AMERICAN AIRLINES INC.

100 EAST 42nd STREET
NEW YORK 17, N. Y.

OFFICE OF
THE SECRETARY

September 1, 1944

Mr. Amon G. Carter
Fort Worth Star-Telegram
Fort Worth, Texas

Dear Mr. Carter:

At Mr. Kemp's request I am sending you herewith a copy of the brief which summarizes our position in the American Export case, together with a summary of a study, "Tomorrow's Customers for Aviation".

Very truly yours,

C. W. Jacob
Secretary

CWJ/c
Encl.

BEFORE THE

Civil Aeronautics Board

WASHINGTON, D. C.

In the Matter of the Application of AMERICAN EXPORT LINES, INC. for approval of the plan for the divestiture of control of American Export Airlines, Inc., by American Export Lines, Inc., under section 408, and for approval of an agreement relating thereto under section 412 of the Civil Aeronautics Act.	Docket Nos. 1345 1346

BRIEF TO EXAMINERS ON BEHALF OF AMERICAN AIRLINES, INC.

PRUITT, HALE AND COURSEN
420 Lexington Avenue
New York 17, N. Y.
Attorneys for American Airlines, Inc.

SULLIVAN & CROMWELL
48 Wall Street
New York 5, N. Y.
Of Counsel

August 29, 1944.

THE SORG PRINTING CO., INC., NEW YORK, N. Y.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases Cited

Other Authorities

BEFORE THE

Civil Aeronautics Board

WASHINGTON, D. C.

In the Matter of the Application of

AMERICAN EXPORT LINES, INC.

for approval of the plan for the divestiture of control of American Export Airlines, Inc., by American Export Lines, Inc., under section 408, and for approval of an agreement relating thereto under section 412 of the Civil Aeronautics Act.

Docket Nos.
1345
1346

BRIEF TO EXAMINERS ON BEHALF OF AMERICAN AIRLINES, INC.

STATEMENT*

This is a consolidated proceeding under sections 408 and 412 of the Civil Aeronautics Act, as amended, wherein approval of the Civil Aeronautics Board (Board) is sought of an agreement dated March 20, 1944 between American Airlines, Inc. (American), American Export Airlines, Inc. (Export), and American Export Lines, Inc. (Steamship). Subject to this approval, the agreement provides that American will purchase from Export 120,000 shares of Export's capital stock thereby transferring to American absolute control of Export and divesting Steamship of its present control, a divestiture required by a prior order of the Board.

* Emphasis wherever the same appears is our own.

The hearing was held before Examiners Thomas L. Wrenn and Ferdinand D. Moran from July 24 to July 26, 1944.

THE INTERVENORS

The intervenors are Pan American Airways, Inc. (Pan American); United Airlines, Inc. (United); Airline Pilots Association (ALPA), and United States Lines Company (U.S. Lines). Transcontinental and Western Air, Inc. (TWA) intervened, but did not appear at the hearing and subsequently withdrew as an intervenor (256).

ADVANTAGES OF THE PROPOSED PLAN

The proposed plan will accomplish

1. The successful participation of U. S. flag air carriers in the inevitable post-war competition for international traffic with foreign flag air carriers, by reserving to the former the traffic generating sources of their own country;

2. A major step toward fuller realization of the inherent advantages of air transportation—direct communication from world city to world city — thereby advancing America's present air transportation system by making it more directly a vehicle of international commerce and security;

3. A unification of complementary air transport systems giving single-carrier and improved service to the public by over-passing both topographical and political barriers, directly connecting the traffic-generating centers of the United States and Europe;

4. An integration which will result in substantial economies in operation, maintenance, sales, and advertising, increasing the generation of traffic and promote international air travel generally by the coordinated efforts of the respective air carriers;

5. A strengthening, rather than a lessening or an eliminating, of the existing competition.

THE ONLY QUESTION PRESENTED

Has the proposed plan been shown to be *inconsistent* with the public interest?

BACKGROUND

1. Relation Between Export and Steamship

Steamship is a surface carrier engaged in foreign ocean transportation. Export is a Delaware corporation organized by Steamship to engage in foreign air transportation. Export has an authorized capital stock of 1,000,000 shares having a par value of $3.00 per share of which 80,000 shares were issued and outstanding as fully paid prior to June 30, 1943, as of which date an additional 55,555-5/9 shares were reserved for issuance upon the exercise of 10,000 non-detachable warrants attached to certificates for 10,000 shares of $100 par value 5% Cumulative Preferred Stock of Steamship.

Under an agreement dated March 1, 1940 between Export and Steamship, Steamship loaned to Export the proceeds from the sale of the 10,000 shares of Steamship's preferred stock. The purchase warrants evidence rights of purchase from January 1, 1941 to December 31, 1950 of 5-5/9 shares of the capital stock of Export for each share of preferred stock held. Other clauses in the agreement provided for surrender of preferred stock to Steamship at the rate of $100 per share in liquidation of Export's indebtedness to Steamship, conversion of the indebtedness

into capital stock of Export under certain conditions, and exchange of Export's capital stock owned by Steamship for Steamship's preferred stock owned by Export.

Since June 30, 1943, 526 shares of Export have been issued pursuant to the exercise of 95 of the stock purchase warrants and Steamship has retired 4,000 shares of its preferred stock canceling accompanying purchase warrants, so that as of March 20, 1944 there was issued and outstanding 80,526 shares of capital stock of Export and warrants entitling holders to purchase an aggregate of 32,805-5/9 shares. As of said date Steamship was the owner and holder of 56,000 of said shares and had issued and outstanding 5,905 shares of its preferred stock with accompanying purchase warrants.

2. *Prior Transatlantic Proceedings*

In its decision *Pan American Airways Co. (of Delaware),* 1 CAA 118, the Civil Aeronautics Authority in granting the application of Pan American for a certificate of convenience and necessity for trans-Atlantic operation, limited the number of round trips to be made by Pan American to two per week, expressly leaving the way open for competition.

> "The Authority is of the opinion, therefore, that, considered in the light of the limited number of landing rights for trans-Atlantic service held by the Government of the United States under existing international agreements *and the necessity of preserving the possibility of competition,* the public interest requires a limitation upon the number of such landing rights which may be utilized by a single air carrier." (p. 131)

By application filed May 9, 1939, as later amended, Export sought certificates to engage in foreign air transportation between the United States and Europe, over certain designated routes. Pan American intervened in opposition.

The Board sharply defined the issues in that proceeding pointing out that fundamentally it involved the authorization of a *second* trans-Atlantic air carrier (*American Export Airlines, Inc.,* 2 CAB 16).

> "The North Atlantic Trade Route
>
> The nature of the application, the entire course of the proceedings, and the respective contentions so strongly urged by applicant and intervenor have made it clear *that what applicant is seeking and intervenor opposing is the inauguration of a second United States trans-Atlantic air transportation service over the general North Atlantic trade route, rather than service between any particular terminals.*
>
> Each route for which application is made has its eastern terminal at an important European trade center, but operations to each of these are now barred by Presidential proclamations under the Neutrality Act of 1939. These proclamations leave only a comparatively small portion of the entire European coastline available for the location of terminals for trans-Atlantic service conducted with flying boats. This comprises the coast of Portugal northward from Cape St. Vincent and the northern Atlantic coast of Spain from the Portuguese boundary to the city of Bilbao. *The only important city situated on this coastline and named in the application which is available for present use as the terminal point of trans-Atlantic operations is Lisbon, Portugal.* * * * Such European air services as now connect trans-Atlantic air service with the interior of Europe have their western terminal at Lisbon, which is thus the only gateway for trans-Atlantic air traffic moving between the United States and Europe. * * * *When the present barriers are removed, it will be ap-*

propriate to consider the institution or resumption of service to European traffic centers other than Lisbon. For this reason, any certificate to be issued in this proceeding should contain a provision designed to permit the operation thereby authorized to continue *pending such period as may be required for any revision of the certificate which may at that time be required by the public convenience and necessity.*'' (p. 24)

The desirability of trans-Atlantic *competition* was put in terms of declared public policy under the Act:

''It is therefore apparent that the fundamental issue is whether a second United States air carrier should be authorized to provide additional air transportation service over the North Atlantic trade route or whether the opportunity of furnishing all such additional United States air transportation service should be reserved exclusively to intervenor. *The issue thus presented involves the entire underlying policy of the Civil Aeronautics Act of 1938.*'' (p. 29)

Concluding that the public interest required a *second* trans-Atlantic service the Board held:

''We have reached our conclusion as to the need for competition on the North Atlantic trade route primarily on the basis of the declaration of policy contained in section 2 of the Civil Aeronautics Act of 1938 and on the particular set of facts before us. However, we believe that the result that we have reached is entirely consistent with general principles of public utility regulation. Competition does not necessarily involve a useless duplication of service. It is true that where a territory is served by a utility which (1) has pioneered in the field, (2) is rendering efficient service, (3) is fulfilling adequately the duty which, as a public utility, it owes to the public and (4) the territory is so generally served that it may be said to have reached the point of

saturation as regards the particular service which the utility furnishes, the trend today is to protect the utility within such field; but when any one of these conditions is lacking, the public convenience may often be served by allowing competition to enter the field. Intervener has pioneered the route here under consideration and is rendering efficient service within the limits of its facilities, *but the saturation point of available air traffic on this route is not yet reached. The territory to be served through the termini of the trans-Atlantic route is almost unlimited.* . . . After carefully weighing the foregoing considerations and all of the arguments advanced by applicant and intervener, we are of the opinion that the inauguration of a second trans-Atlantic service by a properly qualified United States air carrier is in the public interest.'' (pp. 34, 35)

In *Pan American Airways Co.* v. *Civil Aeronautics Board et al.,* 121 F. (2d) 810, the Circuit Court of Appeals considered, among other things, a petition for review of the Board's order denying Pan American's application for a rehearing of the Export case. In denying the petition, the Court examined the declarations of policy in Section 2, subdivisions (a) and (d) and interpreted the phrases ''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'' and ''competition to the extent necessary to assure the sound development of an air transportation system'' as a declaration that competition in foreign service is a definite statutory public policy.

On July 12, 1940, the Board entered an order granting Export a certificate of convenience and necessity to engage in temporary air transportation between New York and Lisbon.

On December 19, 1941 the Board entered an order issuing to Export a temporary certificate of public convenience and necessity to engage in foreign air transportation between New York and Foynes, Ireland.

