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# MERGERS IN DOMESTIC AVIATION: THE ROLE OF COMPETITION

HENRY E. FOLEY\* AND LAURENCE S. FORDHAM\*\*

## INTRODUCTION

The subject of air carrier unifications is one of many discussed by Carl J. Fulda, Professor of Law at Ohio State University, in his recent book.<sup>1</sup> Professor Fulda provides a broad, general work on the transportation field of considerable value to the transportation specialist as well as to the general practitioner. He surveys the various branches of the transportation industry—the railroads, motor and water carriers, commercial airlines and freight forwarders—discussing government regulation of each and their common problems with regard to regulation, rate agreements, inter-modal competition and the court-administrative agency relationship. His broad theme is the interplay between the principle of competition embodied in the antitrust laws and the principle of regulatory restraints on competition created by the federal transportation statutes and applied by the agencies administering those statutes.

Professor Fulda clearly favors vigorous competition. He criticizes Congress for its failure to articulate strongly that such competition should be the dominant influence in administrative decisions in the transportation field. He endorses Congressman Emanuel Celler's proposal that Congress enact a declaration, applicable to all transportation, to the effect that "the principles of free enterprise embodied in the antitrust laws" shall be maintained "to the maximum extent practicable."<sup>2</sup> In short, competition would clearly be the norm and deviations from it would have to be justified by a strong showing of other public interest factors.<sup>3</sup>

Although Professor Fulda, as of the time of his writing, feels that the Civil Aeronautics Board (hereinafter referred to as the "Board") has been more true to the principle of competition in the airline sector than has the Interstate Commerce Commission in other sectors of the transportation industry, he has mixed feelings about the Board's regulation of what he calls airline "unifications," by merger, consolidation, acquisition of assets or other similar means.<sup>4</sup> Professor Fulda

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<sup>1</sup> Fulda, *Competition in the Regulated Industries: Transportation* (1961).

<sup>2</sup> *Id.* at 455.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Id.* at 225 et seq.

lauds the Board for its approvals of unifications of the small trunklines, all of which "made creditable contributions to solidifying the remaining lines and improving their route pattern."<sup>5</sup> These decisions, he reasons, further "the policy of strengthening the smaller trunks" and they "augment competition" rather than diminish it.<sup>6</sup>

On the other hand, Professor Fulda lauds the Board for *disapproving* two proposed acquisitions by large trunkline carriers because of their competitive significance, namely, the proposed United-Western and American-Mid-Continent integrations, and he is critical of the decisions of the Board *approving* two other proposed acquisitions by large trunklines, namely, the Eastern-Colonial and United-Capital mergers.<sup>7</sup> Because these four decisions of the Board are so important in illuminating the line between permissible and impermissible unifications of air carriers, they are examined in some detail later in this comment.

THE GOVERNING STATUTE AND ITS IMPLICATIONS WITH  
RESPECT TO COMPETITION

Unifications of air carriers are unlawful unless they are approved by the Board.<sup>8</sup> If approved, they are exempt from the antitrust laws.<sup>9</sup> The governing statute requires that the Board approve proposed unifications of air carriers "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe" unless, upon application for approval, it finds after hearing that a proposed unification "will not be consistent with the public interest" or "would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier . . ."<sup>10</sup>

The elements of the "public interest" criterion are contained in Section 102 of the Federal Aviation Act, which provides in part that:

[T]he Board shall consider . . . as being in the public interest, and in accordance with the public convenience and necessity:

. . . .

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly

<sup>5</sup> *Id.* at 230. The four largest domestic trunklines—United, American, TWA and Eastern—are known in the industry as the "Big Four." The remaining trunklines are Braniff, Continental, Delta, National, Northeast, Northwest and Western.

<sup>6</sup> *Id.* at 230-31.

<sup>7</sup> *Id.* at 226-29.

<sup>8</sup> Federal Aviation Act § 408(a)(1), 72 Stat. 767 (1958), 49 U.S.C. § 1378(a)(1) (1958).

<sup>9</sup> Federal Aviation Act § 414, 72 Stat. 770 (1958), 49 U.S.C. § 1384 (1958).

<sup>10</sup> Federal Aviation Act § 408(b), 74 Stat. 901 (1960), 49 U.S.C. § 1378(b) (Supp. IV, 1959-62).

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adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense . . . .<sup>11</sup>

The declaration that competition shall prevail "to the extent necessary to assure the sound development of an air-transportation system" is unique among federal transportation statutes and it reflects the view of Congress that "competition" has a singular importance in air transportation.

Congress' intent to prohibit unifications of air carriers which would result in monopoly and thereby restrain competition is emphasized by the legislative history of this proviso, which further shows the importance of competition to Congress.<sup>12</sup> Under the Air Mail Act of 1934, it was unlawful for air mail contractors competing on parallel routes to merge or enter into any agreement that might result in common control or ownership. A bill introduced in 1937 to provide, for the first time, regulation of civil aeronautics authorized approval of mergers "consistent with the public interest." The Postmaster General opposed this proposal, insisting that repeal of the anti-merger provision of the 1934 Act would lead to monopoly, particularly in view of the requirement in the bill that there be specific authorization to engage in air transportation before entry was permissible. The bill as reported prohibited unifications of air carriers which,

would result in creating a monopoly or monopolies and thereby *unduly* restrain competition or *unreasonably* jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control so proposed . . . . (Emphasis supplied.)<sup>13</sup>

Controversy continued, however, as to the adequacy of the safeguards against monopoly. In accordance with a proposal made by Senator Borah, there were deleted the words "unduly" from "unduly restrain competition" and "unreasonably" from "unreasonably jeopardize another carrier." The nub of Senator Borah's argument was that:

When we say to the commission that these lines shall not do a thing "unduly" or "unreasonably," it is very different from saying that they shall not do it. It gives too much room for unlimited construction.

