An Examination of the CAB's Merger Policy

Arthur H. Travers, Jr.
University of Colorado Law School

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Only a few years have passed since the Civil Aeronautics Board’s merger policy was handed its stiffest challenge in the form of three mergers which, if consummated, would have done nothing less than revolutionize the structure of the airlines industry. In the early 1960’s United Air Lines, then the nation’s second largest domestic air carrier, absorbed Capital Airlines, the fifth largest carrier, with the result that United passed American Airlines to become the largest carrier.1 In the wake of this, American and Eastern Air Lines, the fourth largest domestic carrier, presented the Board with a merger plan, and Pan American World Airways, the largest American international carrier, entered into a merger agreement with TWA, the nation’s third largest domestic carrier. Judged from the viewpoint of development of policy, all of this feverish activity ended not with a bang but a whimper. The Board’s approval of the United-Capital merger rested on the ground that the only alternative to merger was the complete financial collapse of the nation’s fifth largest domestic air carrier, a situation unlikely to recur.2 The American-Eastern proposal was withdrawn after an adverse report by Examiner Ralph L. Wiser,3 and the announcement by the Board that a majority of its members were prepared to agree with the examiner.4 The Pan-American-TWA agreement was terminated and their proposal withdrawn without a decision by the Board or examiner.5

These three cases, then, raised more questions than they answered. The absence of a Board determination in two of the cases, and the extraordinary factual circumstances of the third, make them of less importance in retrospect than they bade fair to be when they were current. This anticlimactic end, however, in no way diminishes the value in examining the CAB’s policy and standards for decision regarding airline mergers. In this endeavor, perhaps the perspective of a few years will do us no harm.

3 The Board’s decision relied heavily on the so-called “failing company defense” first articulated in International Shoe Co. v. FTC, 280 U.S. 291 (1930), a case involving § 7 of the Clayton Act. The Court of Appeals found it unnecessary to apply that doctrine in its affirmance of the Board. See Northwest Airlines, Inc. v. CAB, 303 F.2d 395, 402 (D.C. Cir. 1962).
6 Ibid.
I. THE EVOLUTION OF FEDERAL POLICY

A. Policy Prior to 1938

Systematic federal involvement in commercial air transport really began with the Air Mail Act of 1925, also known as the Kelly Act,\(^6\) but since the compensation offered air carriers\(^7\) and the short terms of the contracts discouraged all but a few bids, an immediate amendment of that act was required.\(^8\) Neither the amendment of 1926\(^9\) nor that of 1928\(^10\) established a significantly different mode of compensation, although the latter bill substituted route certificates of no more than ten years duration for short term air mail contracts. With the McNary-Watres Act of 1930,\(^11\) however, Congress substituted a space-mileage technique for computing the compensation to be awarded airmail carriers and called for competitive bidding as the basis for awarding routes. To the extent that this formula made the actual mileage flown by the carrier a significant factor in determining the amount of that carrier's compensation, it was more closely correlated to actual costs than the prior formula;\(^12\) nevertheless, the use of available space instead of mail actually carried as the other factor enabled the Postmaster General to initiate a program of subsidizing air carriers by awarding contracts for routes which generated little or no airmail.\(^13\)

Despite the fact that the McNary-Watres Act required competitive bidding for airmail contracts, the Postmaster General instituted a series of “spoils conferences” among the various carriers at which the routes were allocated among the carriers represented.\(^14\) Moreover, a movement toward combination had begun in the late 1920's resulting in the growth of three massive systems of interlocking corporations and holding companies.\(^15\) By 1934, when the facts

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\(^6\) 43 Stat. 805 (1925). Prior to this enactment Army flyers had carried the mail since 1918. DAVID, THE ECONOMICS OF AIR MAIL TRANSPORTATION 12 (1934).

\(^7\) The Act fixed the postage rate at not less than 10\(^\circ\) per ounce and limited the payment which could be made to a carrier to 4/5 of this revenue received from the air mail. Air Mail Act of 1925, §§ 3, 4, 43 Stat. 805. The act contained no provision respecting the length of the contracts to be awarded, but left the matter up to the Postmaster General.

\(^8\) See Air Mail Docket No. 1, Air Mail Compensation, 206 I.C.C. 675, 728 (1935). It is interesting to note, however, that the five contracts which were let under the Kelly Act went to companies which would one day become parts of the American, United, and TWA systems. See STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., REPORT ON AIRLINES 9 (Comm. Print 1957).

\(^9\) 44 Stat. 692 (1926).

\(^10\) 45 Stat. 594 (1928).

\(^11\) 46 Stat. 259 (1930).

\(^12\) Cf. KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 62-63 (1951). The major complaint about the weight-revenue approach had been that it afforded a carrier essentially the same compensation regardless of the distance he transported a pound of mail. Address of Postmaster General Brown, 4 U.S. DAILY 3129, 3138 (1930), quoted in RHYNE, THE CIVIL AERONAUTICS ACT ANNOTATED 21, n.45 (1939).

\(^13\) KEYES, op. cit. supra note 12, at 62-63. The author takes the position that such a subsidization program was not clearly contemplated by Congress. Id. at 60-62. Other commentators have divined a Congressional policy to award subsidies. DAVID, op. cit. supra note 6, at 161. At this point in time the brute fact that the federal government initiated a program of subsidization seems far more important than precisely how this program got started.

\(^14\) See RYCHMONT, REGULATION AND COMPETITION IN AIR TRANSPORTATION 5 (1961).

\(^15\) These systems were United Aircraft and Transport Corporation, the General Motors-North American complex, and the Aviation Corporation of Delaware, receiving approximately one-third, one-third, and one-fourth respectively of all air mail payments. Ibid. These systems were not limited solely to the carriage
about the Postmaster General's administration of the act came to light, he had managed to place twenty-one of twenty-five airmail contracts, amounting to about ninety per cent of the business, with carriers connected with these three systems. Although the public furor which greeted the publicizing of these facts induced President Roosevelt to summarily cancel all existing airmail contracts and order the Army to fly the mail, the exorbitant cost in lives and equipment of the Army's operations soon spurred the government to return to private carriage of airmail.

The Air Mail Act of 1934 took this step and, more importantly, established the first significant federal economic regulation of aviation. The act prohibited mergers, common control, or common ownership of competitive routes and more or less effectively divorced carriers from aviation equipment manufacturers. It did not, however, afford much federal control over route patterns since it allowed subsidized carriers to set up uneconomical "off-line" routes and unsubsidized carriers to establish any routes they liked. An amendment in 1935 prohibited an airmail carrier from establishing service off its airmail route if that service would "in any way compete" with the service "available on another air mail route." By giving this amendment an expansive reading, the Interstate Commerce Commission, which then passed on applications for off-line routes, effectively tied all further expansion by established air carriers to the acquisition of an airmail contract for the route in question. At the same time there were no restrictions on new carriers having no airmail contracts, who remained free to offer competition to the subsidized carriers—a fact which caused some unhappiness among the regulated and the regulators.

Thus at this early stage several basic elements of federal policy toward air transportation, as well as certain structural and behavioral traits of the industry,
had already emerged. The airlines industry had already exhibited both a
tendency toward concentration, which the Postmaster General encouraged, and
a tendency to develop more or less permanent vertical ties with suppliers of
equipment and materials. At the same time that each line jealously guarded
what prerogatives it had, each also sought to enter the protected markets of
the other. The industry was constantly chafed by the failure of the government
to bar the entry of unsubsidized carriers while subsidized carriers were re-
stricted. For its part, the federal government had become committed to a
policy of promoting the economic growth of the industry through direct sub-
sidies. Among subsidized carriers the government had taken to regulating
the amount of competition on individual routes by controlling entry, but
promoting competition in the industry as a whole by arresting and, if possible,
reversing the trend toward concentration. As a means to this end, vertical ties
between suppliers and carriers were ordered dissolved. All of these elements
would persist until the present day.

B. The Civil Aeronautics Act

Even during the Army’s ill-fated venture into the air carriage business in
1934, Senator McCarran had introduced a bill calling for the comprehensive
regulation of air transportation by the federal government.26 During the next
four years no less than thirty-one bills relating to air transportation were in-
troduced in Congress.27 A major impetus behind this burst of interest was the
rocky financial condition of the industry. There seems to be general agree-
ment that, although the industry had suffered losses before, those sustained
during the 1934-1938 period were especially heavy.28 Colonel Edgar S. Gorrell,
the President of the Air Transport Association and leading spokesman for the
industry in 1938, estimated that fifty per cent of the one hundred and twenty
million dollars in private capital invested in air transportation had been lost.
The resulting loss of confidence by investors made it exceedingly difficult for
the airlines—especially the smaller carriers—to obtain capital for future needs.29
Although recent observers have cast doubt on the idea,30 the contemporary ex-
planation of the industry’s plight relied heavily on the notion of excessive or
“cutthroat” competition. Governmental construction of terminal facilities and
the lack of any need to build ways lowered the amount of capital that a poten-
tial entrant would need to enter the field of commercial aviation. As Gorrell

26 S. 3187, 73rd Cong., 2d Sess. (1934).
27 A comprehensive survey of these bills may be found in Rhyne, op. cit. supra note 12, at 189-220.
The number is a bit of an overstatement since the bills varied widely in their coverage, and many bills
duplicated prior bills in whole or in part. Nevertheless, the amount of interest in the subject is striking.
30 Caves, op. cit. supra note 15, at 385-86, notes that the number of domestic passenger-carrying air-
lines had declined from forty in 1930 to around twenty or twenty-five in 1938. This figure would include
all the established lines represented by Colonel Gorrell. Nineteen domestic trunklines were certificated
in 1938 under the “grandfather clause” of the Civil Aeronautics Act, Pulda, Competition in the Regu-
lated Industries—Transportation 192 (1961), and this, by simple mathematics leaves at most six
interlopers with second-hand aircraft. They must have been awfully determined. Professor Caves attributes
the losses to uneconomic expansion by established airlines.
told the House Committee on Interstate and Foreign Commerce, "It is literally possible to institute a common-carrier service by renting a second-hand plane, many of which are available, and calling up an airport to make arrangements for landing and departure."® While it might appear that these low capital requirements would go a long way toward ameliorating the difficulty which the industry was experiencing in getting funds,® Colonel Gorrell explained that adequate air carrier service required a substantial amount of money; only marginal service could be obtained at cut-rate prices.®

In addition to their financing problems, the smaller carriers seemed threatened from another direction. The Air Mail Act of 1934 had contained unqualified prohibitions against a person holding an air mail contract having an interest in any other firm engaged in any phase of the aviation industry® and against the merging of air mail contractors competing on parallel routes.® Yet so far as concentration within the airlines industry was concerned, much of the damage had already been done.® Furthermore, the Postmaster General continued to approve mergers between competing airmail carriers in the face of the act's prohibitions,® thus increasing the degree of concentration within the industry. By 1938 the four largest carriers accounted for eighty one and nine-tenths per cent of the revenue miles flown.® In the Congressional debates on the Civil Aeronautics Act, this action by the Post Office was denounced® and the danger to the smaller carriers posed by the large systems dramatized.®

