

ACQUISITION OF CONTROL OF AIR CARRIERS

GOVERNMENT

Storage

HEARINGS BEFORE THE SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

FIRST SESSION

ON

H.R. 8261

A BILL TO AMEND THE FEDERAL AVIATION ACT OF 1958, AS AMENDED,
AND FOR OTHER PURPOSES

H.R. 8322

A BILL TO AMEND THE FEDERAL AVIATION ACT OF 1958 TO MAKE IT
UNLAWFUL FOR ANY PERSON NOT AN AIR CARRIER TO ACQUIRE CON-
TROL OF AN AIR CARRIER UNLESS THE CIVIL AERONAUTICS BOARD
DETERMINES THAT SUCH PERSON IS ENGAGED PRIMARILY IN THE
BUSINESS OF TRANSPORTATION OR A RELATED BUSINESS

H.R. 8323

A BILL TO AMEND THE FEDERAL AVIATION ACT OF 1958 TO MAKE IT
UNLAWFUL FOR ANY PERSON TO ACQUIRE CONTROL OF AN AIR CARRIER
WITHOUT THE APPROVAL OF THE CIVIL AERONAUTICS BOARD, AND
FOR OTHER PURPOSES

MARCH 25 AND 27, 1969

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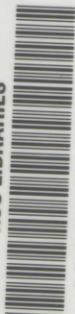
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ACQUISITION OF CONTROL OF
AIR CARRIERS

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ACQUISITION OF CONTROL OF AIR CARRIERS

TUESDAY, MARCH 25, 1969

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Samuel N. Friedel (chairman of the subcommittee) presiding.

Mr. FRIEDEL. The subcommittee will please be in order.

These hearings have been convened to receive testimony on H.R. 8261, H.R. 8322, and H.R. 8323, all of which were introduced by Representative Harley O. Staggers, chairman of the Committee on Interstate and Foreign Commerce. The ranking minority member of the full committee, Mr. Springer, joined Mr. Staggers in introduction of H.R. 8261.

These bills direct themselves to the same subject; namely, the acquisition of control of an air carrier by any person other than an air carrier or one engaged in a phase of aeronautics. Legislation has been introduced in the Senate and I understand that representatives of the Civil Aeronautics Board and the Securities and Exchange Commission testified on the Senate bill, S. 1373, on March 18, 1969.

The bills before us present only the aviation side of a problem which involves the entire transportation industry and, indeed, many other industries within our economy. Today our primary interest is with the entry of noncarriers into the ownership of air carriers.

In all likelihood we will consider the broader questions of conglomerates in the transportation industry in subsequent hearings. Carriers such as air carriers are granted certification allowing them, and requiring them, to perform transportation services based on a demonstration of public convenience and necessity.

To achieve certification, they must establish that they are fit, willing, and able to provide the transportation service contemplated in their certificate application. They must operate in the public interest.

I believe that it is their duty to provide service in accordance with these public convenience and necessity requirements throughout the full term of their certification. It is possible that during the certificate's life, stock acquisitions leading to changes in corporate control could alter the transportation policies of a given corporation.

Essentially this is the question now before us and we look forward with great interest to the testimony by the witnesses who will appear today.

(The texts of H.R. 8261, H.R. 8322, and H.R. 8323, and reports thereon, follow:)

[H.R. 8261, 91st Cong., first sess., introduced by Mr. Staggers (for himself and Mr. Springer) on March 5, 1969]

A BILL To amend the Federal Aviation Act of 1958, as amended, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Aviation Act of 1958, as amended, is further amended as follows:

SECTION 1. Section 407(b) is amended by adding the following additional sentence: "Any person owning, beneficially or as trustee, more than 5 per centum of the capital stock or capital, as the case may be, of an air carrier shall submit annually, and at such other times as the Board may require, a description of the shares of stock or other interest owned by such person, and the amount thereof."

SEC. 2. Section 408 is amended by striking subsection 408(a) (5) in its entirety, and inserting in lieu thereof the following:

"(5) For any air carrier or person whether or not controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

SEC. 3. (a) Section 408 is further amended by deleting the first sentence of subsection 408(b) and substituting in lieu thereof the following: "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, other persons known to have a substantial interest in the proceeding, and the Attorney General of the time and place of a public hearing."

(b) Section 408 is further amended by inserting in the third proviso of subsection 408(b) after the words "determines that no person disclosing a substantial interest" the following: "or the Attorney General".

SEC. 4. Section 408 is further amended by adding the following new subsection 408(f):

"For the purpose of this section, any person owning beneficially 5 per centum or more of the capital stock or capital of an air carrier shall be deemed to be in control of such air carrier unless the Board finds otherwise."

SEC. 5. The provisions of section 2 of this Act shall take effect on March 4, 1969; and the other sections shall take effect on the date of enactment of this Act.

[H.R. 8322, 91st Cong., first sess., introduced by Mr. Staggers on March 5, 1969]

A BILL To amend the Federal Aviation Act of 1958 to make it unlawful for any person not an air carrier to acquire control of an air carrier unless the Civil Aeronautics Board determines that such person is engaged primarily in the business of transportation or a related business

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 408(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1378(a)) is amended by redesignating paragraphs (6) and (7) as paragraphs (7) and (8) and by inserting immediately after paragraph (5) the following new paragraph:

"(6) For any person not an air carrier to acquire control of any air carrier in any manner whatsoever, unless the Board determines that such person is engaged primarily in the business of transportation or in a business which is reasonably incidental, or economically necessary or appropriate, to the operations of such air carrier; except that nothing in this paragraph shall be construed to authorize any act otherwise prohibited by this section;"

[H.R. 8323, 91st Cong., first sess., introduced by Mr. Staggers on Mar. 5, 1969]

A BILL To amend the Federal Aviation Act of 1958 to make it unlawful for any person to acquire control of an air carrier without the approval of the Civil Aeronautics Board, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 408(a) of the Federal Aviation

Act of 1958 (49 U.S.C. 1378(a)) is amended by striking out "or" at the end of paragraph (6), by redesignating paragraph (7) as paragraph (8), and by inserting immediately after paragraph (6) the following new paragraph.

"(7) For any person to acquire control, in any manner whatsoever, of an air carrier or of any person engaged in any phase of aeronautics otherwise than as an air carrier; or".

EXECUTIVE OFFICE OF THE PRESIDENT,

BUREAU OF THE BUDGET,

Washington, D.C., April 8, 1969.

HON. HARLEY O. STAGGERS,

Chairman, Interstate and Foreign Commerce Committee, Rayburn Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Bureau of the Budget on H.R. 8261, H.R. 8322, and H.R. 8323, bills which would amend the Federal Aviation Act of 1958, as amended.

H.R. 8261 would strengthen the reporting provisions of the Act by requiring periodic reports to the Civil Aeronautics Board by persons owning, beneficially or as trustee, more than 5 per centum of the capital stock or capital of an air carrier. It would also amend Section 408 of the Act to require, effective March 4, 1969, Board approval of the acquisition of control of an air carrier by any person. For that purpose, any person owning 5 per centum or more of the capital stock or capital of an air carrier would be considered to be in control of the carrier, unless the Board determines otherwise. Under current law, Board approval is required where acquisition of control of an air carrier is by any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics. The bill would also specifically include the Attorney General as a person required to be served with notice of Section 408 hearings, and entitled to demand a hearing on acquisitions which can otherwise be approved without a hearing.

H.R. 8322 appears designed to prohibit acquisition of control of an air carrier by any person not engaged in the transportation business or a related business. However, its provisions would technically require Board approval for any person to acquire control of an air carrier. H.R. 8323 would require Board approval of the acquisition by any person of control of an air carrier or of any person engaged in any phase of aeronautics other than as an air carrier.

The Bureau of the Budget supports strengthening the surveillance and regulation of changes in control of air carriers which might be detrimental to the air transportation industry or contrary to the public interest. Currently a person—other than an air carrier, a person controlling an air carrier, any other common carrier, or a person engaged in any other phase of aeronautics—is free to acquire control of an air carrier without Board approval. As the Civil Aeronautics Board points out, a technical transfer of a carrier's certificate authority does require Board approval, but the same practical result can be achieved, without Board approval in certain cases, by a change in stock ownership. We agree that this gap in the law should be closed and that the Board should have an opportunity to consider whether the persons who wish to acquire control of an airline are capable of operating it and providing the desired transportation services, and should be able to prevent those acquisitions which the Board finds contrary to the public interest.

Accordingly, we support generally the approach of H.R. 8261, which would close that gap. In that connection, we would like to point out that the Civil Aeronautics Board has suggested amendments to the bill to strengthen it and to provide procedural flexibility in carrying out its provisions, and that the Department of Justice has proposed an amendment to clarify antitrust jurisdiction and strengthen the application of the antitrust laws.

The Bureau of the Budget does not favor H.R. 8322. We agree with the Board that there is no basis to conclude that control of air carriers by persons other than those in the transportation business is per se contrary to the public interest.

Similarly, with respect to H.R. 8323, we agree with the Board that there is no apparent regulatory need to extend the requirement of Board approval to acquisitions of persons engaged in any phase of aeronautics other than as an air carrier. We note the Board believes that such regulatory jurisdiction is not required to cope with problems relating to the control of air carriers.

Sincerely yours,

WILFRED H. ROMMEL,

Assistant Director for Legislative Reference.

Mr. FRIEDEL. First, let me welcome Chairman John H. Crooker, Jr., of the Civil Aeronautics Board. Chairman Crooker, it is a pleasure to have you with us once again. Please introduce your associates and proceed with your testimony.

STATEMENT OF HON. JOHN H. CROOKER, JR., CHAIRMAN, CIVIL AERONAUTICS BOARD; ACCOMPANIED BY JOSEPH B. GOLDMAN, GENERAL COUNSEL; A. M. ANDREWS, DIRECTOR, BUREAU OF OPERATING RIGHTS; AND JOHN W. DREGGE, DIRECTOR, OFFICE OF COMMUNITY AND CONGRESSIONAL RELATIONS

Mr. CROOKER. Mr. Chairman, here with me are Mr. Joseph Goldman, the General Counsel of the Civil Aeronautics Board; Mr. A. M. Andrews, the Director of the Bureau of Operating Rights at the Board; and Col. John Dregge, the Director of our Office of Community and Congressional Relations.

Mr. Chairman, it is good to have the opportunity to comment on the bills before the committee. All of these bills would require Board approval for certain acquisition of stock of air carriers, which acquisitions are now outside the Board's jurisdiction, and the Board endorses that objective.

There are some additional provisions in some of the bills which we do not feel are now urgently required, such as the provision in H.R. 8323, subjecting to Board approval the acquisition by anyone of a person engaged in a phase of aeronautics otherwise than as an air carrier. Another of the bills, H.R. 8322, would restrict the classes of persons who could acquire stock, and the Board believes that legislation of this sort might be deferred until the Congress acts generally with respect to the future role of conglomerates in our national economy.

The third bill, H.R. 8261, would strengthen the reporting provisions of the act with respect to stock ownership, as well as providing for prior approval of certain stock acquisitions, and the Board endorses the objectives of the bill in these two major respects. We do, however, have some suggestions to make with respect to H.R. 8261, which we believe would provide a bill making for sounder administration from the Board's viewpoint, and at the same time accomplishing what we believe to be the basic objectives of the legislation.

First, I would like to state that the Board strongly supports the proposal—as set forth in section 1 of H.R. 8261—to strengthen the reporting requirements of the statute. Section 407(b) presently provides that air carriers shall submit lists to the Board showing the names of stockholders holding more than 5 percent of the capital stock of the carriers, and the proposed amendments would place the same reporting requirement upon the persons who actually hold the stock. The amendments, therefore, would not embody any new regulatory concept but would serve merely to enable the Board to obtain reports from persons other than air carriers concerning stock ownership. At the present time the Board may acquire such information from nonair carriers only in the context of pending proceedings and through use of the subpoena power. As the committee knows, air carriers may not always be aware of the identity of the true owners of their stock, and the Patman report has recently stressed the necessity for full dis-

closure in this field. A requirement that the actual owner of the specified interest report directly to the Board would thus aid the Board in maintaining surveillance over the ownership and control of air carriers.

We also suggest that the reporting requirement, both as to air carriers and the owners of the stock, be broadened to require reports of ownership of 5 percent of any class of capital stock—rather than being restricted to those holdings which represent 5 percent of the total capital stock, as section 407 presently provides. The purpose of the provision is to inform the Board of the identity of the persons who may be in a position to influence or control the carrier. This purpose could be defeated if, for example, a particular carrier were to issue nonvoting stock. In such event, the result could be that a person owning 5 percent or more of the voting stock might not be required to report his holdings, whereas a requirement for a report of the holding of 5 percent of any class of stock would preclude that result. We also are proposing for the same reason that any provisions restricting the acquisition of a stated percentage of stock be cast in terms of classes of stock rather than of total stock.

As the committee knows, section 408 of the Federal Aviation Act presently requires prior Board approval before certain classes of persons may acquire control of an air carrier. Those persons are another air carrier, any person controlling another air carrier, any other common carrier, or any person engaged in any other phase of aeronautics. However, a person not falling within any of these categories is free at the present time to acquire control of an air carrier and, in effect, to take over its operations without any requirement of Board approval. This situation is somewhat incongruous, in light of the fact that a technical transfer of the carrier's certificate authority does require Board approval, whereas the same practical result can be achieved through change in stock ownership without Board approval. It is our understanding that the basic purpose of the instant bills is to plug this loophole, and to insure that the Board has the opportunity to veto any change in control which it finds to be contrary to the public interest.

Closing this loophole would be consistent with the overall purposes and provisions of the statute since the identity of the persons who control an airline can affect the quality of the air carrier service. Thus, when the Board initially determines whether to issue a certificate to a given carrier, it takes into account the identity and qualifications of the persons controlling it in determining whether the carrier is fit, willing, and able to provide the desired transportation services. These same considerations are taken into account where there is a technical transfer of the certificate, which, as previously noted, requires Board approval. We believe that the Board accordingly should have an opportunity to consider whether the persons who wish to obtain control of an airline are capable of operating it.

Thus far, the air carrier system has been fortunate in that, despite the gap in regulatory control, no situation appears to have arisen in which any disastrous effect has resulted from changes in control which were not subject to Board approval. However, the air carriers have now reached a position where they are attractive to large financial enterprises, and it is well known that in the last several months various acquisitions of air carriers have been proposed or attempted. Some of

these proposals have been by persons who require Board approval under section 408 of the act, whereas others have been by persons not presently within the purview of the statute. Certainly everyone should agree that it would be desirable for the Government to be able to forestall the seizures of air carriers by manipulators whose activities may adversely affect the carriers' fitness. The air transportation system is one of our greatest assets in times of national emergency, and this Nation should be able to protect that asset. It is disturbing to realize that under the present law the management and policies of a carrier engaged in vital defense operations during a national emergency could be completely altered, and the operations disrupted, by a change in stock ownership which was not subject to scrutiny by anyone and which even might involve ownership by foreign interests.

Turning to the procedure which would be followed if section 408 were to be expanded so as to apply to acquisition of control by any person, it is the Board's view that any remedial legislation should be so framed as to impose the minimum procedural burdens upon persons seeking to purchase airline stocks, and also so as to permit prompt approval by the Board where there is no basis for believing that the acquisition will be contrary to the public interest. Otherwise, the effect of extending the coverage of the act might be to hamper the air carriers in their financing programs, since roadblocks would be placed in the way of purchases of stock by large institutional investors such as mutual funds, insurance companies, and the like. Furthermore, proceedings of the nature now required by section 408 not only are expensive and protracted, but also have an unsettling effect upon the carriers' overall activities until their completion.

Accordingly, the Board hopes that any legislation which is enacted will be relatively easy of administration, considering the circumstances of the particular transaction. To provide such procedural flexibility, we would suggest a fourth proviso to section 408(b) so that such subsection would read as follows:

Provided further, That, in any case in which an order of approval is required hereunder only by reason of the requirements of section 408(a)— [new subsection number], the Board may enter such order pursuant to such procedures as it by regulation may prescribe.

Now, turning to the most complicated problem (as we see it) of proposed legislation in this area: How can we clarify the fact that "control" of a carrier is the thing which will require prior approval? There are several alternate approaches which the Congress might take to remedy the present inadequacy of the statute.

The first alternative would be merely to broaden the provisions of section 408, so as to require Board approval of any "acquisition of control" of an air carrier, by anybody whomsoever and make no other changes in the statute. This is the approach embodied in H.R. 8323. Under such a bill, the Board would be required to hold the same full evidentiary proceedings which it is now required to hold where, for example, one air carrier seeks to acquire control of another. As previously stated, the Board does not believe that such proceedings should mandatorily be required with respect to all acquisitions by persons who do not now fall within the coverage of the statute. Even more important—because presumably procedural flexibility could be embodied in H.R. 8323—under an amendment of this nature, the question of

just what degree of stock ownership constitutes control is left unanswered; and evidentiary proceedings would be required in borderline cases to resolve that issue.

A second alternative would be to subject all "acquisitions of control" of air carriers to the Board's prior approval, but to provide that the acquisition of a stated percentage of stock would give rise to a presumption of control. This is the approach embodied in H.R. 8261, which provides that 5 percent stock ownership shall be deemed to constitute control unless the Board finds otherwise. One effect of this would appear to be to require full evidentiary hearings—or other proceedings, if the bill were so amended—to determine, in most cases, whether or not the proposed 5-percent ownership would in fact constitute control. Once the fact of "control" was established, further procedures would be required as a prerequisite to any Board approval or disapproval of the relationship.

A third alternative is commended to the committee for consideration. Rather than speaking in terms of "control," the Congress might enact legislation which would subject to the Board's scrutiny, the acquisition of stated percentages of any class of the capital stock of an air carrier—both as to initial purchases and as to increases in existing holdings.

Irrespective of which of the three alternatives may be followed, we believe that new legislation should authorize the Board to enter orders pursuant to such reasonable procedures as the Board might prescribe. We have already pointed out how section 408(b) of the act might be thus amended. In the new subsection of 408(a), we also recommend that the Board be authorized to exempt certain acquisitions which would not otherwise fall within the purview of the statute. For example, the Board might wish to exempt acquisitions of stock in small carriers, such as air taxi operators or air freight forwarders. We also recommend that the Board be permitted to approve, without evidentiary hearings, acquisitions not otherwise subject to its jurisdiction.

If the third alternative mentioned above be followed, section 408(a) of the act might be amended by redesignating the present subsections 408(a) (6) and (7) as (7) and (8), and by adding the following new section 408(a) (6):

(6) For any person to acquire, beneficially or as trustee—per centum or more of any class of the capital stock or capital of an air carrier, as the case may be, or for any person holding — per centum or more of any class of such capital stock or capital to increase its holding by 5 per centum or more: *Provided*, That the Board may by order exempt any acquisition from this requirement to the extent and for such periods as may be in the public interest.

Under these provisions, any initial acquisition of a certain percentage of any class of the capital stock of an air carrier, and any subsequent acquisition of 5 percent or more, would be subject to Board scrutiny. However, the Board would be in a position to exempt from these requirements those persons subjected to the act only by reason of the holding of the specified percentage of ownership, and also to promptly approve, without a hearing, those transactions which did not appear to present any regulatory problem. Under the modifications we propose, the Board would achieve the objectives of the bill with a minimum procedural burden and interference with carrier financing or stock transfers.

The precise percentage of stock acquisition which should be precluded without Board approval is, of course, a matter of judgment and

one on which there is room for differences of opinion. One of the bills before the committee, H.R. 8261, would fix the amount at 5 percent. The language just suggested left blank the precise percentage for an initial acquisition that would bring the transaction under scrutiny. We note that the Public Utility Holding Company Act and the Patman report utilize a 10-percent figure. This may well be a very reasonable figure. On the other hand, section 407 of the 1938 Civil Aeronautics Act required the reporting to the Board of the identity of persons holding more than 5 percent of the capital stock, and this provision represented a congressional recognition at that time that the holding of as much as 5 percent of a carrier's stock could be a cause for regulatory concern. This historic factor lends support to a 5-percent figure, but the Board is somewhat inclined to the view that a figure higher than 5 percent would be more appropriate, especially since it would apply only to those acquisitions not otherwise governed by the statute.

I also would like to comment briefly on certain other features of the bills before the committee. H.R. 8261 would further amend section 408(b) to include the Attorney General as a person required to be served with notice of section 408 hearings, and also as a person entitled under the third proviso to demand a hearing for the limited acquisitions falling within that proviso which can be approved without hearing in the absence of a demand therefor by any person disclosing a substantial interest. While the Board has no objection to these proposals, we regard them as unnecessary. The Board already gives notice to the Attorney General of section 408 matters, and also deems him to be a person entitled to object under the third proviso as it is now written.

H.R. 8261 also contains a provision making it retroactive to March 4. We have no objection to a retroactive provision, but merely defer to the views of the Congress on this point.

H.R. 8323 would subject to Board approval not only any acquisitions of control of an air carrier by any person, but also any acquisition by anyone of a person engaged in any phase of aeronautics otherwise than as an air carrier. The Board opposes this provision. The primary purpose of section 408 is the policing of relationships involving air carriers, and it is designed for the protection of the air carriers rather than of persons engaged in "phases of aeronautics." Thus, persons engaged in a phase of aeronautics are among those persons who may not now acquire control of an air carrier without prior Board approval. While an air carrier or foreign air carrier may not now acquire control of persons engaged in any phase of aeronautics, without prior Board approval, there is no present prohibition against the acquisition of control of a person engaged in a phase of aeronautics by another such person or by common carriers other than carriers by air.

Furthermore, the Board lacks regulatory jurisdiction as such over persons engaged in a phase of aeronautics. Conferring jurisdiction in the Board, for example, over the acquisition of an aircraft manufacturer by a large insurance company, would represent a major expansion of the statute into areas which are not required to cope with problems relating to control of air carriers. I might also point out that most persons manufacturing equipment used in aviation are now regarded as being engaged in a phase of aeronautics, and the effect would be to subject a multitude of corporate relations to Board control

which are now outside its jurisdiction. Consequently, we oppose this portion of H.R. 8323.

