The Rise and Fall of the Civil Aeronautics Board—Opening Wide The Floodgates of Entry*

PAUL STEPHEN DEMPSEY**

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** Professor of Transportation Law and Director of the Transportation Law Program, University of Denver College of Law; A.B.J., University of Georgia, 1972; Hague Academy of International Law, 1974; J.D., University of Georgia, 1975; Georgetown University Law Center, 1976; LL.M. (*summa cum laude*) National Law Center, George Washington University, 1978. Interstate Commerce Commission (1975-1977); Civil Aeronautics Board (1977-1979). The author is a member of the Bars of the State of Georgia and the District of Columbia.

I. INTRODUCTION

The 95th Congress will be remembered as Jimmy Carter's first. It will also be remembered as the least productive, in terms of numbers of pieces of legislation passed than any since the 73rd, which was Franklin Roosevelt's first. Yet, it was the 95th Congress that gave away the Panama Canal, created 152 federal judgeships for President Carter to fill, intro-

duced a mild civil service reform act, and promulgated the most significant piece of legislation in the field of transport regulation in the past forty years.

In 1938, President Roosevelt signed into law the Federal Aviation Act[1] which established the Civil Aeronautics Board[2] [CAB] as an independent regulatory agency designed to provide classic public utility type regulation over the air transportation industry, then deemed to be in its infancy. Essentially, the agency was given authority to regulate three broad areas of economic activity:

1. ENTRY—prescribing which routes shall be flown, which communities will receive air service, and designating the specific carrier(s) which will be permitted to serve such markets; the authority to grant or deny certificates of "public convenience or necessity."[3]
2. RATES—the authority to suspend or establish air fares, and determine whether proposed rates are "just and reasonable."[4]
3. ANTITRUST—the authority to approve or disapprove a host of intercarrier transactions, some of which are patently anticompetitive.[5] Approval has traditionally conferred immunity from the effects of the Sherman and Clayton Acts.[6]

In 1978, following an exhaustive evaluation of the past forty years of regulation, Congress passed and President Carter signed into law the Airline Deregulation Act[7] which will (a) dismantle the regulatory umbrella which has traditionally shielded the industry from the competitive influences of the marketplace, and (b) abolish the Civil Aeronautics Board altogether by 1985.

But even prior to the promulgation of this revolutionary piece of legislation, the Civil Aeronautics Board, under the leadership of Chairman Alfred E. Kahn, had already made incredible strides toward deregulation from within, without legislative guidance. The Board had already adopted the

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1. 49 U.S.C. §§ 1301-1551 (1979). Actually, as originally promulgated in 1938, it was named the "Civil Aeronautics Act." It was not until 1958, when Congress established the Federal Aviation Administration, that the legislation was given the title, the "Federal Aviation Act." 72 Stat. 731. The 1958 Act was not a substantive recodification, however, insofar as it impacted economic regulation by the Civil Aeronautics Board. The Airline Deregulation Act of 1978, 92 Stat. 1705, which is discussed extensively in this article, does not constitute a separate body of legislation, but instead amends several pieces of existing legislation, of which the Federal Aviation Act is the most significant.

2. Actually, as originally created in 1938, the agency was titled the "Civil Aeronautics Authority." The name was changed the following year.

3. *See* 49 U.S.C. § 1371 (1979).

4. *See* 49 U.S.C. §§ 1373, 1482 (1979). *See* Gillick, *Recent Developments in Airline Tariff Regulation: Procedural Due Process and Regulatory Reform*, 9 TRANSP. L.J. 67, 67-72 (1977).

5. *See* 49 U.S.C. §§ 1378, 1379, 1382 (1979).

6. *See* 49 U.S.C. § 1384 (1979). These constitute the three *primary* areas of economic regulation. Other important responsibilities include entry of foreign air carriers, 49 U.S.C. § 1372 (1979), regulation of mail carriage, 49 U.S.C. §§ 1375, 1376 (1979), and (since 1978) assuring service to small communities, 49 U.S.C. § 1389 (1979).

7. Pub. L. 95-504 (Oct. 24, 1978).

most liberal entry and rate policies in the history of transport regulation—reversing a full 180 degrees the prior course of government in this field. Actually, the legislation did little more than sanction what the Board had already done, moot the serious questions raised by many carriers as to the legality of the Board's radical course, and extend to the Board a few additional tools to accomplish the policy objectives it had already adopted.

But prior to the promulgation of the Airline Deregulation Act, the process of deregulating from within was a novel one, and the Board recognized the real possibility of judicial reversal. Query: how could the courts find a regulatory scheme of deregulated entry consistent with a legislative scheme of regulated entry? In light of these dangers, the Board under Alfred Kahn proceeded on two fronts:

> (1) The CAB correctly recognized that many of its decisions were directly contrary to the legislative history and congressional intent, if not the language, of the Federal Aviation Act, and that therefore it would suffer setbacks from the judiciary on many of its decisions. Consequently, it proceeded with a "shotgun" approach, making significant strides toward deregulation in a multitude of entry, rate, and antitrust proceedings, and doing so expeditiously. A reversal here or there would not diminish significantly the overall impact of the mass of decisions being rendered, and even those relatively few reversals would be issued only after years of litigation—well after the market had felt their deregulatory effects. Chairman Kahn's explicit philosophy was to "so scramble the eggs that no one will ever be able to get them back into their shells again."
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> (2) The CAB correctly recognized that the possibility of reversal could be minimized if all interested parties were afforded an adequate opportunity to comment upon each policy decision, and great pains were taken to explain away the policy objections. Thus, the Board moved closer and closer to its policy objectives, explaining in great detail how and why it was proceeding, giving virtually no credence to the carriers and communities who urged the Board to proceed with caution, and who strongly felt that the ultimate results would be deleterious to the industry and the traveling public it serves.

Subsequent to the promulgation of the Airline Deregulation Act, the CAB proceeded on a course of wild abandonment, awarding operating authority in an indiscriminate manner to virtually all who sought it. It far surpassed even the intent of Congress as expressed in this revolutionary legislation. We are now left with a voluminous record in the public domain which explains, in detail, the arguments on both sides, and the rationale behind the policies which prevailed at the Board and in Congress.

This article shall endeavor to explore that record. Although the legal arguments are now virtually moot, the policy arguments remain, for it is too early to grasp the full impact of these decisions upon the airline industry, small communities, and the public. Both the Board and Congress made a plethora of predictions as to the effect of deregulation; all were optimistic.

Although the Civil Aeronautics Board is designated by the new legisla-

tion to self-destruct in 1985,[8] it must prepare a report to Congress the preceding year explaining these effects.[9] If the results of airline deregulation prove to be less than beneficial to certain sectors of the economy, or if the self serving predictions of the CAB prove ultimately to have been erroneous, Congress may well have second thoughts about the demise of both airline regulation and the CAB. The importance of this analysis lies not only in the compilation of a record with which to judge the market effects of a radical change in governmental policy, it lies also in its relevance to the contemporary debate over deregulation of surface modes of transportation (*i.e.*, motor carriers and railroads). An identical objective is sought and many of the same arguments are being made in support of surface deregulation.

The instant discussion will confine itself to a review of the policy arguments in support of and opposed to the traditional regulatory scheme. It will also endeavor to examine and analyze the issues of whether the Board traditionally applied quasi-judicial entry criteria consistent with the legislative history of the 1938 legislation, and whether it now regulates entry in a manner consistent with the intent of Congress as expressed in its 1978 amendments. The focus here shall be the subject of regulated entry in domestic scheduled passenger air transportation. Obviously, it is difficult to discuss entry without also discussing the rate objectives in, or the antitrust consequences of, deregulation. In order to comprehend the magnitude and implications of contemporary developments, it is necessary to begin with a discussion of how and why entry in air transportation came to be regulated.

II. The Legislative History of the Original Entry Provisions

The legislative history of the Civil Aeronautics Act of 1938, the predecessor of the Federal Aviation Act of 1958, reveals that Congress recognized the air transport industry to be in its infancy, and believed that the existing competitive environment could, in the absence of regulation, inhibit or impede its sound development. The existing air mail legislation was believed to have imposed certain undesirable influences upon the industry. Moreover, in order to avoid the deleterious consequences of "cutthroat", "wasteful", "destructive", "excessive" and "unrestrained" competition, and the economic "chaos" which had so plagued the rail and motor carrier industries, Congress sought to establish a regulatory structure similar to that which had been devised for those industries which had also been perceived as "public utility" types of enterprises. Such a system, it was believed, would enhance economic stability and thereby contribute to the sound economic growth and development of air transportation, which was thought to

8. *See* 49 U.S.C. § 1551 (1979).
9. 49 U.S.C. § 1551(c)(d) (1979).

be an industry potentially of vast significance to the economic development of the nation. It would insure service to small communities and the protection of smaller carriers. It would not be a system of regulated competition which might prohibit the entry of new carriers. The regulatory scheme would assure adherence to the highest standards of safety, and would satisfy the needs of commerce, the public interest and the national defense.

A. *An Infant Industry in a Hostile Economic Environment*

At the outset, the perspective from which Congress viewed the aviation industry prior to the promulgation of the Civil Aeronautics Act should be examined. As has been indicated, the air transportation industry was perceived to be in its infancy,[10] and potentially of such fundamental importance to the national economy as to require regulation for its orderly development and economic growth.[11] The Senate Commerce Committee expressed serious concern with the "intensive," "extreme," and "destructive" competition in which all transport modes were engaged; such an economic environment was having injurious effects upon the industry and its ability adequately to provide the service required to satisfy the needs of commerce, the public interest and the national defense.[12] By establishing

10. *Regulation of Interstate Transportation of Passengers, Mail and Property by Aircraft, Hearings in S. 3187 by the Senate Comm. on Commerce*, 73rd Cong., 2nd Sess. 1 (1934). *See* Dempsey, *The International Rate & Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 413 (1978).

11. Among the primary proponents of air transport regulation, and the author of the original bills, was Senator Patrick McCarran, who emphasized the significance of the pending legislation by stating that, "there was never anything before this country more vital from the standpoint of national development, particularly at this hour of the world's history, and at this hour in our national history, than the legislation which is now pending before this subcommittee, because we are dealing with an infant industry, and we are dealing with it from the standpoint of what it can do for this country commercially, industrially, and as an arm of national defense." *Civil Aviation and Air Transport; Hearings in S. 3659 Before a Subcomm. on Interstate Commerce*, 75th Cong., 3rd Sess. 7 (1938) [hereinafter cited as *Senate Hearings on S. 3659*].

The significance of the air transport industry is also reflected in these remarks by Colonel Edgar S. Gorrell, the president of the Air Transport Association, and perhaps the most effective proponent of the pending legislation:

> We realize that our industry is, peculiarly, one affected with a public interest. No other is so intimately bound up with demands of our national government both in peace and in war time. We realize, likewise, that no one can hazard an intelligent prediction as to what the future holds in store for our industry, for in our whole national history there is no other transportation industry, and perhaps no other industry of any kind whatever, that is subject to such rapid, kaleidoscopic, and revolutionary technological and commercial changes.

Aviation: Hearings on H.R. 5234 and H.R. 4652 Before the House Comm. on Interstate and Foreign Commerce, 75th Cong., 1st Sess. 53 (1937). [hereinafter cited as *House Hearings on H.R. 5234 & H.R. 4652*]. *See* Westwood & Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword*, 42 NOTRE DAME LAW, 309, 320 (1967).

12. The report of the Senate Committee on Interstate Commerce expressed the Congressional perspective as follows:

a system for the orderly development of air transportation analogous to that employed in the regulation of public utilities and other modes of transportation, it was believed that these deleterious consequences could be avoided.

Among the difficulties faced by air carriers prior to 1938 was an inability to attract sufficient investment capital.[13] It was argued that the order and stability insured by public regulation would create a situation in which this inability would be diminished. Indeed, governmental regulation was viewed as fundamental to the creation of an economic environment of sufficient order and stability to insure the attraction of capital sufficient to maintain the requisite growth of the aviation industry.[14]

> In recent years, there has been an extraordinary growth of transportation by air. The air lines . . . are engaged in intensive competition with each other and with . . . other carriers. This competition is being carried to an extreme which tends to undermine the financial stability of the carriers and jeopardize the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest and the national defense. Aviation in America today, under the present laws, proves unsatisfactory to investors, labor, shippers, and carriers themselves.

Senate Comm. on Interstate Commerce, Air Transport Act, 1937, S. REP. No. 686, 75th Cong., 1st Sess. [hereinafter cited as *Senate Committee Report on ATA*]. Virtually identical language was expressed in the subsequent Senate Report of *Senate Comm. on Interstate Commerce, Air Safety Act, 1937*, S. REP. No. 687, 75th Cong., 1st Sess. 2 (1937) [hereinafter cited as *Senate Committee Report on ASA*].

13. It has been contended that the difficulty in attracting investment capital may be attributed to the following factors:

> The public faith in the industry had been severely undermined by the Black hearings [*i.e.*, the hearings of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts chaired by Senator Hugo Black of Alabama]. The numerous air crashes also dampered public enthusiasm. Then, too, airline dependence on an unsympathetic and unpredictable Congress for necessary subsidies restrained investment. Lastly, the general depression of the national economy and the added costs of complying with the National Recovery Act hindered the generation of capital.

SENATE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE JUDICIARY COMMITTEE, 94th Cong. 1st Sess., CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES, 207-208 (Comm. Print 1976) [hereinafter cited as KENNEDY REPORT].

14. Thus, Mr. Gorrell emphasized the unfavorable economic circumstances with which the industry was faced, and the urgency with which the proposed legislation was viewed:

> The fact that financial support and access to new sources of capital are critically needed, is well known. Since air transport was launched into meteoric growth, approximating $120,000,000 of private capital has been devoted to it, but, of that sum, there remains today scarcely 50 percent. Since the beginning of air transport, a hundred scheduled lines have traversed the airways in a struggle to build this newest avenue of the sky. But today scarcely more than a score of those companies remain. The industry has been reduced to the very rock bottom of its financial resources. . . .
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> There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into a air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful governmental supervision.
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> It is the second way . . . which is here proposed. It is a way which protects the public through stringent regulation. . . .

Senate Hearings on S. 3659, supra note 11, at 30-31; *See Civil Aeronautics Authority; Hearings*

B. *The Regulatory Environment Prior to 1938*

Among the difficulties which the pending legislation sought to alleviate were those arising under the existing structure of air mail legislation. In 1918, air mail service was inaugurated by the Army. The Kelly Act (Air Mail Act of 1925) established economically feasible commercial air transportation autonomous from the military by permitting the Postmaster General to award contracts to private air lines for the movement of mail.[15] The Air Commerce Act of 1926 vested jurisdiction over safety and the maintenance of airways and navigation facilities in the Secretary of Commerce.[16] The McNary-Watres Act of 1930 established a formula for air-mail payments based upon the amount of mail transported.[17] Congressional discontent with the administration of this legislation by the Postmaster General led to an investigation by a Senate Special Committee chaired by Senator Hugo Black.[18] The outrageous activities revealed by this investigation led President Roosevelt to respond by terminating all existing air-mail contracts on the ground that there had been collusion between air carriers and the Post Office Department in route and rate establishment.[19]

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on S. 3760 Before the Senate Commerce Comm., 75th Cong., 3rd Sess. 338-339 (1938) [hereinafter cited as *Senate Hearings on S. 3760*]; and HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, CIVIL AERONAUTICS BILL, H.R. DOC. 2254, 75th Cong., 3rd Sess. 2 (1938) [hereinafter cited as HOUSE COMMITTEE REPORT ON CAB]. Between the two alternatives posed by Colonel Gorrell—subsidization or nationalization of the airlines on the one hand, and economic regulation, on the other—the Colonel favored and the Congress adopted the latter.

15. *See* KENNEDY REPORT, *supra* note 13, at 195; R. BURKHARDT, THE CIVIL AERONAUTICS BOARD 4 (1974) [hereinafter cited as BURKHARDT]; S. RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION 4 (1961) [hereinafter cited as RICHMOND]; H. KNOWLTON, AIR TRANSPORTATION IN THE UNITED STATES 4 (1941) [hereinafter cited as KNOWLTON], C. PUFFER, AIR TRANSPORTATION 2-3 (1941) [hereinafter cited as PUFFER]; and L. KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 65-66 (1951) [hereinafter cited as KEYES].

16. *See* PUFFER, *supra* note 15, at 3; KNOWLTON, *supra* note 15, at 6-7; KEYES, *supra* note 15, at 65; and KENNEDY REPORT, *supra* note 13, at 199-200.

17. KENNEDY REPORT, *supra* note 13, at 203-204.

18. F. THAYER, JR., AIR TRANSPORT POLICY AND NATIONAL SECURITY 10 (1965) [hereinafter cited as THAYER].

19. KNOWLTON, *supra* note 15, at 9; KENNEDY REPORT, *supra* note 13, at 204. The multitude of problems which arose under this regulatory regime has been adequately explored by a number of commentators, and need not be repeated in any depth here. For example, the CAB STAFF REPORT pointed out that,

> The excessive discretion enjoyed by the Postmaster General under the pre-1938 legislation obviously lent itself to favoritism in the award of contracts. In addition, the system was vulnerable to political pressures for the extension of mail routes into particular localities. As a leading commentator on the history of the legislation has noted, 'Political pressure was constantly being brought to bear on the Postmaster General to get new routes or extensions of old routes into favored localities where the amount of traffic would be very light, but where civic pride would be gratified.'

REPORT OF THE CAB SPECIAL STAFF ON REGULATORY REFORM 31-32 (1975) [hereinafter cited as CAB STAFF REPORT]. *See* RICHMOND, *supra* note 15, at 6; BERNHARDT, *supra* note 15, at 5-6; KNOWLTON, *supra* note 15, at 9; KEYES, *supra* note 15, at 63-65; KENNEDY REPORT, *supra* note 13, at 203-209.

The legislative history of the Civil Aeronautics Act reflects general displeasure with the existing regulatory structure under the air-mail legislation. The Report of the House Committee on Interstate and Foreign Commerce stated that:

> Under existing law there is little economic regulation of air carriers. Routes are awarded not upon the basis of the ability of the particular air carrier to perform the service or the requirements of the public convenience and necessity, but upon the letting of air-mail contracts to the lowest responsible bidders. . . . A route once secured, however . . . does not protect the air carrier . . . from possible cutthroat competition, for air carriers are not required to secure a certificate or other authorization from the government before beginning operations, other than one based on safety requirements. Nor, is there any authority in the federal government under existing law to prevent competing carriers from engaging in rate wars which would be disastrous to all concerned.[20]

C. *The Surface Carrier and Public Utility Analogy*

The legislative history also reveals a concern that the past unfortunate economic experience of surface carriers might be repeated in the air transport industry. The Great Depression was, undoubtedly, the most intense economic calamity of the Century. It was an era of economic upheaval and uncertainty during which the fatality level of business was accentuated. Certain industries were deemed so fundamental to the existence of a sound national economy that the federal government intervened to regulate competition, restore order and diminish the uncertainty which prevailed. Among those industries perceived as essential to recovery and therefore entitled to the benefits of "public utility" regulation, was that of transportation. In 1935, Congress promulgated the Motor Carrier Act which established federal regulation of motor carrier entry and rates, and placed such jurisdiction in the Interstate Commerce Commission [ICC] (which already held extensive regulatory authority over rail carriers).[21] Commissioner Joseph East-

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20. *House Committee Report on CAB*, supra note 14, at 2. When comparing existing legislation with the proposed system of entry regulation, Mr. Gorrell stated, "the existing air-mail law contributes in some ways, more to the promotion of monopoly than would a system of certificates of convenience and necessity . . . [U]nder the present law, although convenience and necessity might be proven, no air-mail contractor may be permitted to fly parallel to the line of another air-mail contractor, or be allowed to maintain passenger and express service off the line of his air-mail route which in any way competes with passenger or express service available on another air-mail route." *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 70. He proceeded to indicate that in the absence of a regulatory system approximating that contemplated under the pending legislation, destructive competition would ensue. *Id.*

21. The Motor Carrier Act was subsequently scattered throughout the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11916 (1979). *See* Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729, 735 (1977). The ICC today regulates freight forwarders and domestic water carriers as well. *See* Dempsey, *The Contemporary Evolution of In-*

man of the ICC stated:

> [I]mportant forms of public transportation must be regulated by the government. That has been accepted as a sound principle in this country and . . . in practically every country in the world. . . .
>
> Transportation is of such vital importance to the public welfare and the business is so affected with a public interest that some measure of government regulation is . . . necessary. Present competition between the several forms of transportation has increased that need. . . . Perhaps the primary reason for creating the Interstate Commerce Commission was the disturbance of business conditions and the peril to stability and financial prosperity to the railroads themselves brought about by uncontrolled competition.[22]

Transportation was viewed by some to be on the order of a public utility, for which regulation was deemed essential. For example, a representative of the National Association of Railroad and Utilities Commissioners testified that:

> [A]ny important public-utility industry requires regulation in the public interest

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termodal & International Transport Regulation Under the Interstate Commerce Act: Land, Sea & Air Coordination of Foreign Commerce Movements, 10 VAND. J. TRANSNAT'L L. 505 (1977); 46 ICC PRAC. J. 360 (1979).

22. *Regulation of Transportation of Passengers and Property by Aircraft, Hearings on S. 2 and S. 17 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 75th Cong., 1st Sess. 67 (1937) [hereinafter cited as *Senate Hearings in S. 2 and S. 1760*].

Commissioner Eastman repeatedly emphasized his opinion that the industry of transportation is of such significance to the economy that it must be regulated, saying "Transportation is an industry that must be publicly regulated. That fact seems to be conceded all over the world. It is an industry which is so affected with a public interest that such regulation is necessary in order to protect that interest, and that regulation should cover . . . all important forms of transportation." *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 30. Other commentators argued that the excessive expansion of the rail industry would have been avoided had entry controls existed. *Senate Hearings on S. 3659, supra* note 14, at 95, 106. Colonel Gorrell testified that:

> [The government] would be wise to regulate [the airline industry] . . . before it gets into bad habits . . . just like existed in the bus and trucking business . . . where through cutthroat competition you could buy a ticket from Chicago to Detroit for as low as a dollar; and just like the practices existing in the railroads before they were regulated. . . . They will not happen if you set up a proper minimum regulation through the enactment of . . . legislation . . . requiring the issuing [sic] of certificates of convenience and necessity. We have already lost about $60,000,000 of the $120,000,000 that has been invested. We cannot go on losing money; we cannot ask people to put money into this industry . . . when their investment can be taken away from them by some unregulated and irresponsible competing company.

House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 81.

Mr. Gorrell repeatedly expressed the view that in the absence of economic legislation, severe price wars and destructive competition might ensue.

> [N]ot many people are willing to [invest capital in the airline] business today . . . unless there is some proper protection against . . . irresponsible companies [which might institute service with] second-hand planes and cut prices right out from under legitimate operators.

Id. at 76-77. *See* BURKHARDT *supra* note 15, at 3. Consequently, it was believed that the economic regulation of entry would insure a stable competitive environment which would promote the orderly development of this industry and the attraction of sufficient capital to hasten that development.

> and will be regulated sooner or later. . . . [T]he full purpose of regulation can be accomplished only by regulation from the beginning of the development of the industry. . . .
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> [Congress must establish] such conditions that there may be an encouraged development of the aircraft business . . . and [create] conditions—and this is of paramount importance—which will avoid the wastes and losses which will be inevitable if the business is left to struggle to establish itself in open competition.[23]

D. *Avoidance of Excessive Competition*

In light of the economically catastrophic experience of other transport modes, it was believed that regulation might insure that such consequences might be avoided for the air transport industry. Mr. Gorrell stated that, "Cutthroat competition is nowhere so dangerous as in transportation. And in no form of transportation would it be more disastrous . . . [than] in the case of air carriers."[24]

A system of economic regulation was envisioned which would avoid the consequences of excessive competition.[25] In fact, the legislative history repeatedly reveals that destructive competition was among the injurious activities to which the Act was addressed. For example, the Senate Reports which preceded its promulgation indicate that the air carriers were "engaged in intensive competition with each other and with the railroads and other carriers [which] is being carried to an extreme which tends to undermine the financial ability of the carriers and jeopardize the mainte-

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23. *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 163.

24. *Senate Hearings on S. 2 & S. 1760, supra* note 22, at 513.

25. Senator McCarran submitted the following material for inclusion in the records of the Senate Subcommittee hearings:

> Following the principles generally recognized in connection with other forms of transportation, it is believed to be sound public policy that an air-line operator who makes the necessary investment to establish and maintain service on a given route should be entitled to protection against unlimited competition so long as he renders adequate and efficient service at reasonable rates. . . .
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> In general, for the present at least, only one operator should be given a certificate for operation between any two given points, except in the case of larger metropolitan centers where the needs of through traffic, together with those of intermediate points, may justify the establishment of two or more services via different routes by different operators.

Id. at 376-377. Thus, it was contemplated that the regulation of entry would so limit competition as to avoid the inherent consequences which were believed undesirable. A representative of the National Association of Railroad and Utilities Commissioners asserted:

> [E]very important public utility industry requires governmental regulation in the public interest. . . .
>
> The only way in which the public can be protected in respect to an industry such as this is by providing for public regulation at the outset, so that the future will not be burdened by overcapitalization . . . which are indigent to the passage of the industry through a period of cutthroat competition, and of difficulties when large losses are incurred, which might be avoided under the control of a government agency.

Senate Hearings on S. 3659, supra note 14, at 17.

nance of transportation facilities and service appropriate to the needs of commerce and required in the public interest and the national defense." The Senate Committee on Interstate Commerce felt that the proposed legislation would not only "promote an orderly development of transportation in the United States," but would also "prevent the growth of bad practices and uneconomic capital structures resulting from a period of *destructive competition*. . . ."[26] The House Committee on Interstate and Foreign Commerce, in its 1937 report recommending adoption of the proposed legislation, maintained that, "The government cannot allow unrestrained competition by unregulated air carriers to capitalize on and jeopardize the investment which the government has made during the last 10 years in the air transport industry through the mail service. . . ."[27]

The Federal Aviation Commission, which was established by the Black-McKellar Act of 1934, submitted 102 recommendations in its report to Congress of January 30, 1935.[28] It contended that the orderly development of air transportation required two fundamental ingredients. First, in the interest of safety, certain minimum standards of equipment, operating methods and personnel qualifications should be maintained. Second, "there should be a check in development of any irresponsible, unfair, or excessive competition such as has sometimes hampered the progress of other forms of transport" (Recommendation 5). However, it was never maintained that competition among carriers should be prohibited.[29]

Congressman Randolph contended that "unbridled and unregulated competition is a public menace," citing as examples that the air transportation industry was then subjected to such unfortunate economic conditions as "rate war[s], cutthroat devices, and destructive and wasteful practices."[30] Other Congressmen emphasized that the legislation was in-

26. *Senate Committee on Interstate Commerce*, 75th Cong., 1st Sess., *Report on Air Transport Act of 1937*, 2 (1937) [emphasis supplied]. *See also Senate Comm. on Commerce* 75th Cong., 3rd Sess., *Report on Civil Aeronautics Act of 1938* (1938), which emphasized, as among the central objectives of the proposed legislation, the prevention of "bad practices and of destructive and wasteful tactics resulting from the intensive competition now existing within the air carrier industry." *Id.* at 2. *See* RICHMOND, *supra* note 15, at 7; Dupre, *A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry*, 9 TRANSP. L.J. 273, 280-281 (1977).

27. Quoted in RICHMOND, *supra* note 15, at 8.

28. *Senate Comm. on Interstate Commerce, Federal Aviation Commission, S. Doc. No. 15*, 75th Cong., 1st Sess. (1935) [hereinafter cited as *Federal Aviation Commission*].

29. *See* 83 CONG. REC. 6852 (1938) (remarks of Sen. McCarran [the author of the original Senate bill]). A representative of the Treasury Department testified that, "this new proposed legislation embodies standards to guide the Board in the exercise of its authority to issue these certificates so as to require the Board to see to it that we have competition where it is in the public interest to have competition and where it would be healthy to do so." *Senate Hearings on S. 3760, supra* note 14, at 5.

30. 83 CONG. REC. 6507 (1930).

tended to inhibit or prohibit monopolization in the industry.[31]

E. *Competition vs. Monopolization*

The legislative history of the Civil Aeronautics Act of 1938 indicates that although Congress was generally concerned with "cutthroat," "wasteful," "destructive," and "unrestrained" competition, it was nevertheless opposed to monopolization of transportation services and sought to insure that such services would be provided in a competitive economic environment. Recommendation 9 of the Federal Aviation Commission focused on the element of competition in entry regulation: "It should be the general policy to preserve competition in the interest of improved service and technological development, while avoiding uneconomic paralleling of routes or duplication of facilities."[32] The Commission rejected the European concept of the formation of national transportation monopolies operating under close governmental supervision, by stating that:

> We are convinced that the results of anything of that sort would be intolerable. . . .
>
> On the other hand, too much competition can be as bad as too little. To allow half a dozen air lines to eke out a hand-to-mouth existence where there is enough traffic to support one . . . would be a piece of folly . . . . Even though air transport is not a natural monopoly . . . a certain restriction on competition is plainly necessary if government funds are to be conserved and if the community is to get its money's worth from all its expenditures on civil aviation. . . . There must be enough competition to serve as a spur on the eager search for progress, but there must not be so much as to raise costs materially through the duplication of facilities.[33]

The Commission contemplated that an applicant promising superior service would be permitted to enter the market, and that the promotion of competition would be a fundamental consideration in the issuance of operating authority. It concluded this discussion by emphasizing the discretion to be afforded to the governing agency in the performance of its regulatory responsibilities, stating that "We urge that the body responsible for airline regulation should be given a general outline of policy, along the lines of this discussion, as a guide, and that it then be left free to apply the policy in particular cases as circumstances may dictate."[34] Recommendation 13 also expressed the policy that activity which might "reduce the effectiveness of any competition, the preservation of which could serve the public

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31. *See* 83 CONG. REC. 6370 (1938) (remarks of Sen. Borah and Sen. Copeland).

32. *Federal Aviation Commission, supra* note 28, at 61. *See Senate Hearings on S. 2 & S. 1760, supra* note 22, at 704. *See* RICHMOND, *supra* note at 8; and CAB STAFF REPORT, *supra* note at 40.

33. *Federal Aviation Commission, supra* note 19, at 61-62.

34. *Id.* at 62.

interest" should be prohibited.[35]

F. *The Regulatory Regime Contemplated Under the Pending Legislation*

The preceding discussion of competition and monopolization leads us to a review of the regulatory scheme envisioned by Congress under the then pending legislation. Karl Crowley, Solicitor of the Post Office Department, contended that

> This is an infant industry. It is something that has grown up with competition. . . . This bill would freeze the present air service. It would create a monopoly with the present contractors. No little fellow with a new idea, with plenty of capital, could go out and establish a line from, say, Wyoming to California. He would have to get a certificate of convenience and necessity before he could do it. The law right now does not prohibit an independent citizen from establishing an air line. . . .[36]

Senator Pat McCarran vehemently disagreed; he responded to these remarks of Mr. Crowley by insisting that:

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35. *Id.* at 69. Mr. Gorrell testified that "the great field of transportation, and the convenience to the public, may actually be subjected to a more serious threat from unbridled and irresponsible competition than from any threat of monopolistic control." *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 67. He acknowledged that the air transportation industry was not a natural monopoly. "When railroad regulation began, the railroads in a sense constituted a definite transportation monopoly. In the case of the air carriers, however, the industry is in constant, active competition with an extraordinarily developed highway and railroad system. . . ." *Id.* at 66. Mr. Gorrell also testified that:

> [T]here is no great economic barrier to the inauguration of new service, such as prevails in the case of railroads or water carriers, and . . . competition is in fact very keen. . . .
>
> Consequently, in order to avoid the stultifying grip of monopolistic tendencies, the problems is one, not of attempting to break up existing industrial units, but of attempting to introduce measures conducive to stability, measures which will give to the smaller and weaker lines some promise of order and a chance to survive, and measures which will make forever impossible the secret and unlimited acquisition of centralized control.
>
> The necessary stability in the industry is sought . . . through the medium of certificates of convenience and necessity, a familiar regulatory device buttressed by salutory and tested conceptions of law in the course of an experience of regulation which antedates even the original Interstate Commerce Act. It is a device which, in one way or another, is rooted in very early common-law conceptions.

