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CRITERIA FOR THE AWARD OF A FOREIGN AIR ROUTE TO A DOMESTIC AIR CARRIER*

EDWARD C. ROBERTS¹

Until the early 1950's, United States international air transportation was clearly pre-eminent throughout the world. In the last decade many foreign countries have entered the field or have expanded their operations. Policies advanced fifteen years ago may no longer be appropriate. . . . They must be re-examined in the light of new developments and adjusted to the requirements of the present and future.

—*Project Horizon*.²

I. INTRODUCTION

A. PRESENT STATUS OF THE INDUSTRY.

As Western Europe has recovered its commercial vigor and new nations have sprung up all over the globe, the United States has suddenly found itself subject to new and different commercial and diplomatic pressures. Balance of payments problems beset the Treasury. Exports have dropped off in the face of rising imports. The United States is not easily the dominant nation in international trade circles, but is often the underdog. The situation is the same for international aviation as it is for automobiles and steel. The impact of technology in the form of the high speed jet aircraft has brought with it acute problems of competition. The desire to furnish service with the most modern equipment has led to the purchase of excess equipment. The resulting overcapacity in turn has produced financial instability in the industry.³ At the same time foreign air carriers, who have been faced with similar problems, have intensified competitive efforts.⁴

*This is Part I of a two part Article. Part II will be published in the second issue of volume sixteen of the South Carolina Law Review.—Ed.

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2. FAA, *Report of the Task Force on National Aviation Goals, Project Horizon*, 24, 119 (1961) [hereinafter cited as *Project Horizon*].

3. N. Y. Times, September 24, 1961, p. 1F, col. 8; November 19, 1961, p. XX, col. 1. Wall Street Journal, September 24, 1962, p. 5, col. 3. The problems of mergers involving air carriers providing international air service will be dealt with *infra*.

4. *Project Horizon* 25; Business Week, June 24, 1961, p. 57.

To complicate the matter, many of the newly organized nations have initiated international service to the major traffic centers of the world.⁵ Repercussions have even been felt in the United States airframe industry, which is presently faced with declining markets because of increased competition from European manufacturers.⁶

B. NEED FOR ADJUDICATORY STANDARDS

If the United States air carrier industry were like the mining or metals industry, a diagnosis of competitive ailments might call for a prescription of Adam Smith economics to force the industry to meet competition rather than shrink from it. But that is not the case with air carriage. The health of the industry has not been entrusted to *laissez-faire* principles. Rather, the wisdom of the Congress has been to impose a system of regulated competition whereby the Civil Aeronautics Board is entrusted with the delicate task of promoting and encouraging an economically sound and safe system of air transportation by American air carriers.⁷

Inasmuch as the health of a regulated industry reflects the efficacy of the administrative process, the present *malaise* of United States carriers demands a re-evaluation of policies of the C.A.B. which no longer seem to serve the national interest and to implement new ones which will recapture American pre-eminence in international air transport. This is a job primarily for legislators and economists, but the lawyer has his role, too. His contribution is made "by endeavoring . . . to draw from the specific cases such general principles governing the Board's action as are discernible from the opinions and [by] suggesting relevant considerations that appear overlooked."⁸ That Board policies require such appraisal is evident from the strong criticism

5. Wall Street Journal, September 26, 1961, p. 1, col. 4; March 26, 1963, p. 11, col. 3.

6. *Project Horizon* 26, 106; Wall Street Journal, September 20, 1962, p. 1, col. 1; February 19, 1963, p. 12, col. 2.

7. Federal Aviation Act of 1958 §§101-1312, 72 Stat. 737(1958); 49 U.S.C.A. §§1301-1542 (Supp. 1961). The Federal Aviation Act differs from ordinary public utility statutes in that it seeks affirmatively to promote or develop air transport whereas the purpose of the traditional public utility statute seeks to protect existing utilities from competition and the customer from excessive rates. Maclay and Burt, *Entry of New Carriers into Domestic Air Transportation*, 22 J.AIR L.&COM. 131, 133 (1955).

8. Westwood, *Choice of the Air Carrier for New Air Transportation Routes*, 16 GEO.WASH.L.REV. 13 (1947) [hereinafter cited as Westwood].

of the Board's failure to formulate clear statements of administrative policy. One writer declares that the C.A.B.'s lack of adjudicatory standards has caused a paralysis of the Board's all important function of planning and coordinating an effective national air transport policy.⁹ Another charges that "the inability of the C.A.B. to develop and to adhere to intelligible standards in the issuance of competitive certificates of convenience and necessity has imposed higher costs on the traveling public, and needless and serious losses on airline investors."¹⁰

Accordingly, the purpose of this article shall be to ascertain the existing criteria for the award of foreign air routes to American air carriers. It is anticipated that this exposition will contribute to an understanding of the legal problems of the statutory system of regulation of United States air transport in foreign commerce. Beyond a simple knowledge of this topic, it is hoped that this study will aid in the development of new legal and legislative policies designed to strengthen the United States' position in international air transport.

II. SELECTION OF THE CARRIER

A. STATUTORY COMMAND

The statute which controls the award of air routes and the choice of air carriers is the Federal Aviation Act of 1958.¹¹ The act does not define what has been familiarly termed a "foreign air route." Instead it speaks of a certificate of public convenience and necessity to engage in "foreign air commerce"¹² or "foreign air transportation," which are broadly

9. Hector, *Problems of the C.A.B. and the Independent Regulatory Commissions*, 69 YALE L.J. 931 passim (1960) (Memorandum and Letter of Resignation submitted to President Eisenhower May 10, 1959) [hereinafter cited as Hector].

10. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV.L.REV. 863, 1072 (1962) (Holmes Lectures 1962) [hereinafter cited as Friendly]. The necessity of a clear definition of administrative standards has been recognized by a recently circulated working draft of proposed policy declarations. Bluestone, *Goals of the C.A.B.*, 5, 13, 23, 32, 33 (December 1962) [hereinafter cited as Bluestone].

11. §101-1312, 72 Stat. 737 (1958); 49 U.S.C.A. §§1301-1542 (Supp. 1961). No substantial change was made in the economic controls by the act of 1958, which superseded the Federal Aviation Act of 1938; the design of Congress was to make the regulation of air safety more effective. Hale and Hale, *Competition of Control IV: Air Carriers*, 109 U.P.A.L.REV. 311, 312 (1961).

12. §101(20), 49 U.S.C.A. §1301(20) (1958).

stated to be the "carriage of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business vocation in commerce."¹³ A domestic "air carrier"¹⁴ is distinguished from a "foreign air carrier"¹⁵ in that the former is a "citizen of the United States" which requires that the "air carrier" be an "individual who is a citizen of the United States," "a partnership in which each member is such individual," or a domestic corporation which is substantially staffed and controlled by such individuals.¹⁶ Thus, for practical purposes a domestic air carrier can be said to be an American company which is engaged in commerce and transportation between the United States and foreign countries.¹⁷

In order for an air carrier to enter into foreign air commerce the act requires that the Civil Aeronautics Board¹⁸ find that "the applicant is fit, willing, and able to perform such transportation properly."¹⁹ The act further commands that such transportation must be required by the public convenience and necessity.²⁰ It is apparent both from the statutory

13. §101(21), 49 U.S.C.A. §1301(21) (1958).

14. §101(3), 49 U.S.C.A. §1301(3) (1958).

15. §101(19), 49 U.S.C.A. §1301(19) (1958).

16. §101(13), 49 U.S.C.A. §1301(13) (1958).

17. The act distinguishes "overseas" air transport from "foreign" air transport, §101(20)(21); 49 U.S.C.A. §1301(20)(21) (1958); the former takes place between the United States and one of its possessions, the latter between the United States or one of its possessions and a foreign country. Because decisions on foreign air routes frequently involve overseas possessions as intermediate points on the foreign air route, cases on overseas air transport will be included in this survey where they are thought to be relevant to the problems of foreign air transport. Cf. Pan American World Airways, Inc., Matson-Inter-Island Contract, 3 C.A.B. 540, 547 (1942). Board decisions indicate that "new service" means initial service between the points under consideration. Pan American Airways, Inc., Domestic Route Case, 11 C.A.B. 852, 859, 925 (1950); American-Eastern Merger, Docket 133555, Examiner's Decision, November 27, 1962, p. 33 (Mimeograph copy) [hereinafter cited as American-Eastern Merger Case]. But a consideration of the problems of entry into air transportation indicates that "new service" is provided whenever a "new" carrier applies for a route because travelers all along the carrier's existing system will offer new opportunities for single-carrier service between existing points and the proposed new terminus. Thus, "new service" may in fact duplicate service on the route applied for. See Westwood, at 5.

18. Hereinafter referred to as the "Board" or the "C.A.B."

19. §401(d), 49 U.S.C.A. §1371(d) (1958). §401(a), 49 U.S.C.A. §1371(a) (1958).

20. Final approval must be given by the President. §801, 49 U.S.C.A. §1461. Because of the intimate connection of foreign air routes with the President's conduct of foreign policy these orders were held non-reviewable by courts. *Chicago & Southern Airlines v. Waterman S.S. Co.*, 333 U.S. 103, 92 L.Ed. 568 (1948); *Pan American Airways v. C.A.B.*, 121 F.2d 810 (2d Cir. 1941). *Cert. dismissed* 332 U.S. 827 (1946). This ruling

command and the decisions of the Board that these two concepts are closely related. It is equally apparent that the concepts have been readily confused and intermingled.²¹ Therefore, in order to clarify the doctrines of the Board this survey will separate the two.

B. FITNESS AND ABILITY

1. Experience

Under the criteria of fitness and ability the Board inquires into the competency of the air carrier to operate the international route up for award. In practice this has come to mean that the carrier must have a strong financial status, a corps of operating personnel trained to fly in international aviation, and a general fund of "experience" upon which to rely.²² In the early cases decided by the Board emphasis was laid on the carrier's having a technical and operation staff which was readily expandible to operate a new route.²³ For this reason companies which had never participated in international aviation were frequently found to lack the req-

has been codified. §1006, 49 U.S.C.A. §1486. However, an exemption by the Board does not require Presidential approval and is subject to judicial review, §416, 49 U.S.C.A. §1386 (1958); *Pan Am. World Airways v. C.A.B.*, 261 F.2d 754, 756 (D.C.Cir. 1958). See Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 403-04 (1958); Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 HARV.L.REV. 684, 689-92, 704, 706, 707-10 (1961). Note, *Economic Regulation of Foreign Air Carriers by the C.A.B.: Its Legality and Reviewability*, 51 GEORGETOWN L.J. 593 (1963). The role of the State Department in international negotiations is discussed at note 127 *infra*. Examples of Presidential action in international air transport include, *e.g.*, *Additional Service to Latin America*, 6 C.A.B. 857, 892 (1946); *North Atlantic Route Transfer Case*, 11 C.A.B. 676, 678-80 (1950); *West Coast-Hawaii Case*, 20 C.A.B. 7 (1955); *Trans-Pacific Certificate Renewal Case*, 20 C.A.B. 47 (1955); *Trans-Pacific Route Case*, note 63 *infra*; see *New York-Mexico City Nonstop Service Case*, 25 C.A.B. 323 (1957).

21. Staff of Senate Comm. on the Judiciary, 86th Cong., 2d Sess., *Report on the Regulatory Agencies to the President-Elect 41* (Comm. Print. 1960) (Landis Report) [hereinafter cited as Landis]. This method of separating route planning and route awards was used in recent international route investigations. See note 27 *infra*.

22. *Pan Am. Airways (Del.)*, *Transatlantic Operations*, 1 C.A.B. 118, 123 (1939); *Am. Export Airlines, Transatlantic Operations*, 2 C.A.B. 16 (1940); *Am. Export Airlines, Temporary Certificate of Public Convenience and Necessity (New York-Foynes Service)*, 3 C.A.B. 294, 298 (1941); *North Atlantic Certificate Renewal Case*, 15 C.A.B. 1053, 1113-20 (1951).

23. THOMAS, *ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT* (1951 67-68, 225, n. 154); *Pan American Airways (Nev.)*, *New Zealand Operations*, 1 C.A.A. 695, 711-12 (1939); the *Pacific Case*, 7 C.A.B. 209, 223-29 (1946) involved a proposal to operate dirigibles across the Pacific to Japan and Australia.

uisite "experience" to demonstrate fitness and ability. Maritime carriers, such as the Moore-McCormack Company have been consistently rejected by the Board on this ground and others.²⁴

Inasmuch as a company can readily gather trained personnel and can gain actual experience in a variety of ways, the recent decisions by the Board have stressed the commercial significance of "experience" as an element of fitness and ability. For example, North East Airlines applied for a North Atlantic route at the end of World War II. The airline had operated charter flights for the military services across the North Atlantic routes during the war. In its presentation to the Board it stressed its actual operating experience over the route in question. The Board rejected this narrow technical construction of the doctrine of "experience" and held that an applicant must demonstrate the commercial significance of his experience.²⁵ Other than "general experience" the Board presently stresses four factors in determining fitness and ability:

- (1) The carrier must have a strong financial base;
- (2) The carrier must have an established sales organization;
- (3) The nature of the carrier's existing service must not conflict with the nature of the proposed service.
- (4) The carrier must be able to provide equipment appropriate to the standard of service on the route.

24. Northeast Airlines, Inc., *et al.*, North Atlantic Route Case, 6 C.A.B. 319, 341, 342 (1945); Additional Service to Latin America, 6 C.A.B. 857, 902-04 (1946); South Atlantic Air Route Case, 7 C.A.B. 285, 305 (1946).

25. North Atlantic Route Case, *supra*, n. 24; North Atlantic Certificate Renewal Case, *supra* note 22 at 1120. When the postwar route cases were opened, a large number of applicants applied. Even though many of them would never have a chance to become serious contenders for the routes, in the initial period it was reasonable to assume that some of the "experienced" troop carriers might receive a route. In that spirit of good faith many of the hopefuls submitted their applications. There was one petitioner, however, whose equal in sheer effrontery the C.A.B. had never seen and probably will never again see. Like something out of an early Evelyn Waugh novel came U.N. Airships, Inc. With \$10,000 capitalization authorized and none paid in, and a one man technical staff consisting of a retired crop duster, U.N. Airships proposed to initiate a dirigible service between Washington, D.C. and principal points of the world. Although the company was perfunctorily rejected as "unfit," the lengthy recitation of its proposal in the Board's opinions attests the fascination of the Board with the strange group. See Pacific Case, 7 C.A.B. 209, 228-29 (1946); American Overseas Airlines *et al.*, South Atlantic Routes, 7 C.A.B. 285, 291-92, 306 (1946).

2. Financial Ability

Of the four criteria there is little doubt that the first has the greatest "commercial significance." A strong financial structure is essential if the carrier is to effectively compete in the world of international aviation which is beset by over-capacity and destructive competition. A recent Presidential Task Force study of the problems of aviation emphasized that the major task facing the Board today was to develop self-sustaining carriers.²⁶ Staff evaluation of the major international routes has indicated a concurrence.²⁷ And the decisions by the Board have frequently stressed the need to place American air carriers on a sound financial basis.²⁸

3. Sales Organization

It is of course important to note that the first criterion is in the nature of a goal, whereas the second, the established sales organization, is in the nature of an existing fact. The cases speak of a preference for a carrier with an "established" sales organization as contrasted with a "minimal" sales organization.²⁹ This terminology would lead an observer to believe that as with the technical staff of the earlier days that a carrier could fulfill the requirements if his sales staff were "readily expandible." However, this is not what the board means. "Established" is used in the

26. *Project Horizon*, at 24; compare *Bluestone*, at 20, 24, 28-30; *Keyes, A Reconsideration of Federal Control of Entry Into Air Transport*, 22 J.AIR L.&COMM. 192, 202 (1955).

27. United States-South America Route Investigation, Docket 12895, Order E-17289, August 8, 1961, at 3 (Mimeograph copy) [By order No. E-19792, July 9, 1963 the scope of the investigation was widened and the name of the proceedings changed to United States-Caribbean-South American Investigation]; North Atlantic Route Renewal Case, Docket 13577, Order E-18301, May 4, 1962, at 11, 12 (Mimeograph copy). (All page references will hereafter be to the pagination of the mimeograph copies of the Staff Studies accompanying the orders.)

28. North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1115-17, 1121 (1951); New York-Balboa Through Service Proceedings (Reopened), 18 C.A.B. 501, 1502 (1954); 20 C.A.B. 493 (1954); Buffalo-Toronto Route Case, Docket 7142 *et al.*, Orders E-17830, E-17381, November 3, 1961, at 3 (Mimeograph copy). The Air Transport Board of Canada denied Eastern's application. *Wall Street Journal*, January 14, 1963, p. 14, col. 3. The importance of finance on criteria for the award of foreign air routes cannot be overemphasized. It provides the motivation for more C.A.B. policies than any other consideration. See, route planning and strengthening the weak carrier, discussed *infra*.