H.R. 8322 would restrict control of an air carrier to persons engaged in the transportation business or a related business. The Board does not believe that such a restriction would be in the best interest of the industry. The effect would be to curtail substantially the classes of persons who could invest in large blocks of airline stock. To this extent, the carriers would be hampered in their financing programs. Moreover, the Board's experience has not indicated that control of air carriers by persons other than those in the transportation business is, per se, contrary to the public interest. The control of Northeast by the Storer Broadcasting Co. is a case in point.

I finally add that enactment of legislation of the type which we have recommended will increase the Board's workload and will require a few more people and a few more dollars in our annual appropriations to hire them. However, we believe the cost would be considerably less if greater procedural flexibility is afforded to the Board. We also believe that the benefits to the air transportation system will far outweigh the small cost of administering the provision.

In conclusion, we endorse what we understand to be the general objective of the bills, to fill the regulatory gap under which a practical transfer of operating authority may occur by reason of stock acquisitions not now subject to Board approval. This Government and the citizens of this Nation have a considerable investment in the air carrier system which has been evolved over the years to meet the needs of the foreign and domestic commerce of the United States, of the postal service and of the national defense. That system and investment should not be exposed to possible adverse impact by the regulatory gap which presently exists in the control provisions of the statute. Rather, it should be safeguarded by enacting legislation along the lines here proposed.

Thank you, Mr. Chairman.

Mr. FRIEDEL. I want to thank you, Mr. Crooker, for your very, very fine statement and your suggested amendments. I particularly like your last statement, "Rather, it should be safeguarded by enacting legislation along the lines that you propose."

Can you tell me why for 31 years or so nothing has been suggested along these lines and not until recently when we hear a great deal about conglomerates trying to take over, do we find out there are loopholes. I have always felt that the CAB had foremost in its mind public convenience and necessity, air safety, and the carriers ability to service the public with proper air routes. In view of this can you tell me why this question has been left open?

Mr. CROOKER. Mr. Chairman, I don't know that I can answer. Since the enactment of the present statute in 1958, I suppose we have gone along for 10½ years with the major certificated carriers, Pan American and 10 or 11 domestic trunklines, and about an equal number of local service carriers where no situation arose which attracted the attention of the Board to the possibility that foreign interests, or interests that would be adverse to the public interest, might acquire control. Another possibility is that until an actual situation presents itself, the Board is so absorbed in its day-by-day work that it is overlooked. It may be that the Board is responsible for failing to bring this possibility to your attention prior to this time.

Mr. FRIEDEL. You previously referred to the 5-percent figure now contained in section 407 and questioned if it were high enough. I believe you said it might go to 10 percent and you also mentioned some other alternatives. It occurs to me that while you are trying to correct one thing another problem may arise. For instance you granted a certificate for a helicopter service to seven or eight trunk carriers to operate between Washington National, Dulles, and Friendship.

How could you limit one of these trunk carriers to 5- or 10-percent ownership when to be equal participants they must necessarily own more?

Mr. CROOKER. Well, Mr. Chairman, nothing in the proposed legislation is designed to prohibit the ownership of more than the stated percentage of stock. It is just designed to require prior Board approval, and I used in my statement an example of Storer Broadcasting Co. acquiring a very large block of stock in Northeast.

So far as we know, if that transaction had required our approval, and if it had been presented to us, we would have approved. Likewise, I think the Board approved the interests of the seven or eight carriers in WAI.

Mr. FRIEDEL. What percentage of Northeast's stock did that broadcasting company acquire?

Mr. CROOKER. Eighty percent of the stock, I think—somewhere in that general neighborhood.

Mr. FRIEDEL. Would your proposal prohibit that?

Mr. CROOKER. No; it would require our prior Board approval.

Mr. FRIEDEL. Let me get this clear now. I thought anyone who acquires 5 or 10 or 8 percent or whatever figure is finally picked would have to have your approval, but you say you can go above that figure?

Mr. CROOKER. Under the present law?

Mr. FRIEDEL. No; under this proposed law.

Mr. CROOKER. No; it would merely require prior Board approval if the proposal was to acquire more than the stated percent. For example, Storer could have proposed to acquire 80 percent of the stock of Northeast and that would have required our approval. Likewise, if X proposed to acquire 6 percent, and the crucial figure was 5, of the stock of Y airlines, that would require approval.

But there is no effect to limit how much of the capital stock.

Mr. FRIEDEL. In other words, if we passed this bill, H.R. 8261, anyone who would get control of 5 or 8 or 10 percent, or whatever limit we put in there would need your approval, but that won't prohibit you from granting them permission to take 20 or 80 percent as you said.

Mr. CROOKER. That is correct. We could give the approval for 20 or 80 percent as easily.

Mr. FRIEDEL. It would not be restricted to the percentage that was put in the legislation?

Mr. CROOKER. That is correct, sir.

Mr. FRIEDEL. Mr. Pickle?

Mr. PICKLE. Thank you, Mr. Chairman.

In line with the chairman's questioning, do you think it might be advisable that we don't use any figure at all, whether 5 or 10 percent? Apparently you have some reservation about the exact percentage.

Could we have language in the bill that might serve the purpose by indicating that in the interest or in the judgment of the CAB, that no

carrier would be permitted, no outside interest would be permitted to buy control of a carrier? Do we need a base percentage of some level?

Mr. CROOKER. Mr. Pickle, we sought to state in the statement on pages 6 and 7 that there are three alternatives that might be followed. The first is to have the legislation relate to control without any definition of control.

The second alternative is to have it relate to control with a further provision as to what percentage of stock ownership raises a *prima facie* presumption of control.

The third approach is not to use the term "control" at all, but to have the statute apply to acquisition of stated percentages of stock.

With respect to the exact amount, it is the Board's position that probably there should be some differential between the percentage stated in section 407, the reporting requirement, and the percentage stated in section 408 where prior approval is required. It seems anomalous to say to a carrier or to an individual, you must tell us when you get over 5 percent under 407, but by the way you must also come to us in advance and get prior approval of 5 percent under 408.

So our thought was, whether it was 3 and 6 or 4 and 8 or 5 and 10, that probably the percentage in section 408 should be a greater percentage than that stated in 407 as the reporting requirement.

Mr. PICKLE. I take it, Mr. Chairman, that the Commission would recommend H.R. 8261 with the reservations and suggestions you have mentioned, but that you do have greater reservations about the two accompanying bills, H.R. 8322 and H.R. 8323. So that the primary gist of what we are holding hearings on is with relation to H.R. 8261?

Mr. CROOKER. Yes, sir.

Mr. PICKLE. Now I notice that the thrust of the two additional bills H.R. 8322 and H.R. 8323, is to provide prohibitions on acquisitions of air carriers. I assume that these two particular bills I made reference to would not be retroactive in application, but I would like your interpretation of it.

I notice on page 10 of your testimony that you do say that H.R. 8261 contains provisions making it retroactive to March 4 and you would have no objection to a retroactive provision. Is that likewise your opinion with respect to these two additional bills?

Mr. CROOKER. Well, Mr. Pickle, I noted particularly the opening remarks of Chairman Friedel when he stated today that we are largely concerned with the aviation portion of this problem, and the committee will consider in subsequent hearings the broader aspect of conglomerates.

It seems to me that one or the other bills tackles a very broad problem in restricting the classes of persons who can acquire airline stocks. It would be the Board's thought that if the committee worked actively on that particular measure, there might be so many broad considerations that would be dealt with in detail in the House and the Senate that it might substantially delay the time when needed legislation of this sort might be passed. So, we would hope that the Congress might act on the more specific subject treated in H.R. 8261, and treat the broader subject as part of a much larger picture.

Mr. PICKLE. I would assume that if the retroactive aspect would pertain to H.R. 8261, it would to the others, but perhaps this is an item for later discussion. I have one question that I want to pursue with you.

Has the Commission or Board given thought to the problems that might arise when we are talking about control and acquisition of control of a carrier, to problems that come about not so much by or not alone by purchase of stock and thus giving prior notice to the Board, but where control, in effect, is given through financial transactions?

This may be a question that the next witness might want to comment on, the representative of the Securities and Exchange Commission. Mr. Chairman, I wonder if I might have 2 additional minutes at this point.

Mr. FRIEDEL. You may proceed.

Mr. PICKLE. I had in mind one particular case which perhaps is well known to all of the industry where a company had to buy a lot of equipment, had to go to a financial institution, had to put all of their stock in a voting trust and the banking and lending institutions at that time had direct control over that carrier.

The same thing probably could happen if they participated in what is called a leasing arrangement, which also is so restricted in operation that, in effect, you have control. What is the difference when you penalize, if that is the word, a carrier where he has put all of his stock up and a lending institution has control as compared to a situation where a corporation or entity can go into the open market and buy direct control?

It seems to me like that is just as severe a control. Has the Board given any thought where notice should be given to the Board or prior approval should be obtained in those instances?

Mr. CROOKER. Mr. Chairman, I am sorry that my answer was so lengthy I have consumed some part of Congressman Pickle's time. I will try to address myself to the three questions you asked.

On leasing transactions where flight equipment is leased, the matter is now submitted to the Board for approval and we pass on it. Where there is debt financing rather than equity financing, there is nothing we see in the proposed legislation that addressed itself to indirect control, or sometimes real if there is a foreclosure, except that I assume involuntary transfers of stock, if stock is pledged, would come under our scrutiny quite as much as a voluntary transfer would.

When you get around to the issuance of warrants or rights along with the evidences of indebtedness, I suppose that you could clarify the fact that when we are talking about any class of stock, this might include warrants or rights. Frankly, the Board hasn't focused on this, but I assume that by legislation, or possibly regulation, we could address ourselves to this problem.

Mr. PICKLE. I think perhaps it is a serious problem that we might not have covered in this hearing. If we are going to require advance notice of individuals who buy open stock, it seems to me perhaps like financing or lending institutions ought to be subject to the same kind of control.

Thank you, Mr. Chairman.

Mr. FRIEDEL. Thank you.

We have the chairman of the full committee, Mr. Staggers, one of the sponsors of H.R. 8261, along with Mr. Springer. Mr. Staggers, would you like to say something now?

Mr. STAGGERS. Thank you, Mr. Chairman. I am appreciative that the gentlemen are testifying here this morning and also that the sub-

committee is giving attention to this problem which I think is important to the Nation, and I am sure it will have to be resolved either this way or some other way.

I was hopeful that perhaps something could be added to this bill that would take care of other situations. I don't know whether this can be done by the subcommittee or not. I am hopeful that it can take care of general situations that may arise in the future.

Mr. FRIEDEL. Mr. Chairman, my opening statement was that I was trying to keep this hearing mostly to the airlines who are regulated and have to get certificated, because maybe later on we will go into that, but right now I am trying to concentrate on this.

Mr. STAGGERS. It would take care of more than one situation. Fine. I say I am happy that we are getting into this now.

Mr. FRIEDEL. Mr. Devine?

Mr. DEVINE. Thank you, Mr. Chairman.

Chairman Crooker, I am not sure I understand why the question of control should be treated differently under the Federal Aviation Act than it is under section 1(3)(b) of the Interstate Commerce Act. Why should it be treated differently?

Mr. CROOKER. Mr. Devine, could General Counsel of the Board address himself to that point, sir?

Mr. GOLDMAN. Mr. Devine, I think that the problem really revolves around the question of certainty. In terms of the marketability of stock, if you only made the legislation apply to acquisitions of stock which, in fact, involved the power to control, it would pose very difficult problems with respect to the marketability of substantial blocks of stock. The buyers and sellers might, not know, in fact, whether or not that block of stock involved control. It was our feeling that if you reduced the bill to a question of stock percentages, you would have an element of certainty involved so that you would, on the one hand, not hamper the free marketability of stock and, on the other hand, have adequate control over the situation in the event that the acquisition of that stock posed some problem from the standpoint of regulation in the public interest.

Mr. DEVINE. I don't believe your answer is exactly responsive to the question. If you set some arbitrary figure of 5 or 8 or 10 percent, how is that going to alter the situation or why should there be a double standard, one for Federal Aviation Act and one for Interstate Commerce Act?

Mr. GOLDMAN. Of course, we are not addressing ourselves to the question of what remedial legislation may be required with respect to the Interstate Commerce Act. It may well be that the same problem posed here will develop with regard to surface transportation.

Mr. DEVINE. I think the chairman has already said that you can't arbitrarily decide what percentage will ultimately result in control of stock.

I am not sure that we are being completely frank here in these hearings. I have read in *Forbe's* magazine, I have read in some of the weekly news publications and in the *Wall Street Journal* and others that this whole thing is motivated by Mary Carter Paints or its successor, Resorts, Inc., is possibly connected with the Cosa Nostra or Mafia and this is clearly from rumor, allegedly tied up with some sinister organization, and that is why people are upset about the pos-

sible acquisition of x percentages or shares of stock in Pan American or something. I am wondering if we are trying to resolve a specific situation with general legislation that will affect the entire industry.

Is that the situation here, Mr. Crooker?

Mr. CROOKER. Mr. Devine, I don't believe it is. This may have been one of the events that triggered our attention to the problem, but I think the Board has focused on the broad problem of looking at any group that would acquire control. If we go to the 10-percent figure, as the Board has rather broadly suggested might be done, the Resorts, Inc., deal will not fall within the purview of the new statute, because they propose to get, I suppose, less than 10 percent of the total outstanding stock of Pan American.

When you get to what is the crucial percentage, so much depends on what airline is involved. As far as Ozark Airlines is concerned, I would have to get 35 or 40 percent of the stock, because there is already a very sizable block in the hands of two or three people. If we go to the other extreme, such as American Airlines, I believe there is no one group or entity that owns as much as nine-tenths of 1 percent.

Mr. DEVINE. Let's get back to very basic generalization in the jurisdiction of the CAB. Do you not at the present time have authority, after hearing, to regulate or modify or suspend or amend a certificate?

Mr. CROOKER. May Mr. Goldman comment, first, and may I then add to his statement, sir?

Mr. DEVINE. You know whether you do have that jurisdiction, don't you, Mr. Chairman?

Mr. CROOKER. Yes, sir; you can obviously after hearing revoke a certificate. I would assume that, if the Board affirmatively went in and showed that a carrier was not fit, willing, and able to perform its certificate requirements. I would also assume that this would be placing quite a burden on the Board and the public to maintain the affirmative burden of proof.

Mr. DEVINE. I know, but you don't mean to say that if the Board once grants a certificate, no longer reviews it, that then you forget it.

Don't you go back and review it?

Mr. CROOKER. I don't think there has been any effort by the Board, or anything that we have read in the statutory intent, to look at every certificate of public convenience and necessity of the trunkline carriers, or the local service carriers, for the purpose of making an annual review.

We get the reports under section 407 of those who own this stock.

Mr. DEVINE. Maybe I am not making myself clear, but if it were to come to the attention of the Board that some organization that was not oriented to aviation were in the process of acquiring a controlling interest in stock in a certificated carrier, could not your Board reexamine the granting of that certificate and review it and amend it, suspend it, modify it, and do so within the powers already granted by the statute?

Mr. CROOKER. If, for example, X stockholder acquires stock in Pan American under the present law and we immediately institute an investigation along the lines you suggest, presumably 16 or 17 months from now the Board would conclude the very full evidentiary hearing. I don't know how Pan American's affairs would be operated if we had some national emergency in the meantime.

Presumably if the matter then went on to the circuit court, there might be another year or so involved. I am apprehensive about what would happen to one of our major airlines if our only recourse were the capability we now have to look into the certificate authority.

Mr. DEVINE. Has the Board ever revoked a certificate of any trunk-line carrier other than for nonuse?

Mr. GOLDMAN. No, we have not and may I comment on the legal questions involved, Mr. Devine. There is some question under the statute as to what the powers of the Board are with respect to outstanding certificates. Section 401 of the act does provide the Board with power to alter or modify a certificate if the public convenience and necessity is involved. It also authorizes the Board to revoke a certificate for a knowing and willful violation, and for failure, knowingly and willfully, to carry out the provisions of the certificate.

But there has been quite a bit of legal controversy over the extent to which the Board can take away a certificate. In addition, I think this question of moving against an acquisition of a carrier through amendment, modification, or suspension of a certificate poses some very real problems with respect to safeguarding continuation of the kind of air transportation that the certificate contemplates.

As a practical matter, if undesirable elements were able to gain control of an air carrier, they could do a great deal of damage in terms of the continuation and maintenance of the required service while litigation was pending as to whether or not the Board had the power and, if it had the power, whether it should take away the certificate.

So I think that very serious consideration should be given to the desirability of taking a look before the damage occurs, instead of waiting for the damage to happen. We run the risk of having service disrupted to many major cities of the United States.

We run the risk of throwing people out of work, et cetera, through an attempt to proceed against the certificate after lengthy administrative proceedings.

Mr. FRIEDEL. Doesn't the Board currently have jurisdiction in case a foreign interest would try to get control of an air carrier? Don't you have that in the present law today?

Mr. CROOKER. Mr. Chairman, I will comment briefly on the subsection Mr. Watson mentioned. Section 401(g) does provide that the Board may alter, amend, modify.

Mr. FRIEDEL. Mr. Devine, you mean.

Mr. CROOKER. I am sorry. I don't even know what I said.

Mr. FRIEDEL. You said Mr. Watson mentioned 401(b).

Mr. CROOKER. I am sorry. I apologize.

It further says in 401(g) that no such certificate shall be revoked unless the holder thereof fails to comply with an order of the Board commanding obedience to the provisions of the order, rule, regulation, and so on, found by the Board to have been violated.

I don't know that I interpret exactly what is meant. Suppose that the carrier contends they haven't violated any order, rule, regulation, and so forth, of the Board. I think this is the thing to which Mr. Goldman alluded—that it is awfully difficult to uphold the power of the Board to revoke the certificate.

Mr. FRIEDEL. What about the problem of foreign interests trying to get control, don't you have jurisdiction today?

Mr. GOLDMAN. In the case of the initial certification of a carrier, of course. Where authorization to what is considered to be an air carrier is involved, the statutes set up a definition of what an air carrier is.

Under section 101 of the act, an air carrier has to be a citizen of the United States. A citizen of the United States is defined in section 101(13) so as to require that the president and two-thirds or more of the board of directors and other managing officers thereof shall be citizens. It also requires that at least the 75 percent of the voting interest be owned or controlled by persons who are citizens of the United States.

To that extent, in the initial certification cases, we would not grant a certificate of public convenience and necessity to a corporation that was unable to meet those standards.

Mr. FRIEDEL. But you would have the right to revoke it?

Mr. GOLDMAN. That is a question we haven't faced, Mr. Chairman. We have never had that situation. It is my own impression that the objective of this bill is not simply to avoid the problem of foreign influence, but also to avoid the possibility of undesirable elements gaining control of an air carrier without regard to any foreign affiliation. Even as to a foreign affiliation, undesirable elements very often have a way of disguising and obscuring just what their relationships are.

Mr. FRIEDEL. In other words, H.R. 8261 would clear up those loopholes?

Mr. CROOKER. H.R. 8261 would subject to our scrutiny a transfer of stock just as a transfer of the certificate now comes under our scrutiny. Here is the thing that concerns me.

Suppose that someone should feel that a proceeding should be brought to revoke a certificate because, for example, foreign interests owned 24 percent of the outstanding voting stock of a carrier. Suppose we proceeded, but the persons trying to maintain the relationship said that under 101(13) it takes more than 25 percent of the voting stock of the air carrier to be in foreign hands before we could even turn down the certificate, or refuse to transfer it if a technical transfer of the certificate were involved.

So I think that the statute needs strengthening in respect to giving the CAB prior approval of some such proposed acquisitions. I hope we are not dealing with only one situation, Mr. Devine. I hope we are talking about legislation that will affect transactions in future times.

Mr. DEVINE. I would hope so, too, Mr. Chairman, and that is why I again go back to the Interstate Commerce Act, section 1(b)(3) where it spells out very specifically where reference is made to control, such reference shall be construed to include actual as well as legal control.

I think that is quite clear, and it hasn't been made clear to me by you or by your counsel why the Federal Aviation Act should have different treatment on this subject matter of control.

Mr. CROOKER. We have invited the attention of the committee to three approaches. One is where you say "control" but you don't attempt to define it. That fits in with just what you are just asking. But it raises serious questions as to what is control.

Robert Young said he controlled the New York Central when he had 4 percent of the stock 25 years ago. I don't know whether he did or not. We thought it might furnish some ease of application of it if at least there were a prima facie presumption that acquisition of a certain percent of the stock constituted control.

Mr. FRIEDEL. Thank you. Mr. Adams?

Mr. ADAMS. Mr. Crooker, I understand the problem of the conglomerates which you are attempting to take a bite out of, but I want to ask you several specific questions on a particular problem, which is involved in these bills.

First, you testified that the Board to this point has not faced or is not aware of evidence of raiders on the air carriers. These raiders buy out a company in a particularly good cash position, drain the cash and use the cash for other of their operations. This is the traditional attack of the conglomerates on companies in cash positions. And we understand the air carriers are in a vulnerable position because they must accumulate large amounts of cash in order to update their equipment.

Is it your position that this pattern of attack is not in evidence yet, to your knowledge?

Mr. CROOKER. To my knowledge, no completed acquisition of control of a carrier, such as the Storer-Northeast situation, has occurred where the acquiring entity is draining off cash from the carrier for other purposes.

Mr. ADAMS. Would you give a memorandum to the chairman and a copy to me, which I am sure you have in your files, of an analysis of the present multiple or single control factors involved in the trunk carriers and local service carriers? I believe there are 10 and about 26 respectively. So we can get an analysis when this committee marks up, if we use H.R. 8261, of the various percentages that should be used, one for notice, and second for possible control legislation. You realize, of course, that if we use the term "control," it would put the burden upon the Board in each case to determine control.

And if you want percentages put into the legislation by this committee, we need to know the basic factors which will determine the percentages to be used. Can you do that for me?

Mr. CROOKER. We will be happy to supply what I think, serves that purpose.

