



AMERICAN AIRLINES INC.

CABLE ADDRESS AMAIR

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May 16, 1946

To the Directors of American Airlines, Inc.:-

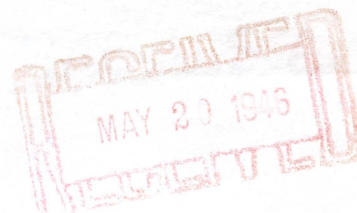
On May 9, 1946, we filed a brief to the Civil Aeronautics Board on behalf of our application for approval of the acquisition of Mid-Continent Airlines.

At Mr. Smith's request a copy of the brief is sent to you herewith.

Sincerely yours,

C. W. Jacob
Secretary

CWJ:nh
enc



BEFORE THE
Civil Aeronautics Board

WASHINGTON, D. C.

Docket No. 2068.

In the Matter of the Application of
AMERICAN AIRLINES, INC.

for approval of acquisition of Mid-Continent Airlines, Inc., by American Airlines, Inc., under Section 408 of the Civil Aeronautics Act of 1938, as amended.

**BRIEF TO THE CIVIL AERONAUTICS BOARD ON BEHALF OF
AMERICAN AIRLINES, INC.**

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May 9, 1946.

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I. THE QUESTION FOR DECISION

The application in this case presents an agreement between American and Mr. Joseph A. Zock pursuant to which American proposes to acquire all the stock of Mid-Continent in exchange for American stock. This agreement has been amended since the hearing. *Infra*, p. 6. The application prays for approval of this agreement and of the acquisition of control of Mid-Continent by American under section 408 of the Act and for such further relief as may appear appropriate.

The purpose of such exchange of stock is to bring about a formal unification of the two companies by merger of Mid-Continent into American or otherwise.¹ (AT² pp. 12-14; Tr. p. 96) Steps to effect in-

¹ Both corporations are Delaware corporations. Under Delaware law one corporation can sell all its assets, including its franchises, upon approval by a majority of its stock. REV. CODE DEL. (1935) c. 65, s. 65. A merger can be effected upon approval by 66⅔ per cent of the stock of each company. *Id.*, s. 59. Conceivably a sale of assets could be very simply accomplished by a lump payment by American to those few Mid-Continent stockholders not desiring to accept American's offer to exchange stock. Cf. *Lease of Louisville, H. & St. L. Ry.*, 150 I. C. C. 741 (1929).

² American's printed testimony will be referred to in this Brief as "AT". The transcript will be referred to as "Tr."

tegration of the organization and properties of Mid-Continent with American will be taken promptly, if the Board enters an order of approval in this case, without necessarily awaiting completion of the technicalities of formal corporate unification. (AT p. 14) Ultimately the Mid-Continent corporation will be dissolved. (AT pp. 13-14)

Hence the question for decision is whether, under section 408(b) of the Act, it "will not be consistent with the public interest" for American to acquire Mid-Continent's stock and to effect a unification of the two companies.³

There is no question under the first proviso of section 408(b). It is hardly arguable that a "monopoly" would be created by the proposal. *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (C. C. A. 2d, 1945). (Cf. Examiners' Report, pp. 34-36)

II. SUMMARY STATEMENT.

The proposed unification of American and Mid-Continent will remove one of the weakest of carriers, the future of which would otherwise present an insoluble problem. Far from self-sufficiency as Mid-Continent now is, it faces a period of rising costs, intensified competition, and lowering fares, which make its prospects gloomy. Only in indefinitely continued, large subsidies can it take refuge. Efforts to strengthen and protect it as an independent venture will be at the cost of damage to other carriers which have no less claim to solicitude.

Nor is the service which Mid-Continent can offer of the highest standard to which the public should be able to look forward. It can provide only a secondary service to cities which are primary in character.

This unification will insure an improved public service in terms of fares, frequencies, equipment and new one-carrier links between important areas of the country. This improved service will come without a cent of subsidy.

At the same time the opportunities of other carriers will be enlarged.

In opposition to this advance in the public service the argument chiefly made is that American is now larger than other carriers. But there can be shown not a single harmful consequence to any carrier by virtue of American's size. The enormous expansion of other carriers in the last few years, which, with new equipment just now becoming

³ In Appendix II, at pp. 44-47, of American's Brief to the Examiners there is discussed the question whether the fact that American's application instituting this proceeding did not include an express prayer for approval of a merger or other unification of the two companies in any way limits the permissible scope of a Board order of approval. The Examiners' Report, at pp. 3-7, properly disposes of the question.

available, they have only begun to plumb, is evidence enough that American does not and cannot stultify any of its competitors. The vigor of independent competition which prevails throughout the industry daily demonstrates the fallacy that a vital improvement in the public service should be denied because American is not as small as some other carrier.

III. HISTORY OF THE TRANSACTION.

The transaction involved here is in every respect a clean-cut proposal for an exchange of American's stock for Mid-Continent stock. There are no strings attached to the transaction—no promise of favors, preferred positions, sinecures, directorates, no checks and balances between contending interests, no payment of commissions or gratuities which so often cloud carrier combinations. The transaction is virtually unique in its above-board and straight-forward character.

A. Merger negotiations with Mid-Continent by other carriers.

The Examiners have done a grave injustice by implying that Mid-Continent has been "on the block" and that the transaction here presented is a "hard bargain" whereby control is delivered to the "highest bidder". (Examiners' Report, p. 40)

The essential facts are undisputed. At the hearing considerable controversy developed over some of the details of Mr. Braniff's repeated overtures to Mid-Continent in past years, and the Examiners apparently gained the impression that there have been constant bids and counter-bids between Mid-Continent and several other carriers for some time past. This impression is erroneous.

A brief review of past merger negotiations and conversations with Mid-Continent, and an understanding of Mr. Zock's position, are important to an appreciation of the difficulties involved in a matter of this kind.

Mr. Zock is an experienced business man who for a number of years has been financial counsel to three of the Thomas Fortune Ryan grandchildren. (AT p. 22) His principals did not include Colonel Thomas Fortune Ryan, 3rd, formerly the President of Mid-Continent, but when Colonel Ryan left for active duty with the Army in early 1942 he asked Mr. Zock to look after his Mid-Continent interest. (*Id.*) Mr. Zock was elected to Mid-Continent's Board in February, 1942, and became Chairman of that Board a year later. (*Id.*) He has been the active policy-making head of Mid-Continent, spending from a third to a half of his time on Mid-Continent's affairs. (*Id.*; Tr. p. 242) He has

served in this capacity without compensation. (Tr. pp. 240, 242) He has no financial interest in Mid-Continent.⁴ He has felt that his position has been comparable to that of a trustee. (Tr. p. 242) There is no question but that the usual "trust" obligation of a director of a company has been accentuated in the case of Mr. Zock, and he has certainly felt the obligation keenly as his testimony, particularly under long and searching cross-examination, abundantly discloses.

Prior to his departure to the Army it appears that Colonel Ryan had had some conversations regarding the possibility of a merger with Braniff and apparently with some other companies. (Tr. pp. 243-244, 554-555, 560)

In any case in May, 1942, less than three months after Colonel Ryan's departure, the government instituted its program of taking airline equipment (AT p. 23) with which the Board is quite familiar. Shortly thereafter merger proposals with three carriers (Braniff, TWA, and Northwest)⁵ were considered by Mid-Continent (AT p. 23), and finally a tentative agreement was reached with Northwest. (AT p. 24) But after several months of negotiations looking to the perfection of a concrete merger plan Northwest had a change of heart for reasons never explained to Mid-Continent and the deal finally fell through in May, 1943. (AT pp. 25-26)

From that time on Mid-Continent never sought a merger and approached no one on the subject. (AT p. 31; Tr. p. 250) Nor was any offer made by any carrier to Mid-Continent until Mr. C. R. Smith opened negotiations on behalf of American in June of 1945. (AT p. 31; Tr. pp. 250-253)

Representatives of several carriers, however, did approach Mr. Zock during that period. They made no definite proposals. (AT p. 31) For example, Mr. Braniff always attached strings⁶ (Tr. pp. 723, 726, 727) and Chicago & Southern seemed wedded to tying the Mid-Continent interests in a merged company into a voting trust. (AT pp. 31-32; Tr. p. 386) It will serve no purpose to recite at length the difficulties presented particularly in the case of efforts to combine small companies. (AT p. 32; Tr. pp. 251, 370, 393) Suffice it to say that Mr. Zock

⁴ His wife owns 400 shares of Mid-Continent's stock; his mother owns 100 shares. (AT p. 22) The Mid-Continent holdings of Colonel Ryan and his children are 105,097.3 shares, the holdings of Mr. Zock's three principals are 59,973 shares, and the aggregate holdings of all the Ryan interests are 181,070.3 shares or 46.5 per cent of the total outstanding Mid-Continent stock. (*Id.*)

⁵ United was also interested for a time but finally concluded that it did not care to make an offer. (AT p. 24)

⁶ In Appendix I, at pp. 42-44, of American's Brief to the Examiners the course of negotiations with Mr. Braniff is reviewed at length. The upshot of the matter was that Mr. Zock became convinced that a merger with Braniff would be undesirable, regardless of how favorable an arrangement might be made, because of the extent to which Mr. Braniff personally dominates his company. (Tr. pp. 391-393, 401-403)

was concerned not only with the financial aspects of any such proposals but also with ready absorption of the Mid-Continent personnel, with the benefits to be brought to the communities involved, and with an arrangement which would make possible a continuance of an investment position in the industry by the Mid-Continent stockholders. (AT pp. 32-33)

B. Negotiations with American.

The course of negotiations leading to the transaction here in question was outlined in detail by Mr. Zock. (AT pp. 33-44; *cf.* pp. 11-12) In no sense was this a case of one carrier bidding against another. American's management had brought up to date studies of Mid-Continent and had concluded that a unification of the two companies would be desirable. (AT p. 5) Mr. Smith presented a series of offers; he was seeking the best possible arrangement and Mr. Zock was equally firm in seeking what he deemed equitable. (AT pp. 11-12, 33-34) It was a case of arm's length bargaining, with each party testing the other and supporting his position by analyses of what he deemed the relevant factors. *Infra*, p. 49. There is not the slightest support for the view that Mr. Zock or Mid-Continent was trying to "auction off" an airline. In fact Mr. Zock was most scrupulous to avoid any mention of his negotiations to anyone (except Colonel Ryan, who thoroughly approved) (AT p. 47), or to approach any other company. (Tr. p. 382)

C. The agreement.

The agreement between Mr. Zock and American contains within its four corners the whole arrangement. There are no deals on the side. (AT pp. 13, 45)

It provided that American desired to obtain all of the stock of Mid-Continent and would issue to all Mid-Continent stockholders one share of its stock in exchange for each four shares of Mid-Continent stock. Mr. Zock undertook to see to it that at least a majority of the Mid-Continent stock would accept this offer.

The proposed exchange of stock is for the purpose of effecting a unification of the companies, which will be brought about promptly upon approval by this Board, by merger of Mid-Continent into American or other otherwise. (AT p. 14; Tr. pp. 95-96, 148)

The proposal, of course, received the approval of American's Board. Recently the company's stockholders by an overwhelming vote also approved the proposal. See affidavit of V. J. Long, dated April

29, 1946, transmitting certain material for the record herein. The entire proposal has also been approved by a unanimous Mid-Continent Board (AT pp. 38-40) and by virtually all the Mid-Continent stockholders. (Examiners' Report, p. 12)⁷

D. Mechanics adopted for the exchange of stock.

It had originally been assumed that American's offer to the Mid-Continent stockholders could not be extended until approval by this Board because of SEC complications. Just prior to the hearing it was found that the SEC would permit American to proceed to file a registration statement and extend its offer, and the Mid-Continent stockholders to accept such offer by depositing their stock with a depository to be delivered to American upon approval by this Board. Mr. Smith stated at the hearing that such a course would be followed. (Tr. pp. 95-96) Accordingly the agreement with Mr. Zock was amended on March 22, 1946, to provide for this change in procedure, a registration statement was filed and became effective on April 15, 1946, the offer was extended to the Mid-Continent stockholders, and as of April 29, 1946, a majority of the Mid-Continent stock had already been deposited with the depository. (See affidavit of V. J. Long, *supra*, p. 5) Pursuant to an understanding at the hearing, the amended agreement⁸ and a composite copy of the registration statement as it became effective have been transmitted to the Board for the record in this proceeding.

The purpose of following this procedure is to save time in effecting the formal unification of the companies in the event the Board approves the proposal. (Tr. p. 95)

IV. THE PROBLEM FACED BY MID-CONTINENT AS AN INDEPENDENT CARRIER

A. Mid-Continent's record is unfavorable.

Mid-Continent's past record has placed it consistently at or near the bottom of the list of the air carriers on the basis of nearly every index of performance bearing on progress toward self-sufficiency. Only Inland's record was consistently worse. (Ex. A-17; A-22; A-23; A-24;

⁷ A questionnaire was sent by Mid-Continent to its stockholders asking that they express approval or disapproval of the proposal. 83.3 per cent of the stock replied. Of this amount, 99 percent approved the proposal. (AT pp. 43-44; Tr. pp. 224-225)

⁸ The amended agreement provides for an adjustment in the amount of the American stock to be issued for the Mid-Continent stock to allow for the five for one split in American stock which recently occurred. The ratio therefore will be $1\frac{1}{4}$ shares of American stock for 1 share of Mid-Continent stock.

A-25; AT pp. 55-56) And Inland has been acquired by Western Airlines.

The seriousness of Mid-Continent's position is emphasized by the significant progress made by certain of the other carriers. For example, although Northeast generally ranks low on the basis of these indexes, it has made notable gains in important respects. Thus whereas in 1939 it and Mid-Continent were about on a par in terms of passengers per route mile per day, with 11.84 and 10.26 respectively, it had jumped to 43.09 in 1943 but Mid-Continent stood at only 22.40. (Ex. A-17, p. 2) And Northeast's non-mail revenue per revenue mile was 83.47¢ for the first six months of 1945 while Mid-Continent's was only 59.41¢; but in 1939 Northeast stood at 23.79¢ and Mid-Continent at 16.21¢. (Ex. A-24) So too, in the case of Continental, the years 1939 to the first six months of 1945 saw a jump in load factor from 35.07 per cent to 76.95 per cent, whereas Mid-Continent increased only from 38.47 per cent to 67.50 per cent (Ex. A-17, p. 1); and those same years saw a drop in Continental's loss per ton mile before mail revenue from 110.5¢ to 14.7¢ while Mid-Continent's record was a drop only from 90.1¢ to 25.5¢. (Ex. A-23)

In terms of the six significant indexes of performance—load factors, passengers per mile of route per day, passengers per mile, express pounds per mile, cost per ton mile, and loss per ton mile before mail revenue—Mid-Continent (excluding Inland) is at the bottom of the list in three cases and next to the bottom in the other three. (Ex. A-17, pp. 1, 2, 3, 6; A-22, p. 1; A-23) Other carriers with a generally low showing have made notable gains in significant respects, while Mid-Continent remains, despite all the abnormally favorable conditions of wartime economies, jams of traffic, and high utilization of equipment, barely started on the road toward self-sufficiency. (Tr. p. 252) It (and Inland) has for years been the "problem" of the industry.

B. Mid-Continent's problem arises from inherent defects in its route.

The problem facing Mid-Continent is inherent in the layout of its route. (Tr. p. 310; see also pp. 152-153, 466-467)

The route itself does not coincide with principal traffic flows but cross-cuts them.

To a degree greater than other carriers, Mid-Continent fails to connect points of primary traffic interest with each other as disclosed by the rail traffic flows. (Ex. A-14; A-15; AT pp. 57-58) And the same kind of weakness is found in terms of the connection of its points with any of their first ten rail interest points. (*Id.*) The significance of

these facts is that Mid-Continent has no springboard of considerable pre-existing traffic to give it a favorable start in the creation of the new traffic without which it will be unable to survive the impending competitive struggle and must inevitably fail as an airline. (AT p. 59) These facts also mean—equally significantly—that there is an absence of high density segments on the basis of which other lighter segments can be carried.

The flows of surface traffic have, moreover, been reflected in the air traffic. Both the Board surveys and the more recent surveys of the Air Transport Command (made in 1944) show quite conclusively that the air flows along the line of Mid-Continent's route are dribblets in relation to the flows along cross-cutting routes and even in relation to other north-south routes in the same general region. Thus even Twin Cities-Omaha and Omaha-Kansas City, Mid-Continent's *heaviest* segments, are substantially lighter than Wichita-Dallas or Tulsa-Dallas. (Ex. A-16, p. 6)

The inherent traffic weakness of the Mid-Continent route was never better exemplified than by the action of the government authorities at the time of the equipment curtailment in 1942. *So low in traffic importance did that route rank that at one point it was virtually wiped out entirely.* There is hardly a doubt but that, had it been found necessary to eliminate any of the airlines at that time, Mid-Continent would have been the first to go—with the possible exception of Inland.

The foregoing basic difficulty with Mid-Continent's route is emphasized by a number of further considerations.