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® 1937 House Hearing at 65-66.
® Keyes, op. cit. supra note 12, at 87.
® 1937 House Hearing at 66. Colonel Gorrell also testified that this cutthroat competition was causing a deterioration in air safety standards as well. Id. at 77-78. The exact weight to be given this safety factor in assessing the scheme of economic regulation (as distinct from the safety regulations) of the Civil Aeronautics Act is hard to judge. Certainly Congress was cognizant that unbridled competition, particularly if manifested in cost reductions, could have serious adverse repercussions on the industry's safety standards. See Hearings on Future of Irregular Airlines in United States Air Transportation Industry Before a Subcommittee of the Senate Select Committee on Small Business, 83d Cong., 1st Sess. 14 (1953), quoted in Richmond, op. cit. supra note 14, at 8. Although it may be said that such a problem might be solved directly through comprehensive safety regulation without the necessity of regulating competition, it may have been felt that the stakes were too high to permit conditions which encouraged scrapping on accident prevention since a certain percentage of hazards would probably escape detection. Nevertheless, it has been pointed out that all forms of transportation undergo a sort of "life-cycle" and that this characteristically involves a period of intense competition. It is at this point that the government customarily imposes comprehensive regulation of the industry. See Fair & Williams, Economics of Transportation 39-42 (rev. ed. 1959). It seems to make no difference whether intense competition can create extreme safety hazards or not. Moreover, other important industries have undergone periods of bitter competition during their expansion, and this could create hazards in some cases. See Lanzillotti, The Automobile Industry, in The Structure of American Industry 311, 312-22 (3d ed. Adams 1961). Yet the government does not step in with regulation. It may therefore be assumed that the regulatory pattern would be essentially the same had the safety problem been absent.
® For example, Representative Boren declaimed:
The independent air lines are compelled to fight for route security, and it is a defensive war that compels the interest and respect of the American government. Some great airlines are grasping for monopolies on all profitable route territories, and their motives are sufficiently sinister to the public interest to demand the government's attention. Public interest demands that American air...
The scheme of economic regulation embodied in the Civil Aeronautics Act of 1938 was the Congressional response. The act extended federal control of entry into air transportation by requiring all air carriers—not just those with air-mail contracts—to refrain from engaging in air transportation unless they had been authorized to do so by a certificate issued by the Civil Aeronautics Board, and these certificates were to be issued only if required by the public convenience and necessity. The so-called “grandfather” clause called for automatic certification of all air carriers operating prior to May 14, 1938, thereby establishing existing route patterns as part of the foundation for further regulation. Abandonment of any certificated route or transfer of a certificate was permitted only with Board approval based on a finding that such action would be consistent with the public interest. The Board was given authority to alter, amend, modify, or suspend a certificate if such a step was required by public convenience and necessity. All carriers were obligated to provide safe and adequate service upon request, at just and reasonable rates, without undue discrimination. If, after notice and hearing, the Board determined that any carrier’s rates were unjust, unreasonable, or unduly discriminatory, it was empowered to set a lawful rate or prescribe limits within which the carrier might set its own rate. Subsidies were available in the form of airmail payments, thus filling the immediate need for capital and presumably facilitating the future acquisition of capital by a government underwriting of the industry. Unfair or deceptive practices or unfair methods of competition were prohibited outright. Mergers and other integrations, as well as loose unifications like

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transportation...be prepared as an industry instead of being destroyed by accumulative monopolies in its infancy.

83 CONG. REC. 6406 (1938). Senator McCarran also expressed concern over the future of the smaller carriers. Id. at 6849.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(a), 52 Stat. 987. Actually the name of the regulatory agency with jurisdiction over economic regulation was originally the Civil Aeronautics Authority; it was renamed the Civil Aeronautics Board in 1940. Reorganization Plan No. IV of 1940, § 7, 54 Stat. 1235. In 1958 the Civil Aeronautics Act of 1938 was repealed, but its provisions regarding economic regulation were re-enacted by the Federal Aviation Act of 1958, 72 Stat. 731, as amended 49 U.S.C. §§ 1371-87 (1964), without substantive change. See S. REP. No. 1811, 85th Cong., 2d Sess. 15 (1958); H.R. REP. No. 2360, 85th Cong., 2d Sess. 15 (1958). Congress, however, expressly stated that this re-enactment did not necessarily constitute an endorsement of any administrative or judicial interpretations of the re-enacted sections and that it should be regarded as a “neutral factor” in future interpretations of the law. See H.R. REP. No. 2556, 85th Cong., 2d Sess. 90 (1958). There were certain changes in the allocation of business made in both 1940 and 1958, but none of these involved the economic regulation of the industry which has always been lodged in the same independent regulatory agency. This will be referred to in the text as the Board even if the reference is to that two year period when it operated under a different name. For those who desire more data on the administrative reorganization, a short account appears in Richmond, op. cit. supra note 14, at 15.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(a)(1), 52 Stat. 987.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(e)(1), 52 Stat. 988.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(k), 52 Stat. 990.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(i), 52 Stat. 989.

4 Civil Aeronautics Act of 1938, Ch. 601, § 401(h), 52 Stat. 989.

4 Civil Aeronautics Act of 1938, Ch. 601, § 404(a), (b), 52 Stat. 993. Section 403 required all carriers to file tariffs with the Board showing all rates, fares, and charges. This was to be kept open for public inspection. 52 Stat. 992 (1938).

4 Civil Aeronautics Act of 1938, Ch. 601, § 1002(d), 52 Stat. 1018.

4 Civil Aeronautics Act of 1938, Ch. 601, § 406(a), 52 Stat. 998.

4 Civil Aeronautics Act of 1938, Ch. 601, § 411, 52 Stat. 1003.

4 Civil Aeronautics Act of 1938, Ch. 601, § 408, 52 Stat. 1001.
interlocking directorates and pooling agreements were declared unlawful unless approved by the Board. Persons affected by a Board order relating to mergers, interlocks, or collaborative agreements were exempted from the operation of the antitrust laws to the extent necessary to permit them to comply with that order.

In an effort to provide the Board with guidelines, Congress prefaced the substantive provisions of the act with the following "Declaration of Policy":

In the exercise and performance of its powers and duties under this Act, the . . . [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

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

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

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

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

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Although far more concrete than "the public interest" this Declaration of Policy is obviously far too general to supply firm standards for the resolution of specific cases. Nor would it seem to have been intended as much more than a signpost indicating general directions of movement. Any lingering suspicion that the Declaration was intended as a tool of close analysis may be dispelled by attempting to say exactly wherein subsection (b) differs from subsection (c) except in greater specificity, or to determine exactly what subsection (f) adds. It seems perfectly apparent that such a neo-scholastic approach could not have been intended. What is most significant about the Declaration of Policy is the presence of subsection (d). Subsections (a), (b), and (c) are virtually the same as three provisions found in the Declaration of Policy of the Motor Carrier Act of 1935, but subsection (d) with its admonition to the Board to use controlled or regulated competition as an aid to industrial development is unique among federal transportation statutes.

All of this raises interesting questions as to exactly what Congress meant.

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58 Civil Aeronautics Act of 1938, Ch. 601, § 409, 52 Stat. 1002.
59 Civil Aeronautics Act of 1938, Ch. 601, § 412, 52 Stat. 1004.
60 Civil Aeronautics Act of 1938, Ch. 601, § 414, 52 Stat. 1004.
61 Civil Aeronautics Act of 1938, Ch. 601, § 2, 52 Stat. 980. This Declaration of Policy was also reenacted in 1958 and is now 49 U.S.C. § 1302 (1964).
62 FULDA, op. cit. supra note 30, at 15.
when it used the word “competition” or how much competition Congress
deemed desirable. When the specific problem presented involves a merger,
consolidation, or other unification under Section 408, things become more com-
plicated. That Section directs the Board to approve the unification unless it
finds that “the consolidation, merger, purchase, lease, operating contract, or
acquisition of control will not be consistent with the public interest.”8 Were
this the only test, the Board would have to determine the impact of the unifica-
tion on the type of controlled, promotional competition which the Declara-
tion of Policy lists as an element of the “public interest” and weigh that factor
along with the other ingredients of that concept. But Section 408(b) also con-
tains the following proviso:

[T]he Board shall not approve any consolidation, merger, purchase, lease, operating
contract, or acquisition of control which would result in creating a monopoly or
monopolies and thereby restrain competition or jeopardize another air carrier not a
party to the consolidation, merger, purchase, lease, operating contract, or acquisi-
tion of control. . . .

Not only does this proviso raise questions as to the meaning of its words and
the relation between its parts, but its existence raises problems as to how it
was intended to interact with subsection (d). Specifically, was the proviso de-
signed to replace the Declaration of Policy in whole or in part as the test for
unifications, or was it viewed as entirely supplemental? Certainly the language
of the act itself points toward the latter interpretation since the Board is
directed to make both determinations. It would seem possible for a merger to
be disapproved because its impact on competitive relations violated the anti-
monopoly proviso regardless of any advantages it might seem to offer. The
scope of inquiry here would be fairly narrow. On the other hand, a merger
might create no “monopolies” and yet not be consistent with “the public in-
terest” generally. This would involve a rather broad-gauge inquiry by the
Board. The remaining question, then, would be whether the anti-monopoly
proviso was intended to replace subsection (d). Did Congress envision the case
in which a merger created no “monopolies” yet failed to be consistent with
the public interest solely because it was inimical to the competitive relations
called for by subsection (d)? Such a possibility would not be excluded by the
statutory pattern unless the meaning to be given “competition” and “monop-
oly” excluded it. So we are back to the problem of ascertaining what Congress
meant when it used those words.

The legislative history of the Civil Aeronautics Act offers only slight illu-
mination. As originally introduced the bill did not list competition as an ele-
ment of the public interest, and the regulatory agency (originally the Inter-
state Commerce Commission) was directed to approve unifications consistent
with the public interest. Both subsection (d) and the anti-monopoly proviso,
however, appeared in the bill as reported by the Senate Committee on Inter-

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8 Civil Aeronautics Act of 1938, Ch. 601, § 408(b), 52 Stat. 1001.
state Commerce. As then written the proviso barred all unifications "if such act would result in creating a monopoly or monopolies and thereby unduly restrain competition or unreasonably jeopardize another air carrier not a party to the" transaction.\textsuperscript{60} During the Senate debates on the measure, several Senators, most notably Senator Borah, an unregenerate Progressive still smarting from the \textit{Standard Oil}\textsuperscript{59} case of 1911, objected that the words "unduly" and "unreasonably" afforded the agency too much discretion in passing on unifications. Borah's amendment, deleting the offending words, was accepted by the Senate, but the extent to which this indicates general agreement with the details of Borah's thinking is unclear. The very act of amendment indicates a purpose to limit the Board's discretion with respect to unifications;\textsuperscript{61} this in turn is consistent with the prevailing mood of hostility to further large combinations in the airlines industry. Even opponents to the Borah amendment displayed attitudes of this sort.\textsuperscript{62} But it seems unwarranted to infer that the amendment itself necessarily reflects congressional concurrence in Borah's views as to the proper adjudication of specific cases.\textsuperscript{63}

Throughout the debates the words "competition" and "monopoly" were used in a loose, non-technical manner, with the former becoming more or less identified with "good industrial conditions" and the latter with "bad industrial conditions." More particularly, "monopoly" seems to have meant a firm with unwarranted power, presumably based on size, which thereby interfered with the equality of opportunity.\textsuperscript{64} "Competition" seems to have meant the existence of more or less equal opportunities, especially for smaller airlines.\textsuperscript{65} Would this necessarily prevent the Board from adopting definitions which more closely correspond to the manner in which economists use those terms? Several writers on antitrust policy have argued that the working of the competitive process may be inconsistent with the preservation of small competitors if size carries with it certain efficiencies unavailable to small firms.\textsuperscript{66} Assuming such...

\textsuperscript{59} See Comment, 62 COLUM. L. REV. 851, 856-57 (1962). Some of the testimony related specifically to the combination of all carriers into one giant enterprise. Such an extreme case may have highlighted the need for some such provision as the anti-monopoly proviso, but there is no indication that the proviso was intended to be limited to such a case. Such an idea would be akin the "old soldier's gun" school of antitrust: "The Sherman Act should be like an old soldier's gun hanging on the wall. It might hang there a long time without being used. It should not be used too often. . . ." See \textit{Hearings on Bill Relating to Trust Legislation Before the Senate Committee on Interstate Commerce}, 63rd Cong., 2d Sess. 1014-15 (1914).

\textsuperscript{60} Standard Oil Co. v. United States, 221 U.S. 1 (1911).

\textsuperscript{61} Even this inference is not absolutely necessary. A substantial number may well have felt that it was not worthwhile to argue the point since the agency would use its best judgment anyway. Compare 83 CONG. REC. 6732 (1938) (remarks of Senator McCarran). Nevertheless, there is nothing to suggest that Congress definitely intended to preclude this natural inference from being drawn.

\textsuperscript{62} See comments cited note 40 supra.


