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Criteria for the Award of a Foreign Air Route to a Domestic Air Carrier

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

EDWARD C. ROBERTS***

IV. COMPETITION

A. THE STATUTORY COMMAND

The Federal Aviation Act of 1958 requires that the Board in assessing the public convenience and necessity shall consider, among other things, the following:

(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; ... 326

Upon examination the unusual nature of this mandate is apparent, for here is a public utility act requiring competition and speaking in terms of using competition to develop a system of air transportation, whereas the usual public utility statute seeks to limit competition and to limit development to a narrowly circumscribed area where the utility has a monopoly.327 The Board early noted the significance of such language, stating that "this provision has no counterpart" in the Motor Carrier's Act of 1935 which was the basis for the present regulatory system.328 The task for the Board in granting certificates of public convenience and necessity was to avoid the perils of destructive competition, and, paradoxically, to use competition to produce results that competition could not produce.329 In short, what the act required was regulated competition.330

* This is Part II of a two part Article; Part I may be found in 15 S.C.L.Rev. 867.—Ed.

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326. § 102(d); 49 U.S.C.A. § 1302(d) (1958).
328. American Export Airlines, Trans-Atlantic Service, 2 C.A.B. 16, 30 (1940); see id. at 34.
329. Alaska Air Transport, Inc., 3 C.A.B. 804, 810 (1942); TWA, North-South California Service, 4 C.A.B. 374-375 (1944); Thomas, Economic Regulation of Scheduled Air Transport, 89 (1951); Bluestone, supra note 324, at 42.
330. Lissitzyn, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY at 250 (1942) [hereinafter cited as Lissitzyn]; Tipton and Gervitz, The Regula-
With the very first decisions awarding new service in international air transportation under the Act, the Board emphasized the importance of competitive service. When Pan American applied for the first trans-Atlantic route from the United States to Great Britain, the Board refused to grant Pan American all of the landing rights available under the treaty authorizing service. The application had to be considered in light of "the necessity of preserving the possibility of competition," the Board declared. "If any carrier had the right to utilize the landing rights to the extent of the full number provided for in international agreements, any competition that might be found necessary to assure the sound development of an air transportation system would be impossible of attainment."331 Shortly thereafter, American Export Airlines applied for the second trans-Atlantic service to Great Britain, which the Board granted as being in the public interest.332

B. RATIONALE OF COMPETITION IN FOREIGN AIR COMMERCE

The rationale for the decision was most important, for it set the policy of the Board toward future competing service. In the first place, the Board reasoned, competition in air transport, as in other branches of business, could be expected to improve standards of service, lower rates, and provide a general spirit of initiative and progress. The Board declared: "Benefits to the public in the shape of improved service resulting from advances in the industry, would be accelerated by competition between United States carriers on the North Atlantic Route."333

Secondly, the Board buttressed its argument by demonstrating that the imperative necessity for competition lay in the fact that the Board had no power to regulate the economic aspects of foreign air carriage:

Whereas the Board may enforce the duty imposed on air carriers by § 404(a) to provide adequate service, equipment, 

333. Id. at 321; see Lissitzyn at 257; Hale and Hale, Competition of Control IV: Air Carriers, 109 U.ALL.REV. 311, 314 (1961).
and facilities in interstate or overseas air transportation, its power in this respect does not extend to carriers engaged in foreign air transportation, upon whom the Act imposed no similar duty. Moreover, the Board’s power to regulate rates, fares, and charges of air carriers does not extend to operations in foreign air transportation. Thus, economic regulations alone may not be relied on to take the place of the stimulus which competition provides to the advancement of technique and service in air transportation.\textsuperscript{334}

Moreover, the Board found that the additional service would provide a “yardstick” by which the efficiency of Pan American’s service could be measured.\textsuperscript{335}

Finally the Board attempted to explain why its decision was consistent with general principles of utility regulation, and in so doing it provided a clue as to nature of the traffic requirements for competitive service:

Competition does not necessarily involve a useless duplication of service. It is true that where a territory is served by a utility which (1) has pioneered in the field, (2) is rendering efficient service, (3) is fulfilling adequately the duty which, as a public utility, it owes to the public and, (4) the territory is so generally served that it may be said to have reached the point of saturation as regards the particular service which the utility furnishes, the trend today is to protect the utility within such field. Intervener [Pan American] has pioneered the route under consideration and is rendering efficient service within the limits of its facilities, but the saturation point of available air traffic on this route is not yet reached. The territory to be served through the termini of the trans-Atlantic route is almost unlimited.\textsuperscript{336}

Thus, the Board seemed to have laid down “the point of saturation,” as the test of entry into a foreign air route market. Whether this was to remain the test was another thing altogether.\textsuperscript{337}

\textsuperscript{334} Id. at 32; see Lissitzyn at 259.

\textsuperscript{335} American Export Airlines, supra note 332; see Lissitzyn at 262, where it is claimed the mere threat of competition caused an improvement in Pan American’s service.

\textsuperscript{336} American Export Airlines, supra note 332 at 34.

\textsuperscript{337} For discussion of the legislative history of the 1938 Act, see Berge, Competition to the Extent Necessary, An Historical Introduction, 22 J. AirL.& Comm. 127 (1955); see Comment: Merger and Monopoly in Domestic Aviation, 62 Col.L.Rev. 851, 855-59 (1962).
C. Chosen Instrument

When the Board refused to grant Pan American the full extent of the treaty landing rights in the first Trans-Atlantic case, it could not be imagined that the company that had pioneered the nation's international routes would stand aside quietly. And in fact Pan American was not gracious enough to give up its exclusive interest in trans-Atlantic air commerce without a strenuous fight. Accordingly, in rebuttal to the Board's policy of competition Pan American brought forward the argument that the United States should be represented by a "chosen instrument," or a single company in matters of foreign air transportation. In terms of statutory language it means that the Board has an ambit of discretion in certifying competitive service if it finds that the public can be better served without competition even though the traffic potential might warrant it.

The argument was first presented in skeletal form in Pan American's attempt to exclude rival American Export Airlines from the trans-Atlantic service. The Board rebuffed Pan American, saying, "We are unable to find that continued maintenance of an exclusive monopoly of trans-Atlantic American flag air transportation is in the public interest. . . ."338 The proposition was presented in its fullest development in the postwar cases dealing with the expansion of American flag service on foreign routes. There were four arguments:

1. There will not be sufficient traffic potential to support more than one domestic air carrier in international aviation.
2. Economies of large high-speed aircraft can be utilized only if operations are concentrated in one company.
3. Separate identities of carriers should be maintained; if domestic carriers are allowed to enter international air transportation, Pan American, which has no feeder operations, will be at a serious competitive disadvantage.
4. The company which pioneers a route should not be required to turn over the benefits of its developmental work to strangers.339

The Board rejected the proposition point by point, saying:

(1) There is a vast untapped potential for international air transportation which is sufficient to support competing service.

(2) A reduction of travel costs to the public will result only through regulated competition between United States carriers.

(3) Separate identity is not required. Domestics would have an advantage, were Pan American restricted to entry at the shore line of the United States; this advantage is minimized by authorization for Pan American to conduct operations to major traffic centers of the United States.

(4) Pan American as the established carrier in the field of international aviation will always retain those intangible advantages which accrue to the pioneer. 340

When one reviews the dialogue between the CAB and Pan American it is evident that the Board’s replies did not entirely answer the question of authorizing a chosen instrument. It would seem that the Board had premised its rejection on some strong underlying belief that a chosen instrument was inimical to the public interest. If one looks generally to the cases, certain language in them suggests that the fundamental reason for rejection of the chosen instrument policy was that the Board had a “fear of power,” of the abuses that uncontrolled monopoly brings with it. 341 In fact, in authorizing the first competitive service over the trans-Atlantic routes, the Board had equated monopoly with the abuse of the public interest. The Board stated:

We are unable to find that the continued maintenance of an exclusive monopoly of trans-Atlantic American flag air transportation is in the public interest, particularly since there is no such public control over the passenger or express rates to be charged or over the service to be rendered as is


customarily provided in the case of a publicly protected monopoly.342

In later cases the Board was to reiterate its famous dictum concerning the benefits of competition:

The improvements which flow from a competitive service cannot be decreed by administrative fiat.343

Thus, the Board set the basic policy that only competition could guarantee the traveling public the increasing comfort and convenience that the future of air transport promised. An additional consideration in international aviation was the danger that a monopoly carrier might meddle in the intergovernmental negotiations for obtaining treaty rights. To allow a chosen instrument to represent the United States exclusively, the Board argued, "would result in placing that company in a position of power which might enable it to interfere with public policies unacceptable to management."344 The Board dismissed the argument on the ground that "national loyalties" would prevent foreign air carriers from providing the necessary competitive stimulus. Research and development of the foreign carriers would not be readily available to the American carriers. Consequently, there would not be an adequate "yardstick" by which the performance of domestic air carriers could be measured.345 Even though there might exist a general competitive

343. Northeast Airlines, Inc., North Atlantic Route Case, 6 C.A.B. 319, 326 (1945), quoting, Colonial Airlines, Atlantic Seaboard Operations, 4 C.A.B. 522 (1944); Additional Service to Latin America, 6 C.A.B. 857, 904 (1946). There is considerable doubt generally as to the efficacy of competition in raising standards of service and at the same time lowering costs to the traveling public. See Gill and Bates, Airline Competition passim (1949); Friendly at 1072; Hale and Hale, supra note 333 at 344; but see Maclay and Burt, supra note 327, 138-147; Tipton and Gervitz, supra note 330, 166-167, 180.
345. Id. at 325; Additional Service to Latin America Case, 6 C.A.B. 857, 861 (1946).
346. Northeast Airlines, Inc., supra note 344 at 325; Lissitzyn at 262.
stimulus from the foreign carriers, the Board had early thought that the national system would best benefit from American carrier competition. It declared:

(U)nnless and until the U. S. Air carriers can match a given improvement in the service rendered by a foreign air carrier, United States air transportation will not have advanced. On the other hand, any addition to service or improvement of equipment will be an immediate and direct advantage to the air transportation system of the United States.347

Five years after making the foregoing declaration of policy, the Board had the occasion to demonstrate its accuracy. In making an award of competitive service on the New York-Bermuda route in the Latin American Case the Board took care to point to the low standard of service on the route as an example of the failure of competition with foreign carriers to produce benefits to the public. The Board wrote:

These data indicate that the air traffic of the Bermuda route has not been fully developed by the existing air services. Such development, we believe can be attained only through the maintenance of a system of vigorous competitive services provided by a United States air carrier.348

Rebuffed at all points, Pan American made an attempt to equalize its position by seeking domestic routes so that it could offer single-carrier, single-plane service from the interior of the United States to foreign points.349 In a classic case Pan American argued that almost all the Board's criteria favored the award. Pan American could provide direct service; the routes would integrate; Pan American would be protected from conflicts of interest.350 In a masterful report the examiner cut through the clouded issues presented by Pan American until only one was left. This was that Pan American should have equal access to sources of traffic with TWA, American, and Eastern who had both domestic feeder routes and direct service foreign routes.351 The examiner rejected this argument on the ground that it was

348. Additional Service to Latin America Case, 6 C.A.B. 857, 888 (1946) cf. Latin American Freight Case, 16 C.A.B. 107, 112 (1952). This policy has been expressly repudiated, see "Conclusion," infra.
350. Id. at 867-68, 870-71, 878-81, 883, 885.
351. Id. at 926.
premised on Pan American's old chosen instrument concept; the act did not require perfect equality, he declared. More importantly, to inject Pan American into the domestic market with its superior identity would expose the domestic carriers with less extensive foreign routes to the dominance of Pan American. Thus, the examiner and the Board which adopted the report almost without comment "feared the power" of a carrier with an undue competitive advantage. The routes would not have provided a monopoly, but it seems that the Board may have feared that they might provide a basis for the abuses of monopolization.

And thus ended for the time being the heated controversy whether the United States should adopt a chosen instrument to represent it in international aviation. The Board had decided in favor of competition. But with the adoption of this policy the Board's problems in international air transportation had not been solved, nor had the issues of the controversy been disposed of. In fact, the problems of international aviation had just begun, and most of the same issues remained to plague the Board in its route awards.

D. FACTUAL CRITERIA

1. Presumptions

With the rejection of the chosen instrument doctrine and the Board's corresponding approval of competing service, the question arises: When is competition required? To what extent is it necessary? Board decisions were highly confusing at first. One domestic case declared that there was "a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing service without unreasonable increase of total operating cost." The impossibility of speaking in terms of a "presumption" was soon apparent. Charges that the Board would authorize "competition for competition's sake" were raised. Consequently, the Board retreated to a position which spoke of considering all the "circumstances and factors involved."

352. Id. at 933.
353. Id. at 910, 913.
354. TWA, North-South California Service, 4 C.A.B. 373, 375 (1945). Extensive criticism of the Board's vacillation can be found in Westwood, Choice of the Air Carrier for New Air Transportation Routes, 16 Geo.WASH.L.Rev. 13 [hereinafter cited as Westwood]. See Fulda, op. cit. supra, at § 7.12; Hale and Hale, supra note 333 at 318.
The international cases reflected the confusion within the Board. The early cases declared that competition "was not mandatory," but would be authorized according to "the particular facts which justify or condemn competition in light of the standards of the Act."\textsuperscript{356} This meant that the "point of saturation" must not have been reached\textsuperscript{357} and that competition could be authorized only to assure the sound development of the national system of air transportation.\textsuperscript{358} Point-to-point duplication was no bar \textit{per se} to additional service as long as there was no "undue" competition.\textsuperscript{359} In other words, the competition required by the act must be economically feasible and beneficial rather than destructive. Such were the guidelines for the authorization of competitive service until after the Second World War.

As a result of the rejection of the chosen instrument doctrine and the various authorizations of competitive service in the decisions, it appeared that the Board might have re-instated the presumption in favor of competition. Interestingly enough, the question was raised by Pan American in the \textit{North Atlantic Route Case} of 1947.\textsuperscript{360} By the previous awards in Europe Pan American had routes to London-Frankfurt, TWA to Paris and Rome. Urging the presumption theory of competition on the Board, Pan American sought entry into Paris in competition with TWA. The Board summarily rejected Pan American’s petition on the ground that the Board’s policy of route planning had brought about the competitive result independent from the Board’s policy of competition. In the course of the decision the Board explained the true nature of route planning in the following manner:

\begin{quote}
Competition created by those (earlier) decisions either at points in Latin America or at points in China and India is merely the \textit{incidental} result of the establishment of route patterns designed to serve the traffic potential of different areas. . . . The fact that these route patterns happen in some cases to converge at certain points . . . \textit{is not due to the need for providing competition at these points} but rather to the need for providing the carriers operating into and
\end{quote}

\textsuperscript{356} American Export Airlines, Trans-Atlantic Service, 2 C.A.B. 16, 31 (1940).
\textsuperscript{357} \textit{Id.} at 34.
\textsuperscript{358} Alaska Air Transport Investigation, 3 C.A.B. 804, 819 (1942); Trans-Pacific Route Case, Docket 7723, Order E-16286, December 7, 1960, at 14.
\textsuperscript{360} North Atlantic Route Case, 7 C.A.B. 455 (1955).
through such areas logical and convenient terminal points or gateways to areas beyond. [Emphasis added]

2. General Considerations

Today, there is no presumption in international aviation for competition. With the numerous problems of the industry it can almost be said that there is a presumption against it. But the basic test for determining the traffic potential necessary to authorize competing service is even today far from clear. It might be said that one must determine the "point of saturation" that was utilized in the first competing service case. In actual practice, resort must be had to the criteria enunciated for single carrier service. The "fitness" of each carrier to serve the proposed market must be compared. Whether a carrier is a "pioneer" with a superior claim may be important. Of especial importance is the capacity of each carrier. The type of equipment used by the respective carriers, their "load factors" or minimum amount of capacity that must be sold to generate a profit, the need for additional equipment to serve the route—all these factors must be weighed and compared to determine whether the route will support an additional carrier profitably.

Of critical importance is the type of equipment that will be employed. In an industry affected by rapid technological change the capacity of a carrier may be tripled by replacing one DC-6 with a modern jet. Hence, the carrier's load factor will be substantially different should he initiate service with older equipment and then change to higher capacity modern equipment. When other carriers on the route make the same change, the problem of overcapacity becomes acute because it generally takes a number of years for the natural growth in traffic to provide sufficient passengers to match the capacity on the route.

It would seem that the Board would have formulated some policy to handle the natural and expected problems of technological overcapacity. However, from its inception until recently the Board was conspicuously silent in regard to this problem.

361. Id. at 456.
362. See Fulda, op. cit. supra, at §§ 7.12, 7.13.
364. See Fulda, op. cit. supra, at § 7.15.
except for its policy of "optimism." This, of course, could hardly be considered a direct attack. Thus, it would seem that there is strong justification for the charge that the Board's failure to enunciate capacity standards has aggravated the problems of overcapacity. Only within the past few years has the Board taken an affirmative step. In Project Horizon it proposed that the minimum traffic potential for duplicating competitive service be enough passengers to provide each carrier one round trip flight per day with a sufficient load factor to allow economical operations with present-day jet equipment. The staff study of the North Atlantic routes recommended the same standard, but the Board has not taken positive action on the proposal. It should be noted that even this action may not be sufficient to protect the long range interests of the American carriers, for within ten years, equipment in present use on international air routes may be rendered obsolete by the Mach II and Mach III jetliners which are on the drawing boards today.

3. Substantial Improvement

Even though a route might have the traffic potential to support competing service the Board has indicated on numerous occasions that the mere additional frequency of flights on a route is not in itself enough to justify competing service. What is required by the criteria of public convenience and necessity is that the proposed service provide a substantial improvement over the existing service other than could be accomplished by mere additional frequency of flights. 371

The paucity of cases authorizing competitive service in the international field makes it difficult to delineate the concept. Certain guidelines, however, have developed. It has been frequently observed that direct service, i.e., single-carrier, single-plane, or non-stop service, is such substantial improvement as to justify competitive service. 372 But where direct service is already available, it would seem that there must be some other benefit which would constitute substantial improvement. For example, in the Trans-Pacific Certificate Renewal Case 373 Pan American


requested a great circle route from the West Coast to Japan. At that time Pan American was certificated over the circuitous central Pacific route to Japan and Northwest Airlines had the privilege of flying the more direct great circle route from the Pacific Northwest to Japan. The Board refused Pan American's bid for competitive service over the route on the grounds that allowing Pan American to fly the route would cause serious diversion of the revenues of Northwest even though there would be no change in the points served on the Pan American route. 374 Upon analysis this decision, like many others, seems to be explained by familiar criteria for an award. Whenever the Board had wished to minimize the desirability of duplicating service, it had been able to base its decision on the ground that a mere saving in time and mileage would not justify new service. 375 Moreover, where a carrier with a superior identity in foreign air transportation had sought to provide the competing service, the Board had denied the certificate on occasion because of the fear of an undue competitive advantage. 376

The use of competing service to raise the quality of existing service has also been an occasional feature of route awards in international aviation. Although there has been considerable debate as to the efficacy of such measures, 377 the Board stated its belief that competing service does benefit the public. For example, in 1956 the Board awarded a route to Pan American in competition with Eastern and the foreign carrier BOAC for the purpose of improving coach service on the New York-Nassau route. 378 Reflecting language used in earlier cases, the Board said:

Past experience has shown that the inauguration of lower fares, substantial savings in flight time, greater frequency of service, and more reliable schedule performance has resulted in substantial increases in traffic, particularly in vacation markets. The coach potential to Nassau from the North East United States is relatively underdeveloped as BOAC has

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374. Id. at 59.
376. See notes 343-349 supra and accompanying text.
377. See note 343 supra.
provided only two tourist round trip flights per week with considerably higher fares than those proposed herein.\textsuperscript{379}

Although the Board decreed that foreign competition could not be relied upon to provide the competitive stimulus necessary to develop the national system of air transportation, foreign carriers can and do raise problems of competition. At the same time the Board rejected the chosen instrument doctrine, it was careful not to foreclose its consideration of detrimental competition by the foreign carriers. In Additional Service to Latin America case, on reconsideration, it recognized that there would be “a multiplicity of service” in the Caribbean area stemming from the Board’s awards and foreign competition.\textsuperscript{380}

4. Foreign Competition

The decisions often have recognized that the presence of foreign competition may require certification of a United States carrier over the same route. The important consideration in each of the cases granting the domestic carrier’s application has been the need to meet the competition of the foreign carrier or to strengthen the operations of the domestic carrier who was faced with diversion from his routes by a foreign carrier. Thus often the decisions will reflect more strongly the criteria used in the initial service cases, than in the competitive cases. Factors such as recapturing traffic (pioneering), route strengthening, and route integration are more frequently discussed than the problems of traffic potential, and cost of service. For example, TWA was extended from Ceylon to Manila to connect with an American flag carrier because it had been faced with the undesirable position of having to deliver 81% of its traffic to foreign carriers.\textsuperscript{381} Pan American was granted a great circle route from the West Coast of the United States to Europe solely on the grounds of meeting foreign competition.\textsuperscript{382} Eastern was permitted to fly non-stop from New York City to Mexico City to match the service of Air France which had captured a major share of the domestic passenger traffic.\textsuperscript{383} Pan American’s Latin American

\textsuperscript{380} S C.A.B. 65, 70 (1947).
\textsuperscript{382} West Coast Europe Case, 25 C.A.B. 180, 183 (1957).
routes were strengthened by the grant of a route between San Juan and Madrid, which would integrate with its routes from the South and Mexico City to San Juan.\textsuperscript{384}

5. Cost and Diversion

The cost of the competing service must be considered as well as any improvements in the standards of the service. Here the Board draws a sharp contrast between initial service and competing service. In the former cost is said not to be controlling if a public need can otherwise be shown,\textsuperscript{385} but in the case of competing service cost may well be the most important consideration of all in that it bears on the financial well being of the carrier and the Board’s policy of reducing subsidy.\textsuperscript{386} The problem arises in two cases. The first concerns service which duplicates existing service; the second involves service which would divert traffic from the existing service. For example, service may be in operation between points A-B-C. If additional service is to be authorized over points A-B-C, the problem is one of duplication or point-to-point competition. On the other hand, if the new service is to be inaugurated from point A to C, the problem is whether that traffic carried between A-C by the presently certificated carrier will be subjected to diversion by the carrier who will provide service between A-C. If there is point to point duplication between B and C, the route is also subject to diversion since the route between A-B-C may depend on traffic from B-C to support operations over the entire route.

As far as the problems of cost of service are concerned, the two are treated essentially the same. The real question is to what extent the Board is willing to intensify competition.\textsuperscript{387} The cases speak of an “overriding” or “compelling” public interest.

\textsuperscript{385} Note 154-182 and accompanying text, 15 S.C.L.Rev. 867, 897-902 (1963).
\textsuperscript{386} See note 178-182 and accompanying text, 15 S.C.L.Rev. 867, 901-02 (1963).
\textsuperscript{387} Westwood, supra note 354 at 215. In one famous incident a member of the Board was asked whether the Board had a “philosophy” of competition. The following reply was made:

You know, we keep talking about philosophy. We keep talking about the philosophy of the Board. Well, the philosophy of the Civil Aeronautics Board changes from day to day. It depends on who is on the Board as to what the philosophy is. You cannot say that the Board as a whole has a fixed philosophy for any fixed period of time because the members come and go, and they do come and go pretty fast down there.

Hearings on Monopoly Problems in Regulated Industries Before the Anti-Trust Sub-committee (Sub-committee No. 5) of the House Committee on the Judiciary 84th Cong., 2d Sess., ser. 22, pt. 1, at 153 (1956).
If the Board believes that the traffic potential of a route will increase with the stimulus of competition, it will certify the competing service. On the other hand, if the statistics on passenger movement are unreliable, if the applicant is relatively weak as an air carrier, or if there will be extensive foreign competition, the Board may deny the application. For example, when American Export sought to enter international aviation in the Caribbean with a Miami-Canal Zone service in competition with Pan American, the Board found the economic data on traffic potential inconclusive and American Export of inadequate strength. It rejected American Export’s bid with the following language:

Even if allowance be made for a large increase in the traffic movement between the eastern section of the United States and the Canal Zone . . . [this] is no justification for a competitive service over the 1,200 miles between Miami and the Canal Zone.\(^{388}\)

In the same proceedings, however, the Board was willing to award to the relatively strong carrier, Eastern, a New Orleans-Mexico City route, which would by the admission of the Board divert a substantial amount of traffic that Pan American had carried via its Brownsville, Texas, gateway. Weighing the benefits to the public of the direct service, they said:

In view of the fact that the extension of Eastern will be affecting a route of Pan American which is primarily local in character and will have no material effect on Pan American’s long-haul services, we conclude that the overriding public interest which will be served by the establishment of single-carrier service by Eastern should be controlling in the present instance.\(^{389}\)

The same balancing of interests test favored establishment of a New York-San Juan route even though Eastern’s Boston-Miami routes would be harmed. In this case the Board believed that, “the substantial benefits in the form of improved service to the traveling public are so great as to be compelling.”\(^{390}\)

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\(^{388}\) Additional Service to Latin America, on reconsideration, 8 C.A.B. 65, 68 (1947).


\(^{390}\) Additional Service to Latin America, 6 C.A.B. 857, 891 (1946).
6. Alternative Criteria

In other cases, where the Board has felt that competitive service should not be authorized, it has frequently cloaked the rationale of its decision in the terminology of other factual criteria. In the *New York-Mexico City Non-Stop Service Case* the Board adopted the rationale of pioneering and "color of title" to keep Pan American from competing with Eastern's multi-stop service via Washington, D. C., and New Orleans. An ostensible reason is found in the examiner's report which declared that preference must be given to the carrier which operates via intermediate stops. However, an examination of the case indicates that the result can be justified on traditional grounds. For example, the Board has often said that additional frequency of service is not in itself a sufficient requirement for authorization of competing service. In the *Alaska Route Modification Case* the Board refined this policy with the statement 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." If the necessity of a substantial improvement in service is considered, then it appears that authorization of Pan American would not have met this requirement. Pan American had argued that it could provide direct service for traffic between Europe and Mexico City. However, the examiner found (1) Pan American did not serve enough of the European traffic centers with a community of interest with Mexico City to support the service without support from the New York-Mexico portion of the route and (2) that connecting service would be adequate because most passengers preferred to stop over in New York City. It would seem, therefore, that Pan American's proposal would not have substantially improved service on the route.

The Board's policy of maintaining "area" or "gateway" competition has also been used to minimize the effects of competition. The theory of the policy is that individual carriers should be certified to serve different geographic areas with a minimum of point-to-point duplication of terminals. Those places which do receive duplicating service are generally termed "gateways" be-

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392. Id. at 331.
393. Note 370, supra.
394. 17 C.A.B. 943 (1953).
395. Id. at 968.
cause they are the central traffic centers toward which all local service flows. The effect of the policy is naturally to insulate American air carriers from the destructive effects of directly competing against each other in foreign markets with a relatively small traffic potential. In the words of the Board, the policy is designed to preserve "the overall balanced relationship between the carriers" and to provide for "effective competition in markets rich enough to support competitive service." The early days of international air transport the Board sought to achieve this objective by drawing up a master plan to guide the post war route awards, which envisioned the broadest possible application of zonal separation to minimize direct competitive contacts. For example, the Pacific routes to Japan were to be served over two routes, a central route via Hawaii and Wake Island and a northern route over a great circle via Seattle. In the Pacific Case Pan American received the central route, Northwest the northern. The advantage of the arrangement, according to the Board, was that "the central Pacific route does not present point-to-point competition to the northern route"; however, if the routes were considered as entities, it was thought "a route from San Francisco and Los Angeles to Tokyo through Hawaii will afford real competition to the northerly great-circle route having terminals at Seattle and Chicago."