In the first place Mid-Continent is a *short haul* carrier. Even the abnormally long haul traffic demands of the war period failed to change this basic characteristic in its route structure. *Every* carrier, including Inland, increased its average haul from 1940 to the first six months of 1945 except Mid-Continent whose average haul *fell* from 272 to 268 miles during this period. (Ex. A-17, p. 4)

This point is of importance not as an indication that short haul traffic is of less public interest than the long haul, but as a further illustration of the difficulties Mid-Continent faces. The shorter the haul the higher the cost to the airline per dollar of revenue. (AT p. 59)⁹ *And if there are no high density segments to offset this factor the airline concerned is bound to be seriously affected; no such segments exist on the Mid-Continent route.* (AT pp. 59-60; Tr. p. 268) This combination of *short* haul and *light* density is insurmountable from the standpoint of profit and loss as the operation record of Mid-Continent so clearly shows.

⁹ Cf. Nicholson, *Possibilities for Lower Airline Costs*, 11 LAW AND CONTEMPORARY PROBLEMS 452, 455 (1946).

A second consideration is the abnormal dependence of Mid-Continent on connecting business. (Cf. Ex. U-2) As much as 58 per cent of its business has been of an interline nature. (Tr. p. 455) Thus to be dependent upon connections may, as Mr. Rheinstrom pointed out, "defeat efforts to glean the full benefit of the route." (AT p. 61) The matter of connection with American at Tulsa illustrates the vulnerability of a carrier which is so dependent, for Mid-Continent's need to make connections with other carriers elsewhere prevented it from making satisfactory connections with American at Tulsa (AT pp. 61, 72), and so resulted in Mid-Continent's losing substantial revenue through having to transfer traffic at Kansas City instead of Tulsa. (Tr. pp. 271, 362) Furthermore Mid-Continent has a peculiar problem in that it intersects its major connecting airlines at mid-points on their routes. This complicates the problem of delays, missed connections, inconvenient departures and so forth to a degree greater than would be true in the case of short run, end to end connecting services. For example, a United flight leaving New York and destined for San Francisco is scheduled to connect at Omaha with a Mid-Continent flight leaving Minneapolis/St. Paul and destined to New Orleans. This type of scissors connection, especially in view of the distance involved, is the most difficult type of connection to schedule and make with regularity. Yet it is the routine connecting problem of Mid-Continent and one which has affected up to 58 per cent of its traffic. Compare, for example, the connecting problem of a carrier such as Northeast making an end to end connection with American at New York. New York is American's main operation point, schedules here are numerous and on time and thus the difficulties are comparatively meager when compared with those of Mid-Continent at all of its major connecting points. Likewise a carrier which is involved in connecting business to such an extent as Mid-Continent is especially open to invidious comparisons where it is unable to keep pace with the equipment parade. (AT p. 64; Tr. p. 309) Finally a connecting carrier will find itself subject to decisions made by other carriers, over which it can exercise no control, with respect to such vital matters as rates, routings, schedules, traffic promotion, and so forth.

Still a third consideration is that for 60 per cent of the population served Mid-Continent route provides service in only one direction, so that it cannot effectively promote traffic or capitalize on the economies and the efficiencies which service in more than one direction permits. For example, St. Louis, representing 29 per cent of Mid-Continent's population, is served only toward Des Moines on an isolated leg of its route. (AT pp. 27-28)

And a fourth consideration is the very important fact that the route standing alone is not in itself a logical structure. Its different segments, with the Huron-Minot stub, the off-shoot to St. Louis, the round-about run from Twin Cities to Kansas City, as well as the Twin Cities-Des Moines-Kansas City-New Orleans "main line", are comparatively unrelated. (AT p. 28) This very route layout is inimical to effective scheduling, in normal times, without serious sacrifice in aircraft utilization. (AT p. 62) While Mid-Continent's aircraft utilization during the war was, of course, increased, it is notable that in 1942 Mid-Continent had one of the least favorable records. (Ex. TWA-6) Likewise the layout of the route defies concentration upon a single, consistent traffic program (AT p. 28) which to a small carrier with necessarily limited means and personnel is especially important. Two examples will illustrate the difficulty: a sales program suited to the stimulation of travel from the Dakotas to the Twin Cities is about as unrelated to the stimulation of travel on the rest of the route as it is possible to imagine; and a program centering on the attractions of New Orleans will give Mid-Continent no aid whatsoever in its largest city, St. Louis. Thus Mid-Continent, nearly the smallest airline, has to face diverse regional problems.

C. Mid-Continent's prospects are unfavorable.

The hearing brought forth nothing to show that Mid-Continent's prospects are substantially brighter than its past.

Some effort was made at the hearing to imply that the institution of the New Orleans route in August, 1945, will make a substantial change. No doubt that operation will provide a considerably better picture for a time: transportation conditions by rail have never been as bad as they have been recently and to fill an airplane it has been necessary only to open the plane door virtually without regard to where or when the plane is flying. ". . . everyone was clamoring to get on planes, it is not a question of selling transportation . . ." (Tr. p. 310; see also p. 252) Indeed it is that very fact that makes Mid-Continent's bad record in the last two or three years so striking.

The favorable effect of the New Orleans extension is subject to two important qualifications. In normal times the traffic on that route will hardly be lush (Tr. p. 304); there have been few new routes granted by the Board where the prospects were as questionable, as is disclosed in the Board members' opinions in the case.¹⁰ And it may well be that

¹⁰ Thus Mr. Branch pointed out that, "The proposed routes, as shown by an analysis of the potential traffic, are at best marginal routes." *Mid-Continent Airlines-Kansas City-Tulsa-New Orleans Service*, 6 C. A. B. 253, 267 (1945).

the Huron-Minot operation, when it is resumed, will offset, if not entirely cancel, the strength, if any (AT p. 62), gained from the extension to New Orleans. (Cf. Tr. p. 393)

The Examiners state that the statistics showing Mid-Continent's record do not allow sufficient weight for the wartime suspension of Route 48. (Examiners' Report, p. 53) At the hearing TWA at one point contended that operations on Route 48 were only recently resumed. (Ex. TWA-17; Tr. pp. 484-486) The Examiners may have been under a misapprehension of the facts. Passenger service on Route 48 was suspended for only about a year, until August, 1943 (Tr. p. 225), and operations since have been steadily increased. (Tr. p. 308) In fact with the resumption of service on Route 48 Mid-Continent began building its traffic department "to the point of and beyond the size of that department prior to the war." (*Id.*) In other words it is simply contrary to fact to suggest that Route 48 has suddenly come back into full play and will transform Mid-Continent into a promising venture.¹¹

More fundamental is the over-all picture presented by Exhibit A-26, which assumes a fleet of 12 DC-3 aircraft operated by Mid-Continent and demonstrates beyond any possible question that Mid-Continent faces heavy losses—or continued sustenance through extraordinarily large subsidies. What is indicated is that *Mid-Continent's losses before mail revenue will be substantially in excess of its losses in 1944* (AT p. 51), and this on assumptions that are obviously far more favorable to Mid-Continent than the facts justify. For instance the assumed expenses of Mid-Continent are the 1941 indirect expenses of Braniff and Chicago & Southern, and the 1944 direct expenses of those two companies. (Ex. A-26, p. 2) This unduly favors Mid-Continent since airline indirect costs in recent years have increased at a rate greater than revenue increases,¹² and Braniff's and Chicago & Southern's plane-mile cost picture for the first six months of 1945 was better than Mid-Continent's (Ex. TWA-23), which indicates that Mid-Continent certainly enjoys no particularly favorable cost factors. Furthermore Mid-Continent's plane-mile costs in the past, with Lodestar equipment, would be lower than its future costs with DC-3 equipment. Likewise, the assumption in question makes no allowance for recent or prospective wage increases and hours of work reductions. For instance a new

¹¹ Moreover any suggestion that Route 48 is an entirely new route added by the Board to Mid-Continent's grandfather routes (Ex. TWA-17) is quite misleading. The most important leg of Route 48—Twin Cities to Kansas City—is to a great degree simply a more direct operation between the two most important points on Mid-Continent's original route.

¹² Nicholson, *op. cit.*, *supra*, p. 8, n. 9 at 454.

agreement with Mid-Continent's mechanics has just gone into effect. (Ex. UAW-1) Nor does the assumption give any weight to the sharp price rises which are being experienced.

Moreover Exhibit A-26 assumes a 60 per cent passenger load factor, which is nearly as high as Mid-Continent's factor for the crowded first six months of 1945 (Ex. A-17, p. 1); and equipment utilization of 10 hours a day, which is higher even than Mid-Continent's unusual wartime experience. (Ex. TWA-6)

Significantly no effort was made by any party to counteract the overwhelming force of Exhibit A-26. The cold, sober fact is that Mid-Continent faces a perfectly bleak set of economic factors which it cannot overcome.

The forecast in Exhibit A-26 is amply justified by the most recent yearly financial data available. For the year 1945 Mid-Continent enjoyed an increase in passenger revenue over 1944 of *more than 100 per cent*, together with some increase in total mail pay and in express revenue. Nonetheless, if a net gain resulting from retirement of flight equipment is eliminated, Mid-Continent's net profit (including mail pay) for 1945 would be but little more than its net profit for 1944. And despite increasing mileage which lowers the rate of mail pay, mail pay per ton mile for 1945 continues at the extraordinary rate of \$3.28. At the same time the ratio of revenue to operating expense fell from 115 per cent in 1944 to 110 per cent in 1945. In fact Mid-Continent's operating profit for 1945 exceeded its profit for 1944 by an amount *less* than the increase in the amount of its mail revenue, so that *it was actually more dependent on its mail pay in 1945 than in 1944.*¹³ In short at the very time when Mid-Continent is benefitting from what will doubtless be the most favorable rate of revenue increase that it can ever attain, and without the need for incurring extraordinary expense due to transition to some new and untried type of equipment (*infra*), Mid-Continent's costs so erode its revenues as to leave it in hardly a better state than it was in a year ago.

Of equally telling significance is an analysis of Mid-Continent's 1945 experience in terms of load factors and passenger rate levels likely to prevail in the future. If its 1945 figures are adjusted to show a 65 per cent passenger load factor—which is certainly high for normal times—and to show an average fare per passenger mile of 4.5 cents—which is now the generally prevailing level—the result would be a net

¹³ These data are found in *Recurrent Report of Financial Data, Mid-Continent Airlines, Inc., December 1945-1944*, issued by the Board's Economic Bureau and based on the Form 2780 reports.

operating loss of nearly \$200,000 for the year.¹⁴ And this loss is increased to a little over \$1,000,000 if its mail pay is computed at 45 cents a ton mile.

Nor can Mid-Continent's plight be shrugged aside by some easy assumption that new types of equipment are in prospect which will serve to gild the carrier's showing. Mid-Continent is only now in process of becoming a DC-3 operator, which as Mr. Zock said "is a bit of a step for Mid-Continent." (Tr. p. 308) Nor does it have any plans for the acquisition of modern equipment. (Tr. p. 343)¹⁵ That it has always been behind the equipment parade is due to its thin traffic flows. It cannot now move beyond the 21-passenger plane without having load factors plummet in view of the route it has to work on. And such

¹⁴ Our computation indicates that the actual operating loss would be \$197,030. The computation is a simple arithmetical computation based on data disclosed in *Domestic Air Carriers, Mileage and Traffic Statistics for 12 Months Ended December 31, 1945, and December 31, 1944*, and in *Recurrent Report of Financial Data, Mid-Continent Airlines, Inc., December, 1945-1944*, both issued by the Board's Economic Bureau and based on the Form 2780 reports. Of course the loss indicated by such a computation would be somewhat excessive in that it makes no allowance for a reduction in expenses resulting from the reduced passenger loads. Such an allowance would not, however, substantially affect the results.

¹⁵ Interchange of equipment as a way out of Mid-Continent's troubles does not offer much promise. In the most important consolidation case ever passed upon by the ICC, *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137 (1942), *aff'd McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), wherein a large motor carrier combine was approved over the vigorous opposition of the Antitrust Division and small competitors, interchange of equipment was advanced as a more desirable means to attain the advantages aimed at by the combination. The ICC disposed of the point as follows:

"The Antitrust Division contends that common control or consolidation of these carriers is not necessary in order to obtain the benefits of through-trailer service, and that such service could be rendered by independent carriers through interchange of equipment without physical transfer of lading. While theoretically this may be true, from an operating standpoint there are many obstacles to such arrangements. Carriers are generally reluctant, and may refuse, to turn over their equipment to others, particularly when they need all available equipment for their own traffic. A carrier delivering equipment to another can never be sure when it will be returned. Complications arise because of the varying types, sizes, and unit costs of equipment used by the various motor carriers. In instances where equipment is interchanged, there is a tendency on the part of operating personnel of each carrier to deliver inferior equipment to the other. Disputes arise over questions of maintenance and damages incurred. Through movements can be coordinated to better advantage and handled more expeditiously under common control, and the instant transactions would result in through movement of much freight which is now being interchanged. The fact that instances where independent motor carriers at present interchange equipment are relatively rare is itself evidence of the difficulties encountered in the making of satisfactory arrangements between them." 38 M. C. C. at 144-145.

Equipment interchange is a slender reed on which to rest Mid-Continent's future. No helpful proposal has ever been presented to Mid-Continent. (Tr. p. 308) The industry's experience with interchange is limited to the single pre-war United-Western instance, and it has many complications. (Tr. pp. 112-113, 183, 188, 204, 207) In air transportation the technical and operating difficulties involved are far more acute than those in the motor carrier industry referred to by the ICC. Differences between the carriers in their radio and other facilities both on the ground and in aircraft, differences in their operating practices and personnel policies, and other such matters give rise to serious problems. And if interchange between a given carrier and more than one other carrier were attempted the problems grow in geometric progression. It is evident that adoption of interchange of equipment on any significant scale will come, if at all, only in the distant future. Furthermore interchange would deal with but a small part of Mid-Continent's problem.

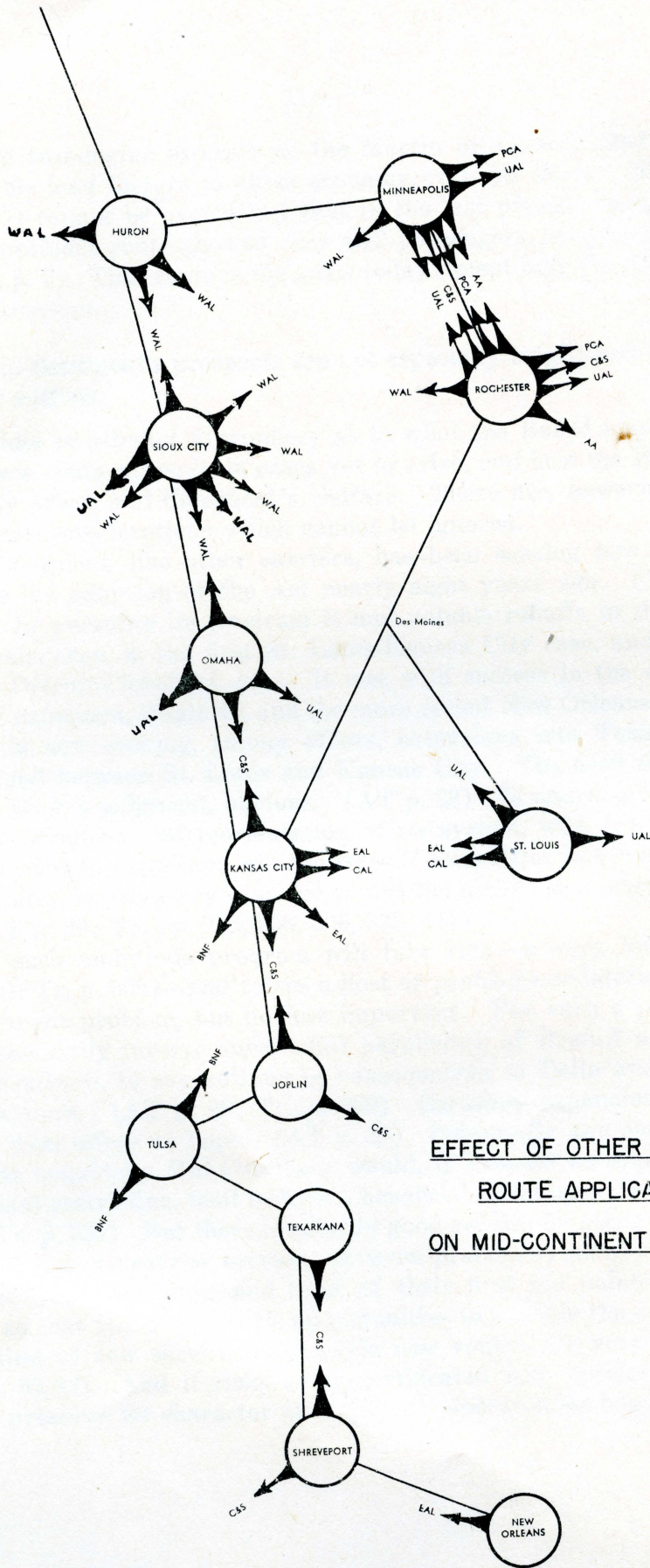
prospective two-engine aircraft as the Martin or Consolidated must have suitable load factors to effect economy over the DC-3. (Tr. pp. 474-475) It cannot be overlooked that in the last prewar year, 1941, the Mid-Continent route showed only 4.12 passengers *per plane mile*. (Ex. A-17, p. 3) That route is the same today except only for the New Orleans extension.