Bear in mind, sir, that under the present reporting requirement what we know is what stock is owned by officers and directors, and then stock owned by others if it is more than 5 percent.

(See letter dated April 21, 1969, p. 26.)

Mr. ADAMS. That is what we want to know because we could base a 5-percent disclosure section, (sec. 1 of H.R. 8261) on that; and we could base an intervention section (sec. 4) on that, because we are talking about amounts over 5 percent.

We are entering into a field with which we have had a great deal of trouble. There are various jurisdictions handling, monopoly situations or control situations in the corporate structure of America. Basically they are the SEC, Antitrust Division of the Department of Justice, and various regulatory agencies, CAB, ICC, and so on.

I would like to know what you believe. First, let me ask this. There is in H.R. 8261 a proposed amendment, which is section 3(b), requiring notice to the Attorney General. You testified that you presently give notice to the Attorney General. Is this done by statute, custom, or regulation?

Mr. CROOKER. As a matter of practice at this time. We stated we had no objection to the provision.

Mr. ADAMS. Then that provision should probably be included so we get a uniform approach I would state to you, Mr. Chairman, that we face this problem in many other agencies, and I think we need a uniform approach as to what the relationship will be between the Department of Justice, probably the SEC, a regulatory agency, and who will regulate stock acquisitions effected for improper control purposes as opposed to operating purposes.

Would you agree with that?

Mr. CROOKER. Mr. Adams, I merely wanted to assure you that from the Board standpoint, even before any legislation is passed, we are continuing our practice of advising the Attorney General. We defer to the views of the Congress as to whether this should be written into the statute, or left with the various agencies merely by regulations.

Mr. ADAMS. All right. Now turning for a moment to bills H.R. 8323 and H.R. 8322, it is my understanding that those two bills, particularly H.R. 8322, basically would keep anybody who was not presently in the airline business from acquiring control of any airline.

Mr. CROOKER. Anyone who is not in the transportation business.

Mr. ADAMS. Yes; airline transportation business.

Mr. CROOKER. Just the transportation.

Mr. ADAMS. All right. H.R. 8323 would require CAB approval for those who want to get into the business. But couldn't this be covered by the provisions of section 2 of H.R. 8261?

Mr. CROOKER. The place where H.R. 8323 expands H.R. 8261 is that it relates to control of persons engaged in phases of aeronautics in addition to merely the air carriers, and we thought that this would greatly expand the jurisdiction of the Board needlessly.

Mr. ADAMS. H.R. 8261 is better in that it applies only to air carriers. But it does place requirements on all persons who would be involved in control?

Mr. CROOKER. Yes, sir.

Mr. ADAMS. All right. Now, the last thing that I have is this.

Assuming we go on this basis: Congress establishes a percentage for notice so that you do not have to get into a control decision each time. Notice of more than 5-percent control would require disclosure so that you could examine the matter and make a determination of who was doing what in the non-air-carrier portion of corporate America so far as the air carriers were concerned.

So we get a disclosure provision at, say, 5 percent.

The second part is your determination of when to have a hearing. I gathered from your testimony that you are worried about the problems involved in an adversary proceeding or a lengthy hearing proceeding; and you want a percentage fixed that allows you to decide whether to hold a hearing or not. Is that correct?

Mr. CROOKER. Mr. Adams, I am afraid that I can't give you a very short answer.

First, we support the objectives of this legislation in giving the Board control over acquisition of control by anyone in the public, and particularly with the idea that there be either a fixed percentage, or a percentage where there would be a prima facie presumption of control.

Mr. ADAMS. That is what I want to know. You want three pegs. You want a disclosure peg, you want an area of determination whether or not you are going to hold a hearing, and then you want one where you will always hold a hearing.

Mr. CROOKER. No, sir; we think that there should be only the two percentages. I might say that on the Senate side, Senator Magnuson referred to the reporting percentage as the yellow light, instead of the red light with the higher percentage for control. But the matter of whether we hold an evidentiary hearing or not is a different point. That point is that we be allowed some procedural flexibility in order that we will not have a 16-month hearing if it is obvious that such a hearing is not needed.

Mr. ADAMS. That is what I am asking. How big a gray area do you want between disclosure and where you absolutely have to hold a hearing. If you absolutely have to hold a hearing, in some cases you will inhibit the airlines' financing to a considerable degree. The minute that a company starts to sell stock or go into a major tender or something of this nature, and they are also involved in a procedural hearing, their financing will be inhibited.

So I need to know what your feeling is about the point at which a hearing becomes mandatory and in what area you want flexibility.

Mr. CROOKER. We don't think there should be any percentage at which the hearing should become mandatory. I do feel, thinking about administrative procedures generally, that if the Board is going to disapprove the proposed relationship, it should proceed to an evidentiary hearing.

Mr. ADAMS. But you have got to give the Congress the key as to how this procedure should be triggered. If Congress sets a percentage, an airline can finance below that percentage. If you have received an application that you must act on within so many days, then the company would wait the 30 days and then they could go on with their financing. We need to know what kind of a trigger mechanism you want to use.

Mr. CROOKER. Mr. Adams, it is not tied in with a percentage. We have suggested a proviso to 408(b), providing that in any case in which an order of approval is required by reason of the requirements of 408(a), the Board may enter such order pursuant to such procedures as the Board may prescribe by regulation. We could do it on a show-cause order, which would take one-tenth of the time.

Mr. ADAMS. That is all I want to know. You want to have a percentage pegged at 10 percent or whatever we analyze to be correct from your memorandum. At that point you will be notified and then you will have so many days within which, by show-cause order, say, to hold a hearing. If you haven't held it in that many days, then the company can go ahead with its financing; is that right?

Mr. CROOKER. Congressman, we could handle it several ways. We could look at the transaction and say this has so many dangers to it that we will insist that there be an evidentiary hearing, or we think it should proceed quickly pursuant to show-cause order procedures.

There would not be a requirement that some would receive the hearing and others would be handled by a show-cause order. The Board would be left with procedural flexibility to go either way when the 10-percent figure was reached.

Mr. ADAMS. But you would want a time limit on that.

Mr. CROOKER. Not in the statute.

Mr. ADAMS. If it is not statutory, then these fellows will be left hanging with their financing.

Mr. CROOKER. Congressman, I think under the present provisions requiring Board action where a person engaged in a phase of aeronautics seeks control of an air carrier, there is no provision that it has to be done within a certain time limit.

Mr. ADAMS. But you have to remember that we are dealing with a particular monopoly situation or with a danger of a horizontal monopoly. This is the problem we have with conglomerates.

When one beings to spread to all persons certain requirements on financing, particularly equity financing with stock, one is asking questions about both the legislation as well as the potential monopoly or raid situation. If there is not a time limit within which the CAB must act, then when the company attempts to finance through the floating of stock and it gets the offer from one purchaser, the financial negotiations will be tied up for whatever period of time you state.

Mr. CROOKER. Congressman, we hope that we are not tying up and won't tie up these proceedings unreasonably to where it would be impossible to do normal financing. I might say that the proceeding has a judicial tone, and any time the Congress says that a matter has to be determined within 30 or 60 days—

Mr. ADAMS. No; I am just cranking in what we really require in the SEC procedures now in corporate financing. Those requirements state that one must file an application and within 30 days or within 60 days, and I don't pretend to be an expert on SEC procedures, the SEC must tell you whether or not they are going to disapprove it. And then as one prepares the financing, he knows that at the end of a certain period of time, he can proceed.

Mr. CROOKER. I think that the only result a 60-day provision would have would be to occasionally bring about a disapproval. If maybe 30 more days were allowed, and there was not a statutory deadline, the transaction would meet with approval.

The reason we want the short cut is to avoid a 16- and 17-month proceedings. We want to proceed in many, many instances on the show-cause procedure basis, and that might well permit complete handling in 30 or 60 days. We would hope there would not be a statutory time limit.

Mr. ADAMS. Thank you, Mr. Chairman.

If the Chairman or his counsel would supply us in written form and send it to the chairman and send me a copy of what your proposal is in that area, I won't take any more time.

(See letter dated April 21, 1969, p. 26.)

Mr. FRIEDEL. Thank you.

Mr. Kuykendall?

Mr. KUYKENDALL. Mr. Crooker, I would like to, for the sake of the record and for the sake of the members particularly who do not have a chance to digest these entire proceedings, review what is now possible and what would be the case and let's build up a hypothetical case here on percent.

Do you feel that except in the case of our large carriers, our top five or six, let's say, do you feel it is possible for anything that you would describe as clandestine operation to even approach control?

I know in the small carriers it is possible, but in the large carriers, do you think anything approaching control could ever be reached on any sort of a clandestine operation instead of an overt operation?

Mr. CROOKER. Mr. Kuykendall, I think it is possible. I alluded to the fact that in the instance of American Airlines I don't believe any one person or group owns more than 0.9 of 1 percent of the stock. I made mention of what Bob Young claimed 30 years ago about control of the Central.

Mr. KUYKENDALL. Will you yield right there?

I was going to come to the nine-tenths of 1 percent that you mentioned on American. Would 3 percent control American?

Mr. CROOKER. I don't know, sir. We find that as of December 31, 1967, some of the mutual funds had gained 5, 6, 7 percent of the stock of some of the trunk carriers. In some instances, there were two or more of the mutual funds that had an interest of this magnitude. In the case of one of the big trunkline carriers, some eight or nine hands put together approaches 70 percent of the stock.

Suppose they act in concert?

Mr. KUYKENDALL. Let's talk now about a hypothetical case of one individual, not even a combine. An individual. And we are all certainly aware that there are a few of those around in the world that have money to buy virtual control of almost any airline.

In fact, one man recently sold control of one airline, right? Through activities that were clandestine or covert, one man gets, say, 7 percent, which is certainly virtual control of American Airlines.

He has bought it. Now he has not had to have permission from anybody through his agents himself to buy it, has he?

Mr. CROOKER. That is correct.

Mr. KUYKENDALL. Now, he buys it. The board meets. He runs his boys in and he elects a bunch of folks. Then what do you do?

Mr. CROOKER. Under the present statute, it would be difficult to do anything.

Mr. KUYKENDALL. Under what circumstances under the existing statutes could you do anything. If, let's say, for instance the man that he runs in is controller of the company. We are going to get extreme here to try to find out where we stand now.

Let's say that the man that he runs in as controller of the company has a prison record, has served his term and has been pardoned by the Governor or something, and let's say he has a prison record. We mentioned a while ago undesirable elements.

Who determines whether he is undesirable and what is "undesirable"?

Mr. CROOKER. Section 415 of the act says that for the purpose of exercising and performing its powers and duties, the board may inquire into the management of the business of any air carrier to the extent reasonably necessary for any such inquiry, to obtain from such carrier or from any person controlling it full and complete reports and other information.

Well, this seems to empower us to get a good deal of information. I suppose then we are back to the problem of canceling or amending the certificate which we have discussed with Mr. Devine.

Mr. KUYKENDALL. Mr. Crooker, would you use an extreme hypothetical case here that is not likely to happen, but for the record would you describe a case where you would call a group of investors undesirable? What might they have done to be undesirable?

Mr. CROOKER. I would be particularly concerned about foreign interests. I think that would be the most undesirable of all. Let me go from there to the newspapers which you and I read about equally, I suppose. We are told that gambling interests represents some elements of undesirability.

I would assume that might be a matter that the board would at least look at if it had the power to make inquiry into things of this nature.

Mr. KUYKENDALL. Would the burden of proof be entirely on the board in this case?

Mr. CROOKER. Under the present status?

Mr. KUYKENDALL. Yes.

Mr. CROOKER. Oh, I think clearly so.

Mr. KUYKENDALL. All right. Now in the question of, you are mentioning, for instance, gambling interest. State of Nevada gambling is perfectly legitimate. Of course, an owner of a former airline is deep in Nevada, I understand.

Mr. CROOKER. You have allegations in a pending matter by incumbents management of a trunk carrier that some one interested in acquiring, or maybe has acquired a substantial block of stock in such carrier has similar interests.

Mr. KUYKENDALL. All right. Going back to the clandestine or covert acquisition as compared to the overt declarative acquisition, you certainly have no problem in investigation of intent when somebody declares that they want to buy 9 percent of Pan American.

If they declare they want to do it, you decide they want to do it and the case is pretty wide open for you to investigate if you have authority to do so. What about investigations of acquisitions that are not declared? What is your authority in that field or do you need further authority in that field?

Mr. CROOKER. Well, if you get a report from the stockholder himself, and if he fails to report it, of course it immediately becomes a violation of the law and an enforcement matter. That is one reason we are seeking the language that beefs up section 407. At the present time, the air carrier would merely tell you that 6 percent is owned in a particular street name here and 6 percent in maybe another street name there. It may be that the beneficial owner is the same man.

So, I think it is our desire to have stronger reporting requirements under 407.

Mr. KUYKENDALL. One last question.

There seemed to be a little contradiction here and I want to find out from you or counsel or possibly Mr. Dixon, the previous requirements of 75 percent ownership by American citizens allows 24.9 by foreign interests by statute; is this correct?

Mr. CROOKER. That is in 101(13).

Mr. KUYKENDALL. Now there is no such thing as a major carrier that 24.9 won't control, is there?

Mr. CROOKER. I would say that—

Mr. KUYKENDALL. Of the major ones.

Mr. CROOKER (continuing). There are one or two that it won't.

Mr. KUYKENDALL. Well, virtual control of the major airlines.

Mr. CROOKER. Yes, seven or eight of the trunks.

Mr. KUYKENDALL. You anticipate that that concept of allowing foreign ownership of 24.9 percent of the stock would be changed by

this particular approach, particularly since you said that extensive foreign ownership would be one of the flags of warning that you would use as an undesirable ownership?

Mr. CROOKER. Presumably if there were enough different people so that no one owned up to the percentage where even reporting was required, we wouldn't know about it either under the present statute or under the bills under discussion here today.

Mr. KUYKENDALL. One last quick question. Getting clear back down to the American Airlines with their largest ownership of 0.9 percent, do you think that reporting at 5 percent is satisfactory for a corporation where certainly 2 or 3 percent would be the largest voting bloc that appears at a stockholders meeting?

Mr. CROOKER. Mr. Kuykendall, plainly the 5 percent was enacted 31 years ago, and when I stated that the percentages in 407 and 408 should be different, I used some examples. It could be 3 and 6, 4 and 8, or 5 and 10—but on the exact percentages, I suppose the SEC might be able to give you more instances than we could as to what those percentages should be.

Mr. KUYKENDALL. Mr. Chairman, I feel that the CAB does need some more authority in this field and I am supporting basically the legislation of your position. I wanted to amplify where you did have extreme shortcomings in the present structure of not being able to act as quickly and as well as you should.

Thank you, Mr. Chairman.

Mr. FRIEDEL. I want to advise that this subcommittee is going to move with speed for the markup of the bill and report of the bill to the parent committee.

I for one want a solid basis upon which to urge prompt and positive legislative action. I think we have to act on it with promptness, but we want to be sure of what we are doing and that we are not hurting any of the other industries. That is why I said I would like to concentrate on H.R. 8261.

This could go a long way to correct one serious situation.

I think something has to be done immediately. We want to get the proper bill and submit it to the full committee and get it out of full committee and pass it on to the Senate.

Are there any other questions, Mr. Pickle? Let me state that after we are through with you, Mr. Crooker, we are going to recess until Thursday and then we will hear the Honorable Hugh F. Owens of the Securities and Exchange Commission. There won't be a meeting tomorrow and if there are any questions that the members have, please submit them in writing so we can have them before Thursday.

Mr. Pickle?

Mr. PICKLE. I want to pursue a thought with you further, Mr. Chairman, as to this matter of financing. If I understood your answer to my questions earlier, you indicated that the CAB would not view with any concern or alarm at least where stock is put in a trust fund and is controlled by a lending institution.

I am going back to a case which has been referred to as TWA financing in the early sixties. In order to get into the jet business, they had to buy a great deal of stock and all of the stock was put up in trust. Four or five institutions actually purchased some 70 or 80 percent of the stock.

For a period of time, 5 years, I assumed that entity had control of that airline. Is it the Board's position that you should not concern yourself about whether that constitutes control or not?

Mr. CROOKER. Mr. Pickle, I didn't intend to state that the Board was indifferent to the problem. I stated that under the present statute, and under bills here proposed, debt financing and the hypothecation of securities had not been tackled—only the transfer of the securities.

Mr. PICKLE. Well, Mr. Chairman, should it be included in this particular consideration?

Mr. CROOKER. Where the stock of the airline is hypothecated with the proxies to vote it at meetings rather than just being an outright transfer—where it is a transfer for security purposes—I don't know that the Board has focused on it. I don't know that the five members have reached any position to state to the committee, Mr. Pickle.

Mr. PICKLE. Mr. Chairman, I think that would reflect any views likewise, but it does seem to me that we should give some consideration to the financing of these huge carriers or huge entities, if in effect control is held either through a trust fund situation or even through leasing situation, that perhaps that kind of notice should be given to the Board.

Is that notice given to your Board now officially?

Mr. CROOKER. On a leasing situation, leasing of equipment, but not the matter of hypothecation of stock of the airline.

Mr. PICKLE. And I assume you have mentioned to the Board this problem. I would like to have the Boards' views of whether this should be a matter that should be considered with respect to this particular bill.

Mr. CROOKER. Mr. Pickle, I will seek to get the Board's views, but I would like to be plain on what we are talking about. Are we talking about a pledge of stock in order to secure an obligation of the air carrier itself?

Mr. PICKLE. Well, a pledge of stock that would be necessitated in order to borrow money.

Mr. CROOKER. Suppose that I owned enough stocks to control a small local service carrier, and for purposes entirely unrelated to that I want to buy 5,000 acres of land and I go down to the bank and pledge my stock.

Are you asking that we develop a Board position on whether that pledge of stock or some other purpose should come under the CAB scrutiny?

Mr. PICKLE. What I am asking, should not the Board be notified and perhaps be asked for prior approval where financing had been developed in a manner that, in effect, control could be exercised by a financial institution as well as an individual or a corporation.

Mr. CROOKER. In other words, whatever the percentages would be in the legislation now under consideration, that if there be hypothecation of stock with the power to vote it even for a temporary time, whether that should come under the same provision. I will seek to ascertain what the views of the Board members are and acquaint the committee with those.

(See letter dated April 21, 1969, p. 26.)

Mr. ADAMS. Mr. Pickle, you might mention one of the problems we are facing in the conglomerate field now is purchase of blocks of stock

by banking institutions from groups to which they are presently lending. I don't know whether this has happened in the airline field or not, but what Mr. Pickle is saying is that if a substantial block of stock could be removed from voting position, and at the same time a substantial block of stock is held by a lending institution, the institution can control such things as operating procedures in the airline by saying: "We don't want you to fly as many schedules in a particular case, because we think you are overrunning your equipment."

Now that is what he would like to be sure is being covered.

Mr. FRIEDEL. Mr. Crooker, our counsel has some questions for clarification.

Mr. DIXON. Chairman Crooker, Mr. Devine has left, but I feel sure that he left without being completely satisfied about the comparison between the Interstate Commerce Act and the proposed legislation and the present status of the Federal Aviation Act. Either now, or through submission for the record, explain to the committee why the Federal Aviation Act should be different from 1 (3) (b) of the Interstate Commerce Act, where the terms are "actual as well as legal" control. I wonder, further, if you could furnish for the record the history of this section of the Interstate Commerce Act and any consideration that has been given to it over the years either in or out of court by the Civil Aeronautics Board.

Mr. CROOKER. Mr. Chairman, we will seek to furnish some statement. I guess I had the impression that if it appears desirable to amend the Federal Aviation Act, you wanted our view in that regard whether the Interstate Commerce Act needs amending or not, so we will try to provide an answer.

But I might say that our entire analysis here in the relatively short time since we knew about the introduction of this legislation has been focused on what the Federal Aviation Act ought to provide.

Next, I of course, will provide anything that the chairman and the committee would want, but with respect to the legislative history of the Interstate Commerce Act, I would assume that the Interstate Commerce Commission would be a much more reliable source than we would be. We do our best, but we might not do justice to what the real legislative history is.

(See letter dated April 21, 1969, p. 26.)

Mr. DIXON. I think that is fair, Mr. Crooker, but these are intermodal years and I do think that it is equally fair that you consider statutes that have been on the books for some time and let the committee have your evaluation of the "actual and legal control" as contrasted with 5 or 10 percent.

Mr. FRIEDEL. Or 8 or 4 percent.

Mr. CROOKER. Certainly a statute that has been on the books, and has worked with complete or substantial amount of success, is a thing that deserves the attention of any agency in considering what similar legislation should provide.

Mr. ADAMS. Will you yield?

Mr. DIXON. Yes, sir, Mr. Adams.

Mr. ADAMS. I have some question about how well it has worked, is working, or is about to work in the case of the ICC and particularly in the regulation of the railroads. I wanted to interject that, counsel, and I think the point, Mr. Crooker, is that it is important that we have

some type of uniform approach between the companies and the three regulatory bodies and I hope you will supply to us your position. We will ask the same of the SEC. Mr. Chairman, is someone from the Department of Justice going to testify also on this?

M. FRIEDEL. Yes, on Thursday.

Mr. ADAMS. Thank you.

Mr. FRIEDEL. The meeting stands adjourned until Thursday at 10 a.m.

(The following letter was received for the record:)

CIVIL AERONAUTICS BOARD,
Washington, D.C., April 21, 1969.

HON. SAMUEL N. FRIEDEL,

Chairman, Subcommittee on Transportation and Aeronautics, House Committee on Interstate, and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my testimony before your Subcommittee on March 25, 1969, on bills relating to stock control of airlines, I was requested to provide the following information for the record:

1. An analysis of the present multiple or single control factors involved in the trunk carriers and the local service carriers;
2. An evaluation of the actual and legal control principle, contained in section 1(3)(b) of the Interstate Commerce Act, as against control of 3, 5 or 10 percent of stock;
3. The percentages (both for reporting and control purposes) which the Board believes should be incorporated by the Subcommittee in the legislation;
4. The time limit which the Board believes should be prescribed for it to act on an application for acquisition of stock in excess of the percentage that may be specified in the bills for control purposes; and
5. Whether the hypothecation of stock, with the power to vote for a temporary period, should be brought within the scope of the bills.