\textsuperscript{64} See remarks cited note 40 supra.

economies of scale are present in the airlines industry; a more technical definition of “competition” would require the Board to approve mergers which contributed to that end even though they injured the smaller lines. Can it be said that Congress directed the Board to preserve small competitors even at the cost of efficiency? The conclusions of a noted commentator on antitrust policy in another connection seem equally appropriate here:

It is undeniable that the legislative history of the 1950 amendment to section 7 [of the Clayton Act] indicated extensive, if not primary, preoccupation with the alleged evils of concentration and the alleged virtues of small entrepreneurship. But in regard to the issue whether economies should be a ground for invalidating mergers, I find no credible support for the statement in Brown Shoe that Congress consciously appreciated the possible efficiency cost of attempting to preserve fragmented industries and consciously resolved the competing considerations in favor of decentralization.

By the same token the legislative materials related to the Civil Aeronautics Act fail to suggest an appreciation by Congress that a hard choice might need to be made between competing values. While certain statements stress the need to protect small airlines, the act itself lists “adequate, economical, and efficient service” as an element of the public interest. It cannot be said that Congress definitely intended to forbid the Board to opt in favor of efficiency if a conflict arose.

Nevertheless, it is possible to overemphasize the conflict between efficiency and smallness. It cannot be assumed that every merger offers significant economies of scale. Moreover, at a level of some abstraction, the economic model of competition presupposes relatively small firms, so that whatever definition of “competition” is chosen, concentrating mergers would be inconsistent with it. And certainly the legislative materials indicate a generalized presumption against mergers, particularly by the larger lines. Taken together these factors would suggest that the Board should view mergers with a jaundiced eye and that the merger’s proponents should make out a clear case for

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67 They are. See Caves, Air Transport and Its Regulators 55-83 (1962); Miller, Domestic Airline Efficiency 10-14 (1963). For a discussion of the nature of these economies and their effect on merger policy see text accompanying notes 120-26 infra.

68 Compare the statements in Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (§ 7 of the Clayton Act); United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945).

69 Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1326 (1965).

70 Civil Aeronautics Act of 1938, Ch. 601, § 2(c), 52 Stat. 980.

71 Professors Bork and Bowman have argued that a trend toward concentration in an industry is “prima facie evidence” that socially desirable efficiencies are available to larger firms. See Bork & Bowman, supra note 66, at 368-69. Obviously an individual merger is not a trend in and of itself, but to the extent that the trend to which they refer is simply the end result of several separate mergers it becomes difficult to say exactly where the authors would stop giving mergers the benefit of the doubt. It would seem that a sound antitrust policy would require solid evidence that economies of scale are present and important before approving any merger on that ground. Compare the criticism of the Bork-Bowman position in Blake & Jones, In Defense of Antitrust, 63 Colum. L. Rev. 377, 399 (1965).

72 “Relatively small” means that the firm does not control a significant share of the market. Small percentages are compatible with “large size” where the market itself is large. See generally Mason, Economic Concentration and the Monopoly Problem 16-43 (1957), for a discussion of the various senses in which a firm may be “large” or an economy “concentrated.”
economic efficiency. Speculations as to major savings, and even solid evidence of trivial savings, would not be enough. Yet it does not seem possible to extract more concrete directions from the materials available. It was enough for Congress to set up guidelines; detailed policy was to be evolved by the Board. To be sure, Congress did intend to place unique restrictions on the Board’s discretion as to mergers by first inserting and then toughening the anti-monopoly proviso. But even here Congress’ use of concepts like “competition” and “monopoly” raised threshold problems of definition which necessarily afforded the Board substantial latitude in its decisions. Here again the fact that Congress had no clear conception of exactly what sort of competitive pattern it wanted, shifted the burden to the Board. Thus, when we turn to the Board’s decisions we shall be as much interested in testing the Board’s policy against some objective standard, and against itself, as in plotting its correspondence to Congressional guidelines.

II. The Economic Determinants of Policy

Selecting a starting point for an examination of the CAB’s merger decisions presents some difficulty. Any assessment of policy—whether that policy is conceived of as the Board’s articulated rationales or the pattern emerging from the results of the cases—presupposes some understanding of the environment in which the airlines and the Board operate. But prior Board action in merger cases and present Board policy regarding such matters as route certifications are now a major element of this environment. Moreover, industrial conditions have changed over the years, and any model based on present conditions could well present a distorted image of past conditions. Nevertheless, it would seem that certain structural conditions existing prior to the creation of the Board have persisted, and that certain inquiries must have always been relevant. These elements of continuity minimize the danger of starting with a survey of the industrial environment.

A. The Structure of the Airlines Industry

The Civil Aeronautics Act authorized the Board to establish reasonable classifications of air carriers in order to facilitate the purposes of the act. The Board created and continues to recognize several basic types of air carrier, each with a distinctive function. Of most importance is the group of domestic trunklines which are authorized “to provide regularly scheduled service of an express, long haul character.” Of the nineteen trunklines originally certified under the “grandfather” clause of the act, only eleven are still in operation. All but one of these firms disappeared via a merger or consolidation. The

73 Compare Professor Bok’s use of the Congressional attitude favoring small business as a technique for resolving merger issues under § 7 of the Clayton Act where more tangible considerations seem evenly balanced. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 HARV. L. REV. 226, 299-308 (1960).
74 KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 104 (1951).
75 Civil Aeronautics Act of 1938, Ch. 601, § 416(a), 52 Stat. 1004.
76 1955 CAB ANN. REP. 25.
Board has never directly certificated another trunkline, and it has been careful to see that carriers certificated for some other function do not evolve into trunklines. Although the dominant position enjoyed by the four largest carriers in 1938 has been somewhat eroded periodically, the inroads by the smaller carriers have often been short lived. As previously noted, the Big Four—American, Eastern, TWA, and United—accounted for nearly eighty-two per cent of the revenue miles flown in 1938. In 1958, their share was approximately seventy-two per cent, but subsequently, Capital, then largest of the Small Eight was merged with United, thus augmenting the Big Four's position.

In addition the Board has been experimenting since World War II with a group of smaller local companies known as "local-service" or "feeder" lines. These serve a dual function of feeding traffic to the trunklines and supplying air transportation to smaller communities and less populous areas. The Board has generally favored a policy of keeping these lines within a defined geographical area so that they may identify with that area and cultivate the potentiality for traffic lurking there. Accordingly, feeder lines are generally compelled by their certificates to service smaller points on each flight over particular segments of their routes; trunklines are under no such compulsion. To the extent that these requirements of frequent stops make a local carrier's service between two terminal points less attractive than the nonstop service available from trunklines, the local carriers are disadvantaged and hindered in offering competition to parallel trunklines. In spite of this factor, where competitive services between trunklines and feeder lines are available the distinction between them may become somewhat blurred. This is particularly true when comparing a small trunkline and a large feeder line.

All-cargo carriers constitute another class which competes with the trunklines for freight traffic. Three such carriers operated in the domestic market in 1963 and two in the international market. Finally, there are several groups of

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[Notes]

17 Fulda, Competition in the Regulated Industries: Transportation 192 (1961). Very early in its history the Board indicated that it had no intention of enlarging the industry absent a showing of particular circumstances and that the existing trunklines were enough "to insure against monopoly in respect to the average new route case." Delta Air Corp.—Certificate of Public Convenience and Necessity, 2 C.A.B. 447, 480 (1941). Opposing points of view regarding this restrictive policy are debated in Maclay & Burt, Entry of New Carriers into Domestic Trunkline Air Transportation, 22 J. Air L. & Com. 131 (1955); Tipton & Gewirtz, The Effect of Regulated Competition on the Air Transport Industry, 22 J. Air L. & Com. 157 (1955).

18 See, e.g., Southwest-West Coast Merger Case, 14 C.A.B. 356 (1951) (merger of local-service carriers disapproved in part because combined system was seen as a potential threat by intervening trunklines); Monarch-Challenger Merger Case, 11 C.A.B. 33 (1949) (merger of local-service carriers approved over objections of intervening trunklines).

19 The remaining "Small Seven" are Braniff, Continental, Delta, National, Northeast, Northwest, and Western.

20 See, e.g., West Coast Case, 6 C.A.B. 961 (1946).


22 It may be possible for the smaller, local service line to compensate for this disadvantage by offering other competitive inducements like lower prices or better schedules, particularly if the trunklines' competitive operations are but a part of a longer route so that its scheduling flexibility is limited by the needs of the overall route. Also, if the difference in elapsed time is not substantial, it may have little effect on customer choice. See Caves, op. cit. supra note 67, at 51-54.


24 1963 CAB. ANN. REP. 75.
only incidental importance to this examination of merger policy. These are American carriers engaged exclusively in international air transport, "supplemental" carriers authorized to engage in common carriage on an irregular basis, foreign lines authorized to land at terminal points in the United States, and helicopter services. In the ensuing discussion the major emphasis will be centered on the Board's policy with respect to mergers involving domestic trunklines since these form the backbone of the domestic air transportation system. Unifications involving local service lines and all-cargo carriers will be fitted into the pattern of the trunkline cases, with adjustments being made where necessary to account for functional differences.

B. Competition Among Airlines

The airlines, like other carriers, sell the service of transporting passengers and cargo from one point to another. Virtually all airline customers have a fixed destination in mind when they enter the market, and only those airlines offering service from a customer's point of origin to his destination can compete for his business. Because of this basic fact, the initial focus of any inquiry into the nature and extent of competition in air transportation, and the effect of mergers on that competition, must be on the arena in which air carriers confront each other directly in vying for the consumer's dollar—the individual market defined by a pair of cities. The Board directly controls the number of carriers offering service on a given route through the certification mechanism. No route has more than nine carriers certificated to fly it, and most routes have far fewer carriers. Yet until after World War II it was a rare route which had parallel services at all. The general trend of the Board's decisions in route certification cases has been to increase the amount of point-to-point competition existing in the industry. Although this has been the long run effect of the Board's decisions, it has not consistently favored a policy of certifying additional carriers wherever it seemed that the route could profitably maintain them. What at one time seemed a presumption in favor of adding competitors was expressly reversed in the early 1950's. While this trend has

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88 Since World War II domestic trunklines have also engaged in international operations on a substantial scale. Because merger cases involving international operations present complex problems only tangentially relevant to this study, such cases will be examined solely to the extent that they offer insights into the Board's policy regarding domestic transport. See generally Note, CAB Regulation of International Aviation, 75 Harv. L. Rev. 575 (1962).

87 One exception is the vacationer who may base his decision on where to spend his holiday in part on the cost of transportation. For example, increased accessibility of Hawaii by jet decreased the amount of passengers headed for Florida. See Garrison, Florida Market Stirs Stiff Competition, Aviation Week, Jan. 18, 1960, p. 36.

86 Hale & Hale, Competition or Control IV: Air Carriers, 109 U. Pa. L. Rev. 311, 315 (1961). The authors are so "route-oriented" that they contend that the total number of certificated carriers is meaningless. As will appear from the following discussion, this is a conclusion with which I would strongly disagree.

85 As of September, 1959, the New York-Washington run had the most carriers with nine; the highly profitable Los Angeles-San Francisco route then had only four carriers. Fulda, op. cit. supra note 77, at 255.