D. Mid-Continent's prospects are not especially brightened by the new route outlook.

It is idle to attempt a prophesy as to what the Board may do in pending new route cases, or in cases yet to arise, and how the Board's action may affect Mid-Continent's welfare. There are, however, certain general considerations which cannot be ignored.

Mid-Continent, like other carriers, has been seeking new routes ever since the adoption of the Act nearly eight years ago. (Tr. pp. 413-414) In pursuing its program it met notable rebuffs in the first New Orleans case, in the first St. Louis-Kansas City case, and in its St. Louis-Detroit-Cleveland case. It met with success in the case of the Minot extension, Route 48, and the more recent New Orleans extension. It is now seeking, among others, extensions into Texas, into Chicago, and between St. Louis and Kansas City. The need therefor is, in Mr. Zock's judgment, obvious. (AT p. 29) In addition to these extensions a substantial reorientation of its system, with Chicago as the hub, and with extension into the Great Lakes cities and the southeastern states, is necessary in order to put the airline in a sound position. (AT p. 29; Tr. pp. 252, 258, 306, 332, 414)

Any such ambitious program will take time—a very long time (AT p. 30; Tr. p. 305)—and raises a host of problems collateral to the Mid-Continent problem, but no less important. For such a program would necessarily involve substantial paralleling of Braniff and Chicago & Southern, to say nothing of consequences to Delta and to the larger carriers. (AT p. 29; Tr. p. 369) Certainly expansion to the north or west offers no hope. (AT p. 29) Potentially any one of the extensions sought by Mid-Continent would, if granted as applied for and without restriction, tend to have a beneficial effect upon Mid-Continent. (Tr. p. 332) But there is already good service by other carriers—much of it a one-carrier service—between practically all of the principal Mid-Continent cities and most of their first ten points of rail interest so that Mid-Continent's opportunities to provide the most favorable kind of new service by possible new routes are very limited. (Tr. pp. 81-83) And it risks being certificated with special restrictions to preserve its character as a "local" operator, as has been re-



EFFECT OF OTHER CARRIERS'
ROUTE APPLICATIONS
ON MID-CONTINENT SYSTEM

cently recommended by the Examiner in the case of its application to enter Chicago. *Route extension with restrictions of that nature, in Mr. Zock's opinion, would not only fail to improve Mid-Continent but would actually put it "through the wringer."* (Tr. p. 326)

Quite aside from the effect of these extensions upon other carriers, there must also be taken into account the effect of extensions of other carriers upon Mid-Continent. Mid-Continent now is singularly free of competition. (Tr. p. 667) Yet the size and importance of cities it serves are such that, unless history is inexplicably not to be repeated, that virgin state is not likely to continue indefinitely. It can hardly be assumed that Mid-Continent will gain vast new routes and at the same time preserve its routes inviolate. Indeed Mid-Continent stands athwart the historical dividing line between east and west transportation systems, and penetration by certain carriers into the Mid-Continent area from the west—to say nothing of other extensions being vigorously pursued by numerous carriers—would have a profoundly adverse effect upon Mid-Continent. (AT pp. 29-30)

The fact is that there is no carrier today which is so open to disastrous consequences from a realization of the perfectly understandable aspirations of other carriers. The accompanying illustration portrays in part what Mid-Continent faces *today*. Those carriers which extol Mid-Continent's position as a connecting carrier, and at the same time are seeking to push their lines beyond the connecting point to the source of traffic (see, *e.g.*, Tr. p. 687), must have a sardonic tongue in cheek.

V. THE PUBLIC INTEREST IN THE UNIFICATION OF MID-CONTINENT WITH AMERICAN

A. The unification will serve the convenience of the traveling and shipping public and will form an efficient traffic pattern.

The question with which we are concerned at this point is well put by the Examiners:

“The factor of integration of the services is one to which attention must be directed in order to ascertain whether the routes to be acquired will be so integrated with the operations of the acquiring carrier, consonant with essential conditions of economy and efficiency, as to result in the establishment of a sound air transportation system.” (Examiners' Report, p. 42)¹⁶

This question, we take it, requires some appraisal of probable future traffic flows in order to determine whether the change from two-carrier to one-carrier routings effected by unification will be efficient.

¹⁶ In support of this statement the Examiners cite *National-Caribbean Atlantic Control Case*, Docket No. 1907 et al., decided March 1, 1946.

This question is very different from that put in a new route case. In a new route case the inquiry is directed to the ascertainment of the need for an entirely new service, and whether that need is such as will support entirely new operations in addition to present operations. Here we are concerned only to discover whether integration of two present services will be efficient.

The evidence in this case shows not only that the integration will provide an efficient traffic pattern but also that the new one-carrier links it will forge are positively desirable and will well serve the convenience of the public.

Except for St. Louis, Joplin, Texarkana and Tulsa (already served by American), every Mid-Continent point will receive, by the unification, a one-carrier link to either three or four of the following four major areas on the American system: (1) southern California, (2) El Paso and Arizona points, (3) Dallas-Fort Worth, and (4) San Antonio and Mexico. (AT pp. 64-66; Ex. A-29) The total population within a 25-mile radius of the Mid-Continent points which will receive these links is, in the case of the link to Southern California, 3,954,996 (Ex. A-29, p. 1), in the case of the link to El Paso and Arizona points and to Dallas-Fort Worth, 4,107,376 (Ex. A-29, p. 3), and, in the case of the link to San Antonio and Mexico, 3,543,977. (Ex. A-29, p. 2) In addition several of the Mid-Continent points will receive feasible one-carrier links to American points in Missouri and to Chicago and Detroit. (Tr. p. 478; Ex. A-29, p. 1, n. 2; Ex. A-31, p. 5)

Likewise the unification will enormously promote the efficacy of the trans-Gulf route between New Orleans and southern Florida recently granted to National by substituting for the present three-carrier routing from southern Florida to western points a logical and attractive two-carrier routing with the junction at New Orleans.

The four major areas on the American system referred to above are extremely important sections from the standpoint of air transportation. They account for 40 per cent of American's total traffic revenue. (Tr. p. 451)

The desirability of perfecting a link between these areas and the Mid-Continent points in question is apparent.

The relationship between the midwest and southern California, both socially and economically, has been steadily growing in importance and gives rise to a large passenger traffic potential and to an important freight and express potential between those areas. Indeed in the case of Twin Cities the need for a one-carrier service to Los Angeles is near the top of the list of this community's requirements for air service. (Tr. p. 37) The existing heavy flow of traffic between

Kansas City and Los Angeles also demonstrates the large potential traffic between all the cities in this midwestern region and southern California in view of the similarity between Kansas City and other cities in this section. (Tr. pp. 449-450) The potential shipment of food products alone between these two areas provides great possibilities for the development of air freight, which peculiarly demands one-carrier service. (AT p. 71), to say nothing of the newly developed industrial production in both the midwest and southern California which will inevitably create greatly increased traffic flows in the future between these regions. Likewise one of the most notable population movements during the last few decades is that which has occurred to southern California from the midwest, and particularly from Iowa. Indeed the Iowa Society in southern California has a membership of between 250,000 and 300,000. (Des Moines Exhibit)

It is well known, too, that the Sun Country of Arizona and the southwest has been greatly developed in recent years as a vacation-land and a natural attraction for persons living in the more northern Mid-Continent cities and even in the southern cities. Similarly the Lake Country of Iowa and Minnesota has great potential attraction for the people of the south and southwest. Between these two regions there is a natural affinity, providing "a fertile field for development." (AT p. 65)

The new connection which would be afforded between the Mid-Continent cities and Texas points and Mexico would also serve the convenience of the public. The Board has already noted evidence of the community of interest between these areas. *Mid-Continent Airlines, Inc., et al.—Twin Cities—St. Louis Operation*, 2 C. A. B. 63, 68, 90, 92 (1940). Braniff is also quite emphatic on this point (Tr. pp. 575-576) which, indeed, can hardly be disputed.

The public convenience of the new links which will be afforded to the southern part of the Mid-Continent route, notably New Orleans, is also clear. New Orleans, the second port of the United States (Tr. p. 21), the fifteenth city in size in the United States and the largest city in the south (Tr. p. 30), with a great program of port development (Tr. p. 24) and with new expansion in the facilities of its steamship lines (Tr. p. 23, its tourist attractions (Tr. p. 30), its popularity as a convention city (Tr. pp. 30-31), its steady growth as an air transport center, and its aggressive fostering of trade and travel through the newly established International House (Tr. pp. 16, 22), already has a great community of interest with the far west (Tr. pp. 21-22, 23, 33-34, 35) which the unification would serve admirably.

It may be confidently concluded that the volume of air transportation between points on the two systems will be very substantial indeed. The admitted underdevelopment of the Mid-Continent route reflected in past air traffic data and the thirteen-year old rail traffic figures naturally do not foretell the possibilities. As Mr. Rheinstrom so aptly said,

“We can't justify this proposed merger on the basis of existing traffic in any particular, *because on that basis there is little future for air transportation at all.*” (Tr. p. 469)

The question—we repeat—is not one of gambling on a new route to be created in addition to existing services. Rather it is one of making a present two-carrier service a one-carrier operation, and there is not the least basis for believing that the traffic which will be developed to flow over both the routes to be combined will be insubstantial or that their traffic integration will be anything but efficient.

As a matter of fact, the ICC consolidation plan for the railroads—the only abstract over-all plan for carrier combinations ever formulated by a government agency—brings out the logic of connecting the Mid-Continent points with the sections of the American system in question, as the overlay in Exhibit A-28 will show. The proposed Southern Pacific System would have linked New Orleans with the west coast and the southwest; the Santa Fe System would have linked many of the northern and central Mid-Continent points with Texas, the southwest and the west coast; the Missouri Pacific System would have linked the central Mid-Continent points with Texas and, by connection with the Southern Pacific System at El Paso, would have linked New Orleans with the west coast. A close study of the Exhibit, with its overlay, reveals a striking similarity between the pattern formed by the upper part of the Mid-Continent route combined with American's route and the pattern made by the proposed railroad systems, as well as the obvious similarity between the proposed New Orleans rail link with the west and that which a Mid-Continent-American union would afford.

The schedule pattern proposed by American concretely demonstrates the feasibility of the consolidation of the two systems. (Ex. A-32) So logically do the two routes fit together that the trips to be operated on the Mid-Continent route will operate also over parts of the present American route to a very large extent. Only in the case of the Huron-Minot stub and the Twin Cities-St. Louis run will the schedules confined to the limits of the present Mid-Continent route exceed in

number the flights which will operate over both routes via Tulsa or Texarkana.¹⁷

It is true the route thus provided to Los Angeles will be somewhat longer than present services from the upper part of Mid-Continent's route, but the difference is not so substantial as to be impracticable. (AT pp. 64-65; Tr. pp. 487-488) And a great circle route from New Orleans to Los Angeles stopping at Texarkana is only 66 miles longer than a direct great circle course, and that via Tulsa is only 157 miles longer than such a course.

B. The unification will result in proper development of the Mid-Continent route.

The Chairman of the Board of Directors of TWA likened Mid-Continent to a belt line railroad. (Tr. p. 647) Whether or not that simile describes the type of operation which Mid-Continent has conducted, it certainly misses the real point: the Mid-Continent cities require and should have something quite different. Cities such as the Twin Cities, Omaha, Des Moines, Kansas City and New Orleans are not secondary or tertiary points. Nor is the Mid-Continent region remote or thinly populated; it is the country's heart. The Mid-Continent route, laid out as it is, provides little promise; but integrated with the American system it can be vitalized.

What is called for is a developmental program—virtually a pioneering program. (Tr. pp. 151-153) The job will not be an easy one. Air transportation has not been developed on the Mid-Continent route and, as we have seen, the route itself is not laid out along lines where pre-existing travel discloses substantial volume.

The program which American proposes is based on the provision from the American system of four strong terminals for schedule building which are not now available to the Mid-Continent route. Those terminals are: Los Angeles, Dallas-Fort Worth, Mexico City and Chicago. (AT p. 66) By providing for new through services, operating from these terminals, as well as by bringing to the Mid-Continent route

¹⁷ One schedule from Twin Cities shown in Exhibit A-32 does not stop at Kansas City. This might require a non-stop authorization since it would depart substantially from the line of Route 26. And New Orleans-Shreveport passengers could not be carried on the one flight between New Orleans and the west via Texarkana and on the one flight between New Orleans and the west via Tulsa which are scheduled to stop at these two points without a change in the present Mid-Continent certificate. A restriction in that certificate permits carriage of New Orleans-Shreveport traffic only on flights to (or from) Kansas City or points north. The purpose of that restriction is to prevent merry-go-round flights to the undue detriment of Delta. When the specific plan for integrating Mid-Continent and American is presented the matter of altering this restriction so that it permits transportation of New Orleans-Shreveport traffic on flights to (or from) some appropriate western point can be taken up. In any case the restriction does not affect flights, even though taking on and discharging traffic at both points, which do not carry New Orleans-Shreveport traffic.

a strong carrier with a management and resources such that the necessary experimentation and development work can be done, a program can be undertaken which will result in the frequencies, equipment, and aggressive sales activity needed to bring out the potential of an underdeveloped route. (AT pp. 66-69) It is to be noted that, while the new through services proposed between points on the two systems are important in themselves, the provision of such through services furnishes a support for more frequencies between points confined to the present Mid-Continent system which makes it possible to furnish those points with a volume and variety of service such as they could never otherwise enjoy.

Increased frequencies, skip stop scheduling, necessary variety of equipment, sales and servicing efforts, an aggressive program of development (AT pp. 66-69, 78-79)—without any question American will provide means for the furthering of the public convenience such as Mid-Continent never could. (Tr. pp. 151-153, 310, 452, 460-462, 466-467, 469, 474, 524-525) Moreover a necessarily heavily subsidized carrier is under certain very real disabilities, effectively preventing it from making heavy expenditures which mean present loss with the hope of later gain, which inevitably curb, if they do not brake, daring experimentation and developmental work. The Board's action in prescribing mail pay for this very carrier has imposed just such curbs. See *Mid-Continent Airlines, Inc.,—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464, 467, 468, 470-474 (1942). (Cf. Tr. p. 474) Mid-Continent is quite aware of that fact (Tr. p. 262) and finds little comfort in the "guarantee" of subsidy. (Tr. p. 260)

Nor is it a simple question of whether Mid-Continent has the money to spend. It is a question rather of having the varied potential travel and shipment to sell which will permit the necessary job of development to be done. (Tr. pp. 524-525) "... there is no use trying to spend the same amount of money selling breakfast food in New Mexico as you do in New York City because you don't have the market." (Tr. p. 525) For example a sales force in the Twin Cities which is also selling Texas, Mexico, Arizona and southern California business can do much more developmental work which will promote travel to Des Moines and Kansas City as well, than can a sales force largely limited to selling the Des Moines and Kansas City business. (Tr. p. 469)

Finally, we are entering upon an epoch when air freight will begin to develop. Freight development on Mid-Continent's route independently operated will face serious difficulties which the union with American will mitigate or remove. (AT pp. 60, 70-71) That the public convenience will be served in this respect, for the reasons recited by Mr. Rheinstrom (AT p. 71), can hardly be gainsaid.

Moreover American can bring to the territory a direct acquaintance with its needs. For predecessor companies of American operated to a number of the Mid-Continent cities, including New Orleans, Kansas City, Omaha and the Twin Cities, and many of the people who were with those companies occupy responsible positions in American today. (AT pp. 8-9)¹⁸

C. The unification will result in fare and air mail rate reductions.

Not least in the public interest among the results of the unification will be the reductions in rates, including the rate of air mail compensation.

Immediate reductions in passenger fares, incident to bringing the Mid-Continent rates into line with the level of the American system, will average 13.7 per cent—and running as high as 22.1 per cent—for the fares between Mid-Continent points. (Ex. A-33; AT p. 68) Rate reductions to and from off-line points will also result. (Ex. A-47; AT p. 68) Such reductions are of substantial public benefit. *Moreover American, which has taken the lead in reducing rates to the lowered levels now generally prevailing, can be looked to for further reductions in the future.*¹⁹ (AT p. 19; Tr. pp. 202-203) It can certainly offer more hope to the public of initiating rate decreases than could Mid-Continent. (Tr. pp. 498-499)

Of equal importance is the very large saving which will be afforded the government in lowered air mail compensation. American expects that the Mid-Continent route, integrated with American's system, will be provided with the rate of compensation applicable generally to its system, and on the basis of the year ended September, 1945, this means a saving to the government of nearly \$800,000 annually. (AT p. 20) A measure of such substantial economy to the government is in the public interest now as perhaps never before.

¹⁸ No contention has been made by any party that the unification will make American too large to do an efficient job of developing the Mid-Continent route. Indeed the addition of Mid-Continent's business to American's business, on the basis of the fiscal year 1945, increases American's percentage relationship to the industry by an infinitesimal amount. *Infra*, p. 43. Furthermore American, with the addition of Mid-Continent, would remain a small enterprise. (AT pp. 9-10) When compared with other similar enterprises, and with industry at large, even including 51.4 percent of American Overseas, American is dwarfed. (Exs. A-37 and A-38; see in particular pp. 2-3 of Ex. A-38) As Mr. Smith put it, there are drug store enterprises larger than American. (Tr. p. 123)

¹⁹ "In a truly competitive industry, there will almost always be a saving minority of progressive leaders who, by radical innovations in operations and bold reductions in prices, demonstrate to the majority that new peaks of prosperity for the entire industry lie in the creation of larger and more stable markets . . . A vast expansion in the amount of service provided, by new route extensions, by more frequent schedules, by the use of larger and faster planes, and by the offering of new types of service, must be accomplished if air transportation is to occupy its destined position in the national and international economy." Barnes, *The Economic Role of Air Transportation*, 11 LAW AND CONTEMPORARY PROBLEMS 431, 448-449 (1946).