On the 30th day of July, 1942, the Board entered an order denying Steamship's application for approval of its control of Export and ordered Steamship to "divest itself of control" of Export, and to submit a plan of divestment within six months. By order dated September 15, 1943 the time was extended to October 25, 1944.

3. *The Divestiture Plan*

On March 20, 1944 Export, American and Steamship entered into a written agreement (Exhibit A attached to the application of American), conditioned upon the approval of the Board, to the following effect:

Export agreed to issue and sell to American, and American agreed to purchase, 120,000 shares of Export's capital stock constituting a complete and unquestionable controlling interest in Export for the purchase price of $3,000,000 ($25.00 per share), such controlling interest to be represented by approximately 51.4% of a total of not to exceed 233,331-5/9 shares of the capital stock of Export to be issued and outstanding upon the performance of the agreement.

American agreed, so long as it retained control of Export, to conduct its operations in international air transportation (exclusive of operations in the North American continent, including the Isthmus of Panama) only through Export. Similarly, Steamship, so long as it remained a stockholder of Export, agreed that it would engage in air transportation only to the extent permitted through its minority stock interest in Export. It is only this provision

of the agreement which might require the Board's approval under section 412 of the Act, the application of American in all other respects being governed by section 408 of the Act similarly to Export.

Major Considerations Prompting American's Proposed Purchase: As the record reflects, American filed an application with the Board for a certificate of public convenience and necessity to engage in foreign air transportation between certain of the major cities it now serves in the United States and London or Paris. The conclusion to file such application was based upon American's studies of potential air traffic on the North Atlantic route, its experience gained in international operation, both civil and military, and its belief in an obligation to those served on its routes domestically, to provide single carrier service to the traffic centers of Europe.

As the record also reflects, certain specific considerations in addition to those enumerated, led American to conclude that its acquisition of Export would be in the public interest as well as in the company's. The testimony on this subject of Mr. A. N. Kemp, President of American, is extremely important to the fair and complete presentation to the Board of the issues in this proceeding:

> "A. As I have stated, American Airlines reached the conclusion after thorough studies that its operation of a North Atlantic route to London or Paris would be in the public interest, creating an integrated service between there and communities served by American Airlines in the United States, Mexico, and Canada. At the time of filing such application there were, and are today, two air carriers, Pan American and Export Airlines, certificated over the North Atlantic trade routes. The acquisition of control of one of those existing air carriers, in our judgment, was desirable for many reasons.

First, it seemed clear to us from the opinion of the Civil Aeronautics Board, when issuing a certificate to Export Airlines, that the Board had reached the conclusion that competition over the North Atlantic trade route was in the public interest and that Export Airlines should be the carrier to furnish that competition to Pan American.

It seemed equally clear from the opinion that both the duration of the certificate as well as the terminal then named, that is, Lisbon, was clearly the result of fortuitous circumstances, and that the important factor in the opinion of the Board was the determination that there should be another air carrier on the North Atlantic trade route in competition with the then certificated carrier and that such other carrier should be Export Airlines.

The original decision in the Export Airlines' case confirms our belief in these respects.

In the second place, upon American Airlines acquiring control of Export Airlines it would have a company already in operation as well as one having been found by the Board to be required and performing a service in the public interest. It was apparent, assuming that there would be other United States flag carriers in the international field, that Export Airlines would certainly continue to be one of them and would operate over the North Atlantic trade route to termini on the continent which would be great centers of population and competitive with Pan American as the Board originally contemplated.

It was clear that the duration of the certificate issued to Export Airlines as well as its terminus in Europe was due entirely to the inability of the Board and the applicant at that time to determine the exact route to be flown by reason of the Neutrality Act and the generally unsettled conditions in Europe. The Board, however, had already determined that Export Airlines should fly the North Atlantic trade route in competition

with Pan American, which they further confirmed by issuing a certificate to Export Airlines based on wartime necessity between New York and Foynes. We therefore believed that the Board would issue to Export Airlines, when circumstances permitted, a certificate over the North Atlantic trade route to the most densely settled centers of population in the North European area.

Q. Is it true, then, Mr. Kemp that American Airlines felt that the acquisition of control of Export Airlines would assure it a route across the North Atlantic to the large centers of population in the North European continent?

A. Absolutely." (54)

From the foregoing it should be apparent that the considerations outlined were paramount in American's conclusion to enter into the subject agreement and to obligate itself to an investment of $3,000,000 — an amount clearly reasonable for the control of the second trans-Atlantic air carrier which is destined to be permanently certificated to one or more of the large European centers of population, affording real competition to the other U. S. flag air carrier, as was so clearly intended by the Board.

Upon the Approval of the Agreement: (a) Steamship will call for redemption its then outstanding shares of preferred stock; (b) Export will discharge its indebtedness to Steamship through (1) payment in cash, or (2) surrender to Steamship of its preferred stock previously acquired, or if warrants are not exercised (3) issue to Steamship capital stock of Export reserved for the exercise of warrants; and (c) Steamship will take all necessary corporate action to provide that a majority of the members of the Board of Directors of Export are persons nominated by American.

Resultant Financial Status of Export:* The investment of $3,000,000 is to be paid directly into the treasury of Export.

The consolidated balance sheet of Export reflects that $1,511,049.56 was expended for Experimental and Development Costs and Expenses prior to and in preparation for the inauguration of air transportation under certificates of public convenience and necessity. With the undertaking being underwritten by Steamship, Export has incurred a total indebtedness to its parent of $1,607,366.60, which is to be paid by Export in the following manner: (a) by surrendering to Steamship, shares of Steamship's preferred stock amounting to $590,500 to be received by Export in exchange for the issuance of 32,805-5/9 shares of its capital stock; and (b) by payment in cash of the balance of the indebtedness, amounting to $1,016,866.60. This would leave in excess of $2,000,000 in cash in Export's treasury.

The Pro Forma balance sheet of Export (AE 19) summarizes the resultant net worth of Export as of December 31, 1943 as follows:

Capital Stock	$ 699,994.65
Surplus	3,545,116.24
Net Worth	$4,245,110.89

* See Exhibit A-20 setting up Pro Forma consolidated balance sheet of Export giving effect to this transaction as of December 31, 1943.

I.

THE PUBLIC INTEREST PURPOSES OF SECTION 408 ENCOURAGE INTEGRATION CONSISTENT WITH THE MAINTENANCE OF COMPETITION AND THE DEVELOPMENT OF AN ADEQUATE, EFFICIENT AND ECONOMICAL AIR TRANSPORTATION SYSTEM AS HERE PROPOSED.

This application for acquisition of control is governed by the provisions of Section 408 of the Act.

Section 408 (a) provides in part:

> "It shall be unlawful, unless approved by order of the Authority as provided in this section—
>
> "* * * (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; * * *"

Section 408 (b) provides in part:

> "* * * Unless, after such hearing, the Authority finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, *it shall* by order, *approve such * * * acquisition of control,* upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: PROVIDED, That the Authority 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 acquisition of control: PROVIDED FURTHER, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith with-

in the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

In *Acquisition of Western by United,* 1 CCA 739, the standards of public interest established by Congress to guide the Board were found to be in Section 2 of the Act:

"The application of United is to be approved, providing the other conditions in section 408 are fulfilled, *unless it is found* that the proposed acquisition of control and the subsequent merger or purchase of assets will not be consistent with the public interest. *'Public interest' as thus used in the act is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives. Thus, section 2 of the act directs the Authority to consider certain specific objectives as being in the public interest.* We are required, inter alia in our decisions, (a) to encourage the development of an air transportation system properly adapted to the present and future needs of our foreign and domestic commerce, the Postal Service and the national defense; (b) to foster sound economic conditions in air transportation and to improve the relations between, and coordinate transportation by, air carriers; (c) to promote adequate, economical and efficient service at reasonable charges, without unfair or destructive competitive practices; and (d) to preserve '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.' We proceed to the examination of the evidence in this case *in the light of the criteria of public interest* thus provided by the act." (p. 741)

The effect of acquisition on competition was weighed in the light of subdivisions (a) and (d) of section 2:

"Any merger or other form of acquisition, therefore, (referring to 2(a) and (d)) which, by stifling normal competition or by encouraging destructive competition, would tend to retard or prevent the development of an air transportation system properly adapted to the present and future needs of the Nation must be deemed inconsistent with the public interest. (p. 745)

The background for the regulatory policy of Congress as embodied in the act was discussed:

"In reaching a judgment on the soundness of the present proposal of the applicant, we recognize the fact that air transportation in the United States, despite its remarkable advance in the short period of its existence, is still in a stage of rapid development and expansion, and that neither the limits of that expansion *nor the ultimate design of the national air map can at this time be safely predicted.* The regulatory policy set forth in the act indicates that Congress was fully aware of this fact. Past experience in the air-transport industry, as in other industries affected with a national public interest, presented abundant evidence of the harmful effects of uneconomic duplication of services, unsound combinations, and undue concentration of economic power. Reference to both the legislative history and to the text of the act demonstrates the congressional intent to safeguard an industry of vital importance to the commercial and defense interests of the Nation against the evils of unrestrained competition on the one hand, and the consequences of monopolistic control on the other. In attaining this objective

the act seeks a state of *competition* among air carriers *to the extent required by the sound development of the industry.* The maintenance of such a constructive competition, we believe, will be best served at the present state of the industry's development by a reasonably balanced system of air transportation in every section of the country.