1. ANALYSIS OF MULTIPLE OR SINGLE CONTROL FACTORS

As we understand it, the Subcommittee wishes by this request to be informed concerning the percentage-size holdings of large blocks of stock in the trunkline and local service carriers and whether the holders of such blocks of stock may be said to control the carriers involved.

Section 407(b) of the Federal Aviation Act requires an annual submission by each air carrier of the names of each of its stockholders holding more than 5 percent of its entire capital stock. Additionally, section 407(c) requires an annual submission by each officer and director of an air carrier of a report describing any shares of stock held by him in any air carrier, and the Board from time to time also receives other information in the course of evidentiary proceedings concerning the identity of persons holding airline stock. On the basis of these reports and data, the Board's staff has compiled the enclosed listing which reflects all persons known to the Board to hold more than 3 percent of the stock of a trunkline or local service carrier. The reports filed by the carriers pursuant to section 407(b) are as of December 31, 1967 (the most recent on file with the Board), while those of the officers and directors submitted under 407(c) are as of March 1, 1969. The Board proceedings from which data were obtained are subsequent to December 31, 1967.

Except in the instances of Braniff, Northeast and Frontier, where more than 50 percent of the carrier's stock is held by one stockholder, the Board is unable to state that any person holding the percentages of stock listed actually controls the particular carrier. However, it is generally accepted that Trans-Texas Airways is controlled by Minnesota Enterprises, and that Ozark, Piedmont and Southern are controlled by the individuals shown in the report who also are officers and directors of the carriers. Somewhat similarly, it is generally assumed that National Airlines is controlled by Messrs. Swim and Maytag who are either officers or directors.

2. EVALUATION OF ACTUAL AND LEGAL CONTROL

As we understand it, this request asks for a comparison of the "actual" and "legal" control concept, as defined in section 1(3)(b) of the Interstate Commerce Act, and the meaning of "control" as defined in sections 408 and 413 of the Federal Aviation Act. In addition, we are requested to compare the actual and legal control test with the proposed legislation's use of a stated percentage, such as 3, 5 or 10 percent.

The Federal Aviation Act of 1958 carried forward without change the control provisions of the Civil Aeronautics Act of 1938. These provisions in turn were derived from section 213 of the 1935 Motor Carrier Act. Neither section 213 nor section 408 contained any definition of control. Rather, both sections made it unlawful for any person within their purview to acquire control of a motor or air carrier by "any manner whatsoever." Moreover, section 213 and section 413 of the Civil Aeronautics Act provided that "whenever reference is made to control, it is immaterial whether such control is direct or indirect." In 1940, the Congress incorporated section 1(3)(b) in the Interstate Commerce Act, containing a broad definition of control which is designed to encompass "actual as well as legal control" whether exercised in named ways or by "any other direct or indirect means * * *." The Board's staff has always considered that the provisions of the Federal Aviation Act relating to control are as broad as those of the Interstate Commerce Act, and the Board relies upon the overall body of case law, including decisions under the Interstate Commerce Act, in applying and interpreting the provisions of section 408.

The Board has never interpreted the application of section 408 as being dependent upon the acquisition of any specified percentage of stock but rather upon whether in all the facts and circumstances there is power to control or actual control. Thus, as the Board stated in *Railroad Control of Northeast Airlines*, 4 C.A.B. 379, 381 (1943) :

"* * * '[C]ontrol' as used in section 408 does not necessarily depend upon the ownership of any specific minimum percentage of stock or other ownership rights but rather depends, in the light of all the facts and circumstances in a particular case, upon whether there exists as a matter of fact a power to dominate or an actual domination of one legal personality by another."

Without going into detail, the case law shows that the Board and the Commission have followed virtually identical principles in interpreting the term "control" as used in the Federal Aviation and Interstate Commerce Acts. Both have held that "control" is a factually oriented determination, and that ownership of substantial blocks of stock may signal the presence of other factors, which in their totality constitute the power to substantially influence or dominate a company's operations or policies and, hence, to control it. Furthermore, the Board has recognized that control may exist by reason of a debtor-creditor relationship (see e.g., *National Airlines v. CAB*, 306 F.2d 753 (C.A.D.C. 1962)).

Insofar as percentages of stock ownership are concerned, it may be stated that the regulatory agencies and the courts have recognized that, coupled with other factors, percentages of stockholdings as low as 6.2 percent may constitute control. Thus, one Board proceeding involved 11.4 percent of stock ownership (see *Atlas Corp.—Control of Consolidated Vultee*, 9 C.A.B. 921 (1948)), an ICC proceeding involved 6.2 percent (see *Chesapeake & Ohio Railway Company Purchase, Etc.*, 271 I.C.C. 5 (1948)), and an SEC proceeding involved 18 percent (see *American Gas & Electric Co. v. SEC*, 134 F.2d 633, 642 (C.A.D.C. 1962)).

The Board regards its historic concepts of control under the Act as compatible with the proposed use of stated percentages in the legislation. The bills before the Committee do not make ownership of the stated percentage of stock proof of control, but rather create a presumption of control solely for the purpose of insuring scrutiny by the Board. A lesser percentage well might constitute control and, in such a situation, the Board would continue to be obligated under the bills before the Committee to determine whether an acquisition of control had in fact occurred.

3. THE PERCENTAGES TO BE EMPLOYED

Concerning the percentage to be specified for reporting purposes, the Board did not suggest any change in the 5 percent figure contained in section 407(b) of the Act when it offered certain amendments to the bills, and it sees no need at the present time for a change in such figure. The Board did, however, express the view that the reporting requirement should be broadened to apply to

ownership of 5 percent of any *class* of capital stock—rather than of 5 percent of the *total* capital stock, as section 407(b) now provides.

As I also indicated at the hearings, the precise percentage of stock acquisition which should be precluded without Board approval is a matter of judgment and one on which there is room for difference of opinion. Nevertheless, the Board still is inclined to the view that reasonable figures might be 10 percent for initial acquisitions and 5 percent for additional increases in holdings. Although our review of court and agency decisions involving control does not point to any precise percentage as being better adapted for this purpose, it does, as previously stated, indicate that the presence of a block of stock, although small from a percentage standpoint, may indicate other circumstances pointing to the existence of an acquisition of control situation. The Congress used the 10 percent ownership criterion in the Public Utility Holding Company Act. Further more, the ATA and the SEC witnesses testifying before your Subcommittee suggested that the 10 percent figure might be a reasonable figure for this purpose.

4. STATUTORY PERIOD FOR BOARD ACTION ON APPLICATIONS

The Board adheres to the belief that any legislation should not prescribe a mandatory time limit within which the Board must act on an application for approval of a stock transaction. In this connection, a distinction should be drawn between the various proposals pending before the Committee. The bills on which hearings were held would subject all acquisitions of control of air carriers to the Board's approval, and H.R. 8261 would specify a percentage of stock which would be deemed to constitute control unless the Board found otherwise. Under these provisions, the Board, unless the proposed purchase plainly did not constitute an acquisition of control, would be required to proceed by way of an evidentiary hearing. The ATA proposal advanced during the course of the hearings would have permitted the Board to issue an order of approval without hearing pursuant to the third proviso of section 408, in circumstances in which no request was made for hearing by any interested person. In contrast, the Board suggested that (1) the acquisition of stated percentages of stock be made subject to its approval, irrespective of whether such acquisition resulted in control of the carrier, and (2) it be empowered either to exempt from the requirement for its approval, or to approve without hearing, those acquisitions of the stated percentage which otherwise would not fall within the coverage of section 408. This would mean, in effect, that an acquisition of control of an air carrier by another air carrier, a common carrier, or a person engaged in a phase of aeronautics would continue to be governed by existing provisions of the statute, irrespective of the stock percentage involved in the new legislation.

The Board believes that it would be impractical to prescribe a particular period of time within which evidentiary hearings must be completed. This is so not only because the proceedings themselves will vary as to complexity and duration, but because of the crowded status of the Board's docket, which does not always permit an immediate setting down of a matter for hearing. (We do not believe that the Congress should enact legislation giving preference over all other proceedings to the new provisions relating to stock purchases.)

If the suggestion advanced by the Board were to be adopted, it might be possible to prescribe a period within which the Board would be required to approve the transaction without hearing, or to set the matter for hearing. However, the Board's suggestion was that it be empowered to enter orders of approval pursuant to regulations to be prescribed by it, and the Board believes that time limitations would be more appropriately provided by regulation rather than by statute. Under its proposal, the Board would be in a position to establish and adjust procedural schedules in the light of actual experience, rather than being bound by inflexible statutory provisions. In any event, the Board does not believe that the Congress should require either an order of approval or exemption, or a setting off of the matter down for evidentiary hearing, in any less than 60 days.

5. EXTENSION OF LEGISLATION TO INCLUDE HYPOTHECATED STOCK

Following the hearings, the Board considered whether the legislation should be expanded to cover a security transaction involving a hypothecation or pledge of stock, accompanied by a transfer of the power to vote the stock. In cases where the airlines themselves borrow money, they customarily arrange their financing without any hypothecation or pledge of stock. The banks and insurance

companies who lend money to the major airlines for new aircraft purchases make the aircraft collateral for the loan; they do not look to the stock for security. Nevertheless, airline shareholders can offer their stockholdings as collateral for a loan although none have (so far as we know) transferred voting rights to a lender.

As the Committee knows, however, there was one case in which creditors insisted upon a transfer of the airline stock and voting rights to a voting trust in connection with airline financing. *Trans World Air., Control by Hughes*, 32 C.A.B. 1363 (1960). It is thus possible for a shareholder or an air carrier to pledge airline stock and to transfer the voting rights to that stock to a person not within the reach of the existing Act. Without legislation, the transaction would not be subject to the Board's review although the control of the stock would be vested in the pledgee, not the title holder of record. Indeed, the identity of a pledgee controlling more than 5 percent of the stock would not be reported to the Board under the current Act. Consequently, the Board believes that the objectives of the legislation would be enhanced if both the reporting and scrutiny requirements covered such transactions.

In addition to your Subcommittee's formal requests for information, I understand that your Subcommittee also desires the Board's views as to what should be the relationship between it, the Securities and Exchange Commission, and the Department of Justice with respect to the handling of monopoly or control situations. In response to a similar inquiry at the hearings, the Securities and Exchange Commission stated that it believed that the Board and the Interstate Commerce Commission should have the authority to determine whether takeovers should or should not occur with respect to carriers subject to their respective jurisdictions, rather than having the SEC assume general responsibility for the approval or disapproval of takeovers involving such carriers. The Board agrees with the SEC's views insofar as they relate to air carriers.

If you desire further information, please do not hesitate to let us know.

Sincerely,

JOHN H. CROOKER, Jr., *Chairman.*

PERSONS KNOWN TO BOARD HOLDING MORE THAN 3 PERCENT OF ISSUED AND OUTSTANDING STOCK OF TRUNKLINES

Trunk industry	Holders	Percent of outstanding
Carrier:		
American Airlines, Inc.	Chase Manhattan Bank	13.8
Braniff Airways	Ling-Temco-Vought, Inc.	80.06
Continental Air Lines, Inc.	Merrill Lynch	7.90
Delta Air Lines, Inc.	Don & Co.	5.33
	Lerche & Co.	5.1
	Merrill Lynch	5.15
Eastern Air Lines, Inc.	None	
National Airlines	Dudley Swim	5.88
	L. B. Maytag	4.07
Northeast Airlines	Storer Broadcasting Co.	85.67
Northwest Airlines, Inc.	Kane & Co.	9.11
	Lerche & Co.	7.38
Trans World	Chase Manhattan Bank	49.6
United Air Lines, Inc.	Fiut & Co.	3.8
	Kane & Co.	3.4
	Cede & Co.	3.3
Western	Kane & Co.	8.14
	Cede & Co.	5.27
	Kirk Kerkorian	28.0

¹ Docket 20749.

² Orders E-25989, Nov. 17, 1967, and 68-9-86, Sept. 20, 1968.

³ Form 2786.

⁴ Docket 20407.

⁵ Docket 20829.

⁶ Docket 20786.

Note: Reports submitted to the Domestic Finance Subcommittee of the House Banking and Currency Committee, for periods different from reports filed with the Board, also disclose additional airline stock holding information. See staff report dated July 8, 1968.

Source: Except as noted, schedule G-41, persons holding more than 5 percent of respondent's capital stock or capital, of CAB form 41: Data as of Dec. 31, 1967.

PERSONS KNOWN TO BOARD HOLDING MORE THAN 3 PERCENT OF ISSUED AND OUTSTANDING STOCK OF LOCAL SERVICE CARRIERS

Local industry	Holders	Percent of outstanding
Carrier:		
Allegheny.....	None.....	
Frontier.....	RKO General, Inc.....	154.16
Mohawk Airlines.....	Merrill Lynch.....	6.54
	Agway.....	7.16
North Central.....	Ed Phillips & Sons Co.....	13.1
	North American Life & Casualty Co.....	5.4
	North American Life & Casualty Co., profit-sharing trust.....	5.4
Ozark.....	F. W. Jones.....	21.50
Piedmont.....	T. H. Davis.....	8.74
	Incl. & Co.....	5.94
Southern Airways, Inc.....	Frank W. Hulse.....	213.48
Trans Texas Airways.....	Minnesota Enterprises, Inc.....	349.69
	R. W. Pressprich & Co.....	

¹ Order E-21595, Dec. 17, 1964.

² Form 2786.

³ Order E-24942, Apr. 4, 1967 (disclaimer).

(Whereupon, at 11:45 a.m. the hearing adjourned, to reconvene at 10 a.m., Thursday, March 27, 1969.)

ACQUISITION OF CONTROL OF AIR CARRIERS

THURSDAY, MARCH 27, 1969

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. Samuel N. Friedel (chairman of the subcommittee) presiding.

Mr. FRIEDEL. The subcommittee will please be in order.

Today we will continue our hearings on the question of acquisition of control of air carriers.

Our first witness this morning is Mr. Hugh F. Owens, Commissioner of the Securities and Exchange Commission. We also have scheduled witnesses from the Department of Transportation, Department of Justice, and the Air Transport Association.

The subject of changes in corporate control is a matter of great interest in the country today. While our present concern is limited to air carriers, we will be interested in the views of the Securities and Exchange Commission as to just what we should have in mind when we debate the questions of "conglomerates."

The Subcommittee on Transportation and Aeronautics has a responsibility to see that the air carriers perform the services for which they are certificated. This responsibility is discharged through our continuing concern and jurisdiction with and over the Civil Aeronautics Board. We have already received testimony from that agency.

Personally, I am not satisfied that their testimony and recommendations fully meet the present problem. However, we expect additional information from them, and I am looking forward to the testimony which we will receive today for assistance in achieving a record which will provide a solid basis for committee consideration in a markup session.

I believe that the particular examples of possible acquisition of control such as the much publicized one concerning Pan American by Resort, or the one concerning the control of Western Airlines by a Mr. Kerkorian need not be singled out for our attention.

So far as I am concerned, if there is a necessity for legislation, such necessity should be met by drafting legislation which will cover the entire certificated air carrier industry.

With that, it is now my pleasure to introduce Mr. Hugh Owens of the Securities and Exchange Commission.

Mr. Owens, you may proceed.

STATEMENT OF HON. HUGH F. OWENS, COMMISSIONER, SECURITIES AND EXCHANGE COMMISSION, ACCOMPANIED BY PHILIP A. LOOMIS, GENERAL COUNSEL

Mr. OWENS. Thank you, Mr. Chairman.

I would like to present to the committee this morning, sitting on my left, the very able General Counsel of the Commission, who will assist me this morning in answering some of your questions, or any other matters. This is Philip A. Loomis.

Mr. Chairman and members of the subcommittee, it is a pleasure to be here. The subcommittee is considering H.R. 8261, H.R. 8322, and H.R. 8323, bills which would, in effect, amend the Federal Aviation Act of 1958 so as to make it unlawful for any person to acquire control of any air carrier unless such acquisition is approved by the Civil Aeronautics Board. Normally, legislation of this type is not within the responsibilities of the Commission. This legislation, however, does have a relationship to the current wave of corporate combinations and the rise of the so-called conglomerate corporations. We understand the subcommittee would like some discussion of this movement and of the Commission's responsibilities with respect to it, together with any aspects of it which are a source of concern to the Commission. I understand also that you wish any views we may have with respect to these bills.

First, with respect to the Commission's jurisdiction in general and insofar as relevant to the subject of today's discussion, the Commission's primary responsibilities are three: First, to provide disclosure of material business and financial information with respect to securities being offered to the public and with respect to securities publicity traded in the markets. Disclosure with respect to new issues is provided by registration statements and prospectuses under the Securities Act of 1933, and disclosure with respect to publicity traded securities is provided by registration and reporting by the companies under the Securities Exchange Act of 1934. Secondly, the Commission seeks to detect and prevent fraud, deception, and manipulation in the securities markets. Thirdly, the Commission is responsible for regulation of the markets and of the brokers and dealers doing business in them.

In this aspect of our work, there is a rather unique scheme of self-regulation. The exchanges are made responsible by law to regulate the conduct of their members and to enforce, as to their members, the provisions of the Securities Exchange Act of 1934. In the over-the-counter market, the National Association of Securities Dealers has a similar responsibility. This is not a trade association, as its name might indicate, but rather is an association comprising most of the broker-dealers who do business in the over-the-counter market, or who underwrite new issues. It was created pursuant to the so-called Maloney Act, adopted by Congress in 1938, for the purpose of providing a self-regulatory body in the over-the-counter market, with statutory responsibilities comparable to those given the exchanges. The Commission is required by these statutes to exercise continuous oversight over the activities of the self-regulatory agencies to see that they do the job which Congress entrusted to them. The rules of both the exchanges and the association are subject to review by the Commission.

The object of this regulatory pattern is to enlist the best efforts of both the industry and the Commission to seek adherence on the part of the industry to just and equitable principles of trade, to prevent fraud and manipulation, and to maintain fair and orderly markets. Except in the limited area of public utility holding companies, the Commission ordinarily has no authority either to approve or disapprove a corporate acquisition or to indicate a view as to its merits.

Turning now specifically to our jurisdiction with respect to corporate combinations, where a person seeks to take over another company by offering its securities in exchange for outstanding securities of the so-called target company, the company seeking the takeover will be required to register the securities to be offered with the Commission under the Securities Act.

When the transaction involves a vote of stockholders, either because a merger is proposed or because changes in the corporate structure or capitalization are necessary in order to consummate the transaction the company seeking such a vote will, in almost every case, have to furnish its stockholders with a proxy statement. This statement is designed to provide the stockholders with the information necessary to permit them to cast an informed vote. While we review such statements in an effort to see that they are accurate and adequate, we are not permitted to pass upon the merits of the proposal on which the shareholders are asked to vote.

Our responsibilities with respect to takeover efforts were recently increased when Congress enacted Public Law 90-439, effective July 29, 1968. This legislation provides that any party who acquires 10 percent of any class of equity securities registered under the Securities Exchange Act of 1934, or who makes a tender offer for such securities involving at least 10 percent, must provide certain disclosures concerning itself and its intentions. I might say parenthetically I will make some references to these percentages figures at the end of my statement, in this act, and also in the other act. It also prohibits fraudulent, deceptive, and manipulative practices in connection with tender offers, and contains substantive requirements concerning the terms of such offers. In addition, it provides for regulation by the Commission of solicitations of shareholders in favor of, and in opposition to, a tender offer. It is important to note that takeover efforts through an exchange of securities rather than a cash offer are exempted from most of its provisions.

Recent years have seen a substantial acceleration in corporate acquisitions. A representative of the Federal Trade Commission presented striking testimony with respect to this trend before the House Committee on Ways and Means. He pointed out that the total number of manufacturing and mining mergers in 1968 reached 2,442, which was 12 times the 1950 level, three times the 1960 level, and $1\frac{1}{2}$ times the level of 1967, which was the previous peak year. He also pointed out an increasing tendency for acquisitions to involve large corporations, which were defined as those having assets of \$10 million or more. Corporations in this size group are a particularly significant factor in our economy. While there are over 180,000 corporations engaged in manufacturing and mining, a relatively small group, 2,500, with assets of over \$10 million, have more than 80 percent of all corporate manufacturing assets and profits. In 1968, at least 192 large corporations,

as so defined, were acquired. Over the period from 1948 through 1968, large manufacturing and mining corporations with combined assets of \$52 billion were acquired. Over one-half of these assets were acquired in the last 4 years of this 21-year period.

When very large corporations are considered, the trend is even more striking. Over the entire 19-year period from 1948 to 1966, only five companies with assets exceeding \$250 million were acquired. In 1967, there were six such acquisitions, and in 1968, there were 12. Thus, more very large acquisitions occurred in 1968 than during the entire 20 preceding years. The Commission's files contain certain further data. In 1968, a total of over \$11,220 million of securities were registered with the Commission for the purpose of exchange for the securities of other companies. Our staff has analyzed 54 cash tender offers, information with respect to which was filed with the Commission pursuant to Public Law 90-439. During the period from the effective date of that bill to February 28, 1969, these 54 cash tender offers involved a total offering price of over \$1,423 million. Of this amount, the lion's share, or \$1,135 million, was financed by bank loans, and another \$97 million by prior sale of securities.

With respect to exchange offers, there has been a marked trend away from exchange offers on a stock-for-stock basis to ones in which debt securities are offered. Analysis of the registrations which were filed with us for exchange offers of securities shows that in 1966 almost 90 percent of such filings were for common stock. In 1968 the corresponding figure was only 40 percent. In this regard, our latest data show that the dollar volume of securities registered for purposes of exchange offers was greater in the month of January 1969 than it was for the entire fourth quarter of 1968, and totaled in excess of \$3.5 billion. The strong movement away from common stock was evident in these data also.