D. The unification will result in a logical operational pattern.

From the standpoint of operations the Mid-Continent and American systems fit together very well.

It is striking that forty-five percent of the schedules proposed for the merged system will operate to and from terminals on the present American system. (AT p. 66) No effort was made by any party to criticize this pattern as not feasible or convenient.²⁰

Furthermore American is opening a very large overhaul base in Tulsa which will serve the needs of aircraft on the Mid-Continent route most conveniently in the event of unification. This step is taken independently of the proposal involved in this proceeding but the location of this plant is ideally suited to the needs of the merged systems. (AT pp. 16-17)

Similarly the flight training center being instituted by American at Ardmore, Oklahoma, is a very important step which is eminently suited to the requirements of the proposed unified systems. (AT p. 17)

Flight control can be handled conveniently. While the northern part of the Mid-Continent route will be served from an office in the Twin Cities, the southern part will be handled by one of the control points on the present American system. (AT p. 18)

And the present Mid-Continent stub to St. Louis will cease to be a dead-end; not only will American's present ground facilities at St. Louis be available for that operation, but aircraft on that run can be routed beyond St. Louis on the present American system, where desirable, instead of having to lay over at St. Louis.

The lack of a coherent operational pattern in the unification of Western and Inland, which led Mr. Lee to dissent in *Western Airlines, Inc., Acquisition of Inland Airlines, Inc.*, 4 C. A. B. 654 (1944), does not at all appear in the unification proposed here. In his dissent, Mr. Lee said:

“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 ef-

²⁰ A suggestion by TWA that American was over-scheduling was the only barb thrust at the schedule pattern. (Ex. TWA-22; cf. Tr. 581) But compared to American's over-all schedule program for its present system in 1946 it has been conservative in its plan for the Mid-Continent route which necessarily could not be placed into effect before 1947. (Tr. pp. 735-736) Moreover American conceives its job as one of development and of anticipating and creating traffic—not as one of always waiting to provide for service after the traffic has appeared. (AT pp. 66-67, 78-79; Tr. pp. 151-153) This is a basic tenet of American's philosophy. Cf. *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C. A. B. 464-468 (1942). Braniff is more timorous. (Tr. p. 581) If American is wrong then some very fundamental changes will have to be made in its conception of its obligations to the Congress and in its attack upon the air transport problems of the future. (AT p. 78) See also Barnes, *op cit.*, *supra*, p. 21, n. 19.

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." 4 C. A. B. at 666

In the unification now proposed there is the substantial community of interest between the Mid-Continent cities and large areas of the American system which we have already discussed. But more than that the routes as now laid out permit—indeed invite—a *pattern of operation which is logical, feasible, and efficient*. To repeat, there is not a word of evidence in the entire record to show that that pattern is not perfectly practicable.

E. The unification will result in substantial economies.

Often in carrier combination cases specific dollar estimates are made as to particular economies which will be effected.

No such estimates were made in this case. We have deliberately refrained from doing so for two reasons:

In the first place, the industry is only now emerging from the war. Additional equipment is being secured. Personnel are returning to add to the increased employees which both companies have accumulated during the war. Business will grow. Prices, and therefore costs, are moving upward. These and other conditions related to the war and its influences make dollar estimates of economies largely meaningless.

In the second place American has no intention of conducting operations over the Mid-Continent route with smaller total expenditures than have been made heretofore. On the contrary American proposes to transform that route and the operations thereof in a way which will involve substantially greater expenditures than have been made by Mid-Continent. Greatly increased schedules, new equipment, opening of new offices, additional personnel are essential to the job which American proposes to do. (AT pp. 66-68, 69; Tr. pp. 148-149) Expense is contemplated which Mid-Continent, as an independent operator, could not justify. (Tr. pp. 460-464, 473-475)

That there will be very large economies in the sense of increased utilization of each dollar spent and decreased unit costs is apparent.²¹

There will be the obvious economies in general overhead expense. (AT p. 19)

²¹ As the Board said in *American Airlines, Inc., Control of American Export Airlines, Inc.*, 6 C. A. B. 371, 378 (1945):

“While no accurate forecast can be made as to the economies which may be achieved, it is obvious that they could be substantial and that their realization would work toward the development of a sound air transportation system.”

Purchases for the combined system will increase the economies from quantity and centralized purchasing affecting both operating and capital items. (*Id.*)

American's national advertising program will automatically redound to the benefit of the merged system. (*Id.*; Tr. p. 132)

Aircraft can and will be operated on longer flights than would be possible on Mid-Continent's route alone, with better opportunity of routing favorably affecting equipment utilization (AT p. 19); the location and new importance of Tulsa are especially conducive to more efficient scheduling for the consolidated systems. (AT p. 70)

American's offices in St. Louis, Tulsa, Joplin, and Texarkana can cover the merged operation. And American maintains an off-route office in Minneapolis now. Furthermore American salesmen now must cover such points as New Orleans and Kansas City. Finally the economy resulting from the ability of each office on both the present systems to sell more service to more different places is apparent. (AT p. 70)

The new overhaul base at Tulsa will be markedly increased in efficiency and economy. (AT p. 17)

So with the flight training center at Ardmore. (*Id.*)

Flight control will be handled on a more economical basis in that control points on the present American system will handle the southern part of the Mid-Continent route. (AT p. 18)

Economies and increased efficiency in these respects are of great importance to the attainment of the service and the rates which are in the public interest. As the ICC said in *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137, 146 (1942):

“Reduction in the cost of transportation service has been recognized by us in numerous decisions as being a matter affecting the public interest. The Supreme Court in *Texas v. United States*, 292 U. S. 522, held that the words ‘public interest’ as used in section 5 have ‘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.’ Among other things, the act declares it to be the national transportation policy of Congress ‘to promote safe, adequate, economical, and efficient service.’ Reduction in the cost of transportation service is properly reflected eventually either in lower rates than would otherwise be applied, or in improvements in service, both of which are in the public interest.”

The Civil Aeronautics Act in Section 2(c), which is similar to the provision of the Interstate Commerce Act referred to by the ICC, declares that the Board shall consider as being in the public interest the

“promotion of adequate, economical and efficient service by air carriers at reasonable charges”. And the Board in its opinions has repeatedly recognized the prospect of reduction of the costs of transportation as a result of a unification to be a vital consideration in the public interest. *Acquisition of Western Air Express by United Air Lines*, 1 C. A. A. 739, 744 (1940); *Wien Alaska Airlines-Acquisition-Mirow Air Service*, 3 C. A. B. 207, 213 (1941); *Marine Airways-Alaska-Air Transport Consolidation*, 3 C. A. B. 315, 317, 319 (1942); *Acquisition of Mayflower Airlines by Northeast Air Lines*, 4 C. A. B. 680, 683 (1944).²²

F. The unification will result in benefits to the employees concerned.

The benefit to the Mid-Continent employees of becoming a part of the expanding American organization is manifest. Certainly there will be no shrinkage in the present Mid-Continent personnel. (Tr. p. 149) With transfers from present locations to be avoided so far as practicable (AT p. 14; Tr. pp. 156, 210-212) and with the purpose to recognize seniority recognized by Mid-Continent (AT p. 14; Tr. pp. 149-150, 176-177), there is no reason to anticipate anything but clear gain for them. It is, of course, realized by American that the Railway Labor Act requires collective bargaining and that working conditions are subject to agreements reached with the representatives of the majority of employee crafts or classes. (AT p. 15)

So far as the point made on behalf of the United Automobile Workers (CIO) is concerned, the jurisdictional dispute among American's mechanics can interpose no reason for disapproving the unification. That dispute is not of American's making. In fact it was another CIO union which invoked the services of the National Mediation Board and asked for the election of a new union representative. (Ex. A-49, p. 2) That no union received a majority approval in the balloting (*id.*, p. 3), and that therefore the National Mediation Board has advised American that it cannot certify a union representative (*id.*, p. 4), does not mean that American “refuses to acknowledge” union representation and agreement as Mr. Nolan alleged. (Tr. p. 703) Mr.

²² “The developmental stage of air transportation has a further significance. In this stage, it is of first importance to keep overhead costs, including the cost of compliance with public regulations, at the lowest figure consonant with safe and adequate service. The size of the market which air transportation can serve is limited by the level of charges imposed by contemporary conditions of cost. The large volume operations, which are essential both to give stability and security to the industry and capacity to fulfill its obligations to the public, can be achieved only if progressive rate reductions are possible. Thus the industry's rate of growth will be dependent upon the ability to keep costs as low as possible. *One test of the proper governmental policy toward air transportation is the contribution which such a policy can make to the achievement of lower costs and lower rates.*” (Italics ours) Ryan, *Economic Regulation of Air Commerce by the States*, 31 VA. LAW REV. 479, 512 (1945).

Nolan, of course, wants his union recognized as the mechanics' representative. But how this can properly be done at this time, with Mr. Nolan's union having just come out a very low third in the employees' election (Ex. A-49, p. 3) is hard to understand.

American's excellent record of employee relationships, and its unfailing and willing compliance with the Railway Labor Act (*cf.* Tr. p. 179), cannot be denied. Moreover it is not inexperienced in welding together different organizations on a satisfactory basis. Its management has done so extensively in the past. (AT p. 14; Tr. p. 149) The merger proposed will undoubtedly be accomplished with fairness and benefit to the employees involved. Indeed it is the benefit to the personnel of the company which is one of the principal reasons for Mr. Zock's conclusion that he "can't imagine a better merger possible than this one, for Mid-Continent." (Tr. p. 383; see also p. 388)²³

G. The unification will promote a coordinated air transport system.

1. The Mid-Continent route will be improved as a connecting route.

It was argued at the hearing that the Mid-Continent route is a connecting route. United has, in fact, emphasized that it is one of the principal connecting routes. (Ex. U-2) General Wilson of TWA, as we have seen, likened it to a belt line railroad. (Tr. p. 647)

We have already pointed out that the nature of Mid-Continent as a connecting carrier is one of its serious weaknesses. *Supra* p. 9. But does it nonetheless contribute to the health of the air transport system to have such a connecting carrier independently owned and operated?

General Wilson and Mr. Crary believe that such a carrier should be a "neutral" carrier. (Tr. pp. 674, 664) It is easy to state this principle in the abstract. But as soon as one gets beyond the abstraction the theory becomes untenable as a practical working proposition.

In the first place the very vigor with which other carriers are attempting by route extensions to reach beyond the connecting point afforded by Mid-Continent, see *supra* p. 15, belies the theory. And Mr. Crary's own company is one of those which is most earnest in its aspirations to be free of use of Mid-Continent as a connector.

In the second place the theory itself has failed to find allegiance in the evolving decisions of the Board since the Act was adopted.

²³ Even were there to be some minor detriment to employees, which there is no reason to anticipate, it would be offset by their ultimate gain. As the ICC remarked in *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137, 146-147 (1942), "Any minor detriment to employees would be offset by the advantages which indirectly would accrue to them from the lower operating costs and greater stability of applicant as compared with the respective carriers involved."

Except possibly for Mid-Continent there is not a single carrier in the country the present route of which fits the theory that independent north-south lines should form a national grid with the east-west trunks being fed thereby. The system has been evolved quite differently.

There was probably a time in the industry's infancy when it was conceived that it would be well to have a limited number of transcontinental trunks with independently owned, small north-south carriers cutting across those routes as "feeders". But those were days of very thin flows, over-all; at that time a line from Chicago to New Orleans, for example, could be thought of as a mere "feeder". That day has long passed, and the Board—with practical realism—has progressed far beyond that pattern of thought. General Wilson's description of a line from Canada to the Gulf as like a belt line railroad is a throw-back to a type of thought which is as out of date in the present air transport picture as the Boeing 247. Every smaller carrier is striving—and perfectly understandably—to attain a status where it is developing and relying upon independent traffic flows. And the Board has responded to this aim to an extraordinary degree. PCA—once thought of as a "connecting" carrier—has extended its roots over a large share of the eastern half of the United States and its thirst is not quenched. Northwest has leaped from a "neutral" connector to an independent transcontinental. Delta has grown lustily in four directions. National has been utterly transformed. Braniff and Continental have been spread out widely. Western, once the model of General Wilson's antiquated theory, already eyes Chicago and doubtless does not avert its gaze at the shores of Lake Michigan. Chicago & Southern has a powerful X between vital sections of the country. Even Colonial can hardly be fitted into that old mold which General Wilson has resurrected from pre-1934 days.

Mid-Continent remains the anomaly in the industry.

Furthermore it is a striking fact that the ICC consolidation plan for the railroads reflected no such pattern as General Wilson espouses. Indeed, in Mr. McManamy's opinion in *Consolidation of Railroads*, 159 I. C. C. 522 (1929), he listed as the very first point among those Congress had in mind in providing for consolidations a consideration flatly inconsistent with General Wilson's theory. He said:

"My conception of what Congress had in mind is, first, that short lines should be changed from independent separate lines of railroad into branches of trunk-line systems thereby providing necessary equipment, facilities, and funds to assure continued operation of these very important and necessary parts of the transportation machine . . ." 159 I.C.C. at 569.

In the third place the union of Mid-Continent with American does not disrupt the function of the Mid-Continent route as a connecting route. As American's, no less than as Mid-Continent's, that route will be a "neutral" connector for points east with respect to TWA, United, Eastern and others. So, too, with respect to traffic between St. Louis and others of the upper Mid-Continent points and the west and north-west, and with respect to traffic between the southern part of the Mid-Continent route and the northwest and mountain states. Furthermore American will have the same incentive as Mid-Continent to participate in two-carrier routings competitive with present one-carrier routings to and from Mid-Continent points.

In fact the allegedly ill effects of making the operator of the Mid-Continent route an "interested" rather than a "neutral" carrier are, as a practical matter, confined solely to the traffic from points north of Kansas City destined for southern California or Texas and Mexico. And with respect to all such traffic Mid-Continent, with improved connections with American at Tulsa and Texarkana, would have an interest in hauling to American anyway.

In the fourth place there is every reason to believe that American will be a far more suitable connecting carrier than Mid-Continent. (Tr. p. 122) American will be able greatly to increase frequencies, and to vary their character. It will therefore more successfully care for the interests of the connecting business—which, with Mid-Continent, would have to rely on few frequencies dictated in large measure by the often conflicting decisions of the long haul connecting operators; and American will be able to adjust to differing connections more readily because of the greater elasticity afforded by its increased frequencies. Mr. Rheinstrom made this point clear during his cross-examination *and there was no effort to refute it.* (Tr. pp. 469-473) Furthermore American has had an unusually great experience in meeting and solving the problem of affording good connecting service. (Tr. pp. 469-470)

" . . . if a carrier operates aircraft in schedules, each schedule of which must make connections all the way along the line from Minneapolis to Kansas City and Tulsa and so on, and at the same time provide a salable through service between Minneapolis and Los Angeles, either by connections or otherwise, then it is difficult to do a good job of both, and I don't believe it is possible to do a good job of both under those circumstances. It is impossible to have a through, fast service while at the same time we have a slow connecting service which has to stop at many places.

"Now American and Mid-Continent together having the support both of the large volume of through traffic which this integra-

tion will generate, and also the opportunity to develop local traffic and to make connections, can do so on different schedules, and thus the integration actually makes the connecting problem simpler, and easy of solution . . . the greater the variety of the service which can be justified and operated profitably over a route, the greater the opportunity there is for doing all of the things which need to be done without one penalizing the other. I believe Mid-Continent has not been in a position to provide both a through and a connecting service without one penalizing the other." (Tr. pp. 470-471)

Thus the "neutral" connector theory breaks down completely when held up to examination in the light of the actual evolution of the industry and the practical facts presented here. The theory—as we have said—is an easy one to formulate in an abstract way; but it bears little relation to the facts of life. And there is probably not a single carrier in the country today which would seriously adhere to it were it to be proposed as a basis for reorganizing the air transport system.

2. The opportunities of other carriers will be enlarged by the unification.

The Board, on several occasions, has evinced a concern to strengthen the position of the smaller carriers.

If such an aim means—as we would be led to believe by some of the arguments made by the smaller carriers—that a larger carrier like American is to be frozen until other carriers are built up to approximate it in size, then that aim would dictate disapproval of this proposal. *In fact that aim would dictate suppression of all effort on the part of a larger carrier to improve its means for serving the public.*

But if that aim is to provide for the smaller carriers outlets which will enable them to hold more securely the self-sufficient position which most of them have already won, then approval of the proposal here will contribute greatly to its realization and will most certainly promote a coordinated air transport system.