Size alone cannot be said to be the determining factor in judging a carrier's conformity to such a balanced system." (p. 749)

Additional elements of public interest are set forth in *Acquisition of Marquette by TWA,* 2 CAB 409, 415:

"It is obvious that the purchase price can properly be regarded as only one element of the public interest in a case of this nature and that it must be carefully weighed in connection with all other applicable factors. *Certainly the improvement and expansion of existing service to the public and the financial strengthening of an existing air carrier, both of which are found to be reasonably expected results of the present acquisition, are consistent with and will advance the public interest.*"

The elements of public interest were summarized:

"*The public interest has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best uses of transportation facilities.*"

In the *United-Western Interchange of Sleeper Equipment,* 1 CAA 723, 728, it is stated:

"* * * We find that the elimination of changes at these hours will improve the service offered to passengers flying to and from Los Angeles over the routes of Western and United. *The coordination of transportation by air carriers is expressly mentioned in section 2(b) of the act as one of the factors to be considered by the Authority as being in the public interest.*"

"* * * 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. * * *" (p. 731)

"*If, in the ordinary case, competitors are to be prevented from inaugurating improvements in service solely as a protection to a particular air carrier, the development of an adequate air transportation system in this country will be retarded rather than assured.* The improvement of a connecting service afforded by two air carriers would appear to be just as desirable as improvements in service which can be made by the carriers individually, and under the express terms of section 2(b) of the act, the coordination of air transportation is to be encouraged." (p. 731)

In *Acquisition of Inland by Western, Doc. 1106, May 23, 1944,* the Board declared:

"Although the proposed acquisition does not accomplish the desirable end of creating a geographically integrated corporate pattern for Western, other considerations of public interest must be examined and weighed in determining the effect of the proposed acquisition on the public interest. * * *"

"The acquisition of Inland by Western would bring Inland under the control of Western's management which has maintained higher standards of operation and financial policy. Certain operating advantages would be derived from giving the two routes common equipment and maintenance and improved service." (p. 8)

Member Lee, in his dissenting opinion, declared integration to be a major consideration in any proposed acquisition:

"Not only may the Board consider the integration or lack of integration of the pattern resulting from a proposed acquisition, in determining whether that acquisition will or will not be consistent with the public interest, but, in fact, the Board must consider it. * * * (p. 14)

"Thus integration, or lack of it, affects the public interest from certain specific standpoints. One of these is economy. The different routes of a carrier's system should be so related as to meet the requirements of a sound operating policy. Economical and efficient operation require a properly related route system. Unless the different segments of the system are connected by a substantial community of interest, maximum operational economies are not attainable." (p. 16)

In its supplemental opinion in the *Acquisition of Marquette,* 2 CAB 409, the Board recognized certain procedures adopted by the Interstate Commerce Commission in its administration of similar sections of the Interstate Commerce and Motor Carrier Acts (as later amended in 1933 and 1940) stating that "the acts are parallel in their general scope, purpose and terms, and it is apparent that Congress intended that the acts, each in its own field, should have like interpretation, application and effect."

The Board recognized that both acts were the fruition of transportation experience running back many years and embodied substantially the same policies. As was further stated in the supplemental *Marquette* opinion:

"* * * The reports of the Congressional Committee hearings held prior to the enactment of the Civil Aeronautics Act likewise *indicate an intent to provide the same general type of regulation for air carriers as was then provided for railroads and motor carriers and that it was desirable to pattern the Civil Aeronautics Act upon such prior legislation* in order to avoid confusion of interpretation, *since that legislation was not new or untried but embraced definite policies built up over a period of years.*" (p. 412)

It would appear from the foregoing that in applying public interest tests the Board is so guided by objective standards of policy as laid down by Congress and as interpreted by the courts and other transportation regulatory agencies, to warrant further inquiry into the evolution of the standards of public interest. It should be understood that the following is submitted only for the purpose of showing the desirability of and trend toward integration of complementary transportation facilities (within the same form) as sound economic planning in the public interest, rather than as urging that the authorities are controlling in the instant proceeding where, of course, competition is not being eliminated.

* * * * *

In testing the consistency of an acquisition with the public interest, the United States Supreme Court has held that the Interstate Commerce Commission is limited to the objectives of the national transportation policy reflected in the long history culminating in the Interstate Commerce Act.

U. S. v. *Lowden, et al.,* 308 U. S. 225 (1939);
McLean Trucking Co., Inc. v. *U. S.,* 321 U. S. 67 (1944);
New York Central Securities Corp. v. *U. S.,* 287 U. S. 12 (1932).

In *United States* v. *Lowden et al., supra,* the Court said:

"In New York Cent. Securities Corp. v. United States * * *, we pointed out *that the phrase 'public interest' in this section does not refer generally to matters of public concern apart from the public interest in the*

maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission to secure a more adequate and efficient transportation system. (Citing cases)'' (p. 230)

The Court held that ''public interest'' is not general welfare, but sound transportation economics:

''* * * Thus restricted, the term public interest 'as used in the statute, is not a mere general reference to public welfare but as shown by the context and purposes of the Act has *direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities.*' Texas v. United States, 292 U. S. 522.'' (p. 230)

The development of modern industrial methods of mass production and the technique of integration of complementary or non-competing units gave such impetus to the merger movement as to compel judicial narrowing of the monopoly acts by evolving distinctions and standards of public economic benefits that would result from certain types of combinations or integrations.[1]

---

1. *"Regulation of Railroad Finance"*, Frederick, Hypps, and Herring-Simmons-Boardman (1930); *"Monopoly in Law and Economics"*, Prof. Edward S. Mason (Professor of Economics, Harvard), 47 Yale Law Journal 34 (1930); *"Economics of Transportation"*, D. Philip Locklin, Revised Edition (1938), 315, 316, 332, 333; *"Evolution in Transportation Economics"*, Clyde B. Aitchinson, 7 I.C.C. Practitioner's Journal 315; *"The Interstate Commerce Commission"*, Sharfman, Part Three, Vol. A (1935); *"Federal Regulation of Railway Management and Finance"*, by Kenneth R. Burgess, 37 Harvard Law Review, 705 (1924); *"Interstate Commerce Commission and Railroad Consolidation"*, by Sidney P. Simpson, 43 Harvard Law Review, 192 (1930); *"Growth of Anti-Trust Legislation"*, John R. Kerdes, 7 Calif. Law Rev. 144.

As aptly summarized by the Court in *United States* v. *Republic Steel Corporation,* 11 Fed. Supp. 117 (1935):

''* * * It is certain that the anti-trust laws have failed to restrict the merger movement. * * * *The result of combinations and mergers may be and not uncommonly is to save overhead, increase mass production, reduce prices, and improve the product.* Where these beneficial results are used fairly and are passed on to the consuming public and to employees, it cannot be considered that, when construed in the light of the International Shoe Case, they are within the prohibitions of Section 7. *The elimination in such cases of the competition between the merging corporation is, in reality, a step in the strengthening of competition between the units vitalized thereby and the general industry.* Therefore, instead of probability of injury to the public resulting from consummation of such merger, the interest of the public will be enhanced.'' (p. 124)

This trend toward combination and elimination of duplication had its counterpart in railroad transportation where the poor financial condition of the railroads made that industry a ready subject in applying and codifying these new concepts of economic public interest.

Clyde B. Aitchinson, Member of the Interstate Commerce Commission, reviewing the situation leading up to the 1920 Act, said:

''Development of mass production methods in industry profoundly changed the whole economic situation. * * *

''The transportation act, 1920, which evolved, was the first thoroughgoing attempt at translating economic planning into legal form. It formulated an integrated code, dealing with all important aspects of the problem presented by the carriers within its scope. * * * (id. footnote 1)

As was said in the *Lowden Case* (supra):

> "* * * *The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation* system that the 'public interest' in one cannot be dissociated from that in the other." (p. 232)

Similar transportation objectives, recognizing the desirability of integration, appear to be present in the administration of the Civil Aeronautics Act. (Opinion of Member Lee, supra p. 18.)

Chairman Pogue has stated:

> "* * * Integrations and proper expansions of existing systems and the wise building of new systems will be required if those objectives are to be achieved." [2]

However, there appear to be some important procedural differences between section 408 of the Civil Aeronautics Act and section 5(2) of the Interstate Commerce Act. The veto power of the Board over an application under section 408(b) appears intentionally to have been framed *negatively,* indicating a Congressional leaning in favor of consolidations, *provided* of course, that the Board did not find them to conflict with the standards of public interest set out in section 2. In this connection it is of interest to note that in the first proviso of section 408(b), the Board is given *no discretion* whatsoever if the application were to result in creating a monopoly and thereby restrain competition or jeopardize a third party air carrier, but must deny the application. On the other hand, in the same paragraph but in the second proviso, it is stated that the Board must

2. *"Scouting Our Air Future"*, by L. Welch Pogue, Chairman, Civil Aeronautics Board—address delivered before the Southern Commercial Secretaries Convention in Birmingham, Alabama, March 21, 1944.

affirmatively find that an application by a non-air carrier be in the public interest before granting it.

This does not appear to be accidental phrasing, since examination of other sections of the carefully drafted Civil Aeronautics Act reveal that in some situations, such as applications for certificates of convenience and necessity, approval of transfer of such certificates and of interlocking relationships, the application must affirmatively show public interest.

This negative procedure in section 408(b) attains an even greater significance when it is considered that in none of the amendments to the Transportation Act of 1920, 1933, 1935 and 1940 have such limitations been imposed upon the administrative discretion of the Interstate Commerce Commission in acquisition proceedings.

The first proviso, by its very limitation of discretion, also points to the objective of encouraging combination, since as far as "restraint on competition" or adverse effect on another air carrier is concerned, the Board in effect is directed to disregard these aspects unless the proposal results in a monopoly. In other words, competition is relative and is to be encouraged generally, although as far as section 408 is involved, integration which does not produce monopoly is to be desired because of the over-all economic benefits to the public.

It would appear that the general pattern of the Board's prior decisions has been consistent with the foregoing reasoning and the Board has approved applications unless they were clearly in conflict with specific standards of public interest.

The *Lamsa Acquisition* by United, Doc. 854, Sept. 17, 1943 was approved even though the routes had no relation to each other and did not connect with or complement each

other. There the Board, not finding that the public or United would be adversely affected, approved the acquisition.

Western's *Acquisition of Inland,* Doc. 1106, May 23, 1944 was granted on the expectation that Western would operate it more efficiently even though the systems did not complement one another. In fact, a dissenting opinion on the ground of lack of natural integration was written.

The *Mayflower Acquisition* by Northeast, Doc. 1083, June 12, 1944, Supp. Op. Aug. 7, 1944 was approved although it was noted that it was of some benefit to the New England area but of no unusual value to Northeast.

In *TWA's Acquisition of Marquette, supra,* the Board apparently did not find reasons adverse to the public interest under the first subdivision of (b) of section 408, except the price (in the first opinion), but on the contrary found that TWA would provide an improved service and develop traffic potential. However, the monopoly issue there arose and was disposed of by the Board's affirmative finding that no monopoly was created since it was merely a substitution of one carrier for another and that competition over the acquired segment would be provided by other carriers.

The Proposed Plan Affirmatively Meets Every Test of Public Interest.