Id. at 341-342. David Behncke, President of the Air Line Pilot's Association, contended that:

> Practically all modes of interstate carriers in this country today are monopolies. . . . In my opinion that is about the only way the situation can be handled, because if it were not handled in this manner, cutthroat competition would get in its destructive work and would destroy all proper and decent standards, both from an economic and a safety point of view. . . .
>
> Certainly the air lines would like to be protected from the uncontrolled competition of would-be competitors. They are quite willing to have the government give them certificates so that no one else can come into their territories and fix rates and undercut them.

Senate Hearings on S. 3659, supra note 11, at 81-82.

36. *Senate Hearings on S. 2 & S. 1760, supra* note 22, at 118; Senator Harry Truman expressed the view that, "We are not interested in the individual fellow who wants to go into the business, but we are interested in protecting life and property on the roads and seeing that 'fly-by-night' operations do not start up and bring down prices and create chaos." *Id.* at 303-304.

> It is true that there is nothing in existing legislation to prohibit an individual citizen from establishing an airline. But it is likewise true that in the proposed bill there is nothing to prevent "a little fellow with a new idea, with plenty of capital" from establishing an airline. . . . If it has plenty of capital, and if it can show to the expert transportation by a new line, then it is entitled to a certificate. The certificating procedure does nothing except to prevent someone with inadequate facilities, or without responsibility, from entering the public service and to prevent the inauguration of service when it would be unjustified. The principle of convenience and necessity is indispensable if we are to have adequate transportation.[37]

Thus, it was contemplated that additional carriers would be certificated to perform air transport services in competition with existing carriers where the applicant could demonstrate that "the public interest will be served." During the hearings, Senator Harry S. Truman insisted that the proposed legislation was not designed to "throttle" competition in the airline industry.[38] It was predicted that the inauguration of services by a new entrant would not be prohibited, except where the applicant was incapable of performing its operations consistent with the public interest or where the proposed operations would not satisfy a public need and would cause injury to both the existing carriers and the applicant. No carrier would have the right to enjoy exclusivity in the markets it serves.[39] The Federal Aviation Commission

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37. *Id.* at 409-410.

38. *Id.* at 303-305. The initial bills proposed for the regulation of air transportation contemplated that jurisdiction over entry and rates in the industry would be vested in the Interstate Commerce Commission, which already held authority over rail and motor carriers. *See supra*, note 21. When asked by Congressman Boren whether a limitation upon entry through the certification process might impose a hardship upon a party that was competent or capable of inaugurating service, Commissioner Eastman responded:

> No; I do not. If a public need can be shown—and the Commission has always been very liberal in the interpretation of the words "public convenience and necessity." It has never construed them in any narrow sense. . . . [T]he Commission has never shown any desire to unduly limit entry into the field and it has always recognized the need for encouraging a reasonable degree of competition.

House Hearings on H.R. 5234 & H.R. 4652, supra note 11, at 40. Amelia Earhart testified as to the ambiguity of the concept of public convenience and necessity in licensing proceedings, stating that "I defy anyone at the present period to define convenience or necessity as applied to aviation. I feel that mere study cannot determine that matter, as we have no background yet of sufficient experimentation to afford adequate interpretation." *Regulation of Transportation of Passengers and Property by Aircraft: Hearings on S. 3027 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess., 100 (1935) [hereinafter cited as *Senate Hearings on S. 3027*].

39. Colonel Gorrell testified that:

> [T]he requirement of a certificate of convenience and necessity prior to the inauguration of a service is in no sense a provision for monopoly. . . . The certificate does two things, and only two. [First], it prevents the inauguration of a service by one who is incapable of rendering [it] according to the standards which are necessary to protect the public. [Second], it prevents a service which cannot be justified by any considerations of public need and which would result only in disaster both to the new proposed service and to existing services. In no sense does this encourage monopoly. No one will have any exclusive rights. The provision merely assumes that those minimum qualifications which

believed that entry into air transportation should remain regulated even in the absence of federal subsidization. With respect to parallel route authorizations, it was felt that although the practice should be avoided, the governing agency should exercise its discretion in the determination of whether duplicative operating authority should be granted.[40] Moreover, it was anticipated that new authorizations which would "meet an unsatisfied public need" or "materially improve upon the service previously available" would be issued.[41]

It is significant that, in drafting this legislation, Congress explicitly required that competition be considered by the Board as a principle element of the public interest.[42] Indeed, as originally promulgated, Section 102 of

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are necessary to an orderly transportation system must be met before anyone undertakes the obligation of public transportation.

Senator Hearings on S. 2 & S. 1760, supra note 22, at 503-504. Mr. Gorrell believed that promulgation of the pending legislation would have the effect of stimulating participation in the air transportation industry by new entrants and over new routes. "We feel that enactment of H.R. 5234 will bring in a number of new companies and there will be additional air line service." *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 75. *See also Senate Hearings on S. 2 & S. 1760, supra* note 22, at 334.

40. The Federal Aviation Commission elaborated on its position regarding entry as follows:

> [W]here a service of high quality exists, with governmental support and under governmental control, and where there is just enough traffic to justify its existence, it seems to us plainly destructive of the general welfare that a new operator should be permitted to appear on the same route with an inferior service and to wean traffic away from the established enterprise by rate-cutting. . . . The ultimate result in such a case is likely to be that both lines will survive on a very inferior plane of service. . . .
>
> The arguments for control over entry into the field seem to us compelling. . . . We recommend that certificates should be issued in the discretion of a commission set up for that and other purposes, and that although a direct duplication of certificates for the same route should normally be avoided, their form should carry no explicit guarantee of exclusiveness of franchise. Whether or not routes should be paralleled should be for Commission discretion to determine, in the light of all the circumstances in the area concerned.
>
> Cases are likely to arise, if our recommendation on this point should be accepted, of two or more operators seeking the issue of a newcomer arguing that he should be accepted, of two or more operators seeking the issue of the same certificate for a new route or of a newcomer arguing that he should be allowed the privilege of paralleling or displacing an existing service on the ground that it is not of as high a quality as he would be willing to provide. Such conflicts of desire would of course be nothing new in the history of regulatory commissions, and it would in our opinion be essential that the appropriate agency of government should be free to exercise wide discretion in dealing with them.

Federal Aviation Commission, supra note 28, at 54-55.

41. Even after air transport shall have attained a purely commercial footing, needing no direct support from the government, we consider that it will still require control as a public utility and one which in some cases must take on a monopoly character. . . . Both during the governmentally-aided period and thereafter, in our opinion, there should be a certain measure of control by the government of the right of entry into the business in order that proper standards may be enforced and irresponsible campaigns of mutual destruction on the part of operators averted.

Id. at 52; *see House Comm. on Interstate Commerce, Regulation of Transportation of Property and Passengers by Air Carriers*, H.R. Doc. No. 911, 75th Cong., 1st Sess. (1937) [hereinafter cited as *House Committee Report on Transport Regulation*].

42. *See* 83 Cong. Rec. 6726 (1938).

the Act required, *inter alia*, that the Board adhere to the principle of competition "in the exercise and performance of its powers and duties."[43] This statutory provision has been interpreted to require that the Board foster competition as a means of enhancing the development and improvement of air transport services on those routes generating a sufficient volume of traffic to support competing carriers.[44]

G. *Providing Order & Stability for the Growth of An Infant Industry*

Among the essential purposes of the promulgation of the Civil Aeronautics Act was to shield the air transport industry from the hostile economic forces prevalent in an unregulated economic environment, so that it could enjoy the order and stability required for the acquisition of capital and long-term growth.[45] A concern was also expressed that service provided to small communities should be guaranteed. Thus, an airline executive stated,

> One of the most important features of the pending legislation will be the issuance of route certificates of public convenience and necessity. This will prevent monopoly and insure adequate service where traffic is heavy. In the more sparsely settled areas, it will give air lines the assurance hitherto lacking, that

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43. 49 U.S.C. § 1302(a) (1977). More specifically, the Act provided (prior to the recent amendments of the Airline Deregulation Act), that the CAB should promote "Competition to the extent necessary to assure the sound development of an air-transportation system. . . ." 49 U.S.C. § 1302(a)(4) (1977). The policy declaration also called for avoidance of "unfair or destructive competitive practices," and the promotion of "sound economic conditions" in transportation. 49 U.S.C. § 1302(a)(2)(3) (1977).

44. Continental Air Lines, Inc. v. CAB, 519 F.2d 944, 946 (D.C. Cir. 1975).

45. One airline executive stated, "As we see it, the Civil Aviation Authority, when created, will have two broad policy functions: first, to reestablish develop, and expand American aviation, both domestic and foreign, on a sound basis; and second, to maintain a healthy condition and growth through proper regulation and control." *Senate Hearings on S. 3659, supra* note 11, at 149. Existing carriers supporting the proposed legislation sought regulation as a means of enhancing stability in the air transport industry. A representative of United Air Lines stated that, "If some degree of permanency can be assured and the investments of already existing carriers be safeguarded, it will allow those air carriers to intelligently and effectively plan for the future. . . ." *Senate Hearings on S. 3027, supra* note 38, at 38. The Report of the House Committee on Interstate Commerce stated:

> [T]his bill when enacted will greatly stabilize the air-transport industry of the United States, and will thereby materially contribute to its sound growth and economic advancement. . . .
>
> The present air-transportation system . . . is now seriously threatened by unregulated airlines, unhampered by any duty to perform the governmental service of carrying mails and not covered by the present law. The government cannot allow unrestrained competition by unregulated air carriers to capitalize on and jeopardize the investment which the government has made during the past 10 years in the air-transport industry. . . .

Federal Aviation Commission, supra note 19, at 170. Thus, regulation was deemed necessary not only to protect the capital investment made by the private sector in the air transport industry, but also to insure security for the investment made by the government.

they can operate with reasonable security as to their routes.[46]

Additionally, the government sought to protect the operations of small carriers from the dangerous effects of predatory competition. Congressman Randolph contended that, "Permanent long-term legislation covering the economic phases of the industry is required to make possible the carrying out of a healthy long-range planning on the part both of management and of government, and to avoid rate wars, cutthroat devices, and wasteful practices of which there have been disturbing signs. Economic power and reckless management should not be permitted to injure the smaller lines, the employees of the companies, and the public."[47] It was also contended that the position of smaller carriers *vis-à-vis* larger carriers should be protected. Mr. Gorrell contended that, "In spreading out into the regions of light-density traffic and developing smaller communities, the small lines have performed an incalculable service to the country. It must be assured, through certificates, that they may continue to perform such a service, and they must be given an opportunity to protect themselves against even the possibility of oppressive competition."[48]

When asked by Congressman Boren whether entry should be regulated, Mr. Gorrell responded by saying, "I think it should be restricted to an extent needed for an orderly expansion of our industry. I think any person going into the common-carrier business should have a certificate of convenience and necessity so that the growth of this industry might be orderly and not 'cutthroat.' "[49] He proceeded to express the belief that had entry in the rail carrier industry been regulated during its infancy, the destructive tactics which prevailed prior to regulation might have been prevented.[50]

III. The Traditional Entry Criteria

As originally promulgated, the Federal Aviation Act authorized the issuance of operating authority to any applicant who was "fit, willing, and able," under circumstances where the transportation in question was "required by the public convenience and necessity."[51] In performing such responsibilities, the CAB was obligated by the Act to "foster sound economic conditions" in transportation, to promote "adequate, economical, and efficient service by air carriers at reasonable charges"[52] to promote "competition to the extent necessary to assure the sound development of

46. *Senate Hearings on S. 3659, supra* note 11, at 170.
47. 83 Cong. Rec. 6501-6515 (1938).
48. *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 90.
49. *Id.* at 69. *See also* Burkhardt, *supra* note 15, at 12.
50. *House Hearings on H.R. 5234 & H.R. 4652, supra* note 11, at 69.
51. Former Federal Aviation Act § 401(d)(1), (d)(2), and (d)(3); 49 U.S.C. & 1371(a)(1), (d)(2), and (d)(3) (1977).
52. Former Federal Aviation Act § 102; 49 U.S.C. § 1302 (1977).

an air transportation system"[53] and to avoid "destructive competitive practices."[54]

In interpreting the statutory concept of public convenience and necessity, the Board traditionally weighed and balanced a number of criteria[55] (including the relative service benefits of proposed operations, and such considerations as historic participation in the involved market, the ease with which the involved segment would integrate with the applicant's existing route structure, and the carrier's needs for subsidy reduction and/or route strengthening), and no single criterion was deemed to be controlling.[56] Most such proceedings involved essentially a two-step process: (1) determining the number of carriers the market in question could reasonably and profitably support; and (2) selecting from among the various applicants which carrier(s) should be designated to receive (a) certificate(s) of public convenience and necessity.

In the years immediately after the Act was passed, the Board was principally concerned with the issuance of "Grandfather" certificates under section 401(e)(1) of the Act,[57] which required that a certificate of Public Convenience and Necessity be issued to any applicant only upon proof that during the grandfather period (May 14, 1938—August 22, 1938), it was an air carrier, continuously operating over the segment for which operating authority was sought (unless the service provided during such period was inadequate and inefficient).

During this period, the Board began to set the stage for its policy of discriminating against new entrants in favor of grandfather carriers. Thus, two carriers which attempted to acquire certificates of Public Convenience and Necessity failed on the basis of lack of service during the grandfather period.[58] Airline Feeder Systems, Inc. was denied a certificate because if had carried only eleven passengers in nine roundtrips during the grandfather period; another airline was denied a certificate because the Board found that there was an existing carrier (Braniff) which could also serve the route.[59]

Each of these carriers operated aircraft, and had carried passengers safely. The Board made no mention of the applicants' *present* ability to conduct operations, nor that their service was required by the "public convenience and necessity." The Board did not inform the applicants that they

53. Former Federal Aviation Act § 102(a)(4); 49 U.S.C. § 1302(a)(4) (1977).

54. Former Federal Aviation Act § 102(a)(3); 49 U.S.C. § 1302(a)(3) (1977).

55. Memphis-Tampa/St. Petersburg/Clearwater Subpart N Proceeding, CAB Order 77-5-66 (1977), at 2-3.

56. Fort Myers-Atlanta Case, CAB Order 76-1-81 (1976), at 11, and cases cited therein.

57. Former 49 U.S.C. § 1371(e)(1) (1977).

58. Application of Airline Feeder System Inc., 1 C.A.A. 167 (1939); Application of Condor Air Lines, Inc., 1 C.A.A. 593 (1940).

59. Trans-Southern Airlines, Inc., Amarillo-Oklahoma City Operation, 2 C.A.B. 250 (1940).

could apply under one of the other provisions of section 401,[60] nor did the Board exercise its power under the exemption provision of the Act. It would appear that the Board looked to the grandfather provision under section 401(e)(1) as the only means that a carrier might enter the industry.

When Northwest Airlines applied for operating authority, and had a portion of it denied, the Board set down its interpretation of what Congress intended:

> [I]t was not the Congressional intent that the air transportation system should be "frozen" to its present pattern. *On the other hand*, it is equally apparent that Congress intended the [CAB] to exercise a firm control over the expansion of air transportation routes in order to prevent the scramble for routes which might occur under a "laissez faire" policy. Congress, in defining the problem, clearly intended to avoid the duplication of transportation facilities and services, the wasteful competitive practices, such as the opening of non-productive routes, and other uneconomic results which characterized the development of other modes of transportation prior to the time of their government regulation.[61]

The Board here was reflecting the country's mood towards the evils of excessive competition that had been witnessed in surface transportation. The Board appeared to overlook the point, however, that the airline industry was at that time, highly physically mobile. Large stations weren't required at airports; aircraft could be moved with ease; if a given route couldn't support two or more carriers, then those that were less efficient could (assuming liberal exit policies) easily leave and retreat to other markets.

Finally, the CAB set as its criteria for authorizing new route service the policy that all routes had to be self-supporting *prior* to certificate operation, without any regard to the potential traffic that could be generated, or the potential benefit to the public of the new service.

> [I]n determining whether the inauguration of a new service will result in carrying out the objectives of the act as set forth in the declaration of policy, [the CAB must] consider not only the need of the particular community or section for the proposed operation but also the relationship which service bears to the development of a nationally adequate and economically sound air transportation system. . . . [T]his determination must be made in the light not only of the cost to the public incident to the inauguration and operation of the service but also of the regulation of the expansion of the industry at a crucial period of its development in a manner which will not only foster sound economic conditions in air transportation at the present time but also in the future. One of the factors directly related to the interests of the public and to the economic welfare of the industry is the relationship between the estimated commercial reve-

60. It is not known whether the applicants did apply under the other provisions of the act, but the evidence indicates that neither Condor nor Feeder Systems appear as certificated carriers in any of the Board's records.

61. Northwest Airlines, Inc.—Certificate of Public Convenience and Necessity, Duluth-Twin Cities Operation, 1 C.A.A. 573, 577-578 (1940).

nues and operating costs of the proposed service.[62]

In a 1941 case, the CAB stated that four questions were to be considered in any application for new service:

> 1. Will the new service serve a useful public service, responsive to a public need?
>
> 2. Can and will this service be served adequately by existing routes or carriers?
>
> 3. Can the new service be served by the applicant without impairing the operations of existing carriers contrary to the public interest?
>
> 4. Will any cost of the proposed service to the government be outweighed by the benefit which will accrue to the public from the new service?[63]

Dixie Airlines was a newly organized corporation formed for the purpose of developing and operating a proposed airline upon the issuance of operating authority. The Board justified its denial by turning the issue of competition against the carrier, saying that "The number of air carriers now operating appears sufficient to insure against monopoly in respect to the average new route case, and we believe that the present domestic air-transportation system can by proper supervision be integrated and expanded in a manner that will in general afford the competition necessary for the development of the system in the manner contemplated by the Act."[64]

The Board thus constructed the policy it was to follow for the next three decades in applications proceedings for trunk line entry. It would issue operating authority only to those carriers which had been operating under the grandfather clause. Furthermore, it was not inclined to issue competitive route authority unless substantial evidence existed that the additional carrier would not only meet all of its costs, but would also not appreciably divert traffic from the incumbent carrier.

Nevertheless, the entry criteria employed vascilated from year to year and, in some instances, from case to case. In later decisions, the CAB emphasized that no criterion was controlling. As the CAB stated in the *Service to Tri City Case*:[65]

> The Board has never established a hierarchy among the various carrier selection criteria but has rather examined all the relevant criteria in reaching a determination in a given case. The Board's policy has been that the weight afforded a particular decisional factor must be determined in the context of the specific needs of the markets and, on occasion, in light of broader public inter-

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62. *Id.* at 579.

63. Delta Air Corporation, Service to Atlanta and Birmingham, 2 C.A.B. 250, 251-252 (1940). These criteria are strikingly similar to those developed by the Interstate Commerce Commission in the regulation of common carrier entry of motor carriers in Pan American Bus Lines Operations, 1 M.C.C. 190 (1936). *See* Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation*, 13 WAKE FOREST L. REV. 729, 735-753 (1977).

64. Delta Air Corporation, Service to Atlanta and Birmingham, 2 C.A.B. 250, 280 (1940).

65. CAB Order 77-3-132 (1977).

est considerations.[66]

In the *Sacramento-Denver Nonstop Case*,[67] the Board elaborated, saying that "[o]nly rarely is there but a single reasonable candidate and quite often the selection of a particular carrier reflects either an applicant's incremental advantage or its ability to combine several factors."[68]

In the *Miami-Los Angeles Competitive Nonstop Case*,[69] the Board enumerated ten different factors it has weighed in determining which, among multiple applicants, should or should not receive certificated authority to serve a particular market:

(1) route integration as evidenced by the ability to convenience beyond-segment traffic;
(2) frequencies to be operated over the involved segment;
(3) the type of equipment to be employed;
(4) the fares to be charged;
(5) the identity of the involved points;
(6) the historic participation in the involved traffic;
(7) efforts to promote and develop the involved market;
(8) the need of the applicant for route strengthening;
(9) the profitability of the route for the applicants and the existing carriers; and
(10) the potential of diversion of traffic from existing carriers.[70]

As can be seen, only the first four of these criteria have as their objective the protection of the consumer interests. Most relate to how a regulated carrier's operations might become more profitable by diminishing the potential adverse influence of competition.

Traditionally, the CAB sought to improve the competitive posture of smaller carriers *vis-à-vis* the larger incumbents, and reduce industry concentration, by favoring the issuance of operating authority to the small carriers.[71] This policy of route strengthening "was intended to combat excessive concentration and to maintain a balance of competitive opportunities within the industry by strengthening the smaller carriers who were at a disadvantage because of their route system.[72]

Enhancing the competitive posture of smaller carriers by issuing segments of potentially lucrative route authority was viewed as being "of great importance in perfecting the route structure of the nation."[73] Thus, the Board frequently scrutinized the competitive positions of various applicants

66. *Id.* at 3.
67. CAB Order 77-6-27 (1977).
68. *Id.* at 3. Memphis-Twin Cities/Milwaukee Case, CAB Order 78-6-20 (1978), at 2.
69. CAB Order 76-3-93 (1976).
70. *See id.*, at 31.
71. Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 7; Transpacific Route Investigation, 51 C.A.B. 161, 287 (1968).
72. Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 15.
73. New York-Chicago Service Case, 22 C.A.B. 973 (1955).

and their relative requirements for route strengthening.[74] By enhancing the competitive posture of smaller carriers, the Board could bring a concomitant reduction in their subsidy requirements, which in itself, became another important criterion of carrier selection.[75]

In other cases, the Board concluded that the potential service benefits offered by larger carriers outweighed the need of smaller carriers for subsidy reduction. For example, in the *Fort Myers-Atlanta Case*,[76] the Board recognized that a carrier "having access to the largest volume of support traffic will be in the best position to provide the greatest frequency and capacity and flow the maximum number of passengers over the . . . segment [and thereby] convenience the largest number of beyond-segment passengers. . . ."[77] Similarly, the ease with which a proposed segment integrated with a carrier's existing route structure was frequently perceived as a factor weighing in favor of the carrier, for such a coherent structure might enable it to convenience a larger segment of the traveling public.

The relative beyond-segment capabilities of the applicants frequently was perceived as an important criterion of carrier selection.[78] For example, the Board in the *Memphis-Twin Cities/Milwaukee Case*[79] recognized that,

> Flow traffic is important in developing a thin market because it helps support the frequencies necessary to permit service levels sufficient to attract and hold new customers. In addition, it generates systemwide profits and benefits passengers by increasing single-plane and single-carrier alternatives. Because beyond traffic contributes significant benefits to carriers and passengers it has become an important element in selecting a carrier to serve this sort of market.[80]

The Board also made efforts, from time to time, to strengthen the financial posture of even large carriers facing financial difficulties through the issuance of lucrative segments of operating authority.[81] Concern with

74. Southwest-Northwest Service Case, 22 C.A.B. 52 (1955).

75. Southern Airways Route Realignment Investigation, CAB Order 73-2-90 (1973), at 9-16; *aff'd* Southern Airways *et al*, v. C.A.B. 498 F.2d 66 (D.C. Cir. 1974); Norfolk-New York Subpart M. Proceeding, CAB Order 70-9-56 (1970). Indianapolis/Dayton-New York Nonstop Subpart M Case, CAB Order 69-8-130 (1969). *See* North Central Airlines, Inc., Subpart M, 49 C.A.B. 138, 151, 153 (1968); Northern New England-Great Lakes Service Case, 49 C.A.B. 255, 291 (1968); Ozark Extension to New York/Washington, 50 C.A.B. 305, 317 (1969).

76. CAB Order 75-10-119 (1975).

77. *Id.*

78. See Sacramento-Denver Nonstop Case, CAB Order 77-6-27 (1977), at 4-5; Midwest-Atlanta Competitive Service Case, CAB Order 78-4-13 (1978), at 7, 9; *id.* CAB Order 78-7-137 (1978), at 7-9; Denver-Twin Cities Service Investigation, 50 C.A.B. 423, 445 (1969).

79. CAB Order 78-3-35 (1978).

80. *Id.* at 2. *See* Memphis-Tampa/St. Petersburg/Clearwater Subpart N Proceeding, CAB Order 77-5-66 (1977).

81. *See* Oklahoma-Denver-Southeast Points Investigation, CAB Order 77-4-146 (1977), at 16. It has also occasionally favored the most aggressive carrier the competing applicants. *Id.* at 17; CAB Order 77-7-40 (1977), at 5-7.

the financial strength of carriers subject to its regulation frequently led the Board to view the potential diversion of traffic from incumbent carriers and consequential revenue loss as a factor militating against the issuance of operating authority to a new entrant.[82] Similarly, the Board scrutinized route proposals to determine whether the inauguration of service pursuant thereto might cause financial injury to the applicant, or as the Board has stated, "whether the proposed operation would result in a revenue deficiency that would weaken the carrier and impair its ability to properly serve its route."[83]

In weighing and balancing these criteria, the Board vacillated between favoring competition as policy objective, and giving it almost no weight at all, with little consistency, and made only shallow attempts to justify or explain this inconsistency. On the whole, it appears that the purported attributes of competition were traditionally given less weight by the Board than the need to protect existing certificated incumbents.[84]

As to the weight which ought to be afforded competition as an entry criterion, the D.C. Circuit prescribed that "there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act. . . ."[85]

IV. CAB Regulation 1938-1975: The Congressional Perspective

Congressional scrutiny of arguments for deregulating the airline industry began with a series of hearings in 1975 under a Senate Subcommittee chaired by Edward Kennedy. Such Congressional analysis was subsequently expanded by Senator Howard Cannon, Chairman of the Senate Commerce Committee, who held a parallel series of hearings. Together, these two senators are largely responsible for the legislation which ultimately resulted.

Whether their conclusions were accurate or inaccurate is an issue which must be left to future commentators. The significance of the instant

82. *See* Memphis-Tampa/St. Petersburg/Clearwater Subpart N Proceeding, CAB Order 77-5-66 (1977), at 4-5; American Airlines, Palm Springs Restriction, 50 C.A.B. 359, 360 (1969).

83. *See* Comment, *An Examination of Traditional Arguments On Regulation of Domestic Air Transport*, 42 J. Air L. & Com. 187, 203-04.

84. *Id.* at 206.

85. Continental Air Lines v. CAB, 519 F.2d 944 (D.C. Cir. 1975). In so concluding, the court reviewed the legislative history of the Federal Aviation Act, finding that Congress intended that air transportation be regulated both to protect the public and the industry against the deleterious effects of unrestrained competition and the potential of monopoly. Congress established the regulatory structure to provide for the benefits of "regulated competition" to achieve the attributes of competition without the injurious consequences of unrestrained entry or rate wars. *Id.* at 952-955.

summarization lies not in the accuracy of these allegations; but right or wrong, this summary represents the perspective from which Congress viewed the airline industry and CAB regulation, and the foundation upon which Congress acted.

A. *Entry*

The legislative history of the 1938 Act reveals that Congress intended that Board implement a cautious, yet moderately liberal approach to entry, permitting new enterprises to compete as the air transportation market expanded. Yet, entry into the industry has been effectively prohibited by the restrictive regulatory policies of the CAB. Between 1950 and 1974, the CAB received 79 applications from firms seeking to obtain operating authority to provide scheduled domestic service. None was granted.[86] Moreover, between 1969 and 1974, the CAB imposed a "route moratorium," a general policy of refusing to grant or even hear any applications to serve new routes.[87] As a result of these policies, the big four in 1938—United, American, Eastern, and TWA—are the big four today. In 1938, United controlled 22.9 percent of the market; in 1975 it accounted for 22.0 percent.[88]

Actually, not a single new domestic trunkline carrier has been authorized. Although there were sixteen such carriers "grandfathered" in 1938, there are only ten such carriers today. The CAB had not permitted a single bankruptcy. This sixteen domestic trunkline carriers of 1938 merged into the ten which exist today; the nineteen local service carriers licensed shortly after WW II merged into the nine which existed in 1975.[89]

B. *Rates*

Traditionally, the Board has applied classical ratemaking to the airline industry. Classical ratemaking is ordinarily employed to set the rates of a regulated monopolist, such as a public utility, and utilizes the following formula: costs + reasonable return on investment = revenue requirement.[90]

Prior to 1978, the CAB followed this approach with significant modifi-

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86. *Kennedy Report, supra* note 13, at 78.

87. *Id.* at 6. During the late 1960s, Chairman Secor Brown led the CAB to implement the moratorium on the grounds that there was excessive capacity in the industry. As a result, no entry applications were even set for hearing for several years. *Id.* at 7. *See id.* at 84-96. *See e.g.*, Additional Service to San Diego Case, 64 C.A.B. 634 (1974); Atlanta-Detroit/Cleveland/Cincinnati Investigation, 64 C.A.B. 647 (1974); Mohawk Segments 8 and 9 Renewal, 63 C.A.B. 338 (1973); and Twin Cities-Des Moines-St. Louis, Nonstop Service, 53 C.A.B. 580 (1970).

88. KENNEDY REPORT, *supra* note 13, at 79-80.

89. *Id.* at 6.

90. *Id.* at 10, 109.

cations developed in its *Domestic Passenger Fare Investigation* [DPFI].[91] First, it examined the cost and revenue figures, not of the individual carriers subject to its jurisdiction, but of the industry as a whole. Second, it adjusted these figures in order to determine what industry costs and revenues would have resulted had load factors of fifty-five percent been achieved (*i.e.*, it assumed that planes were flying fifty-five percent full). To costs determined on this basis was added a twelve percent return on investment. Finally, fares were set at a level adequate to generate this "revenue requirement."[92]

Every three months, the CAB published a compilation of industry cost and revenue figures with these adjustments, simplifying the task of determining what fare level the industry was entitled to set. Where a carrier proposed a tariff embracing that fare level, it could be reasonably certain that the CAB would approve it as "just and reasonable."

Congress concluded that this system, although administratively efficient, tended to keep air fares at an unreasonably high level. The load factor level of fifty-five percent was deemed to be too low. The California and Texas intrastate experience, where carriers regularly achieved sixty to seventy percent load factors, revealed that passengers would accept moderately more crowded aircraft if they could enjoy correspondingly lower fares.[93] The fifty-five percent assumption was based on an industry average, and did not take into account the ability of individual carriers to exceed this standard, or their inability to achieve it, generally or on particular routes.[94]

The Board traditionally prohibited selective price reductions by requiring that carriers charge equal fares for equal distances. Thus, it became difficult for carriers to lower fares in less densely traveled markets in order to stimulate demand. The CAB also inhibited across-the-board price cuts by generally refusing to approve such reductions unless, assuming all competitors participated in the reduction, each would achieve the target twelve percent return on investment.[95]

Congress concluded that, by preventing selective price reductions and inhibiting general price cuts, the Board had encouraged carrier inefficiency, for it became difficult for the more efficient firms, by lowering their prices, to take business away from the less efficient.[96] Moreover, Congress con-

91. *See, e.g.*, CAB Order 74-3-82 (1974); CAB Order 74-12-109 (1974); CAB Order 72-12-18 (1972); CAB Order 73-5-2 (1973).