He recognized that the language he sought to have deleted, has been adopted from the language used by the Supreme

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<sup>11</sup> Federal Aviation Act § 102, 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1958).

<sup>12</sup> The legislative history is reviewed at some length in Comment, *Merger, and Monopoly in Domestic Aviation*, 62 Colum. L. Rev. 851, 854-62 (1962).

<sup>13</sup> S.2, 75th Cong., 1st Sess. § 312(a)(1), as reported, Senate Calendar No. 702, June 7, 1937.

Court in the monopoly cases; but I do not think it is a principle which we ought to foster and encourage.<sup>14</sup>

MEANING OF THE ANTI-MONOPOLY PROVISIO

The decisions of the Board offer only meager guidance as to the meaning of the anti-monopoly proviso. The relevant markets have been merely defined broadly as: "air transportation, or any phase thereof, in any territory or section of the country."<sup>15</sup> Despite lack of guidance by the Board, it is generally accepted that city pairs which generate significant traffic are relevant submarkets.<sup>16</sup> Thus, in the *American-Eastern Merger Case*,<sup>17</sup> the Department of Justice and the CAB's Bureau of Economic Regulation took this position,<sup>18</sup> and neither American nor Eastern disputed them. As the examiner stated:

The most precisely definable geographic submarkets in the air-transportation business are specific pairs of points or a group of such city pairs. However, there are tens of thousands of pairs of points in the domestic-air-transportation-route system, some of which have no traffic at all and many of which account for practically none. In 1961, the Board's 10-percent sample showed passengers traveling between 38,432 pairs of points. A large number of the total had only one passenger during the year. *A pair of points or group of pairs of points becomes a relevant geographic submarket only if found to be economically significant.* (Emphasis supplied.)<sup>19</sup>

This conclusion that significant city pairs constitute relevant submarkets seems eminently sound. It is consistent with the realities of the industry, and it follows, as the examiner pointed out, from the Supreme Court's decision in *Brown Shoe Co. v. United States*.<sup>20</sup> The Supreme Court there recognized that submarkets are determined by

<sup>14</sup> 83 Cong. Rec. 6731-32 (1938).

<sup>15</sup> *United Air Lines Transp. Corp. & Western Air Express Corp.—Interchange of Equipment*, 1 C.A.A. 723, 733 (1940).

<sup>16</sup> The elimination of competition in city pairs that do not generate much traffic has twice been held not to violate the anti-monopoly proviso. *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952); *Continental Pioneer Acquisition Case*, 20 C.A.B. 323 (1955).

<sup>17</sup> No. 13335, CAB. The Hearing Examiner recommended that the merger be not approved. Following a report that the CAB had voted 3-2 against the merger, the agreement was terminated and, upon motion of American Airlines, the proceeding was dismissed. Order No. E-19801, July 12, 1963.

<sup>18</sup> Brief for United States, p. 6, Brief for the Bureau of Economic Regulation, p. 66, *American-Eastern Merger Case*, supra note 17.

<sup>19</sup> Recommended Decision of Ralph L. Wiser, Hearing Examiner, p. 7 (Nov. 27, 1962), *American-Eastern Merger Case*, No. 13335, CAB [hereinafter referred to as Recommended Decision].

<sup>20</sup> 370 U.S. 294 (1962).

examining "such practical indicia as industry or public recognition of the submarket as a separate economic entity . . ." <sup>21</sup> The Court added:

Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area. <sup>22</sup>

The conclusions of the examiner in the *American-Eastern Merger Case* as to which city pairs were "economically significant" appear to, and may, have been based on size alone, certainly a factor of major importance. Two markets with yearly passenger totals of 18,130 and 13,530, the examiner concluded, were "not economically significant for the purposes of the proviso." <sup>23</sup> He ruled that seven other city pairs with passenger totals ranging from 61,040 to 950,350 were "economically significant." <sup>24</sup>

An important and related factor that should be considered is whether the public convenience and necessity requires competition in the markets in question. A city pair which is not large enough to require competitive service, would not seem to be "economically significant", and it is hence not a relevant submarket.

Within a relevant market or submarket, the Board early made clear that the term "monopoly" was to be read in conjunction with the term "and thereby restrain competition". Therefore, "monopoly" requires a degree of control which restrains competition. Thus, it stated in the *United-Western Interchange Case*, <sup>25</sup>

In modern usage, most of the definitions suggested by the courts fall into two general categories, one of which defines the term "monopoly" as embracing any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public, and the other holding that the word "monopoly" means the control of a particular business or article of trade, without regard to the results which may flow therefrom.

. . . .

If the first definition of the word "monopoly", which is

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<sup>21</sup> Id. at 325.

<sup>22</sup> Id. at 336-37.

<sup>23</sup> Recommended Decision, *supra* note 19, at 8.

<sup>24</sup> Id. at 12-13.