The Board has also sought to minimize competition through the means of restrictions on the service that a competing carrier can offer. In a recent case the Board authorized competing service on the New York-Hawaii route, but the new carrier, Northwest, was not allowed to serve traffic between New York

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397. 7 C.A.B. 209 (1946).
398. Id. at 224.
399. Id. at 223.
400. Trans-Pacific Route Case, Docket 7723 et al., Order E-16286, December 7, 1960, at 9. Compare President Truman's letter reversing the Board in 1950: "My objective is to accomplish a route pattern in which our nation may have the benefit of competition to the principal traffic points in Europe, and to avoid a monopoly on the part of either of the United States Carriers. It is apparent that, as traffic points, London, Paris, Rome, and for the time being Frankfurt, are the leading European cities. Therefore I desire that both remaining carriers be authorized to serve each of these points. . . . This adjustment should result in the fullest accomplishment of the broad national objectives which, especially at this critical time, should govern the development of United States air transportation and will provide for vigorous competitive growth by our air lines."

and California or California and Hawaii.\textsuperscript{402} Similarly, in an attempt to protect Braniff's only exclusive South American stop, at Bogota, other carriers were not allowed to provide passenger service there on their flights in Latin American air service.\textsuperscript{403}

V. MERGERS

A. STATUTORY COMMAND

As part of its duties in "maintaining competition to the extent necessary,"\textsuperscript{404} the CAB has also been delegated the power to regulate mergers in the air transport industry.\textsuperscript{405} In contrast to its other functions, the Board in this field of regulation generally does not positively authorize new or duplicating service, instead it assumes the role of the protector of competition in the industry.\textsuperscript{406} The statutory command of the Federal Aviation Act of 1958 is that approval of a proposed merger shall be given unless the Board finds that consolidations, mergers, and purchases are inconsistent with the "public interest" of maintaining competition.\textsuperscript{407} The Board is further charged:

Provided: That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating monopoly or monopolies and thereby restrain competition or jeopardize another carrier not a party to consolidation, merger, purchase, lease, operating contract, or acquisition of control.\textsuperscript{408}

As construed by the Board, the phrase "which would result in creating monopoly or monopolies and thereby restrain competition"...
tion or jeopardize another carrier,” means that “monopoly” signifies the degree of control possessed by the new carrier and that mergers are not prohibited unless the harmful results of the merger are produced by monopoly control.409 In addition, under the McLean Trucking Case the Board may also look to relevant anti-trust statutes for guidelines in formulating and applying its anti-trust policies.410 Consequently, the Board has borrowed certain Clayton Act principles, such as the “substantially to lessen competition, or tend to create a monopoly clause.”411 In the United-Capital Merger Case the Board also introduced the “failing company” doctrine as a criterion.412 The “line of commerce” and geographic market concepts have only recently been applied.413

B. FACTUAL CRITERIA

Strengthening and improvement are the dual themes of the Board’s factual Criteria in merger cases. One important factor in this regard is reduction of costs that will accrue to the new carrier resulting from the merger. It is possible not only to reduce rates to the public with the savings, but also strengthen the carrier’s financial base in order to enable it to provide better equipment, attract more capital, and secure more attractive credit terms.414 Consequently, the Board has refused a merger which would not strengthen the acquiring carrier. For example, Braniff was forbidden to acquire control of an affiliated carrier, Aerovias Braniff, on the ground that the resulting financial drain on Braniff from the unprofitable affiliate would hinder Braniff’s ability to respond to the fast moving requirements of air

409. United Air Lines Transportation Corp. and Western Air Express-Interchange of Equipment, 1 C.A.A. 723, 733-34, 739 (1940). In view of inappropriateness of the traditional definition of monopoly in a regulated industry, viz., the power to exclude competitors or fix prices, a new test has been suggested for air transport: “that degree of control that deprives the public of satisfactory alternative service or threatens, by virtue of the unified carriers economic power and prestige, to prevent the entry or successful operations of rivals.” Comment: 62 Col.L.Rev. 851, 877 (1962).
413. See American-Eastern Merger, supra note 406, at 6-7.
414. See e.g., Flying Tiger-Slick Merger Case, 18 C.A.B. 326, 341 (1954).
transport. On the other hand, if the "failing company" cannot be rejuvenated through other means and the resulting merger will not weaken the acquiring carrier, the Board will reluctantly approve the merger. United's acquisition of Capital and Eastern's merger with Colonial appears to have been the result of such a situation. Capital was faced with imminent foreclosure on its equipment; Colonial was running up ever increasing deficits; neither had the prospect of improvement.

Economies that result from the integration of the merging carrier's systems also have been considered significant but not controlling in determining whether the proposed merger is in the public interest. Savings are likely to result where the two systems consist of short and spur routes since this type of system encourages the use of older and inefficient aircraft. In addition, the use of the equipment is likely to be inefficient. A substantial proportion of time is spent in the relatively expensive maneuvers of taxiing and climbing, and frequent lay-overs preclude maximum utilization of crew and equipment. Seasonal traffic load problems may also be cured. The cases, however, seem to be split on the weight that this factor will be given where there is the issue of geographic disparity. For example, National, a carrier serving Florida and the east coast of the United States, was forbidden to acquire a small local service carrier in the Caribbean on the ground that the carriers' disparate service patterns made it unlikely that an integrated system would develop. On the other hand, when Western acquired Inland, the Board's opinion recognized that the lack of geographic integration was apparent. The Delta-Chicago and Southern case was little clearer in its result. Delta served the southeast primarily; it had one trunk route extending to Chicago. C & S was a Mississippi valley.

416. Eastern-Colonial Acquisition of Assets, 18 C.A.B. 453 (1954); supplemental opinion, 18 C.A.B. 781, 784 (1954). Eastern's control was not approved until certain illegal relationships with Colonial were terminated. Eastern-Colonial Control Case, 20 C.A.B. 629 (1955).
418. See e.g., MacKey-Midet Acquisition Case, 24 C.A.B. 51, 59 (1956); Eastern-Colonial Acquisition of Assets, 18 C.A.B. 784-85 (1954); supplemental opinion to 18 C.A.B. 453 (1954); Acquisition of Marguette by TWA; 2 C.A.B. 1, 14, supplemental opinions, 2 C.A.B. 409 (1940), 3 C.A.B. 111 (1941).
421. 16 C.A.B. 647 (1952).
carrier with routes extending from Chicago to New Orleans. The
carriers were contiguous only along a north-south line, but the
Board approved the merger partly on the ground that the hypot-
eunse of Delta's triangular shaped route pattern would be
strengthened.\(^{422}\)

Route integration's greatest significance, however, does not lie
merely in the economies that it produces. Of greater importance
is the amount of new one-carrier service it incidentally pro-
vides.\(^{423}\) This was considered the critical factor in the Delta-Cd\(S\)
Merger case, discussed supra.\(^{424}\) A desire to implement service
over authorized but inactive routes has also been deemed im-
portant.\(^{425}\) In one case, the strength of new one-carrier service
was so strong that the Board was willing to approve a merger
which resulted in monopoly between Houston and Kansas City,
a major domestic route.\(^{426}\) The effect of the decision, as one
writer noted, was to come close to saying that improved service
could override the statutes admonition against monopoly.\(^{427}\)
Nevertheless, other cases indicate that new service must be placed
in perspective. It will not justify disrupting the system of com-
petitive balance fostered by the Board. For example, two small
but financially sound feeder carriers were not allowed to join
end to end to become a trunk carrier.\(^{428}\) Of course, where there
is necessity for the merger and the Board is assured that trunk-
line traffic will not be diverted, approval may be forthcoming
if the overall proposal can be said to be in the public interest.\(^{420}\)

In determining the public interest the Board's policy of con-
considering the prospective effect of the merger on other carriers
is of equal importance with the doctrine of new service. Termed
generally "diversion," the criterion looks directly to the heart
of the "monopoly control" provision of the Act.\(^{430}\) In the sim-
plest sense of the word "diversion" the Board will look to see

\(^{422}\) Id. at 689-92.
\(^{423}\) Bluestone, Goals of the C.A.B. at 46 (December 1962) [hereinafter cited as Bluestone].
\(^{424}\) 16 C.A.B. at 685.
\(^{426}\) Braniff-Mid-Continent Merger Case, 15 C.A.B. 708, 735 (1952).
189, 221 (1962).
\(^{428}\) North Central-Lake Central Acquisition Case, 25 C.A.B. 156, 159-60
(1957); aff'd sub nom., North Central Airlines v. C.A.B., 265 F.2d 581 (D.C.Cir.
1958), cert. denied, 360 U.S. 903 (1959); Southwest-West Coast Merger Case,
\(^{429}\) Continental-Pioneer Acquisition Case, 20 C.A.B. 323, 329 (1955); West
Coast-Empire Merger Case, 15 C.A.B. 971 (1952); Arizona-Monarch Merger
Case, 11 C.A.B. 246 (1950); Monarch-Challenger Merger Case, 11 C.A.B. 33
(1950).
\(^{430}\) See note 409 supra.
whether the proposed new service will attract so much traffic from competing carriers as to render them incapable of serving their routes adequately.431 In effect the Board seeks to prevent destructive competition which will weaken the affected carriers and upset the competitive balance of the industry, even though the public might initially benefit from some new service. Thus, cases approving mergers where diversion was a factor speak of the diversion as "not serious" or slight.432 Or they proclaim that the diversionary effect is such that will spur a healthy competition between the merged carrier and the affected carriers.433

It is in the cases disapproving merger on the ground of diversion that one gains the fullest picture of the policy of the Board. Reflecting its fear of power manifested in the international cases,434 the Board has refused to approve mergers that would introduce a carrier with superior identity into an area formerly served by the acquired carrier.435 In disapproving American Airlines acquisition of a relatively small local service carrier the Board set forth its rationale in the following language:

It is part of the generally accepted business concept of good will that the company serving the larger number of customers to their satisfaction will on that account enjoy a competitive advantage. . . . American through mere volume and geographical scope of its operations, inevitably holds a position of some favor over its competitors of more limited operation, and this is a competitive advantage apart from that gained by virtue of greater expenditures for advertising and promotion and the various luxuries and extra services which, generally speaking, can be afforded only by the larger organization.436


434. See notes 341-353 supra and accompanying text.


Subsequent approval of a merger of Mid-Continent with Braniff, a relatively weak trunkline carrier, was granted only after the Board was satisfied that the systems of the carriers integrated in such a manner that the new carrier could be strengthened by substantial reduction of expenses, that the public would receive substantial new service on four through-plane routes, and that no serious diversion traffic from other carriers would result.437 Subsequent cases appear to have continued the Board’s fear of the destructive capabilities of the preeminent air carrier.438 For example, in rejecting the proposed American-Eastern Merger the examiner’s report concludes: “There is grave danger that the merged corporation would so preempt the available air-transportation opportunities in the United States that sound economic conditions in the air transportation industry could not be expected.”439

Since no cases have dealt directly with the merger in the complex setting of international aviation, it may be suggested that the decided cases lend themselves only to rough analogies.