92. KENNEDY REPORT, *supra* note 13, at 10.

93. *Id.* at 113-115.

94. *Id.* at 10.

95. *Id.* at 10-11, 124-125.

96. Thus, the Subcommittee concluded that the Board's policies had caused fares to be higher than they would be in a competitive market, and inhibited industry efficiency. *Id.* at 113.

cluded that the Board's policies had little effect in stimulating increased industry profits. The level of profits had, in recent years, regularly been well below the Board's twelve percent target.[97]

The absence of carrier profits is probably attributable to the fact that the airline industry is structurally competitive. The inability to engage in route and rate competition has led various firms to engage in costly service competition. By purchasing larger aircraft in greater numbers, and by increasing frequencies, they have tended to lower their load factors. By offering lavish in-flight amenities and increasing their advertising budgets and operational expenditures, they have tended to diminish their profits.[98] As their costs increased and profits diminished, they tended to seek fare increases, causing prices to spiral continuously upward.

The fundamental deficiency of the Board's rate policies during this period was its failure to recognize the elasticity of demand inherent in passenger transportation—that by lowering fares air carriers might well stimulate new traffic and thereby fill empty seats.[99] The discretionary traveler, one who might take a vacation or visit his relatives only if the price were right, was a wholly unexploited source of potential revenue.[100]

C. *Antitrust*

In the late 1960's, excessively optimistic CAB and industry demand projections led the industry to invest in large numbers of wide bodied aircraft. Yet the economic circumstances of the first part of the 1970s led passenger demand to fail to live up to these expectations.[101] The diminution of disposable income engendered by the recession of the early 1970s, coupled with the tendency of air carriers to raise their prices, led load factors to drop and carrier profits to turn downward.

In response, a number of the major carriers (*i.e.*, United, TWA, and American) agreed to a collective reduction of service provided on several of the major domestic routes.[102] The Board continually approved these agreements between 1971 and 1975, first as an emergency response to overinvestment and excessive capacity, and after 1973, as a necessary response to fuel shortages which allegedly existed after the Arab oil embargo.[103]

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97. *Id.* at 11.
98. *Id.* at 25, 39.
99. *See id.* at 123-124, 128.
100. Note that this argument is almost wholly inapplicable to the transportation of freight, which has relatively little demand elasticity. *See* Waring, *Rate Adjustments on Specific Movements* in TRANSPORTATION LAW INSTITUTE, RATE REGULATION & REFORM (1979).
101. KENNEDY REPORT, *supra* note 13, at 35.
102. *Id.* at 143-144.
103. *Id.* at 12-13.

Although capacity limitation agreements can theoretically bring about lower carrier costs and correspondingly lower fares, the latter did not materialize. The airline industry was, in fact, the only major industry which raised its prices during the recession of the early 1970s.[104] The report of the Kennedy subcommittee concluded that "The classic regulatory response to defects in regulation is to create more regulation: the Board's response to the problem of excess capacity was to introduce capacity restricting agreements. Yet, to do so in this highly competitive, complex industry brought the consumer the worst of both worlds, high prices, and poor service."[105]

Congress found that consumers desire lower fare service, and that increased route and rate competition is likely to induce carriers to offer such lower fares.[106] It recognized the inherent difficulty in applying classical rate and entry regulation to a competitive, economically volatile industry.[107]

It was generally concluded that the traditional system of airline regulation: (a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocations of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency toward excess capacity in the industry.

The Kennedy Subcommittee concluded that:

> The airline industry is potentially highly competitive, but the Board's system of regulation discourages the airlines from competing in price and virtually forecloses new firms from entering the industry. The result is high fares and security for existing firms. But the result does not mean high profits. Instead the airlines—prevented from competing in price—simply channeled their competitive energies toward costlier service: more flights, more planes, more frills. . . .
>
> The remedy is for the Board to allow both new and existing firms greater freedom to lower fares and . . . to obtain new routes. This freedom should lead the airlines to offer service in fuller planes at substantially lower prices, a form of service that most consumers desire.[108]

This, in fact, was precisely the policy adopted by the Civil Aeronautics Board under the Chairmanship of Dr. Alfred E. Kahn.

V. The CAB Under Alfred Kahn: The Origins of De Facto Deregulation

President Gerald Ford became firmly convinced that the air transportation industry should be substantially deregulated. In 1975, he submitted his own version of a deregulation bill to Congress, and appointed John

104. *See id.*, at 23.
105. *Id.* at 19.
106. *Id.* at 39.
107. *Id.* at 3.
108. *Id.*

Robson as Chairman of the CAB. As CAB Chairman, Robson reversed many of the anticompetitive regulatory features for which the Board had been soundly criticized. The route moratorium and the capacity limitation agreements were terminated. Yet, as a lawyer, he found himself constrained by the provisions of the Federal Aviation Act from advancing too radically in the direction of liberalizing pricing and entry.

His successor, Alfred Kahn, an economist appointed CAB Chairman by President Carter, was not so inhibited. By 1978, the CAB had turned a full 180 degrees. It began to grant operating authority by the bushel basket full, at first to any carrier which proferred a low fare proposal, and subsequently, to virtually any "qualified" applicant under an "experimental" policy labeled "multiple permissive entry." The Board in 1978 amended its rate policies in the DPFI by essentially providing downward pricing flexibility under certain circumstances of up to seventy percent, and upward flexibility of ten percent. These efforts encouraged carriers to offer the lowest fares in history. The lower fares, and the general economic recovery of the mid-1970s stimulated demand which increased capacity, enabling carriers to realize the highest profits in the history of commercial aviation.

A. *Competition Embraced as the Overriding Policy Objective*

The Board under Dr. Kahn enthusiastically embraced the observations of the Kennedy subcommittee and those academicians sharing its conclusions.[109] The CAB admitted that the traditional regulatory structure had created significant incentives for service and quality competition, but had almost wholly ignored the potential for innovative pricing proposals and rate competition.[110] It acknowledged the public benefits of "increased service frequencies, better connecting possibilities, more extensive single-plane service" and the other quality improvements, engendered under the traditional regulatory regime.[111]

Nevertheless, it was felt that this system had led fares to be set at a level higher than they might have been in a freely competitive market, and had thereby deprived travelers of low fare alternatives.[112] In order to strike

109. The Board noted that "Commentators, after studying the cumulative effects of both the Board's and the industry's orientation towards service improvements rather than fare competition, are virtually unanimous in concluding that today's public would benefit from a system in which there was more fare competition and greater price/service variety. This is our judgement as well." Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-3-121 (1978), at 2.

110. *Id.* at 1-2.

111. *Id.* at 2. The Board noted that, "The result of our expansionist route policies, and the years in which carriers have competed aggressively in terms of service, is an existing high general quality of air service throughout the United States, measured by such indices as the general availability of nonstop service and a choice of carriers, the comprehensive network of existing routes, and flight frequencies." *Id.*

112. *Id.* at 3. The Board asserted that "Part of the reason for the historic disinclination among

a proper balance between service and price, which the public desired, the Board felt compelled to establish a regulatory environment in which both price and service competition were encouraged.[113] The Board believed that lower fares would attract the discretionary traveler,[114] and thereby enable carriers to make more efficient use of their equipment.[115] Thus, the following entry policy was adopted:

> In determining whether it would be to the public's benefit to authorize competitive service in a market, we must consider the benefits to be derived from fare competition and fare/service variety as well as traditional factors and that in choosing among various applicants for competitive rate authority, carrier proposals to offer significantly lower fares, or a greater variety of price/service combinations deserve far greater weight than they have been accorded in the past.[116]

In order to create an atmosphere conducive to these objectives, the Board also began to certificate a larger number of carriers than it would have under its traditional criteria, stressing the value of liberal entry as a means of sustaining price competition.[117] And, in order to accomplish its objective of increasing rate competition between carriers, the CAB began a novel approach of evaluating the low fare proposals of particular applicants as an entry criterion of significant, even determinative, weight.[118] Where none of the applicants had submitted a low fare proposal, the CAB returned to its traditional carrier selection criteria.[119]

The Board began to emphasize its belief that "competition is the best guaranty that the traveling public will receive service responsive to its needs,"[120] and adopted a policy that "competition on the basis of fares as

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carriers to [engage in rate competition] may be attributable to our past policies of placing in a market only the number of carriers that could be reasonably assumed of profits at the existing fare level." *Id.* at 9.

113. *Id.* at 3. The Board noted that "Competition on both levels is necessary because each places a check on the other; and only the provision of a range of price/service options from which travelers may choose provides an assurance that what the industry finally provides best meets their needs." *Id.*

114. The Board recognized that, "These fares not only seem to satisfy the desires of a large segment of the traveling public; they also broaden the demand for air service in general by attracting a segment of the public that wouldn't or couldn't travel by air at the regular price." *Id.*

115. The Board believed that lower fares "enable carriers to use more efficiently resources currently dissipated in greater numbers of low load factor high-cost flights", particularly where such fares are structured according to peak pricing principles. *Id.*

116. *Id.* at 4.

117. *Id.* at 9; CAB Order 78-7-116 (1978), at 1.

118. *See* Miami-Los Angeles Low-Fare Case, CAB Order 78-1-35 (1978).

119. Midwest-Atlanta Competitive Service Case, CAB Order 78-4-13 (1978), at 7; Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 27. *See supra* notes 51-85, and accompanying text.

120. Midwest-Atlanta Competitive Service Case, CAB Order 78-4-113 (1978), at 2.

well as service is not only permissible, but compelled."[121] The Board believed that because "the freedom to enter markets provides the best assurance of price and service competition, we are now actively expanding the opportunities for airlines to serve new routes."[122]

The issuance of operating authority to a number of carriers on a permissive (rather than mandatory) basis also was perceived as a means of stimulating increased price competition.[123] In granting permissive authority, the Board left to the business judgment of carrier management the extent to which competitive service would be offered.[124] Mandatory authority was not perceived as an effective means of insuring that a responsive level of service would be provided, for the Board had traditionally been rather lax about enforcing such certificate obligations.[125] Moreover, the Board did not want to place itself in a position where it would be forced to "compel an airline to provide unsubsidized service which turns out to be uneconomic."[126]

Latent permissive authority (*i.e.*, operating authority which had been issued to a carrier but which the carrier is not actively using) was also viewed as posing a beneficial competitive stimulus to incumbents, for "it represents a threat of entry and therefore provides a competitive spur to incumbents; if they fail to meet the public's service needs or if the market grows to the point that it can support another airline, the dormant carrier is free to enter at once without the need for a costly and time-consuming certi-

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121. *Id.* Query: Compelled by what? Certainly not by the legislation which then governed regulation of the industry.

122. *Id.*

123. Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4. The purported benefits of *permissive vis-à-vis* mandatory operating authority are discussed in Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 5; U.S.-Latin America All-Cargo Service Investigation, CAB Order 78-4-44 (1978); and Baltimore-Detroit Nonstop Proceeding, CAB Order 78-5-112 (1978).

124. Eastern Air Lines-Piedmont Aviation Route Exchange, CAB Order 77-12-76 (1977), at 1.

125. This traditional policy may have been inconsistent with the then existing statutory provision of Section 401(j) of the Federal Aviation Act, 49 U.S.C. § 1371(j) (1977), which required Board approval as a condition precedent to the abandonment of a route.

126. Eastern Air Lines Piedmont Aviation Route Exchange, CAB Order 77-12-76 (1977), at 2. In U.S. Latin-America All-Cargo Service Investigation, CAB Order 78-4-44 (1978), the Board enumerated four reasons favoring the issuance of permissive authority:

> (1) the difficulty of predicting traffic flows and costs, and hence, risk, especially when initial or new service is involved,
> (2) the desirability in most cases of permitting carriers at least the chance to try their proposals in the marketplace,
> (3) the desirability in terms of resource allocation of encouraging carriers to provide only the service justified by demand, and
> (4) the undesirability of forcing carriers in effect to subsidize service which cannot be justified in terms of profits.

fication proceeding."[127] Furthermore, each operating authority had significant value in forcing carriers to adhere to the notion of threshold pricing (*i.e.*, the threat of potential competition will encourage carriers to maintain prices at a level sufficiently low to forstall entry by new competitors; the carrier will, in a market it dominates, set a threshold price—a price above cost but low enough to make the market unattractive to potential competitors).[128]

Elimination of the traditional process of carrier selection was viewed as resulting in a reduction of procedural burdens and delay, enabling carriers to respond to market demand more expeditiously, and diminishing regulatory expenditures for both government and the industry.[129] The Board was convinced that diminishing regulatory barriers to entry would facilitate the prompt issuance of operating authority, resulting in a greater likelihood that carriers would seek to enter new markets and inaugurate new service.

The CAB was convinced that multiple awards, combined with downward pricing flexibility, would insure that the traveling public would enjoy the benefits of carrier innovation and rate competition.[130] Carrier management would have increased freedom to manage their affairs in response to consumer demand. Market forces would enable consumers to enjoy service by those carriers best suited to participate in the traffic. Indeed, the market was viewed as a superior mechanism (*vis-à-vis* governmental regulation) for selecting both the most efficient and economical participants, and the most desirable combination of price and service options. Consumer choice was also perceived as the best means of ascertaining the appropriate number and identity of carriers which should serve any particular market. Although the CAB traditionally designated the number and identity of participants in a given market, it ordinarily did not reexamine those choices for a number of years subsequent to their designation. In contrast, market forces could work continuously to select and reselect the optimum (most efficient and economical) competitor(s) and the most desirable balance of price and service options.[131] Moreover, the market could weigh and evaluate (on a continuing basis) a wider range of factors than could the Board.[132]

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127. Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4; Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978), at 3.

128. The level of the threshold price depends upon how easy it is for other firms to enter. In contrast, where a monopoly is guaranteed either by regulatory barriers to entry or by the inherent market characteristics of the entry, the monopoly firm is free to set an excessively high price and reap monopoly profits, without fear of competition.

129. *See* Oakland Service Case, CAB Order 78-4-121, at 38-40, 42, 52-53, 55.

130. *See* Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 77-7-116 (1978), at 11.

131. Oakland Service Case, CAB Order 78-4-121 (1978), at 34, 38.

132. In Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), the Board emphasized its belief that

B. *Calls for Caution and Moderation Dismissed*

Although determined to inject more competition into air transportation, the CAB proceeded with caution at first, refusing to overload markets with too many carriers[133] (so as to protect the carriers serving them from the harmful effects of excessive competition), and issuing operating authority to only that number of carriers it believed each market could adequately support.[134] Subsequently, the Board became less concerned with certificating only that number of carriers which the market could profitably support. In fact, it began (at first implicitly, and later explicitly) to authorize a number potentially larger than that which could reasonably maintain profitable operations, saying that:

> It may happen that one (or more) of the carriers will find it unprofitable to continue operating in this market, and will withdraw. Should that occur, we would interpret that as a sign that the type of service provided by it is not desired by the public. The choice is more efficiently made by the marketplace than by the Board.[135]

Further, it began to move more and more expeditiously to implement its implicit objective of eradicating regulatory barriers to entry, admitting that "we are moving *rapidly* in adopting regulatory policies of permitting and encouraging a greater degree of price competition and freer entry into markets.[136]

> [C]ompetition is the best incentive to provide service reasonably responsive to the present and future needs of the traveling public and the best means by which we can encourage the introduction of lower fares and alternative types of service. . . .
>
> [T]here should be no mistaking this Board's dedication to the principle that competition is an extremely important goal of the existing statutory scheme, because of the public benefits which can flow from an environment in which carriers are free to compete. There may be the benefits of additional, higher quality service, which has been a traditional objective of the Board's route program, and there are the possible benefits of price competition—lower fares and more varies [sic] price/service options. While price competition has not always been encouraged in the Board's history, we think that experience has shown that it is not only possible, but highly desirable. We intend to encourage it. To this end, we have permitted a number of low-fare proposals to go into effect, and have emphasized the price dimension as a key factor in route proceedings. A necessary corollary of greater pricing freedom is greater freedom for carriers to enter new markets, since entry and the threat of it provide the best incentive for pricing innovations.
>
> We believe that the Board's renewed emphasis on competition will, over time, strengthen and promote the air transportation system by encouraging efficiency and providing the traveling public with a greater array of services attuned to various present and future needs, with a wider choice of price. Competition, by fostering innovation and thoughtful planning by airlines, will create sound economic conditions in the industry as a whole.

133. *See* Memphis-Twin Cities/Milwaukee Case, CAB Order 78-6-20 (1978), at 2.

134. *See, e.g.*, Cincinnati-Washington Subpart M Proceeding, CAB Order 77-10-4 (1977), at 2; Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 3.

135. Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 29; *see* Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4; Phoenix-Des Moines/Milwaukee Route Proceeding, *et al.*, CAB Order 78-1-116 (1978), at 29.

136. Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 2 [emphasis supplied].

The Board quickly began to consider the issuance of permissive authority to all "qualified" applicants,[137] convinced that "market forces would more likely result in optimum service at optimum fares, for the market selection process operates continuously and efficiently."[138] The issuance of permissive (as opposed to mandatory) authority, it was presumed, would enable the carriers a wide range of discretion to tailor their services to demand.[139]

Reliance on market forces is the rule, rather than the exception, in other sectors of the economy. The Department of Transportation argued that increased competition would lead to lower prices and improved service without subjecting the industry to destructive competition or excessive concentration, and without subjecting passengers to the dangers of unsafe operations.[140]

Several parties argued that the traditional regulatory structure should be maintained. They contended that the objectives of increased rate and route competition could be adequately accomplished without the indiscriminant issuance of permissive authority to all applicants.[141] Automatic route awards would eliminate the strongest incentive for pricing competition—the existing emphasis on low fare proposals as a carrier selection criterion.[142] Indeed, a preferable approach to the adoption of a policy of multiple permissive entry would be to retain carrier selection, by stressing policies of fostering new entrants, rewarding low fare innovations, and encouraging industry competitive balance by strengthening smaller carriers.[143]

But the traditional system of carrier selection was perceived by the Board as having fostered a less efficient system than a policy of multiple permissive entry, a policy which would permit the market place to make ultimate determinations with respect to price and service. The Board asserted that establishing opportunities for dormant authority would keep the potential of new entry alive and thereby "keep incumbent carriers on their toes."[144]

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137. By "qualified", the Board meant "fit, willing, and able." 49 U.S.C. § 1371(d)(1) (1979).

138. Florida Service Case, CAB Order 78-7-128 (1978), at 4; Air Wisconsin Certification Proceeding, CAB Order 78-8-196 (1978).

139. Phoenix-Las Vegas-Reno Competitive Nonstop Service Proceeding, CAB Order 78-7-43 (1978), at 3; Baltimore-Detroit Nonstop Proceeding, CAB Order 78-5-112 (1978), at 5-6. *See* U.S.-Latin America All-Cargo Service Investigation, CAB Order 78-4-44 (1978).

140. Brief of the Department of Transportation in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

141. Brief of North Central Airlines, Inc., in Memphis-Twin Cities/Milwaukee Case, *et al.* (on file with the CAB in Docket 29186, April 21, 1978); Brief of National Air Lines in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

142. *See* Brief of Pacific Southwest Airlines, Inc., in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28840, April 27, 1978).

143. *Id.*

144. Oakland Service Case, CAB Order 78-4-121 (1978), at 42.

In promulgating the Civil Aeronautics Act, the predecessor of the Federal Aviation Act, Congress emphasized the promotion and development of an infant industry.[145] By 1978, the air transportation industry was deemed to be no longer a subsidy-based flegling "infant," but had matured into a sophisticated demand-based system.[146] Therefore, it was believed that the laws of the free market should replace protectionism as the primary policy objective.

Certain parties urged the Board not to apply a policy of multiple permissive entry on an indiscriminant, universal basis. They generally emphasized the drastic differences between markets, and contended that rational regulation must be tailored to serve the spectrum of interests which exist within them. The needs of individual communities, it was contended, would continue to vary widely regardless of the regulatory policies ultimately adopted by the Board. A flexible formula adaptable to the facts and circumstances of each case would be a far more rational means of regulation than would adoption of an inflexible general rule which could not be molded to satisfy the peculiar needs of individual markets.[147]

Other parties argued that *ad hoc* entry deregulation would create a destructive equilibrium through a process of route-by-route freedom of entry, while the bulk of the regulatory structure remained structurally unchanged. A policy of multiple permissive entry would, it was argued, create an irrational economic structure consisting of small enclaves of "free" entry within a comparatively closed and restricted environment. To apply such a policy would create a gerrymandered national route structure in which certain markets would be open to multiple entrants on a permissive basis, while in others certificated carriers holding mandatory authority would be obligated to provide service.[148]

Still others urged the Board to proceed with caution during a gradual transitional period from direct, pervasive regulation to greater reliance upon

145. *See supra* notes 10-14, and accompanying text.

146. Oakland Service Case, CAB Order 78-4-121 (1978), at 22-23, 47.

147. *See* Brief of Southern Airways, Inc. in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1979); Brief of North Central Airlines, Inc., in Memphis-Twin Cities/Milwaukee Case, *et al.*, (on file with the CAB in Docket 29186, April 27, 1978); Comment of the Indianapolis Airport Authority in Las Vegas-Dallas/Fort Worth Nonstop Service Investigation *et al.* (on file with the CAB in Docket 29445, April 27, 1978); and Brief of Hughes Airwest, Inc., in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

148. Brief of Continental Air Lines and Comment of the Houston Pacific in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978). The Board dismissed the dangers of loss of service as a result of a permissive authorization, *vis-à-vis* the purported benefits of a mandatory authorization in Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 5, and Phoenix-Des Moines/Milwaukee Route Proceeding, CAB Order 78-1-116 (1978), at 27.

free market forces.[149] For example, Allegheny insisted that after maintaining a "hot-house of protectionism" for forty years, the Board should not move too rapidly to throw the industry to the wolves of the marketplace, for such hasty action could be highly disruptive for consumers and the industry without any compensatory public benefits.[150]

These local service airlines argued that the entry policies of forty years of regulation placed large trunkline carriers in an inherently superior position in terms of route system capabilities and equipment. They urged the Board to phase in an open entry policy gradually in a manner that would offer them compensatory route segments and preferential treatment to offset the clearly onesided economic posture that regulation had established.[151] In response, the Board stated that

> [A] general policy of multiple entry . . . should not be limited to a few routes or areas; . . . it should be extended to the very core of the system and be broad enough (and carried out rapidly enough) to create substantial new competitive opportunities for all segments of the industry, including small trunklines and local service carriers.[152]

A number of small communities expressed the fear that unlimited entry might disrupt, inhibit, or effectively impede continuous or nonstop service, and the ability to finance airport construction or expansion. They were also concerned that the "permissive" nature of new authority deprived them of any assurance that service, once inaugurated, would be maintained.[153] Further, there was no assurance that a carrier receiving a permissive authorization would even begin the new service, despite the Board's finding that the public convenience and necessity *required* new service.

The Board was implicitly unconcerned with the fate of those communities whose market demand was insufficient to attract or retain new service.

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149. *See* Comment of the Indianapolis Airport Authority in Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, *et al.* (on file with the CAB in Docket 29445, April 27, 1978); and Comment of the Federal Trade Commission in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 21162, April 27, 1978).

150. *See* Brief of Allegheny Airlines in Ohio/Indiana Points Nonstop Service Investigation, *et al.* (on file with the CAB in Docket 21162, April 27, 1978).

151. Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4.

152. *Id.* at 5.

153. *See id.* at 4. Thus, certain local parties believed that should multiple carrier competition prove so uneconomic that all carriers holding permissive authorizations withdraw, no carrier would be the first to reenter for fear of suffering the same fate. Where a number of carriers held dormant authority to serve the market there would be some reluctance of any of them to expand the requisite start-up costs and enter the market. The enhanced risk of inaugurating such service would lead carriers to emphasize other markets in their service offerings and neglect newly granted authority. *See* Oakland Service Case, CAB Order 78-9-96 (1978), at 37-41, 47-50. Comments of the Louisville and Kansas Parties in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978); Brief of the State of Minnesota in Memphis-Twin Cities/Milwaukee Case (on file with the CAB in Docket 29816, April 27, 1978).

It felt that the market would best distribute carriers and their aircraft according to the laws of supply and demand, and that markets unable to generate sufficient traffic to support trunkline carriers or nonstop service might nevertheless be able to attract local carriers or multiple stop service. If not, it was in the best interests of nationwide industry economies and efficiencies that they not be served.[154]

As to the question of airport financing, certain carriers and civic parties argued that distortions in carrier behavior and system-wide market perversities arising as a result of the artificial hybrid of heightened competition in some markets and a close regulatory system in others would impede future efforts to finance and construct the airport facilities necessary to accomodate the type of traffic growth the Board was seeking to encourage.[155] The Board was unconvinced, saying only that the issuance of permissive authority would not relieve carriers of their contractual obligations at those airports where space is leased.[156] Similarly, although it was pointed out to the Board that an inherent barrier to entry for new carriers might exist in the absence of landing slots at major airports (*e.g.*, Washington National and Chicago O'Hare), the Board wholly refused to take into account the scarcity of such slots in its certification policies.[157]

In the *Oakland Service Case*,[158] and the *Chicago-Midway Low-Fare Route Proceeding*,[159] the Board abandoned its traditional approach in entry proceedings in favor of a revolutionary policy of granting permissive, subsidy-ineligible operating authority to any qualified carrier that applied for it.[160] In *Oakland*, the Board granted permissive nonstop, subsidy ineligible authority to virtually every carrier which applied for it, between Oakland on the one hand, and sixteen other cities (*i.e.*, Albuquerque, Atlanta, Boston, Chicago, Dallas/Fort Worth, Denver, Detroit, Houston, Kansas City, Los Angeles, Minneapolis/St. Paul, Philadelphia, Phoenix, Portland, Salt Lake City, and Seattle) on the other.[161] And, in *Chicago-Midway*, the Board granted virtually indiscriminant authority between Chicago, on the one hand, and Cleveland, Detroit, Kansas City, Minneapolis/St. Paul, Pittsburgh, and St. Louis, on the other, restricted to service at Midway Air-

154. *See* Oakland Service Case, CAB Order 78-9-96 (1978), at 34-35, and *infra* notes 171-174, and accompanying text.

155. *See* the position of Delta Air Lines quoted in Oakland Service Case, CAB Order 78-9-96 (1978), at 34, and Comment of the Houston Parties in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978) [hereinafter cited as Houston Comment]).

156. Oakland Service Case, CAB Order 78-9-96 (1978), at 35.

157. Applications of Colonial Airlines, Inc., CAB Order 78-6-183 (1978), at 4-6; Air Wisconsin Certification Proceeding, CAB Order 78-8-196 (1978), at 4.

158. CAB Order 78-4-121 [1978).

159. CAB Order 78-7-40 (1978).

160. Oakland Service Case, CAB Order 78-4-121 (1978), at 19.

161. *Id.*

port.[162]

C. *Profitability of Proposed or Existing Operations Deemed Irrelevant*

The Board abandoned any effort to scrutinize whether a proposal would be profitable within a reasonable period after its inauguration, leaving the investment decision solely to the discretion of business management.[163] The agency began to permit carriers to experiment freely with their transportation proposals in the marketplace,[164] giving little consideration to the economic injury incumbent carriers (which may, in fact, have been providing an exemplary level of service at a reasonable rate) might suffer. Potential profitability of proposed operations became an increasingly less important factor as the Board issued permissive authority, leaving "the responsibility for providing good service to the public in a way that is profitable to the carrier . . . with the latter's management."[165] By awarding permissive, rather than mandatory, authority to the new entrant, the carrier would be free to withdraw from the market should its experimental service prove unprofitable.[166]

The Board also explicitly became less and less concerned that existing carriers might suffer economic injury as a result of the implementation of its novel policies.[167] Where existing carriers began to suffer financial injury as a result of new competition, the Board was confident that they would take steps to reduce their losses or withdraw from the market.[168] Although new entry might well divert traffic and revenue from the incumbent and reduce its profits, so long as increased competition did not impair the carrier's ability to fulfill its certificated obligations, the Board was content to permit market forces to run their course.[169] There was some doubt, however, that

162. In fact, initial Board efforts to generate air service at Midway airport proved unsuccessful; the CAB subsequently attempted to rectify its inability to generate service at the airport in the Chicago-Midway Expanded Service Proceeding, CAB Order 78-7-41 (1978), CAB Order 79-1-7 (1979).

163. Memphis-Twin Cities/Milwaukee Case, CAB Order 78-3-35 (1978), at 1, n.3, and 4; *see* Baltimore-Detroit Nonstop Proceeding, CAB Order 78-5-112 (1978), at 6; Greenville/Spartanburg-Washington/New York Subpart M Case, CAB Order 77-10-1 (1977); Piedmont Boston Entry, CAB Order 78-4-69 (1978).

164. *See* Applications of Colonial Airlines, Inc., CAB Order 78-6-183 (1978), at 14.

165. Cincinnati-Washington Subpart M Proceeding, CAB Order 77-10-4 (1977), at 2; Buffalo/St. Louis Subpart M Proceeding, CAB Order 77-4-25 (1977); Albuquerque-Phoenix Subpart M Proceeding, CAB Order 77-11-114 (1977), at 4. *See* Pacific Northwest-Southwest Service Investigation, 46 C.A.B. 652, 664-665 (1967).

166. Application of Piedmont Aviation, Inc., *et al.* CAB Order 78-8-97 (1978), at 15.

167. Service to Richmond Case, CAB Order 77-5-69 (1977), at 5; Greenville/Spartanburg-Washington/New York Subpart M Case, CAB Order 77-10-1 (1977), at 7.

168. Service to Richmond Case, CAB Order 77-5-69 (1977), at 4, n.3; *See* Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978) at 8-9.

169. Greenville/Spartanburg-Washington/New York Subpart M Case, CAB Order 77-10-1 (1977), at 8.

even under circumstances where it could be convincingly demonstrated that such diversion of traffic and revenue might so jeopardize the economic viability of the incumbent's operation as to cause it to withdraw from the market (in which the CAB was inclined to inject a new entrant), or where its financial condition might be so impaired that it would be forced to terminate all of its operations, whether even under these egregious series of events the Board might exhibit some restraint in the application of its new entry approach.[170] In fact, under the former alternative, the CAB began to view incumbent withdrawal from a market as "*prima facie* evidence that a more efficient carrier had replaced a less efficient one, to the long-run benefit of the traveling public."[171] And, as to the latter, the Board did not interpret the Federal Aviation Act to require that it "try to guarantee the continued existence of any particular firm in the industry."[172]

Ultimately, the Board announced that it no longer felt particularly inclined to protect the financial health of the carriers subject to its jurisdiction by moderating its entry policies, saying "In healthy competition, producers who are innefficient or make bad decisions may fail, but efficient and well-managed producers can operate profitably. . . . The occasional failure can serve a useful purpose, not only by eliminating the inefficient or imprudent operator, but also by flashing a yellow light to others."[173] Diversion of traffic from existing carriers was perceived as having a useful purpose in "signaling consumer preferences to the industry and thereby serving as both an inducement and a prod to innovative and efficient operations."[174] The Board no longer felt any responsibility to protect the revenues or market shares of any particular carrier subject to its jurisdiction no matter how

170. Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 8, n.8. In the Oakland Service Case, CAB Order 78-4-121 (1978), the Board stated that "diversion will not be of decisional significance unless it threatens an affected carrier's ability to perform its certificate obligations, or will necessarily result in termination of essential services which will not be replaced by an applicant or by other carriers." *Id.* at 15. Virtually identical language was employed in Application of Piedmont Aviation, Inc., *et al.*, CAB Order 78-4-69 (1978), at 12; Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 25.

