphasized that Golden Gate was suffering system-wide losses and apparently had not targeted a particular market for below-cost, cross-subsidized pricing.

In the *Air Florida* cases, the Board rejected Air Florida's complaint against Eastern on four grounds. First, Eastern's fares in the short-haul Florida markets there in question were above marginal cost. Second, Eastern could not have hoped to earn monopoly profits on any of the tag-end routes. Eastern and Air Florida were the lone competitors on only two of the five routes in question, and a *de minimus* number of flights and passengers were involved. Third, Eastern had increased its flight offerings in only one of the five affected markets. Finally, entry barriers to all markets involved were quite low.

The *Transcontinental* cases involved the complaint of World Airways and several other parties that the "supersaver" fares approved by the Board in the New York-Newark/Los Angeles-San Francisco market for five major trunk carriers,[52] were predatory. The Board found that the major trunk carriers would not be operating below marginal costs, nor could any one of the major carriers hope to achieve a monopoly position, even if the

of the "nature" allegories Professor McGee seems so fond of, it should be noted that birds of prey are apt to go after smaller, weakened opponents, not the most vigorous ones, not leaving time for the injured to heal and regain competitive vigor.

51. *Swift Aire*, *supra* note 28, at 1827 n.21.

52. United, American, TWA, Pan American, and National. The "supersaver" fares competed directly with World's standard low fare.

complainant, World Airways, was eliminated as a competitor.[53] Furthermore, at least in the *Pan American* case, the discount fare being offered was very restricted and carried an expiration date.[54]

In summary, then, it would be extremely difficult, if not impossible, to establish a prima facie case of predation under the Board's criteria. If a complainant should wish to pursue this line of inquiry, however, certain factors and theories should be considered.

IV. Possible Successful Theories of Predation

There are at least two theories on which a complainant carrier might successfully bring a predation claim before the CAB. First, if the complainant could show that the competing carrier was specifically *targeting the complainant's most lucrative markets* for low-cost pricing in the hope of driving the complainant completely from the marketplace, a predatory pricing claim might be viable. The complainant would have to establish a pattern of assaults on its most lucrative domestic markets in the form of low-price discounts that both significantly undercut its own prices and are near or below the competitor's own marginal costs. Predatory intent arguably would be implicit in such a pattern and, therefore, the complainant might avoid having to show that each of the competitor's discounted fares was actually below marginal cost.[55] The complainant would also have to show that the competitor was not offering similar discounts on a significant number of its other routes where it was not head-to-head with the complainant. Furthermore, the complainant would have to establish that the loss of the complainant as a competitor would have significant negative effects on competition in one or more discrete markets.

The second possible theory of action arises in the case where the competitor's actions in one or several discrete markets *could drive the complainant completely out of all markets*.[56] In that case, the competitor might

53. The Board here, as in the *Air Florida* cases, ignored the major problems inherent in the AVC test:

> While the Sherman Act places primary emphasis on competition, the AVC rule only emphasizes economic efficiency. . . . Federal antitrust policies place great emphasis on competition from as many sources as possible, including new entrants and smaller rivals. New entrants and small producers, however, face higher costs than large or established firms. The AVC rule allows the large or established firms to price below their breakeven point, ATC [Average Total Cost], and well below the corresponding breakeven point for the small or new firms. Thus, the AVC rule seriously threatens the ability of the new or smaller producer to survive.

Shimer, *supra* note 29, at 480 (footnote omitted).

54. Pan American, *supra* note 25, at 3 n.8.

55. Of course, to the extent that the competitor offered only a single, below-cost discount fare on a given, established route, fully allocated costs would be the applicable measure and a discrete instance of predation might be demonstrable.