<sup>25</sup> *United Air Lines Transp. Corp. & Western Air Express Corp.—Interchange of Equipment*, 1 C.A.A. 723 (1940).

essentially descriptive of a result, is applied to the proviso in section 408(b), the words immediately following, "and thereby restrain competition," would be repetitious and of no effect since that definition by its terms includes the factor of restraint of competition. On the other hand, if the second definition, which treats "monopoly" as a condition embodying a particular degree of control, is applied, the remaining words of the proviso would have a definite meaning and effect, since it would not be a foregone conclusion that such a condition would restrain competition. It is a generally accepted rule of statutory construction that every word of a statute is to be given meaning, for it cannot be assumed that particular words were used without some purpose. It is concluded, therefore, that the word "monopoly," as used in the first proviso of section 408(b), refers to a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country. It follows that restraint of competition is a factor, insofar as the application of the proviso is concerned, only if it results from that degree of control which the Authority decides constitutes a monopoly of air transportation.<sup>26</sup>

Construed alone, as "a particular degree of control," without regard to its effect upon competition, the term "monopoly" is essentially meaningless.

The question of what degree of control is objectionable is more difficult. The examiner in the *American-Eastern Merger Case* ruled that a ninety per cent participation in a market would ordinarily constitute monopoly.<sup>27</sup> This definition, the examiner noted, was adopted for use by Gill and Bates,<sup>28</sup> "after extensive discussion with leading airline traffic and sales officials" because,

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<sup>26</sup> *Id.* at 733-34. The Board considered and rejected the argument that the term "monopoly" refers to a situation where only one carrier is *authorized* to provide service in a market. This argument was also made by American Airlines in the *American-Eastern Merger Case*, *supra* note 17. See Brief for American Airlines, Inc., p. 35, *American-Eastern Merger Case*, No. 13335, CAB. This cannot be the test since route authorizations do not, and the Board cannot, compel air carriers to compete effectively. The Board knows from wide experience that many authorized carriers do not provide competitive service in particular markets, and it may take years for a carrier to become a real factor even in a market in which it undertakes to provide competitive service. The Chicago-Miami market is perhaps a good example. Northwest Airlines was authorized to serve this large market in 1958 in the *Great Lakes Southeast Service Case*, 27 C.A.B. 829 (1958). In 1962, Northwest's share of the market was less than 10%, and its share had not exceeded 15% in any prior year. See CAB, *Competition Among Domestic Air Carriers, 1959-1962*.

<sup>27</sup> Recommended Decision, *supra* note 19, at 10-11. The 90% measure is used in the CAB's annual studies of competition among domestic airlines and in Gill and Bates, *Airline Competition* (1949).

<sup>28</sup> *Supra* note 27.

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a 10-percent participation by a competitor was felt to be the minimum participation necessary to constitute effective competition from the standpoint of influencing a competitor's service or rates under normal conditions.

The examiner also ruled that monopoly may be created with a lesser degree of control.<sup>29</sup> As suggested by the Department of Justice,<sup>30</sup> he found the decisions of the courts "in respect of monopolies in other businesses . . . helpful in appraising lesser-percentage situations which also constitute monopoly."<sup>31</sup>

There is, of course, a threshold question of causation. Monopoly would not seem to result from the unification if, independently of the unification, one of the parties to it already has a monopoly in the market. The monopoly in such a case would seem to result from the response of the public to the service and promotional activities of the party thereto who dominated the market independently of the unification. Monopoly also does not result from the unification if one of the parties thereto is about to go out of business. This is the teaching of the *United-Capital Merger Case*.<sup>32</sup> Thus, in various markets, including four major markets (New York-Cleveland, Cleveland-Chicago, Philadelphia-Detroit and Philadelphia-Cleveland), United and Capital were the only carriers authorized to provide service. As a result of the merger, which was approved by the Board, only United was authorized to provide service in these markets.<sup>33</sup> The Board concluded that the anti-monopoly proviso was inapplicable under the "failing business" doctrine in view of the impending failure of Capital.<sup>34</sup> The reviewing court found it unnecessary "to fit this problem . . . into ready-made doctrinaire styles or sizes; the matter is clear enough on the face of the facts and the statute without intermediate measurements."<sup>35</sup> The court concluded that the proviso was not violated simply because, with the collapse of Capital, "the field would have been left to the remaining operators" in any event, whereas,

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<sup>29</sup> Recommended Decision, *supra* note 19, at 12.

<sup>30</sup> Brief for United States, pp. 6-8, American-Eastern Merger Case, No. 13335, CAB.

<sup>31</sup> Recommended Decision, *supra* note 19, at 11.

<sup>32</sup> No. 11699, CAB, April 3, 1961 (Order No. E-16605), *aff'd sub nom.* Northwest Airlines, Inc. v. CAB, 303 F.2d 395 (D.C. Cir. 1962).

<sup>33</sup> To its credit, the Board promptly instituted an investigation to determine whether competition should be restored in the four major markets in which competition was eliminated, United Competitive Service Investigation, Nos. 12837 et al., CAB, July 25, 1961 (Order No. E-17217). The Initial Decision of Herbert K. Bryan, Hearing Examiner, May 31, 1963, finds need for competitive service in these four markets and he recommends that it be provided by American between New York and Cleveland and by Northwest in the other markets.

<sup>34</sup> *United-Capital-Merger Case*, No. 11699, CAB, April 3, 1961, Order No. E-16605, at 3.

<sup>35</sup> Northwest Airlines, Inc. v. CAB, 303 F.2d 395, 402 (D.C. Cir. 1962).