171. Greenville/Spartanburg-Washington/New York Case, CAB Order 77-10-1 (1977), at 9. *See* Ohio/Indiana Points Nonstop Service Investigation, CAB Order 78-2-71 (1978), at 30; and Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978). Similarly, in the Oakland Service Case, CAB Order 78-4-121 (1978), the Board repeated its view that "we would be inclined to regard the replacement of an incumbent carrier in a market by a more efficient and enterprising newcomer as representing a net gain to the public interest." *Id.* at 15-16.

172. Application of Piedmont Aviation, Inc. *et al.*, CAB Order 78-8-97 (1978), at 9, n.18. The Board admitted that diversion of revenue cannot be avoided in the competitive system which it was seeking to impose, but argued that such diversion was not "unhealthy so long as all carriers are afforded expansion opportunities." *Id.* at 10.

173. Oakland Service Case, Order 78-4-121 (1978), at 25.

174. Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 25.

efficient or economical its historic performance.[175]

D. *Potential for Destructive Competition Dismissed*

Several carriers[176] contended that the absence of entry controls would lead to a situation where "more carriers will enter markets than the market can sustain, capacity will be offered for which there is no demand at a price which covers the cost of offering it, and all competitors will suffer losses in these markets."[177] This, in turn, would depress industry profits, discourage investment and the introduction of more technologically sophisticated aircraft, and lead to a deterioration in service. The long-term result would be a general oligopolization in the market.[178]

"Destructive" or "cutthroat" competition[179] was defined by the Board as a competitive situation where (a) a powerful competitor seeks to drive his rivals out of a market through the utilization of predatory tactics, with the hope of securing monopoly profits after their exit, or (b) all competitors operate at a price which consistently fails to meet the costs of even the most efficient.[180] As to the former, the Board was convinced that multiple awards would probably not result in the type of destructive competition which the agency was compelled, by its governing statute, to prevent.[181] The Board felt that it had ample alternative means to deal with the problem, such as its authority over rates and its powers to deal with unfair competition.[182]

The latter type of destructive competition was perceived to exist only under circumstances where "capital is long-lived and immobile, and through miscalculation competitors irretrievably commit too much capital to a particular market. . . ," a situation thought not to exist in the airline industry.[183] The airline industry was believed to have relatively insignificant

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175. *See id.* In the Atlanta-Charleston Competitive Nonstop Case, CAB Order 78-2-114 (1978), at 3, the Board stated:

> We are convinced that carriers can, by and large, adjust their schedules to permit profitable operations. . . . We see no public purpose in protecting an incumbent's existing share of a market unless a failure to do so will impair its ability to perform its certificate responsibilities. . . . [C]arrier management is unlikely to plunge recklessly into unprofitable operations. . . . [T]he basic responsibility for providing service to the public in a way that is profitable for both an incumbent carrier and the new entrants should rest with their respective managements.

176. The carriers which made this argument were, predominantly, smaller carriers.

177. Oakland Service Case, CAB Order 78-4-121 (1978), at 25.

178. *Id.*

179. *See supra* notes 24-31, and accompanying text.

180. Oakland Service Case, CAB Order 78-4-121 (1978), at 25.

181. *Id.* at 24-32, 41.

182. Improved Authority to Wichita Case, CAB Order 78-3-78 (1978), at 4.

183. Oakland Service Case, CAB Order 78-4-121 (1978), at 26. The Board believed that:

> In air transportation . . . the principal form of capital investment, flight equipment, is only moderately long-lived and is exceptionally mobile. Apart from regulatory constraints,

economies of scale, low barriers to entry, reasonably elastic demand, and highly mobile resources.

Neither did the Board believe that the contemporary economic environment was such that the destructive competitive wars that Congress sought to preclude by promulgating the Act[184] would occur as a result of unlimited entry.[185] The industry was perceived to be prosperous and stable, with fleet size in approximate equilibrium with demand,[186] thereby depriving any predatory minded carrier from an opportunity to dump excess aircraft into markets already adequately served by existing carriers.[187] Additionally, it was believed that the capital markets had been disciplined by the traffic recession of the early 1970s and by increased fuel costs, and therefore would probably not support irrational or uneconomic service.[188]

The Board alleged that its implementation of a policy of multiple entry would not result in a number of carriers serving any market significantly greater than that which would serve it had the Board employed traditional entry criteria and engaged in carrier selection.[189] This prediction was essential to support two of its other fundamental assertions: (1) that a multiple entry would not result in destructive or wasteful competition; and (2) multiple entry would not result in profligate fuel consumption and concomitantly increased noise and air pollution.

E. *Potential For Oligopolistic Market Dismissed*

Several carriers were concerned that unlimited entry would lead to a long-term oligopolization of the airline industry. The Big Five (United, American, TWA, Eastern, and Delta) already enjoyed seventy-five percent of domestic trunkline operating revenue.[190] Thus, the structural problem of the

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> it can very easily be transferred from market to market or disposed of, since there is a very active and efficient used-aircraft market. Thus no carrier is constrained by capital immobility to remain in a saturated market.

Id. The Board also found no evidence of destructive competition in those markets where it had already certificated a number of competitors, or in intrastate markets (not subject to federal entry regulation) where numerous competitors participated. *Id.* at 28-31.

184. *See supra* notes 24-31, and accompanying text.

185. Oakland Service Case, CAB Order 78-4-121 (1978), at 32.

186. *Id.*; CAB Order 78-9-96 (1978), at 48-49; Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4-5.

187. Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 4.

188. Oakland Service Case, CAB Order 78-4-121 (1978), at 32.

189. *Id.* The Board stated that, "The number of carriers that can profitably operate in any particular market at any time is limited by such underlying factors as the local traffic demand, its price elasticity, the extent to which it can be stimulated by better service or new price/service options, the availability of connecting traffic and beyond-market traffic flows to support service, available aircraft and their unit costs, and so forth." *Id.*

190. Brief of Pacific Southwest Airlines in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

industry was not that it lacked potential competition, but that it was dominated by concentration, with ogopolistic tendencies already apparent.[191] Such oligopoly power would probably increase as a result of multiple permissive authorizations, because large carriers possess the resources which can be selectively employed to preempt those relatively few markets open for entry and capable of sustaining multiple carrier competition. Concurrently, the potential value of those few routes open for entry would be seriously diluted for newcomers as a result of excessive authorizations.[192]

These parties argued that, given the capital requirements of air transportation and the interrelationship of traffic flows which place a premium on the ability of a carrier to marshall traffic support from as many sources as possible, any type of open market structure affords the dominant carriers inherent advantages which are exceptionally difficult to overcome. The most effective means for an incumbent, particularly a large and financially stable incumbent, to deter new entry would be to demonstrate that it would respond sharply and swiftly to the inauguration of new service. Because potential entry could be deterred by potential response, the elimination of competition through the employment of predatory tactics would be economically rational regardless of the number of entrants certificated by the Board.[193] Although the traditional regulatory scheme permitted competition at reasonable costs, avoided destructive route and rate wars, and created meaningful opportunities for smaller carriers, the inevitable result of an implementation of a policy of multiple permissive entry, the parties argued, would be an increase in systems costs, short-term rate wars materially injurious to both the carriers and the public, and a practical limitation on entry opportunities to large, powerful carriers.[194]

The Board did not believe that unlimited entry would lead to excessive concentration in the industry. It felt that the industry had relatively few economies of scale, beyond those of a relatively low initial threshold.[195] Equipment was viewed as being exceptionally mobile, and could be shifted from market to market, or sold. "Therefore, even if more carriers initially move into a market than it can support, there is little irretrievable commitment of

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191. Brief of North Central Airlines, Inc., in Memphis-Twin Cities/Milwaukee Case, *et al.* (on file with the CAB in Docket 29186, April 27, 1978).

192. *Supra* note 190.

193. Comment of National Airlines, Inc., in Improved Authority to Wichita Case, *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

194. *See* Comment of the Houston Parties in Improved Authority to Wichita Case *et al.* (on file with the CAB in Docket 28848, April 27, 1978).

195. Oakland Service Case, Order 78-4-121 (1978) at 37, citing "R. CAVES, AIR TRANSPORT AND ITS REGULATORS (1962); Crane, *The Economics of Air Transportation*, 22 HARV. BUS. REV. 495 (1945); Koontz, *Domestic Air Line Self-Sufficiency: A Problem of Route Structure*, 42 AM. ECON. REV. 103 (1952); REPORT OF THE CAB SPECIAL STAFF STUDY ON REGULATORY REFORM 102-07 (1975). . . ." *Id.* n.46.

resources to prevent one or more . . . from withdrawing or reducing service and turning their attention to other markets where their capital assets can be better used and the public's demands better served."[196] The Board asserted that there are numerous markets in which smaller carriers compete successfully with larger ones, and that "we fully expect that the industry will continue to have many healthy members, nor do we fear for a disappearance of profitable expansion opportunities for small and medium-sized carriers."[197]

VI. The Entry Provisions of the Airline Deregulation Act

One would have imagined that the revolutionary shift in regulatory policy from a traditional closed entry structure to one in which the flood gates are thrown open wide might placate those who felt that the regulatory structure should be reformed in a manner which encouraged competition as an overriding policy objective. Nevertheless, the fear existed that if the Board's regulatory posture could turn 180 degrees from one of excessive protectionism, to one, which by encouraging downward pricing flexibility and increased entry, sought to inject competition and free markets forces as the sole determinant of the price and quality alternatives which would be made available to the general public, then it could also turn 180 degrees again, and return to protectionism and restraint of competition. Moreover, most of the liberalizing efforts had not yet undergone judicial scrutiny, and the possibility existed that the courts might conclude that many of the efforts were inconsistent with the Federal Aviation Act and/or its legislative history. Hence, Congress concluded that legislation was required in order that the deregulatory efforts of the preceding two years might not be reversed.

In introducing the Airline Deregulation Act to the full Senate, Commerce Committee Chairman Howard Cannon, one of the bill's chief architects, described the legislation as follows:

> Mr. President, I bring to the Senate today one of the most significant pieces of legislation in the past several decades. Important not so much by itself, but because it represents one of the only opportunities this body has had in recent years to vote for less government regulation and more free enterprise for a major U.S. industry.[198]

The new legislation substitutes increased reliance upon competition for classical price, profit and entry regulation.[199] It reflects the modern eco-

196. Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-7-116 (1978), at 3. *See* Oakland Service Case, CAB Order 78-4-121 (1978), at 41.

197. Oakland Service Case, CAB Order 78-4-121 (1978), at 37.

198. *Congressional Record* § 5849 (April 19, 1978).

199. The Conference Committee emphasized that the purpose of the Act is ". . . to encourage, develop, and attain an air transportation system which relies on competitive market forces

nomic view that increased competition in the airline industry will force prices down and eliminate excess capacity; if firms were free to set prices and enter markets without regulatory constraints, they would experiment in offering different combinations of price and service. Thus, the underlying theory of this legislation is that liberalized entry and pricing will force carriers to adhere to the competitive pressures of the marketplace to provide the range of price and service options desired by the public.

A. *The New Policy Declaration*

The statutory criteria governing all modes of transportation has traditionally been couched in inherently vague, if not vacuous, terminology. Congress recognized that it hadn't either the expertise or the time to fulfill properly its obligations under Article 1, Section 8, of the Constitution, to regulate commerce between and among the several states. Therefore, it created regulatory bodies to develop the requisite expertise, and gave them rather wide discretion to regulate the industry as they best perceived the fulfillment of the Congressional intent. Furthermore, Congress recognized that the needs of the public would not remain static, but that the optimum regulatory structure would evolve to meet the dynamic growth and maturity of our nation's commerce.

Hence, such statutory criteria as "public convenience and necessity," standing alone, have virtually no inherent meaning. Nevertheless, Congress set forth its Declaration of Policy in section 102 of the Act to indicate more specifically its interest as to precisely how transportation should be regulated, to give the agency some indication of the Congressional purpose and the ultimate objectives for which the agency should strive, and to thereby breathe life into what might otherwise be virtually vacuous statutory phraseology.

The Airline Deregulation Act amended the Federal Aviation Act to establish a new declaration of policy for interstate and overseas transportation.[200] The declaration includes ten subsections which specify the criteria to be deemed by the Board to be consistent with the public interest and the public convenience and necessity.

The first two of these subsections stress the importance of safety, emphasizing that it shall be a policy objective of the highest priority,[201] and that the Board shall prevent any deterioration in established safety procedures.[202] There can be no doubt that Congress intended that there be no

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to determine the quality, variety, and price of air services. . . ." *Conference Report*, Airline Deregulation Act of 1978, Rep. No. 95-1779, 95th Cong., 2nd Sess., 53 (Oct. 12, 1978) [hereinafter cited as *Conference Report*].

200. 49 U.S.C. § 1302(a) (1979).

201. 49 U.S.C. § 1302(a)(1) (1979).

202. 49 U.S.C. § 1302(a)(2) (1979). Indeed, the Act further provides that "The Congress in-

diminution in the Board's safety evaluation.

Two of these provisions also deal with the role to be accorded competition as a policy objective. Prior to the 1978 amendments, this section's only reference to competition was that the CAB should promote "Competition to the extent necessary to assure sound development of the air transportation system." Today, competitive market forces (including actual and potential competition) are to be employed "to provide the needed air transportation system, . . . to encourage efficient and well managed carriers to earn adequate profits and to attract capital . . . ."[203] and "to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services."[204] The Senate has emphasized that

> [T]he new declaration of policy . . . is designed to give the Board a clear and firm mandate to regulate in a manner which places primary reliance on competition. The Board is instructed to make every effort to utilize competition and market forces to achieve regulation goals, such as low-cost, efficient air transportation. And, the policy statement designates a competitive industry as a goal in itself.[205]

Low fares are to be encouraged, as is the adequacy, economy and efficiency of service, but "without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices. . . ."[206] Similarly, the Board must guard against "unfair, deceptive, predatory, or anticompetitive practices . . ." and avoid "unreasonable industry concentration, excessive market domination . . ." and similar occurrences which might enable "carriers unreasonably to increase prices, reduce services, or exclude competition. . . ."[207]

In addition to promoting rate competition, as a policy objective, the Board is also directed to encourage new entry and route expansion by existing air carriers. The Board is also obligated to strengthen smaller carriers so as to assure a more competitive and effective industry.[208] Curiously, the Conference Report indicates that the CAB is not to interpret this language "to mean that the Board must engage in carrier selection in its route proceedings to preclude large carriers from new routes."[209] Instead, the Board is to "continue providing opportunities for small carriers in as many

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tends that the implementation of the Airline Deregulation Act of 1978 result in no diminution of the high standards of safety in air transportation attained in the United States at the time of the enactment of this Act." 49 U.S.C. § 1301 (1979).

203. 49 U.S.C. § 1302(a)(4) (1979).

204. 49 U.S.C. § 1302(a)(9) (1979).

205. *Conference Report, supra* note 199, at 55.

206. 49 U.S.C. § 1302(a)(3) (1979). This provision also encourages coordinated air transport operations, as well as "fair wages and equitable working conditions." *Id.*

207. 49 U.S.C. § 1302(a)(7) (1979).

208. 49 U.S.C. § 1302(a)(10) (1979).

209. *Conference Report, supra* note 199, at 56.

ways as possible and not restrict them solely because they have historically had operations limited in area or extent."[210]

Finally, three other subsections promote the prompt procedural disposition of regulatory proceedings,[211] encourage use of satellite airports in urban areas,[212] and attempt to insure that reasonably adequate service is provided to small communities, with Federal subsidies where appropriate.[213]

The report of the Conference Committee emphasizes that:

> This legislation establishes specific programs for increased competition. The legislation also includes a new policy statement which gives the CAB broad discretion to establish other programs to encourage competition, such as the multiple permissive authority program recently established by the Board. Such programs are needed in the gradual and phased transition to a deregulated system.[214]

Actually, the CAB had never adopted a general policy of multiple permissive entry, although it had proposed to experiment with the idea in the *Oakland* and *Midway* proceedings.[215] Hence, the Conference was wholly erroneous if it believed that the Board had actually adopted such a policy.

B. *PC & N and the Burden of Proof*

Traditionally, entry in air transportation by domestic carriers has been governed by two statutory criteria:

1. That the proposed service is *required* by the public convenience and necessity [PC & N]; and
2. That the applicant is fit, willing, and able.[216]

The burden of proof in application proceedings was, under section 556(d) of the Administrative Procedure Act,[217] on the applicant.

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210. *Id.*

211. 49 U.S.C. § 1302(a)(5) (1979).

212. 49 U.S.C. § 1302(a)(6) (1979).

213. 49 U.S.C. § 1302(a)(8) (1979).

214. *Conference Report, supra* note 199, at 56.

215. Such a liberal approach had also been adopted in one international routes decision, the Philadelphia-Bermuda Nonstop Proceeding, Order 78-12-192 (1978), which had been submitted to the President for approval under Section 801 of the Federal Aviation Act, 49 U.S.C. § 1461 (1979), but had not yet been approved by him. For a review of this provision and the role the Chief Executive plays in international aviation decisions, *see* Dempsey, *The International Rate and Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 420-423, 434-438 (1978).

Nevertheless, except for these three "experimental" decisions, prior to promulgation of the Airline Deregulation Act, the Board ostensibly "continued to limit awards to the number that given markets might reasonably be predicted to sustain and continued also to engage in carrier selection, by certificating some airlines and denying the applications of others." Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 2.

216. Former section 401 of the Federal Aviation Act; former 49 U.S.C. § 1371 (1977). *See infra*, note 219.

217. 5 U.S.C. § 556(d) (1979).

The 1978 Act left these provisions unchanged for carriers seeking to serve international routes.[218] However, it significantly amended the entry criteria for domestic and overseas transportation (between points located within the territories and possessions of the U.S., albeit over international waters) by requiring it to issue a certificate where the proposed service is *consistent with* the PC & N.[219] The fitness standard remains unchanged.[220] However, the burden of proof has been shifted to an opponent (typically an incumbent carrier), who must now demonstrate that the proposed operations are *not* consistent with the PC & N.[221] In order to deny an application for operating authority, the CAB must conclude "*based upon a preponderance of the evidence* that such transportation is not consistent with the public convenience and necessity."[222] The burden of proof on the fitness issue remains unchanged.[223]

C. *Automatic Market Entry*

During the first month of 1979, 1980, and 1981, each certified passenger carrier may apply for nonstop route authority between any one pair of points (which has not been protected) by filing a notice.[224] It need not demonstrate consistency with the public convenience and necessity. It must, however, satisfy the fitness test.[225]

Each carrier may also protect from automatic entry one pair of points between which it already holds nonstop authority.[226] The Act also includes an escape clause enabling the Board to modify the program should it cause substantial harm to the national transportation industry, or a substantial reduction in service to small and medium sized communities.[227]

D. *Dormant Authority*

A certificate authorizing transportation between two points is considered dormant where the certificated carrier has not provided at least five roundtrips a week for thirteen weeks during the preceding twenty-six week period.[228] The Board must award the dormant route within sixty days to the first carrier submitting an application which demonstrates that it has

218. *See* 49 U.S.C. §§ 1302(c), 1371(d)(1)(B) (1979).
219. 49 U.S.C. § 1371(d)(1)(A) (1979).
220. 49 U.S.C. § 1371(d)(1) (1979).
221. 49 U.S.C. § 1371(d)(9)(B) (1979).
222. 49 U.S.C. § 1371(d)(9)(C) (1979).
223. *See* 49 U.S.C. § 1371(d)(9)(A) (1979).
224. 49 U.S.C. § 1371(d)(7)(A) (1979).
225. *Id.*
226. 49 U.S.C. § 1371(d)(7)(C) (1979).
227. 49 U.S.C. § 1371(d)(7)(D) (1979).
228. 49 U.S.C. § 1371(d)(5)(A)(O) (1979). An exception exists for seasonal markets. 49 U.S.C. § 1371(d)(5)(B)(E) (1979).

satisfied FAA regulations and is able to comply with the Board's regulations,[229] unless the Board concludes that the issuance of such a certificate is not consistent with the public convenience and necessity.[230] However, there is a rebuttable presumption that the authority sought is consistent with the PC & N.[231] Where no more than a single carrier serves the route, the Board must suspend the dormant incumbent's authority for a twenty-six week period, unless it concludes that such suspension is unnecessary to encourage continued service by the newly authorized carrier.[232]

E. *Experimental Certificates*

Where the CAB concludes that a test period is required to evaluate proposed new operations, it may issue a certificate for a temporary period.[233] Should such a certificate be issued on the basis that the carrier will provide innovative or low-cost transportation, and the carrier fails to provide such service, the Board may modify, suspend or revoke the authority.[234]

F. *Other Entry Provisions*

Carriers may carry domestic fill-up traffic on flights in foreign transportation. This privilege is limited to one round trip daily.[235]

Carriers operating aircraft seating of fewer than fifty-six passengers, or with cargo service of 18,000 pounds or less, are exempted from the certificate requirements of section 401.[236] The Board's regulations had previously limited the commuter carrier exemption to aircraft seating thirty or fewer passengers.

On December 31, 1981, the CAB will terminate its licensing function insofar as it determines consistency with the public convenience and necessity.[237] It will, however, continue to make fitness determinations until it goes out of existence on January 1, 1985.[238]

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229. 49 U.S.C. § 1371(d)(5)(A)(D) (1979).
230. 49 U.S.C. § 1371(d)(5)(F)(i) (1979).
231. 49 U.S.C. § 1371(d)(5)(F)(ii) (1979).
232. 49 U.S.C. § 1371(d)(J) (1979).
233. 49 U.S.C. § 1371(d)(8) (1979).
234. *Id.*
235. 49 U.S.C. § 1371(d)(6) (1979).
236. 49 U.S.C. § 1386(b) (1979).
237. 49 U.S.C. § 1551(a)(1)(A) (1979).
238. Other provisions which are likely to enhance entry opportunities are those providing for elimination of restrictions on certificates, 49 U.S.C. § 1371(e)(7) (1979), and those requiring the establishment of expeditious and simplified procedures for the disposition for operating authority applications. 49 U.S.C. §§ 1371(c)(1)(B), 1371(d)(7)(A)(ii), 1371(e)(7)(B), 1371(p) (1979).

VII. Entry Criteria Subsequent to the Airline Deregulation Act

A. *Indiscriminate Multiple Permissive Entry Explicitly Rejected*

As the Board was stripped of much of its regulatory authority, it also lost its charismatic Chairman, Alfred Kahn, who was designated by President Carter to assault inflation (in a manner perhaps analogous to his war on regulation). He was replaced by a man having virtually no experience in transport regulation or the aviation industry, Marvin Cohen.

The most visible immediate effect of the promulgation of the Airline Deregulation Act was the line of carrier representatives which formed on Connecticut Avenue outside the offices of CAB. They stood there exposed to the elements for the several days between the passage of the Act by Congress and the media signing ceremonies of President Carter. With their sleeping bags, folding chairs, and portable radios, scores of airline employees waited patiently in the cold of October for Mr. Carter to lay his pen to paper. Like the pioneers of the Oklahoma land rush, the air carriers were poised to storm the CAB to take advantage of the dormant authority provisions of the new Act.[239] Within a month, the CAB had awarded operating authority to serve 238 dormant routes.[240] Virtually overnight, carriers such as Braniff had expanded their route systems by as much as one-third.

Within two months of the promulgation of the Airline Deregulation Act, the CAB in *Improved Authority to Wichita Case, et al.*,[241] directly confronted the issue of whether it should adopt a broad policy of issuing multiple permissive authority to *all* "qualified" applicants in markets able to support some service. Its tentative conclusion, rendered prior to the enactment of the deregulation legislation in *Las-Vegas-Dallas/Ft. Worth Nonstop Service Investigation*,[242] had been that adoption of such a policy "will in most, and possibly in all instances best meet the transportation goals of the Federal Aviation Act for the present and foreseeable future."[243] Although it

239. *See supra* notes 228-232, and accompanying text. The Board had interpreted the new provisions to require the issuance of dormant authority on a "first come-first served" basis. Thus, conceivably, the first individual in line (which, incidentally, represented the nation's largest air carrier, United Air Lines), could have applied for and received *all* of the segments which were dormant. There was no sanction for nonperformance, except perhaps loss of the route to another applicant under the dormant authority provisions once the statutory 26 week period had expired.

Actually, none of this would have been necessary had the Board not taken such a strict and absurd interpretation of the statutory language. It would have been far more equitable, and probably far closer to the intent of Congress, had the CAB viewed all applications for dormant authority filed on the day the legislation was signed by the President as contemporaneously filed. It could then award the segments through either a lottery approach, or a system analagous to the NFL draft of college football players.

240. Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 4, n.1.

241. CAB Order 78-12-106 (1978).

242. CAB Order 78-7-116 (1978).

243. *Id.* at 2.

had felt confident that the economic and policy issues had been adequately addressed,[244] the legal and environmental issues posed serious obstacles to the adoption of *de facto* deregulation of entry. Thus, the Board had been reluctant to go forward with such a radical departure from the traditional regulatory structure, and the legislative history and the Act itself, until it had prepared a comprehensive legal analysis which had at least some possibility of surviving judicial scrutiny. The Board's legal staff was actively engaged in the preparation of a legally defensible justification for such a policy when Congress passed the deregulation bill.[245]

Of course, the Airline Deregulation Act laid to rest much of the legal opposition to the adoption of a more liberal entry approach. Under the new Act, the Board would continue to evaluate the PC & N of proposed operating authority applications until 1982.[246] Even during the interim, the burden of proof would be reversed; before an application could be denied, opponents of new entry would be forced to prove, by a preponderance of the evidence, that proposed operating authority is not consistent with the PC & N.[247] This, coupled with the other liberalized entry provisions (*e.g.*, dormant authority, automatic market entry),[248] made it clear that Congress sanctioned the CAB's general policy of moderately liberalized entry. The Board interpreted the legislative mandate as confirming and strengthening its "earlier conclusion that a general policy of multiple permissive licensing is the approach likely to produce the greatest transportation benefits."[249] It

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244. *See supra* notes 109-197, and accompanying text.

245. The author was, in fact, among the attorneys in the Board's Office of General Counsel who were delegated the responsibility to prepare the legal justification for application of a general policy of multiple permissive entry.

246. *See supra* note 237, and accompanying text.

247. *See supra* note 221, and accompanying text.

248. *See supra* note 224-236, and accompanying text.

249. Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 6. The Board further argued that the new Act effectively rendered moot the issue of whether it could issue "permissive" operating authority. The CAB felt that, under the new Act, Section 401(j), 49 U.S.C. § 1371(j) (1979), had been amended to delete the PC & N requirement of Board approval as a condition precedent to route abandonment. The new provision merely required prior notice for termination, suspension, or reduction of service, and no more, or so the Board argued. Hence, the Board seemed to believe that virtually all operating authority was how to be permissive in nature. *See* Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 11-12; Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 5; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 6. The Board asserted that Congress intended that "unless important air transportation goals are threatened, we are to leave decisions of when to enter or leave a market to individual carrier's management fettered by competitive, not regulatory constraints." Dallas/Fort Worth-Tuscon Investigation, CAB Order 79-5-35 (1979), at 3.

Actually, this conclusion was not compelled by the language of the Airline Deregulation Act. First, Section 401(j)(1)(B), 49 U.S.C. § 1371(j)(1)(B) (1979), provides that "The Board may . . . authorize such temporary suspension of service as may be in the public interest." This language would seem to suggest some requirement of Board approval as a condition precedent to a "tempo-

further found that these provisions created a rebuttable presumption in favor of issuing operating authority to any "qualified" carrier that requested it.[250]

In the *Improved Authority to Wichita Case, et al.*,[251] the CAB directly confronted the issue of whether it was prepared to abandon its statutory obligation to weigh and balance the PC & N in individual operating authority application proceedings. Its conclusion appears, in retrospect, to have been rather moderate:

> Despite the new Act, however, we are not prepared to conclude that a general policy of multiple discretionary entry, if adopted, should be applied universally. There might still be circumstances in which the public interest may be better served by giving only one or less than all qualified applicants immediate authority. (The Act obviously contemplates this possibility by retaining for three years a public convenience and necessity standard for route awards).
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> For example, it is at least arguable that in some small markets, where no service is feasible without an initial developmental effort or where demand is just on the verge of being able to support service, one airline should be given temporary protection from competition, in the first case to provide it with the incentive to make the developmental investment and in the second to make sure that service is not delayed because potential entrants are scared off by

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rary suspension of service." The new provisions made no mention of what, if anything, was to be done with a proposed termination or reduction in service. In an effort to permit the Congress to adjourn promptly, the Conference Committee prepared the legislation with such haste that the prevailing view at the CAB was that this was an unfortunate, yet egregious, example of sloppy drafting).

Moreover, the new Act established new procedures under section 419, 49 U.S.C. § 1389 (1979), to guarantee essential air transportation to small communities. Included among these provisions is one requiring an incumbent carrier (notwithstanding its compliance with the section 401(j) procedures) to continue to provide "essential air transportation" (*see* section 419(f), 49 U.S.C. § 1389(f)) to an eligible point (*see* sections 419(a)(1), and 419(b)(1), 49 U.S.C. §§ 1389(a)(1), 1389(b)(1)) for consecutive periods of thirty days, under circumstances where the CAB is unable to find a replacement carrier, even utilizing the inducement of subsidy. 49 U.S.C. § 1389(a)(2)(B)(6) (1979). Under such circumstances, the Board is powerless to permit exit; it must require the incumbent to continue its operations. In this sense, operating authority is clearly mandatory, the Board's arguments to the contrary notwithstanding. *See contra* Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 79-9-178 (1979), at 2-8.

250. Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 10. "This presumption will not be overcome unless the record contains an affirmative showing that the public interest requires a different result." Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978), at 2. The CAB has also concluded "that the grant of multiple permissive awards is the approach that generally produces the greatest transportation benefits." Louisville Service Case, CAB Order 79-1-101 (1979), at 2; Improved Authority to Wichita Case, CAB Order 79-3-43 (1979), at 2. Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 2-3; West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 6; Spokane-Montana Points Service Investigation CAB Order 79-4-80 (1979), at 2; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 3-4; Dallas/Fort Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 2.