It seems to me there are two major factors which have a good deal to do with the rapid increase in corporate combinations. The first is the increased use of corporate takeovers, where a company acquires another by appealing, often over the head of management, to the security holders of the so-called target company by offering them either cash or a package of securities in exchange for the securities of the target company. This, of course, is to be contrasted with the more traditional merger, which is negotiated on terms mutually acceptable to the parties. The second factor is the rise of the conglomerate corporation. The term apparently originated in the classification of acquisitions under the antitrust laws, but has now become a part of our general vocabulary. It refers generally to a company which is engaged in two or more lines of business which are entirely unrelated, such as shoe manufacturing and the steel business.

Until comparatively recently, most mergers and acquisitions involved companies which were either in the same line of business or in related lines of businesses. The conglomerate, however, is not so limited. The corporate takeover and the conglomerate corporation in combination greatly increase the opportunities for corporate acquisitions. By the use of the takeover, a company can consummate an acquisition whether the management of the target company likes it or not. Furthermore, acquisitions by a company of another company in the same business or in a related business have been rather strictly limited by

the antitrust laws. As you know, the Justice Department announced this past weekend that it planned to file suit against Ling-Temco-Vought, Inc., to force a divestiture of its interests in Jones & Laughlin.

Both the takeover technique and the conglomerate corporation are somewhat controversial. The takeover effort is viewed by some as an instrument by which corporate raiders may swallow up important and useful companies. On the other hand, it is defended as perhaps the only effective way in which an entrenched but inept management may be dislodged. Similarly, conglomerate corporations are regarded by some as an unhealthy development leading to undue concentration of control over the economy and as creating complex organizations, with equally complex, and perhaps unsound, capital structures. It is contended that such organizations are difficult to manage effectively and likely to be vulnerable in the event of an economic downturn. On the other hand, they are defended as a means by which economic resources can be more effectively deployed and acquired companies can obtain resources and support which will enable them to develop their full potential as contributors to our economy. We do not have the answers to this debate. We suspect that some takeovers and some conglomerates are desirable and useful, and that some are not. One thing we think, however, is reasonably clear. The takeover movement and the rise of the conglomerate corporation carry with them a potential for a rather fundamental change in the structure of American industry. As such, these matters certainly merit the attention of the Congress.

Irrespective of fundamental economic and social issues, there are certain aspects of the takeover movement and the conglomerate corporation which are a source of concern to the Commission.

Until the last 3 or 4 years, the acquisition and merger movement, although extremely important from the standpoint of economic concentration of business and markets, and from the standpoint of overall competition, did not carry with it or have associated strong financial implications. In the last 3 or 4 years, and particularly this last year, more and more the basic reason for the merger or combination seems to be essentially a financial reason. That is, companies are buying other companies or merging with other companies because there are substantial immediate financial advantages to the surviving company in terms of increases in per share earnings, and in terms of the liquid assets which can be obtained by acquiring other companies.

The tendency of the market to give a generous times-earnings appraisal to certain stocks has an additional consequence in encouraging combinations. Let me illustrate by a hypothetical and somewhat oversimplified example. Assume that the acquiring company has become a glamor company, so that its stock sells at a high multiple of earnings. An ideal target for acquisition by this glamor company may be a conservative capitalized company which has had relatively slow earnings growth, so that its stock sells at a low multiple of earnings. For purposes of illustration, let us assume that total earnings of each of the two companies are about equal, and that each is earning \$1 per share, but the common stock of the acquiring company sells at 30 times earnings, while the common stock of the target company sells at 15 times earnings. If the acquiring company can engineer a takeover by exchanging stock on the basis of market value—that is, one of its shares for each two shares of the target company—the total earnings

of the combination are twice that of the target, while the total outstanding shares have only increased 50 percent. In consequence, after the combination, its own earnings per share—restated historically for the same period—jump from \$1 per share to \$1.33 per share.

The techniques for accomplishing corporate takeovers have become increasingly sophisticated, and we believe they are changing rather rapidly. We understand that at present a company planning an acquisition will select as a target a company whose shares are selling at a lower price-earnings ratio, perhaps because it is not regarded as a glamor company and has not caught the fancy of investors and speculators in today's markets. Before announcing its acquisition proposal, the acquiring company will quietly accumulate shares of the target company by purchases in the market, and may also inform certain aggressive institutional investors of its intentions. These institutions, in turn, will then buy securities not only of the target company, but also of the acquiring company, since they contemplate that if the acquisition is successful, the earnings per share of the acquiring company will increase due to the phenomena that I described earlier. While the proposed acquiring company will usually not buy as much as 10 percent of the target, since this would necessitate a filing with the Commission under Public Law 90-439, and consequent disclosure of its purposes and intentions, it may nevertheless succeed, through interesting others, in placing in its own hands and in so-called friendly hands up to 25 or 30 percent of the stock of the target company before the proposed acquisition is announced. The effect of this purchasing is likely to cause the securities of both the target company and the acquiring company to rise significantly in price even before the proposed acquisition is announced.

Takeovers have an impact in other ways, due principally to the fact that the average public investor does not fully understand the complicated package being offered when a tender offer is made. With respect to some conglomerate corporations, we have been concerned by the extremely complex capital structures which are often created. In addition, we have felt that improvements are needed in accounting practices as applied to conglomerates in order to provide more meaningful information for investors and the securities markets. Today, a typical exchange offer might consist of a proposal to issue a package of securities consisting of—

- (1) \$45 principal amount of subordinated debentures bearing interest at a specified rate;
- (2) Three-fifths of one share of preferred stock; and
- (3) Three-tenths of a warrant, expiring in 5 years, to purchase one share of common stock at a specified price, all in exchange for two shares of common stock of a specified issuer.

Here I might say parenthetically I was examining just yesterday a copy of a preliminary prospectus on file with us in connection with a proposed exchange offer which was very close to this particular formula, and the prospectus, incidentally, is, including the exhibits appended thereto, 99 pages in length of printed matter, of course.

I would submit that it would take a financial analyst a great length of time and some degree of difficulty to analyze just exactly what was being proposed, and what the shareholder of the target company was getting, particularly in view of the fact that should 1 year hence the

takeover company experience a decline in earnings as much as 10 per cent.

It may be difficult for a shareholder who receives such an offer to evaluate the package, by reason of the uncertainties involved in valuing subordinated debt or preferred stock for which the market has not been established, and for which no existing issue can be used for comparison. It is likewise difficult to value a right to purchase shares in a future period. In addition, there is the typical problem of inconvenient fractions.

These aspects of takeovers and conglomerate corporations have made it increasingly difficult for the Commission to obtain disclosure which is meaningful to the average investor. Prospectuses and proxy statements of a conglomerate corporation planning a takeover are often extremely complex documents, not because we want it that way, but because what is being described is inherently complex. Where, as is quite often the case, two or more corporations are seeking to acquire the target company, and the management of that company is resisting one or both of these suitors by every means available to it, the situation becomes even more complicated. Claims and counterclaims, charges and countercharges, are hurled back and forth by all concerned, and each side accuses the other of unethical or unlawful tactics. It thus becomes much more difficult for us to prevent investors from being misled. I might say, incidentally, that the Commission believes not only the takeover itself, but also certain of the defensive tactics of management raise problems as a matter of public policy; for example, corporate charters may be amended to restrict voting rights of shareholders in order to abort the takeover, and defensive mergers may be negotiated hastily and, in some instances, without adequate consideration of their business and economic merits.

Takeover efforts are, as I have mentioned, accompanied by very active trading in the securities of the companies involved. There is not only the accumulation prior to the offer, which I referred to, but during the period of the offer, or while a registration statement with respect to the offer is on file with the Commission but not yet effective, speculators and arbitrageurs trade actively in the securities involved.

Even if the takeover bid is unsuccessful, the would-be takeover parties may end up with a substantial profit. Although we do not have specific figures in this area, we are aware of a number of instances in which unsuccessful tender offers have led to profits of many millions of dollars when the unsuccessful party has resold in a market which has been affected by both its efforts and the efforts of those who have successfully resisted its attempt to take over.

All this activity contributes to the tremendous increase in volume of trading on the securities exchanges and in the over-the-counter market which has occurred recently.

Shortly after I joined the Commission in 1964, the New York Stock Exchange reported that the exchange estimated that by 1975 there might be occasions when as many as 10 million shares would be traded on the exchange in a single day. As you know, 10-million-share days are now routine, and some days have been well over twice that figure. This unexpected increase in volume in trading has presented us with a serious problem. Many firms in the securities industry have not been equipped to handle the volume of business which came to them, and as

a result they have fallen behind in their bookkeeping and in the delivery of shares which have been sold from the seller's broker to the buyer's broker. In some instances, we have found firms whose records were in such a condition that they did not know where they really stood. The Commission and the self-regulatory agencies are bending every effort to remedy this situation, but the final solution may be some time in coming. Takeover efforts and conglomerates, of course, are not responsible for this situation. It is more the product of a substantial increase in speculative activity not only by individual investors, but also by certain institutions such as the so-called "go-go" mutual funds and the hedge funds.

Turning now to the bills before the subcommittee, the Commission has no real acquaintance with the regulatory pattern for the air carrier industry, which was created by the Federal Aviation Act, and consequently we are not in a position to express an informed judgment as to whether enactment of these bills is necessary or appropriate to prevent disruption or impairment of the regulatory scheme. On the face of things, however, it would appear to be in the public interest that the Civil Aeronautics Board should have an opportunity to take a look at a proposed acquisition of an air carrier, in order to determine, for example, whether or not this would create relationships which are not in the public interest, or whether the acquisition would impose upon the carrier a capital structure which would interfere with its efficient and economical operation. We have encountered questions of this sort in our administration of the Public Utility Holding Company Act of 1935, where our prior approval is required for certain acquisitions by a holding company. This type of legislation seems entirely appropriate, particularly in view of the fact the air carrier industry has associated with it important national defense implications.

The Civil Aeronautics Board will, no doubt, have suggestions concerning the exact provisions and procedural requirements which it regards as desirable in this type of legislation. It seems to us that the reporting provisions in H.R. 8261, which have no counterpart in the other two bills, would assist the Board in implementing and enforcing the legislation, and also that the presumption contained in H.R. 8261, that a person owning a specified percentage of the stock of a carrier shall be deemed to be in control, would add some desirable certainty as to the application of the legislation. Both a carrier and a person acquiring its shares would thereby have a guideline to determine when an application should be filed with the Board. A somewhat similar technique is utilized in some of the statutes administered by the Commission.

In this connection, Mr. Chairman, I and Mr. Loomis noted with interest as we sat here and heard the testimony of the CAB representatives the other day that the committee members were particularly interested by their questions in this matter of control and percentage figures.

We thought, therefore, it might be of interest, albeit I don't think very helpful, for the committee to have the benefit at least of some of the control features and percentage features as contained in the various securities acts.

Now, the concept of "control" has significance, aside from requirements of disclosure, as to who is in control, in at least three of the statutes administered by the Commission: the Securities Act of 1933, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940. The concept is treated, or defined, differently in each of these acts.

SECURITIES ACT OF 1933

This act uses the term "control" in various places with significant consequences, but contains no definition whatsoever. The House committee report stated that it would be undesirable to attempt to define "control" because this would be difficult, if not impossible.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

While the Public Utility Holding Company Act does not define "control" as such, its definition of "holding company" is based upon the concept of control. It has a double definition.

First, any company which holds 10 percent of the voting stock of a utility is a holding company, unless the Commission, by order upon application, determines that it is not in control; and second, any company whom the Commission, in an administrative proceeding, determines to be in fact in control of a utility falls within the definition.

In the original bill, the first aspect was not included, and the application of the statute depended upon a finding by the Commission that control existed. The 10-percent alternative appears for the first time in a confidential committee print circulated immediately before the final bill was reported out.

INVESTMENT COMPANY ACT OF 1940

The Investment Company Act of 1940 defines "control" in terms of the existence of actual control, but provides that any person who owns 25 percent, or more, of the voting securities of the company shall be presumed to be in control unless the Commission determines otherwise in a proceeding, and any person who owns less than 25 percent of the voting securities is presumed not to be in control unless the Commission determines otherwise in a proceeding.

There was no such definition in the bill as originally introduced. It was suggested at the hearings on the final bill which included this provision that it and various other definitions were inserted at the suggestion of the investment company industry.

SECURITIES EXCHANGE ACT OF 1934

The Securities Exchange Act of 1934 does not refer to "control" as such, but a person who owns 10 percent, or more, of any class of equity security is, along with directors and officers an "insider" for the purposes of the insider-trading provisions of section 16 of the act.

But a 10-percent figure is used in this act with respect to those persons who own 10 percent of an equity security, are required under section 16 of the act to make certain reports, and are also subject to the short-swing profits provision of that act if they engage in trading within the 6-month period.

I might add that the 10-percent figure to which I alluded in the takeover legislation that was passed by the Congress last year, there was really no reason or rhyme or rationale for that 10-percent figure, any more than is in the Exchange Acts, so far as the legislative history is concerned, other than the takeover bill simply keyed its figure to that which is already existent in the 1934 act.

Now, Mr. Loomis has done some more extensive research in connection with this idea of "control" so far as the Securities Acts are concerned, and percentages, and if any of you gentlemen have any questions in that regard, we will be happy to attempt to answer them.

But I thought these figures might be of some aid, at least of some interest, in view of your concern and questions in that area the other day.

I believe, gentlemen, that concludes the prepared remarks, and we will be happy, of course, to entertain any questions we can, and to furnish any supplemental data that you may desire.

Mr. FRIEDEL. Well, I want to thank you, Mr. Owens, for your very informative statement.

I was going to ask you to define what is a conglomerate, but I think you went into it very thoroughly in your statement.

Mr. OWENS. There was a time, Mr. Chairman, that anything that ended in "tronics" and "sonics" was almost automatically glamour, and it would take off as soon as it came through our registration process.

Not long ago, anything that was attached to fried chicken, Minnie Pearl, and all of these fancy names became glamorous, so it all depends on what a person takes a liking for.

Mr. STAGGERS. No, thank you.

I think we have Mr. Staggers here.

Mr. Staggers is the sponsor of the bill, and I would like to see if he wants to add anything.

Mr. STAGGERS. No, thank you.

I would say we appreciate Mr. Owens and Mr. Loomis coming up and giving us the benefit of their views, because I think your testimony is going to be the heart of the bill.

I think the subcommittee is doing a good job, so I have no questions, and thank you very much.

Mr. FREIDEL. Thank you.

Mr. Pickle.

Mr. PICKLE. Mr. Chairman, I thank you.

Mr. Owens, I wanted to ask you two or three questions.

In your testimony on page 7, you make reference to the fact that the Justice Department had announced that they were going to, and I assumed had, filed suit against the Ling-Temco-Vought to force a divestiture of their interest in Jones & Laughlin Steel.

Would you, as a representative of the SEC, care to comment on whether you would favor this suit, or this approach?

Mr. OWENS. No, sir, I would not, because that is an area which is really outside of our cognizance, under the securities laws.

Mr. PICKLE. Would you care to comment on the broad statement that, "Because a company is big does not necessarily mean that it is bad"?

Mr. OWENS. Mr. Pickle, I cannot only comment in generalities in that regard, and these, I might say, are my own personal feelings about it, I do have some apprehensions about where a large institution takes over a meatpacking institution, we will say, which has no relationship to the type of business that it has been doing, or where a steel company, for example, as I have alluded to here, takes over a shoe manufacturing concern, where the management of the acquiring company has no conversancy or cognizance with respect to the operations of this industry. The question arises as to whether or not there is the expertise.

Mr. PICKLE. Your concern would be more with the type of relation between the acquiring company and the target company, rather than the size of the company per se?

Mr. OWENS. There are, of course, other considerations for concern, to which I have alluded.

The larger these conglomerates become, the more difficult it becomes for a lot of the shareholders of the resulting companies to find out just exactly what financial information is actually available.

Mr. PICKLE. Are you saying, then, as a company does become a large company, that it does lose that element of related—

Mr. OWENS. I think this is a very extreme likelihood, yes, sir, and I think there is also the very extreme likelihood that it is going to be difficult for the shareholders of the large complex to know just exactly what product lines are making money, and which are not making money, which departments are making money, and which are losing money. And this area becomes very difficult.

We are trying in this regard to get more realistic disclosure. We have made some progress, but it is difficult, still.

Mr. PICKLE. I notice that you make reference to the fact that when one company would take over another, that they do it because of the increased value of their common stock, as well as their ability to often capture large amounts of capital or cash on hand which the target company has possessed.

Now, my question to us is, if this happens, and I assume that it does, does it stand to reason, in your judgment, or rather, would you express an opinion is it impossible for an acquiring company to take over a target company unless there is some collusion from the inside by management of the target company?

Mr. OWENS. I think this is possible to be accomplished without collusion, yes.

Mr. PICKLE. Would you express an opinion whether you think it has been accomplished with collusion?

Mr. OWENS. No, sir, I would not. I know of no instances.

Mr. PICKLE. Has SEC made any attempt to establish whether there has been any collusion or general discussion or overt contact in discussions in this area?

Mr. OWENS. Well, I think that Mr. Loomis has probably got some instances of where there has been an agreement prior to, but the term "collusion" has a sort of an insidious connotation, and that is the reason that I was kind of soft-pedaling on that particular score.

But I think there have been instances where there have been agreements beforehand.

Mr. PICKLE. I will ask a couple of other questions, but I am willing to defer to the counsel.

Mr. LOOMIS. There have been a good many cases where a takeover is done by prior agreement between the management of the acquiring company and the management of the company to be acquired.

There are also a good many cases where the management of the company to be acquired has no prior knowledge of the proposal, and opposes it just as hard as they can.

Mr. PICKLE. The question then would revolve, it seems to me, on what right does a target company have to protect itself under our present laws, if they protest this takeover.

Mr. LOOMIS. If I could answer that, the courts have recently held that the management of the target company has a legitimate interest in attempting to protect its stockholders if for any reason it feels this is an undesirable operation.

Mr. PICKLE. Of course they would have a legitimate right to protect their interest, but how would they protect their interest?

Mr. OWENS. One way, Mr. Pickle, is a counteroffensive. They go out and they acquire another company, or maybe, as I indicated, in some of the extracurricular activities are devoted to seeking to amend their articles of incorporation so as to blockade the voting.

Mr. PICKLE. Would you say that if they could conduct a counter-offensive, their effectiveness would be very limited, in most instances?

Mr. OWENS. In some instances we know they have been pretty effective, but in others, they have not.

Mr. PICKLE. Let me go on to another question that I wanted to pursue on Monday.

I want to put in the record at this point, though, that I am somewhat concerned that you have not come to us to give us any specific recommendations about what you think ought to be done in this legislation.

You have kind of blown a kiss at it, it seemed to me, and you do indicate that you are concerned about it, but you leave the inference that this is a matter that CAB would rightfully be concerned about.

I think we ought to have a more specific recommendation as to what is your opinion from an SEC basis.

What I want to pursue with you at this point is this. I asked the question Monday on the problems that would result when financial institutions in effect obtain control of a carrier, and they do it through loans made, or through financial transactions, whether in the purchase of stock or in the market.

I made reference particularly to, say, the TWA case, where the company put up all of its stock, the banks, or the combined banks and lending financial institutions thus had the control of the stock, and maintained it for 5 years. The loan was made at a high price, but that is a matter between the carrier and the lending institutions.

Does that bank that has that stock, does that constitute control, as far as a representative of SEC is concerned?

Mr. LOOMIS. Well, in that particular case, we would say as far as our laws are concerned, and as a matter of fact, that the financial institutions did take control in order to secure their indebtedness.

Apparently, as I understand it, they felt they needed to insure stability of management while there.

Mr. PICKLE. Could they actually vote what that company would then do, the financial institutions that held the security?

Mr. LOOMIS. I think they had it arranged that there was a voting trust that they more or less controlled, so they could determine who was going to be the management.

Mr. PICKLE. Would it not be possible that the financial institution could in effect have a conflict of interest between the bank and the carrier?

Mr. LOOMIS. Well, I don't know about a conflict of interest, but the financial institutions wanted to get paid.

Mr. PICKLE. The bank could decide that its interest and its money would come ahead of the consideration of that particular carrier, their overall interest and the money for that carrier, and other institutions, and they would foreclose or move in pretty quickly?

Mr. LOOMIS. That could happen. Whenever a carrier goes into debt, its creditor will want to get paid, irrespective of the other interests of the carrier.

Mr. PICKLE. Could it not also be possible that that financial institution could have an economic interest that would be in competition with the carrier?

Mr. LOOMIS. I am not sure it would be in competition. It would be somewhat different in that the financial institution would be interested in making sure that its loan was paid, and the carrier would be interested in operating its business at a profit.

Whether there is a conflict there depends upon the circumstances.

Mr. PICKLE. Well, a banking institution could always have an interest, say, in a railroad, or some competing type of transportation, and they might decide that they are going to then take some action that would help the railroad, as opposed to this, and it seems to me like that if we let a financial institution have control of a stock, that this is just as much control as going in the open market.

And I would think that either your Commission or CAB would concern itself about what is control, and could we have a situation where they could hold it, but that they could not vote what that carrier did.

Mr. LOOMIS. That could happen, and it could happen that the financial institution would not get into control. It could happen, as in this one case that you referred to, that I think they did.

Mr. OWENS. I am aware of one instance, Mr. Pickle, where one large takeover company went abroad and borrowed over a hundred million dollars. What it put up by way of collateral to get that money, I don't know, but it ultimately paid off the loan, of course.

But I think what it put up as collateral was some of its own security, in order to effect the takeover, and this was a cash takeover in the marketplace.

Mr. PICKLE. Mr. Chairman, I think I have exceeded my time, and I apologize to the committee, but I was hoping I might have some time left.

Mr. FRIEDEL. Mr. Devine.

Mr. DEVINE. No questions.

Mr. FRIEDEL. Mr. Adams.

Mr. ADAMS. Thank you, Mr. Chairman.

First I want to make an inquiry of you, Mr. Commissioner, and I appreciate your bringing some of the information that I was requesting yesterday on control figures and the use of percentages as opposed to a definition of control. I would like to go into that with Mr. Loomis again in a minute.

On page 5, you refer in your statement to the corporate takeover and to significant borrowings being used for the takeover of stock.