84 Richmond, Regulation and Competition in Air Transportation 100-120 (1961).


82 Southern Service to the West Case, 12 C.A.B. 518, 574, 587 (1951).
sharply diminished the number of point-to-point monopolies, each route remains a little oligopoly with entry somewhat blockaded by the certification requirement.\footnote{See Bain, \textit{Industrial Organization} 124-33 (1959). Professor Bain’s classification of industries according to concentration relies heavily on the amount controlled by the four largest firms and the eight largest firms. Control of 70 to 80 per cent by the first four means that the industry is highly concentrated.}

Contemporaneously, the Board has adopted policies which effectively limit the number of available potential entrants to the other trunklines not presently certificated to fly the route. The Board has certificated some local service lines to offer service parallel to that being offered by trunklines on certain routes, but the Board’s objectives of preserving the distinct characteristics of the local service carriers\footnote{See, e.g., West Coast Case, 6 C.A.B. 961 (1946).} and of keeping their competition with the trunklines to a minimum have seriously constricted a potential that was, in any case, limited.\footnote{See North Central-Lake Central Acquisition Case, 25 C.A.B. 156 (1957); Southwest-West Coast Merger Case, 14 C.A.B. 356 (1951).}

Of course, the Board’s announced policy of opposition to the conscious certification of any new trunklines has forestalled potential competition from that quarter.\footnote{See, e.g., West Coast Case, 6 C.A.B. 961 (1946).}

\textit{A priori} theory would predict that under such circumstances the airlines would be disinclined to compete vigorously in terms of price. In industries with few sellers and a relatively standardized product, a price reduction by any seller will be immediately matched by his competitors, leaving all sellers with the same share of the market and a lower unit return.\footnote{Delta Air Corp., Certificate of Public Convenience and Necessity, 2 C.A.B. 447, 480 (1941).} Only where the demand for the industry as a whole is sufficiently elastic to compensate by increased volume for the lower unit return will a price reduction be profitable. Empirical studies show that airline executives believe that any price reduction will be promptly met while a price increase will not.\footnote{\textit{Sweezy, Demand Under Conditions of Oligopoly}, 47 J. Pol. Econ. 568 (1939), reprinted in \textit{Landmarks of Political Economy} 262 (Hamilton, \textit{et al.}, eds. 1962); Bain, \textit{Price Theory} 70-75 (1952).} Moreover, demand seems fairly unresponsive to small price changes.\footnote{\textit{Cherington, Airline Price Policy} 300, 437, 439 (1958).} Thus, the reluctance of the airlines to engage in price competition is understandable.

Nevertheless, there is some evidence that fares tend to be lower on competitive routes than on monopoly routes, at least where smaller trunklines are involved.\footnote{Caves, \textit{op. cit. supra} note 67, at 34-35; Cherington, \textit{op. cit. supra} note 98, at 439; Miller, \textit{op. cit. supra} note 67, at 18-22. All commentators agree that the data on this is very sketchy, but for all practical purposes, the uncertainty about this would be enough to discourage the airlines from active price competition.} Professor Cherington has described the striking result of the Board’s certificating Eastern to offer competing service on the Detroit to Cleveland route, which had formerly been the exclusive domain of Capital. Prior to Eastern’s certification, Capital’s rate had been approximately eight and six-tenths cents per mile as against an industry average of four and six-tenths cents per mile; Eastern immediately established a rate of about five and five-tenths cents per mile, which Capital was forced to meet.\footnote{Richmond, \textit{op. cit. supra} note 90, at 51.} But though the presence...
of two solid competitors on a route has a tendency to lower prices, there is no solid evidentiary support for the conclusion that the addition of still more carriers will intensify that tendency.\footnote{102}

With price competition an unattractive prospect, carriers’ energies are channeled into various forms of non-price competition. These include such techniques as providing in-flight films, better in-flight meal and beverage service, better passenger ground services, more convenient scheduling, and most importantly, more attractive aircraft. Decisions regarding many of these forms of non-price competition rest almost entirely with the carriers, the Board exercising but a vague, indirect control.\footnote{103} Aircraft purchases and scheduling fall in this category. On the other hand, the Board exercises considerable power over other modes of improvement of the product. For example, the offering of non-stop service between a city-pair is subject to Board control.\footnote{104}

In competition of this nature smaller lines can be at a disadvantage vis-a-vis their larger competitors. Equipment purchase constitutes a significant example. Few, if any, industries are so dependent on consumer reaction to their major capital investment.\footnote{105} The favorable position of the larger lines originated to a large extent in the corporate interrelationships which developed under the benign governmental administration of the McNary-Watres Act. Even after 1934 aircraft manufacturers have often been closely tied to one of the larger airlines for developmental purposes.\footnote{106} Wholly apart from this consideration, the purchase of such capital equipment as jet aircraft requires major financing, and the capital-rationing practices of financial institutions have created a continuing disability of smaller lines to secure financing on terms as favorable as those afforded their larger competitors.\footnote{107} Nonetheless, smaller lines are compelled to follow the lead of larger carriers in purchasing new equipment in order to maintain their competitive position on any route on which there is a confrontation.\footnote{108}

\footnote{102} Gill & Bates, AIRLINE COMPETITION 448-49 (1949).
\footnote{103} The inability of the CAB to control the airlines’ purchases of aircraft has been a major problem for years. See Note, 111 U. PA. L. Rev. 195, 216-17 (1962).
\footnote{104} Approval of a merger does not automatically make non-stop service available from points on one carrier’s routes to points on another carrier’s route, Delta-Chicago & So. Merger Case, 16 C.A.B. 647, 700 (1952) (Recommended Decision of Examiner William F. Cusick which was adopted by the Board in pertinent part). A subsequent route consolidation by the Board is required. Northern Consolidated Airlines, Inc., Consolidation, 8 C.A.B. 110, 113 (1947).
\footnote{105} Hector, Problems in Economic Regulation of Civil Aviation in the United States, 27 J. AIR L. & COM. 101, 104 (1959). The author was a member of the CAB and, upon resigning, prepared the blistering “Hector Memorandum” to the President publicizing many of the Board’s shortcomings. The Memorandum has been printed as Hector, Problems of the CAB and the Independent Regulatory Commission, 69 YALE L.J. 931 (1960).
\footnote{107} Id. at 118.
\footnote{108} In United Air Lines, Inc.-Western Air Lines, Inc., Acquisition of Air Carrier Property, 8 C.A.B. 298 (1947), the Board approved the transfer of Western’s route between Denver and Los Angeles to United. Western had been originally granted the route in an effort to improve its shaky financial position, Denver-Los Angeles Service, 6 C.A.B. 199 (1944), and initially the route had proved profitable. But Western felt compelled to purchase DC-6 aircraft to keep up with its transcontinental competitors, even though the route itself did not warrant such equipment. This move brought Western to the verge of bankruptcy. Examples such as this have led some observers to urge that small companies should be barred from competing with carriers of a larger class. Healy, Workable Competition in Air Transportation, 35 AM. ECON. REV. 229 (1945).
In addition, the past success of the larger airlines enables them to spend greater amounts on advertising and other marketing techniques, thus increasing their consumer acceptance. Moreover, communications media, such as television, often give quantity discounts, thus further increasing the lead of the more affluent lines. Because of these factors the size distribution within the industry as a whole has important repercussions on the competitive relations existing on individual routes.

C. The Impact of Mergers on Competition

A merger or consolidation of two air carriers may therefore have an impact on several levels of the industry. At the most basic and obvious level, if the merging carriers are then competing on one or more routes, the merger will reduce by one the number of carriers offering service on those routes. Past experience suggests that if the two carriers are the sole competitors on a route—or if the only non-party carriers are unable to offer effective competition—there may be adverse consequences, such as higher rates or poorer service. But the power of the Board to certificate additional carriers means that such a condition should not exist for long. Short of this extreme situation, it is impossible to predict the effect of subtracting one carrier from the route. A route oligopoly with three solid carriers, for example, may not perform perceptibly differently from one with four such carriers.

It is not true, however, that a merger between airlines not then competing on any routes effects no important changes. The substitution of the unified carrier for the acquired carrier does not immediately reduce the number of carriers offering parallel service on any route. But there could well be other consequences. If the acquiring carrier's existing routes serve points at which a substantial portion of the traffic over the routes of the acquired carrier originates or terminates, the unified carrier may be able to shift much of that traffic to its operations by scheduling techniques. Of course, one-carrier service is itself more attractive. Later, the unified carrier may apply for permission to offer non-stop service between major points, but it must be stressed that the Board has independent control over this. Similar considerations as to traffic control are also applicable to competition on the acquiring carrier's existing routes.

In addition, the overall industry structure will be altered. By hypothesis one independent decision-maker will have left the industry, and thus one center

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109 Richmond, op. cit. supra note 90, at 56-58.
111 Keyes, Federal Control of Entry Into Air Transportation 253 (1951).
112 On occasion the Board has considered unduly high rates as an indication that the certification of another carrier would be advisable. See, e.g., Eastern Air Lines, Inc., Great Lakes to Florida Service, 6 C.A.B. 429 (1945).
114 Keyes, op. cit. supra note 111, at 253.
115 Ibid.
of initiative is gone. The pool of possible entrants onto the various routes has been reduced by one. To the extent that certain decisions are made as a result of an industry-wide consensus, the participants in those decisions are reduced by one. Some commentators have suggested that the elimination of one corporate ladder to climb will reduce the available opportunities for energetic young men, thus diminishing the progressiveness of this dynamic industry.\textsuperscript{118} If the acquiring firm already has an advantage over its competitors in the capital market or other input markets, merger may further increase that advantage.

It should be apparent that some of the above consequences are little more than plausible hypotheses. Some of them are of uncertain significance. For example, will one fewer participant in industry-wide decisions affect the kinds of decisions reached? Certainly, some of these consequences are not "bad," or at least not wholly "bad." Nevertheless, those consequences which seem speculative cannot be dismissed out of hand. Will the elimination of one corporate world to conquer hurt the industry in executive recruitment? Or will the fact that the remaining worlds available for conquest are larger offset this? There is little data upon which to found a solid answer to this question. Likewise, those consequences of undetermined significance cannot be wished away. Reduction of the available potential entrants may have significant repercussions, but here too there is not enough information to make confident predictions.\textsuperscript{117}

But there is one overriding consequence: any merger reduces the Board's future flexibility, since it is a much easier task for the Board to decrease the number of firms than to increase them. This fact implies several things. First, in any balancing of risks, the subsequent freedom to change course afforded by one alternative is a major factor weighing in its favor,\textsuperscript{118} particularly when the consequences of choosing between these alternatives cannot be predicted. Second, the Board should clearly identify the possible consequences of any merger, and adopt rules designed to elicit the best available information about such consequences.\textsuperscript{119} This suggests a rather hard line on mergers since the major sources of such information would seem to be the proponents of the merger and any intervening carriers. Third, strong affirmative reasons, backed by solid evidence, should be advanced in favor of any merger. These considerations dovetail nicely with the previous inferences drawn regarding the intent of Congress; both lead to a general presumption against mergers which may be overturned only by a strong demonstration of economic advantages resulting from the merger.

\textsuperscript{118} Healy, \textit{supra} note 108, at 239. On the kind of non-financial incentives to businessmen on which this thought is based, see generally Gordon, \textit{Business Leadership in the Large Corporation} 305-12 (1945).


Nevertheless, neither the evidence of congressional intent nor the need to preserve future flexibility requires an outright ban on mergers. The legislative materials are in fact to the contrary, and an outright ban in the face of possible economic advantages to be gained via mergers would introduce rigidity of another sort. The most significant benefit has already been identified as the attainment of economies of scale. In virtually all industries an increase in size will mean a more efficient use of resources—up to a point. Further increase beyond a minimum optimal scale of operations will not produce a similar gain in efficiency although it will not ordinarily result in a loss of efficiency either. The maximum number of firms which an industry can support if all firms are at peak efficiency depends upon what percentage of the total output of the industry an individual firm must produce in order to be operating at the minimum optimal scale. Recent studies suggest that an airline’s average cost curve now attains its minimum somewhere between 100 million and 200 million ton miles and thereafter remains horizontal. All but perhaps the smallest trunklines have attained that scale of operations, and it would seem that further mergers among them would achieve few, if any, efficiencies. Local service carriers, on the other hand, are still operating at less than a minimum optimal scale. Since the minimum optimal scale of operations is subject to change as industrial conditions change, such figures do not necessarily reflect cost curves at some past date or inevitable cost curves for the future. But they demonstrate that it is, and has been, possible to unearth the raw data and construct curves if this is desirable.