251. CAB Order 78-12-106 (1978).

multiple authorizations and the prospect of immediate competition.[252]

B. *Indiscriminate Multiple Permissive Entry Implicitly Adopted*

The policy purportedly adopted in *Wichita* has not been, however, the approach implemented by the Board. In every case arising since the promulgation of the Airline Deregulation Act, the CAB has rejected the arguments of carriers and civic parties that fewer than all "qualified" applicants should be certificated. The policy implemented has been one of indiscriminant multiple permissive entry, the Board's assurances in *Wichita*[253] to the contrary notwithstanding.[254]

A number of smaller carriers argued that Congress intended that the Board utilize the interim three year period (between promulgation of the Airline Deregulation Act of 1978, and the elimination of PC & N as an entry criterion on January 1, 1982) as an era of gradual transition during which the Board would protect and strengthen the smaller carriers.[255] To this, the Board responded that the objective of strengthening was not intended by Congress to be a "justification for noncompetitive awards."[256]

Small carriers alleged that the Board was "moving too fast toward deregulation, that multiple awards . . . will undermine the goals of strengthening small carriers and avoiding unreasonable industry concentration, excessive market domination, and monopoly power. . . ."[257] The Board was unconvinced, arguing that "the superior traffic flows available to some large carriers can be largely offset by the advantages unique to the small carriers, such as their ability to develop regional service plans, and, in any event, such advantages as the large carriers may enjoy . . . may well be

252. *Id.* at 8-9. The Board reaffirmed that it had "not yet adopted a universal policy of making multiple awards' in Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 7. It indicated that applicants would still be required to "submit some sort of service proposal,", but that such "operating proposals will be deemed sufficient if they show that they are reasonably calculated to meet some present or future demand in the market." *Id. See* Louisville Service Case, CAB Order 79-1-101 (1979), at 8; West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 16-17; California-Nevada Low Fare Route Proceeding, CAB Order 79-4-85 (1979), at 6; Transcontinental Low-Fare Route Proceeding, CAB Order 79-3-133 (1979), at 5-6. Even that *de minimus* requirement has since been diluted significantly. *See* Florida Service Case, CAB Order 79-9-177 (1979), at 4.

253. CAB Order 78-12-106 (1978).

254. *See supra* note 252, and accompanying text.

255. *See* St. Louis-Louisville and San Francisco Bay Area Nonstop Case, CAB Order 79-4-79 (1979), at 4. For example, Allegheny argued that "A wholesale of granting all applications in all cases would violate the intent of Congress and would vitiate the automatic entry program of the Act, which was intended to be the heart of the transitional phase." [citation omitted]. *Id.*

256. *Id.* at 8. *See also* Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-79 (1979), where the Board held, "The transition period must be used to expand the operations of smaller carriers, not to restrict the operations of larger ones, as Allegheny would have it." *Id.* at 5.

257. Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-10-202 (1979), at 1.

eroded as the result of free entry in the overall air transportation system."[258]

Certain smaller carriers argued that certificating more carriers than the market could support would likely encourage large carriers to drive them out, or under. Thus, in the *Southeast Alaska Service Investigation*,[259] Alaska Airlines [ASA] argued that multiple authorizations would endanger its ability to satisfy its certificate obligations, thereby causing "a reduction or loss of service to the smaller southeast Alaskan communities and bush points served by ASA."[260] This argument, too, was flatly rejected by the CAB, saying that its approach to strengthening small carriers was one of enabling them to take advantage of new route competition, rather than shielding them from competition.[261] The Board continued, "We recognize that the greater reliance we now place on competition . . . means that airlines will be increasingly less willing and able to cross-subsidize loss operations with monopoly profits on other routes. . . . We no longer consider this a valid reason for restricting competition."[262]

Even under circumstances where the Board recognized that small, remote communities would lose air service by a small carrier as a result of the application of its unrestrained liberal entry policies, the CAB still refused to modify them unless it was convincingly established that indiscriminant entry will result in the loss of service that cannot be replaced.[263] No party could meet such a standard; and none did.

To the argument of several civic parties in the *Louisville Service Case*[264] that the indiscriminate issuance of operating authority "would involve an unacceptably high risk of less service" the Board argued that as a result of the new Act it could no longer make authority "mandatory,"[265] that its discretion to limit competition had been restricted, and that it had already concluded that "multiple awards will generally produce the greatest transportation benefits."[266] Nashville, the Board stated, had failed to prove that the loss of service in its market was directly related to the Board's issuance of multiple awards, "*i.e.*, no party has shown that the same result

258. *Id.* at 3. The Board believed that "Multiple awards . . . is the proper remedy for curing high traffic shares." *Id.*

259. CAB Order 78-4-168 (1978).

260. *Id.* at 7.

261. *Id.*

262. *Id.* at 8.

263. *See* Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 3. Here, again, the Board has established evidentiary obstacles on opponents of new entry which are difficult, if not impossible, to overcome.

264. Order 79-1-101 (1979).

265. *See supra* notes 123-127, 151, 249, and accompanying text.

266. Louisville Service Case, Order 79-1-101 (1979), at 4.

would not have occurred had we made a single award."[267] Similarly, the Board rejected the arguments of Louisville, which alleged that American and Delta should not receive nonstop authority "because the incumbent trunks have the financial resources to drive Allegheny out of the market and the incentive to do so. . . ."[268] The CAB felt that it had appropriate sanctions at its disposal to deal with predatory behavior, and was confident of "the ability of small carriers to compete quite successfully with larger carriers."[269]

To the argument that certain markets are too small to support all applicants, the Board in the *Iowa/Illinois-Atlanta Route Proceeding*[270] responded:

> The number of carriers a market can support is no longer a decisive consideration in determining how many carriers should be authorized. It only becomes relevant if it is established that certificating more carriers than the market can support will have adverse consequences to the public that outweigh the benefits of multiple awards.[271]

Actually, the Board has weighed the scales of decisionmaking so heavily in favor of competition that no party has been able to convince the Board that the deleterious consequences of multiple permissive entry outweigh the "benefits" to be derived therefrom.

For example, small carriers have argued (to no avail) that they should be protected in certain markets against entry by large trunk carriers. Despite the admission in *Iowa/Illinois-Atlanta* that the market could support only a single carrier, and despite the arguments of the Cedar Rapids, Iowa, parties and Ozark Airlines that only Ozark should be certificated, the CAB proceeded to award operating authority to Northwest as well, saying that "if Ozark were to be driven out of the market by the entry of Northwest . . . we would be inclined to interpret such a result as prima facie evidence that the carrier offering the more attractive combination of benefits had won the competitive battle. . . ."[272]

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267. *Id.*

268. *Id.* at 5.

269. *Id.* at 6.

270. CAB Order 78-12-35 (1978).

271. *Id.* at 4. *See* Northeast Points-Puerto Rico/Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 3; Louisville Service Case, CAB Order 79-1-101 (1979), at 2; Chicago-Albany/Syracuse-Boston Competitive Service Investigation, CAB Order 79-1-108 (1979), at 3; Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 4; Dallas/Fort Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 2.

272. Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978), at 5. *See* Northeast Points-Puerto Rico-Virgin Islands Service Investigation, CAB Order 78-12-105 (1978), at 4; Midwest-Atlanta Nonstop Service Investigation, CAB Order 79-3-80 (1979). "[W]e consider the diversionary effect of competition on even a certificated incumbent to be of little decisional significance as long as the public continues to receive needed service." Chicago-Albany/Syracuse-Boston Competitive Service Investigation, CAB Order 79-1-408 (1979), at 4.

Similarly, in the *Northwest Points-Puerto Rico/Virgin Islands Service* Investigation,[273] where Eastern argued that the indiscriminant issuance of multiple permissive authority would cause it to suffer diversion of revenue which "could amount to tens of millions of dollars more than the $34 million estimated by applicants," the Board responded:

> [D]iversion from an incumbent is not a significant consideration. . . . Eastern might be driven out of one or more of the markets. . . . Were this to occur . . . we would assume that the carrier offering the most attractive combination of benefits had won the competitive battle, to the ultimate advantage of the traveling public.[274]

The CAB has also refused to modify its indiscriminate entry policies to adhere to the Congressional directive under Section 102(a)(6) of the Act which requires the Board to encourage the development of sattelite airports.[275] Thus, in the *Oakland Service Case*,[276] despite the pleas of Oakland that the Board "not foreclose the possibility of route protection if actual service is not provided in the Oakland markets;"[277] the CAB flatly refused, insisting that "route protection is a disfavored method of sattelite airport development."[278] The Board would do little more to encourage service at sattelite airports than inaugurating additional route proceedings to issue additional segments of operating authority.[279]

In the *Austin/San Antonio-Atlanta Service Investigation*[280] civic parties argued that multiple licensing would be undesirable because of "the critical shortage of airport terminal space," particularly at Austin, and that multiple awards "could greatly inconvenience the public by congesting present airport facilities."[281] These arguments, too, were rejected by the CAB in

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273. Order 78-12-105 (1978).

274. *Id.* at 4. The overwhelming burden placed upon carriers by the Board was as follows: "[D]iversion from existing carriers will not be given decisive weight in rejecting applications for new authority except upon an extraordinary showing of financial jeopardy on the part of one or more existing air carriers, with the consequent loss of essential air service which cannot be immediately replaced. . . ." Northern Tier Show-Cause Proceeding, CAB Order 79-3-60 (1979), at 13. *See* Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 3.

275. 49 U.S.C. § 1302(a)(6) (1979).

276. CAB Order 79-10-89 (1979).

277. *Id.* at 2. Apparently, the Oakland parties were fearful that they might end up with as much service as that generated by the Board at Chicago's Midway Airport through the multiple permissive entry policy employed in the *Chicago-Midway Low-Fare Route Proceeding*, CAB Order 78-7-40 (1978)—none! *See supra* note 162, and accompanying text.

278. CAB Order 79-10-89 (1979), at 3.

279. *See* Baltimore/Washington-St. Louis Route Proceeding, CAB Order 79-11-2 (1979), at 5-6.

280. CAB Order 79-3-9.

281. *Id.* at 10. Similarly, the Texas Aeronautics Commission argued that:

> In making route awards, the Board must recognize the gravity and severity of airport terminal capacity problems. If a number of new carriers are certificated into a market over a short period of time, the demand for gate, ticketing, and baggage facilities will greatly increase. The airport authority will be required to accomodate the increased demand by

much the same manner as it had previously rejected a similar argument that the application of its liberal entry policy should be modified to reflect the scarcity of landing slots at certain airports.[282] Here again, the Board refused to temper its "liberal certification policy for the sole purpose of trying to avoid possible practical problems that new entrants could pose to airport authorities."[283] Further, the Board emphasized that "we are not now inclined to deny entry to any qualified applicant, simply in order to avoid airport congestion."[284]

The decision of the CAB in *Wichita* had been unanimous. But by the time *Austin/San Antonio-Atlanta* had been rendered, CAB Member Richard J. O'Melia had begun to realize that the majority had no intention of deviating from a strict application of a multiple permissive entry policy, and had no intention of moderating this policy along the lines suggested in *Wichita*. Member O'Melia dissented vigorously to the majority's decision in *Austin/San Antonio-Atlanta*, saying, "I dissent because the Board . . . is unnecessarily and . . . woodenly imposing a multiple permissive award policy designed to bring about deregulation today rather than after the transition period prescribed by Congress, and because it appears more concerned with the doctrinal concept of competition than with the real-world demands for air service."[285] Member O'Melia proceeded to cite the policy adopted in *Wichita*, that there "might still be some circumstances in which the public interest may be better served by giving only one or less than all qualified applicants immediate authority."[286] He proceeded in a manner which suggested that he felt deceived by the majority's assurances in *Wichita*:

> It is because this recognition of an obvious truth was included in *Wichita*, because the policy of multiple permissive awards was not declared to be an inflexible imperative, that I supported and approved the Board's conclusions in that case. And it certainly is not an unpopular proposition; the civic parties uniformly in this case and in [other] cases . . . have begged the Board not to inflict on their respective communities the alleged benefits of multiple permissive awards. Indeed, it should give the Board pause that its multiple permissive policy . . . is being greeted around the country with dismay and outright

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> new construction. If the route will only support one additional carrier and the others are forced to withdraw, the airport authority will be left with excess, wasted capacity and no protection for its revenue bonds.

Id. at 10-11.

282. Applications of Colonial Airlines, Inc., CAB Order 78-6-183 (1978). *See supra* note 157. *See also* Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 4; Dallas/Fort Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 3-4.

283. Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), at 11; *see* Baltimore/Washington-St. Louis Route Proceeding, CAB Order 79-11-2 (1979), at 2-3.

284. *Austin/San Antonio-Atlanta Service Investigation*, CAB Order 79-3-9 (1979), at 12.

285. *Id.*, dissent at 1.

286. *See supra* note 252, and accompanying text.

> hostility. If the benefits of multiple permissive authority are that evident, why is there such widespread lack of enthusiasm for it?
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> The fact is that communities and civic parties recognize that multiple permissive awards provide no assurance of effective and predictable service. . . . [T]he Board is no longer interested in selecting the carrier or carriers that might best serve a market . . . in determining when service will commence . . . [or] with whether service is to be viable, or reliable, or continuous. We are going to turn over those concerns to the marketplace. It is my view that the wholesale abdication of responsibilities during the licensing transition period is not what Congress had in mind, and is not consistent with the Deregulation Act.[287]

By the time the Board had decided the *Boise-Denver Nonstop Proceeding*,[288] the example proferred in *Wichita* seems to have become the rule. Unless the market was small, and "no service is feasible without an initial developmental effort or where demand is just on the verge of being able to support service. . . ,"[289] no carrier would be given protection from competition.[290] Nothing (but perhaps this) would deter the CAB from certificating all qualified applicants in every market able to support some service.

Without admitting it, the CAB had in effect adopted a generally applicable indiscriminate policy of multiple permissive entry, for it had systematically rejected every argument made by carriers and civic parties that it should moderate its approach. The burdens it placed upon opponents of new entry were so onerous that, realistically, they could not be overcome. The Board was determined to deregulate, no matter what arguments were made about the deleterious consequences of the blind application of an

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287. Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), dissent at 2. As to the failure of the Board to give credence to the concerns of the Texas civic parties in the instant decision, Member O'Melia was equally outraged, saying that

> The Board should be more concerned with the immediate practical effects of its actions in particular markets during the transition period than with adhering unbendingly to its preconceived economic theories. Deregulation has been scheduled to arrive in the future, and that day will inexorably arrive. It isn't necessary to impose deregulation today in order to prepare for deregulation tomorrow. And today there are service requirements in many markets and operational impediments in many airports that call for the exercise of our still effective regulatory powers and regulatory responsibilities.

Id. at 3.

288. CAB Order 79-5-74 (1979).

289. *Supra* note 252, and accompanying text.

290. *See* Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 3. Although the Board claimed that these two examples did not constitute an exhaustive list of situations in which a more restrictive entry approach might be employed, it regularly concluded that no party had satisfied these, much less had tendered convincing evidence that other, analogous such circumstances existed. *See* St. Louis-Louisville and San Francisco Bay Area Nonstop Case, CAB Order 79-4-79 (1979), at 6-7. For example, in the West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), the Board found that certain Alaska markets were not "developmental," and that therefore their "variable pricing and service needs . . . will best be served in both the short and long run by a determination to provide the maximum in competitive opportunity to all of the carrier applicants. . . ." *Id.* at 9.

economic philosophy cast in concrete. In the CAB's own words, it was "determined to extend competition to the very core of the national transportation system.[291]

C. *Show Cause Proceedings: The Flood Gates Burst*

In the months immediately preceding promulgation of the Airline Deregulation Act, the CAB began to grant new entry opportunities to air carriers through the procedural vehicle of a "Show Cause Order"—a means of disposing of issues without an oral evidentiary hearing. Thus, it granted numerous applications for certificate amendment,[292] route realignment,[293] and even the addition of new segments (where the amendment appeared to be in the nature of restriction removal),[294] through the show cause vehicle. Although the Board had begun to issue operating authority more liberally and hastily than ever before, it nevertheless tended to restrict such procedures to only those instances in which it could be claimed that there existed no material facts or complex economic issues.[295] In part, this caution stemmed from the procedural requirement of a "public" hearing set forth in Section 401(c) of the Federal Aviation Act,[296] which the CAB had traditionally interpreted to constitute a requirement for a full "trial-type" evidentiary hearing held before an Administrative Law Judge.

With the promulgation of the Airline Deregulation Act, the obligation of a "public" hearing in routes proceedings was eliminated,[297] and new expeditious procedures were substituted therefor.[298] Within the first month under the new provisions, the Board had issued a plethora of "boiler-plate" orders setting applications for show cause disposition, explicitly adopting a policy of multiple permissive entry in these proceedings, thereby creating

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291. Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 5, n.21.

292. *See, e.g.*, Application of Hughes Airwest, CAB Order 78-10-120 (1978); Application of Wien Air Alaska, Inc., CAB Order 78-10-96 (1978); Application of Allegheny Airlines, Inc., CAB Order 78-10-95 (1978); Application of Piedmont Aviation, Inc., CAB Order 78-10-93 (1978); Application of American Airlines, Inc., CAB Order 78-9-89 (1978); Application of Braniff Airways, Inc., CAB Order 78-9-57 (1978); Application of National Airlines, Inc., *et al.*, CAB Order 78-8-192 (1978).

293. *See, e.g.*, In the Matter of United Air Lines, Inc., CAB Order 78-9-59 (1978); In the Matter of Eastern Air Lines, Inc., CAB Order 78-9-58 (1978); Application of American Airlines, Inc., CAB Order 78-8-178 (1978).

294. *See, e.g.*, Application of Piedmont Aviation, Inc., *et al.*, CAB Order 78-9-148 (1978), at 5, n.10.

295. See Colonial Airlines, Inc., CAB Order 78-6-184 (1978); Application of Hughes Airway, CAB Order 75-11-24 (1975); Application of Continental Air Lines, CAB Order 73-2-30 (1973).

296. Former 49 U.S.C. § 1371(c) (1977).

297. 49 U.S.C. § 1371(c) (1977). The Board could still set a routes application for public hearing, *id.* § 1371(c)(1)(A), but it was no longer so compelled.

298. *See supra* note 211, and accompanying text.

significant new segments of entry opportunities for air carrier applicants.[299] Soon, the CAB was issuing instituting orders by the "bushel basketfull," as quickly as its secretaries could type and its copying machines could duplicate. The Board was not ashamed to issue orders of incredible redundancy, each employing virtually identical language. Again and again, the Board repeated essentially identical paragraphs:

> Under the Airline Deregulation Act of 1978, we must approve an application for certificate authority unless we find, by a preponderance of the evidence, that approval would not be consistent with the public convenience and necessity. The new Act creates a presumption that the grant of all applications is consistent with the public convenience and necessity. It places on any opponents of these applications the burden of proving them inconsistent with the public convenience and necessity. To give such opponents a reasonable opportunity to meet their burden of proof, it is our view that applicants must indicate what type of service they would provide if they served the markets at issue. This does not mean that an applicant must show that it will provide service if it receives authority.
>
> [N]otwithstanding [our] conclusions in support of multiple authority we in no way desire to deter objections that might be asserted under the 1978 Act by air carriers, civic interests or other interested persons. . . . For example, while diversion from existing carriers will not be given decisive weight in rejecting applications for new authority except upon an extraordinary showing of financial jeopardy on the part of one or more existing air carriers, with the consequent loss of air service which cannot be immediately replaced other provisions suggest that the Congress desires us to take into account other factors. These include, but are not limited to, satellite airport questions, the degree of concentration within the industry and safety.[300]

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299. *See, e.g.*, In the Matter of Western Airlines, Inc., CAB Order 78-11-66 (1978); In the Matter of Piedmont Aviation, Inc., CAB Order 78-11-65 (1978); In the Matter of North Central Airlines, Inc., CAB Order 78-11-64 (1978); In the Matter of National Airlines, Inc., CAB Order 78-11-63 (1978); In the Matter of Hughes Air Corp., CAB Order 78-11-62 (1978); In the Matter of Frontier Airlines, Inc., CAB Order 78-11-61 (1978); In the Matter of Delta Air Lines, CAB Order 78-11-60 (1978); In the Matter of Braniff Airways, Inc., CAB Order 78-11-59 (1978); In the Matter of American Airlines, Inc., CAB Order 78-11-58 (1978); In the Matter of Allegheny Airlines, Inc., CAB Order 78-11-57 (1978); Applications of United Air Lines, Inc., CAB Order 78-11-56 (1978); Application of Southern Airways, Inc., CAB Order 78-11-55 (1978); Application of United Air Lines, Inc., CAB Order 78-11-54 (1978); *et al.*, In the Matter of Western Air Lines, Inc., *et al.*, CAB Order 78-11-53 (1978); Application of American Airlines, Inc., *et al.*, CAB Order 78-10-98 (1978).

300. Application of Piedmont Aviation, Inc., *et al.*, CAB Order 79-1-104 (1979), at 5-6. Similarly, the Board stated, again and again:

> Upon review of all the facts and pleadings in this case, we have tentatively determined that there is no reason why we should not grant multiple awards. Our tentative conclusions comport with the letter and spirit of the Airline Deregulation Act of 1978, particularly the declaration of policy set forth in section 102 which instructs us to rely, to the maximum extent possible, on competitive forces, including potential competition. See our general conclusions about the benefits of multiple permissive authority in *Improved Authority to Wichita Case, et al.* . . . Accordingly, we conclude that it is desirable to award the additional authority sought by the applicants, whether or not services are in fact operated. The existence of additional operating rights in markets now being served by incumbent carriers or authorized to be served will best effect the statute's policy objective

The parties and the markets might vary from case to case, as might the name of the proceeding,[301] but the language, the intent, even the ultimate

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of placing maximum reliance on the decisions of the marketplace. This will occur because newly authorized carriers may actually enter the market in order to exploit unmet demand, both in terms of price and service, or because incumbents will be encouraged by the realistic threat of entry to meet that demand. Because demand is dynamic in character and therefore constantly changing, the most effective means to assure that competitive forces will operate quickly and efficiently is to award multiple operating authority to carriers that are fit, willing, and able to provide service.

Application of Texas International Airlines, Inc., *et al.* CAB Order 79-1-34 (1979), at 6 [citation omitted]. For similar, if not identical language, *see, e.g.*, Application of United Air Lines, Inc., *et al.*, CAB Order 79-1-67 (1979); Application of Braniff Airways, Inc., *et al.*, CAB Order 79-1-68 (1979); Petition of Continental Airlines, *et al.*, CAB Order 79-9-102 (1979); Application of National Airlines, Inc., *et al.*, CAB Order 79-1-105 (1979); Application of Braniff Airways, Inc., *et al.*, CAB Order 79-1-150 (1979); Petition of Frontier Airlines, *et al.*, CAB Order 79-1-151 (1979); Application of Frontier Airlines, *et al.*, CAB Order 79-2-30 (1979); Application of Allegheny Airlines, Inc., *et al.*, CAB Order 79-2-33 (1979); Application of Braniff Airways, Inc., *et al.*, CAB Order 79-2-35 (1979); Application of Allegheny Airlines, CAB Order 79-2-36 (1979); Application of American Airlines, Inc., *et al.*, CAB Order 79-2-37 (1979); Application of Braniff Airways, Inc., *et al.*, CAB Order 79-2-36 (1979); Application of American Airlines, Inc., *et al.*, CAB Order 79-2-39 (1979); Application of United Air Lines, Inc., *et al.*, CAB Order 79-2-40 (1979).

301. Soon the CAB began to designate the redundant orders by the routes at issue embracing virtually every imaginable series of points. *See, e.g.*, Reno-Chicago Show-Cause Proceeding, CAB Order 79-2-94 (1979); Service to Birmingham, CAB Order 79-2-95 (1979); St. Louis/Salt Lake City Show-Cause Proceeding, CAB Order 79-2-96 (1979); Albuquerque-St. Louis/Atlanta Show-Cause Proceeding, CAB Order 79-2-98 (1979); St. Louis-Salt Lake City Nonstop Service Show-Cause Proceeding, CAB Order 79-3-6 (1979); Albuquerque Show-Cause Proceeding, CAB Order 79-3-81 (1979); Austin and Lubbock Show-Cause Proceeding, CAB Order 79-3-82 (1979); St. Louis-Florida Show-Cause Proceeding, CAB Order 79-3-83 (1979); Dallas/Ft. Worth-Los Angeles Show-Cause Proceeding, CAB Order 79-3-96 (1979); Denver-Hawaii Show-Cause Proceeding, CAB Order 79-3-125 (1979); Chicago/San Diego-Hawaii Show-Cause Proceeding, CAB Order 79-3-126 (1979); Los Angeles/San Francisco/San Diego/St. Louis/Kansas City-Hawaii Show-Cause Proceeding, CAB Order 79-3-176 (1979); Boston-Detroit Show-Cause Proceeding, CAB Order 79-4-44 (1979); Las Vegas-Phoenix Show-Cause Proceeding, CAB Order 79-4-46 (1979); New Orleans-Baltimore/Washington Show-Cause Proceeding, CAB Order 79-4-119 (1979); Atlanta-Raleigh/Durham/Greensboro Show-Cause Proceeding, CAB Order 79-4-120 (1979); Salt Lake City Show-Cause Proceeding, CAB Order 79-4-123 (1979); New York-Miami/West Palm Beach Show-Cause Proceeding, CAB Order 79-5-28 (1979); Albuquerque Show-Cause Investigation, CAB Order 79-5-30 (1979); Boston-Dallas/Ft. Worth/Houston Show-Cause Proceeding, CAB Order 79-5-62 (1979); Dallas/Ft. Worth Phoenix Show-Cause Proceeding, CAB Order 79-5-79 (1979); California-Denver Show-Cause Proceeding, CAB Order 79-5-80 (1979); Chicago-Cleveland/White Plains/Burlington Show-Cause Proceeding, CAB Order 79-5-84 (1979); Denver/Chicago-Florida Show-Cause Proceeding, CAB Order 79-8-185 (1979); Northeast/Ohio Valley-Florida Show-Cause Proceeding, CAB Order 79-9-60 (1979); Charleston, W. Va.-New York/Newark and Charleston, W. Va.-Atlanta Show-Cause Proceeding, CAB Order 79-9-104 (1979); Pittsburgh-Las Vegas Show-Cause Proceeding, CAB Order 79-9-109 (1979); Los Angeles-San Diego/Kansas City Show-Cause Proceeding, CAB Order 79-9-167 (1979); Chicago-Nashville Show-Cause Proceeding, CAB Order 79-9-180 (1979); Columbus-Indianapolis-Lafayette Show-Cause Proceeding, CAB Order 79-10-22 (1979); Atlanta-Rochester, New York Show-Cause Proceeding, CAB Order 79-10-23 (1979); Minneapolis/St. Paul-Atlanta Show-Cause Proceeding, CAB Order 79-10-168 (1979); Philadelphia-Washington/Baltimore Show-Cause Proceeding, CAB Order 79-11-5 (1979); Denver-Tucson Show-Cause Proceeding, CAB Order 79-11-7 (1979); Atlanta/Detroit-New York/Newark Show-Cause Proceeding, CAB Order 79-11-91 (1979); Kansas

conclusion was essentially the same—authority would be granted to any and all who applied for it.[302]

The haste and carelessness with which the Board was issuing massive quantities of certificated operating authority through the show-cause vehicle ultimately led Member O'Melia to register a vigorous dissent in the *Milwaukee Show-Cause Proceeding*.[303] The majority in *Milwaukee* had tentatively decided to grant all applications filed by "qualified" carriers for any conceivable domestic route with which Milwaukee could be linked. Unlike its predecessor orders in which specific markets at issue were designated, Milwaukee was virtually geographically infinite. Member O'Melia was outraged, saying:

> Ever since the Board catapulted off the regulatory springboard in April 1978 with the unprecedented and precedential *Oakland Service Case*, I have found it necessary to dissent . . . each time that the Board has . . . unnecessarily and improperly ignored and departed from statutory guidelines and from established due process concepts. Although I cannot pretend that these lonely outcries have influenced the course of the Board's trajectory nor assured anyone outside the Board of our willingness to temper innovativeness with prudence, yet I feel compelled to dissent again in this case. . . . Like *Oakland*, like *Midway*, like *Wichita*, and like a not insignificant number of other cases that dot the path of the Board's orbit, *Milwaukee* being issued today is another amazing leap off the springboard.
>
> [T]he "unusual" step we are taking will undoubtedly be of turning-point significance in our program of deregulation. . . .

City-Florida Points Show-Cause Proceeding, CAB Order 79-11-102 (1979); Salt Lake City-Burbank Show-Cause Proceeding, CAB Order 79-11-132 (1979); Wichita Authority Show-Cause Proceeding, CAB Order 79-11-146 (1979); Denver-Philadelphia Show-Cause Proceeding, CAB Order 79-11-153 (1979).

302. *See, e.g.*, Application of Trans World Airlines, Inc., *et al.*, CAB Order 79-3-48 (1979); Service to Birmingham, CAB Order 79-4-39 (1979); St. Louis-Salt Lake City Nonstop Service Show-Cause Proceeding, CAB Order 79-4-163 (1979); New Orleans-Baltimore/Washington Show-Cause Proceeding, CAB Order 79-10-20 (1979); Salt Lake City-Reno/Las Vegas Show-Cause Proceeding, CAB Order 79-10-21 (1979); Denver-Omaha-Des Moines Show-Cause Proceeding, CAB Order 79-10-86 (1979); Dallas/Ft. Worth-Phoenix Show-Cause Proceeding, CAB Order 79-10-102 (1979); Dallas/Ft. Worth-San Antonio/Austin/Houston Show-Cause Proceeding, CAB Order 79-10-156 (1979); Houston-St. Louis-Chicago Show-Cause Proceeding, CAB Order 79-10-189 (1979) and CAB Order 79-11-138 (1979); Denver-El Paso Show-Cause Proceeding, CAB Order 79-10-190 (1979); Nashville-West Show-Cause Proceeding, CAB Order 79-11-57 (1979); Additional Great Lakes-Florida Service Show-Cause Proceeding, CAB Order 79-11-59 (1979); Denver/Chicago-Florida Show-Cause Proceeding, CAB Order 79-11-60 (1979); Atlanta-Nashville Show-Cause Proceeding, CAB Order 79-11-101 (1979); Chicago-Nashville Show-Cause Proceeding, CAB Order 79-11-139 (1979); Northeast/Ohio Valley-Florida Show-Cause Proceeding, CAB Order 79-11-143 (1979); Pacific Northwest-St. Louis-East Show-Cause Proceeding, CAB Order 79-11-144 (1979); New York-Miami/West Palm Beach Show-Cause Proceeding CAB Order 79-11-174 (1979); Dallas/Ft. Worth-San Diego Show-Cause Proceeding, CAB Order 79-11-176 (1979); New Orleans-Baltimore/Washington Show-Cause Proceeding, CAB Order 79-11-188 (1979).