56. This is highly possible given the current extremely troubled financial posture of a number

not have to achieve a monopoly position in any given market in order to more than offset its short or intermediate term losses. If the competitor should cause the complainant sufficient injury in its most lucrative markets by means of below-cost pricing, the complainant, in its current precarious financial state, might be forced into bankruptcy and to discontinue flight operations. For example, in the major hypothetical market previously referred to in which the complainant is the number two carrier in terms of passenger load, the complainant's withdrawal would leave forty percent of the existing passenger traffic in need of alternate air transportation. If the competitor positioned itself for such an eventuality, it might conceivably grow from an initial toehold position vis-a-vis the total passenger emplanements to a significant percentage of the traffic.[57] While perhaps the competitor could never hope to achieve monopoly power in such a significant market,[58] the mere fact that it might be able to greatly expand its portion of a highly lucrative market, from perhaps three or four percent of emplanements to ten-fifteen percent, arguably would make such behavior, with its short or intermediate term losses, worthwhile.[59] Furthermore, to the extent

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of major national and regional airlines. It is understood, of course, that a complainant or successor might be able to continue to offer competitive air transportation services while in bankruptcy. *Cf.* Areeda-Turner, *supra* note 14, at 698: "Although a predator may drive competitors into bankruptcy, their durable assets may remain in the market in the hands of others."

57. The Board test for predation goes even further than Areeda-Turner and seems to assume that there only can be predation if the predator had hope of attaining and maintaining a position of monopoly power. Areeda-Turner, by studiously avoiding directly linking their test to the attainment of monopoly power, seem to implicitly recognize that predation can be a rational strategy in a market and industry where only something less than monopoly market power is achievable:

> [P]redatory pricing would make little economic sense to a potential predator unless he had . . . a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed.

Id.

58. Not only would the predator stand to pick up load but if, as in *Transcontinental* and *Pan American*, the competitor being targeted and driven from the market was a leading price-cutter, *all* remaining competitors, including the predator, could also raise their prices. So, for example, soon after Laker Airlines left the transatlantic market, *all* competitors' transatlantic fares were raised substantially. See the rather prophetic discussion of the Laker situation and the argument for a rule requiring the quasi-permanence of price reductions in Baumol, *supra* note 29. Also, concerning the ongoing course of Laker's private antitrust suit alleging a "classic antitrust conspiracy" involving McDonnell Douglas, Pan American, Trans World Airlines, British Airways, British Caledonian Airways, Swissair, Lufthansa, Sabena, and KLM, to drive Laker from the marketplace, and U.S. Justice Department probe of related alleged antitrust violations, *see* Averbach, *Airlines Admit Attempt to Stop Laker Creditors*, Wash. Post, July 19, 1983, at D7, col. 5; UK-U.S. Governments Hold New Talks on Laker Dispute, 44 ANTITRUST & TRADE REG. REP. (BNA) 1056 (May 26, 1983); *Laker Antitrust Suit Against Carriers Will Be Tried in U.S. Court*, 44 ANTITRUST & TRADE REG. REP. (BNA) 982 (May 12, 1983); *Keeping Up: British Forum Rejected*, Legal Times, May 9, 1983, at 8, col. 2; and *Antitrust Case Spawns a War Between U.S.-British Courts*, Nat'l L.J., Mar. 21, 1983, at 10, col. 3.

59. Joscow-Klevorick would never admit the possibility of a predatory pricing threat in such a situation despite the fact that, by virtue of their own emphasis on an industry-by-industry examination, it becomes clear that the present state of the airline industry may provide a fertile ground for

that the complainant completely stopped all air transport services, the competitor might be able to make similar gains in numerous markets in which both the complainant and the competitor previously had been competitors, thereby more than offsetting its earlier losses in several strategically targeted markets.[60] Of course, the preceding analysis suffers from one serious weakness. That is, in some cases such a scenario may only be possible as a result of unfortunate investment, or internal management decisions, traceable exclusively to the complainant itself.[61]

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such predatory practices. This, of course, is a result of Joscow-Klevorick linking their analysis exclusively to a Sherman Act § 2, monopoly-type situation. Joscow-Klevorick, *supra* note 14, at 244, 262-65.