The merger brought a new and hearty competitor into the area. Those already there had more competition and thus less monopoly than they had theretofore had.<sup>36</sup>

The question of what degree of control will restrain competition and thereby result in monopoly should be approached flexibly, with due regard for economic and competitive realities in the industry. The ninety per cent measure used by the examiner in the *American-Eastern Merger Case* is useful, but it should be applied with caution, as should all mathematical tests. Market shares tend to be highly volatile in the airline industry, and it would clearly be well to examine them, when used, over a period of years.<sup>37</sup>

A unification of air carriers would not seem to result in monopoly if another carrier authorized to provide service in the market can be expected to provide an effective competitive service.<sup>38</sup> If there is sufficient traffic in the market to warrant such service, there would seem to be no reason why it should not develop in normal circumstances unless the disparity between carriers is such as to discourage it. Although the size of the American-Eastern colossus posed special problems in this regard, the small trunklines have repeatedly demonstrated their ability to compete with the "Big Four." As the Board said in the *New York-Florida Case*:<sup>39</sup>

It has been amply demonstrated that small carriers can compete with larger ones, and that given access to markets of adequate traffic density, sound route structure, and the exercise of sound managerial judgment, over the long run, a small carrier can obtain a fair share of the markets involved.<sup>40</sup>

Even in markets where the unified carrier would be the only carrier remaining with authority to provide service, it is possible, by new route awards, to preserve competition. In order to prevent

<sup>36</sup> *Id.* at 401.

<sup>37</sup> For example, the examiner found that the merger would create monopoly in the Baltimore-New York, Chicago-Indianapolis, Hartford-New York, Louisville-New York and New York-Providence markets, in which the merger partners carried 87% to 97% of the traffic in 1960. Yet, by the fourth quarter of 1962, their share of the traffic, compared to 1960, was as follows:

	1960	1962 (4th qtr.)
Baltimore-New York	87%	41%
Chicago-Indianapolis	94	90
Hartford-New York	95	75
Louisville-New York	94	99
New York-Providence	97	88

CAB, Competition Among Domestic Air Carriers, 1960 and October 1-December 31, 1962.

<sup>38</sup> A carrier that has a 10% participation is, for this purpose, considered to be providing an effective competitive service. See text accompanying notes 28 and 29 *supra*.

<sup>39</sup> 24 C.A.B. 94 (1956).

<sup>40</sup> *Id.* at 102.

the elimination of competition in the interim, the Board could, by exemption,<sup>41</sup> permit another carrier to provide competitive service pending a new route award.

It is possible that monopoly within the meaning of the statute may also not result when, although monopoly is created in one or more relevant submarkets and competition is thereby restrained there, on the whole competition in air transportation is enhanced.<sup>42</sup> Congress legislated a principle of competition in Section 102 of the Federal Aviation Act,<sup>43</sup> and a commitment to competition motivated the successful effort to eliminate "unduly" from "unduly restrain competition." It may well be argued that it is thus inconsistent to construe the proviso as to preclude the Board from approving a unification of air carriers which enhances competition in air transportation.

However, the contrary view—that the statute is violated when monopoly is created and competition restrained in any economically significant market—has much to commend it. This construction is supported by the terms of the statute and also by the traditional usage of the terms monopoly and restraint of competition. Furthermore, Congress, by the deletion of the word "unduly" from "unduly restrain competition" would seem to have sought to circumscribe the Board and limit its discretion to approve unifications of air carriers. This construction, it should be emphasized, does not preclude the Board from approving the unification. The Board can prevent the creation of monopoly and consequent elimination of competition by new route awards and measures to preserve competitive service in the interim.<sup>44</sup>

#### THE PUBLIC INTEREST CRITERION

In cases where the anti-monopoly proviso is not violated, the Board has the broad power to approve any unification of air carriers which, in its judgment, is in the public interest.<sup>45</sup>

<sup>41</sup> Federal Aviation Act § 416, 72 Stat. 771 (1958), 49 U.S.C. § 1386(b) (1958).

<sup>42</sup> This view is expressed in Comment, *Merger and Monopoly in Domestic Aviation*, supra note 12, at 878.

<sup>43</sup> Federal Aviation Act § 102, 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1958).

<sup>44</sup> See text accompanying note 41, supra.

<sup>45</sup> By its terms, the statute requires approval of any merger unless, after hearing, the Board determines that the unification "will not be consistent with the public interest . . ." Federal Aviation Act § 408(b), 74 Stat. 901 (1960), 49 U.S.C. § 1378(b) (Supp. IV, 1959-62). In support of its application for approval of its merger with Eastern, American sought to distinguish this mandate from the usual requirement of an affirmative finding that a merger will be consistent with or promote the public interest. Brief for American Airlines, p. 33, *American-Eastern Merger Case*, No. 13335, CAB. Although the Court of Appeals has stated that "[t]he negative in which this provision is cast is to be noted" and that "it requires approval unless public interest prevents," *Northwest Airlines, Inc. v. CAB*, 303 F.2d 395, 400-01 (D.C. Cir. 1962), there would seem to be no essential difference. The Board has consistently taken the position that these provisions "have essentially the same meaning," *Acquisition of Marquette by TWA*, 2 C.A.B. 1, 5 (1940) and;