303. CAB Order 79-3-13 (1979).

> This is the first time that the Board has used the show cause procedure to mount a handout of route awards of undefined geographic magnitude. . . . The door is being thrown open to *any* application for *any* market so long as it involves Milwaukee authority. . . .
>
> There are two consequences that particularly concern me. The first is that rather than the phased and orderly transition to deregulation that Congress mandated, the clear meaning of the Board's action here is instant deregulation. . . .
>
> The second . . . is that we are unnecessarily, improperly and in a very shameful manner destroying one of the strengths of an administrative agency like the Board—its quasi-judicial nature and function. The shameful part is that the destruction is being carried out not with clean direct surgical strokes, but by draining out the reason for being of our judicial process. With no facts to be analyzed, with no law to be interpreted and followed, what is the point of having a judicial process? . . .
>
> Is it worth it to assemble parties, counsel, recorder, and judge in these route cases merely to bear witness to an act of ritualistic genuflection?
>
> Why don't we put an end to this pretense of being a quasi-judicial agency? We are making a mockery of the formal adversary proceeding as the traditional way of determining factual and legal issues in licensing cases. Why don't we discontinue all other pending proceedings on route applications—there must be a couple dozen of them actively being processed—and tell the applicants that we will mail them their route awards after we show-cause them? We don't need a law judge to recite the catechism of multiple permissive authority. . . .
>
> This gutting of our judicial process, this mockery of evidentiary hearings, combined with the telescoping of the transition period, is not, in my opinion, what the Airline Deregulation Act contemplates. . . . And I feel ever so strongly that this is not in the best interest of the consumers, the carriers, and the communities of our country.[304]

In the *Newark Show-Cause Proceedings*[305] the Board took another leap toward deregulation by launching a routes decision to serve an infinite

304. *Id.*, dissent at 1-6 [citations omitted]. *See also* Northern Tier Show-Cause Proceeding, CAB Order 79-3-60 (1979), dissent. Member O'Melia reaffirmed this position in the Boise-Portland/Seattle/Spokane Show-Cause Proceeding, CAB Order 79-8-160 (1979), dissent at 1:

> I indicated [in *Milwaukee*] my concerns that the Board was not following the Congressional mandate of an orderly transition to deregulation of carrier licensing in the air transport industry; it was making a mockery of the administrative process by the meaningless, noncognitive licensing process used to mass produce certificates, but not service; and, most important of all, I was concerned that we were more interested in "theoretical goals" and "doctrinal conclusions" than we were in air service. . . .
>
> The majority have not proved too accurate in their prior predictions of new service. Only now, well over a year after our *Midway I* decision, and with considerable hoopla, because it is considered such a rare and special occasion, a new carrier will hopefully begin Midway Airport service this fall. None of the literally thousands of one-way flights per week proposed by applicants in that case are being provided. . . . Many other cities have had the same experience with multiple permissive awards. I'm concerned about what our policy of multiple permissive awards is doing to the ability of incumbent carriers to continue service to small and medium-sized communities.

305. CAB Order 79-6-79 (1979).

number of markets (*i.e.*, between Newark and any point in the United States) even though not a single carrier had filed an application requesting Newark authority.[306] The decision concluded that Newark airport was not adequately utilized, being overshadowed by the far more popular New York airports—Kennedy and LaGuardia. The Board had confronted a similar situation in the *Oakland* and *Chicago-Midway* proceedings,[307] and reached a similar conclusion in *Newark*, by asserting that "new entry or the realistic threat of entry which is created by multiple awards offers the greatest hope of revitalizing Newark airport."[308]

But Member O'Melia was not convinced that the *Oakland* and *Chicago-Midway* approach would improve service at Newark airport. Indeed, he had argued in *Chicago-Midway* that rather than indiscriminantly licensing all applicants, the CAB should instead certificate only two small carrier applicants, affording them a protective corridor against competition by the larger carriers for a limited period of time.[309] Member O'Melia feared that indiscriminate licensing would lead to a situation in which numerous carriers held operating authority, but few or none provided service.[310] But the Board in *Chicago-Midway* rejected Member O'Melia's proposal that small carriers be given a period within which to develop the Midway airport market and grow to a level sufficient to withstand entry by the established trunk line giants of the industry, for the Board was "convinced [that indiscriminate entry] will assure the reactivation of Midway airport. . . ."[311] Yet, more than a year later, NOT A SINGLE CARRIER HAD INAUGURATED NEW SERVICE AT MIDWAY AIRPORT![312] And, very little service had been instituted at Oakland.[313] The Board's efforts to revitalize Midway and Oakland by employing the multiple permissive entry vehicle had proven to be a dismal failure—this, despite the fact that the Board had inaugurated subsequent proceedings to issue even more operating authority to additional points.[314]

It is no wonder then, that Member O'Melia again found himself at odds with the majority, over what he perceived to be the mindless deregulatory frenzy of a majority which had failed to learn any lessons from the failures of

306. *Id.* at 1.
307. *Id.* at 7. *See supra* notes 158-162, and accompanying text.
308. CAB Order 79-6-79 (1979), at 10.
309. CAB Order 78-7-40 (1978), dissent.
310. *Id.*
311. *Id.* at 3.
312. CAB Order 79-6-79 (1979), dissent at 2. *See* Boise-Portland/Seattle/Spokane Show-Cause Proceeding, CAB Order 79-8-160 (1970), dissent at 1.
313. As of October, 1979, only two carriers were providing new service at Oakland, one of which *i.e.*, Braniff had announced its intention to terminate such operations. Oakland Service Case, CAB Order 79-10-89 (1979), dissent at 1.
314. *See* CAB Order 78-12-101 (1978).

Oakland and *Chicago-Midway*. He lamented the decision to proceed on an equally fatal course in *Newark*:

> The sausage-machine has ground exceedingly fine so that now we do not even need carrier applications to provide service or supporting requests for a show-cause order before we undertook this *Newark-everywhere* proceeding. I could overlook our contortion of the statutory procedures and of the Deregulation Act call for gradualism that are committed in the name of multiple permissive entry if I thought the public was being served well by it all. But [in light of the *Chicago-Midway* experience, it is not].[315]

Member O'Melia consistently argued, with great fervor, that the majority's approach violated the congressional intent that there be an orderly transition to entry deregulation, that it was "making a mockery of the administrative process by the meaningless, noncognitive licensing process used to mass produce certificates, but not service; and, most important of all, [that it was] more interested in 'theoretical goals' and 'doctrinal conclusions' than . . . in air service."[316] Although he recognized that many larger markets were receiving additional service as a result of the Board's liberalized entry policies, many small and medium sized communities were not. Moreover, many carriers (*e.g.*, Northwest) were complaining of their inability to continue providing service at smaller communities under circumstances where the Board's indiscriminate entry policies diluted their strength in larger, lucrative markets.[317] These, and every other arguments made by carriers and civic parties were consistently rejected by a majority of the Board under the compelling conviction that indiscriminate entry was a panacea for any problems which might be created by the application of its multiple permissive entry policy. A vivid example arose in a proceeding involving Dallas/Ft. Worth-Greensboro/Raleigh authority.[318]

The boilerplate language instituting all show-cause proceedings guarantees parties the opportunity to object to the application of the "tentatively" adopted policy of multiple permissive entry on the grounds, *inter alia*, that the application of such a policy in the markets at issue would not best serve the various objectives of the Airline Deregulation Act.[319] In *Dallas/Ft. Worth-Greensboro*, Piedmont vigorously argued (with substantial supporting evidence) that (a) Congress, in promulgating the Airline Deregulation Act, contemplated a "gradual and phased transition" during which the CAB would strengthen smaller carriers by offering them unique route opportunities, and (b) the Board's general application of indiscriminate entry

315. CAB Order 79-6-79 (1979), dissent at 1 [footnote omitted].

316. Boise-Portland/Seattle/Spokane Show-Cause Proceeding, CAB Order 79-8-160 (1979), dissent at 1.

317. *Id.*

318. Application of American Airlines, Inc., CAB Order 79-10-186 (1979) [hereinafter cited as *Dallas/Ft. Worth-Greensboro*].

319. *See supra* note 302, and accompanying text.

contravenes the Congressional directive to strengthen small carriers, avoid unreasonable concentration, and encourage efficient and well-managed carriers to earn adequate profits and attract capital.[320] Piedmont admitted that all carriers' including local service carriers, were receiving a plethora of new routes. Nevertheless, Piedmont argued that

> particularly in a period of equipment shortage and fuel restraint, it will take time to convert these new routes to system operations with cost and revenue characteristics competitive with the trunk carriers. It will take time for the locals to acquire more efficient equipment and to develop organizations with fuel capacity of operating efficiently routes with longer hauls and hope and greater density. It will take time for them to develop beyond segment networks producing a competitive traffic flow for new route awards. It will take time to establish market identity in major markets.[321]

Emphasizing that the Board had effectively adopted a policy of multiple permissive entry under the show-cause procedural mechanism in virtually all routes proceedings arising since the Deregulation Act had been promulgated, Piedmont contended that the CAB was adjudicating route applications without reference to the surrounding factual circumstances, including such criteria as the traffic levels and special characteristics peculiar to individual markets, the degree of industry concentration, and the size and strength of particular carriers (both applicants and incumbents).[322] The markets at issue were, in Piedmont's estimation, thin, and would not support additional service by any of the four new applicants. Moreover, if Braniff were to enter, Piedmont might be forced to abandon the market, for Braniff held an extensive route system beyond Dallas/Ft. Worth, from which it could funnel traffic on to the segment at issue.[323] In effect, the carrier was contending that the Board's indiscriminate entry policy was leading to undue concentration in the domestic airline industry, was failing to strengthen small carriers and was impairing their ability to attract capital—all in contravention of the policy objectives set forth in section 102 of the Airline Deregulation Act.[324] Piedmont asked for no more than an oral evidentiary proceeding with which to develop these lines of argument.[325]

This, the CAB denied; it proceeded to grant operating authority to each of the four new applicants. The Board maintained that it was irrelevant that Piedmont might be driven out of the market,[326] and generally responded to the carrier's other arguments with the language it has repeatedly employed (summarized throughout this article) in its other routes decisions. In none,

320. CAB Order 79-10-186 (1979), at 1-2.
321. *Id.* at 2.
322. *Id.* at 3-4.
323. *Id.* at 6.
324. *See supra* notes 203-208, and accompanying text.
325. CAB Order 79-10-186 (1979), at 2-3.
326. *Id.* at 11.

has the present Board "found the particular facts asserted to be relevant and material or sufficient to warrant a conclusion different from that proposed in the original show-cause order. . . ."[327]

Member O'Melia was outraged, and justifiably so. As has been indicated, the boilerplate paragraphs instituting show-cause proceedings guarantees opponents of new entry the opportunity to be heard, assures that such objections will be carefully evaluated, and promises that where appropriate, such matters will be set for hearing. But opposition has been a futile undertaking, for in *every* such proceeding, the Board has refused to set the matter for hearing, and has awarded operating authority to all applicants, no matter what the objections of carriers and/or civic parties.[328] Member O'Melia argued that "the Board should for once make good on the boilerplate offer to seriously consider filed objections."[329] He believed that Piedmont had presented a well-documented case which deserved more than "the appalling arrogance of this put-down of its concerns."[330] He characterized the majority's dismissal of Piedmont's objections as giving

> lie to any pretense that the Board will pay any attention to substantive arguments demonstrating that material issues of fact are unquestionably present and unquestionably in controversy.
>
> Piedmont is made the culprit here for daring to comment on the Board's show-cause order, for taking issue with the insensitive imporition of the multiple permissive award doctrine, for arguing once again that the Deregulation Act cares for a "gradual and phased transition" to free entry, for pointing out that the Act compels the Board to concern itself with strengthening small carriers and assisting them to earn adequate profits and to attract capital, for pointing out that the Act places certain obligations on the Board to set forth "findings of fact" on which to base its orders and to comply with the Administrative Procedure Act, and finally, in a desperate, last-gasp, reaching-back-into-history gesture, for asking for an oral evidentiary hearing.[331]

Member O'Melia also objected to the majority's "blatant disregard of the congressional mandate to administer a transition period and tailor our acts to the practical needs of the industry and the public."[332] Further, he

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327. *Id.* at 4.
328. *Id.*, dissent at 1.
329. *Id.*
330. *Id.*
331. *Id.*, dissent at 3.
332. *Id.*, dissent at 4. He elaborated as follows:

> Congress meant the period before we lose our domestic licensing authority in 1982 to be a period of transition. Yet the Board is abdicating completely its obligation to observe the law, to act judiciously in handling public property interests, to act evaluatively in dealing with matters affecting the nation's transportation system, to act responsively in considering the pleas and objections of interested parties, and to act with human-like selectiveness—not with robot-like automation in looking at markets, services and carriers.
>
> Congress has embarked on an experiment of limiting regulation of a major common carrier industry. It ill behoves the Board to fix blinders on its head and to refuse to recognize individual market problems that demand some flexibility and improvisation from us.

saw "only a single-minded push to complete deregulation among my colleagues."[333] If the majority was content to proceed in this mindless deregulatory frenzy, the consequences be damned, he had a novel suggestion for the future regulatory mechanism:

> If the recent voting pattern of the Board is to continue, we might just as well reprogram the sausage-machine. . . . [T]hen all we have to do is turn the machine to "automatic" and it will turn out multiple permissive awards as efficiently and quickly as we can. That being the case, I have one final suggestion. Assuming, *arguendo*, that the majority is correct, that there is no transition period, then I see no need for any present or future Board members. Our resignations would be a savings to the American taxpayers.[334]

By granting operating authority to any and every carrier that applied for it, despite the deleterious consequences to carriers and communities that might result, and by refusing even the opportunity to be heard orally, the Board had become, in Member O'Melia's estimation, little more than a "sausage machine," grinding out grants of operating authority as fast and thoughtlessly as the wheel would crank.

> Our ego is a small price to pay if the public interest is enhanced by a deviation from our monolithic norm. I am convinced that the Board is insensitive to what is happening in the market and I want the Board at some point—why not at this point?—to hold up its headlong rush to unrestricted entry for just one unprejdiced analysis of multiple awards.
>
> The Board's signal to the world from this order is a clear denial of the congressional intention.

Id.

333. *Id.*, dissent at 5. The Board, he pointed out, was no longer concerned

> about the public's air travel convenience or its necessity for reliable service to all points on the national air transportation system. Rather we are only interested in a grand experiment in transportation economics—complete deregulation of air transport. If the experiment fails because carriers can no longer afford to serve marginal markets that fact will merely be a footnote in some professor's textbook.

Id., dissent at 4.

334. *Id.*, dissent at 5. If the voting patterns in favor of indiscriminate entry were to continue, Member O'Melia felt that "we have become no more than overpaid rubberstamps." *Id.*

In the final order in the Oakland Service Case, CAB Order 79-10-89 (1979), Member O'Melia summarized the existing route policy of the CAB by saying, "we only require carriers to express an interest in a route and it will be granted." *Id.*, dissent at 1. He expressed chagrin that the majority had consistently refused to modify its policies so as to assure that communities actually receive the air service they need. As recently as October of 1979, he lamented:

> Experience shows that even with the sausage machine on automatic and with multiple certificate awards issuing each day, service results from the new policy have been mixed. Even though most all carriers have asked for all the routes up for award in the multiple entry cases, service has been instituted in only 180 markets out of the 2246 awards made since December 1978.

Id.

D. *Fitness Rendered Impotent as an Entry Criterion: Is Safety the Sacrificial Lamb of Indiscriminate Entry?*

(1) The Traditional Fitness Criteria

Pursuant to Section 401(d) of the Act,[335] the CAB is directed to issue certificated operating authority where it concludes, *inter alia*, that the applicant is "fit, willing and able" properly to perform the proposed air transportation services[336] and to conform to the provisions of the Act and the Board's rules, regulations, and requirements promulgated thereunder.[337] Although the Act does not define the terms "fit, willing and able," the Board traditionally evaluated three primary factors in its analysis of the applicant's operations: (1) the existence of a proper organizational basis for the conduct of air transportation, (2) the presence of a plan for the conduct of the service made by personnel shown to be competent in such matters, and (3) the availability of adequate financial resources.[338]

The issue of fitness, willingness and ability to perform certain air trans-

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335. 49 U.S.C. § 1371(d) (1979).

336. It has been emphasized that, as a condition precedent to the issuance of operating authority, an applicant must demonstrate that it is fit, willing and able to perform the specific transport services for which the authority is sought. United Air Lines v. Civil Aeronautics Board 278 F.2d 446, 449 (D.C. Cir. 1960).

337. This statutory language is almost identical for both scheduled and supplemental carriers (compare 49 U.S.C. §§ 1371(d)(1), (d)(2), and (d)(3) (1979)).

338. Braniff Airways v. Civil Aeronautics Board, 147 F.2d 152, 153 (D.C. Cir. 1945); Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 309 (1959); Reopened Latin American Air Freight Case, 19 C.A.B. 255, 260 (1954); South Pacific Air Lines, Inc., Hawaii-Tahiti Service, 17 C.A.B. 762, 769 (1953); United States-Alaska Service Case, 14 C.A.B. 122, 136 (1951); Southeastern States Case, 7 C.A.B. 863, 896 (1947); North Central Case, 7 C.A.B. 639, 663 (1946); American Export Air., Temporary New York-Foynes Ser., 3 C.A.B. 294, 298 (1941).

In Additional Service to Latin America, 6 C.A.B. 857, 899-900 (1946), the Board indicated that among the criteria employed in the selection of a carrier to perform proposed operations is the following:

> The applicant's ability to develop the service must be adequately demonstrated before a certificate can be granted. The Board must be satisfied that the applicant has adequate capital or is in a position to raise capital economically. It must also appear that it possesses or can create an organization qualified for the task which it undertakes; that it has access to the technical know-how to operate aircraft; that it is familiar with the problems involved in providing common-carrier transportation, and that the management is capable of assuring an economical and efficient operation.

See also United States-Alaska Service Case, 14 C.A.B. 122, 136 (1951).

In applications seeking operating authority to perform interim supplemental air transport services, the Board has frequently held that:

> In order for [an applicant] to meet the statutory tests of fitness, willingness and ability, it must demonstrate to the Board's satisfaction that it is operationally fit to perform properly supplemental air services with due regard to the convenience and needs of the traveling public; that it possesses the requisite disposition and ability to comply with the Act and the Board's rules and regulations thereunder; and that it has the necessary ability and disposition to comply with the rules and regulations . . . pertaining to safety.

American Flyers Airline Corp., Interim Certificate, 37 C.A.B. 96, 97 (1962); Johnson Flying Service, Inc., Interim Certificate, 37 C.A.B. 120, 121 (1962); World Airways, Inc., Interim Certificate,

port operations was not a matter of degree. Either a carrier was deemed "fit, willing and able" to perform proposed air transportation services, or it was not. There was no weighing and balancing between competing applicants to ascertain which carrier was most or least "fit, willing and able."[339] Indeed, once the Board determined that, for some reason, a particular carrier did not satisfy this statutory criterion, the Board was not compelled to evaluate whether the carrier might otherwise be more fit, willing and able than are other applicants.[340]

The fitness, willingness and ability of an applicant to perform proposed certificated operations required a consideration of the applicant's competence to operate the transport services for which authority was sought, and its financial capacity to do so.[341] As was emphasized by the Federal Court of Appeals for the District of Columbia in *Western Air Lines, Inc. v. Civil Aeronautics Board*:[342]

> Before the Board may issue a certificate authorizing air transportation to any carrier it must find that the carrier is "fit, willing and able properly to per-

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37 C.A.B. 130, 132 (1962); Southern Air Transport, Inc., Interim Certificate, 36 C.A.B. 656, 657-658 (1962). *See* Zantop Air Transport, Inc., Interim Certificate, 37 C.A.B. 12, 13 (1962).

339. The Board may consider the issue of "comparative fitness" as a public interest factor in selecting a carrier to operate over a proposed route. "For example, where there is little or no difference between applicants on economic grounds (*e.g.*, cost, diversion, integration, etc.), the comparative fitness of the applicants may be decisive in the selection of one carrier over another. In weighing these factors, the Board is not passing on the fitness of the applicants—both are deemed to be fit, willing and able within the meaning of the statutory standard—but rather is evaluating their qualifications (financial strength, type, and availability of equipment, management capability) to determine which applicant will best meet the requirements of the public convenience and necessity." New York-Florida Renewal Case, 41 C.A.B. 404, 408-409 (1964).

340. *See* Continental Southern Lines, Inc., v. Civil Aeronautics Board, 197 F.2d 397, 403 (D.C. Cir. 1952).

However, where it is concluded that an applicant is fit, willing and able, the Board may proceed to an evaluation of the public interest factors involved in route proceedings. For example, in Twin Cities-California Service Investigation, 52 C.A.B. 1 (1969), the Board, in considering the applications of a number of carriers seeking additional operating authority, recognized that each had adequately demonstrated its operational plans to perform the proposed operations and could obtain the requisite capital, personnel, and equipment. Considering these factors in conjunction with their experience in providing trunkline air transport services, the Board concluded that each was fit, willing and able to perform the proposed operations. Consequently, it proceeded to evaluate the comparative public interest factors which dominate the issue of which carrier should be selected to provide the service. *Id.* at 22. However, the failure of an applicant to demonstrate that it possesses sufficient experience, ability, or financial resources to perform its proposed services may lead to a finding that the applicant is not fit, willing and able to receive such operating authority. *See* North Central Case 7 C.A.B. 639, 672 (1946). The failure of an applicant to prove that it has an appropriate "organizational plan to provide personnel having sufficient transportation experience to conduct satisfactorily the proposed operation, or that it has adequate capital resources to inaugurate such service. . ." may lead to a denial of the application. Southeastern States Case, 7 C.A.B. 863, 897 (1947).

341. Pan American Airways Company (of Nevada) Certificate of Public Convenience and Necessity, 1 C.A.A. 695, 711 (1940).

342. 495 F.2d 145, 154 (D.C. Cir. 1974).

> form'' the transportation authorized. The Board has given content to this language through its decisions, focusing mainly on the adequacy of (1) technical and managerial resources and (2) financial resources available to the carrier.[343]

In *Pan Am. Airways Company (of Delaware)—Certificate of Public Convenience and Necessity*,[344] the Board expressed the following policy in the evaluation of applications for certificated operating authority:

> Title IV of the act is concerned primarily with air carrier economic regulation, and accordingly the findings of the [Board] as to the applicant's fitness, willingness and ability to perform the transportation covered by the application, to conform to the provisions of the Act and the rules, regulations, and requirements of the [Board] thereunder . . . is primarily concerned with the economic aspects of the questions involved.[345]

Consequently, the financial posture of an applicant seeking authority to perform either supplemental or scheduled air carrier service was of paramount importance in the evaluation of its fitness, willingness and ability.[346] Thus, in *United States Overseas Airlines Inc., Interim Certificate Proceeding*,[347] the Board stated:

> [T]he meaning of the phrase ''[fit, willing and able]'' . . . must be determined in the context of the problems Congress saw and the objectives it intended to accomplish. Looking at the pattern of the supplemental legislation and its legislative history, we are convinced that Congress viewed the financial fitness of supplemental carriers as having a direct bearing on safety of operations and fair treatment of the public; that it contemplated that such carriers should have

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343. *Id.* at 154. Similarly, among the criteria which have been assessed in the evaluation of the fitness, willingness and ability of an applicant properly to perform proposed supplemental services are its experience, financial posture, compliance disposition, and equipment availability. Transatlantic Charter Investigation, 40 C.A.B. 233, 263 (1964).

344. 1 C.A.A. 118 (1939).

345. *Id.* at 120-121. *See also* National Airlines, Inc., *et al.*—Certificates of Public Convenience and Necessity, 1 C.A.A. 612, 637 (1940).

346. Although a carrier may have experienced financial difficulties, the performance of past unprofitable operations does not preclude the Board from finding that the issuance of additional operating authority, by improving an applicant's financial posture, will enable it to perform reasonably adequate air transportation services, and that the applicant is financially fit to perform the proposed operations. Western Air Lines, Inc. v. Civil Aeronautics Board, 495 F.2d 145, 154-155 (D.C. Cir. 1974). Although carriers have been found to have experienced a net loss in their operations, they may nevertheless be found to be financially fit under circumstances where the payment of stockholder subscriptions will satisfy their existing liabilities and where they have never defaulted on the performance of their existing transportation commitments. Aircadia Ltd., CAB Order 73-4-47 (1973). The issue of a carrier's financial fitness cannot adequately be evaluated exclusively by reference to its financial statement. A carrier which may have an economic deficiency with respect to a particular item under generally accepted standards employed in the evaluation of financial statements may be able to demonstrate mitigating circumstances which outweigh the deficiency. United States Overseas Airlines, Inc., Interim Certificate Proceeding, 41 CAB 461, 465 (1964). Moreover, the Board has construed the ability of a carrier to serve and promote a market, despite its financial handicaps, to be far a more valuable indication of the carrier's fitness than its monthly balance sheets. Transatlantic Charter Investigation, 40 C.A.B. 233, 264 (1964).

347. 41 C.A.B. 461 (1964).

> and maintain a minimum financial strength and stability sufficient to protect the public from risk and abuse; and that it intended for the Board to eliminate from the supplemental field carriers who did not meet such minimum standards before financial weakness could translate itself into injury to the public rather than withholding action until after the financial unfitness had evolved into damage or injury to the public.[348]

Congress intended that only those carriers which could convincingly demonstrate minimum financial strength and sufficient stability to protect the public from abuse or risk should be authorized to perform air transport operations.[349] In general, the Board evaluated an applicant's financial history and current and future resources, in order to determine its potential benefits to commerce and for sustain operations, and to operate efficiently without exposing the public to financial risk or unsafe operations.[350] As recently as 1977, the Board interpreted its primary responsibility on fitness requirements to insure that carriers have "the wherewithal and willingness

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348. *Id.* at 463-464.

349. Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966). In evaluating the financial and operating ability of an applicant seeking operating authority to engage in supplemental air transportation, the going-concern status of an air carrier as evidenced by existing supplemental operations has traditionally been accorded heavy weight.

350. *See, e.g.*, Pennsylvania-Cent. Air., Youngstown-Erie-Buffalo Op., 1 C.A.A. 811 (1940); United A.L., Red Bluff Operation, 1 C.A.A. 778 (1940). *Id.* at 436-37. Subsequently, this carrier's economic posture deteriorated to a point which required a finding of unfitness, and its application was denied. United States Overseas Airlines, Interim Certificate Amendment, 38 C.A.B. 1114 (1963). *Compare* Standard Airways, Suspension, 39 C.A.B. 898 (1974), *with* United States Overseas Airlines, suspension, 41 C.A.B. 750 (1964). Where the applicant could not demonstrate going-concern status as an air carrier, it was required to demonstrate its operational and financial ability by a stronger array of other evidence. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 310 (1959).

Although a carrier may be experiencing financial difficulties at the time it submits an application for operating authority, it might nevertheless have been found to be financially fit. For example, in evaluating a carrier's economic fitness for interim authorization to perform charter operations, the Board in United States Overseas Airlines, Inc., Interim Certificate, 37 C.A.B. 424 (1963), concluded that although the applicant's financial position was unfavorable, its past performance record, its existing cash position and demonstrated ability to attract a significant volume of traffic, and its future earnings potential were indicative of the temporary nature of the economic difficulties, and that such difficulties were not such as to impair the applicant's ability to conduct safe and reliable air transportation services. Consequently, the Board resolved that the applicant was financially fit; but that because of the marginal nature of its financial posture, it would remain under close scrutiny by the Board in order to assure the applicant's continued fitness. *Compare* World Wide Airlines, Inc., Interim Authority, 37 C.A.B. 142 (1962); Sourdough Air Transport, Interim Authority, 37 C.A.B. 153 (1962); *with* Air Cargo Express, Inc., d/b/a Columbia Airlines, Interim Authority, 37 C.A.B. 208 (1962).

Undoubtedly, a carrier's financial stature is an essential element to be evaluated in assessing its fitness and ability properly to perform air transport operations. Large Irregular Air Carrier Investigation, CAB Order E-18342 (1962). An additional factor which required consideration in the determination of whether a carrier should receive renewal authority is whether it has adequately performed the operations authorized by its certificate with sufficient consideration for the convenience and requirements of the traveling public. *Id.*

to operate properly and in accordance with the law, and to protect the public from undue risk."[351] Although the Board recognized that the criteria for measuring these requirements could not be determined with mathematical precision, financial posture, experience, operating plans, and compliance disposition have historically proven to be among the most important factors considered.

Traditionally as important as the evaluation of an applicant's financial posture, has been the determination of whether an applicant is operationally fit. Both the applicant's experience and its operating proposal have been deemed relevant to this issue.[352] Among the multitude of factors which have been evaluated by the Board in its determination of whether an applicant is operationally fit were those expressed in *American Flyers Airline Corp., Interim Certificate*,[353] where a finding of operational fitness was predicated, *inter alia*, upon the following factors: (a) the applicant's financial position was relatively secure and it appeared able to satisfy its obligations as they matured; (b) it possessed a substantial fleet of insured flight equipment; (c) it had established a satisfactory maintenance program; (d) its management held extensive experience in airline operations; and (e) it had satisfactorily demonstrated a willingness and ability to provide the proposed operations with due regard for the protection of the travelling and shipping public (by maintaining sufficient liability and property insurance, and by expressing a willingness to adhere to the Board's regulations involving reasonable guarantees to the public).[354] In *Eugene Horbach Acquisi-*

351. *See* Supplemental Renewal Proceeding, CAB Order 77-1-98 (1977), at 34, and Eugene Horbach Acquisition of Modern Air Transport, Inc. CAB Order 77-3-88-89 (1977), at 5.

352. In evaluating the financial and operating ability of an applicant seeking operating authority to engage in air transportation, the going-concern status of the carrier as evidenced by existing operations has traditionally been accorded heavy weight. This, in a number of proceedings, the Board concluded that an applicant is fit, willing and able to perform air transport operations where it has a long record of successful operations and a sound financial condition. *See, e.g.*, Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966), and Pennsylvania Cent. Air., Youngstown-Erie-Buffalo Op., 1 C.A.A. 811 (1940). Where the applicant could not demonstrate going-concern status as an air carrier, it was required to demonstrate its operational and financial ability by a stronger array of other evidence. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 310 (1959).

353. 37 C.A.B. 96, 97-99 (1962).

354. *See also* Johnson Flying Service, Inc., Interim Certificate, 37 C.A.B. 120, 121-122 (1962); World Airways, Inc., Interim Certificate, 37 C.A.B. 130, 132-133 (1962); Southern Air Transport, Inc., Interim Certificate, 36 C.A.B. 656, 658-659 (1962).

Among the factors which have been evaluated by the Board in its determination of whether an applicant is operationally fit were those expressed in Zantop Air Transport, Inc., Interim Certificate, 37 C.A.B. 12 (1962), in which the Board rested its conclusion of fitness on the following considerations: (a) the applicant's financial position was relatively sound and it was able to satisfy its financial obligations as they fell due; (b) the applicant had been engaged in air transportation for a number of years, and it had demonstrated an ability to conduct extensive and continuing transport operations in an efficient and economical manner; and (c) it had exhibited a willingness and ability to perform its operations with due regard for the protection of the traveling and shipping public by carrying

tion of Modern Air Transport, Inc.,[355] the acquiring party was not a carrier already in operation, and Modern had ceased operations for some time. There the Board based its determination of operational fitness on the factors that the applicant had "submitted a reasonably defined plan for future operations,"[356] that it intended, and felt it could implement the plan, and that there was a reasonable possibility that the operations of the type proposed could be profitable.