More than any prior acquisition application to come before the Board, the instant application conforms with the objective of sound air transportation policy. There is no evidence of record to show that it is in any way adverse to the public interest even under the most broad Congressional standards of transportation policy.

It therefore follows that the proposal should be approved unless the Board *affirmatively* finds that the acquisition is inconsistent with the following criteria of public interest:

1. Maintenance and most effective use of present transportation facilities and service.
2. Economy and efficiency of operation.
3. Maintenance of requisite competition.

On the other hand, as we will show in Part II, the record preponderantly establishes that this application is not only not inconsistent with the aforementioned standards, but will advance and promote sound air transportation because it will:

1. Permit U. S. flag air carriers in foreign air transportation to have full benefit of access to their own country's traffic generating centers.
2. Improve through service.
3. Result in the integration of operations with substantial economies and the generation of traffic for both systems.
4. Preserve and strengthen competition in trans-Atlantic air transportation in the national interest.

II.

THE RECORD ESTABLISHES THAT THE APPROVAL OF THE PROPOSED PLAN OF DIVESTITURE AND ACQUISITION WILL ACHIEVE THE PURPOSES OF THE ACT.

A.

An Air Transportation System Properly Adapted to the Present and Future Needs of the Foreign and Domestic Commerce of the United States Will Be Encouraged and Developed—and the Inherent Advantages of Air Transportation Will Be Preserved—(Section 2 of the Act).

What are the inherent advantages of air transportation that Congress has mandated the Board to recognize and preserve? Ox-cart thinking has no place in air transportation—nor has unrealism or impracticalism.

To say that air transportation knows no physical boundaries is but to labor the obvious—but is not that the suggestion of those who would deny the public the advantages inherent in the present proposal by continuing to urge the perpetuation of coast line demarcation between carriers engaged in domestic and foreign air transportation? Overshadowing the obvious public benefit of single carrier service, the position of the opponents to the plan would rob U. S. flag air carriers of one of their greatest compensating competitive advantages over foreign flag air carriers, i.e., direct access to our own country's traffic and trade centers.

With respect to the real issue of whether it is in the public interest for American to operate, directly or indirectly, a route connecting its existing system with Europe and thereby preserving the inherent advantages of air transportation that are here at stake, a witness for American, who could not but be characterized as an expert, stated in part:

> "We think that it is important that there be one responsibility from point of origin to point of destination, and that if there is, the public will benefit.
>
> There are requirements, documentary as well as otherwise, for international travel. The airline that transports a passenger internationally is responsible for the proper documentation and for the meeting of all international requirements by its passengers.
>
> We have found that domestic airlines which do not have that responsibility directly often are not as careful to see that passengers destined to travel internationally are properly prepared, so that at arrival at point of connection with an international carrier there are often delays while the international carrier makes certain that the requirements are met and the documents completed, and so forth. * * *
>
> This is eliminating or minimizing the possibility of delays en route, all to the advantage of the traveler.
>
> We think that an integration such as we have proposed will speed the simplification of international ticketing, through-baggage checking, and so forth, which, while possible without such integration, will be much slower of accomplishment based upon our experience.
>
> We think also that if one carrier operates all the way from Chicago to London, for example, that connections will be sure where such connections are necessary at New York or Boston, for example.
>
> We feel that the frequency of service across the North Atlantic for some years at least will be less than the frequency from Chicago to New York, for example, or from New York to Boston for example, so that connection at New York if missed, will cause greater delay.
>
> * * * We think also that the scheduling will be more in the public interest, and we can cite as an example our own service from New York to Mexico City. Our schedules are set principally for the convenience of

passengers originating in the greatest population centers of the United States, such as New York, Washington, Chicago, and Los Angeles.

Departure from Fort Worth, which is the northern terminus of our operation to Mexico, for example, is in the early morning, approximately 3:00 a.m., whereas departures from New York, Chicago, Washington, and Los Angeles are in the early evening at a convenient hour.

We think that one responsibility and one carrier from Chicago to London, for example, will result, on the schedules which are set primarily to serve Chicago, in departures from Chicago which are convenient for Chicago and not for New York.

We think also that the uniformity in standards of service is important and that passengers being familiar with American Airlines in this country will find an advantage in traveling all the way on American's standard of service to London; that there is an advantage to the public; that confidence is inspired in air transportation if a person can go all the way through on one carrier, particularly in international transportation.

By and large the public of this country is not familiar with the transoceanic travel. We think that one responsibility, one carrier with whom the public is familiar, all the way from Chicago to London, for example, will create traffic and overcome to an extent the hesitancy with which persons might approach a trip with an organization with which they are not familiar. * * *

In the case of cargo, it is felt that one-carrier operation will be important in the public interest. The simplification of forms necessary for the shipment of international cargo will take place more rapidly. * * *

We think also that in the case of through-plane operation, which we would contemplate in the future, the advantage would be considerable to the shipper and consignee in that cargo would not have to be loaded and unloaded, with consequent delays. * * *

As other witnesses have stated, the bulk of the traffic transocean across the North Atlantic, passenger traffic, will consist of citizens of the United States and, as before the war, most of the travel dollars spent outside of the United States throughout the world will be United States dollars spent by United States citizens.

We think that everything should be done to give advantage to international United States flag carriers in order that they will carry a sizable portion of that traffic.

Before the war and before the advent of the airplane, there was no way in which passengers could travel on one carrier from an inland point in the United States to a point in Europe, for example. It was necessary always to change at the border, at the shore line, for example. A person must of necessity have traveled by rail to New York, for example, and thence by boat to Europe. And so the United States flag carriers among the steamship companies had no advantage over the foreign flag carriers among the foreign steamship companies in this respect, and, as we all know, the foreign flag carriers did an outstanding job in competition with the United States flag carriers on the ocean.

Here, as we see it, is an opportunity for the United States to give to its flag carriers a physical advantage, probably the principal physical advantage which the United States can give to its flag carriers over foreign flag carriers among the airlines. * * *

The airplane has eliminated the obstacles of shore lines and coasts. I think we could say that there is no inland city any more. Certainly there is no inland city in the ocean of the air and there is no reason why, in our opinion, we as a nation should set up artificial barriers which will prohibit the airplane from taking advantage of its natural sphere.

We believe that the so-called inland cities of the United States should have the same freedom of access to the other cities of the world outside of this country as those which happen to be located on the coasts of

this nation, an accident brought about by the fact that there were steamships and there were railroads and there was no way to jump the obstacles of the connection at the shore line.

It probably could be said that but for that New York might be located at some other point west in the United States than where it is today.'' (Rheinstrom 143-148)

The transatlantic route of Export just as naturally complements and fits into the transcontinental system of American as though it were over adjacent land instead of over ocean. The important thing is that the resultant combined operations would stimulate a continuous flow of traffic between natural communities of interest over the most important international trade route in the world.

We respectfully submit that to deny this application is also to deny that air transport is at the beginning of the next stage of its inevitable development of which the proposed integrated operation must play a logical part.

The superiority and growth of this country's airlines has brought it to the forefront of world aviation. The technological development of aviation has expanded the boundaries of commercial flying until there are no frontiers but artificial ones (Rheinstrom 205). The special differences between ocean and land operations have disappeared (Damon 82, 83) to the point where the use of the same type of aircraft is planned for both transcontinental and transatlantic flying (Damon 91, 93; Rheinstrom 143, 186).

Thus, some of the peculiar conditions that produced and for a time fostered the dominance of Pan American in the trans-ocean field have disappeared before aeronautical advances. The land plane is successfully flying the world's air lanes over the ocean as the amazing record of the Air Transport Command proves and the future plans of Pan

American to use this type of equipment confirm. It is now possible for commercial air transport to disregard coastlines and inland distances and directly connect the great trade centers of all Europe, Asia, Africa, and South and Central America, with those of the interior United States.

The achievement of this high level of international aerial communication is an important object of the instant proceeding and is possible because the respective sections of the parties are peculiarly adapted to the accomplishment of that end by the integration of their facilities (Damon 87-89).

American's special contribution is a highly developed transcontinental system reaching into the major cities of the United States, extending into Canada and Mexico and tapping the major domestic sources of overseas travel (A-12; Rheinstrom 137-8). It has an excellent record of efficient operation both in domestic and international aviation and in all phases including operations, maintenance and traffic development (Rheinstrom 142). It has also acquired extensive experience in trans-ocean and international flying for the Air Transport Command under all conditions of climate and terrain (Damon 82-84). In May 1944 American flew an average of 12 one-way transatlantic trips a day (Damon 84). There is no substantial difference between American's commercial operations and the contemplated undertaking and no operation or traffic obstacles which cannot be overcome (Damon 83, 86).

On the other hand, Export will contribute its special trans-ocean experience, its trained personnel and equipment, and its know-how enriched by contract flying for the United States Navy (Damon 94).

The acquisition of control of Export is a natural ex-

pansion of our country's and American's air transportation pattern, directly linking the two great industrial continents, which together account for three-fourths of world factory output and over half of world population, trade and income (A-11), and making available to the people of the United States, and particularly those served by American's domestic system, direct, one-carrier service to Europe, from origin to destination (Kemp 53; Rheinstrom 143, 194); it will recognize and preserve the inherent advantages of air transportation, i.e., direct, fast, comfortable transportation from world city to world city.

B.

Substantial Benefits Will Result From This Proposal.

1. THE EXISTING CHANNELS OF TRADE AND PRESENT TRANSPORTATION FACILITIES WILL NOT ONLY BE MAINTAINED, BUT IMPROVED.

Unquestionably the North Atlantic trade route is the most important trade route in the world (Jacob 137; A-11).

The domestic phases and points of origin of oversea travel along this trade route coincide with the routes of American which tap the most fruitful sources of international travel, 82% of which went to Europe in 1938 (A-12; Jacob 137). Accordingly, the expansion of American would be along the existing channels of trade.

No presently available travel facilities would be lost to the public. The routes of American and Export *would be maintained.* By linking them, improved through service would be provided, such as between Los Angeles, Chicago, Detroit, New York and London, or Chicago, Detroit, Boston and London (Rheinstrom 143, 166) reaching to the very

basic sources of U. S. travel abroad. We know that connecting service and through service have advantages and disadvantages, varying according to the traffic characteristics of the particular route. American employs each method as the situation demands (Rheinstrom 201). But in an international operation, where the proportion of through to local traffic is high (201), the advantages of single-company service from origin to destination are particularly desirable.