29. Northeast Airlines, Inc. *et al.*, North Atlantic Route Case, 6 C.A.B. 319, 342 (1946); Additional Service to Latin America, 6 C.A.B. 857, 881 (1946); Boston-Bermuda Case, 9 C.A.B. 563, 568 (1948); New York-Nassau Case, 24 C.A.B. 245, 264 (1956).

sense of "established *contacts*." Thus, the decisions discuss the necessity of a carrier having a "sense of identity" or "historic identity"³⁰ with the foreign market that the carrier wishes to serve. Illustrative of this connotation is the present situation of Braniff Airways in South America. Although Braniff had a large sales organization as part of its domestic route system prior to its award of a South American route, simple numerical expansion of the organization to cover its foreign terminals has not been sufficient to generate traffic sufficient to support the route. A recent staff study concluded that the reason for this was that Braniff lacked a sense of "identity" with the routes and therefore could not obtain adequate traffic.³¹

4. *Conflicts of Interest*

A third consideration in determining fitness is the all important necessity of avoiding conflicts of interest which will impede the development of the national system of air transportation.³² In the field of foreign air commerce there have been two prominent areas of conflict: (1) the conflict between local traffic and long haul traffic, and (2) the conflict inherent in the combination of air and surface carriage.

In certain of the Board's cases it has been governed by an apprehension that a carrier engaged in one phase of air transportation might not be a satisfactory carrier in another. Under the Board's policies from the very first a distinction was made between the "trunk" carriers who specialize in the carriage of traffic over long distances and the "feeder" lines which specialize in funneling local traffic to the long haul traffic centers.³³ Paralleling the doctrines in domestic air transport, the Board held that in foreign air transportation, local traffic should be served by local carriers. The rationale of the early cases was cloudy. Initially, the cases seem to turn on the idea that pioneer local lines should not be sub-

30. Florida-Mexico City Service Case, Docket 2811 *et al.*, Order E-17349, July 21, 1961, at 10 (Mimeograph copy); Buffalo-Toronto Route Case, *supra* note 28, at 7, 9.

31. United States-South America Route Investigation, *supra*, note 27, at 25.

32. Westwood, at 20, 41, 46.

33. Fulda, COMPETITION IN THE REGULATED INDUSTRIES (1961), §§7.8, 7.16, 7.17; Hector, at 941; Westwood, at 24-25, 42; Note, *Merger and Monopoly in Domestic Aviation Cases*, 62 COLUM.L.REV. 851, 866 n. 116 (1962).

jected to competition from powerful mainland companies, and in an attempt to justify this feeling the Board began to develop a policy which would allow it to keep the large companies out.³⁴ These cases of course were not applicable where no existing local carriers had to be protected. Extending concepts found in the domestic cases, the Board decided that the mixing of route awards for local traffic to long haul carriers would lead to a conflict of interest. A carrier whose business was primarily long haul traffic, as an international carrier's business predominately is, might emphasize "milk-run" flights instead of nonstop flights. Or where the need was for short haul service, the carrier whose business was primarily long haul might neglect the development of the short haul service.³⁵ The policy of the Board was clarified in the *Latin American Case*³⁶ when it was faced with a choice of carrier for service between New York and Bermuda. The two applicants for the route were American Overseas and Colonial. American Overseas wished to operate the route as part of its transatlantic service; Colonial as an extension of its New York City-Washington, D.C., service. The Board chose Colonial, noting:

American Overseas would *necessarily* be interested in the development of its long-haul service to European points and we believe therefore that the additional United States Service should be placed in the hands of a company whose interest will be devoted *primarily* to the development of the local traffic.³⁷

As one critic of the Board's policies observed, the question of experience was passed by. American Overseas obviously was the more experienced of the two in international transport. The real point made was that the Board would prefer that carrier which, because of its route lay-out, would be *unable* to do anything *except* concentrate on the development of the traffic in question.³⁸

34. Alaska Airlines, Inc. *et al.*, Service to Anchorage, Alaska, 3 C.A.B. 522, 528(1942); Pan American World Airways — Caribbean Atlantic Airlines, Inc., Puerto Rican Operations, 3 C.A.B. 717 (1942); Pacific Case, 7 C.A.B. 209, 234(1946).

35. Westwood, at 27, 41, 45.

36. 6 C.A.B. 857(1946).

37. *Id.* at 888.

38. Westwood, at 42; *cf.*, Pan American Airways, Inc. — Domestic Route Case, 11 C.A.B. 852 (1950). Pan American was required to remain an international air transport specialist. *But see*, Northeast Airlines, North Atlantic Route Case, 6 C.A.B. 319, 342(1945).

The second area of conflict is found in the combination of carriers to provide a new travel service which would complement each carrier's individual mode of carriage. This has most frequently taken the form of a dual sales agency between a maritime carrier and an air carrier to offer an "air-sea" service. Under the terms of the act the Board must approve these combinations as part of its determination of public convenience and necessity.³⁹ The test of public interest is whether the agreement will enable "the carrier other than the air carrier to use aircraft to public advantage in its operations and will not restrain competition."⁴⁰ The Board is further warned not to approve any consolidation, merger, lease, purchase, or operating contract "which would result in monopoly or monopolies."⁴¹ Because the inquiry must delve into the character of the applicant as well as into the general economic conditions of their area's competition, the Board in granting or withholding approval is in effect making a determination of the general fitness of the carriers. Such approval has rarely been forthcoming on the general grounds that such arrangements have inherent within them conflicts of interests that would damage the development of the national system of air transportation.⁴² A typical rejected agreement is illustrated by Pan American's venture with Matson Steam Co.⁴³ The basic provisions were that the two companies would set up a jointly owned sales agency, Inter Island, which would act as Pan American's exclusive agent in American Samoa, Fiji, New Zealand, and Australia. Pan American also agreed that it would conduct no more flights from the West Coast to Hawaii and beyond except when such operations were necessary for adequate through service. The Board struck down the agreement (in effect finding Matson and Inter Island unfit) on the grounds that

39. §§401, 408; 49 U.S.C.A. §§1371, 1378 (1958); Pan American Airways v. C.A.B., 121 F.2d 810, 815 (2d Cir. 1941). See Bagget, *Are Surface Carriers Grounded by Law?*, 31 VA.L.REV. 337 (1945); Hickey, *Surface Carrier Participation in Air Transportation Under the Civil Aeronautics Act*, 36 GEO.L.J. 125, 144-53 (1948); Tomlinson, *Surface Carrier Participation in Air Transportation*, 34 GEO.L.J. 64, 71 (1946). Note, *Restrictions on the Entry of Surface Carriers Seeking to Fly*, 71 YALE L.J. 1461 (1962).

40. §408 (b), 49 U.S.C.A. §1378 (b) (1948).

41. See Note 40 *supra*.

42. This again demonstrates the confusion of issues inherent in the selection of a carrier. See American President Lines, Ltd. *et al.*, Petition, 7 C.A.B. 799, 800-01 (1947).

43. Pan American Airways, Inc. — Pan American-Matson Inter Island Contract, 3 C.A.B. 540 (1942).

such a restraint of competition would retard the development of a system of air transportation adequately adapted to the present and future needs of the nation and that there was the possibility of an impasse in the jointly owned company which could retard its activities in aviation.⁴⁵

In subsequent decisions the Board more fully developed its views on the character of the agency in avoiding conflicts of interest. When Pan American attempted to name the United States Lines its exclusive agent in Europe, the Board noted that "There is nothing unusual in the use of an agent by an airline."⁴⁶ What made this agency different from the ordinary one was "the size of the territory covered and the fact that the agent is a competitor."⁴⁶ Such an exclusive agency was undesirable because it reduced the control of the carrier over his operations and exposed the carrier to manipulation by a competing transportation interest. In denying the application the Board concluded: "When, in addition, the size of the area covered by an exclusive agency is so great as to account for a substantial part of the carrier's income the influence of the agent is magnified."⁴⁷

Thus construed the act would seem to prohibit almost all air-surface transport agency agreements on the grounds that the inherent conflict of interest would damage the development of the United States air transportation industry. The Board, however, took especial care in an earlier case, which had denied a surface carrier's application to enter into foreign air transportation, to clarify the issue with the statement: "As construed by the Board this requires that the proposed service shall be auxiliary to or supplemental of the surface carrier's operation."⁴⁸ In practice the same principle has applied to air-surface transport agency agreements.

The factual test to be met is whether the proposed agency would account for a "substantial part" of the air carrier's business. For example, the agreement between Northwest

44. *Id.* at 546-548.

45. Pan American Airways, Inc. — United States Lines Co. Agreement, 8 C.A.B. 609, 612 (1947).

46. *Id.*

47. *Id.* at 613.

48. Acquisition of Taca, S.A., by American Export Lines, 3 C.A.B. 216 (1944); American Export Lines, Control of American Export Airlines, 3 C.A.B. 619 (1942); 4 C.A.B. 106, 112 (1943). Note, *Restrictions on the Entry of Surface Carriers Seeking to Fly*, 71 YALE L.J. 1461, 1532-38 (1962).

Airlines and American President Lines⁴⁹ provided that each would solicit traffic for the other but that neither would have an exclusive agency in any city where both had a sales office. The evidence was that the purpose of the agreement was to obtain adequate solicitation of traffic for Northwest at off-line points where it did not have sales offices and that the amount of business expected to be acquired would not be a substantial part of the air carrier's business.⁵⁰ In approving this particular agreement the Board nevertheless did not abandon its fears that a harmful conflict of interest might later arise which would call for dissolution of the agency relationship. The Board issued its caveat, saying:

If in the performance of this agreement it should develop that Northwest was actually *relying substantially* upon the services of President Lines for solicitation of traffic over its international routes, there would then be presented a situation comparable to that which called for disapproval of prior agency agreements. . . .⁵¹

In a similar way the Board rejected attempts of surface carriers to enter air commerce. The arguments by the surface carriers were that air carriage was the product of the natural evolution of surface carriage; therefore, these surface carriers should be allowed to progress into air carriers.⁵² Stressing the advantages of air-sea service, in a turnabout fashion they argued that they should be protected from the harmful competition by the air carriers during the swing from surface to air travel.⁵³ In language similar to that employed in rejecting the air-sea carrier contracts the Board rejected the surface carrier's arguments, saying that *this* conflict of interest was incompatible with the progress of air transport. The Board stated at length:

The applicants who propose such a plan are confronted by independent air carrier applicants dedicated solely to the advancement of air transportation and bent on selling air travel not one way but both ways. . . . It

49. Northwest Airlines, Inc. — American President Lines, Agreement, 9 C.A.B. 336 (1948).

50. *Id.* at 338.

51. *Ibid.*

52. Northeast Airlines, Inc., North Atlantic Route Case, 6 C.A.B. 319, 341, 342 (1945); Additional Service to Latin America, 6 C.A.B. 857, 902 (1946).

53. See note 52, *supra*.

would be expecting too much to assume that a transportation company engaged in both air and sea transportation would be in a position to provide vigorous competition between its air transportation and its surface transportation on this route. Nor would it be reasonable to suppose that in any conflict of interest between their two transportation arms the issue would be resolved in favor of the air arm with its relatively small investment and against its sea transportation with relatively large investment to support. . . . In such circumstances the transportation activities offering the larger investment interest may be expected to dominate in any competitive conflict between the two. . . .⁵⁴

Thus in this situation, as in the others, the danger, according to the Board, was that in a conflict of interest situation the more powerful party would seek to protect itself and this would give that party an undue competitive advantage which would be harmful to the public interest.

5. *Equipment*

The fourth factor, equipment, rarely enters into a determination of fitness and ability. The answer is readily available. If a carrier satisfies the previous two requirements, the carrier will be able to provide whatever equipment is needed to fly the route. This was not always the case in the early days of international aviation where the proper equipment had not become standardized as it has been today. Nevertheless, there have been occasional cases where inadequate equipment caused the Board to find the applicant unfit to provide service appropriate to the route under consideration. For example, where Mackey Airlines proposed to fly the highly competitive New York-Nassau route with relatively slow, non-pressurized DC-4 equipment and all other carriers on the route were using modern DC-6B and DC-7 equipment, the Board rejected Mackey's application.⁵⁵ In

54. Additional Service to Latin America, 6 C.A.B. 857, 903-04 (1946); Hawaiian Airlines, Ltd. *et al.*, Hawaiian Case 7 C.A.B. 83, 108 (1946).
 55. New York-Nassau Case, 24 C.A.B. 245, 261 (1956); Caribbean Area Case, 9 C.A.B. 534, 543 (1948). In Caribbean Investigation, 4 C.A.B. 199 (1942), the Board refused to grant foreign air routes to domestic carriers on the ground that they would have hindered the war effort by shifting their limited amounts of equipment from domestic to international service. Compare Transatlantic Cargo Case, 21 C.A.B. 671, 673 (1954); North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1121 (1951); Pacific Case, 7 C.A.B. 209, 223-29 (1947); Florida-Mexico City Service Case, *supra* note 30, at 9.

the investigation of the South American routes Braniff's inability to provide up-to-date equipment is singled out as one reason for failure to obtain an adequate share of the market.⁵⁶

C. WILLINGNESS

1. *Attitude of the Applicant — Pioneering*

In its simplest sense "willingness" to fly a particular route is inferred from the carrier's application itself. And were this the case, it would naturally follow that the Board might have evolved a doctrine whereby the most "willing" applicant would be the one with priority in point of time in filing for the route. The Board, however, has wisely avoided the simplest sense of the statutory criterion of "willingness." It has specifically rejected the previously mentioned argument with the statement that "To award a certificate covering a particular route upon the basis of priority of application might result in an operation entirely contrary to the public interest."⁵⁷ What has emerged as the contours of the criterion is that the carrier shows that it is "cognizant of the problems confronting it in meeting the rules, regulations and requirements pertaining to air carrier operations and has displayed a desire to cooperate in every respect in accomplishing the ends sought . . ."⁵⁸ It is apparent that the Board was demanding more than casual compliance with its policies by an applicant. The standard implied effort beyond the minimum if a carrier was to be chosen to fly the route. Thus in the case in which the Board first grappled with the problems of "willingness," it compared the standard of service of the competing carriers.⁵⁹ One had a record of reliability with a high record of on time departures and landings. It had exceeded the minimum standards for electronic equipment. The other applicant, to the contrary, had a record of irregular and undependable service with frequent suspensions of service. According to the examiner, the one

56. United States-South America Route Investigation, *supra* note 27.

57. Continental Airlines, Mandatory Route, 1 C.A.A. 88, 101 (1939); Braniff Airways, Houston-Memphis-Louisville Route, 2 C.A.B. 353, 387 (1940); *but cf.* Additional Service to Latin America, 6 C.A.B. 857, 914 (1946); Westwood, 51-52.

58. Pan American Airways, Inc. — Caribbean-Atlantic Airlines, Inc.; Puerto Rican Operations, 3 C.A.B. 717, 729 (1942). For the Board's policy toward a carrier who fails to inaugurate service over an awarded route see note 78, *infra*.

59. Pan American Airways, Inc. — Caribbean-Atlantic Airlines, Puerto Rican Operations, 3 C.A.B. 717 (1942).

interest of this applicant was to technically meet the regulations. In choosing the first applicant for the route and rejecting the second the Board stated, "A desire to comply technically with the regulations does not indicate that type of management which can be relied upon to advance the air transportation industry."⁶⁰

Analogous to this reasonable requirement that a carrier make a positive effort to comply with the regulations of the Board is the important doctrine of "pioneering." Historically, it apparently arose from statements by the Board in the early cases where it referred to the "pioneer efforts" of Pan American in the field of international aviation.⁶¹ Like the criterion of the "established sales organization," pioneering seemed to imply that the applicant was more "experienced." Today, the doctrine means that a carrier is permitted to introduce as affirmative evidence of his "willingness" the fact that the carrier has initiated or "pioneered" the development of a route. For example, in the postwar route cases, especially *The North Atlantic Route Case*, Pan American was given special consideration because it was the American "pioneer" in international aviation across the North Atlantic.⁶² In recent years the doctrine has been most important where the Board was faced with a choice between applicants for a particular route. In these situations the doctrine has meant that the Board will prefer the applicant that has made the proportionately greater effort toward the establishment of the route.⁶³ For example, in the *Florida-Mexico City Service Case*,⁶⁴ the Board granted Pan American a route from Miami and Tampa to Mexico City in preference to National Airlines and Eastern Airlines on the ground that Pan Amer-

60. *Id.* at 728-29.

61. Alaska Airlines, Service to Alaska, 3 C.A.B. 522, 528 (1942).

62. Northeast Airlines, Inc. *et al.*, North Atlantic Route Case, 6 C.A.B. 319, 343 (1945); Additional Service to Latin America, 6 C.A.B. 857, 901 (1946); Pacific Case, 7 C.A.B. 209, 229 (1946).

63. Western Air Express, Great Falls-Lethbridge Operation, 2 C.A.B. 425, 433 (1940); Pan American Airways, Inc. — Caribbean-Atlantic Airlines, Puerto Rican Operation, 3 C.A.B. 717, 729 (1942); Additional Service to Latin America, 6 C.A.B. 857 (1946), where it was noted that "Braniff had deep interest in the establishment of service to South America." *Id.* at 914. For a criticism concerning the dangers of manufactured evidence, see Westwood at 51. See, Trans-Pacific Route Case, Docket 7723 *et al.*, Order E-16286, December 7, 1960; Order E-17230, April 26, 1961; TWA, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287, 308 (1956); Alaska Route Modification, 17 C.A.B. 943, 968 (1953).