I wanted to know whether or why your margin requirements do not apply.

It is my understanding that in the market now you have varying margin requirements. In other words, you cannot buy stock for a portion down, and thus blow up your ability to buy stock because of the crash of 1929.

I also thought there were regulations that provided you could not go to the bank and circumvent this by borrowing money from the bank and buying stock with it.

It is possible to violate the margin requirement. For example, I cannot buy \$5,000 worth of stock, what is the margin now, 80 percent, or what is the margin now?

Mr. OWENS. Seventy percent.

Mr. ADAMS. I cannot put 70 percent down and buy it. I also cannot go to the bank and borrow 50 percent of the stock and use cash from the loan to buy the stock.

Mr. OWENS. Mr. Loomis will address himself to that question.

Mr. LOOMIS. This has been a difficult question. The margin rules of the Federal Reserve Board restrict loans that are secured by stock.

Mr. ADAMS. That statement you issue to the bank, I know because I have had some dealings with that on behalf of various clients, says you are not to borrow to buy stock if you violate the margin requirements; does it not?

Mr. LOOMIS. In these takeover efforts, normally they attempt to get around these margin requirements by not putting up any stock as collateral, but just the borrowing on the general question of the acquiring corporation.

Mr. ADAMS. I thought that was prohibited, too.

Mr. LOOMIS. It is not clear. The Federal Reserve Board, of course, has ultimate responsibility for making that determination, rather than ourselves, but we have been troubled by this.

Mr. ADAMS. What is your position?

For example, if you are using bank leverage, let us say you want to buy stock. The example I think the Commissioner used is a very good one. You want to buy out a stock, and you therefore go to the bank and either on general credit or on your own securities borrow an immense amount of money, say \$50 million, and this then you use to make a cash tender in which you are going to tender, say, \$65 million.

So you have only got \$16 million of your own money, and you have used the bank leverage for \$50 million, so in effect you buy that stock with maybe 10 or 15 percent of your own money, which to me is the same as the oldtime margin deal, and should be, I think, of some concern to the Commission.

Now, are you allowing that to be done?

Mr. LOOMIS. We are concerned about it. The decision whether it is to be allowed is not ours, but the Federal Reserve Board's.

Mr. ADAMS. In other words, you don't enforce that with margin requirements. You go to the bank and say, "No, no, you can't do that."

Mr. LOOMIS. No, the margin rules and margin regulation are regulations of the Federal Reserve Board. They are not our regulations, though we have a responsibility for enforcing them.

Mr. ADAMS. Mr. Chairman, maybe we should have someone from the Federal Reserve Board to testify so that we might inquire into what is being done with the leverage factor of the banks. We can discuss this later.

Mr. OWENS. I might say, Mr. Adams, that this is a provision specifically of the Security Exchange Act of 1934, but it is specifically delegated to the Federal Reserve Board.

Mr. ADAMS. Then I will not badger you any more about that problem, but I want to go to the second question.

I think the problems involved here to a very great degree involve financial leverage. We have asked about the banking industry, and now I want to talk about the little people who provide the rest of the leverage.

Can you give me any recommendation or statement, or could Mr. Loomis do this?

You have mentioned the four acts, actually five, over which you have jurisdiction, where you use various control factors. Can you give me a recommendation or a statement from your experience of whether there should be (1) just a general definition of "control," or a percentage, and (2) if you have a percentage, what in your opinion is the general percentage figure that would be reasonable as a basis for "control"?

And I take it your experience with the Public Utility Holding Act of 1935 and Investment Act of 1940 are probably the best guidelines.

Mr. OWENS. Yes. We have a 25-percent figure in one, and a 10-percent figure in the other. And so far as we have been able to ascertain, we cannot judge just the rationale for either.

But Mr. Loomis can go into that. He has researched this a little bit, and so he could probably give you some background in this area.

Mr. LOOMIS. I think, first, that an abstract definition of "control," without more, saying that you cannot take control under some circumstances, is extremely indefinite, and will get people into trouble, so that the technique that is used in the Investment Company Act and in the Holding Company Act, of putting in some percentage figure, which is presumptively control, makes it possible for people to know where they stand, and when they have to come to an agency for approval, and when they don't. And if that was not there, it might become difficult for the carrier to finance its operations, because people would be afraid that if they bought stock, not with a view to control, but just to finance the carrier, someone would after the fact accuse them of violating the law.

Mr. ADAMS. In other words, the use of an abstract definition of control would be an ultimate sanction. If this committee were to report out that kind of legislation, it would inhibit all potential investors. Is that what you are telling me?

Mr. LOOMIS. Yes.

I think, as this committee said in its report on the Securities Act, control as such is almost impossible to define.

Mr. ADAMS. Right. So everybody would then be inhibited. Is that correct?

Mr. LOOMIS. That is right.

Mr. ADAMS. So the use of a reasonable percentage is a moderate compromise position between establishing an absolute inhibition and putting a control figure so high, for instance, 50 percent, that everybody will gain control and stay beneath the statutory limit.

Mr. LOOMIS. Exactly.

Mr. OWENS. Mr. Adams, as a matter of fact, as we indicated in passing in my statement, we have indication that some of the institutions are now in the takeover area staying below the 10-percent figure that was used.

Mr. ADAMS. I want to get to that in a minute.

Mr. LOOMIS. I would like to mention also that the 25-percent figure in the Investment Company Act seems rather high for the present purposes. I think it was fixed so high because there was a concern in the Investment Company Act not only with control over investment companies, but with control of various smaller organizations, closely held, partnerships and so on, and so they used a high figure which I don't think necessarily should be a model for the committees' consideration of this legislation.

Mr. ADAMS. What you are telling me is that 25 percent is high. Five percent is the disclosure figure, and I assume that we are all pretty much in agreement.

Mr. OWENS. Ten percent is the disclosure figure.

Mr. ADAMS. Ten percent in one, and five percent in another of the acts.

I gather from your expertise you gentlemen would not feel that 5 percent is a reasonable disclosure figure—we are not talking about control—this disclosure figure is probably a reasonable figure with which to operate.

Mr. LOOMIS. Yes, some of our statistics have that.

Mr. ADAMS. Now, between 5 and 25 percent, I need a recommendation, a figure. Ten percent? Eight?

Mr. LOOMIS. Well, in various places in the statutes we administer. Congress has used 10 percent, and so far, particularly in the Holding Company Act, and so far as I know, this has worked quite well.

Mr. ADAMS. That brings me to my third set of questions: The institution, the mutual fund, the insurance company, and others who are moving in and out of the market on a very heavy basis, with a non-operating concern.

Should there be some provision relating to this activity, and do you have a suggestion? I can see how even with a 10-percent figure you could use the leverage of two or three large institutional buyers to arrive at 30 to 40 percent very easily.

Mr. LOOMIS. Yes, if you assumed that you can lump them together.

Mr. ADAMS. Or do you think that you are about to take on this problem, so we don't have to worry about it?

Mr. OWENS. It is a matter which is going to be under very intensive study under the institutional study that we are now getting underway.

Mr. ADAMS. How long will that take? Because our problem is a more immediate one of operating transportation areas.

Mr. OWENS. You have fixed the deadline for us, but whether we can get it done in that time, I don't know, Mr. Adams, because it is going to be a tremendous undertaking, but there are a lot of answers in this area that we don't have, but we have a lot of indications.

We know that right now there is a great amount of activity by institutions, even sometimes without design or purpose, to take over, as you say, as an operator. But they make a lot of money in connection with the activity that goes on by the purchases that are going on.

Mr. ADAMS. This was the problem that some of us were trying to address ourselves to with the CAB. We recognize that when we move into this field, we are moving into fields of financial control, SEC operations, Federal Reserve Board, and so on. If we had some assurance that you were going to do this across the board in the very near future, a number of us would take the position that we should let you do it.

But if this is going to take a considerable period of time, then perhaps we had better move in the area of regulated industries just as was done in the Public Utility Holding Company Act.

Mr. LOOMIS. As the Chairman pointed out in the statement, we have no authority under present law to approve or disapprove a takeover, except under the Public Utility Holding Act.

Consequently, there is nothing we could do to accomplish the purpose of this bill.

Mr. ADAMS. Are you thing in terms of requesting this type of regulatory power?

I am going to ask the man from the Department of Justice the same thing as regards their merger control.

In other words, who is going to bell the cat here? Is the SEC, the Department of Justice, or the individual regulatory agency?

Mr. LOOMIS. I would think insofar as regulated industries such as carriers and so forth are concerned, the agency which should have authority to determine whether a takeover should occur or should not occur would be the CAB or the ICC, rather than the SEC taking on a general responsibility to approve and disapprove takeovers.

Mr. ADAMS. All right. Then I gather that this committee should be expected to move in the regulated field, if somebody is going to move. That is an important point.

I am sorry to take so much time, Mr. Chairman.

Mr. FRIEDEL. I would like to say that we have four witnesses, and we are going to meet again at 2 o'clock this afternoon.

Mr. ADAMS. The last question I want to ask is whether or not you are prepared to move in a wholesale manner within the jurisdiction of either the acts you have now to combat the inflationary aspects of business activity? Or should the Congress try to do it with the regulated industries?

If A starts to buy out B with a tender offer, what should happen in terms of economics? If the value of A stock or its equity should drop as it is paying out money to acquire B, and B's value should raise to the value of the tender that is being made. What is happening in the market, of course, is that both A and B stock are going up.

The result of all of this, of course, is, granted there are other inflationary practices, that it increases the borrowing power of the conglomerate; it increases the value of the stock; it increases the borrowing power of every person who owns any of the stock of any of those companies; and it places a final control in one board, instead of two.

Now, do you have in mind recommendations on this at all?

Mr. OWENS. No, sir, because our authority in this area is very much circumscribed, Mr. Adams. We have to content ourselves in the first instance in the matter of disclosure under the new takeover legislation as passed last year.

The effects of it we cannot be concerned with unless we are presented with a case of fraud, of course, in which event we would move.

Mr. ADAMS. Thank you, Mr. Owens.

Mr. FRIEDEL. Thank you.

Our next witness will be Mr. Stuart G. Tipton, president of the Air Transport Association.

STATEMENT OF STUART G. TIPTON, PRESIDENT, AIR TRANSPORT ASSOCIATION

Mr. TIPTON. Mr. Chairman, members of the committee, my name is Stuart G. Tipton. I am president of the Air Transport Association. The association includes most of the certified scheduled airlines of the United States.

We appreciate the opportunity to comment generally on the bills before the committee, which would require Civil Aeronautics Board approval for certain acquisitions of control of air carriers not now covered by the Federal Aviation Act. In light of the complexities of some of the issues, certain ATA carrier members may wish to file their additional views and recommendations.

We strongly endorse the objective of all the bills to give the CAB jurisdiction over all acquisitions of control of air carriers.

Under the present act, control of an air carrier may be acquired without CAB approval, unless the acquiring interest comes within these categories of persons: (1) another air carrier; (2) persons controlling another air carrier; (3) another common carrier; or (4) a person engaged in any other phase of aeronautics. If the acquirer is one of these persons, CAB approval of the transaction is required by section 408 of the act. If not, the acquisition does not have to be passed upon by the CAB.

This situation is incongruous, in that to formally transfer a carrier's certificate to a person not named in section 408 would require CAB approval, under section 401 of the act, yet a transfer could be achieved in effect by the alternative of simply acquiring control of the airline, which would not require CAB approval. This anomaly is incompatible with the congressional purpose in the act to give the CAB the authority to determine whether the operators of an air carrier are fit, willing, and able to provide air transportation which serves the public interest, convenience, and necessity.

Recent public disclosures of possible acquisitions of control of Pan American World Airways and of Western Air Lines have focused legislative attention on the problem.

The immediate issue is one of the acquisition of control of a carrier which is required to be operated in the public interest, where the acquirer may not be subject to such regulation, and may or may not be properly equipped to continue such operation in the public interest. In such a case, the CAB should have the necessary authority to protect the public interest.

The reasons why the Board should have the opportunity to pass upon the public interest aspects of all acquisitions of control of an air carrier were cogently stated by Chairman Crooker of the Civil Aeronautics Board in his earlier statement to the committee, and I shall not take up the committee's time by repeating them. A majority of our members support the need for such legislation, and support the principles of the legislation.

The proposal of H.R. 8323, to require CAB approval of acquisitions of "any person engaged in any phase of aeronautics otherwise than as an air carrier" does not appear to be of equal urgency with the need for CAB approval of air carrier acquisitions.

Similarly, H.R. 8322, which would preclude acquisition of control of an air carrier by certain classes of persons, is more far reaching in its effects than warranted by any presently known need. We would agree with the CAB that this kind of legislation might better be deferred until Congress has considered generally the role of conglomerates in the national economy.

H.R. 8261 would appear to accomplish the objectives of the legislation, with some changes. Basically, H.R. 8261 embodies the most direct method of giving the CAB approval authority of acquisition of control of an air carrier by noncarriers and nonaeronautical entities. It would simply add these new classes of persons to those classes of acquirers now covered by section 408(a) (5) of the act.

We believe this to be the best method of accomplishing the legislative objective involved.

We would suggest only one change from H.R. 8261 in this respect. H.R. 8261 would expand the coverage of existing section 408(a) (5) to noncarrier acquirers of control by inserting the italicized words, as follows, in the existing paragraph:

(5) For any air carrier or person *whether or not* controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

It would appear preferable to insert the italicized words in the second line of Section 408(a) (5), as follows:

(5) For any air carrier or person controlling any air carrier, any other common carrier, or any person *whether or not* engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; *Provided, That the Board may exempt from the requirements of this paragraph any transaction involving the acquisition of control of any air carrier other than a certificated air carrier to the extent and for such periods as may be in the public interest.*

This wording would better insure application of the amended coverage of the paragraph to nonaeronautical acquirers of control of any air carrier, and thus appears broader in application than H.R. 8261.

We would add the italicized proviso to paragraph (5) in recognition of the CAB's valid position that it should retain flexibility to exempt certain acquisitions of control of small carriers, such as air taxi operators or air freight forwarders. However, the acquisition of control of

any certificated air carrier, including supplemental airlines, could not be exempted by the Board.

We agree with the CAB that it should also retain reasonable flexibility to grant prompt approval where there are no conflicts of interest or other regulatory problems presented by a minor proposed acquisition. For this purpose, we would suggest amending the third proviso of section 408(b) as follows:

Provided further, That in any case in which the Board determines that the transaction which is the subject of the application [does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation] does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

Thus amended, section 408(b) would permit the Board to approve minor acquisitions without hearing in those cases where no person with a substantial interest requests a hearing. Undue procedural burdens on the Board could thereby be avoided, and the Board could approve routine acquisitions by a simple order. At the same time, the Board would retain reasonable control over frivolous or obstructive requests for public hearing from persons not actually possessing a substantial interest. The "substantial interest" test has been construed by the Board as broad enough to enable it to determine whether a petitioner for hearing "has, in fact, presented a legitimate and substantial issue."

Second, we wish to comment on the provisions of section 4 of H.R. 8261, page 3, line 1. This section would establish a legal presumption that anyone owning 5 percent or more of the "capital stock or capital" of an air carrier shall be "deemed to be in control of" such carrier.

We support the establishment of a stated percentage of ownership as constituting a prima facie legal presumption of control, which the applicant may rebut under his burden of proof. However, we would apply the presumption only to ownership of voting stock, and not to "capital," and we would set the percentage at 10 percent rather than 5 percent.

A guideline based on "capital" ownership would introduce ambiguity and complexity into an otherwise straightforward provision. It is uncertain, first of all, exactly what would be included under "capital," particularly in a situation involving certain trust and debt relationships. These are better left undisturbed.

We assume that the term "capital" was included simply because that term now appears in the reporting provisions of section 407(b) of the act. It is appropriate, of course, that the existing language of section 407(b) be followed in expanding those reporting requirements, as proposed in section 1 of H.R. 8261.

But there is no compelling reason for exact parallelism as between the reporting requirement of section 407(b) and the approval requirements of section 408(a), as the latter relate to acquisitions of control. On the contrary, in view of the more stringent operative effects of section 408, under which certain named acts are declared unlawful absent CAB approval, it is appropriate that any presumption of control

attach only to clearly identifiable interests, such as ownership of capital stock. We would accordingly so limit it.

Similarly, since it is control of the air carrier with which the legislation is concerned, the presumption should attach to ownership of a stated percentage of voting stock, and not to the "entire" capital stock of all classes. Ownership of whatever amount of nonvoting stock should not create any presumption of control. Our suggested change would so limit the presumption of control to the acquisition of a stated percentage of the voting stock.

There is room for considerable difference of opinion on the exact percentage of ownership which should be legally presumed to constitute control of a carrier. H.R. 8261 stipulates 5 percent. Presumably, this 5-percent standard would refer to ownership of total voting and nonvoting stock.

For the reasons we have stated, we believe that the presumption should attach only to ownership of voting stock. Since this would, in most cases, comprise less than the carrier's entire capital stock, the applicable presumptive percentage should be higher than where based on the entire capital stock of the carrier. In our opinion, the ownership percentage of voting stock for a legal presumption of control should be 10 percent, rather than 5 percent. We are separately submitting a brief memorandum summarizing relevant judicial and administrative agency determinations supporting a 10-percent test for presumptive control.

Actually, the material contained in our memorandum has for the most part been submitted to the committee by the Securities and Exchange Commission witnesses.

There are additional considerations why 10 percent is a reasonable and appropriate figure for a presumption of control. First, the number of air carriers of which there is ownership by one person of 10 percent or more of voting stock, or even entire stock, is extremely limited. Of the trunk carriers, based on latest available reports filed with the CAB, only two have ownership of as much as 10 percent of their capital stock by one person. The stock of most such carriers is widely held, among many thousands of stockholders, no one of which owns any substantial percentage. Therefore, it would not impose any burden on an ordinary investment purchaser of such airline stocks to adopt a 10-percent test as *prima facie* control.

In contrast, it is not uncommon for or individual investors to acquire 5 percent or more of an airline's stock. In fact, many carriers have now or have had historically one or more stockholders who own 5 percent or more of their capital stock. Thus, a 5-percent presumption threshold would doubtlessly place a burden on ordinary investors to have to provide that their purchase would not constitute control. This seems neither reasonable nor necessary to the purpose of the legislation, particularly since the figure is only a guideline, with the CAB free to inquire into any lesser percentage as might appear justified.

To meet these several suggestions, and to clarify this intended power of the Board to determine "control" in the case of ownership of less than 10 percent of voting stock, we suggest the following amendment as a new subsection to be added to section 408:

Sec. 408(f). A person will be presumed to control an air carrier if he owns beneficially 10 percent or more of the voting stock of such carrier, which pre-

sumption may be rebutted by evidence satisfactory to the Board, but the Board may determine that a person controls an air carrier even though he owns less than 10 percent of the voting stock of an air carrier.

H.R. 8261 provides that section 2 of the bill, extending section 408 of the act to all acquisitions of control, would take effect on March 4, 1969. The other sections of the bill would take effect on the date of enactment of the legislation. There is no constitutional or other inhibition on the legislation being made retroactive in this manner, in whole or in part, either to the date of introduction of the legislation or earlier. It would appear, however, that if section 2 is to be made retroactive, section 4 of the bill, which establishes the legal presumption applying to section 2, should, for consistency, also be made retroactive to the same date.

Whatever the form of legislation which the Congress might ultimately adopt, it is important to make clear that the CAB approval to be required of all acquisitions of control of an air carrier is advance approval, prior to consummation of the transaction, except any past acquisitions which would be covered by a retroactive provision. We believe that our suggested changes assure this result. If a different approach is taken, however, we would urge that the committee's report make clear the intention that prior CAB approval must be secured, and not merely post facto review by the CAB of a consummated acquisition.

The objectives of the proposed legislation have been supported by the Civil Aeronautics Board, the Securities and Exchange Commission, and the Department of Justice in their testimony before this committee and the Senate Commerce Committee.

The control of an air carrier can affect the performance of its public service obligations under its certificate. This is clearly a matter of proper concern to the Congress and the Civil Aeronautics Board, particularly where the acquisition is by a noncarrier or nonaeronautical entity. For this reason, we strongly support legislation to insure that such acquisitions are in the public interest.

That concludes my statement, Mr. Chairman.

(Attachment A to Mr. Tipton's prepared statement follows:)

[Attachment A]

A 10-PERCENT STANDARD FOR PRESUMPTIVE CONTROL

A standard of 10 percent stock ownership for a legal presumption of control finds support in Judicial, Congressional and administrative agency determinations on the issue.

Actual "working control" over a corporation can be achieved by far less than a majority of stock ownership.¹ In a study conducted by the Securities & Exchange Commission, it was found that of the 200 largest corporations in the United States, the majority were controlled by holdings of less than 30%.² A similar study by Berle and Means showed that only 5% of the 200 largest companies were controlled by majority ownership at the beginning of 1930.³ A

¹ Judge Learned said: "... I think we can take judicial notice of the fact that the ownership of twenty percent of the voting power of a corporation makes the owner 'liable' to have practical control." *Morgan Stanley & Co., Inc. v. S.E.C.*, 126 F. 2d 325 (2d Cir., 1942). See also, *Perlman v. Feldman*, 219 F. 2d 173 (1955), where it was held that sale of stock amounting to 33% of the corporation's outstanding stock was a sale of "control."

² Temporary National Economic Committee, *The Distribution of Ownership in the 200 Largest Non-financial Corporations*. Monograph No. 29, p. 104.

³ Adolph A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (1932), p. 94.

Senate Committee has found that control of a public utility could be attained by groups holding as little as 3% of the total voting stock of the corporation.⁴ The Van Sweringen system of railroads was controlled through a network of holding companies, so that control over the operating companies was exercised through ownership of less than 1% of their stocks.⁵

These examples represent an extreme, however, and a clear majority of court and agency cases involving control through stock ownership have been at a figure of 10 percent or more. For example, the CAB has held that 11.4 percent stock ownership constituted control where it elected 9 of 17 members of the board of directors (*Atlas Corp.—Control of Consolidated Vultee*, 9 CAB 921 (1948)); the I.C.C. has found that a 10 percent stock ownership constituted control (*Greyhound Corp.—Control—Southeastern Greyhound Lines*, 57 MCC 123, 142 (1950)); the SEC has found control by virtue of 18 percent stock ownership (*American Gas & Electric Co. v. S.E.C.*, 134 F2d 633, 642 (D.C. Cir., 1943)); and the F.C.C. has found control existed where there was a 33 percent stock ownership (*Rochester Telephone Corp. v. U.S.*, 307 U.S. 125, 144-145 (1939)).