In the first place, the unification will remove one of the weakest carriers, now hopelessly distant from self-sufficiency. If that carrier remains independent the Board for years to come will be plagued with the question of how to build it to a point where it can attain economic independence. The carrier is so situated that its strengthening must come largely at great expense to Braniff, Delta, and Chicago & Southern. Mid-Continent's location—a historical accident stemming from an illogical air mail contract bidding system—has left it jammed between and across these three of the smaller carriers; and if it is to grow it must feed on their territory. Such growth will not simplify

the so-called "small carrier" problem. It will only complicate it.

In the second place—and perhaps more important—Mid-Continent's route lies in a territory wherein numerous of the smaller carriers clamor for entry. Every response to this clamor is bound to have seriously adverse effects upon Mid-Continent, both with respect to its present routes and with respect to routes to which it might reasonably aspire.

The point was made quite aptly twice during the hearing.

Mr. Braniff told of Braniff's efforts to extend to the Twin Cities. They failed because of the adverse effect upon Mid-Continent which such an extension would cause. (Tr. pp. 529-530) And Mr. Woolman told of Delta's efforts to extend to Kansas City in the case in which the New Orleans extension was awarded to Mid-Continent. Delta failed, according to Mr. Woolman, because Mid-Continent's need for strength was greater. (Tr. pp. 610-611)

If the unification is approved there will be no question, in future new route cases, of Mid-Continent's ability to survive. If the public convenience and necessity require that Continental or Western or Braniff or Delta or Chicago & Southern extend to or between certain of the cities of the Mid-Continent territory, that question can be dealt with on its merits and without having to cast into the balance with the cities' interests in improved transportation the extraneous issue now always present: how can Mid-Continent survive?

In this connection it is to be observed again that this is not a new route case. It is not, as in the *Great Lakes to Florida Case*, a question whether American is to receive a new route into a territory distant from its existing operations in preference to another carrier, such as Delta. The question rather is, shall American be substituted on an existing route for a carrier which cannot stand without heavy subsidy, the protection of which requires a negative attitude toward the expansion of other carriers? *If that substitution is made American, without any doubt, will be able to develop the latent potential of that territory far beyond Mid-Continent's capacity and so will promote, instead of bar, the possible expansion of others.*

VI. ARGUMENTS ADVANCED IN OPPOSITION TO THE UNIFICATION.

A. The contention that the two systems will not integrate favorably is unfounded.

The Examiners concluded that the two systems do not integrate in the sense that their unification will be "consonant with essential conditions of economy and efficiency." (Examiners' Report, p. 42; see

supra, p. 15) The Examiners' discussion of the matter can be resolved into three propositions: (1) American is an east-west carrier and Mid-Continent is a north-south carrier; (2) past traffic data show a relatively small amount of traffic interchanged between American and Mid-Continent; and (3) the amount of new or additional one-carrier service which American could provide as a result of the unification is small.²⁴

Even at a glance, it is apparent that in this case there is no such lack of traffic integration as was the fact in the *National-Caribbean Atlantic Control case*, Docket No. 1907 et al., decided March 1, 1946, or in *Western Air Lines, Acquisition of Inland Air Lines*, 4 C. A. B. 654 (1944). Upon close scrutiny of the three propositions advanced by the Examiners it becomes perfectly clear that a finding that the integration of these two systems is so slight as to make their unification contrary to the public interest as not "consonant with essential conditions of economy and efficiency" has no relation to the facts.

1. *Difference between the two systems in directional emphasis does not show lack of integration.*

The first proposition both overlooks facts and is irrelevant.

American is in fact a north-south carrier from Chicago to points in Texas and Mexico. And unification with Mid-Continent will tie in the whole upper part of the Mid-Continent route with Texas and Mexico in a perfectly logical north-south operation. There is not the slightest suggestion anywhere in the record that there is anything illogical about that tie.

Furthermore it is wholly novel to propose that a mere difference in directional emphasis in two routes has anything to do with the economy and efficiency of their integration. Were this true Eastern Airlines, PCA, National, and Delta—to mention a few—would present strange spectacles indeed, and one might wonder how some of the most important actions of the Board could be justified.

Rationalization in terms of an assumed north-south, east-west dichotomy is utterly specious. *Supra*, pp. 26-27.

2. *Data on past interchange of traffic between American and Mid-Continent are of no significance.*

The second proposition is factually true. The difficulty with the proposition is that it means nothing.

²⁴ The Examiners do not contend that the systems will not integrate conveniently from the standpoint of physical operations. We refer to such physical integration, *supra*, pp. 22-23.

The data showing interline traffic between American and Mid-Continent are confined to the September, 1940, and March, 1941, Board surveys and to a count made in August, 1945.

a. *1940 and 1941 data are old and fragmentary.*

As bearing on the question here, the 1940 and 1941 figures are so old and fragmentary that they can carry no weight.

b. *1945 data furnish no reliable guide.*

The August, 1945, figures show that American ranked sixth among fourteen carriers in passengers delivered to Mid-Continent and ninth in passengers received from Mid-Continent. (Examiners' Report, p. 25) But there are several considerations which make these figures of no real significance in appraising the problem presented.

(i) *1945 traffic was too small in volume to provide a basis for reasonable judgment.*

In the first place the traffic involved is so small as to mean but little—it simply reflects the underdevelopment of the Mid-Continent route. And even the small volume involved was swollen since where there was a three-carrier haul the same passenger was counted twice.²⁵ In any event with such small numbers relatively slight changes in circumstances can affect the carriers' relative standing markedly. Thus Delta ranks tenth among carriers delivering to Mid-Continent, but, though Delta received from Mid-Continent only 66 more passengers than it delivered to Mid-Continent, its rank among carriers receiving from Mid-Continent jumps to sixth.

(ii) *1945 traffic data do not reflect the New Orleans extension.*

In the second place operations on the extension from Tulsa to New Orleans were not inaugurated until August 10, 1945 (Examiners' Report, p. 53), so that the August, 1945, figures barely reflect the results of that operation and its likely important effect upon interchange of traffic with American.

(iii) *Lack of connections between American and Mid-Continent in the past are a product of conditions which will not prevail in the future.*

In the third place connections between American and Mid-Continent at Tulsa have been notoriously bad for years (Tr. pp. 580-581) due to lack of equipment, to low frequency of trips, and to Mid-Conti-

²⁵ It is evident that this was done since the data show passengers received from and given to non-connecting carriers.

ment's need to adjust its schedules to meet other connections. In the future a greater amount of equipment, more frequent schedules on Mid-Continent, and much greater frequencies on American through Tulsa due to the extension of Route 4 from Tulsa to El Paso (AT pp. 70, 72-73) will make Mid-Continent's connections at Tulsa with American at least as good as Mid-Continent's connections at Kansas City (Tr. p. 472), and Mid-Continent will of course prefer to haul its passengers on to American at Tulsa rather than to lose them at Kansas City. This fact alone—not to mention the connections with American at Texarkana which were not previously available—makes past data on traffic interchange wholly unreliable. It borders on the absurd to draw conclusions as to the economy and efficiency of integrating the two systems from the past traffic counts appearing in this record.

c. The finding that one-carrier services would be few if based on a misconception of the effect and weight of the evidence.

The Examiners' third proposition—that new or additional one-carrier services which will result from the unification are small—is based entirely on an analysis of 1933 rail passenger figures and of the air passenger figures for September, 1940, and March, 1941. (Examiners' Report, p. 44)

The Examiners' have made an outright misstatement of fact. The Examiners give the alleged percentage of rail and air passengers "between cities which American contends would be primarily benefited by the acquisition" who would receive an additional or new one-carrier service. The data relied on are to be found in Exhibits TWA-20 and TWA-21. But those Exhibits give the alleged percentage of *all* rail and air passengers between the Mid-Continent cities and *all air cities* who would receive a new or additional one-carrier service as a result of the unification. Obviously the percentage would be relatively small. Even in many new route cases the percentage of *all* rail and air passengers between a given city and *all air cities* who would be afforded a new service by a given new route would be small indeed. And that fact proves nothing. The Exhibits are a clever exercise in a statistical device, and apparently misled the Examiners whose very paraphrase of their purport misrepresents what they show.

Moreover those Exhibits are made up on the basis of a definition of what is a new, as distinguished from an additional, one-carrier service which is as arbitrary as it is misleading. For example, they treat the one-carrier service which American will provide between New Orleans and Los Angeles not as a new but merely as an additional one-carrier service. (See, *e.g.*, Ex. TWA-20, p. 1) *Yet there is no present*

one-carrier service of any sort between those cities. This defect applies throughout the Exhibits, as the record shows. (Tr. pp. 631-633)

Furthermore, reliance upon rail data of thirteen years ago in connection with this problem is hardly sensible. For instance there were 19 rail passengers between Kansas City and Mexico City in 1933. (See Ex. TWA-20, p. 1) To conclude from that that unification of a present two-carrier link between such cities is of negligible significance and betrays a lack of "integration" simply makes the truths of air transportation subordinate to a musty statistic.²⁶

²⁶ Even so, the 1933 rail traffic shows a volume of travel between Mid-Continent points and American points which compares quite favorably with 1933 rail traffic between points between which the Board has certificated *new routes*. The following table presents the comparative data:

COMPARISON OF PRIMARY TRAFFIC POTENTIAL AA-MCA MERGER AND NEW ROUTES GRANTED BY CAB BASED ON 1933 RAIL TRAVEL.

Great Lakes to Florida Service

6 C. A. B. 429 (1945)

	Detroit	Cleveland	Akron	Total
Miami	1,379	1,137	108	2,624
Jacksonville	361	328	37	726

Detroit-Memphis Service.

6 C. A. B. 117 (1944)

	Detroit	Toledo	Indianapolis	Ft. Wayne	Total
Memphis	467	63	270	19	819
Paducah	641	7	38	3	689
Evansville	375	106	633	30	1,144

Kansas City-Tulsa-New Orleans Service

6 C. A. B. 253 (1945)

	Kansas City	Tulsa	Total
Shreveport	745	73	818
New Orleans	985	102	1,087

Norfolk-Knoxville Service

2 C. A. B. 207 (1940)

	Knoxville	Asheville	Total
Norfolk	128	348	476
Raleigh/Durham	287	1,329	1,616

Pittsburgh-Birmingham Service

2 C. A. B. 447 (1941)

	Knoxville	Chattanooga	Birmingham	Total
Pittsburgh	214	168	307	689
Wheeling	9	17	55	81

AA-MCA Merger

(Docket No. 2068)

	Minneapolis/St. Paul	New Orleans	Total
Los Angeles	5,013	1,850	6,863
Dallas/Ft. Worth	583	7,652	8,235
Phoenix, Tucson, El Paso	368	382	750

Nor is it much more sensible to draw conclusions on the basis of the 1940 and 1941 air surveys. Those surveys, of course, do not reflect the significant new routes that have since been inaugurated. But, more important, a survey of air travel from a city served by Mid-Continent at that time to some other point in part over Mid-Continent's route will necessarily reflect the fact that *the Mid-Continent route was underdeveloped—a fact which is painfully apparent*. An example will make the point specific: the air passengers between Des Moines and Fort Worth/Dallas in the 1940 and 1941 survey months reached the grand total of 2. (Ex TWA-21, p. 3) That figure may be a good measure of the job of development that Mid-Continent was doing—or the lack thereof—but it can hardly have any bearing upon the question whether a union of the two-carrier route between those points in the future will be an uneconomic step.

B. The contention that diversion from other carriers will be injurious is exaggerated in importance.

1. *The significance, in a unification case, of diversion of traffic.*

At the hearing it was contended that the unification would result in diversion of business from certain other carriers. The contentions were advanced as though this were a new route case. *It is not a new route case, and that fact is of paramount practical and legal importance.*

The ICC, which has had a considerable experience in these matters and whose views are entitled to something more than the cavalier treatment afforded them by the Examiners in this case (Examiners' Report, pp. 53-54), has had a number of occasions to consider the effect of diversion from other carriers in unification cases.

In *Transamerican Freight Lines, Inc.—Purchase—Gorman*, 5 M. C. C. 712 (1938), the ICC said of the diversion argument:

“A similar contention was rejected in *English—Purchase—Robison*, 5 M. C. C. 221. Obviously the new through service could impair the revenues of protestants only to the extent that it might be used by the public in preference to presently available service. The issue is whether transfer to applicant of vendor's statutory operating rights is consistent with the public interest, and not whether it is required by the public convenience and necessity. There is nothing inconsistent with the public interest in providing the public with improved service, even if it should have an unfavorable effect on the revenues of protestants. *It must be borne in mind that no creation of operating rights is here proposed, but only the transfer of existing rights to new ownership. A change in ownership which will enable existing rights to be used in a way that will produce better service can hardly be found to be inconsistent with the public interest.*” (Italics ours) 5 M. C. C. at 713

Again in *Horlacher Delivery Service, Inc.—Purchase—Parker*, 35 M. C. C. 149 (1940), the ICC had this to say:

“Obviously applicant’s service could impair the revenues of competitors only to the extent that it might be used by the public in preference to service at present available. The issue is whether transfer to applicant of vendor’s operating rights is consistent with the public interest, and not *whether it is required by the public convenience and necessity*. There is nothing inconsistent with the public interest in providing the public with improved service, even if it should have an unfavorable effect on the revenues of protestant.

“... Approval of the transaction will afford the public a better service than vendor has been able to afford, will provide additional through service to the public and eliminate interchanges now required between many points, and will provide service by a financially responsible carrier, well equipped with motor vehicles and terminals. It must be borne in mind that no creation of operating rights is here proposed, but only the transfer of existing rights to new ownership. A change in ownership which will enable existing rights to be used in a way that will produce better service can hardly be found to be inconsistent with the public interest.” (Italics ours) 35 M. C. C. at 153

The ICC has summed up the matter in a rule that unless diversion of traffic “would so seriously affect the revenues of protestants as to impair their ability to continue rendering their present service” it is hardly to be treated as of any legal significance in determining the public interest issue in a unification case. See *Standard Freight Lines, Inc.—Lease—Ralph D. Holt*, 39 M. C. C. 85, 87 (1943); *Mason & Dixon Lines, Inc.—Purchase—Coggin and Cox*, 36 M. C. C. 475, 480 (1941).

In the present case there is no proof whatsoever that diversion from TWA, Braniff, or Delta—the only carriers producing evidence of diversion—would have any such effect.

2. *Alleged diversion from Delta and Braniff will not be serious.*

At pages 12 to 15 of American’s Brief to the Examiners we analyzed Delta’s and Braniff’s diversion evidence. We refer the Board to that analysis. Such evidence is—to say the least—exaggerated.

The Examiners’ Report calls for some additional comment.

a. *Delta.*

We invited the Examiners’ attention to the fact that American’s plans call for only two schedules a day to and from New Orleans via Texarkana, which is the routing principally emphasized by Delta as diversionary (Tr. p. 597), and that even those schedules are through

schedules to Los Angeles. (American's Brief to the Examiners, p. 13)

Of this point the Examiners say only that American would doubtless increase its frequencies if traffic warranted. The Examiners miss the point. The extent of diversion claimed by Delta is so exaggerated that it could be approximated, if at all, only by American's devoting itself exclusively to the business of taking traffic from Delta by blanket-schedules and other such uneconomic devices. (American's Brief to the Examiners, p. 13) Obviously this will not be done. It would be unprofitable and foolish.

But even more important is the fact that Delta has presented the alleged diversion which it will suffer on its leg to New Orleans in the light of Delta's 1945 income, which does not take into consideration the rich route from Chicago to Miami awarded to Delta during that year and on which operations had just been inaugurated at the year's end. This gives Delta an enormous new traffic vein which dwarfs in significance its capillary to New Orleans. (Tr. p. 738)

Quite recently, in assessing evidence of possible diversion from National that would be effected by granting a *new route* to another carrier, the Board commented:

"In addition, this estimated percentage of diversion of traffic from its system does not take into consideration substantial revenues which undoubtedly will accrue to National by reason of its recently inaugurated Jacksonville-New York operation." *The Florida Case*, Docket No. 489 et al, March 28, 1946, at pp. 7-8 (mimeographed copy).

b. *Braniff*

Braniff's evidence of diversion is a model of exaggeration. (American's Brief to the Examiners, pp. 13-14; Examiners' Report, p. 48)

Aside from this exaggeration, Braniff's evidence fails to make allowance for the fact that much of the alleged diversion will be suffered by it even though Mid-Continent were to remain independent. For in the past Mid-Continent has been unable to make practicable connections with American at Tulsa and so has been forced to turn over traffic to Braniff at Kansas City which it would prefer to carry on to American at Tulsa or Texarkana. In the future Tulsa connections will undoubtedly be greatly improved for reasons not heretofore present. (*Supra*, pp. 32-33)

With the change in the equipment situation after the war and the very great difference in American's route through Tulsa in terms of frequency of schedules, the connections between Mid-Continent and American at Tulsa will obviously be made much more satisfactory than

they have been in the past even if the present application is denied. They will be at least as good as those with Braniff at Kansas City (Tr. p. 472), whereas in the past these connections were so poor that Mr. Beard feels there was not even a two-carrier competition with Braniff between Kansas City and Oklahoma City or Dallas. (Tr. pp. 580, 586) It is perfectly clear that in the future Mid-Continent would haul to American at Tulsa or Texarkana in preference to Braniff at Kansas City (Tr. p. 362), and that American would haul to Mid-Continent at Tulsa or Texarkana in preference to Braniff at Dallas or Oklahoma City.²⁷ Thus what Braniff has enjoyed heretofore it will lose in major part any way. The unification—which, after all, is the matter in issue—will by no means have the effect which Braniff estimates. (AT pp. 72-73)

Of this point the Examiners say that greater availability of equipment will also improve connections with carriers other than American. (Examiners' Report, pp. 47-48) True. But the Examiners overlook the fact that with feasible connections with American it is to Mid-Continent's interest to haul to American at Tulsa or Texarkana instead of to Braniff at Kansas City as in the past, and it will undoubtedly do so to a very substantial extent *regardless of any increase in Braniff's schedules at Kansas City.*

c. Other carriers.