Since those pending international cases involving merger also involve general considerations of the problem of competition, it would seem more appropriate to treat them in the context of the current trends and problems of the international air transport industry in the United States.

VI. CURRENT TRENDS

A. ADJUDICATORY METHODS

When one speaks of current trends in a regulated industry, it is best to distinguish between activity within the industry and that of the regulatory process. Too often the rates are manifestly disparate. The situation may be in part the result of the natural phenomenon of administrative lag. However, this does not justify inordinate delay. The goal of an agency always should be to achieve a rate of regulatory activity fairly reflecting the commercial activity in the industry so that the lag will not be prejudicial to applicants before it. Although the history of the CAB

gives little indication that it has achieved this desirable goal;\(^{439a}\) the recent flurry of activity at the agency would seem to indicate that it may have acquired a new vigor.\(^{440}\) No doubt, much of it is due to the sharp prods by Dean Landis and Judge Friendly. Part of it may be attributed to a "new frontier" desire to be "chic" in formulating standards. No matter what the motive may be, the development is salutary; the public and the industry can only be benefitted.

Perhaps the most important substantive result of the new studies has been the proposal of David Bluestone, Chief of Planning for the CAB, for the adoption of a "management by exception" system of regulation.\(^{441}\) This method would emphasize a rule-making approach concentrating on major policy decisions and long-range planning:

> With rapidly growing case loads, the CAB will probably have to shift its major effort from deciding great numbers of individual cases to establishing basic principles and yardsticks under which fewer specific cases can be processed as precedent determining "regulation by exception." It is essential that the CAB adopt basic principles, publicize them, and follow them as precedent and until changed for clearly stated reasons. Stability of policy should be such that the major policy outcome is predictable for a substantial majority of cases.\(^{442}\)

Even with the virtue of stability in mind, Bluestone warns that such a system should not be allowed to degenerate into mechanistic process:

> The CAB should try to establish yardsticks in quantitative terms whenever possible. . . . However, yardsticks cannot be precise mechanical formulas blindly programmed into massive computes for automatic solutions. They are helpful

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\(^{439a}\) The South American route investigation began in the National Route Investigation Case, 12 C.A.B. 798 (1951). A preliminary decision was made in New York-Balboa Through Service Proceedings Reopened, 18 C.A.B. 501 (1954). Not until 1961 did the Board undertake a comprehensive review. Presently the Board has taken 13 years of formal action to solve a problem that was created 17 years ago in the Additional Service to Latin America Case, 6 C.A.B. 857 (1946).

\(^{440}\) Recent studies include Report of the Interagency Committee on Transport Mergers, March 6, 1963; The Interagency Steering Committee Report on International Air Transport Policy, April 24, 1963. (Both hereafter cited to mimeograph pagination.)

\(^{441}\) Bluestone, at 32.

\(^{442}\) Ibid.
in the exercise of human judgment but cannot be replace-
ments for it.\textsuperscript{443}

Finally, Bluestone outlines the mechanics of the “regulation by exception system”:

These measures should help greatly to reduce the number and complexity of CAB cases. They should set reasonable principles and quantitative standards, with realistic margins above and below the standard values to provide zones of reasonable variation. Airlines should be able to act with some reliance on a high probability that actions subject to regulation would morally be approved if they fell within the margins; if they fell outside, the applicant would carry the requirement that he demonstrate the reasonableness of his requested deviation from the standards. This would tend to act as a strong deterrent to the generation of new cases, or to reduce their size and complexity.\textsuperscript{444}

B. Current Route Investigations and Proposals

The new method of adjudication is indeed timely, for there is little doubt that the air transport industry is undergoing the greatest ferment since the period at the close of the Second World War. If recent industry maneuvers are any indication of the future, the proceedings at the CAB can only become more complicated.\textsuperscript{445} In all of the proceedings, however, two basic issues will predominate:

1. To what extent is competition necessary?

2. To what extent may merger be used to accomplish the goals of the Federal Aviation Act?

Resolution of these issues will not be easy. No one should expect a simple solution or even a universally satisfying one. Nevertheless, the vitality of the administrative process within the CAB, and the public interest entrusted to a proper functioning of that process, demand some solution in the very near future.

The necessity for action by the Board is clear. As the opening paragraphs of this article indicate, American carriers in international air transport are faced with vastly different conditions from those which they faced in the post World War II era. Old

\textsuperscript{443} Ibid.
\textsuperscript{444} Id. at 32-33.
\textsuperscript{445} See discussion of current trends in merger \textit{infra}. 

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policies simply do not meet the contemporary needs. The pressures are vastly different. Rather than fostering a carpe diem expansion of American air services, they encourage retrenchment and protection. This tendency, of course, wars with the statutory policy in behalf of "an air transport system properly adapted to the present and future needs of the foreign and domestic commerce" and of "competition to the extent necessary." 446

As the President's Interagency Steering Committee declared, United States influence in international aviation "must be placed on the side of expansion not restriction." 447 However, neither the act, nor the President's Committees, nor any other responsible parties, call for the abandonment of the carriers to laissez-faire competition. The Board has a mandate to protect the carriers individually and to promote the public interest by fostering a system of transport "properly adapted" to the needs of commerce and the national interest. This is a demand for regulated competition, that basic paradox which calls for "the use of competition to produce the results that competition could not produce." 448

The major reason advanced for a policy of retrenchment has been the competition from foreign carriers. They have progressively increased their share of the international market as the share of American carriers has fallen. The disturbing factor is that foreign carrier participation has not been keyed to the increase in travel of foreign nations, but it has continually outstripped the growth in travelers from the carriers' own nations. The figures plainly indicate that it is the American traveler who is contributing to this increase. 449 It is this fact which has led American carriers to call for retrenchment and for a re-examination of Board policies of competition. The reasoning is that the American carrier has enough to do in competing with the numerous foreign carriers without having to compete with another American carrier in the rich domestic market. It follows that a reduction in competition among American carriers is in order if the industry is to be preserved.

The Board and other governmental bodies involved in the problems of international aviation seem sympathetic to the pleas of the industry. However, they have been careful to re-affirm the fundamental United States policy in favor of competition.

447. Supra note 440, at 1.
448. Bluestone, at 32. See discussion of competition supra.
449. Project Horizon 108-110.
The *South American Route Case* investigation was opened to investigate the question of "the need for point-to-point duplication of such services," but the staff study declares that its goal is to see "that balanced competition is to be assured." The report in the *TransAtlantic Route Renewal Case* plainly states: "The staff does not believe that it is time to abandon the historic national policy of regulated competition for a policy of U. S. monopoly in the North Atlantic." The President's Interagency Committee finds that the policy "is sound, and deserves to be reaffirmed." The reason underlying the governmental unity is the strong belief that the air transport system "should continue to benefit from that irreplaceable stimulus to growth brought by competitive enterprise." But an important departure from older policies has been made. Formerly the Board believed that competitive stimulus could only come from competition between domestic carriers in international air transport. The belief was that national loyalties would inhibit access to information that could be used as a "yardstick" to measure the efforts of the American carrier. The staff report in the *TransAtlantic* case adopts a realistic view in urging rejection of the old policy:

Clearly today this earlier reasoning does not support direct point-to-point U. S. carrier competition. As long as U. S. manufactured equipment is superior to foreign equipment, it is even purchased by foreign flags. If foreign aircraft proves [sic] superior in the future, it might become an economic necessity for our carriers to purchase it. As for national loyalties, the blue-ribbon North Atlantic offers ample evidence that this reasoning is now outmoded. In fact since 1950, the U. S.-flag participation has closely paralleled the U. S.-flag percentage of seats available in this market and not the percentage of U. S. citizens in the market. . . . During the past 12 years the foreign flags have demonstrated that they can supply the competitive spur desired.

In viewing the future of air commerce the reports again insist that realism be the principal ingredient in the formulation of

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450. United States-South America Route Investigation, Docket 12895, Order E-19792, August 8, 1961, at 2.
451. Id. at 25.
452. Id. at 17.
453. Supra note 440, at 11.
454. Id. at 2.
456. Supra note 450 at 19-20. See notes 347-48 supra and accompanying text.
new policies on traffic potential. The problems of the industry may be serious, but the policy-matters need not be swayed by an atmosphere of false crisis. Although the United States carriers’ relative share of traffic has been declining as total traffic zoomed at an average growth rate of fifteen percent per year, the important thing is that the absolute amount of traffic carried has remained healthy. The Interagency Committee report states:

A realistic view of the future suggests that the same forces may result in some further decline in the relative share. The same look into the future tells us that, in any event, the U. S. international air carriers should continue to grow at an impressive rate, one considerably greater than the growth rate of our economy as a whole. We are dealing with a U. S. industry growing in size and maturity; not one which is sick and declining and can be expected to fade away to obscurity or death. The good health of the industry seems to be indicated by reports of higher earnings and increased traffic. Pan American’s earnings, for example, rose in 1962 to $2.23 per share from $1.34 in 1961. TWA, which has been beset by a variety of managerial trouble, has continued to show healthy increases in traffic and revenue in its international operations.

Although the study groups have maintained a fundamentally optimistic approach to the future of international air transport, they have been quick to reject any things of the old carpe diem philosophy. The facts of today’s aviation market are different from those of fifteen or twenty years ago, since “the present network of international air routes . . . is rather fully developed.” “Consequently,” one group warns, “expansion of the present routes must be approached with caution.” The emphasis must be on traffic potential; in other words, a bona fide public need for additional service. As David Bluestone states: “The basic advantages of ‘competition’ . . . require that there be effective

457. Interagency Steering Committee Report on International Air Transport Policy, supra note 440, at 3.
458. Id. at 4. This seems to reject the chosen instrument policy.
459. Wall Street Journal, April 23, 1963, p. 10, col. 3; see ibid., May 10, 1963, p. 16, col. 3 where it is reported that the normal seasonal deficit has been halved.
This situation of course will not result where the competition is economically unjustifiable. Accordingly, it has been recommended that, first, there be no "forced flag flying"; and, second, that point-to-point duplication of services be allowed only where the traffic will support at least two profitable jet round-trips per day. It would seem that a return to a policy of public need is long overdue. One can only speculate how much lost time and money could have been saved had the Board adopted and adhered to this approach from the beginning.