Finally, Congress itself has recognized the acceptability of a 10 percent ownership criterion for similar purposes in legislation. For example, section 2(a) (7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 b (a) (7), creates the presumption that the ownership or holding of 10 percent of the outstanding voting securities of a public-utility company constitutes control unless the SEC determines otherwise. The Securities and Exchange Act of 1934 was amended last year to provide that any person who acquires 10 percent of any class of equity security registered with the SEC or who makes a tender offer for such securities involving at least 10 percent, must provide certain disclosures concerning itself and its intentions. (15 U.S.C. 78 m(d) and 15 U.S.C. 78 n(d)).

Mr. FRIEDEL. I want to thank you, Mr. Tipton.

There is only one question I want to ask.

Why are you indicating that you would like to have it retroactive?

Mr. TIPTON. Actually, I have not taken a position, Mr. Chairman, on the extent of whether there should be any retroactivity, or the extent of that retroactivity. I think our industry as a whole has not taken any such position, and are thus leaving that to the judgment of the committee without recommendation.

I think my only point was that it can appropriately be made retroactive to a date chosen by the committee, or as far as the constitutional limitations are concerned.

Mr. FRIEDEL. Thank you.

Mr. PICKLE.

Mr. PICKLE. Thank you, Mr. Chairman.

Mr. Tipton, it is good to have you here.

Mr. FRIEDEL. Yes. It is always a pleasure.

Mr. PICKLE. You always give us good testimony and good points to think about.

I am impressed with your two suggested amendments, one with respect to adding the words "whether or not," that is, the extended coverage of section 408(a) (5), and the proviso that the Board could exempt under the requirements of that paragraph any transaction involved. I think that might save a lot of time.

And I also was impressed with the amendment of section 408(f), where a person would be presumed to have control of a carrier if he owned 10 percent of the voting stock of that carrier, but it could be rebutted if the Board ultimately wanted a hearing.

⁴ Hearings Before the Senate Subcommittee on Interstate Commerce (Public Utility Holding Company Act), 74th Cong., 1st Sess. (1935), p. 469.

⁵ Adolph A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (1932), Chart III, p. 74.

For my own personal information, from your experience with the carriers, I want to ask you a question with respect to constitutional code.

When a carrier borrows large sums of money, and they put this money into a voting stock or trust of a financial institution, does this mean that that financial institution votes the control of that company, and handles its affairs?

Mr. TIPTON. It would, I am sure, depend upon the particular transaction concerned.

If a bank were to acquire stock in a carrier as an investment, I would say that under those circumstances they would probably vote it. If the transaction were otherwise, particularly in the case of large blocks of stock, in the past I believe we have had some examples of where stock was placed in a voting trust, and in which event the trustees would vote the stock, and not the bank.

I would guess that those transactions would vary all over the lot.

Mr. PICKLE. Well, the Chairman of the CAB said that they did not concern themselves with hypothecations of stock, that is, the pledging of stock would not carry with it title to the stock itself.

They concerned themselves only with transfer, that is, specific transfers.

I assumed that they mean actual sale of stock.

Would the pledging of such stock with a financial institution mean that they have in effect or legally sold their stock?

Mr. TIPTON. Not normally. When stock is pledged as security for a loan, the ownership is retained by the person who pledges it, and he votes it, without regard to the fact that it has been pledged.

The voting right normally goes with the ownership of the stock, in my recollection.

Mr. PICKLE. The language of the bill before us, H.R. 8261, section 1, would amend section 407 by in effect requiring certain things of any person owning more than 5 percent of the capital stock, and it goes on to say that the descriptions of these shares of stocks would be furnished to the Board, the shares of stocks owned by such persons.

Now, this means that if stock is just pledged, or if it is actually held in voting trust, that they would not have to notify the CAB under the present law. Is that your interpretation?

Mr. TIPTON. The ownership being the test, they would.

The holder of the stock, if it was pledged to that person, would not have to report that he had acquired a particular block of stock, because, of course, he actually has not. He is voting it just as a loan.

If under circumstances, if he were to later acquire it, then he would, of course, have to report.

Mr. FRIEDEL. Mr Tipton, we have a witness here from the Justice Department, and he cannot make it this afternoon. Can you come back this afternoon?

Mr. TIPTON. I certainly can, Mr. Chairman. I would be glad to give way to the witness from the Department of Justice.

Mr. FRIEDEL. I would appreciate that.

Our next witness will be Mr. Richard W. McLaren, Assistant Attorney General, Antitrust Division, of the Department of Justice.

STATEMENT OF RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOSEPH J. SAUNDERS, CHIEF, PUBLIC COUNSEL AND LEGISLATIVE SECTION, ANTITRUST DIVISION

Mr. McLAREN. Mr. Chairman, I very much appreciate your accommodating me, and I am sorry that my schedule will not permit my returning this afternoon.

Mr. Chairman and gentlemen of the committee, with me this morning is Mr. Joseph J. Saunders, Chief of the Public Counsel and Legislative Section of the Antitrust Division.

We appreciate this opportunity to appear before you today to comment upon the problem of acquisitions of airline control.

Mr. FRIEDEL. If you want to summarize your statement, your full statement will be included in the record.

If you feel that you have to read it all, O.K., but if you want to summarize it, your full statement will be included in the record.

Mr. McLAREN. I think I can do that very well.

I believe the committee has copies of my statement, and I should say that perhaps the committee knows that both the Attorney General and I are on record as being very much concerned by the conglomerate merger movement, and we expect to use the existing antitrust laws to the greatest extent possible where we feel that the acquisitions or mergers in question are having adverse effects upon competition or tendencies to monopoly.

We are, of course, aware of the matters to which this committee is directing its attention, and we are concerned that, in moving to give the Civil Aeronautics Board jurisdiction and expanding its power to hear evidence and approve transactions in which airlines may be transferred from one person's control to another's, there may be loopholes punched in the antitrust laws.

This could happen in the event that the CAB approved a merger that involved a conglomerate, one portion of which was an airline, we will say, with another company outside the airline business.

There might very well be aspects of the transaction that we would want to prosecute under the antitrust laws. As we understand the proposed legislation, it might very well be contented where the CAB had approved a transaction involving an airline, that the nonair transportation aspect were immunized from the antitrust laws.

This is a very real possibility, we think, because in a number of cases, very substantial companies own or control air carriers, both scheduled and supplemental. These companies have made acquisitions in the past, and were they to make further acquisitions of the type that would have to be approved by the CAB, we would be very concerned that antitrust jurisdiction would remain as to the nontransportation aspect of the transactions, and that they would not be inadvertently immunized by this legislation.

We do not believe that this proposed legislation is intended to have this result. However, we are concerned that inadvertently immunity might be given under the legislation as proposed, and that some of the unregulated sectors of the economy would be, particularly as to merger transactions, exempted from antitrust jurisdiction.

We are concerned also that even if the CAB were authorized to consider and approve transactions involving the joinder of air carriers with non-transportation companies, the standards which CAB would apply would be different from those established under the antitrust laws.

Accordingly, in order to avoid the possibility, among other things, that different standards would apply in such situations, depending upon whether an airline was the acquiring or the acquired firm, it is our strong suggestion that a proviso be added which would head off this possibility of immunizing certain transactions.

We suggest that what we are concerned about might be achieved by amending the proposed legislation to make it clear that antitrust jurisdiction remains to deal with transactions which involve air carriers, but which have adverse effects outside of the air transportation industry, and you will find our proposal at the top of page 9 of my prepared statement.

Our amendment would add at the end of section 414 a new subparagraph stating as follows:

Provided, however, That no order of approval shall relieve from the operation of the antitrust laws acts, practices, or transactions which violate the antitrust laws with respect to any line of commerce other than transportation.

Mr. FRIEDEL. Have you had discussions with CAB?

Mr. McLAREN. We have had discussions with CAB. They are concerned that this particular amendment and its language would be broader perhaps than they would like to see.

I understand them not to intend or want authority to immunize transactions outside the air transportation industry, but they are concerned by this language.

Now, we have an alternative proposal, in light of the Civil Aeronautics Board's concern, which seems to relate to possible unforeseen effects with regard to air carrier agreements and possibly other matters.

We think that the proviso which I have just read would carry out the original intent of Congress in enacting section 414, because as we read the legislative history, Congress intent was that immunity was only to apply in the air transportation industry. Now there is a Second Circuit Court of Appeals decision that tends against our position in that regard and we think that this is a good opportunity for Congress to focus on this question and to clarify what it originally intended, that is, to make plain that it intended to limit any immunity attaching to CAB orders exclusively to firms in the air transportation industry.

Now, if notwithstanding our view, the committee and the Congress would wish to limit action at this time to the matter of mergers, acquisitions, and other transactions covered by section 408, and the immunity related thereto, our amendment could be limited as shown at the top of the tenth page of my statement.

The proviso reads as follows:

Provided, however, That no order of approval under Section 408 of this Act shall relieve from the operation of the antitrust laws transactions which violate the antitrust laws with respect to any line of commerce other than transportation.

If either H.R. 8261 or H.R. 8323 were amended as we propose, preferably by the first proviso, but in any event by the second, the one I just read, the Department of Justice would support the enactment of either one of those bills.

The third bill, we believe, tightens the screws too tight and we don't think that one should be adopted.

(Mr. McLaren's prepared statement follows:)

STATEMENT BY RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL,
ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

I appreciate this opportunity to appear before you today to comment upon the problem of acquisitions of airline control and the bills which are presently before this Committee, H.R. 8322, H.R. 8323, and H.R. 8261.

The thrust of these bills is to give to the Civil Aeronautics Board control over acquisitions of air carriers by persons and firms not in or related directly to the aviation industry, in order to prevent acquisitions which may harm the public interest in air transportation.

The proposed legislation would amend Section 408 of the Federal Aviation Act which presently requires prior Board approval of acquisitions of control of air carriers by another air carrier, another common carrier, or any person engaged in any phase of aeronautics. These amendments would increase the responsibilities of the Board so that it would no longer consider solely acquisitions between firms engaged in air transportation and in aeronautics, but also acquisitions of air carriers by companies in other lines of business, particularly by "conglomerates"—firms within whose corporate structure are joined many large, loosely related, or diverse companies under one locus of control.

The great increase in the number and magnitude of conglomerate acquisitions has aroused deep and widespread concern here in Congress as well as in many executive departments and regulatory agencies charged with responsibilities with respect to key industries in the Nation's economy. As you may know, both the Attorney General and I have stated on more than one occasion that the Department will act vigorously to insure that our national interest in effective competition throughout the economy is not compromised by mergers of this type. H.R. 8261, H.R. 8322, and H.R. 8323 and similar bills which have been introduced to amend the Interstate Commerce Act appear, at least in part, to be a response to the prospective impact of conglomerate mergers in the transportation industry.

We believe that the general objective of H.R. 8261 and H.R. 8323 is desirable in that they would permit the Board to review acquisitions of air carriers by nontransportation companies before such acquisitions occurred, to determine their probable effect on air transportation. We believe H.R. 8322 goes too far in that it flatly prohibits control of air carriers by a firm not closely related to air transportation, even where no adverse effects of such control could be shown.

In our view, the Civil Aeronautics Board should have the opportunity to make certain that the public's interest in air transportation is not compromised in the numerous multi-firm corporate structures being rapidly created at the present time.

However, we also believe that the legislation must not prejudice broader efforts to preserve effective competition throughout the economy. H.R. 8261 and H.R. 8323 create dangers of such prejudice and may have unintended legal consequences of which the Committee may be unaware. It is my hope today to make clear to you these dangers and possible legal consequences and to suggest specifically an amendment by which the objective of the bills may be preserved and by which, at the same time, such dangers and consequences may be avoided.

To achieve the objective of these bills and yet not prejudice broader efforts to preserve vigorous competition in the Nation's economy, it is necessary to take into account the fact that the acquisitions to be reached by the proposed bills are basically different from the acquisitions now subject to the Aviation Act. As I noted earlier, acquisitions between firms engaged in air transportation and in aeronautics are now required to be submitted for Board approval under Section 408. Thus the Board is given control over corporate relationships in the aviation industry where the Board has continuing regulatory responsibility. To facilitate Board regulation in the aviation industry, Congress provided that certain immunity from the antitrust laws would attach to transactions approved by the Board. H.R. 8261 and H.R. 8323, however, would deal with joiners between firms outside the aviation industry and firms within the aviation industry. Such joiners may have significant anticompetitive effects not only within the aviation industry, in areas subject to CAB control, but also in areas outside the aviation industry, in areas not subject to CAB control. Indeed, it may be antici-

pated that for some conglomerate companies which may be involved in such joiners, only a small portion of their activities would be in the aviation industry.

I have stated publicly that it is the intent of the Department of Justice to apply antitrust standards to meet threats to competition which may result from conglomerate mergers. Recently, I testified before the Ways and Means Committee of the House that conglomerate mergers may adversely affect the economy in numerous ways: by creating undue concentration of economic power in the economy; by diminishing the sources of new entry into important lines of commerce; by making new entry more difficult; by creating or enhancing dominant industry positions, with attendant inhibitions of rivalry from smaller firms; by creating reciprocity relationships which foreclose competitors, and in other ways.

Because acquisitions joining common carriers and noncarriers may have the kinds of effects I have just described, both within regulated industry and outside it, they pose special considerations both for the regulatory agency involved and for the Department of Justice. We think it is clear that the regulatory agency should be able to prevent those acquisitions it deems detrimental to the public's interest in the regulated services. We think it is equally clear that the agency's review and action, directed primarily to regulated industry concerns, should not preclude action to deal with the effects of transactions in industries outside air transportation under the statutory standards generally prevailing in nonregulated commerce, such as the standards of Section 7 of the Clayton Act.

Unfortunately, the present language of H.R. 8261 and H.R. 8323 does not make this intent clear, and could give rise to claims of antitrust immunity in broad areas not subject to Board regulation.

H.R. 8261 and H.R. 8323 would add to Section 408 CAB authority to approve or veto direct and indirect acquisitions of control of air transportation firms by nontransportation companies. Existing Section 414 provides that any person affected by an order under Section 408, and other sections, shall be relieved from the operation of the anti-trust laws, and all other restraints and inhibitions of law, "insofar as may be necessary to do anything authorized, approved, or required by such order." Thus, if the Board were to authorize an acquisition of control of an air carrier on the grounds that it saw no harm to air transportation in the acquisition, the acquiring company might contend that the antitrust laws could not be applied to any aspect of the transaction, even though it would have substantial anticompetitive and harmful effects outside air transportation.¹

Allow me to give you some illustrations of the problem. If a hotel chain were to acquire control of an air carrier with Board approval and then another hotel chain were to seek to acquire control of the first hotel company, thereby indirectly gaining control of the air carrier, H.R. 8261 and H.R. 8322 would require that such a transaction receive CAB approval. Board approval of the second acquisition could give rise to a claim that the Board had immunized from the antitrust laws the joiner of the competing hotel chains. Also, an acquisition of an airline by an oil company or by a food preparation firm might have no adverse effects in air transportation but might have the effect of prejudicing the competition of other oil companies or other food companies for the substantial purchases made by the air carrier. Yet, the acquiring company might contend that CAB approval of its acquisition of the air carrier (on the grounds that no adverse effects in aviation were apparent) would preclude inquiry under the antitrust laws into the anticompetitive effects of the transaction in the oil or food processing industries.

These problems are magnified when large and diverse conglomerates are involved. To give you a concrete example, one of the major conglomerates, which has current gross sales of over 3 billion dollars a year, has acquired 33 corporations since 1961, and has at least five subsidiaries with gross annual sales over \$100 million engaged in such disparate areas as meat packing, sporting goods, wire and cable manufacturing, aerospace products, and electronics systems. This company also happens to control an air carrier. The gross annual sales of this air carrier are approximately eight percent of the total gross sales of this conglomerate. Yet, if a firm which directly or through subsidiaries engaged in the same line of commerce as one of the conglomerate's subsidiaries, for example, meat packing, were to merge with this conglomerate, and if it were the surviving corporation, the transaction would under the proposed legislation be subject to

¹ Even though an applicant under section 408 waived antitrust immunity as to an acquisition outside the field of air transportation, a court has held that immunity attached upon CAB approval of the transaction. *Butler Aviation Company et al. v. Civil Aeronautics Board*, 389 F.2d 517 (C.C.A., 2d Cir., 1968).

the approval of the Board and, if approved, arguably immune from prosecution under the antitrust laws. Accordingly, the Department of Justice might be prevented from challenging the effects of this transaction although it might have clear and perhaps significant anticompetitive horizontal effects in the meat packing or other industries.

Nor is this example of an air carrier being owned by a major economic power an isolated one. The largest supplemental air carrier is a subsidiary of a major insurance firm; another of the largest supplemental air carriers is controlled by a firm with over three billion dollars in assets, and total annual gross revenues over one billion dollars; and a third supplemental is owned by a major real estate development firm. The possibility cannot be ignored that such diversified firms controlling air carriers might attempt to merge, and to claim immunity from the application of the antitrust laws as to effects in non-transportation markets if the CAB were to approve the transaction.

We do not think it is intended that this legislation, or existent aviation legislation, allow these results. Legislation providing authority for the CAB to approve and immunize from the antitrust laws transactions having substantial anticompetitive effects outside air transportation would be inconsistent with the need to maintain a consistent antitrust policy throughout the unregulated sectors of the economy. Under such legislation anticompetitive effects outside the air transportation industry either would receive no scrutiny at all or would be considered only by an agency with no experience in or responsibility for the maintenance of competition outside of air transportation. Moreover, even if the CAB did scrutinize the competitive effects in other markets it would do so under a "public interest" standard of the Aviation Act. The result would be the application of different legal tests to transactions having identical effects in non-transportation markets, depending on whether an air carrier was collaterally involved. We note in this connection that the problem of making a test primarily applicable to a regulated industry also apply in non-transportation industries, and of having different legal tests applied to transactions having identical effects in non-transportation industries, would not be resolved by the Attorney General's intervening in Civil Aeronautics Board proceedings, as is contemplated by H.R. 8261.

In sum, the advancing wave of conglomeration has produced corporate relationships not envisaged at the time the Civil Aeronautics Act was passed in 1938, and makes plain the necessity for a clear definition of responsibilities as between the regulatory agency, with respect to regulated air transportation, and the Attorney General and the courts, with respect to nonregulated lines of commerce.

This may be achieved by amending the proposed legislation to make it clear that antitrust jurisdiction remains to deal with transactions which involve air carriers but which have adverse effects outside of the air transportation industry. This amendment would add at the end of Section 414 a new subparagraph stating as follows: "*Provided, however,* That no order of approval shall relieve from the operation of the antitrust laws acts, practices, or transactions which violate the antitrust laws with respect to any line of commerce other than transportation."

Such an amendment would assure surveillance of air carrier acquisitions by conglomerates both from the standpoint of the Board and the Department of Justice. It would also serve to clarify what we have traditionally regarded to be the separate and yet complementary roles to be played by the two agencies in fostering the safe and sound development of our regulated air transportation system and the preservation of competition in the unregulated spheres of our national economy.

We understand that the Civil Aeronautics Board is concerned that amending Section 414 as we have suggested might have unforeseen effects with respect to air carrier agreements, and, possibly, other matters. However, we believe that the language we propose is essential to mark a clear and appropriate delineation of responsibilities between agencies which is necessary and desirable in the light of current developments in the area of industrial organization and experience with the administration of the Aviation Act. If, notwithstanding our view of this matter, the Committee wishes to limit its action to mergers, acquisitions and other transactions covered by Section 408, the amendment may be limited, as follows: "*Provided, however,* That no order of approval under Section 408 of this Act shall relieve from the operation of the antitrust laws transactions which violate the antitrust laws with respect to any line of commerce other than transportation."

If H.R. 8261 or H.R. 8323 were amended as we propose, the Department of Justice would support its enactment.

Mr. FRIEDEL. I want to thank you, Mr. McLaren. I am going to call on Mr. Adams, who has a few questions.

Mr. ADAMS. Mr. McLaren, a particular problem in this area is the interaction of three agencies, the SEC, Department of Justice, and CAB. You have given us recommendations on what type of interaction there should be between the two of you so far as the antitrust laws are concerned.

But I gather you have not agreed or you have not worked out an agreement with the CAB so that this committee through its staff is going to have to maintain contact with your staff and with the CAB staff to see if we can get an agreement. Or else we will have to break the deadlock and find the solution ourselves. Is that the situation?

Mr. McLAREN. I think that is roughly it, yes.

Mr. FRIEDEL. I would rather see them work together themselves.

Mr. ADAMS. That then is how we are to work with regard to your relationship under the present antitrust laws and the present regulatory laws between the two agencies. Now I want to come to the second point, which I think bothers me even more.

I am not at all sure that you have any jurisdiction under the present antitrust laws over problems that are involved with either the corporate takeover or various aspects of the conglomerate merger.

If you do not, and I am going to ask the same question of you that I did of the SEC, are you proposing legislation or do you think through the Ling-Temco-Vought case you will obtain the necessary jurisdiction so that this committee need not concern itself with the problems of the corporate takeover and the conglomerate? Or in this bill should we do as we have proposed to do, that is, to legislate some inhibiting factors to prevent concentration from happening in the industry?

Mr. McLAREN. Well, I think there are two very big questions involved. First, so far as the existing antitrust laws are concerned, we feel that section 7 of the Clayton Act has some unused reserves, you might say, of effectiveness. We have moved as you suggest in one particular merger situation.

Perhaps you have had a chance to see my testimony before the Ways and Means Committee—

Mr. ADAMS. Just right on that point, but you go farther, and for the record, I have a pretty good idea but I would like it in the record.