64. *Supra* n. 30.

ican was a "pioneer" in the development of the Mexico City route.⁶⁵

One aspect of the doctrine is not likely to appear again. This is the situation where there is actually only one carrier who has pioneered and there are other carriers who have applied for international routes. The problem is whether preference should be automatically granted to the lone pioneer. This question was presented to the Board shortly after World War II.⁶⁶ Deciding in favor of a system of competitive routes, the Board avoided inconsistency with the pioneer doctrine as it is known today by holding that the principle of pioneering need not be confined to the efforts of a carrier in the development of a particular international route; the same principle, the Board thought, might operate in favor of a carrier in the field generally without reference to a particular route.⁶⁷ Under this rationale of pioneering Trans World Airlines was recognized as a "pioneer in the domestic operation of long-range four-engine aircraft."⁶⁸ The Board also noted that TWA had entered into an extensive program of study and planning and had "energetically sought to lay a sound foundation for the operation of a successful international service."⁶⁹ As a result of this general pioneering TWA was awarded extensive routes both in the North Atlantic and the Middle East service areas.

2. Color of Title

Where there has been actual participation in the development of the route, the force of the doctrine becomes much stronger. In many cases the Board has indicated that the carrier has what amounts to a vested right in the route. In the first postwar international case, *The North Atlantic Route Case*,⁷⁰ the Board selected American Export Airlines for a route on the grounds of its investment and its developmental work, which it said "would entitle it [American Export] to serious consideration" even though it had no "legally enforceable claim."⁷¹ Ten years later they were seemingly

65. *Id.* at 10.

66. *Northeast Airlines, Inc. et al., North Atlantic Route Case*, 6 C.A.B. 319 (1945).

67. *Id.* at 344.

68. *Id.*

69. *Id.*; compare *Additional Service to Latin America*, 6 C.A.B. 857, 914 (1946).

70. 6 C.A.B. 319 (1945).

71. *Id.* at 343.

determined that this type of pioneering would give the carrier a "legally enforceable claim." The issue before the Board was the choice of carrier to provide nonstop service between New York and Mexico City.⁷² Pan American applied for the route, as did Eastern Airlines which was already certificated to serve the route on a multi-stop basis via Washington and New Orleans.⁷³ The Board selected Eastern, saying: "We have in the past given some preference to the carrier which operates via intermediate points between points where the grant of a nonstop route is contemplated."⁷⁴ The preference was not as great when the carrier had not actually developed the route, the Board continued; however, this latter consideration was immaterial in the instant proceeding because by virtue of the previously vetoed nonstop route Eastern had "color of title" to the route.⁷⁵

"Color of title" had apparently motivated C.A.B. decisions in other contexts even though the term has not been mentioned.

In overseas service cases involving certification of long-haul carriers to serve local traffic, the Board refused to allow the long-haul carriers to participate in local traffic because the local carriers must be allowed "to retain the more lucrative local business so they can continue to serve the needs of those areas in Alaska where business is less profitable."⁷⁶ In a subsequent case involving similar considerations of local traffic the Board excluded the local carriers completely and allowed the long-haul carriers to serve local traffic.

The statement of Chairman Warner in dissent seems to be nothing less than an argument for the concept of "color of title":

The present operations of each of these carriers represent a substantial monetary investment, and the investment of several years of the lives of men who have chosen to devote themselves to the development of air

72. New York-Mexico City Case, 25 C.A.B. 323 (1957).

73. Eastern's nonstop route had been vetoed by the President in 1946. *Id.* at 347. See Additional Service to Latin America, 6 C.A.B. 857 (1946).

74. *Id.* at 331, citing Eastern Route Consolidation, 25 C.A.B. 215 (1957).

75. Instant Case at 331.

76. Alaska Airlines, Inc. *et al.*, Service to Anchorage, Alaska, 3 C.A.B. 522, 528 (1942). See discussion of conflict of interest, *supra*.

transportation in Puerto Rico and the surrounding area. I cannot concur in a decision which sweeps away the work of one of these carriers, through a denial of the right to continue upon any portion of the routes heretofore served.

. . . (T)he total exclusion of one of the carriers from all future participation in the field . . . appears to impose such a hardship upon a long-established enterprise as . . . to be, in my opinion, highly undesirable.⁷⁷

The doctrine of pioneering has also been successfully used as an affirmative defense. In the *Chicago-Mexico City Case*⁷⁸ Braniff applied for American Airlines' route between the two cities, which American had never been able to put into service because of the failure of the State Department to acquire additional capacity in the treaty negotiations. The Board denied Braniff's application on the ground *inter alia* that American had a better claim to the route by virtue of the prior award. Even though American had never instituted service, the Board reasoned that the benefit of American's pioneering would be lost by transferring the route to Braniff.⁷⁹ It is important to note that the Board is not speaking simply of a carrier's affirmative efforts to implement a route. Beyond them, the Board seems to be concerned with the carrier's "identity" in the market. Thus, in the *Trans-Pacific Route Case*⁸⁰ the Board in opening the east coast to direct service to the Orient, refused to allow Pan American to serve the Baltimore-Washington area on the grounds that Pan American was not a pioneer in the development of traffic to the Orient from these terminals, whereas Northwest had spent a number of years promoting east-west flights.⁸¹ Similar considerations prompted the C.A.B. in the *Caribbean Area Case*.⁸² In the reshuffling of the Latin American routes in 1946 Pan American had lost its

77. Pan American Airways, Inc. — Caribbean-Atlantic Airlines, Inc., Puerto Rican Operation, 3 C.A.B. 717, 731 (1942).

78. 25 C.A.B. 464 (1957).

79. *Id.* at 466. Failure to inaugurate service due to circumstances beyond the control of the carrier will not result in the loss of a certificate of public convenience and necessity. Additional Service to Latin America, 8 C.A.B. 65 (1948); Delta-Chicago & Southern Airlines Merger Case, 16 C.A.B. 647, 687 (1952). For discussion of treaty problems, see note 127, *infra*.

80. *Supra* note 63.

81. *Id.*

82. 9 C.A.B. 534 (1948).

stop at Aruba. Two years later it applied for a transfer of its intermediate stop from Coro to Aruba on its San Juan-Caracas flight. The Board granted the request, saying that Pan American would be able "to recapture" its "historic share" of the traffic at Aruba.⁸³

Whether the doctrine is viable is difficult to answer after the decision in the *Service to Puerto Rico Case*.⁸⁴ Decided in the same year as the *New York-Mexico City Case*, *supra*, its actual situation was strikingly similar to the latter case, but its results were completely at conflict. The routes in question were from Puerto Rico to the interior points of the United States. Delta and Eastern applied for the Chicago-San Juan route. Delta claimed preference for the route on the basis of its route via New Orleans to San Juan. If "color of title" had been applied Delta would have been selected. However, both the examiner and the majority failed to mention the doctrine and turned the decision on grounds of strengthening the weak carrier.⁸⁵ There being no evidence that Delta would be strengthened by the award, the application was denied.⁸⁶

The inconsistency among these decisions, however, is not the main concern. The real question is how "color of title" ever was allowed to creep into the Board's decisions. As the term has been used, it means that a carrier has what amounts to a vested right in certain routes that it has "pioneered." Yet, it is an elementary principle of law that a license, such as a certificate of public convenience and necessity, confers a privilege on the licensee which may be withdrawn or revoked.⁸⁷ This is clearly the policy of the Federal Aviation Act which declares: "No certificate shall confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, landing area, or navigation facility."⁸⁸ The reason for such a principle is manifest: The ultimate weapon that a public service agency has to compel compliance with

83. *Id.* at 545; TWA, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287, 304 (1950); *but cf.*, Pan American Airways, Inc. — Domestic Route Case, 10 C.A.B. 852, 883, 933-34 (1950); Trans-Pacific Certificate Renewal Case, 20 C.A.B. 493, 498 (1954).

84. 26 C.A.B. 72 (1957).

85. *Id.* at 76, 152. "Strengthening the Weak Carrier" is discussed *infra*.

86. *Id.* at 76, 81, 152.

87. See DAVIS, ADMINISTRATIVE LAW TREATISE §§7.16, 7.17 (1958).

88. §401(i); 49 U.S.C.A. §1371(i) (1958).

its regulations is withdrawal of the franchise. Since the C.A.B. has virtually no other means of regulating standards of service in international air transport,⁸⁹ *a fortiori* the Board must rely on the threat of withdrawing a franchise as its chief weapon.⁹⁰ But as the Board's careless use of the language indicates, the C.A.B. would seemingly deny itself this fundamental power.

The administrative process may not be, strictly speaking, a judicial process, but the need for clear and definite statements of policy is no less pressing.⁹¹ Under any system employing the principles of rational analysis, it would be indefensible for a policy-maker to promulgate a standard which the authorizing statute in essence and in express terms clearly forbids. Where there is no judicial review available even to correct errors of law, as there is none here, the duty to avoid erroneous interpretations is even stronger. The litigants have a right to expect a logical coherence of the Board's decisions. From their viewpoint, which reflects that of the public interest as well, it is indefensible for the C.A.B. in one month of the year to proclaim a new criterion and in another month to treat the utterance as *lapsus linguae*.

The problem remains, however, of what grounds on which to base the decision. It would seem that within the statutory standards that the Board could — and indeed should — find clear and definite standards under which it could base the decision. Prominent among these criteria are those which evaluate a carrier in terms of his "experience" in the field, his "identity" in the market (ability to generate traffic), or in terms of improving an existing service. Time and fact sustain the reasonableness of these criteria. For example, the

89. Withdrawal of a certificate of public and convenience and necessity is the Board's ultimate weapon. The Board may bring indirect pressures on a carrier to improve service by authorizing competitive service on the route. See notes 343, 347 and 348 *infra* and accompanying text.

90. Compare American Airlines Inc., Chicago-Detroit Local Service Case, 20 C.A.B. 505 (1955); *aff'd sub nom.*, Lake Central Airlines v. C.A.B., 239 F.2d 46, 50 (D.C.Cir. 1956). The C.A.B. refused to renew a certificate of public convenience and necessity even when legislation was pending that would have granted the carrier the advantage of permanent certification. [Since this article was written the Board once again demonstrated its power to refuse to renew a franchise where the existing service is not beneficial to the public convenience and necessity. Deficit-ridden Northeast Airlines lost the New York-Florida run in the New York-Florida Renewal Case, Docket 12285 *et al.*, Order E-19910, August 15, 1963.]

91. Friendly, *supra* note 10, at 874.

Board has set forth the policy that "in absence of a showing that the service of one company would be more in the public interest, the carrier which has been providing more service and generating more traffic should receive the authorization."⁹² Following logically from this was the Board's statement in the *New York-Mexico City Case* to the effect that a carrier who serves a route on a multi-stop basis should be preferred when nonstop service is proposed between the termini of the route,⁹³ a policy which encompasses the realistic considerations of "experience" and "identity." Surely, anything would be preferable to the Board's marrying the relatively simple requirement of willingness to provide service with the criterion of fitness to bring forth the *nullius in terra* of "color of title." Such a careless attitude toward administrative standards can hardly generate confidence in the administrative process. The danger is, as numerous writers have charged, that the lack of standards creates a situation where influence peddlers are bound to rush in.⁹⁴ The sad record of exercise of executive prerogative in the field of foreign air route awards serves only to confirm the truth of the indictment.⁹⁵

III. PUBLIC CONVENIENCE AND NECESSITY

A. GENERAL CONSIDERATIONS

Section 401 of the Federal Aviation Act of 1958 prohibits any air carrier from engaging in air transportation unless there is in force a certificate of public convenience and necessity authorizing service over the route.⁹⁶ Properly viewed, the criteria of public convenience and necessity are designed to determine whether service should be instituted between the points on the route without consideration of which carrier should be chosen to provide the service, although in practice the issues are often confused and mingled.⁹⁷ The general meaning of the terms, which have been employed frequently in statutes regulating public utilities,⁹⁸ is that some general

92. Alaska Route Modification Case, 17 C.A.B. 943, 968 (1953). See notes 391-396 *infra* and accompanying text for suggested rationale of instant case.

93. 25 C.A.B. 323, 331 (1957).

94. Friendly, *supra* note 10, at 880-81; Hector, *supra* note 9, at 954, 988-89.

95. Landis, *supra* note 21, at 14, 43-44; See Note 127 *infra*.

96. §401; 49 U.S.C.A. §1371 (1958).

97. Landis, *supra* note 21.

98. Northeast Airlines, Duluth-Twin Cities Operation, 1 C.A.A. 573, 576 (1940); *cf.* American-Eastern Merger, Docket 13355, November 27,

public good should be advanced.⁹⁹ What is "expedient" can be considered a "necessity;"¹⁰⁰ and what is "suitable and fitting to the public need" meets the definition of "convenience."¹⁰¹ Considered together, and the two are not used separately,¹⁰² the terms signify "a reasonable public convenience which would meet a reasonable public need."¹⁰³

The terms are obviously elastic and give a regulatory agency wide discretionary power in determining what is or is not the public convenience. Considering the foreign air transportation industry with its far-flung routes scattered over the world, it might be thought that the C.A.B. would have unlimited discretionary power in the award of certificates.¹⁰⁴ Certain limitations, however, supposedly prevent arbitrary decisions. These are (1) the statutory criteria of the Federal Aviation Act and (2) the factual criteria which have developed from the many cases decided under the act.

B. THE STATUTORY POLICIES

Fundamental to an understanding of the concepts of public convenience and necessity in foreign air commerce is that transportation and communication are factors that shape national policy; and at the same time they are well adapted to being used as instruments of national policy.¹⁰⁵ That national policy is of more importance in foreign air commerce than in domestic air commerce has been frequently recognized by the C.A.B.¹⁰⁶ That Congress recognized the necessity of emphasizing the national interest is illustrated by its command to the Board to consider the following criteria as being

1962 (Examiner's decision); American Export Airlines, Transatlantic Serv., 2 C.A.B. 16, 30 (1940); *but cf.* Caribbean Area Case, 9 C.A.B. 534, 549 (1949); Delta-Chicago & So. Merger Case, 16 C.A.B. 647, 651 (1952). See Bagget, "Are Surface Carriers Grounded by Law?", 31 VA.L.REV. 337 (1945).

99. Seaboard Airline R.R. Co. v. Wells, 100 Fla. 1027, 130 So. 537 (1931).

100. Wabash, Chicago and West. R.R. Co. v. Commerce Comm. *ex rel.* Jefferson S. W. R.R. Co., 309 Ill. 412, 141 N.E. 212 (1924).

101. Abbot v. Public Util. Comm., 48 R.I. 196, 136 Atl. 490 (1927).

102. *Re* Aldrich, New York Pub. Util. Comm., P.U.R. 1923A, 385.

103. *Re* McCartney, Missouri Pub. Serv. Comm., P.U.R. 1928C, 182.

104. Editorial, *What is Public Convenience and Necessity?*, 11 J. AIR L. & COM. 163 (1940).

105. LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY 18 (1942) [hereinafter cited as, LISSITZYN].

106. *E.g.*, Pan Am. Airways (Nev.), New Zealand Operation, 1 C.A.A. 695, 703 (1939); North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1104 (1951); South Atlantic Renewal Case, 19 C.A.B. 276 (1954); Bluestone, at 6-11.

in the public interest and in accordance with public convenience and necessity:

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) the regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) the promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) the promotion of safety in air commerce; and

(f) the promotion, encouragement, and development of civil aeronautics.¹⁰⁷

1. *Stimulation of Trade*

The thrust of the statute makes it clear that the basic consideration in international aviation is the stimulation of trade.¹⁰⁸ As a means of rapid transport and communication, the airplane is unsurpassed in this competitive age as a stimulator of international commerce.¹⁰⁹ As the Board recognized in an early decision granting a route from California to New Zealand, "the proposed route is not simply a line of communication between San Francisco and Auckland but is a means of commercial contact between the North American continent and the entire Australasia section of the world."¹¹⁰

107. §102; 49 U.S.C.A. §1302 (1958).

108. South Atlantic Renewal Case, *supra* note 106, at 283.

109. LISSITZYN, at 14.

110. Pan American Airways (Nev.), New Zealand Operation, *supra* note 106, at 705.

In 1961 Project Horizon confirmed the importance of air transportation in international trade, stating:

The commercial air transport has, over the years, made increasing contributions to the national economy. It has stimulated commerce, promoted travel, helped to develop remote areas, and radically reduced the amount of time spent by important segments of the population in getting from one place to another.¹¹¹

It must be emphasized, however, that when the Act speaks of the stimulation of commerce, it does not use the terms in a narrowly commercial sense but within the context of international aviation as an instrument of national governmental policy to promote the diplomatic and military interests of the United States abroad as well as to provide a bridge of commerce for its citizens.¹¹² *Project Horizon* has proclaimed that "continued U.S. pre-eminence in international air transport is unquestionably in the national interest."¹¹³ One writer has even suggested that the development of an American national system of air transport is not likely to be achieved if air transport is left entirely in the hands of private enterprise.¹¹⁴

2. National Defense and Diplomatic Needs

Emphasis on the national aspects of public convenience and necessity is found in the mandate to the Board to consider the needs of the national defense.¹¹⁵ The premise of the Board's decisions in this area is that the civilian air force is to the military force what the merchant marine is to the navy.¹¹⁶ From this it follows that it is in the best interests of the national defense to encourage the development of cargo and supplemental carriers which can quickly be pressed into

111. *Project Horizon*, 126.