The problem remains, however, of resolving the conflicts between the various policies and the factual problems facing the industry—competition, foreign flags, and duplication. The solution that has been generally endorsed is a return to the zonal system of competition. This would allow American carriers to compete with foreign-flag carriers in the principal traffic centers; at the same time they would compete against each other generally serving roughly contiguous zones; point-to-point duplication of American carrier services would be minimized. Perhaps the clearest statement of this policy is found in the report of the Interagency Steering Committee, which declares:

We should continue to aim for a U. S. carrier system in which one U. S. flag carrier has access to world markets on a scale comparable to that of the flag carriers of other major civil aviation powers, and other U. S. carriers continue to be authorized to serve one or more areas of the world in overall competition with this carrier.

The advantage of the system is that while it maintains a balance between monopoly and excessive competition, the benefits of competition will be retained. The carriers themselves will benefit since the system tends to establish "a balance between routes that will permit reasonably equal traffic opportunities." Thus, the routes will "encourage U. S. carriers to exploit their authority to the fullest and thereby recapture to the fullest as large a por-

463. Interagency Steering Committee Report on International Air Transport Policy, supra note 440, at 8.
464. Project Horizon 120; Bluestone, at 41.
466. Interagency Steering Committee Report on International Air Transport Policy, supra note 440, at 12.
467. United States South America Route Investigation, Docket 12895, Order E-17289, August 8, 1961, at 30a.
tion of the market as possible. More importantly the public will receive the benefits of the competitive stimulus. In the North Atlantic routes the staff finds that "the stage would be set for the two flag carriers, Pan American and TWA, not only to pit their full strength against the foreign flags in their exclusive markets rather than against each other, but at the same time to maintain a reciprocal yardstick as to the quality of U. S. flag service and the ability of a U. S. flag carrier to compete with foreign flag operators."

Although zonal competition may seem to have offered an easy solution to the problems of the industry, one hardly needs to emphasize that it is always easier to project a solution than to achieve one. The problem, of course, is that "pioneers" routes are going to be disturbed as the Board attempts to untangle the different routes. Perhaps the best illustration of the complexity of the route cases is the South American case. As the routes are presently certificated, Pan American flies from New York, via Miami, to the east coast of South America; Braniff, from Dallas-Houston, via Miami, to the west Coast; Panagra, from the Canal Zone to the west coast, duplicating Braniff's routes. In addition a system of interchanges supply Braniff and Panagra with traffic from the east coast of the United States. The goal of the CAB has been to reduce the duplicating service on the west coast and to provide independent single carrier service from the eastern United States. The interchanges were introduced as a stop-gap measure, but they have conceded failed. The proposed route system would divide South America into two geographic sectors, A, the east coast and B, the west coast. Route A would enter South America at Curacao; Route B at the Canal Zone. Both sectors would be served by direct service from New York; traffic from the midwest would connect at Miami. Balance between the routes would be achieved by eliminating all point-to-point duplication except for the joint terminus of Buenos Aires, which is


469. Id. at 18.

470. These interchanges are a Pan American-Panagra interchange from New York via Miami, a National-Pan American-Panagra interchange from New York and points south via Miami, and an Eastern-Braniff interchange from New York and points south via Miami. United States South America Route Investigation, Docket 12895, Order E-17289, August 8, 1961, at 15-19 (mimeograph copy).

471. Ibid. See discussion of "route planning" and "strengthening weak carrier" supra.

472. Supra note 470 at 16, 18.

473. Id. at 25, 27.
termed "the Southernmost anchor" of the respective route systems. Each route would also have access to Brazil. Rio would be on route A; and since Rio traffic probably will be diverted as activity increases at the new capital, Brasilia, that city has also been included on route A. Balance would be maintained by placing San Paulo on Route B. Since Delta has had serious difficulty in penetrating the South American Market because of inadequate routes and a lack of "identity" in the market, problems of diversion would be minimized by removing Delta's certification to serve Caracas and points in the Caribbean. In addition, the carriers would be protected from uneconomical service by forbidding them to enter into local service in South America. Only the "historic gateways" would receive American carrier service.

The TransAtlantic report follows a similar pattern. At present there is duplication of services by the American carriers, TWA and Pan American, at London, Paris, Frankfurt and Rome, the principal gateways to Europe. The staff recommends that the best solution to problems on the TransAtlantic routes would be to eliminate duplication entirely by substituting zonal competition. Under this proposal TWA would be certificated to serve Paris and Rome; Pan American, London and Frankfurt. This would be a "healthy" competition "since one carrier would be bidding for the customer to begin his European tour at the nearest major gateway, London, and the other at the most distant gateway, Rome." Although the arrangement would preclude United States flag operations between London and Paris or Rome, or Frankfurt and Paris or Rome, the staff argues that this is a "realistic" step and that the only loss of traffic will be Frankfurt-Rome, which is a small price to pay since there is no "Fifth Freedom" traffic available between the other points.

If the Board wishes to retain a policy of direct competition at major gateways, the staff proposes an alternative system of routes. The test of adequate traffic potential would turn on whether there was enough traffic to support one jet round-trip per day per carrier with 120 seat equipment, a 55 per cent load factor, and 95% performance factor. London, Paris, and Rome

474. Id. at 29.
475. Id. at 28-29.
476. Id. at 28.
477. Id. at 24; local service would be eliminated; Id. at 21, 32.
479. Id. at 23-24.
qualify for duplicating service under this criterion. In addition Frankfurt would qualify as a gateway exception since “hidden trans-Atlantic traffic through Frankfurt is of such volume that that point would also qualify for competitive service under the standard.” A second alternative would allow competitive service only at London and Paris. Under this proposal the focus of American international carrier operations would be shifted to those two points; Frankfurt and Rome would become marginal operations. This would demand that they be served by Pan American and TWA respectively on an exclusive basis. The disadvantage of the proposal is that much of the “beyond-gateway” traffic would be limited. Most of TWA’s service would have to be served at London and most of Pan American’s at Paris because of weak traffic potential for service beyond those points.

In order to maintain healthy, balanced, and economic operations, the staff recommends the elimination of competition at all other European traffic centers, which include Lisbon, Madrid, and Shannon. For example, because Lisbon “integrates more logically” with TWA’s Madrid-Rome and points beyond route, Pan American would be prevented from serving Lisbon on its flights eastward. However, Lisbon would remain a point on Pan American’s South Atlantic route to points in Africa since many passengers desire a European stop-over. In addition the route could gain “support” from European passengers. Even though Pan American has been certificated by the CAB to serve Madrid from San Juan, Pan American would lose those rights because there is no likelihood that the necessary operating rights can be obtained from Spain.

The bright symbol of American supremacy in international aviation, the second around-the-world service, would be scuttled. Because the growth of traffic beyond Cairo will probably be inadequate to provide for a sufficient frequency operation for effective penetration of the market, TWA would lose its routes from Cairo to Hong Kong. The older cases and the recent Trans-Pacific case are rejected by the staff on the ground that they were based upon “a policy involving a greater degree of competition than the policy we now believe is called for in the

480. Id. at 25-26.
481. Id. at 27-28.
482. Id. at 29-30.
483. Id. at 30-31.
484. Id. at 38-39.
Atlantic." The points on the excised route would be transferred to Pan American in order to protect "national defense and other considerations." National defense is also the consideration for affirming route awards at Casablanca and Lagos. As in the South American case, all local service would be prohibited as an economic drain on the primarily long-haul American carriers.

The proposed zonal system of competition may be the solution to the industry's problems. Other answers, however, are being offered. The giant of the industry, Pan American, would remove the clogs on progress by merging with its principal competitors in the two major markets presently under consideration by the Board. This would involve merger with TWA and acquisition of Panagra. There is little doubt that the carrier's major troubles would be dissipated. The trouble with this convenient solution is that, like so many other market-place arrangements, it tends to ignore the public interest in "competition to the extent necessary" and the ban on "any consolidation, merger . . . or acquisition of control which result in creating monopoly or monopolies and thereby restrain competition or jeopardize another carrier. . . ." Thus, the second major issue facing the Board in present proceedings is: To what extent may merger be used to accomplish the goals of the Federal Aviation Act?

As David Bluestone has noted, the Federal Aviation Act contains a built-in paradox: "The use of competition to produce the results that competition could not produce." Of course, he is speaking of a system of regulated competition under the Federal Aviation Act as opposed to a pure system of competition. This system has led the Board to look favorably on mergers, consolidations, and acquisitions of control which lead to improved serv-

486. Instant case at 39.
487. Id. at 38. Defense considerations are a considerable problem. They oppose economical service since they are based on considerations other than traffic potential. See note 463 supra and accompanying text. The stand against "forced flag" flying by the Interagency Steering Committee adds another complication. See note 463 supra. It is ironic that in an attempt to clarify policy standards this committee failed to clarify the meaning of this term. Quaere: Does it refer to meeting foreign competition, national defense, or duplicating service between domestic carriers?
489. Id. at 58-60.
491. See e.g., Wall Street Journal, April 19, 1963, p. 4, col. 2.
494. Bluestone, at 32.
ice. Financial strengthening of carriers\textsuperscript{495} and integration of carrier systems leading to improved service\textsuperscript{496} have been approved as being in the public interest. But the Board has been equally vigilant to see that the degree of control possessed by the merged carrier would not jeopardize other carriers\textsuperscript{497} or deprive the public of the benefits of competition.\textsuperscript{498}

When the industry was composed largely of small carriers, relatively simple criteria would serve in making a determination of the public interest. That situation no longer prevails today with an industry dominated by long-haul carriers. A merger among the giant trunk-line carriers strains the earlier developed concepts. As the problem of competition has stimulated the development of criteria to fit modern circumstances, so also has the problem of mergers of the trunk-line carriers brought forth suggested criteria for testing the public interest value of the proposal. It has been argued for example, that the old monopoly control test may be unsuited. In its place the following test has been suggested: "That degree of control that deprives the public of satisfactory alternative service or threatens, by virtue of the unified carriers' economic power and prestige, to prevent the entry or successful operation of rivals."\textsuperscript{499} Thus, this test would focus on the problem of assuring the public the benefits of an optimum competition between fully effective competitors within the industry. The goal of such a merger would be to make available more new service and to effect a resultant system of balanced competition in the way that a system of zonal competition seeks to achieve a healthy balance among competitors.\textsuperscript{500} Introduction of a carrier of undue economic power or dominance into

\textsuperscript{495} E.g., Flying Tiger-Slick Airways Merger Case, 18 C.A.B. 326, 341 (1954). \textit{But see}, Braniff Airways Inc.—Acquisition of Aeronavias Braniff S.A., 6 C.A.B. 947, 956-59 (1946).