The Board's decisions give considerable guidance as to the role played by the principle of competition as an element of the public interest in unification cases. The Board has consistently approved, as being in the public interest, unifications of the smaller trunklines. In two early cases, it approved Western's acquisition of Inland Air Lines, which combined two independent systems serving different territories and different needs and having a single common point;<sup>46</sup> and it approved Northeast's control of Mayflower, which was in bankruptcy and inoperative, thereby joining together two regional carriers in New England which served different areas with a common point at Boston.<sup>47</sup> The Board also approved the merger of Braniff and Mid-Continent, thereby unifying two systems which complemented each other geographically and creating new competitive and single-carrier services.<sup>48</sup> Competition was eliminated in several small markets, including Kansas City-Houston, which generated 457 passengers in March 1950 and 434 passengers in September 1950. Improved service was expected to result in these markets from the merger, however, and overall, its benefits clearly outweighed whatever adverse effects might be anticipated in these markets. Similarly, in the *Delta-Chicago and Southern Merger Case*,<sup>49</sup> the Board approved a merger of two contiguous systems with several common points. The merger would "augment competition" by enabling the surviving carrier "to compete for traffic now moving over routings of other carriers. . . ."<sup>50</sup> Although only the *Delta-Chicago and Southern Merger Case* was opposed, the foregoing decisions indicate that the Board favors sound mergers of small trunklines where the anti-monopoly proviso is not violated.

On the other hand, unifications involving Big Four carriers as one of the parties to a proposed unification, have been disapproved except where no anti-monopoly proviso violation existed and where either the carrier to be absorbed was *in extremis* or had no hope of achieving self-sufficiency.

In the first case to come before the Board involving a Big Four

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under our interpretation of these sections, in accordance with well-established rules of construction, the distinction between the affirmative and the negative finding is an unimportant one for the purposes of this decision since the public interest is the primary consideration of either of them.

Acquisition of Mayflower Airlines, Inc. By Northeast Airlines, Inc., 4 C.A.B. 680, 681 (1944). Although the difference in language may have some bearing on the burden of proof or the burden of going forward with evidence, it is not likely that any carriers proposing to integrate their systems would take any risks in this regard.

<sup>46</sup> Western Air Lines, Inc., Acquisition of Inland Air Lines, Inc., 4 C.A.B. 654 (1944).

<sup>47</sup> Acquisition of Mayflower Airlines, Inc. By Northeast Airlines, Inc., 4 C.A.B. 680 (1944), supplemental opinion, 6 C.A.B. 139 (1944).

<sup>48</sup> Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952).

<sup>49</sup> Delta-Chicago & Southern Merger Case, 16 C.A.B. 647 (1952).

<sup>50</sup> *Id.* at 685.

carrier, the Board, in *United Air Lines Transp. Corp.—Acquisition of Western Air Express Corp.*<sup>51</sup> found that the acquisition of Western by United was not in the public interest.<sup>52</sup> Its decision in this regard, which is approved by Professor Fulda, was contrary to the recommendation of Dean Roscoe Pound, special trial examiner. Dean Pound would have approved the acquisition because it would provide, in competition with TWA, a new transcontinental service to Los Angeles in place of an inconvenient connecting service via Salt Lake City. In his view, the north-south services of United and Western co-existed and were complementary; they were not really competitive, and could not become so because forty per cent of Western's revenues was derived from its link with United at Salt Lake City. The Board however viewed the proposed acquisition in quite another light. Approval would, in the Board's view:

(1) significantly affect the competitive balance between the three transcontinental carriers by giving United "direct transcontinental routes to all four major West coast metropolitan areas, whereas no other air carrier has direct entry to more than two of such areas,"<sup>53</sup>

(2) "extend United's control over western traffic, and its advantage with respect thereto, [over the other transcontinental carriers] eastward to the Rocky Mountains," and thereby "adversely affect the existing competitive opportunities for western business and . . . greatly increase United's advantage with respect to such business"<sup>54</sup> and

(3) eliminate "some competition . . . for north and south business" on the West Coast and "the only established route capable of offering competition to United between the Los Angeles region and points in the north such as Spokane, Wash., and between Salt Lake City and the same northern points, including Seattle, Wash."<sup>55</sup> The Board also noted that Western was "financially self-sufficient" and "active and aggressive in the promotion of new business in the west," and it anticipated that it would "promote local service more aggres-

<sup>51</sup> 1 C.A.A. 739 (1940).

<sup>52</sup> United was a transcontinental carrier and a north-south carrier on the West Coast. Western's system extended from San Diego to Great Falls, Montana, via Los Angeles and Salt Lake City.

<sup>53</sup> *United Air Lines Transp. Corp.—Acquisition of Western Air Express Corp.*, supra note 51, at 745. United already had routes to San Francisco, Portland, Oregon, and Seattle and Spokane, Washington. TWA had routes to Los Angeles and San Francisco; American had a route to Los Angeles.

<sup>54</sup> *Id.* at 746. United, by virtue of its north-south West Coast service, already had a significant advantage in competing for West Coast passengers.

<sup>55</sup> *Id.* at 747. United and Western were in direct competition between San Diego and Los Angeles. Western also carried some passengers going to or from Seattle and Spokane, although the only possible routings were by connection with United in Salt Lake City or by connection with Northwest in Butte or Helena, Montana.

sively than would a large transcontinental system."<sup>56</sup> The Board concluded that approval of the unification was not the "only means of eliminating passenger inconvenience at Salt Lake City due to the change of planes,"<sup>57</sup> and on the same day as it disapproved the acquisition, it approved an equipment interchange to do so.<sup>58</sup> In summary, the Board stated that:

the act seeks a state of *competition* among air carriers to the extent required by the sound development of the industry. The maintenance of such a constructive competition, we believe, will be best served at the present state of the industry's development by a reasonably balanced system of air transportation in every section of the country. . . . To allow one air carrier to obtain control of air transportation in the West coast area greatly in excess of that possessed by competitors would, in our opinion, seriously endanger the development of a properly balanced air-transportation system in this region; and the elimination of the only independent north and south air carrier west of the Rocky Mountains might be expected to retard the promotion of air travel in this direction.<sup>59</sup>