TWA submitted evidence of traffic subject to diversion which simply sets forth the total amount of TWA's traffic between Kansas City and Phoenix, Los Angeles and San Francisco. (Ex. TWA-11; see AT p. 74)

No other carrier submitted evidence of diversion.

Nonetheless the Examiners say:

“Other carriers, such as United, TWA, and Western-Inland, will suffer in proportion to their previous participation in interline traffic with Mid-Continent.” (Examiners' Report, p. 48)

This finding is so utterly without basis that it suggests a decidedly superficial appraisal of the record by the Examiners. There has undoubtedly been a substantial volume of interline traffic between Mid-

²⁷Braniff's connection at Tulsa will be less favorable than American's in view of the difference between the volume of schedules which will doubtless prevail on American's route through Tulsa, which will be one of its main routes, and Braniff's route to Memphis. And Braniff will have no connection with Mid-Continent at Texarkana, whereas it is reasonable to assume that, especially with Mid-Continent's cut-off between Joplin and Fort Smith, Mid-Continent could make at least as good connections with American at Texarkana as with Braniff at Tulsa.

Continent and United at Omaha and Des Moines destined for or originating at points far removed from American's system or points on American's system to which American would not provide a feasible service. The same thing will be true in the case of every other carrier with which Mid-Continent has exchanged traffic.

The fact is that the unification will make comparatively little change in the interchange of traffic with other carriers except in the case of traffic to and from the southwest and southern California. To say in one breath, as the Examiners have, that the American and Mid-Continent systems do not integrate because of the alleged minor amount of traffic between the points between which the unification will permit American to provide a one-carrier service, and, in the next breath, to say that various of Mid-Continent's connecting carriers will suffer from the unification in "proportion to their previous participation in interline traffic with Mid-Continent" requires a shift in the major premise that is too abrupt to follow. Consistency may often not be a virtue; but when the inconsistency is so sharp as to be flatly contradictory it does not commend the Examiners' findings on either point.

The real fact of the matter can be summed up as follows:

Past traffic to and from Mid-Continent's route has been underdeveloped and has been small in volume.

The unification will permit American to provide one-carrier services to certain specific areas. Such services will result in some diversion from existing carriers but such diversion, because of the relatively small amount of traffic which Mid-Continent has generated, or in the future could generate, will be relatively minor.

By far the largest amount of traffic which will flow between the Mid-Continent points and the areas to which the unification permits a one-carrier service will be newly created traffic.

Existing connecting carriers will continue to participate in interline traffic between points on the Mid-Continent system and other points not on American's system or to which American will not provide a feasible one-carrier service. Traffic of this nature has constituted a very considerable portion of Mid-Continent's interline traffic heretofore.

The traffic which will go to connecting carriers in the future, if the unification is approved, will greatly exceed that heretofore exchanged because American will be able to develop the Mid-Continent route far beyond Mid-Continent's ability.

C. The contention that the unification will unbalance the air transportation pattern is baseless.

The principal argument advanced in opposition to the unification is that American is the largest of the domestic carriers. The argument is variously couched by various of the intervening carriers and by the Examiners, but in the last analysis, however couched, it comes to the same thing: American is Big; therefore the proposal should be disapproved.

1. *The unification will not result in "domination" of any carrier by American.*

Throughout the argument of several of the intervenors runs the charge that the unification will result in American's "domination" of other carriers.

Much of this argument is so devoid of logic as to warrant terming it propaganda—as Mr. Eastman once termed a similar argument in the rail field. *Infra*, pp. 45-46. For example, Western Airlines' case consists of exhibits showing the percentage of the industry's total business which American's business represents (Ex. W-2; W-3; W-4; W-5; W-6; W-7) and a map showing routes for which it is alleged that American might some day apply. (Ex. W-8) Chicago & Southern strikes a slightly different note with a map showing, in addition to the present routes of American and Mid-Continent, every additional route for which either has applied. (Ex. C&S-2) *Significantly neither carrier has produced any proof to show that the proposed unification will affect it in any substantial way.* In fact these carriers will unquestionably gain very considerably from the increased connecting business which American will generate. Western received 51 passengers from Mid-Continent in August, 1945, for which the revenue amounted to \$708.50. Inland received 152 for which the revenue amounted to \$2,786.65. Chicago & Southern received 107, for which the revenue amount to \$1,698.05. (Examiners' Report, p. 25)

Continental, Northwest and National introduced no evidence.

Delta's evidence is confined to a showing of diversion from its New Orleans segment which we have already discussed. *Supra*, pp. 36-37. Certainly that alleged diversion will not enable American to "dominate" Delta.

Braniff also contends that it will be "dominated". The effect of the unification upon Braniff is to transform two-carrier competition between Kansas City and Oklahoma City and Kansas City and Dallas into one-carrier competition. As Braniff's own evidence shows, this means additional one-carrier competition for only 5 per cent of the

passenger miles on Braniff's 26 heaviest segments, without taking all its other segments into account at all. (Ex. B-4, p. 5) We have already dealt with Braniff's argument that it will suffer diversion of traffic. *Supra*, pp. 37-38. But is there something else, arising from the extent of American's routes, that would peculiarly subject Braniff to injury as a result of this unification?

The only respect in which American's present extent will give it some advantage over Braniff in the unified operation is in the case of traffic originating at or destined to certain points west of Dallas/Fort Worth. And that advantage is not substantially different from the disadvantages under which Braniff would labor, were the unification not to occur, in competition with TWA, United, Continental, Western and American with respect to such traffic going to or from Mid-Continent points. In other words, even without the unification, Braniff in the future would be under serious handicaps in seeking the west of Dallas/Fort Worth business to or from the Mid-Continent points. The fact that this unification happens to be with American can make but little difference to Braniff so far as that business is concerned.

As to the rest of the business affected by the unification, American's present extent gives it no advantage over Braniff. The only part of American's present system which can bear on the problem is that in Texas and Mexico. And there Braniff is as advantageously situated as American—in fact Mr. Beard thinks that Braniff is more advantageously situated in Texas. (Tr. p. 581)

In short there is a complete lack of any showing that this unification will enable American, because of the extent and layout of its routes, to shut off the flow of traffic to, or hem in, any other carrier. Unless some such power as that is conferred upon American as a result of this unification, talk of American's "dominating" another carrier amounts to no more than a rhetorical way of saying that the competition of a one-carrier service is more telling than that of a two-carrier service.

2. *The unification will not create an undue concentration of power in American.*

The real point which the intervenors intend to make is probably that American is too large in relation to other carriers and that the unification will make American larger. Something to this effect seems to be implied by the Examiners. (Examiners' Report, pp. 50-51) Thus the Examiners say that

"The sheer weight of American's size alone clothes it with a competitive advantage over other carriers in such items as advertising, sales force, ticket offices, etc." (*Id.* at p. 51)

It is only with respect to some general proposition such as this that there can be any possible relevance to evidence presented by Braniff, for example, relating to such matters as the number of the heaviest traffic segments served by American. *For this unification will not increase the number of such segments served by American by a single one.* (Cf. Ex. B-10; B-11) Such evidence as this bears not upon the merits of this unification but seeks to try American on the ground that it is Big.

Let us see how American has grown since the adoption of the Civil Aeronautics Act.

In permanently certificated route miles it has grown by 19 per cent; in total population of cities to which it is permanently certificated it has grown by 5 per cent. In each case its per cent of growth has been very substantially less than that of any of the other carriers. And even if all its temporary route to Mexico is added in, its rate of population growth remains the lowest. At the same time other carriers have been increased in route mileage by as much as 365 per cent and in population by as much as 1017 per cent.²⁸

And of the 19 per cent route mile increase nearly all of it is accounted for by the cut-off from Nashville to Oklahoma City to El Paso—which adds not a single city to American's route and is in reality only an operational alteration in that route. (Ex. A-48) The new cities to which it has been certificated are confined to Bridgeport, Niagara Falls, Windsor, Toronto, San Diego, Akron, Joplin, Elmira-Corning, and Binghamton. (*Id.*)

At the same time other carriers have been certificated to provide direct competition with American to a greater degree than is true in the case of any other carrier. Prior to June, 1940, the passenger miles flown by American with which there was direct competition by three other carriers were 0.2 per cent of American's total business, those with which there was direct competition by two other carriers were 7.5 per cent, and those with which there was direct competition by one other carrier were 13.8 per cent—for a total of 21.5 per cent. By August, 1945, by virtue of the increase in the certification of services directly competitive with American those percentages had grown to 15.9 per cent, 20 per cent, and 29.5 per cent—a total of 65.4 per cent. (Ex. A-36, p. 1) And the greater part of this direct competition has been provided for since Pearl Harbor, during a time of equipment

²⁸ The data appear in Exhibit A-44. The addition of the temporary Mexican route does not change American's relative standing if other carriers' Mexican subsidiaries are also added, except that in rate of growth in terms of route mileage (but not in population) American would exceed one carrier, TWA, if no allowance is made for TACA.

shortage and service curtailment, so that its full effect upon American's position will not have been registered for some time to come.

Plainly, then American has not been waxing at the expense of other carriers. Other carriers have been enormously strengthened in relation to American—and to a significant degree their newly attained stature has not even yet been measured.

Now, what will be the effect of the proposed unification? As we have seen, it will not add to American a single one of the twenty heaviest traffic segments. *Supra*, p. 42. It will increase the population to which American is certificated by 6.4 per cent. (AT p. 50) And on the basis of the fiscal year 1945 figures the increase in American's relative standing among the domestic airlines by the addition of Mid-Continent's assets and business to American is one per centage point or less in total assets, total passenger revenue, total mail revenue, total express and freight revenue, total revenue passenger miles, total mail ton miles, and total express and freight ton miles. Only in total revenue plane miles is the increase more than one percentage point; in that case it is one and four-tenths points. (Ex. A-45)²⁹

In other words, the unification as such will make no substantial difference in American's relative position in the industry. If American's efforts to create new business on a presently underdeveloped route are successful, and its business therefore grows, surely no one can properly complain.

Stripped of rhetoric, then, the real contention made by most of the intervenors is only that American is big. The argument is, in effect, that simply because American is big smaller carriers are at a disadvantage. Exactly the same argument is being made in nearly every type of case in which American is involved. It is an assertion made without proof—its logic is that American should be frozen in its tracks while other carriers, a number of which are to a significant extent but the incorporated ventures of a few individuals who are growing wealthy from their good fortune, receive the benefits of growth.

It is of more than passing interest to observe the short shrift made, by the ICC, of an argument exactly like the argument advanced here.

²⁹ The increase in percentage points is as follows:

Total Assets	1.0
Total Passenger Revenue	1.0
Total Express and Freight Revenue	0.2
Total Revenue Plane Miles	1.4
Total Revenue Passenger Miles	0.9
Total Mail Ton Miles	0.4
Total Express and Freight Ton Miles	0.2

Exhibit A-45 gives the increase in percentage of total mail revenue without adjustment for the lower mail rate which would prevail for the Mid-Continent route as part of the American system. With that adjustment the increase would be by only 0.7 of a percentage point.

The case was one where the consequences of a proposed unification were infinitely graver, in terms of creating inequality in size among competing carriers, than any possible consequences from the unification of American and Mid-Continent. The argument made was summarized by the ICC thus:

“It seems that protestants are more apprehensive as to the possible indirect effect of the consolidation upon remaining competing operators than the direct elimination of competition between the carriers involved. They allege that the consolidation would bring into being the largest common carrier of property by motor vehicle in the United States, which appears to be true at least from the standpoint of revenues, and contend, in effect, that applicant, because of its extensive route coverage and large total revenues, would be so dominant in the territory that it would smother competition of remaining independent motor carriers.” *Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137, 161 (1942).

The ICC gave the argument an abrupt answer:

“Experience has not demonstrated that such result would be likely to follow.” 38 M. C. C. at 161.

So in the present case there is not the slightest basis for contending that the modest growth which this unification would mean for American will “smother” other carriers. This is particularly so where the real gain to American will come as a result, and solely as a result, of American’s making something of a route which otherwise is destined to remain an anemic organ in the air transport system.

3. *The unification will not unbalance the relationship among the larger carriers.*

It hardly seems necessary to labor the point that from the standpoint of the effect upon Eastern, United and TWA the unification will not be contrary to the public interest.

Eastern will be affected in no way whatsoever—save in the increased flow of connecting business which American will generate for it. In August, 1945, it received a grand total of 70 passengers from Mid-Continent, representing \$2041.35 in revenue. (Examiners’ Report, p. 25) Eastern’s real complaint—if it has any—is its fear that its application for a transcontinental route running through New Orleans to the west coast (Docket No. 2148, introduced as an exhibit in this proceeding) may be adversely affected. The union of Mid-Continent’s route from New Orleans to Texarkana with American’s route provides

a one-carrier routing between New Orleans and Los Angeles which is only slightly longer than a direct line between those points, *supra*, p. 19, and of course greatly contributes to the possibility of vitalizing the route from New Orleans to southern Florida recently granted to National.

As to United and TWA, most of the connecting business heretofore received from Mid-Continent will not be affected—save by increase. United, however, fears that the connecting business it has received from the Twin Cities to southern California would be lost to American, and that for the business between Omaha and Des Moines to southern California the competition will be more severe. TWA's fear is substantially of the same order: it fears loss of connecting business to points in Arizona and southern California from Twin Cities, Omaha and Des Moines, and more effective competition for the business between Kansas City and certain points in Arizona and southern California.

It should be reiterated that this is not a new route case. At stake there is only the question of making available to the public the improvement incident to converting a two-carrier to a one-carrier service. *Supra*, p. 16. By no stretch of imagination can it be seriously thought that this benefit to the public will be outweighed by the very restricted effect upon United and TWA.

The argument that there is some self-evident virtue in making American, United and TWA approximately the same size carries no weight. It is well enough to seek a "balance" in the air transport system in the sense that its several components should be able to compete vigorously with one another and that none should have an exclusive position in a considerable region of the country, such as United sought in the *Western Air Case*. *Infra*, pp. 60-61. But to imply by "balance" that the mass of population served by each, or that the number of travelers carried by each, or that the dollars of assets possessed by each must be equal is to introduce through a figure of speech a principle of regulation which has neither practicality nor validity. Mr. Eastman's answer to a contention that such a principle should be applied in working out the abstract railroad consolidation plan under the Transportation Act of 1920, which called for "a limited number of systems," bears thoughtful consideration. He countered what he described as the propaganda that certain of the rival systems should be of "equal size" with this statement:

"To my mind this propaganda rests upon a premise which is wholly unsupported by proof. What evidence is there that it is necessary for a system to be as large as another in order to com-

pete effectively with it? I submit that not only has there been no such proof but the evidence points distinctly the other way. If the proposition were sound, how would it be possible for the Baltimore & Ohio, the Wabash, the present Nickel Plate, the Lackawanna, and the Lehigh Valley, among others which might be named, to live and prosper? Yet we know that they have done so, and upon the same level of competitive rates. In our working papers in this proceeding we have statistics showing average rates of return for the three years ended December 31, 1927, upon our basic valuations brought up to date by net additions and betterments since valuation date. The results were as follows:

Pennsylvania	4.77	Baltimore & Ohio	6.36
New York Central	4.96	Wabash	6.72
Central of New Jersey ...	5.08	Western Maryland	6.75
Lehigh Valley	5.15	Reading	7.70
D., L. & W.	6.22	Nickel Plate	7.73''

Consolidation of Railroads, 159 I.C.C. 522, 558 (1929).

VII. THE FINANCIAL TERMS OF THE PROPOSED EXCHANGE OF STOCK.

So far as the financial terms of the proposed exchange of stock are concerned, the Board has two questions to resolve: (1) the reasonableness of the terms as they relate to the Mid-Continent stockholders, particularly the treatment of minorities; and (2) the propriety of the consideration from the standpoint of the burden placed upon American.³⁰

Certainly no problem arises in connection with the first question.

Frequently contested in carrier combination cases is the treatment of minority stockholders of the carrier being absorbed. Here there can be no suggestion that any minority interest is being dealt with unfairly and no minority interest has protested.³¹ American has, indeed, leaned over backward to be absolutely fair *by providing for an exchange of stock as the first step and by making that offer open to every Mid-Continent stockholder on equal terms.*³² No interest is being

³⁰ Cf. IIIA Sharfman, *THE INTERSTATE COMMERCE COMMISSION*, 466-472 (1935).