In concrete terms it may be predicted that a merger will achieve economies of scale if it will enable the unified lines to make better use of existing equipment and personnel. This may come about because the volume of operations of the combined firms may be safely predicted to exceed that which the two lines could attain alone, even if no total cost savings are foreseeable. Contrariwise, if a substantial amount of duplicative equipment and personnel can be immediately jettisoned or fairly quickly phased out, some saving may be realized in the absence of any clear hope of augmented operations. Various combinations of these elements are also possible. Certainly evidence of such

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121 Stigler, The Economies of Scale, 1 J.L. & Econ. 54, 70-71 (1958). Professor Stigler points out that there is no unique optimum size, "that there is customarily a fairly wide range of optimum sizes. . . ." Id. at 71.
123 CAVES, AIR TRANSPORT AND ITS REGULATORS 57-59 & Table 18 & Fig. 1 (1962); MILLER, DOMESTIC AIRLINE EFFICIENCY 12-13 (1963).
124 CAVES, op. cit. supra note 123, at 57-59 & Table 18 & Fig. 1. Discussions of the causes of such economies of scale may be found in GERRINGTON, AIRLINE PRICE POLICY 49-62 (1958); FREDERICK, COMMERCIAL AIR TRANSPORTATION 128-36 (5th ed. 1961).
125 See id. at 134. The Board’s approval of the merger in Western Air Lines, Inc., Acquisition of Inland Air Lines, Inc., 4 C.A.B. 654 (1944), rested in part on the hope that the combined system would develop additional long-haul vacation traffic, but there was no indication that immediate total cost reductions would occur.
126 See Monarch-Challenger Merger Case, 11 C.A.B. 33 (1949), in which convincing evidence of direct reductions in operating costs was presented. The Board admitted that a fusion of the systems was unlikely to produce a substantial increase in traffic.
savings should be solid, but this alone should not be sufficient. The evidence
should also point to major savings, lest the Board sell its future freedom of ac-
tion too cheaply. In addition, the Board should satisfy itself that alternative
methods of achieving the same results are unavailable. Depending on the
nature of the difficulty, equipment interchanges, certification of the carriers on
additional routes, outright subsidies, or a judicious blend of techniques may be
less drastic and costly options.

This leads to a related consideration. It may be argued that the Board should
courage the merger of smaller carriers while it bars any mergers by the Big
Four. Ideally, this policy would eventually produce a rough parity among
trunklines, and competitive advantages based on size would disappear. But it
is necessary to ask why these advantages exist. To the extent that size ad-
vantages are based on economies of scale, this factor adds nothing to the pre-
vious analysis which treated that directly. Certain advantages, however, are
unrelated to present efficiency levels and must be treated. If the larger lines’ ad-
vantages are based on their ability to purchase needed inputs on more favorable
terms, the Board has power to go after this directly. Continuing connections
between carriers and suppliers can be shattered, or better still, the oppor-
tunity to participate may be extended to all on equal terms. Price discrimina-
tion not based on cost savings to suppliers can be outlawed. A complication
appears, however, with respect to financing. Past profitability is the key to
present financing, whether the source of that financing is internal or external.
This advantage may simply have to be temporarily tolerated. If the smaller
carriers are no longer at a cost disadvantage, the remaining elements of
profitability are route structure and management. The Board has it within
its power to even out advantages based solely on differences among routes.
This leaves only the factor of management. Not only is the Board ill-suited to
inquire into degrees of managerial ability, but differences in the profitability
of airlines attributable to this factor should not be eliminated. The retention
of private decision-making within the regulatory scheme presupposes that this
sort of incentive will operate. The profit motive is already somewhat blunted
by the subsidy policy, it would be a mistake to do away with it.

Several minor considerations may also be disposed of. A merger may well
result in an immediate improvement of the service along some of the routes

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127 See FULDA, COMPETITION IN THE REGULATED INDUSTRIES: TRANSPORTATION 230-31 (1961); Flying
128 Healy, Workable Competition in Air Transportation, 35 AM. ECON. REV. 229, 230-32 (1945). See also
the Board’s limitation in the inter-corporate dealings between TWA and Hughes Tool Co. in Trans-
130 CAVES, op. cit. supra note 123, at 118.
131 Ibid.
132 Hale & Hale, Competition or Control IV: Air Carriers, 109 U. PA. L. REV. 311, 358 (1961), argue
that subsidy eliminates “both the carrot and the stick often thought necessary to goad competitors into
action.” It seems unlikely that the presence of a possible subsidy would directly affect the desire of air
carrier managers to make their company as profitable as possible. It could, however, tend to produce an
undue willingness to take risks. As yet economic analysis has been unwilling or unable to take account of
such subtle psychological changes. See KATONA, PSYCHOLOGICAL ANALYSIS OF ECONOMIC BEHAVIOR 6 (1951).
of the parties. If one carrier has offered very irregular and poor service this may be corrected. If the routes of the two carriers are well integrated, many passengers may receive one-carrier service, possibly eliminating the necessity to change planes. Such improvements are not without value, but many of them seem trivial when balanced against the possible losses resulting from a merger. Here too there is always the possibility that alternative correctives are available, with or without Board intervention. The general interest in maintaining a strong market for capital assets requires less tolerance of mergers in the airlines industry, because there already exists a substantial and active market for used aircraft.

D. Summary

A merger between air carriers may have a direct adverse impact on competition on any route on which a point-to-point monopoly results. This seems a comparatively minor problem, easily corrected by Board certification of another carrier. The elimination of an independent decision-maker from the industry may have a variety of adverse consequences, although we lack adequate data to be precise about these. This fact, coupled with the fact that the risks of an erroneous denial seem far less than those of an erroneous approval, would suggest a presumption against mergers; the congressional attitude points likewise to such a presumption. Nonetheless, neither the legislative history nor sound policy should prohibit mergers which may result in significant economies of scale. The evidence of efficiencies adequate to rebut the presumption should be convincing, and the Board should frame rules designed to elicit this sort of evidence. There seem to be no other considerations which would warrant the Board’s refusing to apply the presumption.

III. The CAB Decisions

As stated above, the Civil Aeronautics Act supplies the Board with two tests mergers must pass. The first test—the “public interest”—is a vague standard composed of many elements in addition to competition, and it necessarily allows the Board a good deal of discretion. The second test—the “anti-monopoly” proviso—was intended as an inhibiting rule which would prevent the Board from approving certain mergers despite the possibility that some benefits might be gained thereby. In examining the policy developed in the Board’s decisions, the first point of inquiry will be the anti-monopoly proviso. It would seem advisable, if possible, to separate out those mergers to which it applies first, before proceeding to consider the Board’s treatment of the “public interest” standard.

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189 Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1317 (1965).
180 Caves, op. cit. supra note 123, at 106-07.
A. The Anti-monopoly Proviso

Fundamentally, there are two techniques whereby the Board might have articulated a policy respecting the anti-monopoly proviso. First, it might have produced a comprehensive, meticulous opinion explaining its understanding of what Congress intended to ban under the anti-monopoly proviso. This understanding might be drawn from legislative history as well as the statute; it would provide an analytical framework for future development grounded in economics; and it would define the terms of the statute with reference to this perceived policy. Second, the Board might have proceeded tentatively, on a case by case basis, to isolate the various factors present in each merger proposal and then to assess these factual differences in terms of whether the merger was intended to be prohibited without regard to its possible benefits or whether the benefits might be balanced against the competitive impact. To be sure, neither approach is wholly adequate by itself; general statements of policy can be little more than hypotheses to be tested against actual cases, and a totally undirected inquiry into the facts of individual cases will lead to drift and chaos. Both methods are required. Unfortunately, the Board has failed to produce an adequate effort at generalized analysis, nor has it really given much content to the anti-monopoly proviso through a case by case approach.

1. Early Construction. The Board's only attempt at "grand theory" respecting the anti-monopoly proviso occurred very early in its life in the United-Western Interchange case, one of two related proposals decided on the same day. United's route number one and Western's route number thirteen connected at Salt Lake City, thus enabling a passenger to fly from New York to Los Angeles. The two had for some time maintained connecting schedules, but passengers were still required to change planes in the middle of the night. The agreement submitted for approval eliminated this by allowing United to lease aircraft from Western on eastbound flights and Western to lease aircraft from United on westbound flights. Because the arrangement involved the lease of a "substantial part" of an air carrier's properties, the arrangement fell within Section 408, with its anti-monopoly proviso, as well as Section 412. Said the Board:

Under the terms of section 408(b) and 412(b) of the act, two distinct issues are presented for decision: (1) Whether or not the agreement is adverse to or inconsistent with the public interest, or will violate the act or any of the conditions of section 408; and (2) whether or not the agreement will result in creating a monopoly and thereby restrain competition or jeopardize another air carrier.

\[187\] See, e.g., Judge Cooley's enunciation of basic policy guidelines for the Interstate Commerce Commission in In re Southern Ry. & S.S. Ass'n, 1 I.C.C. 278 (1887), discussed in Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 863, 885-87 (1962). Judge Friendly later suggested that the failure of the CAB to produce a similar fountainhead opinion had been a major cause of its unsatisfactory performance. See id. at 1076, 1294.

\[188\] United Air Lines Transp. Corp. & Western Air Express Corp.-Interchange of Equipment, 1 C.A.A. 723 (1940).

\[189\] The other case, United Air Lines Transp. Corp.-Acquisition of Western Air Express Corp., 1 C.A.A. 739 (1940), is discussed in text accompanying notes 203 and 204 infra.

\[190\] 1 C.A.A. at 728.
The Board first determined that the proposed arrangement would not be adverse to the public interest. On the affirmative side, the Board noted that the arrangement would improve service to Los Angeles without any diminution of service to other points. The Board then dealt with the argument of TWA that the Western-United arrangement would divert a substantial amount of transcontinental business from TWA and threaten its continued existence.

The fact that the inauguration of improved service will have incidental effects which will adversely affect competing air carriers is not in itself sufficient to render the improvement inconsistent with, or adverse to, the public interest. Western and United already are jointly competing with [TWA]... for Los Angeles traffic, and they should be permitted to attempt to increase their transcontinental traffic by improving their service, at least in the absence of more important factors weighing against the public interest.140

After pointing out that the Declaration of Policy made competition a factor to be considered in the public interest, the Board continued: “If, in the ordinary case, competitors are to be prevented from inaugurating improvements solely as a protection to particular air carrier, the development of an adequate air transportation system in this country will be retarded rather than assured...”141

Turning to the proviso, the Board discerned two distinct problems: “(1) whether or not any restraint of competition would prevent approval ... and (2) whether or not jeopardy to another air carrier would prevent such approval without regard to the existence of a monopoly.”142 Central to a solution of the problems surrounding the proviso was a clear conception of the meaning to be given the word “monopoly” in the statute. The Board agreed with counsel that the legislative history supplied little light on the point; it then proceeded with its own analysis:

In modern usage, most of the definitions suggested by the courts fall into two general categories, one of which defines the term “monopoly” as embracing any combination the tendency of which is to prevent competition in its broad and general sense, and to control prices to the detriment of the public, and the other holding that the word “monopoly” means the control of a particular business or article of trade, without regard to the results which may flow therefrom... . If the first definition of the word “monopoly,” which is essentially descriptive of a result, is applied to the proviso in section 408(b), the words immediately following, “and thereby restrain competition,” would be repetitious and of no effect since that definition by its terms includes the factor of restraint of competition. On the other hand, if the second definition, which treats “monopoly” as a condition embodying a particular degree of control, is applied, the remaining words of the proviso would have a definite meaning and effect, since it would not be a foregone conclusion that such a condition would restrain competition. It is a generally accepted rule of statutory construction that every word of a statute is to be given meaning, for it cannot be assumed that particular words were used without some purpose. It is

140 Id. at 731.
141 Ibid.
142 Ibid.
concluded, therefore, that the word “monopoly” as used in the first proviso of section 408(b), refers to a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country. It follows that restraint of competition is a factor, insofar as the application of the proviso is concerned, only if it results from that degree of control which . . . constitutes a monopoly of air transportation.\textsuperscript{148}

The Board then decided that the absence of any punctuation in the proviso clearly pointed to the conclusion that jeopardy to an air carrier, like restraint of competition, must result from a monopoly. Finally, the Board analyzed the United-Western agreement and concluded that it would not give United any “control” over Western, “and, since no additional control over air transportation is involved, that it will not result in creating a monopoly.”\textsuperscript{144} The Board approved the agreement.