Similarly, the Board disapproved the proposed acquisition by American of Mid-Continent, which was a north-south carrier with routes extending from Minot, North Dakota, and Minneapolis-St. Paul, Minnesota, on the north, to New Orleans on the south.<sup>60</sup> In Professor Fulda's view, this decision, which he approves, was "[m]ost significant, from an antitrust point of view . . ."<sup>61</sup> The Board concluded that the systems would not integrate well and that optimum development of Mid-Continent's important connecting services would be impeded. However, principally, it disapproved the acquisition because of the "size and competitive position" of American<sup>62</sup> and the competitive effect of the proposal upon TWA and United as well as Braniff and Delta. As the Board stated:

In the first place, it is part of the generally accepted business concept of good will that the company serving the larger number of customers to their satisfaction will on that ac-

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Id.* at 742.

<sup>58</sup> United Air Lines Transp. Corp. & Western Air Express Corp.—Interchange of Equipment, 1 C.A.A. 723 (1940).

<sup>59</sup> *Id.* at 750.

<sup>60</sup> American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C.A.B. 365 (1946).

<sup>61</sup> Fulda, Competition in the Regulated Industries: Transportation 226 (1961).

<sup>62</sup> American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., *supra* note 60, at 380.

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count enjoy a competitive advantage of soliciting patronage for additional service. It is only human nature to elect a service or commodity of known value rather than risk a choice of the less familiar. In this respect American, through the mere volume and geographical scope of its operations, inevitably holds a position of some favor over its competitors of more limited operation, and this is a competitive advantage apart from that gained by virtue of greater expenditures for advertising and promotion and the various luxuries and extra services which, generally speaking, can be afforded only by the larger organizations.

In the second place, the wider the geographical scope of a carrier's operations in comparison with a particular rival, the greater the competitive advantage which it will enjoy through its control of traffic originating at or destined to points to which the other carrier does not have access. Because of this fact, the extension of a carrier's system may enable it to divert a substantial amount of traffic from a competing carrier without at the same time rendering a service more attuned to the public convenience and necessity.

.....

In the light of these considerations, the facts of record require us to find that the acquisition of control of Mid-Continent by American must reasonably be expected to produce so great a diversion of traffic from other air carriers as would be inconsistent with sound economic conditions in air transportation and would impair the competition we deem requisite to assure the development and maintenance of an adequate air transportation system. In this respect, therefore, the transaction proposed would transgress against two of the important principles of policy incorporated in the over-all standard of public interest.<sup>63</sup>

Approximately seven and one-half years later, the Board approved for the first time a significant acquisition by a Big Four carrier—the acquisition of Colonial by Eastern.<sup>64</sup> The unification of these systems was held to be in the public interest for a variety of reasons. Colonial's future as an independent entity was deemed hopeless. Since its system was characterized by short, multi-stop flights, unusual scheduling difficulties, bad weather and poor utilization of

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<sup>63</sup> *Id.* at 378-79.

<sup>64</sup> *Eastern-Colonial, Acquisition of Assets*, 18 C.A.B. 453; 18 C.A.B. 781 (1954); 23 C.A.B. 500 (1956). TWA had previously been permitted to acquire Marquette Airlines, a very small carrier with a route of only 566 miles. *Acquisition of Marquette Airlines, Inc. By TWA*, 2 C.A.B. 1 (1940).

personnel and equipment, its unit costs were high, and it had "achieved but little progress toward economic self-sufficiency."<sup>65</sup> As the Board stated:

The record is clear that Colonial's existing route system fails to afford it either now or for the foreseeable future a reasonable opportunity to enjoy profitable operations at competitive fares without considerable government support through mail pay.<sup>66</sup>

There was no "immediate prospect" of solving "Colonial's difficulties" by route awards, which "would involve a considerable investment in duplicate facilities with attendant costs to be written off," and perhaps excessive competition and disruption of the operations of other carriers.<sup>67</sup> There was "substantial advantage to the public" by way of improved and new single carrier services. The systems were well integrated, making possible improved "personnel utilization" and "aircraft scheduling."<sup>68</sup> The acquisition gave Eastern a real advantage over National in the competition for traffic between upstate New York and Florida, but the anticipated diversion of revenues from National was estimated to be only \$68,000 a year. Although Professor Fulda disapproves of this decision, which he regards as having "serious anti-trust implications" and "inconsistent with the principles set forth in the *American-Mid-Continent* case,"<sup>69</sup> there seems to your writers to be an important difference of degree in view of the substantial advantages of the merger. The advantages of the Eastern-Colonial unification are obscured somewhat by the Board's comparative consideration of a National-Colonial unification, which Professor Fulda thought was inadequate, but since no such unification appears ever to have been proposed, this would seem to have been of no practical moment.

Finally, the Board approved the merger of United and Capital.<sup>70</sup> It did so simply because there was no "practical alternative. . . Capital is financially *in extremis* and will not survive if the merger is disapproved." The Board fully recognized "the manifest implications of the merger in terms of maintaining a balanced route structure," but ". . . the public interest in preventing a collapse of the Capital system outweighs whatever disadvantages may inhere in the merger."<sup>71</sup> Although this decision too is disapproved by Professor Fulda in view of its impact upon competition, the Board's analysis is persuasive.