Initiation of international travel from interior points presents no insurmountable difficulties, and has other decided advantages (Rheinstrom 142). Uniformity in standards of service, assistance in overcoming governmental travel formalities, procurement of travel and shipping documents and papers, lack of necessity for passengers from inland U. S. cities to deplane at New York and generally, single-company responsibility all the way inspires confidence and promotes travel (Rheinstrom 202). Single carrier service simplifies international ticketing, baggage checking, minimizes delay in making connections and thereby generates travel (Rheinstrom 144). Scheduling of departures are established for the convenience of great population centers, also resulting in the creation of traffic.

Expensive and time consuming loading and unloading of the connecting aircraft will be minimized or eliminated in the carrying of cargo as well as avoidance of substantial documentary work attendant upon transfer of freight (Rheinstrom 146).

It is not believed that the improved service which is proposed here could be accomplished by agreements between independent carriers, since experience has shown that one carrier in such an arrangement must be dominant while the other subordinate in its service (Rheinstrom 148). Subject to Board approval, American will in due

time supply single plane service to and from interior points by such methods as interchange of equipment (Rheinstrom 167). The advantages of such operation are now believed but incidental to the greater public advantage of single carrier operation (Rheinstrom 186).

2. Operations will be thoroughly integrated and economies of mutual benefit to American and Export achieved.

As a result of the acquisition American will be in complete control of the policies and operations of Export and actual integration of the two companies from an operational standpoint is a definite objective to be achieved by a gradual stepping up of coordination (Kemp 57; Damon 87). Integration will be accomplished in almost every phase of the operation such as more intensive use of equipment, line maintenance, overhaul, loading, dispatching, meteorological service, communications, engineering, stores, reservations, ticket sales, advertising, accounting, purchasing, passenger service, personnel procurement and training, financing and in general, a pooling of resources and avoidance of duplication (Damon 87).

(a) *Economies.*

Interchange and more intensive use of equipment and facilities, joint maintenance and repair, joint purchasing, joint use of clerical and engineering staffs will bring an estimated saving of at least $600,000 annually (Damon 92). For example, land type of equipment such as the DC-6 is expected to be used interchangeably and to save at least $165,000 per year (Damon 91, 93).

In the United States, American will handle domestic reservations and sales for both companies through its extensive facilities. Available also will be its system of travel agencies and other contacts among the steamship companies and foreign flag airlines (Rheinstrom 150; A. 13, 14). On the continent, Export will accomplish similar services for both companies (Rheinstrom 151). The estimated saving to Export alone on traffic and advertising expenses will be about $300,000 annually with a combined annual saving to both companies of $500,000 (Rheinstrom 153).

(b) *Increased Revenue to Both Carriers through Traffic Generation.*

Each line will contribute substantial revenues to the other (Rheinstrom 153). Combined promotional effort will develop traffic and because of through service, inland cities will be fruitful sources of increased traffic for both systems (Rheinstrom 194).

(c) *Financial Strengthening of Export.*

Since Export's financial requirements for its trans-Atlantic system immediately after the war are approximately $3,000,000, the proposed plan will meet its net current needs (Slater 20). In addition, American's credit position can be of inestimable assistance in further financing for both companies. Export's major debts will be paid and it will emerge from the transaction with over $2,000,000 in cash.

3. Competition will not only be maintained but assured.

(a) *Export's Position.*

The effect of the Board's order of divestiture was to cut Export adrift from its parent Steamship, an affiliation

which had been considered by Export a beneficial one from the standpoint of sales solicitation and experience in over-ocean travel generally. If the proposed acquisition were not approved Export would find itself faced with the continuing powerful competition of Pan American and its world system, with competition of foreign flag air carriers supported by their own large traffic generating systems, and finally with the competition of other U. S. flag air carriers now in the domestic field who appropriately and in the public interest will engage in foreign air transportation. Export, operating independently with no supporting transportation system, might therefore find it difficult to survive (Slater 31). Pan American impliedly admits this situation (226, 276).

If then, the Board intended that Pan American should have competition over the North Atlantic and that Export should be the carrier to furnish that competition, Export must be maintained as a strong competitor which only the approval of this acquisition can assure. The improvement of air transportation between the United States and Mexico, to which reference has heretofore been made, stands as mute, but nevertheless convincing evidence of the contribution to the public interest that the creation of real competition to Pan American makes possible (Damon 95-97; Rheinstrom 160).

(b) *The Competitive Balance Will Be Improved.*

The acquisition will not upset the competitive balance in domestic or foreign air transportation. Experience has shown that in domestic transportation, the relative progress of the air carriers has resulted from "a pulling and a hauling" that has ultimately resulted in an equalizing competitive advantage with the greater public interest served

(Damon 98). A believed handicap to an air carrier in one place is frequently compensated by an advantage in another place. Example—United's application to Hawaii. The competitive balance domestically will be maintained by interchange of traffic between Pan American, domestic, and foreign-flag airlines to the exclusion of American (Rheinstrom 155, 164). This was substantially admitted by Pan American (Chenea 230).

As to foreign air transportation, Pan American with its world-wide routes is not dependent upon the North Atlantic trade (159). Pan American too, will continue to have equal traffic opportunities in the New York area (Rheinstrom 195; Chenea 214) which has been the source of 43% of the trans-Atlantic travel (Chenea 211). Pan American admits that it would suffer no loss in terms of present volume and that its share of future traffic will be substantial (Chenea 271).

(e) *Competitive Benefits—National.*

Interior origination and destination of traffic will be of tremendous advantage to United States flag carriers in meeting foreign competition as well as in the creation of traffic (Rheinstrom 147; McCarthy 416).

American's highly successful domestic airline system which is now self-sustaining will be directly geared to an international operation—and this country's necessary foreign air commerce can thus be supported, as it should be, by its own domestic air commerce.

III.

THE ACQUISITION WILL NOT HAVE AN ADVERSE EFFECT ON OTHER UNITED STATES CARRIERS.

Probably the most significant aspect of this proceeding was the fact that no party denied, or even attempted to deny, but that the public would receive an improved service upon the approval of the proposed acquisition. As has been indicated, the only objections came from Pan American and United. These carriers offered no proof that the public would be adversely affected, but only that they might be injured directly or indirectly—how much they were not sure. Clearly then the issue is whether improved service shall be created or denied on the basis of surmised adverse effect on the providers of competing services. As the Board stated in the *United-Western Interchange of Equipment,* supra:

> "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." (p. 731)

The intervenors, not surprisingly, confuse individual interest with public interest of which their individual interest is but a very small part.

As the Interstate Commerce Commission aptly stated in *Clinchfield Railway Lease,* 90 I.C.C. 113, 121:

> "The public interest, however, is the aggregate of many individual and community interests, and where there is a conflict as to the results which would follow the approval of a proposed transaction, it becomes necessary to assume the claims of the conflicting interests in order to determine the ultimate public interest."

At times during the hearing in this proceeding it appeared that those who opposed the acquisition lost sight of two fundamental points. First—that the Board was *not* being called upon to redetermine the issue of Export's right to a certificate of public convenience and necessity. Second—that the Board was *not* being called upon to redetermine the issue of Export's right to be a competitor of Pan American on the North Atlantic route. A finding of public convenience and necessity was made by the Board when Export received its temporary certificate. At the same time the Board decided implicitly and explicitly against a chosen instrument in foreign air transportation.

The only real issue before the Board here, other than those characteristic of this type of proceeding, is whether American, as an air carrier in domestic and foreign air transportation, may continue in such role to the extent of operating through Export a route terminating not in Mexico City, nor Toronto, but on the continent of Europe.

American, as one of the oldest operators in this country, has itself and its predecessors, not only been interested in foreign air transportation but has actively operated in it for many years. (50)

What the opposition in effect argues is that American can go no further in the foreign field because (1) it will impair the operation of the principal operator (Pan American)—or, that there isn't enough traffic in the particular field for all the major transcontinentals and, therefore, none should serve any part of it (United). Most of the fallacies in these arguments are obvious, others require a lifting of the crust.

As to the obvious—if Pan American believes that it cannot survive the competition which it fears it will face upon the approval of this acquisition, then the traveling and shipping public must be receiving from American un-

der the present proposal, a vastly more attractive service than it has enjoyed through Pan American in the past—and the Board should certainly see that the public is not denied that better service. On the other hand, if the proposed competitive service does not have the dire results Pan American fears, its diversion estimates are grossly over-stated and it will not suffer the harm that it alleges. Certainly Pan American finds itself on its own-sharpened horns of a dilemma. Perhaps a suggestion of the correctness of the latter conclusion can be derived from Pan American's recent public announcement of its postwar plans which reflect no inhibitions or fears of too little traffic or of too much competition from either United States flag or foreign flag air carriers.

As to United's argument—it would deny to the public the benefits of single carrier service to distant places except as United might furnish it to Hawaii, Mexico, Canada or perhaps Alaska. Suffice it to state here that this germ of inconsistency might well result in an epidemic of improper conclusions on a subject of vital importance to the future of air transportation in this country—perhaps with the same results that led the citizen of the United States to use foreign passenger vessels for North Atlantic overseas travel in preference to his own country's in the ratio of approximately eleven to one (U-18). It is difficult however, if not impossible, to reconcile the advertisers of the glowing "Age of Flight" with the exponents of a doctrine which would deny to our citizens desiring to travel to, or trade in, the international markets of the world, the benefits of single carrier over-land and over-ocean air service on so thin an argument as United advances in this proceeding.

The foregoing is intended merely to describe the general type of argument advanced by the opponents of the

proposed acquisition. In succeeding parts of this brief will be discussed in greater detail the specific points urged in their testimony and exhibits. It is clear, however, that the encouragement and development of an air transportation system for the United States can not be predicated on the type of thinking reflected by the opponents of this acquisition nor the preservation of the inherent advantages of air transportation entrusted to their sole care.

Pan American

Pan American World Airways' monopolistic position in the international air service of this country was seriously threatened only when, by the declaration of both the Board and the Circuit Court of Appeals, Export's competitive route was granted across the North Atlantic. But whether this dominance will be reduced depends upon the kind of competition that is created for Pan American. If Pan American is to have competition, it is natural that it should prefer a weak carrier rather than a strong one, and that such competing carrier's route should be truncated at the coast line, regardless of public need. That is the sum total of Pan American's case. All that Pan American has proved is that American's control of Export would give Pan American more effective competition, but, realistically, not proving that the public's air transportation would not thereby be improved.