The exposition in the United-Western Interchange case has failed to play a significant role in the subsequent development of doctrine regarding the anti-monopoly proviso, although the actual decision reveals certain tendencies which were destined to endure. Whatever else may have contributed to this result, it must be concluded that a major factor was the basic weakness of the Board’s analysis. In the first place, the Board’s distinction between the two prevalent definitions of “monopoly” is very inartfully expressed. A combination with a “tendency” to restrain competition or control prices seems much the same as one having “control” of a business. Control over price is a function of control over supply.\textsuperscript{148} Taken as a whole, however, the Board’s analysis seems to be designed to distinguish between the “abuse theory” of monopoly and the “structure theory” of monopoly.\textsuperscript{146} Several early cases decided under Section 2 of the Sherman Act required not only the power to exclude competitors and raise prices but also some exercise of that power.\textsuperscript{147} Later cases took the position that the mere possession of the power constituted a violation of the law unless it had been “thrust upon” the defendant.\textsuperscript{148} Actual exclusion of competitors was no longer required.\textsuperscript{140} It might therefore be possible for an air carrier merger to give the merged firm power to exclude competitors without that power ever being exercised. It would thus be possible to give all words in the proviso meaning.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{148} Id. at 733-34.
\item \textsuperscript{146} Id. at 737.
\item \textsuperscript{144} See Wilcox, Competetion and Monopoly in American Industry 1-11 (T.N.E.C. Monograph No. 21, 1940); Dorfman, The Price System 92-96 (1964).
\item \textsuperscript{146} See Hale & Hale, Market Power: Size and Shape Under the Sherman Act 23-24, 89-92 (1958).
\item \textsuperscript{148} At one time it was possible to distinguish between these two theories as the “legal definition” and the “economic definition” of monopoly, Mason, Monopoly in Law and Economics, 47 Yale L.J. 34 (1937), but a series of postwar cases involving § 2 of the Sherman Act has largely brought the law into line with economic thinking. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953); aff’d per curiam, 347 U.S. 521 (1954). Professor Mason’s observations on some of these cases may be found in The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265 (1949), reprinted in Mason, Economic Concentration and the Monopoly Problem 351 (1957).
\item \textsuperscript{144} See, e.g., United States v. United States Steel Corp., 251 U.S. 417 (1920).
\item See cases cited note 146 supra.
\item \textsuperscript{146} See American Tobacco Co. v. United States, 328 U.S. 781 (1946).
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\end{footnotesize}
But what difference would it make? The proviso prohibits mergers "which would result in creating a monopoly or monopolies and thereby restrain competition...". This seems to say that the monopoly created must restrain competition if it is to violate the proviso; unexercised power would not violate the proviso. It would thus seem that if the word "competition" in the proviso is to be taken as a collective referent to "competitors" then exercise of the power is required to violate the proviso. The Board's whole analysis becomes nothing more than a determination of how many words it takes to say the same thing. Moreover, this sort of analysis pairs up two concepts which are not necessarily related. The antithesis of both the "abuse theory" and the "structure theory" of monopoly is "competition." To be sure, "competition" does not mean the same thing in both cases: The obverse of the "abuse theory" is "free competition," or unimpeded entry into a trade; the obverse of the "structure theory" is "pure competition," or the inability of any seller to affect price by adjusting output. Free entry is but one aspect of pure competition. The Board's analysis thus assumes that Congress intended to pair the "structure theory" definition of "monopoly" with "free competition," a concept logically related to the "abuse theory" definition of "monopoly." Why should it be necessary to attribute this sort of confusion to Congress? The apparent answer is that this is the only way you can give all the words of the proviso meaning. If "competition" is defined as the obverse of the definition given "monopoly," the words "and thereby restrain competition" are always going to be redundant.

The fact that it is impossible to give every word meaning without garbling the statute, and the fact that in the last analysis it makes no operative difference which theory is adopted, points up the basic objection to the Board's approach. It is a little frightening to think that the Board was attempting to establish guidelines for federal policy concerning a major industry purely as a by-product of an attempt to give every word in the regulatory statute meaning. Policy decisions of this nature should be faced squarely by either Congress or the agency. Statutory exigesis will yield the correct decisions only where Congress has had a precise idea where it wants the agency to go and has carefully crystallized that idea in the statute. Here the Board's recognition that the legislative history offered no answers should have alerted it to the error of proceeding as it did. These objections are even more true of the Board's treatment of the "jeopardy" clause; the mind rejects the thought that practical men were actually willing to let this issue turn entirely on the presence or absence of a comma.

Yet the actual definition adopted seems perfectly sound as far as it goes. By focusing on structure and power the Board seemed intent on grounding its construction of the statute in economic theory, and the vagueness about the "degree of control" which amounts to monopoly seems a necessary concomitant of this. But the Board did not clarify exactly what it meant by a "phase" of air transportation, or how relevant geographical markets were to be deline-
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ated. In particular its remark about "any territory or section of the country" raised the possibility that a merger creating one or more route monopolies would have to be disapproved. There is nothing in the legislative materials which compels a route orientation. Moreover, at the time of the passage of the act there was little parallel service, and thus a merger would be unlikely to create a route monopoly. Finally, route monopolies are relatively easy to rectify if the industry as a whole has not become unduly concentrated. Yet if the Board intended to treat the anti-monopoly proviso as covering undue control of something less than the whole industry, the individual route seems the most significant "submarket."

One wishes the Board had followed through somewhat more in its analysis. "Monopoly" could have been defined as the possession of a greater percentage of the industry than warranted by considerations of efficiency. In this sense, more than one "monopoly" could exist in an industry, and although this seems at odds with economics, it would have the effect of erecting a standard for airline mergers tied to economics and reflecting the necessary presumption against mergers. Under this view the proviso would essentially replace subsection (d) in merger cases. It would, however, be possible for a merger to create no problems so far as competition and yet fail to be consistent with the public interest for some other reason.

The opinion itself, however, clearly indicated that subsection (d) and the anti-monopoly proviso were separate and distinct standards. The Board discussed the impact of the merger on TWA, and dismissed that line's complaints about loss of business on the ground that such a loss would be nothing more than the result of competition and that subsection (d) made competition an element of the public interest. In the companion case, in which the Board denied United's application to acquire Western outright on the ground that such a fusion would disrupt the "competitive balance" in the Western United States and thus be inconsistent with subsection (d), the Board explicitly stated that this determination made it unnecessary to discuss the proviso. The upshot is that the Board did little to clarify how these standards might differ. The Board's subsequent opinions have failed to follow through consistently with this idea of separate standards. In approving some mergers, the Board has, in cursory fashion, found no violation of the proviso, but has not discussed subsection (d); in disapproving other amalgamations the Board has used subsection (d) without attempting to force it into the proviso's mold.

On one matter, however, the Board has been quite consistent, and the United-Western Interchange opinion was the first to establish that pattern. The Board has never found that an arrangement would violate the anti-monopoly proviso. In this case the Board managed to sneak by the whole issue by play-

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5 United Air Lines Transp. Corp.-Acquisition of Western Air Express Corp., 1 C.A.A. 739 (1940).
62 Examiner Wiser's opinion in the American-Eastern case found that the arrangement there proposed would violate the proviso. In so doing he found monopoly control of seven routes as well as the northeastern section of the country would be created. The examiner was willing to find "monopoly" on five routes on which the combined carrier controlled between 87 and 90% of the traffic, and also on the New

ing on the different meanings of the word “control,” but its analysis, however abstract and inadequate, was fairly lengthy. In the later cases the Board’s handling of the proviso would amount to little more than a brusque finding that it had not been violated. To reach this result the Board has used several rationales.

2. The Later Cases. (a) No Elimination of Competitive Services. In several cases the Board has based its conclusion that the unification would create no monopoly on the fact that the parties to the agreement were not then rendering parallel service, and hence there could be no loss of services to the public or any reduction in the number of competitors. For example, in the Western-Inland Acquisition case, the Board said:

There is no evidence in the record which would lead to the conclusion that the acquisition of Inland by Western would result in the creation of a monopoly and thereby restrain competition or jeopardize another carrier not a party to the acquisition. Inland and Western do not now compete with each other and are scarcely complementary except for their junction at Great Falls. They serve different areas so that the general public will not be subjected to less air service than at the present nor subjected to monopoly through the elimination of competitive services.

This analysis was especially useful during the early years of the act’s administration when carriers rarely offered parallel services. It relies heavily on the word “create” and it is exclusively concerned with the immediate impact on routes. Some of the inadequacies of this approach have already been discussed. Immediate impact on particular routes is a relatively minor consequence of a merger. The consequences for the structure of the industry as a whole are much more significant. Furthermore, this analysis would—given the then prevailing route pattern—eliminate the proviso as a significant obstacle to concentration, which Congress pretty clearly intended it to be. It would have been preferable for the Board to inquire into all the possible consequences of the merger, focusing on the overall industry structure, and to require evidence of efficiencies to overturn the presumptive invalidity of the merger.

This rationale also seems a departure from the approach sketched out in the United-Western Interchange Case. The Board’s defining monopoly in terms of power, its references to a “phase” of air transportation and to a “territory” or “section of the country” all seem unnecessarily vague and general if the sole inquiry was to be whether the number of carriers on any route had been re-

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York-Washington and Boston-New York routes on which the merging lines had but 67% and 70% in 1960 respectively. The examiner’s doubts on the last two markets were dispelled by the fact that Eastern’s shuttle service, introduced after 1960, was increasing its share. American-Eastern Merger Case, Docket No. 13355, Examiner’s Recommended Decision and Report, November 27, 1962, discussed in Lindahl, The Antitrust Laws and Transportation, 11 Antitrust Bull. 37, 81-86 (1966). Whether the Board would have used exactly the same rationale in a formal opinion is a matter for speculation.


4 C.A.B. at 663.

See text accompanying notes 111-19 supra.
duced. The Board's failure to go on to discuss subsection (d) likewise seems inconsistent with the earlier cases.

(b) Availability of Substitute Services. The prior rationale would suffice to reach the desired result only while the route pattern contained very little parallel service. Thus, although the fact that no competitors would be removed from any route was conclusive against a finding of monopoly, the removal of such services was not sufficient to lead to a finding that monopoly would result. As long as other carriers offer service on all the routes, the elimination of one competitor will not amount to a monopoly. These two rationales can be found in tandem in the TWA-Marquette Acquisition Case, in which the Board found that TWA would still have competition from at least one other transcontinental carrier on every route, except those routes on which only Marquette had been certificated. As to those there would be no elimination of competitive services. In the course of its opinion the Board issued the following delphic utterance: "The intensity or the effectiveness of competition is not to be confused with the existence of a competitive situation..."

Apart from being vulnerable to the same criticisms which could be levelled at the previous theory, this approach offers distinct weaknesses of its own. The Board seems to have done the very thing it cautioned against by confusing the existence of at least one competitor with the existence of effective competition. Even though other carriers offer parallel service, it is nonetheless possible to possess a degree of control over a route which amounts to monopoly. Thus this theory too is inconsistent with United-Western Interchange.

(c) Two Test Cases. The inadequacy of these two rationales was revealed in two recent cases. The Braniff-Mid-Continent Merger Case presented the Board with a proposal to merge two carriers which then divided between them almost all the traffic on the Kansas City-Houston route. The merger would therefore not only have reduced the number of carriers serving that route, but it would also have eliminated effective competition on the route, giving the merged firm the degree of control constituting monopoly, as that term had been defined in United-Western Interchange. Nevertheless, the Board approved the merger, saying, "This removal of competition for passengers traveling between Kansas City and Houston will not affect the amount of service now available, but on the contrary it appears that additional services will re-

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158 Acquisition of Marquette by TWA, 2 C.A.B. 1 (1940), Supplemental opinions, 2 C.A.B. 409 (1940), 3 C.A.B. 111 (1941).
159 2 C.A.B. at 9.
161 Acquisition of Marquette by TWA, 2 C.A.B. 1 (1940), Supplemental opinions, 2 C.A.B. 409 (1940), 3 C.A.B. 111 (1941).
162 2 C.A.B. at 9.
165 Of 457 passengers carried in March 1950, Braniff and Mid-Continent carried all but 12; of 434 passengers carried in September 1950, they carried all but 27. Id. at 734-35. This gave the merging firms over 97% of the business in March and almost 94% of the business in September. Not only are those figures tantamount to monopoly on the route, but the Examiner so held in American-Eastern. American-Eastern Merger Case, Docket No. 13355, Examiner's Recommended Decision and Report, November 27, 1962, discussed in Lindahl, The Antitrust Laws and Transportation, 11 Antitrust Bull. 37, 81-86 (1966).
This is, of course, total capitulation. The immediate improvement of services is irrelevant on the issue of the existence of a monopoly. The decision cannot be squared with either of the previous rationales, and, assuming that the proviso refers to route monopolies, is inconsistent with economic theory, the United-Western case, and the intent of Congress as the Board had previously perceived it. But it is the assumption that the anti-monopoly proviso deals with route monopolies that is the fundamental difficulty.