112. LISSITZYN, at 94; Pan American Airways (Nev.), New Zealand Operation, *supra* note 106, at 705; North Atlantic Certificate Renewal Case, *supra* note 106 at 1058, 1105, citing testimony by Paul Hoffman, President of the Ford Foundation; South Atlantic Renewal Case, *supra* note 106 at 283-84, 289.

113. *Project Horizon*, 24.

114. LISSITZYN, at 94, 130, 135.

115. §§102(a) (d), 103, 306, 312; 49 U.S.C.A. §§1302(a) (d), 1303, 1347, 1353 (1958).

116. Pan American Airways (Del.), Transatlantic Operations, 1 C.A.A. 118, 128 (1939); States-Alaska Case, 20 C.A.B. 791, 842 (1955); *Project Horizon*, 24, 100; CLEVELAND, AIR TRANSPORT OF WAR, 5, 59, 90-91, 93 (1946); LISSITZYN, 23, 73; Bluestone, at 17-19.

service in case of a national emergency.¹¹⁷ Also, a strong consideration is that "a route cannot be established on the spur of the moment to meet an emergency situation;" it is necessary to have the route already in operation, with flight personnel acquainted with the problems peculiar to the route so that in case of emergency the route could readily be expanded.¹¹⁸

Most of the foreign air route cases have been influenced by national defense considerations in the most general way.¹¹⁹ For those few which have been decided solely on the grounds of national defense it appears that the Board was willing to decide the case on this ground alone only after intervention from the Department of Defense.¹²⁰ Illustrative of this type of case is the route to South Africa which was originally granted during World War II on the request of the War Department and which has subsequently been renewed two times solely on the grounds of national defense.¹²¹

Similar in concept to the criterion of the needs of the national defense is consideration of the diplomatic needs of the nation. Almost no cases mention this as a positive factor.

117. American Overseas Airlines, Inc., South Atlantic Routes, 7 C.A.B. 285, 301-303, 305, 309 (1946); *but cf.* United States-Europe-Middle East Cargo Service Case, 15 C.A.B. 565, 567 (1951), where it was said:

As a matter of policy, we should not authorize services which are not commercially feasible solely to provide standby equipment and personnel for the armed forces during emergencies. To do so could require an almost unlimited number of aircraft to be operated with great financial drain on the United States Treasury.

The most recent statement on the national defense criteria favors a less restrictive view, declaring that the requirements should be met "at the lowest *long-run* overall cost to the nation." Bluestone, at 17. See also notes 463 and 487, *infra* and accompanying text.

118. States-Alaska Case, 20 C.A.B. 791, 842 (1955).

119. *E.g.*, Western Air Express, Great Falls-Lethbridge Operation, 2 C.A.B. 425, 432 (1940); American Airlines, Inc., Temporary Certificate of Public Convenience and Necessity, 3 C.A.B. 415 (1942) (Mexico City Operations); Pan American Airways, New Orleans-Guatemala City Serv., 4 C.A.B. 161, 174 (1943); Caribbean Investigation, 4 C.A.B. 199 (1943); Northeast Airlines, Inc., North Atlantic Route Case, 6 C.A.B. 319 (1945); Additional Service to Latin America, 6 C.A.B. 857 (1946); North Atlantic Route Transfer Case, 11 C.A.B. 676, 678, 679 (1950); see LISSITZYN, at 135.

120. Pan American Airways, Africa Serv., 3 C.A.B. 32 (1941); American Overseas Airlines, Inc., South Atlantic Routes, 7 C.A.B. 285, 304 (1946); United States-Europe-Middle East Cargo Case, 15 C.A.B. 565, 567 (1951); *but see* North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1061 (1951) (Jones, dissenting), the policy of the Dep't of Defense is never to testify in behalf of a particular applicant. Trans-Pacific Route Investigation, *supra* note 63, at 52, 55-56.

121. Pan American Airways, Africa Serv., 3 C.A.B. 32 (1941); American Overseas Airlines, Inc., South Atlantic Routes, 7 C.A.B. 285 (1946); South Atlantic Route Renewal Case, 19 C.A.B. 276 (1954).

In the recent *United States-South American Route Case* we find the staff recommending that service be continued at Ascuncion, Paraguay, and Monte Video, Uruguay, for "national interest" reasons. Similar considerations seem to have prevailed in the staff recommendation for service to Brasilia, the new capital of Brazil even though no estimate could be made of the traffic to be served at this point.¹²² However, in general the Board has refused to grant weight to diplomatic considerations in determining public convenience and necessity. In two areas where the problem has arisen the C.A.B. has been actually hostile. The first is in providing service for local traffic in foreign lands. For various reasons, which are mostly financial,¹²³ the Board has consistently refused to grant local traffic route awards. But the fact remains that a foreign interest in local air transport also provides, like other foreign investments, the opportunity for diplomatic intervention,¹²⁴ a factor which should be investigated by the Board. The mere presence of the American carrier is newsworthy in the new nations of the world.¹²⁵ The second area is where the proposed route award would conflict with existing treaty rights. Under §1102 of the Act the Board is required to exercise its powers and duties "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries."¹²⁶ This means that where there is an existing treaty which defines a particular route in regard to American carriers and specifies the number of American carriers which can serve the route, the Board will not authorize a route or select a carrier in contravention to the treaty.¹²⁷ There is an exception to this rule which had brief

122. *United States-South America Route Investigation*, *supra* note 27.

123. Discussed *supra* notes 33-38 and accompanying text; *infra* notes 167-173 and accompanying text.

124. LISSITZYN, at 63, 64 n. 19.

125. *North Atlantic Certificate Renewal Case*, 15 C.A.B. 1053, 1104, 1108 (1951); *Project Horizon* 30, 135-45, esp. at 139, credits previous American and foreign aviation for beneficial effects on South American nations in the development of their transportation systems and calls for focussing on the internal aviation needs and possibilities of the new nations in order to assist them in obtaining national unity — geographic, economic, and political.

126. §1102; 49 U.S.C.A. §1502 (1958).

127. *Northwest Airlines, Inc., Additional Service to Canada*, 2 C.A.B. 627, 632 (1940); *Latin America Case*, 8 C.A.B. 65, 72-73 (1947). Neither will the Board recognize any private negotiations with a foreign country; since 1943 all negotiations for international air routes have been conducted by the State Department. THOMAS, *ECONOMIC REGU-*

life immediately after World War II. At that time the Board was willing to grant routes to carriers even though there was no treaty in effect between the United States and the country where the terminal was located.¹²⁸ Since that time the C.A.B. has returned to its strict policy. In one case applications were denied for cargo service to the Middle East on the grounds that they would "upset the delicate balance of international civil air relationships."¹²⁹ Interference with diplomatic negotiations may provide an excuse to refuse an application. Twice the Board has refused to grant an award for additional service to Mexico City because such an award might endanger negotiations in progress in Mexico to allow Braniff to implement service under a grant made in the original *Latin American Case*.¹³⁰ Undoubtedly, the Board in its wisdom (as usual gained through painful experience) wishes to avoid duplicating the Mexico City situation which no doubt has provided opportunities for ex parte diplomatic intervention on the part of the carrier seeking the route. This would certainly be the last thing that the State Department needs in performing its official duties on behalf of the C.A.B.¹³¹

3. Postal Service

The needs of the Postal Service must also be considered.¹³² From the paucity of cases involving this criterion directly, it appears that it has rarely had a direct influence on route awards, except where totally new service is being proposed as in the early international route cases or in the all-cargo

LATION OF SCHEDULED AIR TRANSPORT, 214 (1951). See Calkins, *The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage*, 22 J. AIR L. COMM., 253, 263 (1955); Rhyne, *Legal Rules for International Aviation*, 31 VA.L.REV. 267, 269 (1945) (Text of State Department's 1944 Memorandum). The State Department's activities have been criticized as detrimental to the health of U.S. carriers. See Friendly, at 1305 n. 475; Bluestone, at 6-11.

128. Northeast Airlines, Inc., North Atlantic Route Case, 6 C.A.B., 319, 322 (1945); Pacific Case, 7 C.A.B. 209, 243, 248 (1946) (Gurney, dissenting); North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1056-57 (1951); Transatlantic Cargo Case, 21 C.A.B. 671, 684 (1954).

129. United States-Europe-Middle East Air Cargo Case, 15 C.A.B. 565, 567 (1951).

130. Chicago & Southern Airlines, Inc. — Pan American World Airways, Inc., Interchange Agreement, 15 C.A.B. 685, 688 (1950); Chicago-Mexico City Case, 25 C.A.B. 464, 466 (1957). Failure to implement service on a route due to circumstances beyond the control of a carrier will not result in loss of the carrier's operating rights, note 79 *supra*.

131. See note 127 *supra*.

132. §§102(a) (d); 401 (1) (m); 406(a) (b); 49 U.S.C.A. §§1302(a) (d), 1371(1) (m), 1375, 1376(a) (b) (1958). The Postmaster General's power to order scheduling is very rarely exercised. Bluestone, at 15.

service cases. Evidence of a large bulk of mail between the United States and the terminal or intermediate cities on the route¹³³ or evidence of substantial expediting of mail handling¹³⁴ are affirmative factors to consider in determining public convenience. Similar considerations naturally prevail to a stronger degree in the all-cargo service cases.¹³⁵ By the same reasoning, if no improvement can be made in the mail service, this too must be considered,¹³⁶ as where cargo capacity on passenger ships is adequate to meet the needs of cargo service,¹³⁷ or where the speed of delivery cannot significantly be increased.¹³⁸

C. FACTUAL CRITERIA

1. *General Considerations*

Aside from the clear statutory commands mentioned, *supra*, it is obvious that there can be fixed and rigid definition of public convenience and necessity as applied in practices; the meaning of the term can only be determined in light of the factual situation before the Board and the objectives of the statute as interpreted by the Board.¹³⁹ This has of necessity lead to the formulation of elaborate factual doctrines for determining whether the public interest requires certification of a particular route. Accordingly, in an early international route case, the Board enunciated four general criteria:

- (1) Whether the new service will serve a useful purpose responsive to a public need;
- (2) whether this purpose can and will be served adequately by existing parties and carriers;

133. Pan American Airways (Del.), Transatlantic Operations, 1 C.A.A. 128 (1939); South Atlantic Renewal Case, 19 C.A.B. 276, 285 (1954).

134. Pan American Airways (Nev.), New Zealand Operations, 1 C.A.A. 695, 707 (1939); Pacific Case, 7 C.A.B. 230 (1946).

135. Air Freight Case, 10 C.A.B. 527 (1949); Latin American Air Freight Case, 16 C.A.B. 430 (1951); Transatlantic Cargo Case, 21 C.A.B. 671 (1954).

136. American Overseas Airlines, Inc., South Atlantic Route Case, 7 C.A.B. 285, 305 (1946).

137. Latin American Air Freight Case, *supra* note 135, at 117, 119 (Ryan and Gurney, dissenting); Transatlantic Cargo Case, *supra* note 135, at 691-92 (Ryan and Gurney, dissenting). United States-Europe-Middle East Cargo Case, 15 C.A.B. 565, 587-88, 597 (1951).

138. Pan American World Airways, Inc., Service to American Samoa, 15 C.A.B. 545, 555 (1951).

139. Northwest Airlines, Inc., Duluth-Twin Cities Operations, 1 C.A.A. 573, 591 (1940); THOMAS, ECONOMIC REGULATION OF SCHEDULED AIR TRANSPORT, 70-71, 73, 225-26 (1951).

(3) whether it can be served by the applicant without impairing the operations of existing carriers contrary to the public interest;

(4) whether the cost of the proposed service to the government will be outweighed by the benefit which will accrue to the public from the new service.¹⁴⁰

In applying the tests the Board has not actually outlined them and followed them minutely.¹⁴¹ However, upon an examination of the major international route awards, it is clear that the decisions have been premised upon the general criteria. In determining public need the Board considers the passenger traffic available for the service, the type of service to be provided, the cost of the proposed service, integration of the proposed route with existing routes, the effect on other carriers, and the problems of competition. The most important factors for the applicants are probably the appeals to efficiency and economy, the avoidance of conflicts of interest, and fear of monopoly power, which figure prominently in the decision-making process.

2. Traffic Potential

It is manifest that an award of a certificate of public convenience and necessity will not be responsive to a public need unless there are passengers who will support the new service. This requirement is called the "traffic potential" of a route, and the burden of demonstrating it falls on the carrier applying for the route. The traffic potential is measured in various ways.¹⁴² Generally, it is said that there must be a "community of interest" between the points on the route.¹⁴³ Evidence of this is usually commercial intercourse over the route, such as mail, telephone calls, the business climate of

140. Boston-Maine Airways, Inc., Bangor-Monckton Operations, 2 C.A.B. 327, 319 (1940); Western Air Express, Great Falls-Lethbridge Operations, 2 C.A.B. 425 (1940); Northwest Airlines, Inc., Additional Service to Canada, 2 C.A.B. 627 (1941); Pan American Airways, Inc., Los Angeles-Mexico City Operations, 2 C.A.B. 807 (1941).

141. THOMAS, *op. cit. supra* note 139, at 226; note *Paramount Public Interest in International New Route Cases*, 15 J. AIR L. AND COMM. 480, 485 (1948).

142. See Richmond, *Forecasting Air Passenger Traffic by Multiple Regression Analysis*, 22 J. AIR L. AND COMM. 434 (1955).

143. Pan American Airways (Nev.), New Zealand Operations, 1 C.A.A. 695, 705-07. (1939); San Juan-Madrid Case, 25 C.A.B. 407 (1957); THOMAS, *op. cit., supra* note 139, at 74, 227.

the points on the route.¹⁴⁴ Adequacy of existing transportation facilities is extremely important if there is no direct service to the United States or if the existing service is lengthy, circuitous, and inconvenient.¹⁴⁵ International events may play a part in determining the community of interest. For example, during World War II routes to South America were granted on the grounds of "strengthened and increased . . . economic relations between the United States and South America" due to the "events of recent months."¹⁴⁶

Where the new service on the route will divert traffic from other carriers, the applicant who proposes the new service must show that this diversion will not be harmful or that the benefits to the public outweigh the harmful effects.¹⁴⁷ Other aspects of the problem of traffic potential which figure more prominently in other areas of public convenience and necessity are the increased capacity due to new high speed jet equipment, the problem of seasonal traffic in balancing the carrier's route system, and competition from foreign air carriers.¹⁴⁸

The important exception to the general requirements of traffic potential occurs when the carrier applies to serve a "gateway" city. These cities are the vast metropolitan terminals where a large amount of traffic from the surrounding region naturally flows for the purpose of connecting with the trunk-carriers.¹⁴⁹ Under the decisions of the Board, it appears that such a terminal is deemed to have a potential in and of itself. One of the outstanding examples of this type of exemption from the general requirements occurred at the Miami gateway. In the *Latin American Case Braniff* was awarded a route from Houston to South America. In order to serve East Coast traffic Braniff was required to

144. Pan American Airways (Del.), Transatlantic Operations, 1 C.A.A. 119, 128 (1938); Pacific Case, 7 C.A.B. 209, 230 (1946); Trans-Pacific Route Case, *supra* note 63.

145. Pan American World Airways, Inc., Service to American Samoa, 15 C.A.B. 545 (1952); Trans-Pacific Route Case, *supra* note 63, at 11.

146. Caribbean Investigation, 4 C.A.B. 199, 204 (1943); Pan American Airways, Inc., New Orleans-Guatemala City Service, 4 C.A.B. 161, 174 (1943); American Airlines, Inc., Temporary Certificate of Public Convenience and Necessity, 3 C.A.B. 415 (1942).

147. Discussed under "Competition" *infra*.

148. See "Route Planning" *infra*.

149. Western Air Express, Great Falls-Lethbridge Operations, 2 C.A.B. 425 (1940); Pacific Case, 7 C.A.B. 209, 219, 221 (1946). The burden is the carrier seeking to change a gateway to show that a "substantial improvement" in the quality of service will result. Additional Service to Latin America Case, *on reconsideration*, 8 C.A.B. 65, 68 (1947).

provide connecting service at Havana, Cuba, with National.¹⁵⁰ Several years after the award, when the carrier was unable to attract sufficient traffic to support the service, it petitioned the C.A.B. to make its connection in Miami. The Board granted the request on the ground that Braniff would be serving a gateway city and need not show that there was adequate traffic potential or that there would be no harmful diversion from other carriers serving Miami.¹⁵¹

Whether the force of this criterion remains is in doubt. Basically, it is a device for the Board to overlook the problems of diversion from other carriers or to overlook the nettlesome problem of competition.¹⁵² The strict view that the Board has taken against duplication in the *Transatlantic Route Renewal* and *United States-South American Service* cases suggests that the gateway exception is no longer viable, for the crux of those cases, especially the one involving European routes, is that duplicating service *even* to gateways may be inadvisable in the present era because of the intensive competition from foreign air carriers.¹⁵³

3. Cost and Diversion

Intertwined with the problems of traffic potential is the Board's all-important policy that the cost of the service must not exceed the benefits to the public as defined by the Policies of the Board and the Federal Aviation Act.¹⁵⁴ The "cost" referred to is payment for the carriage of mail, which all carriers are under an obligation to carry if the Postmaster General so directs.¹⁵⁵ Under the terms of the Act, the Board

150. 6 C.A.B. 857, 901, 914 (1947).