Pan American has an efficient world-wide organization with seventeen years of experience in the international field (PA 10, 11). It has sales contacts and arrangements with agencies all over the world, including its own offices in the major, and foreign-traffic producing interior cities of the United States and Canada (Chenea 224). One of

Pan American's exhibits (PA 4) shows a total population of 28,756,487 for the cities where it maintains sales offices in the United States. By adding only ten cities, namely, Baltimore, Detroit, St. Louis, Cleveland, Pittsburgh, Minneapolis-St. Paul, Buffalo, Milwaukee, Cincinnati and Providence, Pan American would have sales offices in cities with a total population of 40,735,967, approximately equivalent to the population served by American.

Because of its world-wide network of routes, Pan American has the type of traffic-generating system which generates trans-ocean transportation and will continue to produce substantial quantities of Atlantic business in the future (Rheinstrom, 159; Chenea, 226). On the other hand as has been stated, Pan American is not dependent on the North Atlantic traffic since its success depends generally on its world-wide system reaching into every important world trade area (Rheinstrom, 159). *The combined American-Export system, tapping the roots of traffic of United States origin, would provide a true balance and be perfectly complementary to Pan American with its multiplicity of world routes and national subsidiaries. Likewise, the combined American-Export system would be the only effective answer to foreign flag air carrier competition which not only dominate their own local markets but reach into nearly every major world market besides.* (A 18, 19).

It is logical, too, that American's domestic competitors will feed their trans-Atlantic traffic to Pan American upon the approval of this acquisition (Rheinstrom, 155, 164). Pan American concedes this (Chenea, 230). As a matter of fact, on cross examination, Mr. Chenea, Pan American's Vice President and General Traffic Manager, admitted that his company assumed there would be a traffic arrangement between Pan American and United and that interchange

agreements would go far toward improving Pan American's competitive position. (233)

Pan American's own study of traffic diversion failed to show that Pan American would be harmed—only that it might be forced to divide some of the traffic to be generated (Chenea, 271).

PA 8, Part I pessimistically concludes that Pan American will still receive 43% of the Atlantic business of the U. S. flag air carriers. But Pan American's conclusions are but the unreliable conclusions resulting from compounding estimates and inferences. Moreover, Pan American's labored exhibit lacks even the saving grace of consistency. Although it admits that other carriers as competitors of American will turn traffic over to Pan American or to foreign carriers, Pan American's figures show that it will receive only 50% of the traffic from areas served *exclusively* by carriers other than American. Mr. Chenea admitted the fallacy and was at a loss to explain it (230, 231). The same reasoning also applies to Part II which refers to the division of traffic by other domestic competitors that may enter the international field and need not be further discussed here since it deals with pure conjecture.

Pan American's case was most notably shaken when on cross examination by public counsel it was forced to concede that if this transaction were approved, its share of future traffic would still be greater than its past traffic and there would be no loss in terms of present volume (Chenea, 271).

United

At the hearing, American objected to the introduction in evidence of the entire line of United's testimony and exhibits on the ground that they were irrelevant and raised

issues entirely outside the scope of the proceeding (326, 330). In spite of the agreement at the pre-hearing conference of all parties that convenience and necessity was not an issue (325), United sought to prove that there was insufficient business to warrant other than an operation by a single chosen instrument. This—in the face of the Board's ruling that Export was entitled to a certificate, that transatlantic competition was required, and the Circuit Court's statement that Sections 2(a) and 2(d) were opposed to monopoly and that competition was indicated.

Mr. Patterson, President of United, started out truly altruistically. He felt that "there are possibilities of doing an extremely constructive job if we will view this realistically and view it from a standpoint of national interest, instead of our own individual interests—" (357). Later, however, he admitted that "our [United's] specific interest is opposition to American" (369).

Mr. Patterson, although obviously believing that the potential traffic over the North Atlantic trade route was many times that to Hawaii, rationalized the need for two U. S. flag air carriers (including United) to the latter point and opposed the strengthening of the presently certificated second air carrier over the Atlantic (Export), by suggesting the absence of foreign competition on the former route. Although advocating the chosen instrument, Mr. Patterson at the same time admitted the desirability of competition to assure a high type of service and believed that it could be obtained from foreign flag carriers, just after having concluded that United would not have such competition to Hawaii (Patterson 372).

Again he readily admitted United's expansion program through Lamsa into a *foreign country* but believed it *different* than going to a foreign country on the continent of

Europe. However, he apparently was reluctant to feel that the character of service United would give to Mexico through Lamsa would be particularly improved by the foreign flag competition there. Finally, on the question of the desirability of providing one carrier service to the citizens of Chicago, whether they desired to go west on United to Honolulu or east on American to Europe, Mr. Patterson gave up and admitted that United's position in the instant proceeding was inconsistent with its own application to serve Hawaii (384).

Mr. Hampel, also testifying for United, carried the burden of United's urgent desire to prove that the future of foreign air transportation is highly over-rated. His studies were relied upon by Mr. Patterson, apparently implicitly (365). A difficulty arose in the painting of that gloomy picture only when Mr. Hampel's estimate of 105,300 trans-Atlantic passengers in 1950 did not quite "gee" with an open letter to the Board from Mr. Patterson, wherein another statistician of United had estimated North Atlantic air passengers in 1948 *(two years earlier)* at 318,586 (377). Mr. Patterson unhesitatingly explained this situation by pointing out that Mr. Hampel's study was not under way or completed at the time of his open letter to the Board.

During the course of United's presentation it admitted that it was in favor of single carrier service wherever possible (Patterson 375) and that American would do a better job in promoting international traffic than would Export as an independent air carrier. Then, significantly enough, an admission of real public interest was forthcoming when United recognized that the American public's historical preference for foreign steamship lines in ocean travel might well shift to American air carriers in the case of air travel (Hampel 393).

Then, of telling import in United's presentation, were the answers given by Mr. Patterson in response to a series of questions by public counsel (382).

> Q. Concentrating on that selfish interest, would you say you don't know whether United would be hurt by the approval of this application or not?
>
> A. Yes; but I can't give you any measurements, whether 6% or 60%.
>
> Q. Isn't it true you are not sure you would be hurt to the extent of any percent?
>
> A. Well, it would be a pleasant surprise if we were not. That is the very way I would like to see it turn out.
>
> Q. Would you change that "possibly" to "probably", or do you still think it is a question of possibilities and you are not sure which way it will go?
>
> A. That is exactly it.
>
> Q. The latter—it is a question of possibilities, but you are not sure?
>
> A. I am not sure.

The foregoing remarks attain even greater moment when it is recalled that TWA, the *other* transcontinental carrier, withdrew from the instant proceeding as an intervenor—it did not protest the proposed acquisition on either a so-called "national" or on a frank "private" interest basis.

U. S. Lines

The U. S. Lines, a surface carrier operating across the North Atlantic, presented its case through Mr. McCarthy, a Vice President of the company (397). Essentially the objection of U. S. Lines was the same as that of United. It opposed a domestic carrier making any alliance with an over-ocean air carrier, *particularly* the combination here. Over objection, U. S. Lines offered its own program

which proposed the integration of sea and air transportation (407). On cross examination it was brought out that U. S. Lines at present market prices has a stock investment in Pan American of over $850,000 (412) and serves as its general agent on an exclusive basis over a substantial part of Europe (PA 10, pp. 4, 5).

It is to be noted, however, that Mr. McCarthy, whose experience in international steamship traffic is extensive, stated that in his opinion domestic carrier control of over-ocean traffic would considerably increase inland travel to foreign points (416), since it would be "just moving the Atlantic seaboard right west".

ALPA

The ALPA appeared in the proceeding only by its counsel, who apparently was seeking assurance that the members of that trade union would continue to receive fair labor treatment under the acquisition plan in accordance with the provisions of the Railway Labor Act, through the negotiation of agreements covering the flight personnel of the interested companies. The record reflects that an agreement between Export and ALPA has been under negotiation for some time covering rates of pay, rules and working conditions for the flight personnel of that company (Damon 128; Slater 129-30, 417-20). It appears to be ALPA's position that the proposed acquisition in this proceeding should not be approved by the Board until a satisfactory disposition has been made of that labor agreement.

The status of this agreement is fully reflected in the record, and the position of American generally with respect to the handling of labor problems involving flight personnel in the acquired company were outlined by Mr.

Damon, when he stated that any provision satisfactory to both groups, i.e., American's and Export's employees with respect to relative seniority would be satisfactory to American.

Counsel for this intervenor agreed to notify the Board and the Examiner in the event of changes or modification of the conditions relied upon in its intervention (419-430).

IV.

THE PURCHASE PRICE IS REASONABLE.

As Mr. Slater, Executive Vice President of Export, effectively pointed out in his testimony (12), the proposed transaction results in *no sale of assets* of Export, *franchises* or *good will*, but merely represents, from the standpoint of American, an *investment* in and control of Export, from the standpoint of Steamship a *divestiture,* and, from the standpoint of Export, new *financing* and credit. The evaluation of the franchises of Export is not here involved, and the Board, therefore, not required to evaluate this asset apart from the other assets of Export in determining the reasonableness of the investment.

The record reflects that the final price agreed to be paid by American to Export for the stock of the latter company was the result of a continuous series of negotiations over a period of many months (Kemp 51) and "arm's length" dealing characterized the entire negotiations. No commissions were paid by American or Export in connection therewith, nor was there any agreement to that effect (Kemp 62; Slater 33).

Mr. Kemp, a man of extensive and unusual experience in financial matters, testified that he believed the price finally agreed to be paid for the stock of Export was a

reasonable one and outlined the considerations which formed the basis of his judgment (56). He stated that he believed American's control of Export would bring about a relationship beneficial both to the public and the stockholders of his company. He outlined the long range plans for the integration of American's existing system with that of Export's, pointing out the logic of the acquisition. One of the most significant features of the plan, in his opinion, was the fact that the money being paid was finding its way directly into the treasury of Export and that it was not as though the stock was being acquired from outside shareholders, in which event the money would not, of course, redound to the benefit of the acquired company.

Another major consideration in the determination of the final price, was the fact that absolute control of Export was being acquired. Control, Mr. Kemp observed, in and of itself, would justify the payment of some premium (57). However, he pointed out that the price being paid for the shares of Export, was well within the market range of sales of that stock made during the prior year, which obviously could not reflect the improvement of the financial condition of the acquired company that is inherent in the plan. In this connection he also pointed out that securities of new and promising enterprises, such as air transportation, always command higher prices in the market than of those concerns or industries which have been in existence over a long period of time.