<sup>65</sup> Eastern-National-Colonial, Acquisition of Assets, 18 C.A.B. 781, 785 (1954).

<sup>66</sup> Id. at 784.

<sup>67</sup> Id. at 785.

<sup>68</sup> Id. at 782, 784.

<sup>69</sup> Fulda, *op. cit.* supra note 61, at 228.

<sup>70</sup> United-Capital Merger Case, supra note 32.

<sup>71</sup> United-Capital Merger Case, supra note 34, at 2.

Perhaps the Board was bluffed by United's insistence upon "all or nothing," but no other meaningful alternative seems to have been proposed, and the risk of "calling the bluff" was great. Professor Fulda favored the view of Member Minetti,<sup>72</sup> who would have conditioned approval of the merger "upon immediate institution of an investigation to determine whether Capital's authority to serve major points . . . should be altered, suspended or transferred to a carrier other than United."<sup>73</sup> Member Minetti thought that rejection by United was unlikely, but he was prepared to risk such rejection in view of the competitive impact of the merger. In the event of rejection, the Board could, in his judgment, "take effective action to prevent Capital's failure while the carrier is being reorganized into a profitable economic unit."<sup>74</sup>

Although approval of the United-Capital merger contravenes well established concepts of "balanced route structure," it is clear that this does not mark a policy change by the Board and that the requirement of "competitive balance" will continue to be an important factor in future cases. The circumstances of the United-Capital merger were unique, and there seems no reason to expect the Board again to depart from its policy of "competitive balance" except in the most extreme circumstances. Pursuant to the policy of "competitive balance," the Board has repeatedly made route awards to the smaller trunklines and reaffirmed a policy to reduce the disparity in size and strength between the Big Four and the remainder of the trunklines. Thus the Board stated in the *Southwest-Northeast Service Case*,<sup>75</sup>

As we pointed out in the *New York-Chicago Service Case* the statutory objective of a sound national air route structure requires, in the selection of a carrier to provide needed new services, consideration of the applicants' competitive positions and their relative need for strengthening. It is vital, in our opinion, to so develop the national air route structure as to tend to decrease rather than increase the gap between the relative size of the Big Four carriers and the smaller trunks.

. . . .

We cannot ignore the fact that substantial route awards to the larger carriers would tend to create a greater unbalance in carrier size, and thereby adversely affect the ability of the smaller trunks to compete effectively in markets which they jointly serve with the larger carriers. We believe

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<sup>72</sup> Fulda, op. cit. supra note 61, at 229.

<sup>73</sup> United-Capital Merger Case, supra note 34, opinion of Member Minetti at 1.

<sup>74</sup> Id. at 10.

<sup>75</sup> 22 C.A.B. 52 (1955).



that the benefits to be derived from effective competition will be spread to a greater number of cities if the size disparity between the smaller and larger carriers is reduced. In many markets which are jointly served today by a small trunk and a Big Four carrier, there is no effective competitive service because the smaller carriers' resources and route systems inhibit them from challenging their larger competitors. To the extent that we choose a small trunk instead of a Big Four carrier to provide a needed new service in high-density markets, we enlarge the small carrier's opportunity to render effective competitive service in other markets which they are already authorized to serve.<sup>76</sup>

Pursuant to this policy, the Board has often declined to make route awards to Big Four carriers, or done so with the greatest of reluctance because of compelling service needs.<sup>77</sup> Similarly, the Board has sought to maintain "competitive balance" among the Big Four itself.<sup>78</sup>

The Board's emphasis on the desirability of competition would also seem to foreshadow skepticism of integrations which will significantly reduce competition. In route cases, the Board has repeatedly emphasized the desirability of competition in air transportation. As the Board stated in the *Great Lakes-Southeast Service Case*,<sup>79</sup>

The Board in the past has recognized the benefits which accrue to the public from stiff multicarrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc.

.....

It has been suggested that more than enough seats are now available to accommodate all travelers, and that therefore an additional carrier in the market is not needed. This is a familiar argument that has been advanced virtually every time a competing authorization has been sought. Undoubtedly, the *threat* of additional competition may cause carriers temporarily to improve service in particular markets; but the *authorization* of additional competition insures the

<sup>76</sup> Id. at 56-57. See also, e.g., Southern Transcontinental Service Case, Nos. 7984 et al., CAB, 1961 Order No. E-16500, at 21, 37-43, 53-58; Great Lakes-Southeast Service Case, 27 C.A.B. 829, 850, 862 (1958); New York-Florida Case, 24 C.A.B. 94, 99, 113 (1956); Southwest-Northeast Service Case, 22 C.A.B. 52, 56-58, 64, 75 (1955); New York-Chicago Service Case, 22 C.A.B. 973, 979-80, 985, 988 (1955); Denver Service Case, 22 C.A.B. 1178, 1187-88 (1955).

<sup>77</sup> Southern Transcontinental Service Case, supra note 76; Southwest-Northeast Service Case, supra note 76; Denver Service Case, supra note 76.

<sup>78</sup> Southern Transcontinental Service Case, supra note 76.

<sup>79</sup> 27 C.A.B. 829 (1958).

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continued provision of a fully competitive service. From a regulatory point of view, we are convinced that the division of a major traffic market among a number of carriers sufficient to insure a lively competition will result in the continued provision of the greater number of benefits to the traveling public. The Board has long followed this policy, and we see no sound reason to depart therefrom.<sup>80</sup>

Faithful to this principle, the Board, in a series of important route awards stretching over a decade, has authorized additional services in major traffic markets throughout the country.<sup>81</sup> In these decisions,

the Board has been influenced, in accordance with its statutory mandate, by the concept that competitive service holds the greatest prospect for vigorous development of our national air transport system with the fullest improvements in service and technological developments.<sup>82</sup>

This concept should also have an important influence in unification cases.