³¹ The ICC in *St. Louis Southwestern Railway Co. Control*, 180 I. C. C. 175, 186 (1932), observed of an offer of exchange of stock made to minority stockholders that, "From the action of the holders of a substantial majority of the minority stock it is apparent that the offer of the applicant is considered fair under all the circumstances." Mr. Zoek testified that the canvass of the Mid-Continent stockholders, *supra*, p. 6, showed that, excluding the stockholders he represented, 97 per cent of the stock favor the proposal. (Tr. p. 225)

³² The ICC in the railroad cases has recognized "as evidence of fair dealing" the applicant's "willingness to hold its offer open to the minority interests on the same terms as those accepted by the majority." IIIA Sharfman, *THE INTERSTATE COMMERCE COMMISSION*, 468-469 (1935); see also Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 HARV. L. REV. 192, 228-232 (1929).

given any preferred position or any favor or "rake off" on the side by payment of commission, promise of office, or otherwise.³³

The only remaining question is the propriety of the stock exchange from the standpoint of the burden placed upon American. The public interest in this question is limited to the prevention of depletion or waste of the acquiring airline's assets with the resulting imposition of financial burden upon the public or of obstacles to the improvement of the service.³⁴ The controlling principles were stated by the Board in its opinion in *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409, 415 (1940):

"The public interest in the purchase price involved in a transfer such as that here before us, rests upon the fact that an extravagant and unreasonable price may result in a depletion and waste of the purchaser's assets, with the resultant imposition of additional obligations upon the public or an impairment of the service now being rendered to the public by TWA."³⁵

It is plain that this transaction does not result in a depletion of American's assets within the meaning of the *Marquette* case. Nor is there any possibility that American will not be able to maintain its present standard of service. Indeed, the record is replete with assertions by the intervenors that American will be strengthened by the transaction. Nowhere has it been suggested that American will be weakened.

Moreover, *this is not a cash transaction*. Nothing is involved but the issuance of common stock within limits already authorized by American's charter. No indebtedness or fixed charge is to be incurred. And in cases involving only an exchange of stock the considerations are very different from those affecting an acquisition of stock or assets for cash. This difference was emphasized by the ICC in *New England Greyhound Lines, Inc.—Purchase—New England*, 15 M. C. C. 536, 541 (1938):

³³ The agreement submitted to the Board expresses the entire arrangement. There are no collateral understandings, express or implied, of any nature. (AT pp. 13, 44-45; Tr. pp. 416-417.) There is not even an agreement among the Ryan interests for concert of action as American stockholders. (Tr. p. 339)

³⁴ *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409 (1940); *Wien Alaska Airlines—Acquisition—Mirrow Air Service*, 3 C. A. B. 207 (1941); *Western Air Lines, Acquisition of Inland Airlines, Inc.*, 4 C. A. B. 654 (1944); *American Airlines, Inc., Control of American Export Airlines, Inc.*, 6 C. A. B. 371 (1945).

³⁵ The ICC applies the same rule. Its classic statement is to be found in *Control of Big Four by New York Central*, 72 I. C. C. 96, 97 (1922), where it said:

"We may inquire whether the consideration to be paid by the applicant is fair and reasonable, to the end that the assets of the applicant be not wasted or its credit impaired so as to jeopardize its ability to perform its public functions." (Italics ours)

“As above indicated, the transfer of the properties will be accomplished without the payment of any cash, and with no increase in debt except for the assumption by applicant of equipment notes of vendors amounting only to \$56,391. *Otherwise payment will be made in no-par common stock, which means no more than that vendors will have an opportunity to share . . . any profits that applicant may earn.*” (Italics ours)

See also *Greyhound Corporation—Purchase—Old Colony Coach Lines, Inc.*, 15 M. C. C. 553, 557 (1938). In some cases the ICC has approved an acquisition of assets or stock of motor carriers only on condition that the applicant arrange for the financing of the transaction by the issuance of stock instead of paying cash or incurring debt obligations. *Cincinnati, N. & C. Ry. Co.—Control—Black Diamond Stages*, 15 M. C. C. 644 (1939); *Phoenix Blue Diamond Express of Calif.—Purchase—Phoenix*, 37 M. C. C. 25 (1941).

As the Board indicated in the *Marquette* case, American need do no more than establish that its assets will not be depleted or its service impaired. This has been amply demonstrated.

But the case need not be rested here, for it is clear that the ratio for the exchange of stock is reasonable and has been agreed to by American in full realization of its responsibilities.³⁶ This conclusion is sustained even in the light of cases where the value of property or interests acquired has been examined in order to determine whether a payment is likely to deplete the acquiring carrier's resources. In such cases, it is the commercial or exchange value of the property which is important. *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409, 412 (1940). The rules for ascertaining value in rate cases are different. *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 276 (1923). And “exchange value”, “commercial value” and “market value” all express the concept of the purchase price which would be paid after fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 155 (1925); *New York Central—Acquisition of Ulster & Delaware*, 175 I. C. C. 65 (1931).

³⁶ In no event should the Board put itself in the position of American's officers and directors and place its own valuation on the Mid-Continent stock. This is an arm's length transaction. In the railroad cases before the ICC, “where the dealings were consummated at arm's length, there was no disposition to question the proposed terms . . .” IIIA Sharfman, THE INTERSTATE COMMERCE COMMISSION, 468 (1935). In other analogous cases the question has been whether the corporate management used sound business judgment in fixing the consideration. Thus when stockholders assert that no-par stock has been issued for an inadequate consideration or creditors maintain that par value stock has been watered, the question is whether the management exercised sound judgment, not whether it in fact overvalued the property acquired. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343 (1886); *Bodell v. General Gas & Electric Corp.*, 15 Del. Ch. 119, 132 Atl. 442 (1926); 11 Fletcher, CORPORATIONS, §§ 5214, 5260; 2 Bonbright, VALUATION OF PROPERTY, 797-799 (1937).

The ICC's treatment of exchange value is described by Sharfman as follows:

"The consideration approved, whether in the form of rentals for leased lines or of prices paid for stock, was not measured by property valuations determined under section 19a; while excessive rentals and unduly high prices contributed to the denial of applications for acquisitions of control through lease or stock ownership, the guiding standard was not the value of the property for rate-making purposes, *but rather, in most instances, the market value to the lessee of the facilities acquired, or some reasonable approximation to the market value of the securities purchased.* In this way, by recognizing that voluntary combinations can be effectuated only by flexible adherence to a commercial basis of interchange of rights, the Commission facilitated acquisitions of control which appeared, on the whole, to promise public advantage." (Italics ours) IIIA Sharfman, *THE INTERSTATE COMMERCE COMMISSION*, 466-468 (1935). See also Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 HARV. L. REV. 192, 229, (1929).

This view that approximation to market price demonstrates that the consideration is reasonable stems not only from a recognition that market price is the minimum a willing seller would accept but also from the view that the market price of stock is a public estimate of the commercial value of an enterprise. *Kansas City Southern Ry. Co.*, 84 I. C. C. 113, 129 (1924). Moreover it is the value *to the acquiring carrier* which is the significant element.

With these considerations in mind, the facts bearing on the four to one ratio³⁷ agreed to in the present case amply justify it as an exercise of managerial judgment.

American opened negotiations after previous studies of Mid-Continent had been reviewed and brought up to date. (AT p. 5) Its management was persuaded that the route was such that it could be advantageously developed as a part of the American system. (AT pp. 5-7)

The negotiations reflected arm's length bargaining in every sense, with a series of offers being made accompanied by an exchange of data respecting the companies. (AT pp. 11-12, 33-34) Throughout Mr. Zock insisted that some premium to Mid-Continent stockholders over the market ratios was warranted both as an incentive to them all to accept, and in view of the fact that a block of stock carrying control was involved. (AT pp. 12, 34) It was made clear by Mr. Zock from the outset that he would accept no less favorable a ratio than four to one

³⁷ The ratio has been adjusted to reflect American's recent stock split, *supra*, p. 6, n. 8.

(AT p. 34), and that this ratio placed a value on Mid-Continent, per route-mile, in terms of the market prices of air line stocks, approximately the same as on Continental and lower than any other airline in the country. (AT pp. 33-34; Tr. pp. 277-279)

From American's point of view it was eminently desirable to make an arrangement which would meet with reasonably ready acceptance by all, or substantially all, the Mid-Continent stockholders.³⁸

During the negotiations American could not, of course, anticipate what might be the reaction among all the Mid-Continent stockholders. There are hundreds of them, and Mr. Zock could commit only Colonel Ryan and three of the Ryan grandchildren. (AT p. 22) To make up even a majority interest it was necessary that he go outside the circle of his principals. (AT pp. 35-36) As a practical matter, then, if approximately 100 per cent acceptance were to be reasonably assured without delays and dispute, an offer on a ratio somewhat more favorable than the market ratio makes business sense. (AT p. 12) Certainly Mr. Zock, in a practical world, could not be reasonably confident of accomplishing his end of the bargain, or American reasonably certain of gaining its objective, at any ratio less than the market. (Tr. pp. 154, 346-347) And the market ratio of the two stocks had been growing steadily more favorable to Mid-Continent over a period of more than a year and a half. (AT p. 48)³⁹

The ratio agreed to was somewhat more favorable to the Mid-Continent stockholders than the market ratio.⁴⁰ But "... it is well known that large blocks of stock carrying a measure of corporate control usually sell somewhat above the market". *Unification of Southwestern Lines*, 124 I. C. C. 401, 431-432 (1927). (AT pp. 12, 49) Moreover, if

³⁸ In a transaction of this kind it is very much to the advantage of the acquiring carrier to secure the largest possible percentage of the stock of the acquired corporation (where there is no effort to coerce or discriminate against a minority interest). For if the acquiring carrier can secure 100 per cent, or nearly 100 per cent, of that stock the actual mechanics of corporate integration—which otherwise might become quite involved—are a mere formality. The area of possible argument and dispute disappears and difficulties with respect to appraising and paying for dissenting interests—which frequently lead to long-drawn litigation—are wholly avoided. And it was important to American that the negotiations be consummated quickly and on a basis that would forestall the possibility of future delays and dispute. (AT p. 13) It cannot be overlooked that the present is an extremely favorable time to effect a merger of two systems in the sense that the acquiring carrier can work out satisfactory adjustments now, during the post-war readjustment period, much more easily and economically than it could later on. (*Id.*)

³⁹ The Mid-Continent stock, though unlisted, has enjoyed a very active and stable market. (AT pp. 45-46; Tr. pp. 240, 348, 413.) Nor was the stock inflated by rumors of the proposed agreement with American. (AT p. 47)

⁴⁰ The market ratio was 4 to 1 when the initial agreement with Mr. Zock was made. Prior thereto it had been about 4.5 to 1. (Ex. A-40; AT p. 48) Since the initial agreement with Mr. Zock the weekly market ratios of the two stocks have been about 4.5 to 1 until the time of American's stock split. Of course the present market for the Mid-Continent stock will reflect the natural tendency to discount the possibility of an adverse Board decision in this case.

Mid-Continent had been a listed stock that alone would have added to its market price in relation to American (Tr. p. 347), and, in a dealing between business men, that fact might well be taken into account in arriving at a ratio slightly favoring Mid-Continent (AT p. 49), especially since it was reasonable to believe that Mid-Continent might soon become listed. (AT p. 46) And the effectiveness of a slight "premium" inducing ready acceptance by hundreds of miscellaneous stockholders is apparent. (AT pp. 12-13, 49)

Furthermore the ratio proposed gives to the Mid-Continent stockholders approximately a seven per cent equity interest in American. American's management estimates that the additional earning power which it will derive as a result of the unification will be proportionately greater. (Tr. pp. 146-147, 441-444)

The Examiners' treatment of this phase of the case is untenable. They compared the market value of the stock to be issued by American with the value of Mid-Continent's tangible assets, and found that the difference was \$4,238,628. (Examiners' Report, p. 38) This meant, they said, that the physical assets to be transferred are to be valued at only slightly more than 25 per cent of the consideration to be paid. (*Id.*, p. 40) They concluded that it was "clear" that this places an abnormally high value on the operating rights to be received; but they promptly admit that their finding is "an arbitrary one" concerning which people may well differ. (*Id.*, p. 41)

And so they may, as is disclosed by the following table wherein both the Board and the ICC are shown to have approved transactions for cash or short-term indebtedness where the per cent of physical asset value received to total payment was even less favorable than the percentage fixed by the Examiners in this case—certainly within the same range:

Case	Tangible Assets	Cash Purchase Price	Per Cent
<i>Acquisition of Marquette by TWA</i> — <i>Supplemental Opinion</i> , 2 C. A. B. 409 (1940)	\$27,673.23	\$313,333.33	8.8
<i>United Airlines Transport Corp.</i> — <i>Acquisition of Lamsa, S. A.</i> , 4 C. A. B. 409 (1943)	32,000.00	194,333.33 (\$145,750 paid for 75% interest)	16.27
<i>Intermountain Transp. Co.—Purchase—Meisinger Stages</i> , 5 M. C. C. 493 (1938)	6,519.00	30,000.00	21.73
<i>Acme Freight Lines, Inc.—Purchase—Carter</i> , 5 M. C. C. 648 (1938)	1,010.00	4,800.00	21.04
<i>Brown Express—Purchase—Netzer</i> , 5 M. C. C. 681 (1938)	10,734.00	50,000.00	21.47
<i>C. & D. Motor Delivery Co.</i> , 38 M. C. C. 547, 550 (1942)	3,040.00	13,040.00	23.31

It may be pertinent to ask: if 8 per cent was good enough for TWA and if 16 per cent was good enough for United, why should not 25 per cent be good enough for American?

In any case, the basic trouble with the Examiners' treatment of the problem is that the transaction is not a cash transaction. *American is paying out not one nickel of its assets.* It is merely proposing to issue an equity interest in its company in exchange for the whole interest in another company. If this kind of transaction is to be judged on the basis of a comparison of the admittedly inflated market prices of an airline's stock with the value of physical assets to be acquired the practical consequence is that, as long as the markets reflect current public optimism (if not hysteria) about airline stocks, *there can never be an exchange of stock basis for effecting a carrier combination.* To expect Mid-Continent stockholders to take an equity position in American which gives present American stockholders *all*, or any more than a proportionate share of, the benefit the present inflation in equity values does little credit to the acumen of Mid-Continent stockholders. It is understating the case to say that the Examiners' treatment of this matter is unrealistic.

If book values of physical assets are to be weighed, then, instead of comparing apples and oranges as the Examiners have done, it is

only proper that like elements be compared. The valid comparison on a book value basis is to be found in Mr. Jacob's testimony. He shows that as of September 30, 1945, the book value of the American stock to be issued to the Mid-Continent stockholders by American will exceed by only \$837,210⁴¹ the book value of the Mid-Continent company. (AT p. 49) This is a modest premium indeed in relation to the benefit to American of securing all the Mid-Continent personnel as a going organization thoroughly familiar with the territory involved, and the value of being able to add the Mid-Continent route to the American system with all that that means to American. (Tr. pp. 442-443) Even in a cash purchased such elements of value loom large:

“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.” *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409, 412 (1940).

And in the *Marquette* case TWA was acquiring only a bare route. The value of the Marquette company and organization were virtually nothing; indeed they were probably a liability.

⁴¹ This amount is computed with the exclusion from American's book value of a \$2,750,000 reserve for transition to peace-time operations. (Tr. p. 439) It happens that the Board's regulations require that a reserve be included in the surplus section of the balance sheet. But a reserve for the purpose indicated is not a true "surplus reserve" and American has never so treated it in its reports to the stockholders and to the public, since the reserve is a provision for expenditures which would not add to book value. (Tr. pp. 439-440) The reserve in question is not unlike a railroad's reserve for the elimination of grade crossings. Mr. Dewing in his authoritative treatise, *FINANCIAL POLICY OF CORPORATIONS*, at page 529, says of railroad outlays for the elimination of grade crossings:

“It is improper to defray their cost by increasing the admitted plant assets of the corporation, because the plant is worth no more, for the purpose of making a profit, after the improvements are made than it was before. . . . The only logical method of treating such expenditures is that of creating a reserve fund for them through annual appropriations from the general surplus.”

But even if the \$2,750,000 reserve were included in the computation of the book value of the American stock it would increase the \$837,210 given in the test only to \$1,044,565.50.

VIII. THE UNIFICATION JUDGED IN THE LIGHT OF FUNDAMENTAL CONGRESSIONAL POLICY TOWARD CARRIER COMBINATIONS.

A. Section 408 of the Act reflects a general legislative policy affecting transportation.

Section 408 did not appear from the blue. It was intended to reflect definite policies adopted by Congress in preceding transportation legislation. The Board has forcefully pointed out the relationship between the section and its Interstate Commerce Act progenitors:

“Since the Acts are parallel in their general scope, purpose, and terms, it is apparent that Congress intended that the Acts, each in its own field, should have like interpretation, application, and effect. 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.*” (Italics ours) *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C. A. B. 409, 412 (1940)

The Board’s conclusions are supported by the Supreme Court’s treatment of a similar question. The Court, in *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), dismissed the contention that Congress intended that a policy should be applied to motor carrier consolidations different from that applicable to railroad consolidations. The Court held that Congress had declared its policy “in terms which do not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute’s operation.” (321 U. S. at 79) It pointed out that “The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation’s transportation facilities beginning with the Interstate Commerce Act of 1887” (*id.* at 80). It is notable that, in referring to the various statutes which embody the evolving transportation policy of the Congress, the opinion cites, among others, the Civil Aeronautics Act of 1938. (*Id.* at 81)

B. The legislative policy is favorable to carrier combination.

The evolution of legislative policy from one antagonistic to one favorable to carrier combinations is too familiar to need repetition. Suffice it to say that with the adoption of the Transportation Act of

1920 Congress very deliberately and consciously reversed the restrictive policy of the antitrust laws so far as the policy toward mergers, acquisitions of control and other combinations of carriers is concerned, “. . . the Transportation Act of 1920 marked a sharp change in the policies and objectives” of Congress. See *McLean Trucking Co. v. United States*, 321 U. S. 67, 80 (1944); see also *United States v. Lowden*, 308 U. S. 225, 232 (1939).⁴²

C. The legislative policy particularly encourages combinations of the weak with the strong carriers.

The Transportation Act of 1920 was, in the main, a heroic effort to come to grips with the fundamental problem of regulated transportation enterprise in this country. The problem is this:

Passenger and cargo rate levels, for a variety of reasons, approach uniformity. Indeed in air transportation, because of its speed and length of trips and shipment, the compulsion toward absolute country-wide uniformity is inevitably stronger even than in the case of rail transportation.