However, where an applicant fails to submit a reasonably defined plan for its proposed operations, has not demonstrated that said operations would eventually be profitable, and has not proven that its financial condition is of sufficient strength to sustain those services then, even assuming that the public convenience and necessity requires their institution, the authority has ordinarily been denied.[357]

Traditionally, an applicant seeking operating authority was also required to establish its compliance disposition, or its willingness and ability to comport with the requirements of the Act and the Board's rules and regulations promulgated thereunder. In the *Large Irregular Air Carrier Investigation*,[358] the Board expressed the following attitude regarding a carrier's compliance disposition:

> Evidence of wrongdoing is not appropriate for consideration . . . for any purposes of punishment. Rather, such evidence has been evaluated solely from the viewpoint of its indications concerning the respective applicants' qualification to engage in air transportation in the future. Particularly, it has been concluded that the Board desires an appraisal as to whether each applicant can and will comply with the provisions of the Act and the Board's regulations. In such an appraisal, a negative conclusion on qualification would not follow from the finding of relative unimportant, isolated violations. Failure to qualify on account of violations has been found only in situations where the evidence shows that the violator whose disregard of the Act and the Board's regulations, considered in conjunction with all other evidence, shows that it can be expected to violate the Act and the regulations if given the authority covered herein.[359]

The failure of an applicant to adhere to its responsibilities under the Act and the Board's rules and regulations thereunder does not constitute a legal

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adequate insurance and expressing a willingness to provide reasonable performance guarantees to the public. *Id.* at 13-15. *See also* Saturn Airways, Inc., Interim Certificate, 37 C.A.B. 45, 47-49 (1962).

355. CAB Order 77-3-88/89 [1977).

356. Specifically, the Board noted that they "have clearly described the nature and method and manner in which they will operate, and have provided sufficient detail relating to the proposed areas they will serve, the charters they will offer, the equipment they will use, and the traffic they will most likely carry. . . ." *Id.*

357. Airline Transport Carriers, Inc., d/b/a/ California-Hawaiian Airlines, Supplemental Air Service Case, 39 C.A.B. 200, 303-303 (1963).

358. 28 C.A.B. 224 (1969).

359. *Id.* at 310-311 (citation omitted).

prohibition to future certification, but it is a factor of importance to be evaluated in determining whether the applicant should receive the authority sought.[360] A determination that a particular carrier has not satisfied the statutory criteria of fitness, willingness and ability properly to provide the proposed operations has not been imposed for punitive reasons, for that is not the purpose of Section 401. In so concluding, the Board has merely evaluated the fitness of the applicant pursuant to the statutory standard and the prospects for its reliability in the future in comporting with the Act and the regulations.[361]

In evaluating fitness issues on currently operating certificated carriers, the Board has recognized that a carrier's record of successful existing service, as well as its sound financial condition, may be sufficient to establish its fitness, willingness and ability to perform proposed operations.[362] The Board has frequently recognized that, in evaluating the fitness and ability of an applicant, an existing carrier is on a different footing than an applicant seeking entrance into the air transport industry.[363] With respect to the former, the Board has appraised the carrier's balance sheet and operational experience.[364] Where the applicant is an uncertificated entity seeking its initial segment of operating authority, the Board has been inclined to scrutinize its financial condition more closely.[365] Such an applicant traditionally

360. Transatlantic Cargo Service Case, 21 C.A.B. 671, 689 (1954); *see* Hawaiian Intraterritorial Service, 10 C.A.B. 62, 67 (1948); Twentieth Century Air Lines, Inc., *et al.*, 21 C.A.B. 133, 159 (1955). The Board has concluded that, despite a carrier's violations of the Act and the rules and regulations promulgated thereunder, operating authority should nevertheless be issued. Such a conclusion is preceded by a weighing and balancing of the factors involved, including the nature of the violation and the requirements of the public convenience and necessity. New York-Florida Case, 24 C.A.B. 94 110 (1956).

361. New York-Chicago Service Case, 22 C.A.B. 973, 990 (1955). Similarly, where an applicant fails to demonstrate the compliance disposition required for the issuance of supplemental air carrier operating authority, the Board need not proceed to a consideration of the applicant's financial and operational fitness to perform the proposed operations. Paramount Airlines, Inc., Supplemental Air Service Case, 39 C.A.B. 350, 352 (1963).

362. United Air Lines Transport Corporation-Certificate of Public Convenience and Necessity, 1 C.A.A. 778, 790 (1940); Pennsylvania-Central Airlines Corporation-Amendment of Certificate of Public Convenience and Necessity, 1 C.A.A. 811, 821 (1940); Braniff Airways, Inc.-Certificate of Public Convenience and Necessity, 2 C.A.B. 199, 205 (1940).

363. New York-Florida Renewal Case, 38 C.A.B. 680, 730 (1963); Intra-Area Cargo Case, 28 C.A.B. 200, 205 (1959); Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 308-309 (1959); Trans-Pacific Airlines Ltd., Renewal Case, 21 C.A.B. 253, 257 (1955); Pioneer Air Lines, Inc., Amended Certificate, 18 C.A.B. 11, 12 (1954).

364. Trans-Pacific Airlines, Ltd., Renewal Case, 21 C.A.B. 253, 257 (1955). The existence of financial resources sufficient to insure inauguration of proposed services and operation thereof for a period sufficient to test their usefulness is an essential ingredient to a finding of fitness, willingness and ability. Samoan Airlines Case, Reopened, 18 C.A.B. 533, 538 (1954).

365. *Cf.* Pioneer Air Lines, Inc., Amended Certificate, 18 C.A.B. 11, 12 (1953) (with respect to the Board's financial evaluation of supplemental carriers); *see, e.g.*, United States Overseas Airlines, Interim Certificate, 38 C.A.B. 1114, 1116 (1963); and Riddle Airlines, Transatlantic Pas-

was required to

> shoulder a substantial burden in establishing that it is fit to be entrusted with a certificate of public convenience and necessity. The fact that certain of the deficiencies in their showings might not be disqualifying for a going concern which has demonstrated through continuous operations its ability to cope successfully with the ups and downs of financial fortune, does not warrant a finding that they too are fit.[366]

Where an existing carrier seeks a renewal or extension of a segment of its route system, the Board has held that the "continued performance of operations is convincing if not conclusive proof of the ability to operate satisfactorily, in the absence of proof to the contrary."[367] The Board in the *West Coast Case*[368] expressed the following sentiments regarding existing vis-a-vis noncertificated carriers in application proceedings:

> In passing upon the fitness, willingness and ability of an applicant the Board has required it to show adequate financial resources. It is clear, however, that the position of an existing carrier operating pursuant to certificates of public convenience and necessity authorizing the carriage of persons, property, and mail differs from that of a new company seeking entrance into the air transportation industry. Route extensions, if they are not too great in relation to the carrier's other operations, can usually be added to existing operations of a carrier and successfully operated despite the fact that the carrier has not shown that it intends or is able to obtain new capital financing.[369]

(2) Fitness in the Post Airline Deregulation Act Environment: Erosion of the Traditional Standards

As has been indicated, the Airline Deregulation Act did not diminish the fitness issue as a potential barrier to entry in any way. The burden of proving fitness remains with the applicant;[370] and the CAB is obligated to continue its fitness scrutiny of carriers until 1985—long after its PC & N

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senger Charters, 38 C.A.B. 1170, 1173 (1963); Airline Transport Carriers, Inc. d/b/a California Hawaiian Airlines, Supplemental Air Service Case, 39 C.A.B. 299, 301 (1963).

366. Supplemental Air Service Proceeding, 45 C.A.B. 231, 267 (1966). Moreover, the discontinuance of existing air carrier operations may reasonably be interpreted as demonstrating a lack of willingness or ability to provide transport services, to operate, or to conform to the Act and the Board's rules and regulations thereunder. However, despite the discontinuation of air services, an applicant might nevertheless demonstrate its fitness, willingness and ability to perform proposed air carrier operations on the basis of other evidence, such as previously successful operations, financial ability, a competent organization, and available equipment. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 310 (1959).

367. Large Irregular Air Carrier Investigation, 28 C.A.B. 224, 238 (1959); New York-Florida Renewal Case, 38 C.A.B. 680, 730 (1963).

368. 8 C.A.B. 636 (1947).

369. *Id.* at 638-639. Boston-New York-Atlanta-New Orleans Case, 9 C.A.B. 38, 57-58 (1948). The existence of financial difficulties may not be an impediment to a finding of fitness where the applicant is a going concern and where its financial situation is improving. Airlift International, CAB Order 73-3-58 (1973).

370. *See supra* note 223, and accompanying text.

obligations have expired.[371] The first two subsections of the new Declaration of Policy strengthen and emphasize the overriding importance of safety as a regulatory obligation of the highest priority.[372]

One would have assumed then, that Congress intended that the Board continue, if not make more stringent, its quasi-judicial interpretation of its fitness responsibilities, discussed above. Incredibly, the Board did precisely the opposite.

The first import regulatory diminution of the fitness standards came in the *Chicago-Midway Low-Fare Route Proceeding*.[373] In *Chicago-Midway*, the Board acknowledged an interrelationship between fitness and safety. Although it argued that operational safety was principally the obligation of the Federal Aviation Administration, it admitted that passengers could reasonably assume that the issuance of operating authority by the CAB represented a determination by the Board that the carrier had the requisite personnel, compliance disposition, and financial ability to operate properly.[374] Nevertheless, the Board felt compelled to relax the traditional fitness standards so that they would be compatable with the thrust of multiple permissive entry[375] and "would not unnecessarily discourage new entry into the industry in the name of consumer protection."[376]

As a result, the Board in *Chicago-Midway* designed a simplified, streamlined test whereby a carrier could easily establish its fitness. The CAB required that an applicant adduce evidence that it:

> (1) will, before inaugurating its operations, have the requisite managerial skills and technical ability to operate safely;
>
> (2) if not internally financed, has a plan for financing which, if implemented, will generate resources sufficient to commence operations without undue risk to consumers;
>
> (3) has a proposal for operations reasonably satisfactory to meet a part of the demand for service in the city-pair markets embraced in its application; and
>
> (4) will comply with the Act and the rules and regulations promulgated thereunder.[377]

In the *Transcontinental Low-Fare Route Proceeding*,[378] the Board further expanded the second criterion of *Chicago-Midway*. Although the Board, as recently as 1977, had required a new operator to demonstrate

371. *See supra* note 238, and accompanying text.
372. See *supra* note 202, and accompanying text.
373. CAB Order 78-7-40 (1978). *See supra* notes 159-162, and accompanying text.
374. *Id.* at 49-57.
375. *Id.* at 49-50.
376. Transcontinental Low-Fare Route Proceeding, CAB Order 79-1-75 (1979), at 25.
377. Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-7-40 (1978), at 50; *see* Chicago-Midway Expanded Service Proceeding, CAB Order 79-9-55 (1979), at 8-9.
378. CAB Order 79-1-75 (1979).

that it possessed "resources commensurate with the nature and scope of its under-taking" sufficient to enable it to operate safely (*i.e.*, that the firm possessed either sufficient capital to operate the proposed service, or commitments from investors or lending institutions to provide the requisite capital),[379] the Board in *Transcontinental* believed that this requirement "could impose a serious barrier to entry. . . ."[380] It therefore eliminated the obligation that a carrier demonstrate its ability to actually obtain the requisite capital to commence reasonably safe operations. An applicant for operating authority now need merely proffer a financial plan which, if implemented, will generate sufficient financial resources to commence operations.[381]

The Board claimed that relaxation of the fitness criteria would not impair the safe operations of carriers subject to its regulations (and thereby endanger the lives of passengers), saying that if a carrier "cannot operate, the carrier will exist on paper only."[382] True, but would it not be possible for shoestring operators to secure the capital necessary to inaugurate some *de minimus* service for a limited period of time, while skimping an equipment, maintanence, and replacement parts? The Board had repeatedly emphasized that there are relatively few economic barriers to entry or economies of scale in the airline business.[383] In the highly competitive environment the Board was attempting to create, as prices approached marginal costs, would not a real incentive exist even for established incumbents to cut costs and defer maintenance? Deferred maintenance is already characteristic of another transportation industry—rail carriage. In an era of intense price competition, could not the same injurious consequences occur in the airline industry, at even greater risk to the lives of human beings? Incredibly, the majority did not even address these reservations.

Member Richard J. O'Melia recognized the potentially deleterious consequences to passenger safety which were likely to occur as a result of this deterioration of the traditional fitness criteria. He issued a vigorous dissent on the fitness issue:

> [M]y colleagues today have . . . [enshrined] some multiple permissive dogma to control the meaning of "fit, willing, and able," and have gone on to impale the Board on a dangerous notion of what constitutes fitness. The pronouncement on "qualifications" is tantamount to a determination that the financial resources of an applicant for route authority have practically no relation to its fitness to provide air transportation. This key determination of what is a critical, statutorily mandated prescription—one which is legislated to endure

379. Eugene Horbach, Acquisition of Modern Air Transport, CAB Order 77-3-88 (1977), at 7-9.

380. CAB Order 79-1-75 (1979), at 26.

381. *Id.*

382. *Id.*

383. *See supra* notes 183 and 195, and accompanying text.

> even after the Board's licensing authority has terminated—has been reached with a slight-of-hand maneuver that has in terms of its potential impact no parallel in my experience with agency action. . . . From this day forward an aspiring entrepreneur need only show that in a set of perfect circumstances the proposed operations could be feasible.[384]

Where carriers already provide scheduled certificated operations, the Board's fitness scrutiny is perfunctory, at best.[385] Most are not even required to adduce evidence consistent with the *Chicago-Midway* criteria (even as diluted by *Transcontinental*); instead, their fitness is regularly established by "officially noticeable data."[386]

Since *Transcontinental*, the Board has proceeded on a course which has further eroded the traditional fitness standards. For example, in the *Florida Service Case*,[387] Administrative Law Judge Dapper, concerned with the poor financial condition of Southeast Airlines; limited its operating authority to a period of one year so at the end of this trial period, the Board could reexamine the carrier's financial health.[388] This has been the traditional means employed by the Board to assure that such a poor economic position would not endanger the safety of a carrier's operations. And, traditionally, this has had a prophylactic effect; carriers recognized that if they allowed their financial posture or, more significantly, the safety of their operations, to deteriorate further, they would jeopardize renewal of their certificates.

The term-limitation approach was abandoned in *Florida* in favor of the

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384. *Id.*, dissent at 1. Member O'Melia continued:

> [Under the revolutionary fitness criteria adopted by the majority, it is now irrelevant] that the new entrant may not be able to afford the cost of insurance . . . or even the cost of maintenance of its equipment. All that matters is proliferation of permissive authority, erosion of entrance requirements, and a vision of more planes in the air. . . .
>
> In my opinion the Board has not sufficiently considered the safety implications of the fitness text now being proclaimed. The Board traditionally has considered fitness to be inseparable from a fundamental level of financial resources, at least to the point of stability over the first year of operations. The elimination of this nexus poses a threat . . . to the safety and best interests of the traveling public.

Id. In his dissent, Member O'Melia submitted a prophesy which, in retrospect, seems to have been fairly accurate:

> Apparently a carrier will soon be able to obtain a certificate to engage in domestic and overseas air transportation by presenting a single document proposing service in a purely hypothetical market. The Board will simply rubber-stamp them. . . . The transformation of the Board's decision-making function to something akin to a "sausage machine" . . . should never be permitted to occur with an issue as critical as carrier fitness.

Id.

385. *See, e.g.* Phoenix-Las Vegas-Reno Nonstop Service Investigation, CAB Order 78-12-38 (1978), at 4.

386. *See* Milwaukee Show-Cause Proceeding, CAB Order 79-3-13 (1979), at 6; 49 CFR § 302.24(m) (1979); Chicago-Midway Expanded Service Proceeding, CAB Order 78-7-41 (1978), at 4.

387. CAB Order 79-9-177 (1979).

388. *Id.*

imposition of several conditions intended "to assure that consumers would not suffer unduly if the company's financial condition were to deteriorate further."[389] Such conditions were primarily in the nature of bonding requirements[390] and obligations to file certain documents.[391] Although the Board was confident that if Southeast was unable to solidify its poor economic position, it "would terminate the service rather than allow its corporate finances to deteriorate further,"[392] the Board made no mention of the possibility that the carrier might instead defer maintenance in order to reduce costs.[393]

As the Board had diluted the financial aspects of the fitness question, it also began to relax its traditional requirements involving compliance disposition. In the *Chicago-Midway Expanded Service Proceeding*,[394] Administrative Law Judge Yoder questioned Federal Express' compliance disposition, for it had filed false and misleading information, and failed to adduce requested evidence concerning interlocking relationships in which it was engaged and prior safety violations.[395] The Board reversed the Judge on this issue, finding that prior violations of the regulations of the CAB and/or the FAA would not necessarily warrant denial of an application on fitness grounds.[396]

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389. *Id.*

390. *Id.*, appendix C at 1. The Board admitted that the carrier's "current cash flow problems are serious enough to raise the real possibility that the carrier will not be able to continue operating the expanded service, and as a result, may be unable to provide transportation for which passengers have paid in advance, or to refund their money." *Id.*

391. *Id.*, appendix C, at 2.

392. *Id.*, appendix C, at 1.

393. The author finds these omissions reprehensible, if not alarming.

394. CAB Order 79-5-55 (1979).

395. The standard evidentiary request of new applicants required a response to these questions:

> 1. Provide a description of each formal or docketed complaint lodged against the applicants, any predecessor or affiliate thereof . . . in the past five years regarding compliance with the Federal Aviation Act or the rules, regulations, and requirements thereunder. Indicate the final disposition, if any, of the matters.
>
> 2. State whether any of the persons and/or companies listed in Item A above, either as a partner, officer, director, or stockholder, have been affiliated with, controlled, or participated in control of any air carrier which during such association, was found to have committed knowing willful violations of the Act, or of any order, rule, or regulation issued pursuant to the Act. If so, list orders covering the period from ten years ago to date.
>
> 3. Indicate any action taken by the FAA under 14 CFR 13.15 (involving civil penalties of $500 or more per violation), 13.17, 13.19, and 13.23 and the disposition of each.

Id. at 12, n.32.

396. More specifically, the Board held:

> Our primary concern [in evaluating the issue of fitness] is that the consumer's interest in safe, reliable air transportation be protected in the competitive environment. We must examine the evidence to discern whether the applicant is favorably disposed to comply voluntarily with the regulatory protections that the Act provides the public and to comply with our rules and regulations. If the applicant has a previous operating record, we want

In the *Northwest Alaska Service Investigation*,[397] the Board proceeded even further, concluding that even *serious* violations of the statutes and regulations might not result in a finding that an applicant is unfit.[398] In this proceeding, the Board concluded that the violations by Alaska Airlines of the control provisions of Section 408 of the Act[399] were "not the sort that brings into question its ability to serve the public effectively and safely, and with little financial risk to consumers."[400] Although the Board indicated that it had a number of sanctions at its disposal for contumacious disregard of the Act and the applicable rules and regulations thereunder,[401] it did not specify what those sanctions were, or whether it might even be inclined to employ them.

Finally, the issue of fitness involves an evaluation of an applicant's "fitness, willingness, and ability." In the *Dallas/Fort Worth-Tucson Investigation*,[402] the CAB diluted the obligation of "willingness." Administrative Law Judge Kolko had concluded that operating authority could not lawfully be granted to all of the applicants, for only two had indicated a present intention to enter the market regardless of the number of competitors, and therefore not all could be found "willing" within the meaning of the Act.[403] The Board reversed, arguing that the statutory prerequisite of "willingness" did not embrace "any requirement of an actual intent to inaugurate service."[404] The requirement of "willingness" refers instead to an applicant's obligation:

> (1) to perform properly, under its obligations as a common carrier, the transportation covered by its application;
>
> (2) to operate suitable and safe aircraft; and
>
> (3) to conform to the Act and to Board regulations.[405]

Yet, under the approach adopted by the Board, the applicant need not be willing actually to provide any of the operations, either immediately or ever,

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> to be sure that the past record reveals a willingness and disposition to deal honestly and responsibly with the public. Of course, an applicant's history of compliance with rules and regulations bears on this issue. However, this does not mean that every past infraction of our regulations, or those of the FAA, will disqualify an applicant. The character of violations must be assessed with an eye toward how they reflect on an applicant's willingness to serve the public. Similarly, the manner and completeness of an applicant's evidentiary submission reflects on its fitness. We have determined that the filing of false and conflicting exhibits and testimony may be grounds for disapproving an application to perform air transportation.

Id. at 15-16 [citations omitted].

397. CAB Order 79-11-99 (1979).
398. *Id.* at 5.
399. 49 U.S.C. § 1378 (1979).
400. CAB Order 79-11-99 (1979), at 6.
401. *See id.*
402. CAB Order 79-5-35 (1979).
403. *Id.* at 4.
404. *Id.*
405. *Id.* at 5.

for which authority is sought. Today, in order to receive certificated operating authority, a carrier need only be "willing" to file an application.

E. *Energy Consumption and Environmental Pollution*

Under Section 102(2)(C) of the National Environmental Policy Act of 1969,[406] the CAB is obligated (as are all federal agencies) to evaluate whether a given decision is a major federal action "significantly affecting the quality of the human environment. . . ." Similarly, under Section 382(a)(3) of the Energy Policy and Conservation Act of 1975,[407] the Board must determine whether a given decision is a "major regulatory action which . . . has the effect of requiring, permitting, or inducing the inefficient use the inefficient use of petroleum products. . . ." Incredibly, the CAB has uniformly concluded that none of the route decisions described herein (either individually or collectively) have had a significant effect upon environmental pollution or fuel consumption.

In rationalizing its new policy of relaxing entry barriers and encouraging rate flexibility, the Civil Aeronautics Board has emphasized the elasticity of the passenger market, and the ability of carriers, if free to compete, to generate new sources of traffic.[408] Yet, in assessing the environmental implications of multiple awards, the CAB has repeatedly insisted that:

> while multiple awards are likely to encourage price competition and generate traffic, they are not likely to significantly increase the number of flights operated. Rather the lower fares resulting from increased competition will force carriers to operate with higher load factors. Thus most, if not all, of the newly generated passengers are likely to fill seats which would otherwise have been empty.[409]

This boilerplate language has been repeated in a number of CAB entry proceedings.[410] Occasionally, the Board would add its conclusion that, "The

406. 42 U.S.C. § 4332(2)(c) (1978).

407. 42 U.S.C. § 6362(a)(3) (1978).

408. *See supra* notes 114-115, and accompanying text.

409. Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978), at 17.

410. *See, e.g.*, Phoenix-Las Vegas-Reno Nonstop Service Investigation, CAB Order 78-12-38 (1978), at 6; Louisville Service Case, CAB Order 79-1-101 (1979), at 11; Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), at 13; Phoenix-Las Vegas-Reno Nonstop Service Investigation, CAB Order 78-12-38 (1978), at 6; Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-1-15 (1979), at 5; Improved Authority to Wichita Case, CAB Order 79-3-45 (1979), at 4; Boise-Denver Nonstop Proceeding, CAB Order 79-5-74 (1979), at 6; Spokane-Montana Points Service Investigation, CAB Order 79-4-80 (1979), at 5; Pittsburgh-Orlando-Daytona Beach Route Proceeding, CAB Order 79-4-78 (1979), at 7; Norfolk-Atlanta Subpart M Proceeding, CAB Order 79-10-202 (1979). *Compare* Straszheim, *The Scheduling and Route Impacts of Increased Fare Flexibility*, 10 TRANSP. L.J. 269 (1978). The Board contended that:

> [M]ultiple awards force both the incumbent(s) and the awardees to reevaluate their plans in light of the increased competition and higher load factors which accompany multiple awards. The carriers' reevaluation has led them to provide less service than they had originally planned, with the end result being that multiple awards do not significantly increase the level of operations.

higher load factors which multiple awards are likely to induce will allow many more people to fly without significantly increasing fuel consumption or any of the other environmental consequences associated with an increase in operations."[411]

The quoted language is misleading, if not wholly inaccurate. Although load factors have increased significantly, according to the statistics compiled by the CAB, so too have flight frequencies and carrier purchases of and orders for new aircraft. With respect to the quantitative effects of deregulation, the Board has emphasized that "Airline service has increased significantly. Comparing February 1978 to February 1979 service, measured by weekly aircraft departures at each point, scheduled service was up 8.4 percent for the nation, with increases experienced in all regions of the country and in communities of all sizes."[412] As of September, 1978, 3,697 aircraft were available for service, while 1,024 were on order and on option.[413] The Board itself, has admitted that, "Investment in aircraft of all sizes is . . . on the rise."[414]

Even assuming that no single routes proceeding is a "major federal action" within the meaning of the aforementioned statutes, what of the combined effect of the hundreds of such decisions issuing literally thousands of new routes? For example, the state of California has argued that the Board is obligated to evaluate, from an environmental and energy standpoint, the cumulative impact of its plethora of entry decision.[415] The

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West Coast-Alaska Investigation, CAB Order 79-4-36 (1979), at 23; *see also* Dallas/Ft. Worth-Tucson Investigation, CAB Order 79-5-35 (1979), at 6. The Board cited no statistics to support these allegations. *See* Oakland Service Case, CAB Order 79-10-89 (1979), at 6.

411. Midwest-Atlanta Competitive Service Case, CAB Order 79-1-64 (1979), at 5. With respect to the potential for excessive fuel consumption arising as a result of indiscriminate entry, the Board has argued:

> [I]ncreased competition will promote energy efficiency by providing an incentive for carriers to increase load factors on their flights. As carriers cut prices in their effort to increase market shares, they will be forced to make their operations profitable. Second, while there may be some increased fuel consumption, we do not [believe] . . . that multiple awards . . . offend EPCA. . . . [nor that they will] waste fuel as they produce a prolonged competitive battle during which the markets will be flooded with excess capacity. . . . [E]ven assuming that there may be a competitive struggle in which carriers initially schedule some excess capacity, there is no basis for concluding that this struggle will be so prolonged or so fierce as to require us to throw away the benefits of multiple permissive awards on the grounds that they are inconsistent with EPCA. . . . This consideration, coupled with our finding that multiple awards will produce greater transportation benefits in these markets, more than justifies any additional fuel usage that may be required.

Transcontinental Low-Fare Route Proceeding, CAB Order 79-1-75 (1979), at 33-34.

412. CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE, STATUS ON FEBRUARY 1, 1979, 1 (1979).

413. *Id.* at 108-109.

414. CIVIL AERONAUTICS BOARD, PRESENTATION BEFORE THE SUBCOMMITTEE ON AVIATION, SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION 35 (1979).

415. California-Arizona Low-Fare Route Proceeding, CAB Order 79-9-176 (1979), at 1-2.

Board rejected this argument, saying, "Absent a further showing indicating, at a minimum, what prospective route awards pose the potential for a cumulative impact on a specific point, we reject the argument that we are required to undertake a cumulative analysis."[416] Nonsense! This nation can no longer afford the luxury of callously shirking its responsibility to diminish its wasteful and profligate consumption of fuel.[417] Regulatory policies such as these seem pompous, and worse, grossly inconsistent with national energy objectives.

And, what of the impact of liberalized entry upon aircraft noise? Would not increased service (resulting from both the issuance of new route opportunities and the enhanced demand generated by price competition) have a deleterious affect upon noise levels in areas surrounding major airports? Perhaps, but, the Board was unwilling to modify its entry policies or impose appropriate restrictions in order to alleviate the aircraft noise problem, leaving the issue in the laps of the local governmental authorities to "take whatever steps they deem necessary to curtail noise."[418] The CAB felt that if it were to impose any such restrictions, "such action might have serious anticompetitive consequences and create an undue burden on interstate commerce."[419] But, if such federal action might unduly burden interstate commerce, how then could such state action survive judicial review when challenged on the grounds that it violates Article I section 8 of the Constitution? The Board did not directly confront the issue, saying only that such matters are best left to local authorities.[420]

VIII. Conclusion

The experience of the Civil Aeronautics Board reveals that economic regulation can be like a swinging pendulum. Over a period of time regulatory philosophy can swing in either direction; and it may swing too, too far. In one direction, the pendulum may swing in favor of protecting the industry from the deleterious effects of "excessive," "wasteful," or "destructive" competition. This was the regulatory philosophy which characterized the CAB between 1938 and 1975, when the Board gave excessive protection to tightly regulated carriers against route and rate competition. 1975 to 1978 was an interim period for the Board, when the pendulum began to move away from protectionism in favor of increased reliance upon free market forces. Since 1978, the pendulum has swung fully in the direction of

416. *Id.* at 2.

417. *See* Dempsey, *Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 Case W. Res. J. Int'l L. 247 (1976).

418. Chicago-Midway Low-Fare Route Proceeding, CAB Order 78-8-203 (1978), at 11.

419. *Id.*

420. *Id.* at 11-12. *See* British Airways v. Port Authority of New York, 558 F.2d 75, 83 (2d Cir. 1977).

unlimited, unrestrained competition, so that today there is virtually no regulation at all; indeed, the pendulum has swung almost off the clock.

Both extremes violated the congressional intent. That intent has recently been described by the U.S. Supreme Court as imposing upon transport regulatory agencies the obligation "to strike a fair balance between the needs of the public and the needs of the regulated carriers."[421] This "fair balance" has been lost both in the era of excessive protectionism (1938-1975), and the era of excessive competition (1978-present).

In enacting the 1938 legislation, "Congress made it clear that while it was moving to safeguard against the excesses of destructive and unrestrained competition, it was in favor of the competitive principle and opposed to a principle of monopoly."[422] In its fervent determination to protect the industry from excessive competition, the CAB refused to permit the entry of a single new trunkline carrier; it refused to allow the bankruptcy of a single inefficient carrier; it virtually eliminated air fare competition; and it ultimately imposed a moratorium on the issuance of new operating authority. As a result, by 1975, there were fewer competitors; the industry suffered from excessive investment, excessive non-price competition (*i.e.*, "frills"), excessive capacity, and inadequate profits; and passengers paid unnecessarily high prices for air travel. In general, the Board failed to allow the industry to enjoy the beneficial effects of regulated competition—the increased economies and efficiencies of operation which would have arisen as a result of reasonably increased pricing and entry competition.

The interim period (1975-1978) proved that by encouraging carriers to compete they would offer passengers new, innovative combinations of price and service options. This would, in turn, stimulate passenger demand (which was inherently elastic), and thereby enable carriers to fill empty seats on aircraft. Although the Board during this period probably exceeded the Congressional intent and the perimeters of the Federal Aviation Act, increased capacity levels and decreased "frills" led to the highest industry profit levels in history. Carriers were encouraged to improve the economy and efficiency of their operations; passengers were permitted to enjoy air fares set at a more competitive level.

Yet, the Board since 1978 has violated the congressional will at least as reprehensibly as did the agency during the worst excesses of the protectionist era. Certainly, Congress intended that air transportation be deregulated, and established a specific timetable for the elimination of regulatory scrutiny over various carrier activities. But clearly too, Congress did not intend for the Board to deregulate entry until 1982; it implicitly designated 1978-1982 as a transition period during which the Board would gradually

421. Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 653 (1977).

422. Continental Air Lines v. CAB, 519 F.2d 944, 953 (1975).

expose the highly regulated common carrier system to the rigors of the marketplace, and allow communities to adjust to the evolving traffic patterns of an air carrier system which was responding to the needs and demands of the market. Congress also encouraged the CAB to employ the transition period as a vehicle to insure continued and viable service at small communities, and to enhance the possibility of long-term competition by strengthening small carriers. Had Congress intended that there be no transition period, it would most certainly have opened the floodgates in 1978.

Although *de jure* deregulation of entry in air transportation is not scheduled to arrive until 1982, *de facto* deregulation is here today. Not in a single instance, no matter how persuasive or vehement the objections of affected parties, has the Board awarded operating authority to fewer than all "qualified" applicants in a single domestic routes proceeding consummated since the promulgation of the Airline Deregulation Act.[423] In the author's opinion, the blind application of such a regulatory policy satisfies the definition of fanaticism. Pandora's box has been opened wide. Thousands of segments of operating have been created for virtually any entity willing to file an application.[424] Like a pack of ravenous sharks, the CAB has attacked its prey in a deregulatory frenzy. The ultimate tragedy, however, may well be that communities, carriers, and passengers must suffer the irresponsible and ill-conceived policies of a misguided majority of the CAB.