In view of the prohibition in Section 7 of the Clayton Act of acquisitions the effect of which "may be substantially to lessen competition,"<sup>83</sup> the expectation that the Board would not look with favor upon unifications which significantly reduce competition would seem to be supported by the Board's statement in the *Local Cartage Agreement Case*<sup>84</sup> that:

Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.<sup>85</sup>

Although this approach was not mandatory on the Board under the Supreme Court's decision in *McLean Trucking Co. v. United States*,<sup>86</sup> as it would have been under the minority opinion, it seems clear that

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<sup>80</sup> Id. at 853-54.

<sup>81</sup> E.g., Pacific Southwest Local Service Case, January 23, 1962, Order No. E-17950; Southern Transcontinental Service Case, supra note 76, at 21, 37-43, 53-58; New York-San Francisco Nonstop Service Case, September 2, 1959, Order No. E-14412; Great Lakes-Southeast Service Case, supra note 79; Southwest-Northeast Service Case, supra note 76; New York-Chicago Service Case, supra note 76; Denver Service Case, supra note 76.

<sup>82</sup> Southwest-Northeast Service Case, supra note 76, at 60.

<sup>83</sup> Clayton Act § 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1958).

<sup>84</sup> 15 C.A.B. 850 (1952).

<sup>85</sup> Id. at 853.

<sup>86</sup> 321 U.S. 67 (1944).

it is a sound approach. It is true that pursuant to *McLean Trucking*, acquisitions governed by the Interstate Commerce Act are not to be measured by the standards of the antitrust laws. The policy of these laws is, however, a factor to be considered. This would seem even clearer under the Federal Aviation Act than it is under the Interstate Commerce Act in view of the unique declaration in the former favoring "[c]ompetition to the extent necessary to assure the sound development of an air-transportation system . . . ."<sup>87</sup>

A cautionary note should be injected with regard to the Board's continuing commitment to the principle of competition in air transportation. The Board has recently refused to renew the authority of Northeast Airlines to operate between the northeast and Florida.<sup>88</sup> This decision is completely inconsistent with established Board policy with regard to competition. In the original *New York-Florida Case*,<sup>89</sup> the Board stated that:

[A]s we have on a number of occasions pointed out, the Congress in adopting the Civil Aeronautics Act, clearly considered competition to hold the greatest prospect for vigorous development of our national air route system "with the fullest improvements in service and technological developments."<sup>90</sup>

The markets involved, the Board said, "are in material respects more than comparable to those for which in recent cases we have authorized service by more than two carriers,"<sup>91</sup> and the Board concluded that

It would not be consistent with our statutory obligations under the Act and the course of our decisions thereunder, to merely maintain the status quo, and rely upon the carriers' assurances as to their willingness and ability to remedy the situation.<sup>92</sup>

The Board's decision that three carriers are not needed in one of the largest travel markets in the world cannot be reconciled with the Board's prior pronouncements as to its "statutory obligations under the Act" and the policy of "the Congress in adopting the Civil Aeronautics Act" with regard to competition. The Board's new attitude with regard to competition, if lawful, should be reflected in unification cases, as well as in route cases.

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<sup>87</sup> Federal Aviation Act § 102, 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1958).

<sup>88</sup> *New York-Florida Renewal Case*, Nos. 12285 et al., CAB, August 15, 1963, Order No. E-19910, petitions for reconsideration denied, October 8, 1963, Order No. E-20073.

<sup>89</sup> 24 C.A.B. 94 (1956).

<sup>90</sup> *Id.* at 99.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

## CONCLUSION

Although it is impossible to be doctrinaire about the role of competition in connection with proposed unifications of air carriers, a few generalizations are possible. The Board is likely to continue to be receptive to sound unifications of small trunklines, which normally augment, rather than diminish, competition. Unifications among the Big Four are not likely to be tolerated. Any such arrangement would be inconsistent with the Board's policy of competitive balance, and, absent protective action by the Board, would inevitably involve an intolerable lessening of competition.

Finally, the Board can be expected to approve the unification of a Big Four carrier with a small trunkline if the small trunkline is in serious difficulty or has no hope of achieving self-sufficiency. However, except in such circumstances, such a unification is not likely to be approved at least if it (1) upsets "competitive balance," (2) significantly lessens competition or (3) diverts substantial revenues from another small trunkline that the Board feels should be strengthened or protected. Measured against this principle, the Board's actions with regard to the United-Western, American-Mid-Continent, Eastern-Colonial and United-Capital unifications are consistent and sensible, and they afford excellent guideposts for future Board actions in this area.

Each case will, in the last analysis, depend largely on its particular facts. As the Board stated in the *American-Mid-Continent Merger Case*<sup>93</sup>:

The ultimate question to be decided in this proceeding is whether the proposed acquisition of control is not consistent with the public interest. Adjudication of this issue is a balancing process. No single factor is controlling; rather, we must weigh all the considerations disclosed by the evidence relating to the high purposes enumerated in section 2 of the Act, in order to calculate, as near as may be determined, the probable net effect of the proposed transaction upon the public interest.<sup>94</sup>

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<sup>93</sup> *American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc.*, 7 C.A.B. 365 (1946).

<sup>94</sup> *Id.* at 372.