The earning power of the acquired company was, of course, also a major consideration, and the anticipated return on the investment of American was accorded thorough study within the limits existing circumstances permitted. Summarizing this element of consideration in the purchase price, Mr. Kemp stated:

"Naturally, it is not possible to estimate potential earnings with any degree of accuracy. For one thing, we do not yet have a definite determination by the Board of what Export Airlines' European outlets will be. We do not know how many American flag carriers there may be or which of the domestic carriers, if any, may be authorized to operate in this field. Neither do we know how many foreign flag airlines there may be, or where they may operate to in this country.

"We do not know when the war will be won or when Export Airlines will be able to start normal peacetime operation. A forecast of all these unknown factors will be a forecast of a forecast and we feel that this is too intangible a thing to work on. We do know that this is the finest trade route in the world. We do know that we have been able to develop air transportation successfully within the United States over routes where the potential traffic volume is not nearly as great, and we, therefore, feel that the prospect for Export Airlines' operations being profitable are immeasurably greater than were the prospects that many of our domestic operations would be profitable when our domestic routes were first awarded." (59)

A. General Statement.

While we have urged that the proposed acquisition is purely a financing of Export by American and not a purchase by American of the assets of Export, which might require the Board's evaluation of the tangibles and intangibles as such, it does not appear inappropriate that certain authorities on the question of valuation be reviewed at this point.

In the foregoing section we have indicated the various elements of value taken into consideration by the management of American in determining the amount of its investment. Such elements, the Board will find have judicial

recognition in the following authorities and the Board's own prior decisions are consistent therewith.

The general subject of valuation for various purposes is fully discussed in the *Kansas City-Southern Railway Co. et al.* decision, 84 I.C.C. 113, 116, the Commission stating:

"* * * Valuation for capitalization, consolidation, taxation, and rate-making purposes and estimates of exchange value cannot all be made upon the same basis. In valuing a railroad for tax purposes it is immaterial to what use the property is put, and no segregation between carrier and non-carrier property is necessary. The value of the physical property is often the primary consideration. *In determining purchase and sale values the aggregate value of the physical units becomes less important, and is controlling only where actual replacement or a substitute plant is feasible. The earning power of the property is the primary consideration in such a case.* Similarly in condemnation cases, where the whole property, carrier and non-carrier, is taken, the franchise rights destroyed, earning power completely wiped out, and the legal title actually transferred, property value and earning power may be prime considerations. * * *"

Justice Brandeis dissenting in *South Western Bell Telephone* v. *Public Service Commission,* 262 U. S. 276, 311 (1922) stresses the elements that are important in the market place:

"* * * *But, obviously, good will and franchise value are important elements when exchange is involved.* And where the community acquires a public utility by purchase or condemnation, compensation must be made for its good will and earning power; at least, under some circumstances. * * *"

One of the outstanding cases on valuation is *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 396 (1922) where it was stated:

> "In determining the value of a business, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property. * * *"

The problem of fixing a reasonable value on a receiver's sale of an electric utility to a parent company over the objections of other lienholders was before the Federal Court in *Schroeder* v. *Annapolis & Chesapeake Bay Power Co.,* 2 Fed. Supp. 394, 398 (1933):

> "In order to determine which contention is sound, we turn to a consideration of the evidence respecting the fair value of the property, which discloses figures bearing upon three different, well-recognized rules for the ascertainment of fair value of property of this kind: (1) Original cost; (2) cost of reproduction, less depreciation (including going value); (3) capitalization of earnings."

The Court in this case made an allowance for the element of intangibles where the purchase of securities in the market was involved:

> "* * * Securities are presumed to be purchased on a value of other than mere plant value, *namely upon reliance upon financial structure, management, prospects for future development, and earnings,* etc.—a variety of elements, all of which vary in any given case." (p. 399)

In the railroad industry, having large fixed capital investment, the rate of return in relation to that investment is necessarily small. In the motor carrier and air carrier industry having small fixed capital investment, the earnings

are proportionately high in relation to that investment. This condition automatically gives motor and air carrier franchises a comparatively high value in relation to other assets.

B. Going Concern Value and Development Costs Are Elements of Value.

In *Omaha* v. *Omaha Water Co.,* 218 U. S. 180 (1910), the Supreme Court held:

> "The option to purchase excluded any value on account of unexpired franchise; *but it did not limit the value to the bare bones of the plant,* its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. *The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on,* or any mere good will as between such a plant and its customers. * * * That there is a difference between even the cost of duplication, less depreciation, *of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident.* * * * (202)

See also *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153 (1915) where the following were listed as elements of going value: time and money expended in the promotion of the enterprise, in the organization of the company, including legal expenses and cost of obtaining the necessary franchise, cost of preliminary engineering, cost of organizational administration, other similiar overhead expenses, and developmental costs generally. (Cf. *Sharfman* id. 238).

Even the Interstate Commerce Commission in making

its single sum valuations under Section 19 (a valuation which is reflected in the rate base) has included going value in its allowance of intangibles which has been as high as 13.7% (*Sharfman,* id. 260)

Specific allowances for going value were made in the following purchase cases: *National Water Works Co.* v. *Kansas City,* 62 Fed. 853; *Omaha* v. *Omaha Water Co.,* 218 U. S. 180 (1910), and *Galena Water Co.* v. *City of Galena,* 74 Kan. 644, 87 Pac. 735 (1906).

In the first *Marquette* decision, 2 CAB 1, the Board indicated that operating and other losses could be weighed as elements of value in acquisition cases where they were incurred as a result of pioneering or development.

> "* * * The record contains no showing that any appreciable part of Marquette's operating losses have been properly describable as development costs, or as costs attaching to pioneering a new territory. The record gives no indication that the continued losses have been contributing to the future improvement of the quality of operation over the route, except insofar as they have served to make it possible to hold the personnel together. Marquette has flown into airports that were established independently of its requirements; it has not been under the necessity of expending any substantial sum on the installation of its own facilities; there is no showing that it has made any contribution to the development of new operating methods or practices; * * *" (p. 13)

Cf. Pan American Airways Company—Transatlantic Mail Rates, 1 CAA 220;

Pan American Airways Company—Transpacific Mail Rates, 1 CAA 385;

Mail Rates for Pacific Alaska Airways, Inc. and Pan American Airways—Docket No. 458, July 17, 1944.

Export is a going enterprise and has been operating now for nearly three years (Slater 27); it has acquired, after much experimental work, valuable experience in international air transport; and it has a highly trained airline organization and competent management (AE 7; Damon 94). Consequently as the foregoing authorities would substantiate, the amounts expended for experimental and developmental costs have a definite value and in the opinion of American here reflect a justifiable expenditure (Damon 94).

C. An Operating Right is an Element of Value.

In the *Acquisition of Marquette by TWA,* Supp. Op., 2 CAB 409, the Board in following the practice of the Interstate Commerce Commission in the administration of those provisions of the Interstate Commerce and Motor Carrier Acts comparable to Section 408 stated:

> "* * * *in passing upon the reasonableness of the price the Board should take into consideration all types of value which are in fact elements in the fixing of the exchange value of property. It is clear that in the sale of the property of an air line the value of the right to operate the route is an element which the parties necessarily take into consideration in determining the price* which they are willing, respectively to receive and pay. The existence of such value in the exchange of property, as distinguished from value for rate making purposes, has long been recognized by the courts and regulatory commissions." (p. 412)

Following the Commission, the Board ascribed a value to the certificate as such and its special value to the purchaser was stressed:

"The Interstate Commerce Commission has in many cases refused to sanction acquisitions of control involving unreasonable or inflationary prices; however, the Commission has frequently held that operating rights have an independent value and has approved acquisitions of other carriers, even though it felt that the operating rights were too highly valued, where it appeared that such rights would be more valuable to the purchaser than to the vendor and that the price proposed would not unduly burden the purchaser, increase its indebtedness, or harm the public indirectly through ill-effect on the purchaser" (p. 413).

D. *The Ratio of the Price of the Stock to Resultant Book Value Is Not Inconsistent With Prior Decisions of the Board.*

The Board approved the purchase of *Marquette by TWA* at a ratio of purchase price to physical assets of 6 to 1, the price being $313,333 as against $52,040 in physical assets.

The Board has adhered to this principle ever since in its subsequent acquisition cases. In *United Air Lines Acquisition of Lamsa, Doc. 854 (September 17, 1943),* the Board approved the price of $146,000 where there were physical assets valued at $32,000 or at a ratio of 4½ to 1.

In *Western Air Lines, Inc., Acquisition of Inland Air Lines, Inc., Doc. 1106 (May 23, 1944),* the ratio was 3 to 2, with a purchase price of $415,000 as against physical assets of $296,000.

In the *Acquisition of Mayflower Airlines, Inc., by Northeast Airlines, Inc., Doc. 1083, Supp. Op. (August 7, 1944),* the Board approved the purchase price of $17,000 as against physical assets of $8,300, or at a ratio of 2 to 1.

The equity book value of the stock which American will receive for its $3,000,000 investment is $2,183,260. Therefore, the ratio of purchase price to underlying assets is 1.4 to 1. This ratio is extremely low in comparison with the ratios approved in the *outright* prior acquisitions noted above.

Motor Carrier Cases.

The motor carrier cases are numerous on this point. They involve purchases ranging from $1,000 to $450,000 with ratios of purchase price to physical assets from 1½ to 1 to 20 to 1.

The general attitude of the Commission is stated in *Union Bus Lines, Inc., Purchase, Joe Amberson,* 5 M.C.C. 201 (1927):

"We have no desire to be unduly rigorous in our regulation of these matters, and we realize that if progress is to be made in building up well-balanced motor-carrier systems of the size required for the more efficient and economical operation, acquisition of operating rights are necessary and reasonably liberal prices must be paid for them." (p. 201)

A list of representative motor carrier acquisition cases in which the purchase price was approved by the Commission as consistent with the public interest is set forth in Appendix A. The amounts involved are in stated round numbers, the first figure representing the purchase price, and the second the net worth or value of tangible assets, with the ratio being set forth in each case.