Had the Board lived up to its promise in *Wichita*, and equitably evaluated the needs and requirements of communities and carriers on a case-by-case basis, structuring route awards to meet these specific needs and requirements, the congressional will might have been satisfied. But *Wichita* was a lie. The current majority of the Board has weighed the scales so heavily in favor of increased new entry that no party could, under any conceivable circumstances, convince it that fewer than all applicants should receive operating authority.[425] And, the Board should be severely reprimanded for falsely leading communities and carriers to believe that it might actually mold its regulatory policies to conform to the needs adduced by these parties in particular markets at issue. Query: what were the aggregate legal expenses incurred in this futile effort to encourage the Board to

423. "The Board has granted all certificate applications of all comers in all cases, domestic or foreign, with only incidental exception." Letter from Richard J. O'Melia to Paul Stephen Dempsey (December 18, 1979).

424. So loading the scales so strongly in favor of a conclusion was held unlawful by the United States Supreme Court in an analagous context in I.C.C. v. J.T. Transport, 368 U.S. 81, 89-90 (1961).

425. *See supra* note 423. As of December, 1978, the CAB had issued 2,242 segments of operating authority in 422 markets on a multiple permissive entry basis. CAB Order 79-10-186 (1979), dissent at 6. Such issuances, coupled with the dormant authority provision of the Airline Deregulation Act (*see supra* notes 228-232 and accompanying text) have together created virtually an infinite number of route opportunities. The floodgates have, quite clearly, burst.

utilize its regulatory powers in a prudent manner, and give the nation something more than a mindless deregulatory frenzy? The author finds himself agreeing with the frustration and exasperation of Member O'Melia, who regularly lamented the Board's "sausage machine" approach to entry—an approach of awarding operating authority to every applicant in every conveivable market. The author cannot believe that Congress was so irresponsible as to impose the continuation of regulatory scrutiny over entry until 1982, when it actually intended that the Board effectively abandon its regulatory responsibilities over entry immediately. But this is the contorted assumption that must be made if we are to conclude that the Board's contemporary entry policies are consistent with the congressional intent.

Deregulation should not be viewed as an end in itself; it should instead be perceived as a means to an end, a tool with which to secure a much more important objective—competition. Viewed from this perspective, regulatory means may frequently accomplish the objective of enhanced competition more efficiently than the wreckless abandonment of regulatory means which now characterizes the Board's approach. For example, long-term competition may be most effectively enhanced by strengthening small carriers during the transitional period (strengthening them may increase the likelihood that they will be able to withstand the aggressive, and perhaps predatory, competition of larger carriers). But again and again, the Board has refused to modify its entry policies to encourage these long-term benefits. While unlimited entry may increase short-term competition, it may unnecessarily impair the ability of smaller carriers (many of which own their modest size to the regulatory policies of the CAB) to compete on a long-term basis.

Another example: many small communities have urged the Board to shield a carrier or two from unlimited entry in particular markets so that they might be encouraged to provide service. This, the Board has refused to do, awarding operating authority to every applicant no matter how small the market. Again, the loss of competitive service (or *all* service) in many of these markets may well have an unfortunate long-term impact upon competition. This is, in fact, the lesson of even some rather large markets, such as those considered in *Chicago-Midway* and *Oakland*, where the Board refused to employ regulatory means to rectify the absence of competition which existed because of a free market choice of most carriers to serve alternate airports. Thus, although the Board seems to encourage competition through its unlimited entry policies, the purported effects of the Board's policies are not always those which arise in the "real world." Indeed, one might argue that the present Board has no idea of what goes on in the "real world." Certainly, the agency seems almost fanatically determined to apply its inflexible deregulatory philosophy no matter what the consequences to the public or the industry.

The Board has lost sight of the ultimate objective of increased competition. It has instead followed a false prophet, deregulation, promoting deregulation as an end in itself. Paradoxically, the Board has vehemently insisted that unlimited entry witl be a panacea for all of the ills which may be incurred as a result of unlimited entry. It will not; and the industry and the public may ultimately suffer the consequences of this unfortunate confusion.

Because of the Board's misguided fury there may ultimately be less competition and fewer competitors than there are now. As a result, passengers may pay more for travel than they would have had the Board employed the transitional period in the manner that Congress intended. The Board's inflexibility may well exacerbate our nation's excessive energy consumption. And, perhaps more significantly, the public's safety may well be jeopardized because the Board has so watered down the "fitness" criteria, despite specific congressional directives to the contrary. In the end, history may record Member O'Melia as the sole and lonely voice of reason in a sinking ship of fools.

It is too early to draw conclusions as to the precise effect of the Board's policies. Yet, this has not stopped some from applauding the purported "benefits" of deregulation. For example, in introducing the administration's "Trucking Competition and Safety Act of 1979"[426] last June, Senator Kennedy said:

> Eight months ago, Congress enacted and President Carter signed into law the Airline Deregulation Act of 1978, which loosened substantially the restrictive economic regulations which had interfered with the efficient performance of that industry. The results of the legislation have indeed been impressive. Airline deregulation has meant:
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> More people can afford to fly;
>
> More industry jobs;
>
> Increased entry and service:
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> More revenues and higher profits for the airlines themselves;
>
> Reduced bureaucracy with substantial savings to the industry and the taxpayers;
>
> And, of course, lower prices for consumers.[427]

Again, it is probably too early to make any definitive statements with respect to the impact of airline deregulation. But one cannot help but be disturbed by such a one-sided account of its purported "benefits." One could easily compile a parallel list of problems and injuries which have arisen as a result of the legislative initiatives in this field.

For example, the aforementioned quotation (a) fails to address the loss

426. S. 1400; H.R. 4568, 96th Cong., 1st Sess. (1979). *Compare* Motor Carrier Regulatory Improvement Act of 1979, S. 1496, H.R. 4549, 95th Cong., 1st Sess., (1979), *with* Motor Carrier Efficiency and Regulatory Improvement Act of 1979, S. 1497, 95th Cong., 1st Sess. (1979).

427. 125 CONG. REC. S. 8416 (June 25, 1979).

in quantity and quality of service which has been incurred by small and remote communities,[428] (b) ignores the significantly increased and discrimi-

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428. Between February 1, 1978, and February 1, 1979, 260 cities suffered a decrease (most, a significant decrease) in aircraft departures. CIVIL AERONAUTICS BOARD, REPORT ON AIRLINE SERVICE, STATUS ON FEBRUARY 1, 1979, 43-50 (1979) [hereinafter cited as AIRLINE SERVICE]. *See also id.* at 56. Even the Chairman of the CAB, Marvin Cohen, admitted that, "We have heard the complaints about service cutbacks, and there is no denying that the carriers have been using their new freedom to exit cities as well as their new freedom to enter them." CIVIL AERONAUTICS BOARD, PRESENTATION BEFORE THE SUBCOMMITTEE ON AVIATION, SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, 23 (1979) [hereinafter cited as CAB PRESENTATION BEFORE SENATE COMMERCE COMMITTEE]. Certainly, the nation as a whole experienced an aggregate increase in service, when measured solely in terms of departures performed. *Id.* at 34. In many communities, a new entrant (frequently, a small commuter carrier) is willing to replace service lost by the departure of an incumbent (frequently, a large scheduled air carrier). But the community may be left with a smaller carrier which, although it may provide as many departures, may nevertheless provide service to less convenient points at less convenient time, will ordinarily provide far less service when measured in terms of capacity (*e.g.*, the replacement carrier may be flying 30-seat aircraft, while the departing incumbent was providing an identical number of frequencies with 120-seat aircraft), and may provide far less satisfactory service in terms of dependability and safety. Thus, the loss of service must be measured from two perspectives: (1) quantitatively (which the CAB has emphasized); and (2) quantitatively (which the CAB has virtually ignored). Although the Civil Aeronautics Board has provided elaborate departure statistics in an attempt to prove that deregulation was a brilliant success, it has provided no statistics with respect to the corresponding qualitative loss that many small communities have experienced. The CAB Chairman has acknowledged only that:

> Some cities will receive replacement service that is not as convenient as the service provided by the departing carrier. The new carrier may provide service with smaller aircraft or to a less convenient airport.

Id. at 39. Small communities find little consolation in statistics which prove that, when measured solely in terms of departures, the nation is receiving improved service. From their perspective, the qualitative loss is not reflected in such statistics. And, many such communities are not even receiving the purported benefits of increased departures; indeed, as has been mentioned, 260 suffered a quantitative loss in service between February 1, 1978 and February 1, 1979. Member O'Melia has pointed out that the Board's own data proves

> that at the 663 cities surveyed, July 1979 over July 1978, departures declined at 37 percent of the cities. All scheduled service has apparently been lost at 49 cities, involving 974 weekly departures last year. 44 percent of the cities experienced a reduction in available seats—including points at which the study shows an increase in frequencies. . . .
>
> I should also note, with quiet understatement, that the July 1, 1979 date used here for service comparisons probably reflects a high point in domestic service this year.

Applications of American Airlines, Inc., CAB Order 79-10-186 (1979), dissent at 6.

When Congress promulgated the Airline Deregulation Act in October of 1978, it gave air carriers a great deal of flexibility to abandon routes or communities which were deemed insufficiently profitable, so that the carriers would be able to behave like rational businessmen and shift these resources to more lucrative routes in higher density markets. *See* Conference Report to Accompany S. 2493, Airline Deregulation Act of 1978, REP. NO. 95-1779, 95th Cong., 2d Sess. [Oct. 12, 1978); Improved Authority to Wichita Case, *et al.*, CAB Order 78-12-106 (1978); Iowa/Illinois-Atlanta Route Proceeding, CAB Order 78-12-35 (1978); *see* Sims, *International Air Transportation: The Effect of the Airline Deregulation Act of 1978 and the Bermuda II Agreement*, 10 TRANSP. L.J. 239, 248-249 (1978). On the whole, it was thought, the public interest would be better served by permitting carriers to deploy their resources in response to market demand. Rather than retain the traditional system of cross-subsidization, whereby a carrier took profits derived from its lucrative routes to subsidize service provided on its unprofitable ones, Congress ex-

natory rates, as well as the limitations on liability imposed by air cargo carriers,[429] (c) ignores the significant increases in aviation fuel consumption and

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panded the system of direct federal subsidization so that "essential air transportation" would be maintained at "eligible points." 49 U.S.C. § 1389 (1979). 14 CFR § 398 (1979). For a representative survey of decisions issued by the Civil Aeronautics Board as to the essential air transportation requirements at various "eligible" points, *see, e.g.*, CAB Order 79-11-38 (1979), CAB Order 79-11-27 (1979), CAB Order 79-11-26 (1979), CAB Order 79-11-24 (1979), CAB Order 79-10-203 (1979), CAB Order 79-10-201 (1979), CAB Order 79-10-183 (1979), CAB Order 79-10-165 (1979), CAB Order 79-10-150 (1979), CAB Order 79-10-149 (1979), CAB Order 79-10-143 (1979), CAB Order 79-10-140 (1979), and CAB Order 79-10-135 (1979).

Yet, many small communities were extremely disturbed when major carriers began to drop routes or to pull out of these markets altogether. Chambers of Commerce realize that a loss of air passenger service diminishes their ability to attract new industry and tourism. So, too, are so many small communities distraught when rail carriers propose to discontinue service and abandon trackage with which they are linked to distant markets. And, many remote communities are concerned that the deregulation of surface transportation may eliminate the obligation of trucking companies to provide essential service. Clearly, there is more at stake than the sanctity of the laws of the marketplace. There is a public interest in assuring that the fundamental ingredients of economic growth are abundant in all regions of our nation, so that the fruits of such growth might be enjoyed by a larger segment of the population. This is, of course, a distribution of wealth concept. A geographic disbursement of economic growth offers the potential for a more equitable distribution of regional growth rates. Moreover, by removing industry from the concentrated urban areas where the industrial revolution was born, the quality of life might ultimately be improved as workers, by following industry like a magnet, enable population to become more geographically disparate.

Clearly, transportation is, like communications and energy, a fundamental component of national, regional, and local economic development. If any of these vital components is deficient, either from a qualitative or quantitative standpoint, investment in industrial plant will not be forthcoming, and existing industry may relocate elsewhere. Traditionally, it has been thought that these essential industries were too important to be left to the rigors of the market-place. Several of these industries were natural monopolies (*e.g.*, the early railroads, telephone, telegraph, gas, and electric companies, and to some extent, television and radio), which if unregulated, would produce in lower quantities and at higher prices than would industries in a competitive market. Regulation seeks to substitute that which is lacking in the marketplace, by insisting that such natural monopolies produce at a lower price and higher volume than they otherwise might.

Recognizing this distinction, virtually every major industrial nation on the planet treats these industries in a manner significantly different from the rest. In most, the industries are owned and operated by the state. In transportation, most of the rail, motor, barge, and air carriers are socialized, even in western Europe.

In the United States, the services of transportation, communications and energy have largely been performed by the private sector, with government serving the role of a vigorous regulator of a wide variety of activities, weighing and balancing the public interest against what would otherwise be the economic laws of the marketplace. The government plays a dual and perhaps schizophrenic role—on the one hand, it seeks to stimulate the inherent economies and efficiencies of the regulated industries; on the other, it seeks to protect the public from the abuses which these industries might otherwise perpetrate. For the most part, the United States has been able to avoid nationalizing these industries, for private ownership thereof under governmental regulation has, on the whole, proven successful.

429. *See* Augello, *Rate Making Without Regulation* in TRANSPORTATION LAW INSTITUTE, RATE REGULATION & REFORM 101 (1979) [hereinafter cited as Augello, *Rate Making*].

The legislative history of the Air Cargo Deregulation Act reveals that Congress specifically intended that the CAB not eliminate the tariff filing requirement for all cargo carriers. *See Conference Report* accompanying H.R. 6010, No. 95-733 (Oct. 27, 1977), at 14-15. The obligation to

air pollution attributed to increased flights and frequencies in the densely

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file tariffs insures that each shipper will be apprised of the "going rate," not only for itself, but also for its competitors. Discrimination is inhibited because of the self-policing nature of the pricing scheme—publically filed tariffs reduce the ability of carriers to deviate therefrom in order to discriminate between their customers. *See* O'Neal, *Price Competition and the Role of Rate Bureaus in the Motor Carrier Industry*, 10 TRANSP. L.J. 309, 317 (1978). Discrimination, in fact, was among the primary motivating factors which initially led Congress to regulate transportation in 1887. *See* Aitchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 GEO. WASH. L. REV. 289, 292-296 (1937).

Today, as a result of the elimination of the tariff filing requirement, there is widespread discrimination by air cargo carriers between shippers. Because the CAB no longer regulates air tariffs, air carriers have been free to increase cargo rates significantly. Between January 1978, and January 1979, such rates rose 89% on minimum charge shipments, 21% on 100 pound shipments, 76% on 5,000 pound shipments, and up to 900% on accessorial charges. *See* Augello, *Rate Making, supra*. Deregulated carriers are no longer under an obligation to maintain "just and reasonable" rates; they can now charge whatever the market will bear. Aside from discrimination and significantly increased rates, air cargo shippers are also faced with a plethora of paperwork, for there is now no uniformity in tariff charges between carriers, and no stability in rates, for the tariffs of air carriers may change from one day to the next. Moreover, the CAB has specifically exempted all cargo air carriers from the obligation to establish reasonable rates or to carry upon reasonable request! 14 C.F.R. §§ 241, 242, 249, 291 (1979). *See* EDR-359, Proposed Rules for All-Cargo Air Carriers and Domestic Cargo Transportation by Section 401 and 418 Air Carriers (July 25, 1978).

An even more serious problem for shippers lies in the limitations on liability imposed by air cargo carriers. Such liability has now been reduced from 50 cents per pound total shipment, to $9.07 per pound per package; special or consequential damages have been eliminated; the time within which a claim may properly be filed has been reduced to 180 days; and "fuel shortages" have been imposed as a bill of lading exception from recovery on loss and damage claim. *See* Augello, *Rate Making, supra*. (For an excellent review of the limitations on air carrier liability which have arisen as a result of the Air Cargo Deregulation Act and the CAB's liberal interpretation thereof, *see* W. AUGELLO, FREIGHT CLAIMS IN PLAIN ENGLISH 55-62 (1979)).

These are hidden transportation costs. To the extent that they pragmatically reduce the incentive of carriers to maintain the highest standard of care in handling shippers' commodities, loss and damage will suffer a corresponding increase, to the detriment of the national economy. The lack of uniformity and stability in rates may also characterize the regulated motor carrier industry should Senator Kennedy's S. 710 become law. *Compare* Popper, *Collective Ratemaking: A Case Analysis of the Eastern Central Region and a Hypothesis for Analyzing Competitive Structure*, 10 TRANSP. L.J. 365 (1978), *with* Rose, *Surface Competition and the Antitrust Laws: Let's Give Competition a Chance*, 8 TRANSP. L.J. 1 (1976). Senator Kennedy's bill would repeal the Reed-Bulwinkle Act, 49 U.S.C. § 10706 (1979), and thereby subject carrier agreements on rates, accessorial charges and rules to the meat cleaver of the antitrust laws.

The Carmack Amendment now prohibits regulated motor and rail carriers from limiting their liability for loss and damage in transit, except under specifically approved released rates, or from reducing the time limits for reporting losses or filing claims. 49 U.S.C. § 11707 (1979). The ICC has recently expanded the ability of surface carriers to limit their liability through the released rates option, permitting, for example, such released limitations on shipments of less than 500 pounds. 49 CFR § 1100.225(i) (1979); Released Rates in Conjunction With a Small Shipments Tariff, 361 I.C.C. 404 (1979).

Presumably, total deregulation of such carriers will lead to limitations on liability and reductions on filing times (if not rate increases) analogous to those imposed by deregulated carriers. This will, in the long run, remove existing incentives for carriers to give commodities the highest care while in

populated markets,[430] (d) ignores the inherent market barriers to entry confronting small carriers and aviation entrepreneurs, such as the unavailability of aircraft and fuel (and the rapidly rising cost of both) and lending slots at major airports,[431] (e) ignores the overcrowding of airports ill-equiped to handle the surge in traffic generated by potentially predatory fares,[432] (f) ignores the tendency of major carriers to seek to merge or consolidate (*e.g.*, North Central-Southern, Continental-Western, Tiger-Seaboard, and Pan Am-National)[433] and the long-term potential for market oligopoly such behavior may portend, (g) ignores the deteriorating safety records of air car-

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their possession, and will subject the shipping public to a long term increase in loss and damage in transit, for which recovery will be difficult and prescribed.

430. *See supra* notes 406-417, and accompanying text. Air transportation is the most fuel consumptive of the various modes. The relative energy efficiencies are as follows:

Pipeline	420	BTU's per Ton-Mile
Rail	675	BTU's per Ton-Mile
Waterways	750	BTU's per Ton-Mile
Truck	3,440	BTU's per Ton-Mile
Air	37,500	BTU's per Ton-Mile

Letter from William J. Augello to Jimmy Carter (April 12, 1979), republished in YOUR LETTER OF THE LAW 44-45 (1979). As air cargo prices fall, more and more freight leaves the surface modes and is instead tendered to the air freight industry, thereby exacerbating our national energy crisis.

431. With respect to the inaccessibility of access at congested airports, CAB Chairman Marvin Cohen has acknowledged:

> The problem of airport access is a . . . troublesome one . . . . We know that much that we do affects airport access and we recognize our obligation to reduce public inconvenience on the ground as well as in the air. Clearly at congested airports, the increase in traffic and service has exacerbated an existing problem.

CAB PRESENTATION BEFORE SENATE COMMERCE COMMITTEE, *supra* note 428, at 40. Nevertheless, the CAB has been wholly unwilling to modify its *de facto* policy of multiple permissive entry in all markets able to support some service to reflect the scarcity of landing slots at airports, *see* Applications of Colonial Airlines, Inc., CAB Order 78-6-183 (1979), or the inability of airports to withstand terminal capacity problems associated with unlimited entry in large markets, *see* Austin/San Antonio-Atlanta Service Investigation, CAB Order 79-3-9 (1979), at 10-11. Curiously, the Board's merger policies apparently have been altered to reflect the "constraints on entry imposed by airport rules or limitations. . . ." Continental/Western Merger Case, CAB Order 79-9-185 (1979), at 2. Hence, the problems of congestion and inaccessibility due to FAA landing slot limitations are given no weight in entry proceedings, and are given determinative weight in merger proceedings. One can only speculate as to the reason for this inconsistency, for the Board has never attempted to distinguish or explain it.

432. *See* Austin/San Antonio-Atlanta Service Investigation, *id.*, and accompanying discussion.

433. *See* North Central-Southern Merger Case, CAB Order 79-6-8 (1979), CAB Order 79-6-7 (1979); Texas International-National Acquisition Case, *et al.*, CAB Order 79-7-55 (1979), CAB Order 79-3-152 (1979), CAB Order 79-1-117 (1979), CAB Order 79-1-49 (1979), CAB Order 78-12-104 (1978), CAB Order 78-12-109 (1979), CAB Order 79-4-74 (1979), CAB Order 79-4-69 (1979), CAB Order 78-10-142 (1979), Texas International Airlines, Inc. v. Pan American World Airways, Inc., National Airlines Inc., Enforcement Proceeding, CAB Order 78-12-56 (1978); Pan American World Airways-National Acquisition Case, CAB Order 79-9-163 (1979); Application of Eastern Air Lines, Inc., CAB Order 79-3-136 (1979); Application of Tiger International Inc., CAB Order 78-10-101, (1978); Tiger International-Seaboard Acquisition Case, Order 79-2-131 (1979), Order 78-12-173 (1978); Continental/Western Merger Case, Order 79-9-185 (1979).

riers (particularly cummuter carriers),[434] (h) ignores the 26 percent increase in passenger fares since the beginning of the year,[435] (i) ignores the significant reductions in airline profits beginning the third quarter of 1979,[436] and (j) ignores the recent decision of a number of major carriers (*e.g.*, United, Pan Am, Braniff, TWA) to reduce service, increase rates, and lay off employees.[437]

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434. Recently, much media attention has been focused on the safety problems of DC-10s, as a result of the tragic crash near Chicago. And, a number of major carriers (*e.g.*, Braniff) have come under intensive governmental scrutiny and sanction for failure to adhere to FAA safety regulations.

As has been indicated, commuter carriers have replaced the larger scheduled carriers in many small and medium sized communities, resulting in a qualitative (and, frequently, a quantitative) loss in service. *See supra* note 4. The fatality rate for passengers boarding commuter carriers is 300 times worse than the rate for the larger carriers. Panetta, *Commuter Airlines: Taming the Wild Blue*, COLORADO/BUS. (November 1979), at 17.

435. Actually, coach fares increased almost 28 percent during the first ten months of 1979. Karr, *Airline-Industry Decontrol in First Year Boosts Competition, Fails to Slash Fares*, WALL ST. J. (October 23, 1979), at 6, Col. 1. Curiously, although the CAB granted 416 new segments of operating authority during this period, carriers inaugurated service only on 8 percent of these routes. *Id.*

The recent increase in passenger fares has been widely attributed to the increase in the cost of aviation fuel. *See, e.g., Fasten Seat Belts*, NEWSWEEK (Nov.5, 1979), at 89. Does it not, however, seem somewhat inconsistent to argue that last year's rates (which were declining) were a direct consequence of the new liberal pricing and entry policies of the CAB, as sanctioned by Congress with the promulgation of the Airline Deregulation Act, while this year's rates (which are increasing) are wholly unrelated to the pricing and entry determinations of our new deregulatory regime?

Much attention has been focused on the assertion of CAB Chairman Marvin Cohen, made on April 25, 1979, that "We have estimated that consumers have saved almost $2.5 billion over the past year." CAB PRESENTATION BEFORE SENATE COMMERCE COMMITTEE, *supra* note 428, at 3. Actually, he provided no data to substantiate that allegation. Moreover, how can the American public be deemed to have saved anything, when the aggregate amount spent on air transportation, generated by the price elasticity of the passenger market, increased during this period? The CAB itself has repeatedly recognized that lower fares tend to lure the "discretionary traveler" to take the trip or vacation of which he might never have dreamed. As the Board has said, lower fares "broaden the demand for air services in general by attracting a segment of the public that wouldn't or couldn't travel by air at the regular price." Las Vegas-Dallas/Fort Worth Nonstop Service Investigation, CAB Order 78-3-121 (1978), at 3. How then, does one, by spending money, save it?

436. Virtually all of the major airlines have suffered a serious reduction in profits during the third quarter of 1979 (*vis-à-vis* the same quarter, the preceding year). Indeed, two carriers (*i.e.*, United and Braniff) together actually lost over $30 million during this period. *See Fasten Seat Belts*, NEWSWEEK (Nov. 5, 1979), at 89.

437. *Id.* The Air Transport Association anticipates that traffic will continue to decline during 1980. *Id.*

For a review of typical instances in which major carriers have recently sought to terminate, suspend, or eliminate service at various points, *see, e.g.*, CAB Order 79-10-169 (1979), CAB Order 79-10-28 (1979), CAB Order 79-9-101 (1979), CAB Order 79-5-87 (1979), CAB Order 79-5-86 (1979), CAB Order 79-5-85 (1979), CAB Order 79-5-26 (1979), CAB Order 79-5-22 (1979), CAB Order 79-5-19 (1979), CAB Order 79-4-185 (1979), CAB Order 79-4-182 (1979), CAB Order 79-4-178 (1979), CAB Order 79-4-175 (1979), CAB Order 79-4-166 (1979), CAB Order 79-3-183 (1979), CAB Order 79-3-177 (1979), CAB Order 79-3-166 (1979), CAB Order 79-3-165 (1979), CAB Order 79-3-139 (1979), CAB Order 79-3-138 (1979), CAB Order 79-3-132 (1979), CAB Order 79-3-131 (1979), CAB Order 79-3-107 (1979), CAB Order 79-3-105

Whether one views the CAB's policies on having desirable or undesirable effects will depend upon one's perspective. Large carriers which increase their market shares, and high density markets which may enjoy increased air service will surely view this approach as heaven sent. Small carriers which suffer economic injury (or bankruptcy), and small communities which lose service, will view CAB Chairman Marvin Cohen as Satan incarnate.

In the end, the absolute effects of the Board's policies may be obscured. Increased air fares will be blamed on higher fuel prices. Small carrier bankruptcies will be blamed on ineffective management. Increased industry concentration will be blamed on free market forces. Loss of service at small communities will be blamed on insufficient market demand. Loss of life will be blamed on aircraft design, pilot error, weather, or the inadequacies of the Federal Aviation Administration. In the end, the Civil Aeronautics Board will probably receive much less blame for the unfortunate results of its mindless approach than it deserves. And, it can probably be relied on to provide a less than objective analysis of the impact of its indiscriminate entry policies.

If indeed, one accepts the author's conclusion that the Board has abrogated the congressional will, and that effects of the agency's actions will be far less beneficial than it would have us believe, what are the lessons Congress should derive from this experience? After all, our elected representatives are now contemplating proceeding on an analogous course in the fields of motor and rail carriage. How can the Congress avoid the growing erosion of its constitutional powers over interstate and foreign commerce?

First, Congress should be much more specific in its statutory directions and much more careful in drafting the legislation. Ambiguous terminology such as "public convenience and necessity," "public interest," and "fit, willing, and able" should be defined in a much more precise manner, or abandoned.[438] If a regulator is adamently dedicated to a particular economic or political philosophy, as are the members of the present Board, he will resolve all ambiguities in his favor. Which leads us to the second lesson.

The Senate should carefully scrutinize all Presidential appointees to the regulatory agencies, so as to insure that they aren't so dedicated to a particular regulatory ideology that they are willing to bend, twist, or indeed, abrogate the congressional will. The President and the Congress should

(1979), CAB Order 79-3-100 (1979), CAB Order 79-3-99 (1979), CAB Order 79-3-98 (1979), CAB Order 79-3-91 (1979), CAB Order 79-3-76 (1979), and CAB Order 79-3-41 (1979).

438. Such terms are employed not only in air transport regulation, but also to the regulation of rail carriers, *see* 49 U.S.C. §§ 10901, 10903, 10909 (1979), motor and water carriers, *see* 49 U.S.C. §§ 10922, 19023 (1979); brokers of motor carrier transportation, *see* 49 U.S.C. § 10924 (1979); and communications, *see* 47 U.S.C. §§ 214(a), 307(a)(d), 309(a) (1977).

abandon the political patronage system and begin to appoint individuals who are (a) reasonably intelligent, (b) reasonably well educated in the legal and economic intracacies of the regulated industry, and (c) not so fanatically obsessed with a particular crusade (*e.g.*, deregulation) that they lose sight of both the congressional intent (as expressed in the relevant legislation and its history) and that which is in the best interests of the nation. Unfortunately, President Carter has attempted to "pack" both the CAB and the ICC with fervent deregulators. This trend must be reversed.

Finally, whatever the benefits of deregulating air transportation, they may not be repeated should Congress choose to deregulate other modes. Prior to 1975, the airline industry suffered from excess capacity and low profits. By lowering prices, air carriers were able to appeal to the discretionary traveler, thereby filling seats which might otherwise have flown empty. In so doing, air carriers increased the economies and efficiencies of their operations, and thereby increased their profits. As has been mentioned, these benefits were rather short lived.

Nevertheless, even these temporary attributes of airline deregulation may not be repeated in the surface transportation of commodities. As has been indicated, the passenger market is price elastic—lower prices may generate demand from discretionary travelers. However, in the aggregate, the commodities market is relatively demand inelastic with respect to the use of transportation services.[439] Between carriers and modes there may be some demand elasticity, but the total market, at any point in time, is virtually finite. Hence, while air passenger deregulation led to price competition which, in turn, enabled air carriers to fill seats which might otherwise have flown empty, deregulation is unlikely to fill empty areas in motor carrier trailers or rail boxcars.

The overriding purpose of this article has been to set forth, in great detail, the primary allegations made by the CAB regarding the postive impact it has assured us we will enjoy as a result of its deregulation of entry (and its repeated insistence that despite the vehement objections of a plethora of parties, no deleterious effects will arise). If, indeed, such beneficial consequences do occur, they will certainly be evident if only we examine the airline industry and the passenger service it provides. Let us now begin to scrutinize carefully the results of these policies to discern whether the Board's contentions were correct, or whether they were erroneous, and place the appropriate credit or blame, respectively, upon the shoulders of those who deserve it. Let the reader, the traveling public, and the Congress be the judge of whether the nation is left with a superior or a deficient na-

439. *See* Waring, *Rate Adjustments on Specific Movements*, in TRANSPORTATION LAW INSTITUTE, RATE REGULATION & REFORM 145 (1979).

tional transportation system.[440]

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440. The importance of these issues should not be underestimated. As this author has emphasized elsewhere:

> Air transport regulation is perhaps the most rapidly developing area in all of administrative law; certainly, the developments here have been among the most revolutionary in the history of governmental regulation. The extent to which these innovative policies succeed or fail will undoubtedly affect not only civil aeronautics, but all of regulated transportation, if not all of governmental regulation.

Dempsey, *The International Rate & Route Revolution in North Atlantic Passenger Transportation*, 17 COLUM. J. TRANSNAT'L L. 393, 441 (1978).