151. Braniff Airways, Inc., Exemption, 14 C.A.B. 327 (1951). Considerations of "route planning" and "competition" had a considerable force in the various Board decisions involving Braniff's South American Routes. *Id.* at 328. See also Latin American Air Service Case, 6 C.A.B. 857 (1946); 8 C.A.B. 65 (1947); Pan American-Grace Airways, Inc. *et al.*, 9 C.A.B. 325 (1948); Pan American Airways, Inc. — Domestic Route Case, 10 C.A.B. 852 (1950); New York-Balboa Through Service Proceedings (Reopened), 18 C.A.B. 493 (1954); 20 C.A.B. 501 (1954); United States-South America Route Case, *supra* note 27, at 3, 24.

152. See Friendly, at 1305 n. 475.

153. *Supra* n. 27; North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1098 (1951).

154. Pan American Airways (Nev.), Pan American Airways, Inc., New Orleans-Guatemala Service, 4 C.A.B. 161, 176 (1943); American Export Airlines, Inc., Transatlantic Service, 2 C.A.B. 16, 37 (1940); New Zealand Operations, 1 C.A.A. 695, 704 (1939); Northwest Airlines, Inc., Duluth-Twin Cities Operation, 1 C.A.A. 573, 578-79; THOMAS, at 95-100.

155. §§401(1)(m), 405; 49 U.S.C.A. §§1371(1)(m); 1375 (1958). This power is rarely used. Bluestone, at 15.

is empowered to fix and determine "fair and reasonable rates of the compensation for the transportation of mail."¹⁵⁶ In effect, this is a system of subsidization of the carrier's operations where they fail to become commercially profitable.¹⁵⁷

Thus, the Act provides the following criteria for the Board:

(1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing adequate facilities and service for the transportation of mail;

(2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and

(3) *the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character required for the commerce of the United States, the Postal Service, and the national defense.*¹⁵⁸

In the early cases the Board took the attitude that cost, although it was important, was not controlling in determining the ultimate question of public convenience and necessity.¹⁵⁹ In 1941 Chairman Edward P. Warner stated, "[T]he balancing of commercial revenue against the cost of operation, which would supply the measure of success in a purely com-

156. §406; 49 U.S.C.A. §1376 (1958).

157. FULDA, *COMPETITION IN THE REGULATED INDUSTRIES*, at 15; THOMAS, *op. cit. supra* note 139, at 95-100, 246; WESTMEYER, *ECONOMICS OF TRANSPORTATION* 547 (1952).

158. §406; 49 U.S.C.A. §1376 (1958). The phrase "together with all other revenue of the air carrier" means that an air carrier must balance costs of his international routes against his total revenues, domestic and international, before he is eligible for subsidy. *Delta Air Lines, Inc. v. Summerfield*, 347 U.S. 74, 78-79, 98 L.Ed. 513 (1954); *American Overseas Airlines v. C.A.B.*, 254 F.2d 744, 750 (D.C. Cir. 1958). It should be noted that no subsidies are presently being paid on international operations. *Bluestone*, at 21; *Trans-Atlantic Final Mail Rate Case*, Dockets 1706, 1706A, 8837, Order E-18018, February 13, 1962 (Mimeograph copy). See generally, Howell, *The Rate of Return in Air Transport*, 24 *LAW AND CONTEMPORARY PROBLEMS* 677, 678, 681 (1959); Gelman, *The Regulation of Competition in Domestic Air Transportation: A Judicial Survey and Analysis*, 24 *J. AIR L. & COMM.* 410, 426 (1957); Hale and Hale, *supra* note 11, at 339-41.

159. *Supra* note 154; *Pan American-Grace Airways, Inc.*, 9 C.A.B. 325, 327 (1948).

mercial sense, now plays only a minor part, if any, in the decisions."¹⁶⁰ Accordingly, in the postwar decisions involving initial service where it could be shown that the implementing or extending a route was consistent with the Board's plan of international routes¹⁶¹ or that there was a prospect for increasing traffic, the Board would grant the application.¹⁶² The usual language of the decisions was to the effect that "cost could not be considered controlling where the national interest is involved."¹⁶³ Thus, when Panagra sought to have the Board reconsider Braniff's South American service less than two years after the original authorization, the Board adamantly refused to recognize that a carrier's subsidy costs could be grounds for reviewing matters of public convenience and necessity.¹⁶⁴ However, where the application proposed service between points which already had air transportation, the C.A.B. took a strict view, saying that there was no sufficient benefit to the public by merely increasing the frequency of the flights on a route already served by an air carrier.¹⁶⁵ The Board even refused an offer by a carrier to serve without subsidy on the ground that a new carrier on the route would divert revenue from existing air carriers and would cause them to seek subsidization.¹⁶⁶

The factor of cost has also influenced the Board policy discouraging the service of local traffic. The traditional view has been that this service will not have adequate traffic potential and will thereby incur unnecessary subsidy costs.¹⁶⁷ The reason for the low traffic potential seems to lie in the national loyalty that the local traveler has to his local air carrier.¹⁶⁸ Moreover, the Board has discouraged participation

160. LISSITZYN, *op. cit. supra* note 105.

161. See Route Planning, *infra*.

162. *Supra* note 154; Pan American Airways, Inc., London-Frankfurt-Rome Serv. 20 C.A.B. 441, 442, 444 (1955).

163. *Supra* note 154; North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1096 (1951).

164. Pan American-Grace Airways, Inc. *et al.*, Petition, 9 C.A.B. 325, 327 (1948).

165. Northwest Airlines, Inc., Additional Service to Canada, 2 C.A.B. 627, 641 (1940); see discussion of the problems of diversion under "Competition," *infra*.

166. Waterman S.S. Corp. and Waterman Airlines, Inc., New Orleans-San Juan Service, 159 F.2d 828 (5th Cir. 1947); *aff'd sub nom.* Waterman S.S. Co. v. C.A.B., 333 U.S. 103, 92 L.Ed. 568 (1948); see North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1053-59 (1951); *cf.* Pan American-Grace Airways, Inc., 9 C.A.B. 325 (1948).

167. See "conflict of interest" *supra*.

168. Latin American Air Service, 8 C.A.B. 65, 72-73 (1947); United States-South America Route Investigation, *supra* note 27, at 15-16. Be-

in local traffic because of the uncertainties of the international situation. For example, when Northwest proposed a stop at Fukuoka, Japan, on its route to Manila, it was found that adequate support of the route depended on traffic between Fukuoka and Shanghai. With the success of the Red Chinese on the China mainland, the carrier could not serve Shanghai, nor was there any likelihood of its doing so in the near future. Consequently, the proposed service at Fukuoka was denied.¹⁶⁹ Nevertheless, the Board did take a different stand when the applicant was able successfully to demonstrate that his primary purpose in seeking to provide the local service was to develop long-haul service to points beyond the immediate locality.¹⁷⁰ The traffic to be incidentally served is generally termed "support traffic."¹⁷¹ In the same case that denied service to Fukuoka, Northwest employed this argument to gain an intermediate stop at Okinawa on the Tokyo-Manila route.¹⁷² Recently, Eastern was allowed to extend its trunk route that terminated at Buffalo, New York, to Toronto, Canada, on the ground that the traffic served would give it additional "back-up traffic support for its east coast operation."¹⁷³

The problem of the cost of the service is still present as a criterion for the award of foreign air routes. In fact, because it is the symptom of the many ills of international air transport, it is probably the most important single factor influencing route awards. For example, the cases allowing local service caution that such service must be "econom-

cause of international treaty restrictions there is virtually no "Fifth Freedom" traffic or right of cabotage for an air carrier to transport goods and passengers between foreign states. THOMAS, at 184; see, Berle, *Freedom of the Air, A Blue Print for World Civil Aviation*, DEPT. STATE PUB. 2348, CONF. SERIES 70 (1945); Rhyne, *Legal Rules for International Aviation*, 31 VA.L.REV. 267; Ryan, *Policy Issues in International Air Transport*, 16 GEO.WASH.L.REV. 443, 457 (1948).

169. Pacific Route Amendment Case, 12 C.A.B. 158, 178 (1951).

170. Latin American Air Service Case, 6 C.A.B. 857, 904 (1946); Northwest Airlines, Inc., Additional Service to Canada, 2 C.A.B. 627, 651 (1940); see North Atlantic Route Transfer Case, 11 C.A.B. 676, 680 (1950).

171. Buffalo-Toronto Route Case, *supra* note 28, at 12.

172. Pacific Route Amendment Case, *supra* note 169, at 179.

173. Buffalo-Toronto Route Case, *supra* note 28. (Eastern's application was denied by the Air Transport Board of Canada. Wall Street Journal, Jan. 14, 1963, p. 14, col. 3.) See Service to Montego Bay, 7 C.A.B. 741, 744 (1946), which allowed an additional intermediate stop on Pan American's Miami-Canal Zone route.

ical."¹⁷⁴ The Board's policies of "strengthening the weak carrier,"¹⁷⁵ route balancing,¹⁷⁶ and competition,¹⁷⁷ all stress the necessity of weighing the cost of the service against the benefits to the public. Departing from the easy optimism of the early decisions, the Board's present position emphasizes the necessity of reducing mail pay subsidy. In one of the early re-appraisals of the South American service the Board stated: "Basic to the consideration of the questions presented to us in this proceeding is our determination to take such action as will further the national policy directed toward reducing the or (sic) air mail subsidy payments."¹⁷⁸

That cost is paramount is underscored by the issuance within the past year of staff studies of two of the major route systems, Europe and South America, plus the overall report on the national goals for aviation, *Project Horizon*. In each the overriding consideration is the necessity of placing United States carriers on a sound financial basis, hence to reduce the reliance of the carriers on air mail payments.¹⁷⁹ The effect on the criteria for the award of routes is not mentioned in these reports. But one can glimpse the implications of a policy that stresses reduction of cost. For example, the *United States-South America Route Case* concludes that Braniff and Delta should be removed from foreign air transportation because of their continuing heavy losses.¹⁸⁰ Accordingly, it would seem that the C.A.B. has abandoned its postwar policy on cost that was so dramatically etched in the Panagra petition to have Braniff removed from the South American routes.¹⁸¹ Today, it would seem to be an affirmative argument in behalf of a route award for

174. See, e.g., Buffalo-Toronto Route Case, *supra* note 28; notes 169 *supra* and 179 *infra* and cases cited therein; cf. Philadelphia Trans-Atlantic Serv. Case, 15 C.A.B. 148, 149 (1952).

175. Discussed *infra*.

176. Discussed *infra*.

177. Discussed *infra*.

178. New York-Balboa Through Service Proceedings Reopened, 18 C.A.B. 501, 502 (1954); 20 C.A.B. 493 (1954).

179. United States-South American Route Investigation, *supra* note 27, at 13-19 North Atlantic Route Renewal Case, *supra* note 27, at 9-12; *Project Horizon*, 153. Bluestone, at 20-24, calls for scheduled elimination of subsidy. Unit costs have consistently been lower in foreign air transport, *id.* at 163, but financial returns remained unsatisfactory until quite recently. In 1962 TWA reported a substantial profit on international operations with an inversely larger deficit on domestic operations. Wall Street Journal, Oct. 8, 1962, p. 2, col. 3. No subsidies are presently paid in international operations. Bluestone, at 21.

180. *Supra* note 27.

181. Pan American-Grace Airways, Inc. *et al.*, 9 C.A.B. 325 (1948).

a carrier to show that absorption of a rival's route would improve substantially the financial instability of the respective carriers.¹⁸²

4. Direct Service

Because connections in international air travel are more difficult and critical to make than in domestic travel with its multitude of flights and intense competition, it is undoubtedly desirable that a passenger have to make a minimum of connections. The policies of the C.A.B. in international air transport have largely reflected the realities of this situation. Accordingly, the Board has favored the application that will provide direct service, *i.e.*, single-plane service, single-carrier service, or interchange service to the terminus of the route over which the applicant proposes to provide air transportation.¹⁸³ Similar considerations have led the Board to approve "linear route consolidations" by a carrier already in the field, which, as the term indicates, is a method of arranging a carrier's intermediate stops into a line so that the carrier can provide nonstop service between any two points without having to apply for a new route award between those points.¹⁸⁴ Again, when two carriers desire to combine by means of an "interchange agreement"¹⁸⁵ to provide direct service over the same route using the same equipment, as far as public convenience and necessity are concerned, the

182. See North Atlantic Route Renewal Case, *supra* note 27, at 14; North Atl. Certificate Renewal Case, 15 C.A.B. 1053, 1102-05 (1951) (TWA would lose its routes east of Cairo, Egypt).

183. Pan American Airways, Inc., Singapore Operations, 2 C.A.B. 661, 663 (1940); Latin American Air Service Case, 6 C.A.B. 857, 881, 883, 898, 904 (1946); Pacific Case, 7 C.A.B. 209, 230 (1946); Pan American World Airways, Inc., Guatemala City-Los Angeles Operations, 14 C.A.B. 18, 33 (1950); North Atl. Certificate Renewal Case, *supra* note 174, at 1057; Pan American World Airways, Inc., Service to Damascus, Syria, 19 C.A.B. 697 (1954); Chicago and Southern Airlines, Inc., Service to Maracaibo, 19 C.A.B. 710, 728 (1954); Pan American World Airways, Inc., Central American-New York-Ciudad Trujillo Nonstop Serv., 21 C.A.B. 431 (1955); San Juan-Madrid Case, 25 C.A.B. 407, 412 (1957); *but see* Florida-Mexico City Service Case, *supra* note 30, at 2, San Juan Madrid Case, *supra*, distinguished. See FULDA, *op. cit. supra*, §7.8.

184. North Atlantic Route Transfer Case, 11 C.A.B. 676, 680 (1950); Pan American Airways, Inc. *et al.*, Latin American Route Amendment Case, 10 C.A.B. 351 (1949).

185. Such a contract requires C.A.B. approval under the anti-trust sections of the Act, discussed *supra* notes 39, 40 and accompanying text.

Board seems to treat the application on the same basis as an application to provide direct service.¹⁸⁶

5. Substantial Improvement

Although the C.A.B. favors direct service, it is important to note that an application to provide such service does not raise any presumption that public convenience and necessity have been met. The burden is on the applicant to demonstrate that his service will effect a "substantial improvement" in the flow of traffic.¹⁸⁷ For example, in the *Latin American Air Service Case* the Board indicated that the test would be met if the carrier could show that he could provide direct service for passengers beyond the United States terminal of the route under consideration.¹⁸⁸ In that case Pan American was awarded a route from New York to San Juan that would allow it to provide direct service as far south as Buenos Aires. In 1956 when Eastern applied for the New York-Nassau route, it argued that it would provide better service for the entire northeast area outside of New York. The application was rejected when Eastern failed to show that through service would result.¹⁸⁹ Another instance of the failure to demonstrate substantial improvement occurred in the *New York-Mexico City Case*.¹⁹⁰ Pan American applied to the Board for permission to fly directly from Europe to

186. *E.g.*, Pan American-Panagra Agreement 8 C.A.B. 50 (1947); Latin American Air Service Case, 8 C.A.B. 65, 68 (1947). For an analysis of the interchange as a device to avoid the problems of competition, see FULDA, *op. cit. supra* §7.8, citing Southern Service to the West Coast Case, 15 C.A.B. 94, 97 (1952); 12 C.A.B. 518, 548-49 (1951) (Lee, dissenting); Winkelhake, *Interchange Service Among the Airlines of the United States*, 22 J. AIR L. & COMM. 1 (1955). The problems of conflicts of interest and harmful diversion combined with gordian complexity in the C.A.B.'s valiant attempts to provide Panagra with access to United States mainland traffic without harming National, Eastern, and Braniff. See Latin American Air Serv. Case, 6 C.A.B. 857 (1946); 8 C.A.B. 65 (1947); New York-Balboa Through Serv. Proceedings Reopened, 18 C.A.B. 501 (1954); 20 C.A.B. 493 (1954); United States-South American Route Investigation, *supra* note 27. The advent of long range jets have made the interchange useless in international air commerce, because foreign competitors can fly direct, whereas interchange service requires at least one stop at the junction point of the carrier's systems. Such a requirement was of no concern when propeller driven aircraft were being used since all carriers had to make a similar stop to refuel. *Id.* at 18.

187. Latin American Air Service, *supra* note 178 at 897-98; Pan American Airways, Inc., Domestic Route Case, 10 C.A.B. 852, 843, 860, 924-26 (1950).