But traffic flows and factors affecting unit costs are not uniform. Hence rates under which one carrier can survive very profitably will bankrupt another carrier.

In the great debate concerning the disposition to be made of the railroads in 1919 and 1920 after wartime government ownership, this problem was stated and restated.⁴³ Proposals to meet the problem were numerous, including even a continuance of government ownership or a consolidation of all railroads into a single privately owned system.

The action which Congress finally took is explained by Professor Ripley in his *Report to the Interstate Commerce Commission on Con-*

⁴² In the *Lowden* case the Court said:

“As a result of the enactment of the Transportation Act in 1920, *consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . .*” (Italics ours) 308 U. S. at p. 232.

⁴³ Thus Senator Cummins, who took a leading part in securing the adoption of the Transportation Act of 1920, said:

“. . . if the weaker roads are made self-sustaining, so that they can continue to serve the communities through which they pass, the stronger roads will enjoy a revenue so excessively large that the people as a whole will be compelled to pay inordinately for their transportation. This is one proposition upon which all impartial students of the subject agree . . .” SEN. DOC. No. 19, 66th Cong., p. 10 (1919).

The Senate Committee which reported the Senate Bill leading to the Transportation Act of 1920 put the matter thus:

“In a given competitive area the rates which will furnish one company a grossly excessive income will lead another into bankruptcy.” SEN. REP. No. 304, 66th Cong., p. 13 (1919).

consolidation of Railroads, 63 I. C. C. 465 (1921). The Senate adopted a bill

“... intended to compel the stronger roads to merge their identity with the weaker roads for the common good of the country as a whole.” 63 I. C. C. at 476.

However, instead of adopting the compulsory consolidation provisions, the two houses of Congress agreed upon a bill, which became the Act of 1920, providing for voluntary consolidation and including the Recapture Clause. The relation between these two provisions was described by Professor Ripley:

“But the measure ultimately emerged from conference committee with the procedure as above described, in place of compulsion. *It was evidently expected that the new statutory rule of rate making would afford an incentive sufficiently powerful to induce the strong companies to merge with weaker ones, rather than to be compelled to pay over their surplus earnings above the rate of return fixed as reasonable, into a revolving fund for the general benefit of their respective groups.* An incentive to the weaker roads might also conceivably obtain. The aid extended by the act from the surplus earnings of the strong roads consists merely of advances or loans, except in so far as a better balanced opportunity yields larger earnings. Or else possibly a fairer administration of the division of through rates may help. But the weaker roads are encouraged to seek shelter through affiliation. They are not taken care of by any definite guaranty of earnings.” (Italics ours) 63 I. C. C. at 476.

In its administration of the consolidation provisions of the Act (including the provisions governing acquisitions of control) the ICC has always recognized that the fundamental policy of Congress was to encourage the combination of the weak with the strong lines to insure an adequate transportation system. IIIA Sharfman, *THE INTERSTATE COMMERCE COMMISSION*, 432-433 (1935).⁴⁴ Thus in its report on *Consolidation of Railroads*, 185 I. C. C. 403 (1932), the Commission stated:

“The primary purpose of consolidation, as we understand it, is to effect, subject to certain requirements as to preservation of competition and of existing routes, where practicable, an amalgamation between the weak and the strong roads so as to produce systems which, while perhaps not as strong as some of the existing properties, will be stronger than the average of the weaker roads

⁴⁴ See also Sharfman, *THE AMERICAN RAILROAD PROBLEM*, 233 (1921); Splawn, *THE CONSOLIDATION OF RAILROADS*, 7 (1925); Moulton and Associates, *THE AMERICAN TRANSPORTATION PROBLEM*, 853 (1933).

to be consolidated; and there is no conceivable way by which that objective may be attained except by allocating to the same system, both strong and weak roads." 185 I. C. C. at 420-421.⁴⁵

In *Minneapolis and St. Louis Railroad Company Reorganization*, 240 I. C. C. 57 (1940), the Commission said of the legislative policy of the Transportation Act:

"The underlying purpose of that act is to group weak and strong lines in such a manner that a strong national transportation system will be created." 240 I. C. C. at 86.

In *Nickel Plate Unification*, 105 I. C. C. 425, 449 (1926), the Commission stated that "the union of the weak with the strong lines is one of the ends which Congress apparently had most definitely in mind" in adopting the Transportation Act of 1920. To the same effect is *New York Central Unification*, 150 I. C. C. 278, 321 (1929).

D. The legislative policy specifically relies upon voluntary combinations.

As we have seen, the Congress very carefully considered and decided to reject governmental compulsion in bringing about the carrier combinations it sought. The use of compulsion had been approved by the Senate but rejected by the House and the Conferees in providing for the Transportation Act of 1920. *Supra*, p. 56.⁴⁶ The Recapture Clause, originally designed as an incentive having an element of compulsion, *supra*, p. 56, was quickly abandoned. Even the provision in the Act of 1920 that consolidations (but not acquisitions of control) had to be in accordance with an over-all consolidation plan

⁴⁵ In addition to the statement quoted in the text, individual members of the Commission emphasized the same point in separate opinions announced in connection with the consolidation plan. Mr. Eastman, in *Consolidation of Railroads*, 159 I. C. C. 522, 553 (1929), said of the Congressional purpose:

"To state it still more briefly, the chief purpose was to eliminate the 'weak sisters'."

In an opinion written on the same occasion Mr. McManamy, in reciting the Congressional objectives, said:

"My conception of what Congress had in mind is . . . that weak lines should be considered with stronger trunk lines, thus assuring continued life and usefulness for the weak lines . . ." 159 I. C. C. at 569.

And Mr. Porter, in his opinion, stated:

"In fact, one of the good results expected to be accomplished by consolidation is that the strong roads will carry the weak ones and on the whole be able to maintain an adequate system of transportation at the lowest possible level of rates." 159 I. C. C. at 583.

⁴⁶ Britain adopted a compulsory consolidation plan in 1921 under which 120 roads were amalgamated into 4. Association of American Railroads, CONSOLIDATION OF RAILROADS, 15 (1945).

adopted by the ICC was eliminated in the Transportation Act of 1940.⁴⁷

For reasons sufficient to it—the supreme lawmaker—Congress has set its face firmly against governmental compulsion or any element of compulsion. Thus there remains in our transportation law—the Interstate Commerce Act and the Civil Aeronautics Act alike—only the wise administration of the voluntary consolidation provisions themselves to attract the kind of carrier combinations which the Congress desired to have effected.

E. The fundamental legislative policy dictates approval of the proposed unification.

In the light of the fundamental legislative policy thus outlined, the unification of Mid-Continent and American merits approval.

American is a strong, sound carrier. Mid-Continent is a weak carrier which will be dependent upon subsidy for the indefinite future. *Supra*, pp. 10-14. The unification of these two, then, is precisely the type of unification which the Congress has very plainly indicated to be what it desires.

There can be only two reasons for denying approval for such a unification. One is that the continued independence of Mid-Continent is so important as to justify its indefinite sustenance through public subsidy. The other is that the union of these two carriers involves some fault that outweighs the attainment of the objective which Congress has sought.

Neither such reason is present here.

If Mid-Continent were located in some autonomous section of the country, or were serving some peculiar purpose such as providing a necessary local service, or were meeting the needs of a distinct and sparsely settled region, it might be felt that its independence is peculiarly important, and indefinite subsidization might be considered. But the briefest glance at a map will show that no such element is present here. Mid-Continent's route and lay-out are simply not soundly designed for an independent operation. There is not the slightest justification for accepting as desirable the indefinite subsidization of a route from the Twin Cities to New Orleans.

Nor does this particular unification have faults which outweigh the attainment of the Congressional objective. To say that the two systems will not integrate efficiently, on the one hand, and, on the other hand, that the unification will so increase American's business and so divert traffic from other carriers as to be dangerous is too inconsistent

⁴⁷ The history of the provision for a consolidation plan, and the reasons for its elimination as unworkable, were summarized in American's Brief to the Examiners at pp. 2-3.

to warrant credence. Nor is there any proof that the unification will enable American to "smother" any other carrier: unless rhetoric and maps of fanciful routes are to be treated as proof. And if there appears to be some especially undesirable danger of diversion between particular points (which we emphatically deny), the Board has a very sweeping power to attach terms and conditions to its approval which could fully avert that danger.

In weighing these matters, there is one basic and all important consideration to be kept firmly in mind. Our system, unlike the British, depends upon *voluntary* combinations of carriers; any element of governmental compulsion has been emphatically rejected by Congress. *Supra*, p. 57. In the railroad field the Congressional objective to bring about unions of the weak and strong into a limited number of systems has been in effect for a quarter of a century.⁴⁸ It is true that by 1940 twenty railroad systems⁴⁹ represented 80 per cent of the revenue of Class I roads.⁵⁰ On the other hand there has been strong feeling that in the combinations proposed from time to time the fundamental objective of uniting the weak with the strong is ignored.⁵¹ Undoubtedly to rely on voluntary action to bring about such unions is theoretically difficult.⁵²

This makes it doubly important that when an opportunity is presented to do the very thing, the desire for which chiefly motivated Congress in adopting a tolerant policy toward carrier combinations, that opportunity cannot be lightly passed by. And it would be fatally

⁴⁸ There have been several proposals as to the number of systems. Three have received most attention: The "Prince Plan" for seven systems. Association of American Railroads, CONSOLIDATION OF RAILROADS, 14 (1945). The "Oldham Plan" for eleven systems. *Id.*, at p. 12. And the ICC's own consolidation plan, adopted pursuant to the Transportation Act of 1920, for twenty-one systems, two of which were the Canadian roads, later reduced to twenty, or a net of eighteen American systems. *Consolidation of Railroads*, 159 I. C. C. 522 (1929); *id.*, 185 I. C. C. 403 (1932).

⁴⁹ 58 of the 133 Class I roads are in systems. As to the remainder the situation is as follows:

"Deducting the 58 'System' roads, 9 Canadian system roads, and 5 about to go into the Missouri Pacific System—72—from 133 Class I roads, leaves 61 Class I roads not now or presently to be included in those 'Systems'. Of these some are jointly owned by two or more larger systems, for which they are important as 'Bridge' or 'Feeder' lines and thus may be considered parts of such systems. Generally, the joint ownership of such roads was left undisturbed in the various consolidation plans. And, finally, some of the so-called 'System' roads have financial interests or investments in still other roads now operated independently, some of which may be trending toward consolidation." Association of American Railroads, CONSOLIDATION OF RAILROADS, 18 (1945).

⁵⁰ The revenue of Class II and Class III roads is only 1.3 per cent of total railroad revenue. Association of American Railroads, *op. cit. supra*, at 18.

⁵¹ See, e.g., Robinson, *The Relation of the Short Lines to Railroad Consolidation*, PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE, June 1929, 90, at 96.

⁵² Esch, *Advantages and Disadvantages of Consolidation*, PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE, June, 1929, 57, at 67; Grodinsky, RAILROAD CONSOLIDATION, 270-271 (1930).

inconsistent with the accomplishment of the Congressional objective to adopt an approach such as that of the Examiners in this case—which would turn the issue of efficient integration upon a myopic view of fragmentary and old traffic data, the issue of balance in the air transport system upon the perfectly artificial element of route mileage, and the issue of the reasonableness of the financial terms upon a completely unrealistic comparison of inflated stock values with non-significant asset values.

IX. CONCLUSION.

“Transportation success can never be the product of high rates and restricted service. As the makers of low-priced automotive vehicles fully demonstrated, there is no fixed amount of transportation to be performed, but rather an amount capable of indefinite expansion, provided the public can be offered sufficiently attractive service at a price which it is able to pay.” I. C. C. ANNUAL REPORT, 1938, p. 22.

This statement expresses a principle which was never of more importance than it will be in air transportation's immediate future. The principle requires more than formal adherence; there must be aggressive pursuit of the goal of low rates and abundant service.

This goal is served by the proposed unification of American and Mid-Continent. Alone, Mid-Continent faces indefinite subsidizing with service being improved and expanded only at the restricted pace allowed to a subsidized carrier. See *Mid-Continent Airlines, Inc.—Mail Rates for Routes Nos. 26 and 48*, 3 C.A.B. 464, 467, 468, 470-474 (1942). Every factor in its situation points to a continued lag—as in the past—in its development of air transportation. Its opportunities are severely delimited by an inherently faulty route structure and by the accident of its location. But linked with American the route will be greatly strengthened and its aggressive development is certain. And rates will be lowered, service will be dramatically increased and improved, and a large annual subsidy payment will be eliminated.

The opportunity thus afforded is, moreover, singularly free of the faults found in the proposed Western-United merger. *Acquisition of Western Air Express by United Air Lines*, 1 C.A.A. 739 (1940). There Western was found to be “financially self-sufficient” and aggressive in the promotion of air transportation (*id.* at 747) and was the only north-south competitor with United—indeed the only north-south car-

rier, other than United, in the entire far west region. (*Id.* at 750) Here Mid-Continent is shown to be far from self-sufficiency, with its prospects *even worse* than its past (AT p. 51; Ex. A-26) and with a record of consistently lagging far to the rear in the industry's development. Even now Mid-Continent is just becoming a DC-3 operator. Moreover there will not be added to American—as there would have been to United—any regional dominance to the exclusion of all effective competition. On the contrary the unification would eliminate no competition—and Mid-Continent is only one of several carriers in this region.

Finally it is to be emphasized that this is not a new route case. The ICC has repeatedly made the distinction clear. Thus in *Baggett Transp. Co.—Purchase—Bishop*, 36 M. C. C. 659, 663-664 (1941), it said:

“Section 206 provides the exclusive method and the sole standards by and under which we may issue a certificate. The primary standard there established is the existence of public convenience and necessity. The standard for our approval of a transaction under section 5 is consistency with the public interest. The one is not necessarily the equivalent of the other. *Public convenience and necessity, as we have frequently defined it, ordinarily requires a higher degree of proof than mere consistency with the public interest, and usually contemplates an entirely distinct set of circumstances.* The issue of public convenience and necessity is not presented in the normal proceeding under section 5, and, not being presented, cannot be decided.”⁵³ (Italics ours)

Where, as here, a more adequate service will result, economy and efficiency will be promoted, a fuller provision of and better use of transportation facilities will ensue, *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25 (1932), teaches that the statutory test for a unification is met.⁵⁴ And upon that showing the Board, under

⁵³ The ICC cases on the point are legion. The following are representative. *Trans-american Freight Lines, Inc.—Purchase—Gorman*, 5 M. C. C. 712, 713 (1938); *Red Arrow Freight Lines, Inc.—Purchase—Charlton*, 15 M. C. C. 142, 145 (1938); *Arrow Carrier Corp.—Purchase—Lehigh Valley M. Exp. Corp.*, 15 M. C. C. 203, 204-205 (1938); *Spitzer—Purchase—Howe*, 15 M. C. C. 331, 334 (1938); *Keystone Freight Lines—Purchase—Ross*, 25 M. C. C. 18, 21 (1939); *K & L. Transp. Co.—Purchase—Chastain*, 25 M. C. C. 341, 343 (1939); *Lee Way Motor Freight, Inc.—Merger*, 25 M. C. C. 520, 523 (1939); *Horlacher Delivery Service, Inc.—Purchase Parker*, 35 M. C. C. 149, 153 (1940); *Standard Freight Lines, Inc.—Lease—Holt*, 38 M. C. C. 483, 486-487 (1942), *aff'd* 39 M. C. C. 85, 87 (1943).

⁵⁴ “Applicant is required to show only that the transaction will be consistent with the public interest, that is, not contradictory or hostile thereto.” *Merchant's Dispatch, Inc.—Purchase—Smathers*, 25 M. C. C. 407, 409 (1939); see also *Scott Bros, Inc., Collection and Delivery Service*, 2 M. C. C. 155, 164 (1937).

section 408(b), is required to enter an order of approval. *Cf. Pacific Power & Light Co. v. Federal Power Commission*, 111 F. (2d) 1014, 1017 (C. C. A. 9th, 1940).

Respectfully submitted,

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May 9, 1946.

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.

HOWARD C. WESTWOOD (Signed)
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May 9, 1946.