Nothing illustrates this more dramatically than the situation confronting the Board in the United-Capital Merger Case. There were nineteen city-pair markets in which United and Capital were the only carriers, and the merger would give United a monopoly of all nineteen routes. Yet it seemed clear that the only alternative to a merger was the complete financial collapse of the nation's fifth largest domestic airline. If that happened United would likewise have had a monopoly of those nineteen routes, and in addition there would have been a reduction in competitive service on one hundred and sixty-one routes. The examiner, recognizing that the dilemma was caused by excessive attention to individual routes, explicitly rejected this approach, although he did not clearly indicate what approach he thought proper. By invoking the failing company defense, the Board allowed itself to escape the necessity of doing such an about-face.

(d) What is a "Phase" of Air Transportation? Another aspect of the United-Western Interchange opinion was that the proviso would be violated if the merger resulted in "monopoly control" of a "phase" of air transportation. Considerable uncertainty as to what qualifies as such a "phase" was engendered by the Board's decision in the Flying Tiger-Slick Merger Case, in which approval was given to a proposal to merge the two leading all-cargo carriers. In answer to the argument that the merger would substantially reduce competition in the air freight field, the Board replied that the all-cargo carriers were "having difficulty competing with the multiple service carriers." All indications pointed to Flying Tiger and Slick both operating at a loss during the upcoming year. The merger would allow them "a much greater chance to continue as an effective competitive air-cargo carrier" than either would have as an independent unit. It would have seemed that all-cargo service constituted a separate "phase" of air transportation, if anything did. The Board has certainly treated it as functionally distinct. The fact that the trunklines also carried freight would not necessarily overturn this conclusion. Competition
between phases of air transportation no more renders the classification invalid than competition between modes of transportation obliterates the distinctions between, say, air transportation and railroad transportation.171 The Board's analysis, however, either renders "phase" devoid of meaning by lumping all-cargo carriers and trunklines together, or argues that a monopoly of one "phase" will be tolerated if it intensifies interphase competition. This latter doctrine is inconsistent with the statutory mandate as the Board has interpreted it; it has been rejected by the Supreme Court in analogous circumstances;172 and it ignores the possibility that inter-phase competition might be fostered by other means. For example, a major difficulty facing the all-cargo carriers in their battle with the trunklines was that the latter could carry freight at a rate very near their marginal cost because their overhead costs could be absorbed by their passenger operations. The Board established a new, higher rate floor tied to the all-cargo carriers' costs,173 thus treating the problem directly without a merger.

3. Summary. In more than a quarter century of administration of the Civil Aeronautics Act, the CAB has failed to develop meaningful standards which would indicate what sort of mergers violate the anti-monopoly proviso. The Board's one major effort at definition in the United-Western Interchange Case suffered from serious defects: its approach was exclusively one of nice linguistic analysis without reference to policy; it indicated that the monopoly prohibited was a route monopoly, or a monopoly of some undefined "phase" of air transportation; and it failed to tie its analysis to the facts of the case, leaving the matter on an abstract plane. Later cases would relegate the proviso to the status of a minor annoyance which had to be considered but which did not warrant much attention. Because most of those cases treated competitive considerations only in connection with the proviso, the Board has also slighted the impact of the merger on competition within the airlines industry. These cases have carried on the notion that the proviso was directed against the creation of point-to-point monopolies, but they have found no violation of the proviso in cases in which the Board's own analysis should have led to the conclusion that a route monopoly was being forged by the merger. The Board has also ignored its prior ruling that the creation of a monopoly of a "phase" of air transportation violates the proviso.

It is the contention of this article that the proviso was not intended to prohibit route monopolies, but that it was designed to prevent the further concentration of the industry. The legislative history of the act, as well as notions of sound policy, support this view. A presumption against mergers was thus erected and only a strong demonstration of major efficiencies would suffice to

171 KEYES, FEDERAL CONTROL OF ENTRY INTO AIR TRANSPORTATION 11 (1951).
173 RICHMOND, REGULATION AND COMPETITION IN AIR TRANSPORTATION 52-53 (1961). It might be argued that this resulted in a misallocation of resources by artificially raising prices to protect inefficient operations. In a sense, this is true. But the Board made a determination that all-cargo carriage was required even if it was to be "subsidized" by its users for a time. Maintenance of "uneconomic" service because of its desirability for other reasons has often been an aspect of federal regulation of transportation.
overcome that presumption. In this inquiry only competitive considerations were relevant. Noncompetitive goals made part of the "public interest" by the Declaration of Policy could not be balanced against an adverse impact on competitive relations to permit the Board to approve the merger. The proviso was to restrict the Board's discretion. By shifting its focus to route monopolies, the Board emphasized a comparatively trivial effect of a merger, and it laid the foundation for future embarrassments like the Braniff-Mid-Continent and United-Capital cases.

The one consistent theme has been the Board's failure to find a violation of the proviso. Whenever the Board has disapproved a merger because of the merger's impact on competition, it has found that the merger would be inconsistent with the amount of competition necessary to the sound development of an air transportation system—with subsection (d) of the Declaration of Policy. But exclusive use of this "public interest" standard means that the merger's impact on competition becomes only one factor to be considered; the intended limitation on the Board's discretion disappears entirely. One recalls Senator McCarran's remark during the Senate debate that there was no point in attempting to restrict the agency since it would find a way to use its discretion anyway. It will thus be necessary to see what use the Board has made of that discretion.

B. The "Public Interest" Standard

1. The Board's General Approach. In determining whether a proposed merger would be inconsistent with the public interest the Board considers a variety of factors apart from the merger's impact on competition. Indeed, the Supreme Court has said that the amount of weight to be given the policy in favor of competition is a matter almost wholly within the discretion of the Board. These factors differ a good deal in the extent to which they are relevant to competitive objectives. For example, the Board frequently spends a great deal of time on the type of labor-protective provisions to be imposed as a condition of approval. The significance of such provisions, for present purposes, lies in the extent to which they may inhibit the merging carriers from achieving economies by cutting back on personnel. Similarly, the Board has devoted considerable attention to the price to be paid by the acquiring carrier. Indeed, the Board has been known to disapprove an otherwise unobjectionable merger solely because it deemed the purchase price unreasonably high. This too is a legitimate concern because of the problems which can be thus engendered, but of only marginal relevance to this article.

174 83 CONG. REC. 6732 (1938).
177 See generally Note, 16 Geo. WASH. L. REV. 509 (1948).
178 See United Air Lines, Inc.—Western Air Lines, Inc.—Acquisition of Air Carrier Property, 8 C.A.B. 298, 325 (1947) (Landis, Chairman, dissenting).
Other factors are of more significance. The Board's inquiring whether the merger of two carriers will work an integration of their routes may be relevant in several ways.\(^{180}\) If there is a substantial flow of traffic between one carrier's routes and the other carrier's routes, or a clear traffic potential, the ability of the unified company to offer one carrier service may increase that traffic,\(^{181}\) thus increasing the scale of operations of the carriers, and, perhaps, resulting in economies of scale by lowering the average costs of the enterprise. However, the fact that the route patterns offer little\(^{182}\) or no\(^{183}\) chance of integration is not conclusive against the merger. The Board has even remarked, without further elaboration, that when the merger of two local-service carriers is under consideration "it is not essential that the routes of the two companies be complementary."\(^{184}\) In such cases it is enough if the two companies will be able to integrate their physical assets and achieve economies by the elimination of duplicative facilities. Route integration is thus linked to another factor considered by the Board: the degree to which the merger will achieve economies of operation.\(^{185}\) In part this will depend on the amount of route integration possible, but other efficiencies, such as eliminating duplicative managerial personnel, are also theoretically possible.

Since it has been argued in this article that only solid evidence of economies of scale could rebut the presumption against mergers, the Board's treatment of these issues is important. Naturally, the Board has not consciously weighed these factors in light of a presumption against mergers, simply because it has erected no such presumption. To the contrary, the Board's attitude has been hospitable, even encouraging, toward mergers. In such circumstances, it is not surprising that the evidence on projected cost savings has varied considerably in amount and persuasiveness. In one early case involving two Alaskan carriers,\(^{186}\) the parties had been operating a partially consolidated operation for over two years. Previously both corporations had sent out partially empty flights when one plane could have carried the combined traffic. On occasion both corporations cancelled flights for insufficient traffic when the combined load would have made one flight profitable. In July 1939, they set up a common traffic manager and agreed that he would send all traffic out on the first carrier to leave. The companies also accepted each other's round-trip tickets and interchanged repair and communication facilities. In 1939, the first year of the plan, the carriers had reduced their cost per flying hour fourteen per cent, their cost per passenger twenty-seven per cent, and their cost per trip twenty-

\(^{180}\) These are wholly apart from the bare fact that the improved service which may thus result is of value in itself.

\(^{181}\) See, e.g., National-Caribbean-Atlantic Control Case, 6 C.A.B. 671 (1946).


\(^{184}\) See, e.g., Arizona-Monarch Merger Case, 11 C.A.B. 246, 247 (1950). Integration has seemingly been a more important factor when the fused system of the local-service carriers threatens a trunkline. See Southwest-West Coast Merger Case, 14 C.A.B. 356 (1951).


three per cent. There was also a sizeable increase in the volume of traffic, and both companies were operating in the black in 1940 and 1941. Evidence of this sort is impressive. Although not every merger proposal can be thus supported, it gives some indication what the carriers can produce if the Board but insists on it.

In other cases, the evidence of efficiencies has amounted to not much more than guesswork held together with hope. An instance of this is found in the case approving Western's acquisition of Inland. It was admitted that the interchange of traffic between Western's routes and Inland's had been negligible. In particular, in March 1940, Inland carried 1,437 passengers, 903 of whom originated or terminated at points on the routes of other carriers; only 75 of these traveled on Western. The Board admitted that the merger offered "nothing in the development of an integrated and coordinated transportation system." Although the proponents predicted monthly cost savings of two to four thousand dollars, Western expressed its intention to retain as many of Inland's employees as might be consistent with prudent management. The Board seemed to think that Inland's management had been so poor that efficiencies could be anticipated from the mere fact of change. Yet Western had employment contracts with Inland's president and two of its vice-presidents. Judging from the opinion, there was little to support Western's optimistic estimates. Thus it can hardly be said that the Board has been rigorous in its demands of proof of cost savings.

One factor related both to considerations such as route integration and to the merger's impact on competition is the extent to which the combined company may be expected to divert traffic from carriers offering parallel service. Usually, however, the Board has not explicitly related the consideration to its conscious examination of the merger's competitive impact. In some cases the Board has talked as if diversion were an unmitigated evil and that any merger causing diversion would have to compensate for this drawback. This is hard to square with the Board's feeling that route integration is a good thing since it must be assumed that the additional traffic generated will in part be shifted from other airlines. In other cases the Board has taken a more realistic approach by attempting to calculate the amount of diversion from other carriers to be anticipated and then determining whether that amount will seriously threaten the other carriers. This latter approach recognizes the possible adverse effects on other carriers of the operation of the competitive process.