188. Latin American Air Serv. Case, *supra* note 186, at 898, 903.

189. New York-Nassau Case, 24 C.A.B. 245, 247 (1954).

190. 25 C.A.B. 323 (1955).

Mexico City with an intermediate stop at New York City. The Board denied the Pan American application on the ground that no substantial improvement over connecting service had been shown in that (1) most passengers preferred to stop over in New York and (2) Pan American did not serve the areas in Europe that would attract the traffic.¹⁹¹ The latter observation again emphasizes the importance of traffic potential and cost, for the Board in this context has ruled that the test of substantial improvements has not been met where the traffic potential is so insubstantial as to impose the burden of mail payments on the government or to divert and to dilute the traffic of other carriers so as to impair their earnings and cause them to seek government subsidy.¹⁹² The bias against local service also applies, but it has been rebutted where the carrier was able to show the necessity of providing local service in order to improve the flow of long-haul traffic over the route.¹⁹³

Inasmuch as the criterion of substantial improvement is essentially an appeal to economy, a logical question is whether a saving of mileage through the institution of direct service meets the test. Language in the early decisions would seem to indicate that it would. The Board at this time spoke of the desirability of operations over the "shortest feasible route," and of the "very substantial savings in mileage" of the shorter routes.¹⁹⁴ In the *North Atlantic Route Amendment Case*¹⁹⁵ the Board rested an award of an intermediate stop at Naples on the London-Turkey route of Pan American on this ground.¹⁹⁶ It must be emphasized, however, that these awards were made in the idyllic state of aeronautic nature that prevailed between 1940 and 1947 when there rarely loomed the present-day problem of diversion from other car-

191. *Ibid.* 332; Additional Service to Latin America, on reconsideration, 8 C.A.B. 65, 68, 70 (1947); Pan American Airways, Inc., Domestic Route Case, 10 C.A.B. 852, 853-54, 867-68, 870-73, 882 (1950). Compare Caribbean Investigation, 4 C.A.B. 199, 205, 210 (1943). *But see* TWA, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287, 290 (1956) (Gurney, dissenting on grounds that connecting service is adequate).

192. Chicago and Southern Airlines, Inc. — Pan American Airways, Inc., Interchange Agreement, 15 C.A.B. 685 (1952); New York-Balboa Through Service Proceedings Reopened, 18 C.A.B. 501, 504 (1954); 20 C.A.B. 493 (1954).

193. Pan American Airways, Inc., New Orleans-Guatemala Service; Caribbean Area Case, 9 C.A.B. 534, 541 (1948).

194. North Atlantic Route Amendment Case, 7 C.A.B. 133, 138 (1947); see Pan American Airways, Inc. *et al.*, Latin American Route Amendment, 10 C.A.B. 351 (1949).

195. 7 C.A.B. 133, 138 (1947).

riers and competition. Where diversion from other carriers is involved, the Board has adhered to a more rigid attitude of substantial improvement. The basic policy on mileage saving was set in a domestic case in 1945, when the Board formally declared that a mere saving of mileage would not be sufficient to meet the test.¹⁹⁶ In the international cases of the same year the same concept was applied.¹⁹⁷

Although language in a subsequent case added some confusion by stating that the test for new service was a "substantial saving in time and mileage,"¹⁹⁸ the policy today is that mileage saving is an incidental factor to be considered. Those cases which do recite the saving of mileage as entering into the decision are generally decided on a more compelling ground — that an improvement in the flow of traffic has been achieved. For example, when Pan American applied for a route between San Juan and Curacao, it claimed that a saving of 317 miles would result. The C.A.B. made the award on the ground that the route would constitute substantial improvement in Pan American's service by integrating with the New York-Caracas route.¹⁹⁹ Clearly demonstrating the incidental nature of mileage saving is the *Boston-Bermuda Case*.²⁰⁰ Pan American was awarded the route, which in fact eliminated a 184-mile penalty that Boston passengers incurred by having to make connections in New York City. The basis of the decision, however, was not that primarily of saving mileage, but was the fact that Pan American would be better able to handle the seasonal swings of traffic than its rival Colonial.²⁰¹ In other words, had Pan American not applied and had the Board found Colonial unfit to fly the route, the Board would have had little justification for finding that the route was needed for the public convenience and necessity.

196. West Coast Case, 6 C.A.B. 961, 977 (1946).

197. Additional Service to Latin America, 6 C.A.B. 857, 897 (1946); Service to Toronto, 12 C.A.B. 305, 325 (1952); accord Pan American Airways, Inc. *et al.*, Latin American Route Amendments, 10 C.A.B. 351, 359-60 (1949).

198. Additional Service to Latin America, *on reconsideration*, 8 C.A.B. 65, 72 (1947).

199. Caribbean Area Case, 9 C.A.B. 534, 543 (1948).

200. 9 C.A.B. 534 (1948).

201. *Id.*, at 565.

D. ROUTE PLANNING

1. *Statutory Provisions*

Of all the factors of public convenience and necessity, none should be more important than that of long-range planning to maintain the steady growth necessary to a soundly functioning system of public transportation.²⁰² Such was undoubtedly the intention of Congress in passing the Federal Aviation Act. In the criteria of public convenience and necessity set forth in §102 of the act, Congress speaks of "the encouragement and *development* of an air transportation *system*," and of "competition of the extent necessary to assure the *sound development* of an air-transportation *system*"²⁰³ which will meet the needs of the United States. The Administrator of the Federal Aviation Authority is "empowered and directed . . . to *foster the development* of civil aeronautics."²⁰⁴ Finally, the Administrator "is directed to make *long range plans* for and *formulate policy* with respect to *orderly development and use* of navigable airspace."²⁰⁵ And if the statute had been silent on the subject, common sense would still have dictated that from time to time the C.A.B. should set out its policies and make surveys and re-appraisals of past decisions in order to discourage the ragged, unbalanced and uneconomical routings that a system of *ad hoc* awards brings with it. But common sense has not always resided with federal regulatory agencies, and the C.A.B., especially in the domestic field, has most missed its company. In the international area the Board has been frequently negligent in regard to planning, but its record is substantially better than its domestic one.²⁰⁶

2. *Ajudicatory Methods*

By its nature, route planning is essentially a device to prevent destructive competition among American air carriers in foreign air commerce.²⁰⁷

Beginning with President Roosevelt's admonition to the Board early in World War II to undertake studies of "such

202. Bluestone, at 49.

203. §102; 49 U.S.C.A. §1302 (1958).

204. §305; 49 U.S.C.A. §1346 (1958).

205. §307; 49 U.S.C.A. §1348 (1958).

206. Landis, at 18-19, 22-23, 41-42; Hector, at 935; Friendly, at 1091.

207. Friendly, at 1305 n. 475.

an integrated air-system as will serve the development of air transportation for our neighbors and ourselves,"²⁰⁸ the Board has from time to time undertaken to study the route systems which are demanded by the needs of the United States. Its first report was made in 1944 in the form of a press release which set forth the proposed routes for United States air carriers in foreign air transportation.²⁰⁹ This report espoused a "zonal" basis of routing and largely avoided direct point-to-point competition between carriers.²¹⁰ Basically, it provided for three routes to Europe, northern, central, and southern or Mediterranean; two around-the-world routes; and three Pacific routes, northern via Japan and central via Hawaii, and a southern to Australia and New Zealand. The only places where competitive service was to be authorized between the United States and a foreign terminal were London and Lisbon, which, as the major European "gateways," were recognized as exceptions.²¹¹ The importance of route planning can only be underscored by the Board's subsequent failure to continue its appraisal, when one realizes that for over seventeen years this study was the foundation of all route award decisions in international aviation. Yet in that period basic equipment used on international flights changed twice, and countless new foreign air carriers entered the field before the Board initiated a new survey. It cannot be said that new staff reports on the routes of the North Atlantic and of the South American systems have come too soon.

3. *Route Integration*

From this system of route planning, two effects on the criteria of foreign air routes can be observed: (1) That

208. Colonial Airlines *et al.*, Atlantic Seaboard Case, 4 C.A.B. 392 (1944), cited in Additional Service to Latin America, 6 C.A.B. 857, 860-61 (1946).

209. See THOMAS, *op. cit. supra* note 139, at 233; Sweeney, *Postwar International Route Planning by the Civil Aeronautics Board*, 16 J. AIR L. & COMM. 388 (1949); Tipton and Gerwitz, *The Effect of Regulated Competition on the Air Transport Industry*, 22 J. AIR L. & COMM. 157 (1955).

210. Friendly, at 1305 n. 475; *cf.* LISSITZYN, at 262; note, *Paramount Public Interest In International New Route Cases*, 15 J. AIR L. & COMM. 480 (1948); see North Atlantic Route Case, 7 C.A.B. 455, 456 (1947).

211. THOMAS, *op. cit. supra*, at 235-37; Sweeney, *supra* note 209; North East Airlines, North Atlantic Route Case, 6 C.A.B. 319 (1945); Additional Service to Latin America, 6 C.A.B. 857 (1946); Pacific Case, 7 C.A.B. 209, 223 (1947). See Pan American Airways, Trans-Atlantic Operations, 1 C.A.B. 118, 131 (1939).

the growth of the national system demands implementation of these routes; and (2) that the carrier whose existing system will most readily accommodate the new route should be preferred. Thus, the former is directly concerned with public convenience and necessity; the latter is concerned with the choice of carrier after the route has been deemed necessary. But the traditional *caveat* as to the clear distinction between the two still applies.

In application, the doctrine of route planning can hardly be said to be a sharp departure from the policies discussed *supra*. Many of its features are simple extensions of the basic doctrines, for in essence it is largely a combination of "direct service" and the appeal to economy, "cost."²¹² For example, the force of route planning is evident in the Board's policies on the award of local service routes to the long distance carriers. In granting local routes only to companies who specialize in local service, the Board declares that its policy is the avoidance of conflicts of interest which will impair service to the public.²¹³ What it is actually doing is tailoring the carriers to the type of routes it wants them to serve — "route planning." And what it is really saying is that trunk carriers will not be able to function in an economic manner if they attempt to provide two wholly different kinds of services.

A. OPTIMISM

Factors other than rationale extensions of basic doctrines also have played a prominent part in the Board's policies. The most important of these, "optimism," is derived from the Board's expert knowledge of the potential of the industry.²¹⁴ Its Panglossian nature was apparent from the first when the Board proclaimed in the 1946 *North Atlantic Route Case*:

We may confidently look forward to the sound development of a sharply expanded transportation system even though precise predictions as to the volume of traffic cannot be made . . . we do not believe that we should take an ultra-conservative or overcautious course in dealing with the future of this industry . . .²¹⁵

212. Westwood, at 73, 76.

213. See notes 32-38, *supra*, and accompanying text.

214. Westwood, at 172.

215. 6 C.A.B. 319, 322 (1945).

The reason for this optimism was evident: from the early days of transatlantic service no other carriers except United States carriers were operating or capable of operating in international air transport. It logically followed that American carriers should "seize the day."²¹⁶

The force and the danger of the policy can be seen in the development of the Pacific routes, for, as Westwood has put it, "The seeds of an optimism that was later to become almost hysterical had been planted."^{216a} Of primary importance in these proceedings was the fact that the Board decided that there should be two American around-the-world air services. The stage had been set in the *North-Atlantic Route Case* which authorized Pan American and TWA to serve India.²¹⁷ In the companion *Pacific Case* the Board was faced with the problem of completing its proposed round-the-world service.²¹⁸ Pan American's old central Pacific route from the west coast was extended to Hong Kong and Calcutta, thereby providing single-carrier round-the-world service. Pan American was also granted routes to Australia and Batavia, but the gap between the two points was not closed by authorization of service. A second round-the-world service was made possible through the certification of Northwest over the northern Pacific great circle route from Chicago and Seattle to Manila and with the extension of TWA to Shanghai, where the routes of the two carriers would intersect. Although it would appear that the Board had authorized a comprehensive pattern of service throughout Asia, strong objections to the Board's actions came from the dissenting opinion of Member Lee. He protested the failure of the Board to authorize a complete system of American air carriage in Asia. His specific objections were that the Board had failed to link Pan American's Australia-Batavia service points and that it was necessary to provide a second carrier over the northern Pacific route who would primarily serve the east coast of the United States. In a strongly worded opinion, he revealed the *carpe diem* philosophy that had motivated his dissent:

The Board cannot readily correct an error made now of providing an inadequate system of air transportation

216. American Export Airlines, Trans-Atlantic Operations, 2 C.A.B. 16, 33 (1940).

216a. Westwood, at 172.

217. 6 C.A.B. 319 (1945).

218. 7 C.A.B. 227 (1946).

in the Pacific area. Unless an adequate route pattern is created in this proceeding, we may lose forever the opportunity now afforded us to establish a comprehensive American Service to the Orient. There are occasions when it is an expensive luxury to indulge in overcaution . . . the determination of an international route pattern, unlike the determination of the domestic route pattern, is subject to change by many agencies other than this Board. We cannot expect in a subsequent review of the present issues to find the pattern of international services in the Orient exactly as we leave it in this proceeding. The open field opportunities which American-flag carriers have today for making a success of newly certificated routes will not last long and are not likely to return. Therefore it is a mistake to certificate only a minimum of service now in the belief that we shall have a second chance at this field under equally favorable conditions. Instead of following a timid "wait and see" policy, I believe we should pursue a farsighted, progressive policy which will maintain our strong position of leadership in air transportation.²¹⁹

Although Member Lee was disappointed at the Board's "wait and see" policy, it would seem in retrospect that even this "timid" program may have been rash in its expectations. It may even be suggested that current problems of unprofitable routings could only be worse with additional routes which even today have limited traffic potential for American air carriers.

The force of optimistic route planning has been strong in the subsequent Pacific Route cases. At times it has been used to avoid the traditional concepts of traffic potential. In the *Pacific Route Amendment Case*²²⁰ in 1951, Pan American was authorized to conduct an all-cargo operation over the Australia-New Zealand trunk route via Noumea. Although passenger and cargo traffic was admittedly insufficient to support the route at that time, the Board awarded the route on the ground it was desirable to have a United States carrier in a position to serve the traffic as soon as it showed

²¹⁹ *Id.* at 244. See also *id.* at 248-49, 251; notes and text at notes 246-247 *infra*.

²²⁰ 12 C.A.B. 158 (1951).

signs of increasing.²²¹ Later cases have almost entirely involved implementation of the original Pacific routes, especially completion of TWA's round-the-world routes. These decisions are notable for their swings of opinion over the importance of traffic potential. In 1955 TWA applied for an extension from Colombo, Ceylon, to Tokyo via Hong Kong so that it could connect with Northwest, which had applied for an extension from Tokyo to Hong Kong and Taipei.²²² The Board granted the Northwest application on the ground of improving existing service by providing direct service for Northwest passengers and thereby avoiding a connection with foreign carriers.²²³ TWA was turned down because the Board felt that point-to-point duplication (between Hong Kong and Tokyo) would be unwise with the limited traffic potential.²²⁴ However, the following year TWA and Northwest routes were both extended to meet in Manila to provide for connecting round-the-world service.²²⁵ The ostensible ground for the decision was that of implementing the route pattern of the *Pacific Case, supra*.²²⁶ A close analysis, however, demonstrates that this was but one reason. Other grounds included a belief that traffic would increase because of renewed political interest in the East²²⁷ and a desire to "strengthen" TWA's routes which suffered from the double disability of having a dead end at Colombo, a gateway generating little traffic,²²⁸ and of having to deliver 81% of its traffic to foreign carriers.²²⁹ The next route case involved an even greater swing away from adherence to traffic potential considerations.²³⁰ In 1959 President Eisenhower ordered a revision of the Pacific routes to provide the fullest competition. This time the Board provided full implementation for the "Pacific Pattern" by granting Northwest a central Pacific route to Tokyo via Hawaii in competition with Pan American; and to Pan American it allocated a northern Pacific route to Tokyo via Seattle in competition

221. *Id.* at 172.

222. Trans-Pacific Certificate Renewal Case, 20 C.A.B. 47 (1955).

223. *Id.* at 62.

224. *Id.* at 66; see opinion of Lee and Adams, dissenting, *ibid.* at 74, 76.

225. Trans World Airlines, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287 (1956).

226. *Id.* at 288, citing Pacific Case, 7 C.A.B. 209 (1946).

227. *Id.* at 302.

228. *Id.*

229. *Id.* at 299; see opinion of Gurney, dissenting, *id.* at 290.

230. Trans-Pacific Route Case, *supra* note 63.

with Northwest. TWA was extended to Hong Kong to connect with Northwest. The TWA application for a Hong Kong-Tokyo route was again denied.²³¹ Even though the President found it necessary to deny the new route awards to Japan on the grounds of foreign policy, the Board, nevertheless, did grant the TWA extension to Hong Kong, preserving the second around-the-world service.²³² The controversy has continued to the present. In 1962 a staff investigation recommended the abolition of the second service. Thus, the stage is again set for a controversy over the desirability and implementation of this set of routes first conceived in 1944.²³³

Although the Board's original route planning may be said, as with the common law causes of action, "to rule us from the grave," the Board was careful to leave the door open for future modification of the routes. The Board declared:

Actual experience with the route pattern we have authorized may well disclose traffic potentialities outside that pattern for which adjustments should be made. This Board naturally will seek to evaluate data of this nature and direct changes that the public interest, in the light of new evidence, may dictate.²³⁴

Subsequently, the Board has seen fit to merge the original three zones of competition in Europe into two by approving the sale of American Overseas Airlines to Pan American.²³⁵ As a result of this modification, TWA's service to Rome on the Southern European Route was found inadequate, and the Board deemed it necessary to extend the Northern European Route of TWA from Frankfurt to Rome.²³⁶ Current C.A.B. staff recommendations would again revise the European routes so that the original concept of gateway competition would prevail with each United States international air carrier serving separate "area" gateways.²³⁷

231. *Id.* at 9-11.