60. As Joscow-Klevorick recognize, different structural considerations will affect the efficiency of any single predatory pricing model when applied to a given industry:

> If all markets were identical in their structural and behavioral aspects, then having found the optimal predatory pricing rule for one market, we could apply it with confidence to all others. But, as one might expect, different markets are not identical with respect to the features that determine the sum of the expected error costs and the costs of implementation for alternative rules. Hence, our decision-theoretic evaluative mechanism reveals that no single rule will be best for all market situations; if a predatory pricing rule is formulated with one particular market in mind we cannot be sure that it should be applied to other market situations.
>
> What is needed is an approach that can accommodate important market differences: the characteristics of firms and markets that affect the probabilities of error, the error costs, and the implementation costs of alternative policy approaches.

Joscow-Klevorick, *supra* note 14, at 218. In our critique of the CAB's policies above with respect to the airline industry, the danger of applying a single relatively inflexible, mechanical "*per se*" rule, such as Areeda-Turner's, is revealed. In essence, the structure of the airline industry as it exists today is far different from the single "dominant" or "monopoly" firm markets suggested or addressed by most commentators. Yet in this industry, perhaps the dominant transportation industry in the nation today, the potential for very real — and serious — predatory pricing practices exists as we have demonstrated.

At the same time, there is a serious increase of price-fixing and attempted monopolization in the industry under deregulation. *See, e.g.*, United States v. American Airlines, 4 TRADE REG. REP. (CCH) ¶ 45,083 (Case 3044) (Jan. 9, 1984).

61. Furthermore, it should be noted that in Transamerica Computer Co. v. International Business Machines Corp., 481 F. Supp. 965 (N.D. Cal. 1979), the court listed several situations where prices below average total cost might not be predatory, including (1) excess capacity in the industry, and (2) decreasing demand. *Id.* at 996. Both caveats arguably are currently applicable to the airline industry. In judging any predatory pricing complaint, therefore, the Board should keep in mind that:

> Severe excess capacity in the price-cutting firm due to declining demand or overexpansion of the industry . . . is another legitimate, non-predatory reason for lowering price below ATC. A firm in a declining industry may incur excess capacity because of a decrease in demand for the product. This lowered demand can be satisfied by much less industry capacity, thereby forcing many existing firms out of the industry. Managerial practices indicating a desire to remain a producer in a declining industry is [sic] a legitimate reason for the pricing conduct. Where it is inevitable that some firms will be forced out of the industry, the conduct of cutting prices may be the only alternative open to a firm desiring to remain. Although competitors will be ruined, the motivation behind the conduct is self-preservation, not predation.

Shimer, *supra* note 29, at 504 (footnote omitted). Accordingly, in the airline industry, suffering from both excess capacity and decreased demand, the Board must decide whether the target's

V. Conclusion

Any complaint charging predation, discrimination, or unreasonableness, before the CAB either directly or as the result of removal from district court pursuant to a motion for primary jurisdiction, would have only a small chance of success. In order to have even that small chance, such a complaint should be based on the theories outlined in Section III. Following the filing of a formal complaint, the charged competitor would be allowed to file an answer, and then the complainant would have the opportunity to file a reply.[62] The Board would then issue an order either granting a formal investigation and possibly suspending the challenged fare, or would deny such an investigation and dismiss the complaint. Given the result reached in the *Swift Aire*, *Air Florida* and *Transcontinental* cases, and for the reasons set forth, the likely result of any foreseeable complaint would be dismissal by the Board. This abdication of regulatory responsibility has resulted from a combination of unclear past Board practice and deregulatory legislation. The reversal of such a trend can probably only be accomplished by forceful corrective legislation.

initial weakness and vulnerability to discrete pricing attacks stemmed not so much from the predatory nature of those attacks as from inherent structural problems within the industry.

62. 14 C.F.R. § 302.505 (1983). *See generally* Rowen, *Airlines: Competing to the Death*, Wash. Post, Nov. 11, 1982, at A27, col. 2; Cohen, *The Antitrust Implications of Airline Deregulation*, 28 Antitrust Bull. 131 (1983); Eads, *Airline Competitive Conduct in a Less Regulated Environment: Implications for Antitrust*, 28 Antitrust Bull. 159 (1983).