187 C.A.B. at 317.
188 See, e.g., Wien Alaska Airlines, Inc.-Acquisition of Mirov Air Serv., 3 C.A.B. 207 (1941).
190 Id. at 660-61.
192 See, e.g., Flying Tiger-Slick Merger Case, 18 C.A.B. 326 (1954) (multiple service carriers could afford the loss); Delta-Chicago & So. Merger Case, 16 C.A.B. 647 (1952) (separate calculation of diversion to be expected from each carrier, all of whom could withstand loss).
193 The Board explicitly recognized this in United Air Lines Transp. Corp. & Western Air Express Corp.-Interchange of Equipment, 1 C.A.A. 723, 731 (1940).
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In most of these cases, though, explicit consideration of the merger's impact on competition has not gone beyond the abrupt treatment of the anti-monopoly proviso already described. In view of this, and of the fact that the Board almost always approves a proposed merger, it might be fairly said that the Board has indulged a presumption in favor of mergers instead of a presumption against them. Yet in three cases the Board has called a halt and disapproved mergers, largely, if not entirely, on the ground that they would violate subsection (d) of the Declaration of Policy. 194

2. The American-Mid-Continent Case. By far the most significant of these cases is the American-Mid-Continent 195 case. In 1946 American was the nation's largest domestic carrier, having several routes that spanned the continent from New York, Boston and other east coast points to Los Angeles and San Diego. Mid-Continent's route system ran north and south from Minot and the Twin Cities to New Orleans. It connected with eleven other carriers at some fifteen points, four of these junctions—St. Louis, Joplin, Tulsa, and Texarkana—being with the American system. Mid-Continent had been facing a crisis caused by the loss of key personnel and a substantial amount of equipment to the war effort. Its board had voted to attempt to consummate a merger, but negotiations with Braniff and Northwest failed to produce agreement. Twenty months passed before American proposed a plan, which did eventuate in a merger agreement. But the CAB found that the arrangement would be adverse to the public interest and denied its approval.

In so doing, the Board was careful to point out that no single factor was controlling, that it was weighing all the considerations disclosed by the evidence. 198 One such factor militating against the agreement was the fact that the two systems were relatively uncomplementary. Although fifty per cent of Mid-Continent's dollar volume was connecting traffic, there was comparatively little exchange between it and American; the latter accounted for only a little more than four per cent of the traffic exchanged between Mid-Continent and other carriers measured in number of passengers and only approximately three and one-third per cent measured in revenue. 197 The Board then turned its full attention to the merger's effect on competition.

The Board reiterated that American was the largest domestic trunkline; that it served more cities with more population than United or TWA; that it enjoyed a like leadership in revenue and revenue miles flown; and that the merger would add substantially to American's system in point of cities and

194 In two cases the Board has disapproved the merger of two local-service carriers on the ground that the combined system would be able to compete with trunklines. North Central-Lake Central Acquisition Case, 25 C.A.B. 156 (1957); Southwest-West Coast Merger Case, 14 C.A.B. 356 (1951). Such decisions are designed to restrict rather than promote competition and are more related to the Board's blockading of entry into the industry than to its merger policy. A suggestion by the Board in the latter case that a merger of West Coast with some other carrier might be all right led to the proposal approved in the West Coast-Empire Merger Case, 15 C.A.B. 971 (1952).


196 7 C.A.B. at 372.

197 Id. at 373-74.
population served and route miles. The Board reasoned that any company serving the larger number of customers to their satisfaction will enjoy a competitive advantage over its smaller rivals in securing new business, and the wider the geographical scope of a carrier's service, the wider its competitive advantage will be since it controls more points of origin or destination. Hence, the extension of such a system may enable the larger carrier to divert a substantial amount of traffic from competitors without rendering better service.\textsuperscript{98} For example, although Delta's connecting service between Fort Worth/Dallas and New Orleans offers a shorter route, American would probably carry most of the traffic. 

"... Serious economic damage may thus be inflicted upon a competing carrier without any concomitant public benefit, since the diverted flow of traffic may represent the effect of artificial factors of competitive advantage rather than the establishment of any truly integrated transportation facilities."\textsuperscript{99} The Board insisted, however, that it was not saying American was too big; nor was it forever barring any extension of American's system. And it certainly was not attempting to establish a parity of size among the trunk-lines.\textsuperscript{100} But in view of the competitive impact and the lack of integration, the Board would be "sacrificing [its] ... freedom of action over future matters."\textsuperscript{101}

The Board did consider the arguments urged in favor of the merger and concluded that certain benefits consistent with the public interest would accrue. Improved transportation services would result; economies could well be achieved (although the Board made a few tart remarks about the lack of detail in the evidence as to these); some additional fare reductions could be expected; and Mid-Continent would go off subsidy.\textsuperscript{102} But these were overwhelmed by the adverse factors discussed above.

Despite the Board's claim that no one factor was controlling in \textit{American-Mid-Continent}, it is hard to escape the conviction that the decision rested entirely on the adverse impact on competition which could be expected to result from the merger. The lack of any possibility of integrating the routes of the two carriers has not stopped the Board in other cases, such as \textit{Western-Inland}. With this factor neutralized, the impact on competition becomes the major drawback.

Much of the Board's analysis of this issue reflects the approach urged by this article. The Board's recognition that it would sacrifice its future freedom of action, and its conscious appreciation of the interrelationship of various routes are examples of this. The Board's adverse comments on the generality of the evidence as to cost savings has merit as well, although the Board's willingness to assume that economies would result took much of the sting from this. Most importantly, the Board shifted its focus to the structural change which this merger would produce in the industry as a whole. The disapproval of mergers

\textsuperscript{98} Id. at 378-79.
\textsuperscript{99} Id. at 379.
\textsuperscript{100} Id. at 379-80.
\textsuperscript{101} Id. at 381.
\textsuperscript{102} Id. at 382-84.
having such an effect, in the face of admitted benefits to be gained, could have been the foundation upon which the Board might have reshaped its analysis along the lines suggested herein.

There are, however, certain problems with the Board's analysis which should be noted. In large measure, these problems are traceable to the fact that the Board had created an extremely favorable climate for mergers in the past. Had the Board expressed a presumption against mergers, much of the awkward portion of its reasoning would have been unnecessary; only an inquiry into the affirmative justifications for the merger, and a finding that they were inadequate, would have been required. Having been unduly hospitable to prior mergers, the Board was compelled to point out why it was calling a halt here. Notwithstanding its caveat to the contrary, the Board's explanation points to one conclusion—American was too big. The competitive advantages which the Board felt American enjoyed result entirely from size and scope of operations. The harm which the merger might do to other carriers is rooted in the assumption that passengers will always pick the larger airline, even though the smaller line offers better service. Carried through, this analysis would argue for a freeze on mergers by the Big Four while the smaller lines would be encouraged to merge. The Board's attempt to disclaim such a policy is understandable.

*American-Mid-Continent* was not a wholly unprecedented decision; yet until the examiner's decision in *American-Eastern*, it went further than any other case in its recognition of the threat to competition in the airlines industry posed by mergers. The Board had very early disapproved United's proposal to acquire Western, in part on the basis that the merger would have an adverse impact on the competitive balance west of the Rockies. But the Board also found that there were no affirmative benefits to be gained from the merger. Although United employed certain technical devices that Western did not use, Western's operations were not inferior to United's. No substantial economies could be expected, and the major benefit—improvement of transcontinental services—had already been achieved by approval of an interchange of equipment agreement. Four years later the Board denied approval to Alaska Airlines' plan to acquire Cordova Air Service on the ground that Alaska already had an “overwhelming competitive advantage” in Alaskan air transportation and the acquisition would have brought it into the one area that it was not then serving. The Board pointed out that during a short period when Alaskan carriers had been exempted from economic regulation, Alaska had absorbed three other companies. Although representing much the same attitude as these cases, *American-Mid-Continent* went further than either of them. The

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1 United Air Lines Transp. Corp.-Acquisition of Western Air Express Corp., 1 C.A.A. 739 (1940).
2 1 C.A.A. at 743-44.
4 4 C.A.B. at 710-11.
Board was willing to admit that some benefits would accrue from the fusion of Mid-Continent with American, whereas it found there were none in United-Western. And while American was the largest domestic trunkline, it did not approach having a monopoly of the industry, whereas Alaska Airlines apparently did have a virtual monopoly in Alaskan air transportation, and a history of recent merger activity to boot.

American-Mid-Continent's potential to develop as doctrine received what seemed a mortal blow in the Eastern-Colonial case.7 Despite the fact that Eastern's original acquisition of control of Colonial was tainted with illegality, the Board allowed the merger after Eastern purged itself by relinquishing the control illegally obtained. It is true that Colonial was in financial difficulty, although the Board did not invoke the failing company doctrine. But the Board approved the merger with Eastern instead of the merger with National which was offered as an alternative. To justify this choice, the Board said only that an Eastern-Colonial merger would result in a "somewhat superior integration" and that it would divert less revenue from National than a National-Colonial merger would divert from Eastern.8 Apart from the intriguing problems posed by the attempt to harmonize those two findings, the Board's approach seems completely at odds with American-Mid-Continent. The extent to which the integration of Colonial's routes with Eastern was superior was not spelled out. Nor did the Board give comparative statistics on the amount of diversion to be anticipated, but surely Eastern's net operating profit of over nine million dollars could withstand much more diversion than National's three million six hundred thousand dollar net operating profit.9 The Board did not refer to American-Mid-Continent.

The United-Capital Merger Case10 must also have contributed to the eclipse of American-Mid-Continent. It has already been noted that approaching the case from the angle of route monopoly leads to an insoluble dilemma. The real problem in the case is whether Capital's assets should be allowed to pass into the hands of United. It is not contended that the Board reached the wrong result in that case. Accepting the total collapse of the nation's fifth largest airline with equanimity requires a ruthlessness ordinarily found only in academics. What is objected to is the fact that the Board did not address itself at all to the question of the merger's effect on the structure of the industry as a whole. It is this failure of method rather than the result which is inconsistent with American-Mid-Continent. It was shortly thereafter that the American-Eastern and TWA-Pan American arrangements were submitted.

8 Eastern Colonial Acquisition of Assets-National-Colonial Integration Investigation, 18 C.A.B. 781, 782 (1954) (supplemental opinion).
9 STAFF OF SUBCOM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS. REPORT ON AIRLINES Table 5 (Comm. Print 1957). The figures are for 1955.
A persistent theme in the federal regulation of air transportation has been the inability of Congress to restrict the administrators of policy from doing what they want to do. The awarding of subsidies and the spoils conferences under the McNary-Watres Act, as well as the approval of mergers under the Air Mail Act of 1934 all attest to this. In a sense, therefore, the Board is pursuing a time-honored tradition in refusing to allow the anti-monopoly proviso to restrict its discretion, although it is quite clear that Congress intended such a restriction. In this instance, however, the result has been the failure of the Board to develop anything like consistent policy respecting airline mergers.

Had the Board submitted to the Congressional will and used the proviso as it was evidently intended to be used, there would have been a policy of presumptive disapproval of all mergers. Only strong evidence of real economic advantages to be gained from the merger would be permitted to overturn this presumption. Non-economic considerations would be excluded. In this way the Board would have been able to define standards which not only conformed to the intent of Congress, but preserved the Board’s future flexibility in developing the air transportation industry. The variety of powers granted the Board under the Civil Aeronautics Act would have enabled the Board to meet immediate crises by techniques which did not involve structural changes in the industry.

Instead, the Board apparently adopted a presumption in favor of mergers. It subordinated the anti-monopoly proviso to a trivial status by treating it as if it referred to route monopolies, usually tossing it off in a perfunctory manner. It has failed to develop rationales which are internally consistent. At times the Board seemed to feel that a proposed merger would have too great an impact on competition to be approved, but these cases cannot be fitted into the over-all pattern of the Board’s decisions in any meaningful way. Moreover, the Board has simply ignored them if they later proved inconvenient. Without in any way attempting to minimize the difficulty of the Board’s regulatory tasks, it must be said that it could have done better.

It is not too late for the Board to adopt a hard line on mergers. It means an about-face, but this is nothing new. The Board can begin to insist that evidence of efficiencies be presented to support any merger. It can return to the approach of American-Mid-Continent, and re-examine the meaning of the anti-monopoly proviso. It must recognize that every merger subtracts one firm from the industry, and closes one more door to its own future freedom.

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211 A perceptive and sympathetic appreciation of these difficulties may be found in Fuller, The Morality of Law 170-77 (1964).