The Interstate Commerce Commission, Bureau of Transport Economics and Statistics has published "Statistics of Class I Motor Carriers for the Year Ended December 31, 1941" from which it appears that the intangible accounts carried and reported by motor carriers average over 30% in relation to net operating property.

The Present Market Value of Stock of Air Carriers Reflects a Substantial Investor Allowance for Intangibles.

Export submitted a detailed study reflecting the relation between the respective net worths and stock market values of the various air carriers and in each case presented simplified balance sheets and quotations of market prices (AE 19). The summary of this study shows ratios of market value to book value varying from 1.3 to 6.6 for the eighteen air carriers studied. It is noteworthy that Export reflects the second lowest ratio at 1.4. That these ratios have not impaired the public confidence in air carrier securities is reflected in AE 20 "Comparison of Book Value and Sale Price of Recent Common Stock Financing by Air Lines" covering seven air carriers, indicating that they have experienced little difficulty in public financing at favorable market prices.

E. Other Elements of Value.

The acquisition here has a special value to American. It is a part of American's plans for expansion, it is complementary to its system, it will be a source of considerable revenue, and afford an opportunity for substantial operating economies and benefits to the public and the participating carriers. *Cf. Control of Ann Arbor Railroad Co. by Wabash Ry. Co.,* 105 I.C.C. 43 (1925); *New York Central R. R., Acquisition of Boyne City,* 180 I.C.C. 538, 550; *Chicago Junction Case, Application of New York Central,* 71 I.C.C. 63 (1922); *Motor Express, Inc., Lease, Arkansas Motor Freight Lines, Inc.,* 5 M.C.C. 177 (1937).

These elements of anticipated improvement and expansion of service and the betterment of the position of the acquiring carrier were favorably considered by the Board

in its supplemental opinion in the *Marquette* case and in the *Lamsa* and *Inland* cases, supra.

An increase in revenues, direct or indirect or even the making of present revenue more certain and secure, furnishes a substantial commercial consideration for acquisition of branch line property. (*New York Central* case, supra).

In *Herrin Transportation Co., Purchase, Ben Coleman,* 35 M.C.C. 88 (1939), the Commission was favorably influenced by the fact that through service would be rendered following the unification of operations in separate ownership. The Commission also noted that the "* * * *instant proposal would create no additional operating rights but contemplates merely the transfer of existing rights to new ownership*".

Market quotations are accepted as evidence bearing upon value in acquisition cases (*New York, New Haven & Hartford R. Co. Reorganization,* 239 I.C.C. 337, 393 (1940) and *Proposed Unification of South West Lines,* 124 I.C.C. 401 (1927)). AE 21 sets forth a complete history of the transfers of Export stock showing that prior to the public announcement of the proposed acquisition, the prices ranged in the period between January 1943 and February 1944 from $19.50 to $35.00 per share.

Purchase of a block of controlling stock would warrant a price above the market:

> "The Commission recognizes that a large block of stock carrying control of a carrier normally sells at something above the market (citing South-West Lines unification 124 I.C.C. 401, 431) especially when control is closely held (The Commission is less lenient when purchase is from interest controlling the applicant, 124 I.C.C. 401, 432; also citing 105 I.C.C. 43; 94 I.C.C. 191) and will allow as fair, a consideration substantially

above the market price in such a case'' (*The I.C.C. and Railroad Consolidation*: 43 Harvard Law Review 192).

''Where the dealings were consummated at arm's length, there was no disposition to question the proposed terms; * * *'' (Sharfman id. 468).

American's financial position will not be adversely affected nor will its ability to render service on its own routes be impaired. On the contrary, a greater opportunity to furnish a public service will be afforded (Kemp 61).

Pan American has attempted to show that the other stockholders of Export will unreasonably profit by the approval of the plan because of an increase in value of their stock resulting from the $3,000,000 being paid into Export's treasury (PA 15). Naturally if a company is financially strengthened, it is reflected in the book and market value of the stock held by its stockholders. No acquisition, it is believed, has ever been disapproved because the minority stockholders were protected. As a matter of fact, such alleged benefits could only be translated into tangible terms through liquidation, a very unlikely step under the circumstances.

V.

THE PLAN WILL EFFECTIVELY DIVEST STEAMSHIP OF CONTROL OF EXPORT BOTH AFFIRMATIVELY AND NEGATIVELY.

The record shows that Steamship, which will be left with only 24% of the outstanding stock of Export, will exercise no positive or negative control in the latter's affairs (Slater 19). On the other hand, American will in no way favor Steamship by exclusive traffic arrangements or otherwise (Rheinstrom 161). Moreover, apart from the legal framework of the plan which tends to insure that Steamship's control is definitely divested, American's record as an aggressive air carrier should relieve any fears in this respect.

VI.

CONCLUSION.

Under the Act, the Board is directed to approve this acquisition of control unless it finds the plan inconsistent with the public interest. After the foregoing review of the entire proceeding, American believes it can, with all modesty, respectfully inquire as to what, if anything, is wrong with the plan.

At the outset we find Steamship under an order of the Board requiring it to divest itself of control of Export. We find Export, under those circumstances, in need of financial and economic strengthening if it is to continue to serve the purpose that the Board has found required in the public interest, i.e., serving the North Atlantic in competition with Pan American. Clearly the North Atlantic trade route is the greatest trade route in the world, and Export, as the second United States flag air carrier to be certificated over it, must ultimately receive from the Board a permanent certificate of public convenience and necessity from New York in the United States to a point or points of greatest traffic potential on the North European continent, such as London or Paris.

It is clear that the eastern terminal of Export's route was not finally determined by the Board by reason of world conditions existing at the time of the issuance of its temporary certificate. It is equally clear that, if Export is to be *the* competitor of Pan American on the North Atlantic trade route, it must ultimately be certificated to a competitive point or points with Pan American in Europe. Again

regardless of its route, Export, in order to be a real competitor of Pan American, must have an economic stature sufficient to accomplish that end.

The Board must recognize what Export knows—that in the postwar period of development it must compete not only with Pan American and its world-wide system but also with foreign flag carriers and with United States flag air carriers now certificated only for domestic service.

With Export in those circumstances, we find American, as a successful foreign and domestic air carrier, desirous of providing to the public on its present system, a through single carrier service to Europe, thereby giving full recognition to the inherent advantages of air transportation. With these considerations in mind, Export and American bring to the Board an agreement for its approval which will accomplish the divestiture ordered by that Board and an acquisition that patently is in the public interest.

The opposition with which American and Export have been faced in this proceeding is both obvious and understandable. Pan American originally opposed the certificating of a competing route over the North Atlantic and it wants that competitor now to be as weak as possible; and United wants its transcontinental competitor to gain through this proceeding no advantage that it also cannot enjoy. Thus a smoke screen of "national interest versus private interest" is created. The chosen instrument argument is advanced and all the dire results that can be imagined are made to appear as realities. In pursuance of a concerted opposition by Pan American and United, an attempt is made to erase the fact that Pan American has today a competitor on the North Atlantic, that convenience and necessity has been proved by that competitive carrier, and that the Board long ago turned the corner in favor of

competition in foreign air transportation against the doctrine of monopoly as the proper way to carry out the declaration of policy in section 2 of the Act.

It is, therefore, respectfully submitted that the Board must approve the proposed plan of divestiture and acquisition as being one where a finding of an adverse effect upon the public interest cannot be reached and where a preponderant mass of evidence has demonstrated that the public can and will receive, by the Board's approval of the plan, all the inherent advantages of this newest and greatest form of transportation.

American trusts that the regulatory agency for air transportation of this government will not deny to their country which created the modern airplane and whose citizens constitute three-quarters of the trans-Atlantic travel, the unlimited advantages of transportation and security that only this instrumentality can here bring.

Respectfully submitted,

PRUITT, HALE AND COURSEN
420 Lexington Avenue
New York 17, N. Y.
Attorneys for American Airlines, Inc.

SULLIVAN & CROMWELL
48 Wall Street
New York 5, N. Y.
Of Counsel.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing brief upon all counsel who appear of record in this proceeding, by causing to be mailed to each of them a copy thereof properly addressed, postage prepaid.

Dated at New York, N. Y., this twenty-ninth day of August, 1944.

HAMILTON O. HALE
Counsel for American Airlines, Inc.

APPENDIX A.

Case 2—$472,000 to $120,000; 4 to 1—Case 1—$93,000 to $21,000; 4½ to 1—*Public Service Interstate Transportation Co., Purchase Healy's Special Tours,* 5 M.C.C. 735 (1938), as modified 15 M.C.C. 480 (1938).

$250,000 to $63,000; 4 to 1—*Keeshin Transcontinental Freight Lines, Inc., Acquisition of Seaboard,* 5 M.C.C. 25 (1937).

$45,000 to $22,650; 2 to 1—*Consolidated Freightways, Inc., Purchase, Volck Brothers, Inc.,* 37 M.C.C. 952 (1941).

$17,000 to $2,800; 3 to 1—*Herrin Transportation Co., Purchase, Ben Coleman,* 35 M.C.C. 88 (1939).

$212,000 to $110,000; 2 to 1—*Pacific Motor Truck Company,* 35 M.C.C. 355 (1940).

$100,000 to $16,000; 6 to 1—*Gray Line Motor Tours, Inc.,* 15 M.C.C. 326 (1938).

$5,000 to $2,800; 2 to 1—*Transamerican Freight Lines, Inc., Purchase, Harold D. Gorman,* 5 M.C.C. 712 (1938).

$50,000 to $10,000; 5 to 1—*Brown Express, Purchase, J. C. Netzer,* 5 M.C.C. 681 (1938).

$22,500 to $8,000; nearly 3 to 1—*Fax & Ginn, Inc., Purchase, Norris E. Richardson,* 5 M.C.C. 587 (1938).

$30,000 to $6,000; 5 to 1—*Intermountain Transportation Co., Purchase, Meisinger Stages,* 5 M.C.C. 493 (1938).

$14,000 to $5,400; nearly 3 to 1—*Burlington Transportation Company, Purchase, Bell Transfer, Inc.,* 5 M.C.C. 291 (1937).

$10,000 to $3,600; nearly 3 to 1—*New South Express Lines, Inc., Purchase, S. S. Sale,* 5 M.C.C. 191 (1937).

$75,000 to $32,000; 2½ to 1—*Eastern Michigan Motorbuses, Control, Great Lakes Motor Bus Co.,* 5 M.C.C. 120 (1937).