\textsuperscript{497} American Airlines Inc.—Acquisition of Mid-Continent Airlines, Inc., 7 C.A.B. 365, 377-79 (1946); Acquisition of Marquette Airlines by TWA 2 C.A.B. 1, \textit{supplemental opinion}, 2 C.A.B. 409 (1940); 3 C.A.B. 111 (1941); United Airlines Transportation Corp., Acquisition of Western Air Express Corp., 1 C.A.A. 739, 750 (1940); \textit{cf.} Pan American World Airways Inc.—Domestic Route Case, 11 C.A.B. 852 (1950).

\textsuperscript{498} See, \textit{e.g.}, American-Eastern Merger Case, Docket 13355, November 27, 1962, at 33-38; Coast-Empire Merger Case, 15 C.A.B. 971, 976, 979, 998 (1952).


\textsuperscript{500} Bluestone, at 45, 46.
the markets of carriers not a party to the merger would probably be prohibited.501

The problem with the proposed Pan American mergers is that they would achieve neither the goals of competitive service—they would virtually abolish it—nor those of merger. In fact, they would twist the merger issue around to something quite different from what it is intended to be. In effect it would become: To what extent can mergers be used to wreck the Board’s attempts to provide a competitive balance?

An inspection of the merger proposals and their effects on the markets indicates that wreckage is exactly what the staff studies of the routes would become. In South America, for example, the Board has sought to provide a competitor, independent of any link with Pan American, to serve the west coast of South America from a mainland terminus at New York City. In order to do this the Board is faced with the necessity of combining the present west coast routes of Braniff and Panagra. Nevertheless, Pan American proposes to purchase the fifty percent interest of W. R. Grace in Panagra.502 Although Pan American has disclaimed any intention of merging with Panagra and has announced that it will continue to operate Panagra as a separate entity, it takes the simplest mathematics to figure out that Panagra would be Pan American’s wholly owned subsidiary. One need hardly pause to conclude that the introduction of Pan American’s undiluted economic power into the west coast market would break the frail hold that Braniff presently has. In effect Pan American would be competing against itself—a situation only one step from the chosen instrument. This would be a complete negation of the Board’s fundamentally sound policy of maintaining an independent carrier in the South American market that could be an effective competitor against Pan American.503

501. Supra note 497. The Interagency Committee Report, supra note 440, re-affirms the policy against the chosen instrument on the traditional economic grounds and apparently because of a "fear of power" that the monopoly carrier would intrude in the implementation of foreign policy. "Government flexibility in implementing international, political and aviation policies would be reduced if the interests of any single carrier became, over the long run, too dominant a factor in U.S. aviation policy." Ibid. at 11. See 15 S.C.L.Rev. 892, note 127 and accompanying text on the 1944 C.A.B. memorandum on carrier intervention in diplomatic negotiations.


503. Braniff has countered the Pan American maneuver by offering to buy the interests of Pan American and W. R. Grace in Panagra. Wall Street Journal, April 30, 1963, p. 2, col. 3. Although Pan American and Grace have insisted that the proposal is a high-minded attempt to save the industry from destructive foreign competition, one must wonder just how lofty their motives are. The reaction of the President of W. R. Grace Co. to the Braniff offer was the fol-
A similar problem exists in respect to the North Atlantic routes. Once again Pan American has proposed to eliminate its principal competitor, TWA, through a merger.\textsuperscript{504} High purpose and an atmosphere of crisis dominate the press releases of the two companies. Their object is to provide effective competition against foreign carriers.\textsuperscript{505} Their means is justified, according to TWA officials, "as a question of survival."\textsuperscript{506} Glowing statements over cost, savings and more efficient use of equipment issue almost daily. For example, it has been claimed that the combined company would have a $19,000,000 profit the first year of operation.\textsuperscript{507}

The trouble with the barrage of expertly composed reports is that they have failed to persuade any one other than the authors that there is a high purpose crisis sufficient to justify a return to the chosen instrument policy through the merger route. Certainly, reports from the industry itself belie the idea of crisis, or that the merger was a "question of survival." Pan American's earnings were up over $1.00 per share last year, and 1963 bookings are up 10 per cent over last year.\textsuperscript{508} The amazing thing about TWA's losses is that they all occurred on the domestic routes; it has been the earnings from international routes that reduced the heavy deficit. The fact that much of TWA's troubles stem from bad management seems to have been overlooked.\textsuperscript{509} It would seem that the alleged $19,000,000 profit of the combined company\textsuperscript{610} is an illusory saving since neither carrier has demonstrated any incapability in the international field. There is no

\textsuperscript{504} E.g., Wall Street Journal, May 5, 1963, p. 2, col. 1. Since this article was completed the Board has tentatively rejected the Pan-Am bid to buy the rest of Panagra on the ground that \S\ 411 of the Federal Aviation Act of 1958, 49 U.S.C.A. \S\ 1381 (1958), outlawing unfair competition had been violated through existing interlocking relationships since "Pan American through use of its negative control of Panagra appears to have prevented that carrier from instituting any competitive service to the east coast whenever Panagra proposed to take such action." Pan American-Panagra Acquisition Case, Dockets 14452, 14641, Order E-19789, July 9, 1963, at 5.

\textsuperscript{505} Ibid.

\textsuperscript{506} Ibid.

\textsuperscript{507} Id., December 24, 1962, p. 3, col. 2.

\textsuperscript{508} Id., August 27, 1962, p. 20, col. 1.

\textsuperscript{509} Id., April 26, 1963, p. 22, col. 5.

\textsuperscript{510} The present management of TWA is seeking to permanently bar Howard Hughes from control of the airline. Hughes owns 78\% of the stock, which has been placed in a voting trust as a result of insistence of creditors. The Hughes interests have counterclaimed for damages on account of waste and mismanagement. In addition the Hughes interests have pleaded that the district court does not have jurisdiction to divest them of control; the C.A.B., they assert, has primary jurisdiction. See Id., August 27, 1962, p. 20, col. 1; Id., May 3, 1963, p. 4, col. 3; Id., May 6, 1963, p. 13, col. 2; Id., May 15, 1963, p. 19, col. 4.
genuine reason to apply a "failing" carrier doctrine to either of the carriers.

Another problem with the merger is that the benefits to the public in terms of new service are virtually non-existent. There is probably little public need for new direct service to Europe on TWA's domestic routes, since gateway access already is provided to the principal points on the continent. Moreover, it is doubtful whether direct service from many points in the interior United States would be such a substantial improvement over connecting service as to warrant reversal of basic policies of competition.511 Assuming that there is sufficient traffic to support such service, one wonders whether it would be in the public interest to introduce a giant carrier into the domestic markets. This is a real problem because TWA has clearly stated that it would retain its domestic routes.512 Nevertheless, the teaching of the American Airlines—Mid-Continent merger case513 and the Pan American—Domestic Routes Case514 is that introduction of an unduly dominant carrier into the domestic market would severely impair the competitive balance among the domestic carriers.515 That this would mean an acceptance of the forbidden chosen instrument policy is explicitly recognized and rejected in the Domestic Route Case.516 It may well be that administrative cases generally cannot be expected to have the precedential value that a common law property case has, but it would seem that this is certainly one time where the previous cases not only set forth the criteria governing the administrative resolution but also control it. Whether they will, only time can tell. And at the CAB, that can really take time.

VII. CONCLUSION

When the work of a decision making organization is being assessed, there is great temptation to stress the difference in result as the critical factor. Another similar approach tests the instant case by juxtaposing a felicitously phrased statement of the holding of an earlier "correctly" decided case. By the simple process of deduction, error can be inferred in the suspect deci-

515. See American-Eastern Merger Case, supra note 498, at 41-43, 64, 66-68.
sion. Both methods are easy to perform, but neither truly lends itself to accurate analysis. When the object of analysis is an administrative agency decision, it is apparent that these facile methods are even more inappropriate, for the agency decision encompasses vast numbers of economic variables. In this field of law it is the unwary critic who places great weight upon an apparent difference in results.

Nevertheless, the goal of every decision making process is to decide like cases in a like manner. As Judge Friendly and others have persuasively argued, there is no reason to exempt an administrative agency from this fundamental requirement of human reason. The courts attempt to achieve this desired uniformity of result through establishments of rules of law. Judge Friendly urges that the agency can achieve reasonable uniformity through the use of definitions of agency policy standards, or administrative criteria. Analysis of the decisions would proceed somewhat in the same way that legal decisions are criticized. The problem, of course, is the factor of the economic variables. They may well preclude this type of analysis. However, as Professor Jaffe has observed, this should not deter critics from insisting on an effective operating rationale. It is here that the study of administrative standards becomes truly important.