232. *Id.* at 44-51.

233. Trans-Atlantic Route Renewal Case, *supra* note 27.

234. North Atlantic Route Amendments, 7 C.A.B. 133, 140 (1946); Pacific Route Amendments, 12 C.A.B. 158, 168 (1951).

235. North Atlantic Route Transfer Case, 11 C.A.B. 676, 678 (1950). N.B. The President substantially interfered with Board policy in this case by overruling the Board's decision to sell the assets of American Overseas Airlines (formerly American Export Airlines) to Pan American.

236. Trans World Airlines, Inc., Pan American World Airways, Inc., London/Frankfurt-Rome Service, 20 C.A.B. 441 (1955).

237. *Cf.* United States-South American Route Investigation, *supra* note 27; Trans-Atlantic Route Renewal Case, *supra* note 27.

B. EFFECT ON THE CARRIER — SUBSTANTIAL IMPROVEMENT

With the foregoing general policies of the C.A.B. in mind, it is evident that a carrier can make a strong argument for an award of a foreign air route by showing that the route proposed by the Board, as in the area of public convenience and necessity, will integrate with the carrier's existing system. That this is essentially an appeal to economy is indicated by such language in the decisions as "the proposed operation could be integrated . . . with comparatively little additional expense."²³⁸ And as a consequence of this underlying consideration the C.A.B. has felt compelled to limit the implications of the doctrine of route planning and route integration by frequently declaring that long term considerations must prevail and that the carrier which can contribute the most in the short run might not be best in the long run.²³⁹

Examples of route integration abound in the decisions of the C.A.B. One of the earliest cases arose in 1949²⁴⁰ as a result of the route pattern set forth in the original *Latin American Air Service Case*.²⁴¹ This case had decided that public convenience and necessity required a route between New York and South America. Pan American was chosen to provide service from New York to San Juan on the ground that this route itself integrated "most logically" into the Pan American System and would enable Pan American "to provide single-company service for the heavy traffic moving between New York and Rio de Janeiro and points as far south as Buenos Aires."²⁴² Service to Caracas was provided by means of a route from San Juan to Ciudad Trujillo and by interchange and connecting service at Miami.²⁴³ In the *Caribbean Area Case*,²⁴⁴ Pan American sought an extension

238. *E.g.*, Pan American Airways, Inc., Service from New Orleans to Cuba and Central America, 4 C.A.B. 161, 177 (1943); *cf.* New York-Nassau Case, 24 C.A.B. 245, 264 (1956).

239. States-Alaska Case, 20 C.A.B. 791, 841 (1954); North Atlantic Route, *on reconsideration*, 7 C.A.B. 133, 141 (1947); Additional Service to Latin America, 6 C.A.B. 857, 899 (1946). Compare New York-Nassau Case, 24 C.A.B. 245, 265 (1956); Buffalo-Toronto Route Case, *supra* note 28, at 5, which urge that operations must be "economical." See note 159 and accompanying text, *supra*, for discussion of the statement that "cost is not controlling."

240. Caribbean Area Case, 9 C.A.B. 534 (1948).

241. Additional Service to Latin America, 6 C.A.B. 857 (1946).

242. *Id.* at 904.

243. Pan American-Panagra Agreement, 8 C.A.B. 50 (1947); Additional Service to Latin America, *on reconsideration*, 8 C.A.B. 65 (1947).

244. 9 C.A.B. 534 (1948).

of its San Juan Route to Curacao and on to Caracas. Noting that the present Pan American routing via Ciudad Trujillo was circuitous and not conducive to the development of the route, the C.A.B. awarded a San Juan Curacao-Caracas route to Pan American on the grounds that the new route would integrate with Pan American's New York-Caracas system and that the more direct routing would provide a "substantial improvement" in service.²⁴⁵

C. BALANCE

As the Board has used route planning as a criterion for "rounding out" the national system of air routes, so has it considered the "balancing" of the systems of individual carriers in making awards to carriers. In the *Pacific Case*²⁴⁶ the C.A.B. was faced with a choice of carrier for routes between the Midwest, the Pacific Northwest, and the Orient. The applicants were Pennsylvania Central Airlines (later called Capital), TWA, and Northwest. In selecting Northwest, the Board was impressed by the fact that the carrier had fully equipped facilities at Minneapolis-St. Paul and Seattle and was operating between Chicago, the most important junction in the Midwest, the Twin Cities, and Seattle. The Board concluded:

Northwest's operations between the United States terminals for the route to the Orient would facilitate the handling of traffic and promote an efficient utilization of equipment. It is apparent that the northern route to the Orient can be best integrated in the Northwest system.²⁴⁷

The policy of favoring the carrier whose system will be "balanced" by a route award has continued. Of especial importance has been the problem of seasonal swings in traffic. This situation occurs where a carrier has to provide a large number of flights during one part of the year when traffic is heavy, *e.g.*, resort traffic which is heavier in the winter months. The consequence of such a seasonal traffic pattern is that the carrier must acquire extra equipment to serve the traffic. This in turn results in inefficient utilization of equipment and personnel, which runs up the cost of the carrier's operations. Thus, in making a route award, the

^{245.} *Id.* at 542, 543.

^{246.} 7 C.A.B. 209 (1946). Note the introduction of the problems of "fitness" into the determination of public convenience and necessity.

^{247.} *Id.* at 227.

C.A.B. will prefer the carrier whose route system will be balanced with a seasonal traffic problem through more efficient use of personnel and equipment. For example, in the *Boston-Bermuda Case*²⁴⁸ Pan American was chosen in preference to Colonial. Because Pan American had an excess capacity in the winter months due to reduced traffic on its European routes, it was better able to handle the seasonal surge of winter vacation traffic to Bermuda.²⁴⁹

It should not be supposed, however, that the doctrine of route integration operates in a vacuum, divorced from a consideration of benefits to the public. Increased utilization of equipment is not in itself of sufficient force to require the grant of a route or the selection of a carrier. The Board has on occasion rejected an applicant where the applicant would not be benefited.²⁵⁰ Moreover, the Board has indicated that the public should be benefited through a "substantial improvement" in service.²⁵¹ Accordingly, the Board has spoken of improving the flow of traffic as an important consideration in making a route award.²⁵² This has been particularly prominent in the cases involving the elimination of dead-end terminals. TWA received an extension of its European routes from London-Frankfurt to Rome so that it could offer an improved flow of traffic between the United States and points in Europe.²⁵³ Similar considerations ruled the C.A.B.'s extension of TWA from Colombo to Hong Kong and Manila²⁵⁴ and of its award of a Sydney-Djakakarta route to Pan American for the purpose of "closing the gap" in its South Pacific System.²⁵⁵

248. 9 C.A.B. 563 (1948).

249. *Id.* at 565; New York-Nassau Case, 24 C.A.B. 245, 265 (1956); *cf.* West Coast & Hawaii Case, 20 C.A.B. 9, 12 (1955).

250. Service to Toronto, 12 C.A.B. 305, 325 (1952); *but cf.* Colonial Airlines, Inc., Washington-Ottawa-Montreal Service, 6 C.A.B. 481, 501 (1945).

251. Caribbean Area Case, 9 C.A.B. 534, 542, 543 (1948); *but cf.* Service to Puerto Rico Case, 26 C.A.B. 72 (1957), (Gurney dissenting at 80.) See notes 375-382 *infra* and text.

252. Northwest Airlines, Additional Service to Canada, 2 C.A.B. 627, 651 (1940); Western Air Express, Great Falls-Lethbridge Operations, 2 C.A.B. 425 (1940); Caribbean Area Case, 9 C.A.B. 534 *passim* (1948); Trans World Airlines, 20 C.A.B. 441, 442 (1955).

253. Pan American Airways, Inc., London-Frankfurt-Rome Service, 20 C.A.B. 441 (1955).

254. Trans World Airlines, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287, 288 (1956).

255. Trans-Pacific Certificate Renewal Case, 20 C.A.B. 47, 62 (1955); Trans-Pacific Route Case, *supra* note 63, at 11, 37; San Juan-Madrid Case, 25 C.A.B. 407, 410 (1957).

4. Charter of Limitations — Substantial Improvement

As much as the Board's route pattern has been a blue print for growth and extension of American air carrier service, so has the pattern acted as a charter of limitations. Where no compelling benefit to the public interest is shown, the Board will refuse an application that departs from and disrupts the basic route pattern.²⁵⁶ For example, Pan American was denied the right to serve Shanghai on its Tokyo-Calcutta route because, the Board held, such an award would inject Pan American into competition with Northwest in the Northern Pacific Area, a situation not contemplated by the original route pattern.²⁵⁷ Similar reasoning was found in the C.A.B.'s denial of an interchange between St. Louis, Houston, and Mexico City.²⁵⁸ Interestingly enough, in the latter case, the Board then proceeded to authorize a route from St. Louis to Houston which would allow connecting service to Mexico City. Any competitive diversion from this type of service, the Board reasoned, would only be "incidental."²⁵⁹ Whether connecting service as opposed to single plane interchange service would in fact be less desirable was not inquired into. Yet, in many cases, prior and subsequent to the pending case, the Board had found that single plane service offered no improvement over connecting service where the junction point was a major gateway.²⁶⁰ Inasmuch as Houston was considered a gateway both in this case and in the earlier Latin American proceedings,²⁶¹ it would seem that the C.A.B. was displaying manifestly contradictory attitudes.

E. STRENGTHENING THE WEAK CARRIER

Given the Board's policies of "Balancing" a carrier's route system and that of reducing subsidy cost²⁶² — both of which

256. Cf. North Atlantic Route Amendments, 7 C.A.B. 455, 456 (1945); Northwest Airlines, Inc., Additional Service to Canada, 2 C.A.B. 627, 638 (1940).

257. Trans-Pacific Certificate Renewal Case, 20 C.A.B. 47, 54-55 (1955); North Atlantic Route Amendments, 7 C.A.B. 455, 456 (1955); but see West Coast Hawaii Case, 20 C.A.B. 7 (1955).

258. Chicago & Southern Airlines, Inc. — Pan American Airways, Inc., Interchange Agreement, 15 C.A.B. 685 (1952).

259. *Id.* at 687.

260. See notes 187-191 *supra* and accompanying text.

261. *E.g.*, Additional Service to Latin America Case, 6 C.A.B. 857 (1946); New York-Balboa Through Service Proceedings Reopened, 20 C.A.B. 501 (1954); 20 C.A.B. 493 (1954).

262. See notes 174-180, 246-251, *supra* and accompanying text.

are directed toward the development of an economical and efficient system of air transportation, the important questions arise: (1) To what extent will the C.A.B. implement these policies? (2) Must the Board take affirmative action to "strengthen" a "weak" carrier? The answer was given in a series of domestic cases involving local service, which were decided during World War II. If the local carrier was to survive, the Board reasoned, it must be protected from destructive competition which would result from authorizing trunk carriers to provide local service. Moreover, the Board was cognizant of the problems of a conflict of interest that might lead to a deterioration of local service should the trunk carriers come to dominate local service.²⁶³ In the process of arriving at this conclusion the Board began to speak of awarding the routes according to the relative need of the local carrier.²⁶⁴ As the controversy over the dominance of the industry by the "big-four"²⁶⁵ raged, the decisions of the Board were cast in terms of "strengthening" the local carrier by providing it with additional traffic centers of importance.²⁶⁶

The implications of such a policy were far-reaching. Soon three issues emerged which were critical to the success or failure of the applicants for the route award. These were:

- (1) Must there be a public need for the route in question?
- (2) Is the proper criterion the need of the carrier?
- (3) Must the carrier be actually strengthened?

Resolution of the conflict between the first two issues depends upon whether the doctrine of "strengthening the weak carrier" is concerned with the selection of the carrier in the way that fitness, willingness, and ability are, or with the grant of a route in the public interest in the way that traffic potential and direct service are. If the doctrine ap-

263. See notes 35-38 *supra*.

264. *E.g.*, Western Airlines, Inc., Denver-Los Angeles Service, 6 C.A.B. 199, 211 (1944); Alaska Air Lines, Inc., Service to Anchorage, Alaska, 3 C.A.B. 522, 528 (1942); Westwood, *supra* n. 8, at 80-103, exp. at 80-81.

265. Westwood at 81-82. See Southeast-Northeast Service Case, 22 C.A.B. 52, 56-57 (1955).

266. Continental Airlines, Inc., Denver-Kansas City Case, 4 C.A.B. 1, 18 (1943); Trans-Continental and Western Airlines, Inc., North-South California Service, 4 C.A.B. 254, 297, 313 (1943); Los Angeles-San Francisco Case, 4 C.A.B. 373, 376 (1943); see FULDA, *op. cit. supra*, at 7.16, 7.17; THOMAS, *op. cit. supra*, at 100-104.

plies to the grant of a route, then all considerations of traffic potential, diversion, route planning, and cost will be overridden.²⁶⁷ On the other hand, if the doctrine is concerned with the selection of the carrier, then a public need for air transportation, consistent with the requirements of traffic potential and the orderly development of the United States air transport system, must be demonstrated before a carrier will be able to qualify.

In the early cases involving the doctrine, the C.A.B. appeared to be concerned with the selection of the carrier that could contribute to the development of the national system of air transportation. The famous Ryan concurrence in *Eastern Air Lines, Memphis-Greenville Operation*²⁶⁸ set forth the considerations that a properly balanced competitive system of civil aviation could not be maintained by a great disparity in size between carriers.²⁶⁹ Thus, he argued, the Board had a "broader power in the selection of a carrier."²⁷⁰ The implication was that where a route was a sound addition to any of two applicants it should go to the smaller or "needier" of the two.²⁷¹ Subsequent cases spoke of the "improvement . . . of competitive position" of the smaller carriers as the criterion for choice of carrier. In all of these cases there was apparently a demonstrated public need for additional carriers. However, the issue of the separate requirement of the public necessity was subsequently raised. The Board took great care to declare that there could be no extension of a carrier's route merely to increase its economic strength.²⁷² The Board elaborated:

The public convenience and necessity must be found to require a proposed new route before one can be authorized. In a particular case the choice of the carrier to provide the service may be affected, other things being equal, by the fact that the award of the certificate to the carrier chosen will economically strengthen that carrier as a constituent of the national system of air transportation.²⁷³

267. Westwood, at 84.

268. 4 C.A.B. 429 (1943).

269. *Id.* at 438.

270. *Id.* at 437.

271. Westwood, at 84.

272. Northwest Airlines, Inc., North Central Case, 7 C.A.B. 639 (1946).

273. Northwest Airlines, Inc., Chicago-Milwaukee-New York Service, 6 C.A.B. 217, 224 (1944); see *Ibid.* at 237-38.

It would seem that with the foregoing statement of principle that the policy of the C.A.B. required a separate public need. As had happened many times before with C.A.B. declarations of policy, subsequent decisions served only to confuse and ultimately to engulf the original statement. Only a few months later Members Landis and Lee dissented on the ground that the doctrine should be applied on the basis of the carrier's need. Although they claimed to adhere to a policy of favoring the weaker carrier in selection of the carrier, they spoke in sweeping language of "the wise industrial statesmanship" of making a "new system" out of National and Delta.²⁷⁴ Thus, they emphasized the condition of the carrier as the primary criterion for award of a route and came close to saying that a carrier could receive an award without a finding of independent need.²⁷⁵

Whether this was their intention or not, the force of their reasoning appears to have secured a permanent niche at the C.A.B. In the guise of "industrial statesmanship" carriers that have suffered diversion have been "compensated" by the award of a new route or allowed "to recapture" traffic lost through diversion²⁷⁶ without a finding of public convenience and necessity and the Board has fruitlessly attempted "to build" carriers for the international routes.²⁷⁷ As an examination of the cases in the international field will show, the confusion over the policies and factual criteria has hardly been abated by the Board's decisions, but it has in fact only increased.

The early cases seem to adhere to a viewpoint that the carrier with the greater need for the route should be preferred. In a case involving local service in Alaska the Board sought to protect local carriers by keeping the trunk carriers out of local service. The Board declared that "local carriers should be allowed to retain the more lucrative local business so they can continue to serve the needs of these areas in Alaska where business is less profitable."²⁷⁸ Subsequently,

274. Northwest Airlines, Inc., North Central Case, 7 C.A.B. 639, 690 (1946); compare Southwest-Northeast Service Case, 22 C.A.B. 52, 56-57 (1955); New York-Chicago Service Case, 22 C.A.B. 973, 978 (1955); see Hector, *supra* note 9, at 940-41.