It must be emphasized that this survey has not attempted to weigh the economic issues involved in economic air transport in the manner of a professional transportation economists. Such an investigation is beyond the scope of this study. But it is important to note that the objective signs of the international air transport industry indicate that the domestic carriers in the field are becoming increasingly healthy. This is as much a tribute to the Board's policies on entry as it is to the vitality of the carriers. Perhaps the Board's decisions could have taken better advantage of the economic situation. However, this should not be allowed to detract from the CAB's achievements in selecting carriers who were truly fit, willing, and able to enter international air commerce. The Board's early decisions did launch an extensive United States flag operation which has suffered no economic fatalities. Moreover, the carriers have survived numerous adverse influences ranging from presidential interference in the basic route pattern to extensive foreign carrier competition. In

the face of the serious economic problems that have faced the industry since the end of World War II, this is a remarkable record.

An evaluation of CAB policies must also credit the Board for its earlier efforts at route planning. The 1944 memorandum that set forth the basic international routes was probably the most significant document in the history of the industry.\textsuperscript{520} This memorandum laid out a competitively balanced system in advance of the adjudicatory proceedings. In the subsequent hearings the effect of this move was to emphasize the public convenience and necessity for service over the route and thereby to keep the public interest from being lost in the mass of factors involved in selection of the carrier for the route. Flexibility was retained since the route integration arguments of the carriers meant that some modification of the proposed routes would take place. If the method was followed, it could prevent happenstance growth—the unsettling feature of the expansion of the domestic route systems. Presidential interference again hindered full effectiveness of Board policy. Nevertheless, the Board was able to approach its goal in the early cases. Its abandonment in later cases for a trial-and-error patchwork system which dragged along case by case is one of the unexplained wonders that abound in the jungle of administrative agency decisions. The revival of the route planning approach in the current investigations is long overdue.

The most controversial CAB decisions involve the mystic phrase "competition to the extent necessary". Many critical broadsides have been discharged justly at the Board for its failure to define its policies on competition. Jaffe declared that "in the course of its short history the Board has shown an almost incredible flexibility in moving toward and away from competition."\textsuperscript{521} Judge Friendly scornfully declared: "The Board's history is a prime example of an agency's failure to grasp the nettle which can make a relatively easy problem hard."\textsuperscript{522}

One may doubt whether a solution to the problems of competition is "relatively easy." There is substance to the charges of the critics, but it seems more accurate to say that the Board's failures to define its policies on competition made a hard problem ultimately more difficult to solve. The proliferation of car-

\textsuperscript{520} Was this the "Judge Cooley opinion" called for by Judge Friendly? See Friendly at 885.
\textsuperscript{521} Jaffe, Book Review, 65 YALE L. J. 1068, 1074 (1956).
\textsuperscript{522} Friendly, at 1097.
riers on domestic routes is one example. In the international field a major problem is the CAB's failure to define policies directly affecting competition within a context of competition. The conflicts of interest policies are a ready example. The fear of tying up one carrier with an exclusive sales agency probably has a strong kinship with the policy against excessive control or dominance in the field of mergers. The policy against mixing local and long-haul service is probably related to the "benefits to the public" policy favoring domestic carrier competition. Certainly, the stand against the chosen instrument bears strongly on the proposed mergers among the domestic carriers in international air commerce. By their silence, Board decisions indicate no awareness of any harmony among the various policies. Nevertheless, every time a decision involving one of these criteria is made, it directly affects the competitive status of the industry.

Another area where the CAB has been careless of standards is the decisions involving initial service over a route. The goal of the decision should always be to provide the service needed by the public. Diversion from other carriers, which might unbalance the route system, individually and ensemble, should be avoided. The primary ingredient of such a decision is the Board's estimate of traffic potential. Although the Board might faithfully follow the criteria for determining the potential, in too many decisions the Board's exercise of expert judgment was unduly influenced by a blithe attitude of "optimism." The CAB's avid pursuit of the second round-the-world service provides many excellent examples of the hazards of this brand of reasoning, for the danger always remains that the Board in a burst of enthusiasm will overextend the carriers. Where the selection of a carrier has been the issue, the CAB's record is notorious. The color of title cases indict themselves. The unfortunate feature of this type of ad hoc decision making is that the effect on policies of competition seems to have been overlooked. Were the Board's reasoning on "color of title" to stand, both the public need for the best service available and a carrier's ability to provide that service would be completely ignored. Even the necessity to maintain balanced route systems would become only an inconsequential factor.

Where duplicating service has been the problem, the Board's record is somewhat brighter. Because the zonal or gateway system of competition severely limits duplication, the Board has

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523 One wonders whether the Board might not have unified and clarified its policies with "a rule of reason" approach similar to that of the traditional antitrust laws.
avoided a proliferation of domestic carriers on the international routes. Of course, the foreign carriers provide an abundance of duplicating service. In regard to them the CAB has shown an increasingly realistic attitude. In the early days of international aviation it was no doubt reasonable to insist that the benefits of competition would not accrue to the American traveler unless American carriers were competing directly on the foreign routes. In that age of nationalism, national loyalties probably would have deprived the public of competition even though there might be duplicating service offered. For this reason the chosen instrument was rejected. The experience of the postwar years has demonstrated that problem of the national loyalties is not so severe as it was once thought. Accordingly, the Board has relaxed its policies on duplicating service in the belief that competition with the foreign carrier will stimulate improvements in service. Nevertheless, the Board has wisely refused to consider installing a chosen instrument system. Domestic carrier duplicating service may not be needed to provide competitive stimulus, but there is still a strong argument in behalf of zonal competition.

If the Board is to be censured for ignoring public need in route award cases, it must be commiserated in certain aspects of the determination of public convenience and necessity. At the same time that the Federal Aviation Act directs the CAB to mold a national system of air transport and competition to the extent necessary, it plainly orders the Board to ignore the demands of economy in several vital respects. The Act makes several special provisions for improving mail service. The Act also directs that national defense needs be considered. That the Board should have difficulty reconciling the policies is inevitable. Mail pay at least helps the carrier meet operating costs, but there is not compensation for meeting national defense needs. Presently, the Board has a definite program to reduce any mail pay in the form of subsidies. Yet no one would deny the desirability, even the necessity, of having American flag service in the developing nations of the world. The problem is that these places have such limited traffic potential that profit making service is presently impossible. One wonders whether the Board wisely might not consider a contract incentive system to aid the extension of American flag service.

Another factor mitigating against an economically sound competitive system is the problem of presidential interference. Case after case demonstrates that the clearest stated policies are use-
less when a third person has unfettered power not only to ignore the decision of an expert body but also to substitute judgment for it. Much of the present trouble with the South American routes can be traced to presidential certification of duplicating service on the West Coast. The problem of excessive duplicating service on the North Atlantic routes can also be attributed to a fateful White House letter installing duplicating service at all major gateways. Similarly, the jumble of Pacific route investigations is the result of presidential action. It is ironic that the Board's task in each of recent route investigations has been to restore the status quo.

It is apparent that many of the CAB's problems are not its own making. The statutory commands are confusing and contradictory. Presidential interference hinders comprehensive regulation. But these clogs in the administrative process do not excuse the Board's fundamental failure in the exercise of its duties. A failure to establish administrative standards is only symptomatic of a lack of initiative in seeking administrative as well as legislative solutions to the problems of international air commerce. Too often the Board has pretended that a problem did not exist, or it has delayed action beyond reason in the hope that the worrisome thing would go away. The effect has only been to postpone action. When a remedy is finally proposed, it may be nothing more than could have been done earlier; or worse, it may be such strong medicine that some of the carriers may expire. That a lack of initiative is the Board's greatest flaw is underscored by the few occasions that it did take imaginative action. In the New York-Mexico City case it indicated that presidential interference need not freeze the route system.524 Moreover, that decision also suggests that the Board need not defer to a presidential order where no public need has been demonstrated. The current route investigations confirm this.

Thus, what the CAB really needs is imagination, vigor, and the courage to implement solutions to industry problems. It is here that the force of Judge Friendly's criticism truly applies. Administrative criteria and policy statements can never overcome intellectual lassitude, for statements of policy too easily become another series of Washington platitudes. The use of administrative criteria in decisions can degenerate into a label pasting process designed to perfect an appeal-proof decision.525

Only the adoption of a critical attitude by the decision-making process can prevent this.\textsuperscript{526} Agency personnel are the first who must display this quality, but other members of the legal community must also meet the standard. This is the crux of Judge Friendly's argument. In a strongly worded appeal he declares:

Yet, with a few distinguished exceptions, the law teachers and the law reviews have not yet begun to do for the administrative agencies what, for many years, they have been doing for the courts. . . .

Ought not the law schools recognize more fully that administrative agencies are creating, or should be creating, a body of substantive law requiring constant critical analysis, almost as important as that produced by the courts? The day when commissioners become concerned how their work in defining the general standards laid down by the legislature will be dissected in the law reviews, professors and students, as judge's decisions applying decisions regularly are, will be a good day for administrative adjudication.\textsuperscript{527}

Here lies the solution to the problems of the administrative process—ceaseless, unrelenting criticism and a concerted demand from the legal world for a rational decision. In the area of foreign route award decisions, where there is no judicial review, the adoption of the critical attitude is an imperative necessity. Today the industry stands rudderless. With a sense of direction and purpose it could achieve preeminence.\textsuperscript{528}

\textsuperscript{526} See Bluestone at 32.
\textsuperscript{527} Friendly at 1318.
\textsuperscript{528} Since this article was completed, the C.A.B. has once again blatantly engaged in the very activity for which it has been most severely criticized. The Board tentatively rejected the American-Eastern Merger by a three to two vote. When American then withdrew its application, the Board dismissed the case as moot and stated that it would issue no formal opinion on the merits of the case. Thus, C.A.B. merger policies remain in a state of dark confusion and the industry is left without guide lines. Wall Street Journal, July 15, 1963, p. 22, col. 1.