275. Westwood, at 93.

276. See note 83 *supra* and accompanying text.

277. See notes 301-321 *infra* and accompanying text.

278. Alaska Airlines, Inc., Service to Anchorage, Alaska, 3 C.A.B. 522, 528 (1942).

the Board veered toward a more activist view. In the *Latin American Air Service Case*,²⁷⁹ the Board selected National for Tampa-Miami-Havana routes in preference to Eastern. Although public need was present in the case, the Board emphasized the need of the carrier as the paramount consideration, saying:

The selection of National will give that carrier an opportunity to strengthen its competitive position and to prepare itself to render more effective service. Having fewer route miles and serving fewer large cities, it now has fewer opportunities than Eastern to increase utilization of its equipment and to achieve similar economies in operation. The addition of the Miami-Havana and the Tampa-Havana routes will give National's management an opportunity to realize such gains in operating efficiency. The award of the proposed route to National will place that carrier in the field actively promoting international air travel. . . .²⁸⁰

In the next international case presenting the problem, the *Pacific Case*,²⁸¹ the Board was faced with two applicants, Pan American and Hawaiian, for the Central Pacific route to China. Had the Board been willing to premise its decision on the statements made earlier in the *Latin American Case*, discussed *supra*, and to employ dry logic, the award would have gone to Hawaiian, a local carrier in the Hawaiian Islands. The majority saw the undesirability of such a course of action and bypassed the question altogether. Instead, they concluded that Pan American should be chosen on the grounds that it was the "pioneer" and that the route "integrated logically" with Pan American's existing routes.²⁸² The issue was raised and vigorously propounded by Member Lee in dissent, but it remained unanswered by the majority. Although the failure of the Board to resolve the conflict and to explain the shift in premises gave the appearance of inconsistency, there does seem to be an explanation for the Board's actions. It must be recalled that Hawaiian was a local carrier, *i.e.*, a specialist in local service. Entrance into trunk line service would, therefore, bring about a conflict of interest between the two types of service. For the

279. 6 C.A.B. 857 (1946).

280. *Id.* at 891.

281. 7 C.A.B. 209 (1946).

282. *Id.* at 229.

same reason, the Board had prohibited entrance into local service by trunk carriers, and had prohibited the expansion of local carriers into trunk carriers.²⁸³ And in an earlier case in the same year involving Hawaiian and its attempt to expand into a trunk carrier by obtaining a Hawaii-Los Angeles route, the Board had denied the Hawaiian application on the grounds of such conflict of interest.²⁸⁴

The other cases, with one outstanding exception, manifest no sharp departure from the domestic cases.²⁸⁵ At times the possibility of controversy has been bypassed by referring to the improvement of a carrier's route system as "incidental strengthening."²⁸⁶ In other cases the doctrine of strengthening the weak carrier has appeared as such, but it has acted negatively to prevent competition by larger carriers. In *Colonial Air Lines, Washington-Ottawa-Montreal Service*²⁸⁷ a small carrier, Colonial, received an extension of its route system between Montreal and New York City to Washington, D.C. Although the route integrated better with the systems of American and Eastern, the Board felt compelled to grant the route to Colonial because an award to American or Eastern would result in a loss of connecting business that Colonial had been interchanging in New York City.²⁸⁸ Similar considerations moved the Board to protect a local service carrier in the Caribbean, Caribbean-Atlantic, by eliminating Charlotte Amalie and Saint Thomas, Virgin Islands, as stops on Pan American routes.²⁸⁹

Aside from the cases providing "incidental strengthening" it seems, therefore, that the focus of the Board's decisions in this field has been on the need of the carrier. This was true with the case that awarded a route stop to Pan American so that it could "recapture" traffic it had lost through

283. Notes 31-35 *supra*.

284. Hawaiian Case, 7 C.A.B. 83, 109 (1946); see Trans-Pacific Route Case, *supra* note 63, at 11; but *cf.* Service to Puerto Rico Case, 26 C.A.B. 72, 80 (1957).

285. They are seemingly inconsistent.

286. Trans World Airlines, Inc., India-Bangkok-Manila Extension, 24 C.A.B. 287, 288 (1956); see San Juan-Madrid Case, 25 C.A.B. 407, 411 (1957).

287. 6 C.A.B. 481 (1945).

288. *Id.* at 501. The success of this effort can be judged by Colonial's subsequent merger with Eastern. See Eastern-Colonial, Acquisition of Assets, 18 C.A.B. 453 (1954); *supplemental opinion*, 18 C.A.B. 781 (1954); Colonial-Eastern Acquisition Case, 23 C.A.B. 500 (1956); Eastern-Colonial Control Case, 20 C.A.B. 629 (1955).

289. Caribbean Area Case, 9 C.A.B. 534 (1948).

shifts in the Caribbean route system.²⁹⁰ Subsequent cases, which appear to have rejected the emphasis on the need of the carrier, can generally be distinguished on the grounds that the doctrine had been intertwined with unacceptable arguments on the nature of a competitively balanced system. For example, in an effort to obtain domestic routes, Pan American argued that it should be allowed to recapture traffic it had lost as a result of foreign route awards to other domestic carriers. The Board denied Pan American's application on numerous grounds — lack of improvement of service, no new service, and disruption of route patterns.²⁹¹ The rejection of Pan American's argument for strengthening turned primarily on the idea that Pan American could claim no right to a substantially equal share of United States traffic, for to allow this argument would be to admit Pan American's premise which the Board had vigorously rejected in a series of cases, *viz.*, that there should be a "chosen instrument" to conduct foreign air transport in behalf of the United States.²⁹² The same fate met TWA when it attempted to argue that carriers in the European market should have access to equal amounts of traffic to insure financial stability.²⁹³ The examiner's opinion, adopted by the Board, made it clear that the policy of maintaining a competitive balance among United States Air carriers engaged in foreign air commerce, did not require "perfect equality."²⁹⁴

A determination of the third issue, whether there must be actual improvement, is no less difficult than the resolution of the conflict between the first two over public need and need of the carrier. In the *Service to Toronto Case*²⁹⁵ the Board held that increased utilization of equipment and personnel by Colonial, the weak carrier, would not be sufficient to require the grant because Colonial could not provide the service without a substantial subsidy whereas American would need none to provide the same service.²⁹⁶ The effect of the decision was to demand that the carrier in fact be

290. *Ibid.* at 545, 551, 552; *cf.* Trans-Pacific Certificate Renewal Case, 20 C.A.B. 47, 59 (1955).

291. Pan American Airways, Inc., Domestic Route Case, 11 C.A.B. 852 (1950).

292. *Id.* at 933-34.

293. North Atlantic Certificate Renewal Case, 15 C.A.B. 1053, 1097 (1951).

294. *Id.* at 1098.

295. 12 C.A.B. 305 (1951).

296. *Id.* at 321, 325.

strengthened by the route award. The *Service to Puerto Rico Case* would seem to be in agreement.²⁹⁷ There the Board rejected a Delta application for direct San Juan-Chicago service on the grounds that there was no evidence that Delta would be strengthened by the award and that there was even the possibility of weakening Delta.²⁹⁸

Although the *Toronto* and *Puerto Rico* cases are important in that they determined the fate of the third issue, it should be noted that their bearing on the resolution of the conflict between the first two issues was of equal weight. In effect they were both premised on the requirement of public need for the service: If there was not sufficient traffic to support the route, then, the award could not "strengthen" the carrier. An examination of the cases indicates that such a requirement had been assumed by the Board. In the *Toronto* case the Board stated that it was necessary "to consider whether the traffic potential is sufficient to support economical operations by two or more carriers" ²⁹⁹ And in the *Puerto Rico* case the problem was explicitly considered by the examiner, who stated:

Although strengthening of our existing certificated carriers by permitting their entry in *strong traffic markets* is a factor which the Board has considered in past cases, notably in the *New York-Florida Case*, 24 C.A.B. 94 (1956), it is not a consideration that should be controlling.³⁰⁰

In adopting the report the Board agreed that low traffic potential was the significant factor.³⁰¹

Ultimate resolution of the problems of the doctrine of strengthening the weak carrier can be had only by examining the decisions relating to the South American routes, for it is here that all of the weaknesses of the Board's *ad hoc* industrial statesmanship are revealed.³⁰² At the time of the first postwar route awards there were two United States

²⁹⁷ 26 C.A.B. 72 (1957).

²⁹⁸ *Id.* at 76, 77.

²⁹⁹ 12 C.A.B. 305, 321 (1951).

³⁰⁰ 26 C.A.B. 72, 152 (1957) (emphasis added); *but cf.*, New York-Mexico City Nonstop Service Case, 25 C.A.B. 323 (1957). See notes 78-94 *supra* and accompanying text.

³⁰¹ Instant case, 26 C.A.B. at 77.

³⁰² *Cf.*, Friendly, at 1091: "Decisions that would vitally affect the economics of the domestic airline industry for generations were taken in a tone of gay abandon. . . ."

carriers providing service to South America, Pan American, and Panagra, which was owned jointly by Pan American and the W. R. Grace Co. Pan American provided service from Miami and Caribbean points to the east coast of South America, and from Los Angeles to Mexico City. Panagra served the west coast of South America, but had no United States terminal. West coast traffic from the United States was interchanged with Pan American at Balboa, Canal Zone.³⁰³ In the *Additional Service to Latin America Case*³⁰⁴ the Board decided that South American service required two American air carriers, but it split on the question of introducing a third. When the Board's recommendations were sent to the President, he decided in favor of the third service and ordered the Board to issue a certificate of public convenience and necessity to Braniff to serve the west coast routes.³⁰⁵ The Board responded by granting routes to Braniff from Houston and New Orleans via Havana to Balboa down the west coast with the terminus at Buenos Aires on the east coast. Braniff was to serve the traffic needs of the central United States. Since this traffic was too thin at the time to adequately support the route award, Braniff was allowed to connect with the east coast carrier, National, at Havana. An additional advantage of the arrangement was that National could be strengthened.³⁰⁶

The one remaining problem was to provide the northeast with service competitive with that offered by Pan American via San Juan — preferably single carrier service — and to provide for a source of traffic for Panagra, which had been extended from the Canal Zone to Miami. The Board seemed to realize that for Panagra to compete effectively it should have a measure of control over its traffic sources. Thus, connecting service would not be adequate. The Board had an additional complication in the fact of the joint ownership of Panagra by Pan American and W. R. Grace, for Pan American was using every maneuver known to the law of corporations to paralyze Panagra in order to keep it out of

303. See, e.g., Pan American Airways, Grandfather Certificate, 2 C.A.B. 111 (1940); Pan American-Grace Airlines, Grandfather Certificate, 2 C.A.B. 104 (1940).

304. 6 C.A.B. 857 (1946).

305. *Ibid.*

306. *Id.* at 891.

the mainland United States.³⁰⁷ In the process of settling Panagra's internal difficulties, the Board also was able to solve the problem of providing the northeastern United States with single-carrier service. The answer was found in the 99 year "through flight" agreement which concluded the internecine warfare between Panagra's owners. The terms stipulated that Pan American would charter Panagra aircraft on an interchange basis, thus providing Panagra with access to United States mainland traffic and consummating the Board's plan for single-carrier service between the northeastern United States and the Canal Zone.³⁰⁸

Had the Board's and the president's estimates of the traffic potential of the South American routes been substantially correct, many of the South American carriers' subsequent ills might not have developed. Unfortunately, it soon became apparent that the public need did not require two carriers to the west coast. After the first year the pattern for Latin American troubles was apparent. Panagra responded with a petition to the Board to suspend Braniff's rights on the ground that Braniff's diversion of Panagra traffic had increased costs beyond a profitable level. Optimism still reigned at the Board, and the petition was denied.³⁰⁹

The problem of competitive balance was persistent, however, and increasingly the Board was called upon to "strengthen" carriers involved in Latin American service. National, which had originally been strengthened in 1946, required additional aid two years later.³¹⁰ By 1951 it was apparent that previous measures, including an interchange at Havana, had failed to help National and Braniff.³¹¹ Accordingly, the Board strengthened Braniff again by granting it a stop at Miami on the Houston-Havana route. By admitting Braniff to the rich gateway traffic at Miami, the Board

307. Panagra Terminal Investigation, 4 C.A.B. 670 (1944); reversed and remanded *sub nom.* W. R. Grace & Co. v. C.A.B., 154 F.2d 271 (2d Cir. 1946); *cert. denied*, 332 U.S. 827, 92 L.Ed. 402 (1946). This same accusation has been recently repeated by the C.A.B. in its temporary order requiring Pan American to divest itself of all interest in Panagra. Pan American-Panagra Acquisition Case, Docket 14452; Panagra-Pan American-Grace Investigation, Docket 14641, Order E-19789, July 9, 1963.

308. Pan American-Panagra Agreement, 8 C.A.B. 50 (1947).

309. Pan American-Grace Airways, Inc. *et al.*, Petition, 9 C.A.B. 325 (1948).

310. Middle Atlantic Area Case, 9 C.A.B. 131, 144 (1948).

311. National Route Investigation, 12 C.A.B. 798 (1951).

believed that it would be able to maintain competition between United States' carriers in South America.³¹²

Meanwhile, the Board continued its efforts to achieve the goals it had set in the *Latin American Case* of competitive, single-carrier service from New York to Balboa. In 1954 it announced the results of its investigations in the first *New York-Balboa Through Service Proceedings Reopened* case.³¹³ These were (1) that the Board would seek to reduce air mail subsidy payments and (2) that the Latin American service required a single independent carrier free from control of Pan American or W. R. Grace on the Houston-Miami and points beyond route to South America.³¹⁴ The solution which the Board chose was to rearrange the interchange system serving the northeastern United States. Fearing the conjunction of a strong carrier such as Eastern with either Pan American or Panagra, which was, for the purposes of the case, the alter ego of Pan American, the Board directed that Eastern join with Braniff to provide interchange service, which the Board thought would be competitive with Pan American.³¹⁵ But in strengthening Braniff, the Board had also created a situation of severe diversion for National, another "weak" carrier. In order to protect National the Board then authorized a second New York-Balboa interchange service between Pan American, Panagra, and National.³¹⁶

Thus, the stage was set for the present debacle in the South American service. Although the Board as much as admitted that the traffic potential between New York and Balboa was inadequate to serve two competing interchange services, the Board dismissed arguments against excessive authorization by cautioning the carriers against the dangers of over capacity in air transport!³¹⁷ Member Ryan dissented

312. Braniff Airways, Inc., Exemption, 14 C.A.B. 327 (1951).

313. 18 C.A.B. 501 (1954).

314. *Ibid.* at 502, 504, 505. The Board also indulged in some administrative coercion by suggesting that Pan American and W. R. Grace could save the expenses of a pending anti-trust divestiture suit by merging Panagra and Braniff. *Ibid.* at 505. See Ryan, *Ibid.* at 508 (dissent) (strongly criticizing Board action as improper.) See *United States v. Pan American World Airways, Inc., W. R. Grace and Company and Pan American-Grace Airways, Inc.*, 193 F.Supp. 18 (S.D.N.Y. 1961), *revised*, 83 S.Ct. 476 (1963) (the C.A.B. has primary jurisdiction).

315. Instant case, 20 C.A.B. 493, 501-502 (1954); compare 18 C.A.B. 501, 504 (1954).

316. Instant case, 20 C.A.B. at 504.

317. *Id.* at 511.

vigorously that the Board had neglected route planning and had ignored the inadequacy of the traffic potential. In the first instance, he pointed out that the northeastern states had been denied single plane service because National's routes only extended to New York and that Eastern was the only carrier with extensive and effective service in the area.³¹⁸ Secondly, he argued that the decision compounded duplication by creating two interchange services, whereas, in a major domestic market with 30% more passenger traffic, the Board had authorized only one such service.³¹⁹

The futility of this exercise has since become apparent. The recent *United States-South America Route Investigation*³²⁰ is but one long admission of the Board's failure in "industrial statesmanship." In spite of interchanges, Braniff's share of the South American traffic has continued to decline and the competitive balance of the South American service has become even more lop-sided.³²¹ There are many reasons cited by the Board for its failure, foreign competition, the advent of nonstop jet service, etc. Presidential action overriding a split board may even be one. But the Board's initial mistake in attempting to apply the doctrine of strengthening the weak carrier without first considering the public need for service must surely be counted as a fundamental cause of the present unhealthy situation of United States' carriers in Latin America. Admittedly, it may be argued that Braniff was thrust upon the Board, but that would not be an adequate ground for the Board's subsequent decisions which were often made in a factual vacuum and without a clear policy for a guideline. Lack of administrative standards here was critical. Instead of making the best of a bad job, the effect of the Board's decisions was to make a bad thing worse.

318. *Id.* at 519, 521.

319. *Id.* at 517.

320. See *supra* note 27. A similar failure is recorded in the New York-Florida Renewal Case, Docket 12285, Order E-19910, August 15, 1963, where the Board admitted its failure to strengthen Northeast Airlines by giving it a supposedly lucrative long haul route.

321. *Id.* at 16-19. The advent of long range jets have rendered interchange ineffective because a stop is necessary at the junction of the two systems, whereas other carriers over the route can fly nonstop.