What would be the approximate time by which you would have a court answer on the extent of unused reserves of jurisdiction under either the Sherman Act or Clayton Act or related acts so that you would know whether or not you would be successful in the field of merger control?

Mr. McLAREN. It is terribly hard to say, but a fully regulated case through the trial stage and through the Supreme Court, I would assume, would be perhaps on the order of 2 years.

Mr. ADAMS. In other words, you are 2 years or more away from knowing by court decision whether or not you can control the conglomerates in the airlines.

Mr. McLAREN. I don't think that is quite true. I think that, No. 1, we may very well get some decisions on preliminary injunctions and this could happen within a matter of weeks. We might get a decision on a request for a preliminary injunction, have it granted or denied,

and have an appeal on it. Such an appeal would be an expedited one, which could be concluded in a matter of weeks. Then, possibly, the question could even get to the Supreme Court without much delay.

It is conceivable that this could happen.

Mr. ADAMS. Are you recommending one way or the other that this committee should wait on your judicial proceedings or should we move now or what is your recommendations?

Mr. McLAREN. My feeling on that, Congressman, is that we should move ahead with the legislation we now have. On the other hand, we certainly don't oppose further legislation. We welcome any guidance Congress wants to give us.

If Congress wants to adopt a joint resolution saying that the Clayton Act does mean what I contend it means, I think we would not need additional legislation.

Mr. ADAMS. That is my next question. Is the Department proposing additional legislation in the Congress in the field over all of the corporate takeover, the conglomerate?

Mr. McLAREN. We have that matter under study, Congressman. We have not yet come to a recommendation or proposed a bill. This is an extremely difficult field in which to legislate and at the same time avoid tightening the screws too tight.

I think that all of us feel that one of the things that makes this country great is a man's right to build a company and, when he feels like retiring, to sell it out and retire. And if we tighten things too tight, perhaps he can't do that.

Mr. ADAMS. I gather from you, as with the SEC people, that you are not in a position where you are going to say to this committee, "We have got our package and we are ready to go with it, so wait on it."

Mr. McLAREN. No, sir, but we would certainly welcome any help that the Congress wants to give on this. We think it is a terribly serious thing.

Mr. ADAMS. My last question is this. Knowing some of the problems you have had with the ICC in the merger field as to whether or not you have jurisdiction over regulated industries. I noticed that you consistently stated the distinction between those involved in the airline or transportation industry and those outside of it dealing with the merger problems.

What we are worried about here is that we are dealing with a new type of concentration that does not center in the traditional horizontal monopoly or horizontal acquisition situation.

Are you satisfied that your amendment here is broad enough to allow you to use the antitrust laws, because you are now dealing with a situation that is not a horizontal merger, and if we give you such immunization in the traditional horizontal merger area, may you still not be left hanging with a concentration under section 7 and have the CAB rule on it, and you would be fighting the antitrust immunization fight all over again.

Mr. McLAREN. On the question of merger in air transportation, we substantially defer to the CAB. To the extent that a merger involving an airline also involves other lines of commerce, then we don't want immunity to apply and we want to be able to apply the antitrust laws, whatever they may be, to the transaction if it has anticompetitive effects outside the transportation industry.

Mr. ADAMS. You are also applying the antitrust laws in the railroad transportation field which is within a regulated area. I am fairly sure that you are right to do that. Do you want to do that in the airline area, too?

Mr. McLAREN. Yes, to this extent. We attempt to have the ICC make a careful analysis of competitive effects of railroad mergers and to accord adequate weight to competition consideration in weighing the disadvantages against the benefits of a proposed merger.

Mr. ADAMS. Then your authority isn't broad enough, is it?

Mr. McLAREN. We want to take to a court those determinations that we think are not in accordance with the regulatory statute that Congress has set up. Do you follow me?

Mr. ADAMS. Yes, I do follow you and that is what I am specifically asking you, do you want a greater power to protect the public interest in merger situations within a regulated industry?

Mr. McLAREN. Mr. Saunders reminds me that the CAB Act contains an antimonopoly proviso and that to me may fall short of standards that ought to be applied in such cases. As for the ICC Act, I don't think there is really a clear standard as to the weight to be given to competitive considerations even to the extent of the CAB standard, and I would think that study could be given to improving that situation.

Mr. ADAMS. I won't take any more of your time, but I would appreciate at some point here a memorandum to the Chairman, and I would like to receive a copy of it, of what your position is on this point. If we are going to try to fix this portion of the law with regard to immunization and jurisdiction, we had better do it once and for all.

If you want some power to protect the public interest with regard to mergers within a regulated industry, then we would like to know about it and then we will go to the CAB and try to get a definite position.

Mr. McLAREN. By not offering that at this time, we are, of course, not saying we don't need it or want it, but we are endeavoring to avoid slowing up the bill that the CAB thinks it does need immediately.

Mr. ADAMS. I would close by saying with immense concentrations of financial control, particularly in the banking industry as well as in several other industries in the conglomerate area, both vertical and horizontal monopolies occur through a back door route and we might investigate merger activity within the regulated industry. You are the expert in this area. Tell us what you feel is the correct posture for this committee to take.

Mr. FRIEDEL. You can furnish that for the record. You don't have to answer that right now.

(See letter dated April 4, 1969, on p.63.)

Mr. FRIEDEL. Mr. Dixon.

Mr. DIXON. Mr. McLaren, following Mr. Adam's inquiry, I must confess I am a little confused. I can't tell whether you want something additional as far as antitrust legislation is concerned or you just want to be certain that no new immunities are granted by this amendment.

Is it the latter?

Mr. McLAREN. There are two positions, Mr. Dixon. The first is that we feel that the present legislation might be interpreted to open immunity that we would contend isn't there. We suggest clarifying legislation in the first proviso that I mentioned and this would dissipate any

effect that this Second Circuit decision may have that we feel, in any event, is erroneous.

Mr. DIXON. Would you take a look at section 116 of the National Traffic and Motor Vehicle Safety Act, as far as a disavowal of any change in antitrust legislation is concerned, and see if that would fit your purpose here so far as your first point is concerned.

Mr. McLAREN. All right, sir. Should we reply on that with our other memorandum?

Mr. FRIEDEL. Yes.

(The following letter was received for the record:)

DEPARTMENT OF JUSTICE,
Washington, D.C., April 4, 1969.

HON. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C.*

DEAR MR. CHAIRMAN: This refers to my appearance before the Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, on March 27, 1969 to present the views of the Department of Justice on H.R. 8322, H.R. 8323, and H.R. 8261. During my testimony Congressman Adams inquired whether the Department of Justice is seeking or intends to seek legislation which would give the Department greater authority than it now possesses over mergers and acquisitions within the transportation industries.

The Department of Justice is not recommending at the present time any amendments to the Federal Aviation Act or the Interstate Commerce Act which would alter or attempt to clarify the substantive standards which the Civil Aeronautics Board and the Interstate Commerce Commission must apply in merger cases under their respective statutes. As indicated in my prepared statement, the Department's principal concern is that the passage of H.R. 8323 or H.R. 8261 not create gaps in the Department's antitrust enforcement program by immunizing from antitrust prosecution joinders of air carriers with non-carriers which may have substantial anticompetitive effects in lines of commerce other than transportation. We consider it essential to the Department's efforts to preserve and foster competition in the unregulated sectors of our national economy that, though the Board may have power to evaluate and immunize from the operation of the antitrust laws acquisitions of air carriers insofar as such acquisitions affect air transportation, the Department's authority to take action if such acquisitions would have significant anticompetitive effects outside of the transportation industry not be foreclosed.

The Department sees no need at the present time to seek legislation which would amend the present statutory criteria to be applied by the CAB in determining whether to approve or veto a merger or acquisition under Section 408 of the Federal Aviation Act.

Under the present statutory scheme the Board considers, pursuant to Section 408, mergers between air carriers and other carriers and firms engaged in aviation, and is required to evaluate such mergers on the basis of the public interest standards of the Act, which include "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." (See Section 102(d) of the Act, 49 U.S.C. 1302(d).) In addition, a specific standard applicable to mergers is contained in Section 408(b) which provides "That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another carrier not a party" to the proposed transaction. We believe that the precedent and record which the Board has established in administering the criteria set forth in Section 408 and 102 has been on the whole quite good. (See, e.g., *American Airlines—merger—Eastern Airlines*, 38 CAB 1153 (1963); *American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc.*, 7 CAB 365 (1946); *Acquisition of Cordova Air Service, Inc., by Alaska Airlines, Inc.*, 4 CAB 708 (1944); *United-Western Acquisition Case*, 1 CAA 739 (1940).) We see no reason to believe that the CAB will not continue to be properly attentive to competitive considerations in evaluating future

acquisitions subject to Section 408. Accordingly, while this statutory scheme might be improved, given the performance of the Board in the administration of Section 408, we are not recommending amendments to the substantive standards which the Board is to apply in evaluating Section 408 mergers.

With respect to the Interstate Commerce Act, it is true that this Act does not contain express standards or criteria relating to the maintenance of competition in the transportation industries regulated by the Interstate Commerce Commission such as those contained in the Federal Aviation Act. It is also true that the Department has often indicated its belief that the Commission has not given sufficient weight to the maintenance of competition and the prevention of monopolies to the extent feasible in a number of railroad acquisition cases upon which the Commission has ruled pursuant to Section 5(2) (49 U.S.C. 5 (2)). (See, e.g., *Seaboard Air Line R. Co. v. U.S.*, 382 U.S. 154 (1965); *Baltimore & Ohio Railroad Co. v. U.S.*, 386 U.S. 372 (1967); *U.S. v. Interstate Commerce Commission*, U.S.D.C., D.C. Circ., No. 1132-68, decided Nov. 20, 1968; jurisdiction noted by U.S. Supreme Court, Feb 24, 1969.) There may be need for the Congress to make explicit through legislation the nature and extent of the Commission's duty to weigh a proposed merger in light of the policies of the antitrust laws and the proper accommodation to be made by the Commission between these laws and the statutory scheme of the Interstate Commerce Act. However, we anticipate that in the near future the United States Supreme Court will hand down its decision in *U.S. v. Interstate Commerce Commission*, better known as the "Northern Lines" case, in which the Department raises directly the issue of the extent to which the Commission must weigh competition as a factor in determining the public interest pursuant to the Interstate Commerce Act as it now stands. Accordingly, it may be appropriate to defer legislative recommendations until we receive the Court's decision. However, if the Committee deems it appropriate that specific legislative direction should be given the Commission at this time, we would be pleased to offer our recommendations and wholehearted assistance.

Mr. Dixon inquired whether our proposed amendment was comparable in effect to Section 116 of the Traffic and Motor Vehicle Safety Act. Section 116 provides as follows:

"Nothing contained herein shall be deemed to exempt from the antitrust laws of the United States any conduct that would otherwise be unlawful under such laws, or to prohibit under the antitrust laws of the United States any conduct that would be lawful under such laws."

The thrust of our proposed amendment is essentially the same as that of the first clause of Section 116, except that the Board would retain jurisdiction to immunize from the operation of the antitrust laws acquisitions of air carriers both by aviation and non-aviation interests insofar as such transactions may affect transportation. As to the latter clause of Section 116, we believe that such a provision is unnecessary. We are aware of no contention that anything in the Federal Aviation Act prohibits any conduct lawful under the antitrust laws. However, if the Committee deems it appropriate that this understanding be made explicit, the Department would not object to the addition of such a provision to its proposed amendment.

Sincerely yours,

RICHARD W. McLAREN,
Assistant Attorney General Antitrust Division.

Mr. DIXON. I have determined from what Mr. Adams has said and from your testimony that somehow we are going to have to resolve a position or get a resolution of a position as far as the Department, CAB and SEC are concerned, and perhaps specifically on this antitrust facet of the legislation.

So I wish you would see if the provision in the Motor Vehicle Act would reassure you so far as any inroads on antitrust legislation are concerned.

Mr. McLAREN. I am sorry not to come before the committee with an agreed position on this with the other agencies involved. We tried, but time was a little too short to get there. I don't really feel that CAB's position is too far from ours, because they say that they don't want to try and get immunity for transactions.

At least I understand this to be true, that is, outside the transportation industry. That being true, I should certainly think we could agree on language.

Mr. FRIEDEL. I want to thank you, Mr. McLaren, and you can furnish the other information for the record.

The meeting stands adjourned until 2 p.m. this afternoon.

(Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 2 p.m., on the same day.)

AFTER RECESS

(The subcommittee reconvened at 2 p.m., Hon. Samuel N. Friedel (chairman of the subcommittee) presiding.)

Mr. FRIEDEL. The subcommittee will now come to order. Our first witness will be Mr. Stuart G. Tipton. He started this morning.

STATEMENT OF STUART G. TIPTON, PRESIDENT, AIR TRANSPORT ASSOCIATION—Resumed

Mr. TIPTON. Thank you, Mr. Chairman. I have concluded my statement, but since I got off the stand the representatives of the Department of Justice have testified and recommended an amendment to the statute, in order to deal with problems that we pointed out, as they at least thought they arose under this new provision.

Actually, on listening to that, and reviewing it some—

Mr. PICKLE. Will the gentleman yield?

Are you talking about the Justice recommendation?

Mr. TIPTON. The Justice recommendation for an amendment.

And having reviewed it, obviously, in a limited way, it appeared to me that the Department of Justice was being unduly concerned as to the effects of this amendment, and that the Congress has already dealt with the problems they are raising, and have dealt with them quite effectively.

Here is the reason I think so. The provisions for the approval of agreements and for acquisitions of control and the like have been in the statute, been effective for 30 years, ever since the statute was passed.

All during that time, the provisions of section 414 of the Civil Aeronautics Act have conferred upon those subject to orders of approval some immunity from the antitrust laws. As a result of that, the Civil Aeronautics Board has, during all of these years, considered the antitrust effects of these various transactions with great care.

The Department of Justice has participated in many of these proceedings and have been, of course, permitted to participate in any fashion that they care to, and bring forward to the Board any views and evidence that they cared to, bearing upon the antitrust effects, and the antitrust characteristics of the various transactions brought before them, so that there are very extensive safeguards to the preservation of the antitrust principles already written in the statute, and there is no proposal by anyone to change those.

The process is one calculated to solve these problems very effectively. The Board sets up these acquisitions or a contract for hearing. Interested persons, including the Attorney General's representative, appear there. They are given adequate opportunity to present their

points of view, and based upon that record, and a consideration of it, the Board acts.

The Board, in reaching its conclusions, must reach them on the basis of a standard of the public interest, and the courts have held, and the Board has recognized, for many years, that an element—and an important element of the public interest, is the antitrust principles, the principles reflected in our antitrust laws, so that they take those principles into account.

I was rather struck with the Department of Justice presentation, which seemed to proceed on the assumption that the Board decided these cases on whether it was good for air transportation or bad for air transportation, and looked at the problem with kind of blinders on.

They are not permitted to do that. They can't do that. They must take into account the antitrust problems that are presented to them, and they do, and always have. And as I say, nothing is proposed here to change the status as it exists.

In addition to that, an order of approval, under the statute, of an acquisition of control or a contract or the like, which creates this immunity is quite specifically limited, and has been limited, all during the time that this law has been in effect. It is not a wide-open blanket immunity for anything you care to do from that point onward, but says very specifically that the immunity is created—

Mr. FRIEDEL. What are you reading from?

Mr. TIPTON. I am reading from Section 414 of the Federal Aviation Act of 1958, and the immunity is created "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

So that the beneficiary, shall we say, of such an order, doesn't have wide-open scope there to act, but he gets an immunity within those relatively restricted terms.

The Department of Justice was concerned by inadvertent issuance of immunity from the antitrust laws. I pointed out, I really believe that it would be most difficult for the Board, with as much advice as they get from the Department of Justice, in one of these proceedings, to inadvertently give more antitrust immunity than they intend to give, so that we would think that the Congress has already dealt with the problem that the Department of Justice has raised, and that no further amendment to this statute is necessary.

Mr. FRIEDEL. All right. In other words, the first amendment, as Mr. McLaren mentioned, the CAB was opposed to, and then he had an alternative amendment, on the last page of his statement, have you gone into that one?

Mr. TIPTON. Yes, I reviewed that. While that is more restrictive than the first of the amendments that Mr. McLaren proposed, it still would, in my opinion, be unnecessary.

In addition to that, it seems to me that it reduces even the effect of the existing law. It gives the Board less power than they have now, so that—

Mr. FRIEDEL. In other words, you are opposed to either one of the amendments.

Mr. TIPTON. Yes.

Mr. FRIEDEL. But prefer the law as it is today.

Mr. TIPTON. I think that the statute would be far more workable, and protect antitrust principles just as effectively, if left alone.

Mr. FRIEDEL. Thank you.

Mr. Pickle? Did you want to pursue any more questions?

Mr. PICKLE. Mr. Tipton, I had to leave before the distinguished gentleman from the Department of Justice had completed his testimony, and I therefore have followed your statement with interest. I wish you would state again for me in what way would this last suggested amendment, under section 414, though it would be more restrictive, how actually it would do damage or violence to the manner in which the CAB operates today?

Mr. TIPTON. It tends to reduce the extent of immunity that can be conferred now. I will get this before me.

At the present time, the Board passes upon issues arising in this provision on matters that affect air carriers, matters that affect common carriers, matters that affect persons engaged in a phase of aeronautics. This latter phrase, of course, is quite a broad one, and carries the Board into wide areas of aviation relationships.

In the provision in the amendment that the Department of Justice has brought forward, the Board's ability to confer antitrust immunity appears to be limited to transportation only, and does carve out a wide area of aviation activity, over which they have jurisdiction now, and would not seem to have jurisdiction under this amendment.

Mr. PICKLE. Perhaps I am misunderstanding the amendment. It seems to me like you are saying that the CAB would still be able to give this approval, and thus protection from the antitrust law, but only with respect to commerce, and not with respect to other modes of transportation. Isn't that correct?

Mr. TIPTON. No, the way it reads, "shall relieve from the operation in order of approval." "Can relieve from the operation of the antitrust laws transactions which violate the antitrust laws, with respect to any line of commerce other than transportation."

The amendment is difficult to understand, but it seems to me that these orders of approval can relieve from the antitrust laws only with respect to matters of transportation. And of course, one of the difficulties that I have with this amendment is that it is difficult to understand, and it is very difficult to determine the scope of it.

We have a situation now in which these problems can be dealt with on a case-by-case basis, with all of the facts and circumstances before the regulatory agencies. And an amendment of this kind, dealing with complex business transactions, if they are stated in general terms of this kind, you won't ever know what they mean, for many years.

Mr. PICKLE. Yes, Mr. Chairman, I think that finishes my questioning. I would hope that if Mr. Tipton wanted to submit to the committee a prepared statement, written statement, on these amendments and your views, we would be glad to have it.

Mr. TIPTON. I would appreciate that opportunity very much, to present for the record a memorandum on this subject, because of course I have discussed it rather quickly after having seen the amendment, and I would appreciate having an opportunity for a more extensive treatment.

Mr. PICKLE. Mr. Chairman, I request that that be allowed.

Mr. FRIEDEL. Right, we would be very happy to receive it, and it will be put in the record.

(The following letter and attachment were received for the record:)

AIR TRANSPORT ASSOCIATION,
Washington, D.C., April 9, 1969.

HON. SAMUEL FRIEDEL,
Chairman, Transportation and Aeronautics Subcommittee, Committee on Inter-
state and Foreign Commerce, U.S. House of Representatives,
Washington, D.C.

DEAR CHAIRMAN FRIEDEL: During our testimony before the Committee on March 27, 1969, we were requested by the Committee to submit a supplemental written statement of our comments on the testimony given immediately following my own by Mr. Richard W. McLaren, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, relative to possible antitrust implications of H.R. 8261.

As I stated during questioning by the Committee, we do not believe that H.R. 8261, or the similar bills dealing with acquisition of control of air carriers, entails any real problems of inadvertent legal consequences adverse to competitive factors "outside the aviation industry".

The reasons for our belief, and the corresponding conclusion that there is no need for any special amendments to the legislation in this respect, are discussed in the attached memorandum.

We appreciate this opportunity to supplement our previous statement to the Committee by the filing of these comments on the antitrust question.

Cordially,

S. G. TIPTON, *President.*

ADEQUACY OF EXISTING ANTITRUST SAFEGUARDS IN CAB CONSIDERATION OF SECTION 408 ACQUISITIONS OF CONTROL

PRELIMINARY STATEMENT

In its testimony supporting the objectives of the bills to expand Civil Aeronautics Board authority under Section 408(a)(5) of the Federal Aviation Act to include acquisitions of control of air carriers by non-carriers and non-aeronautical entities, the Department of Justice has raised the question whether an unintended legal consequence of the legislation might be to give antitrust immunity to "transactions in industries outside air transportation," and thereby "prejudice broader efforts to preserve vigorous competition in the Nation's economy."

It was suggested that this might result under the legislation from the CAB's approving a non-carrier's acquisition of an air carrier on basically "air transportation" considerations, and the acquirer's thereafter contending that the "antitrust laws could not be applied to any aspect of the transaction, even though it would have substantial anticompetitive and harmful effects outside air transportation."

To offset this asserted possibility, Justice proposed that the antitrust immunity provided under existing Section 414 of the Act be expressly limited by the following amendment: "Provided, however, that no order of approval shall relieve from the operation of the antitrust laws acts, practices, or transactions which violate the antitrust laws with respect to any line of commerce other than transportation."

Alternatively, Justice proposes that this amendment to Section 414 be applied at least to all CAB orders of approval under Section 408 of the Act.

It is believed that Justice's concern is not warranted, in light of the existing safeguards of the Act, particularly as interpreted and applied by the Civil Aeronautics Board and the courts. There is, accordingly, no sound basis for enacting any such special amendments to Section 414. On the contrary, the proposed amendments would introduce uncertainties and complexities into an otherwise established statutory scheme.

1. THE ANTITRUST IMMUNITY OF SECTION 414 IS ALREADY NARROWLY
LIMITED IN SCOPE

Under Section 414 of the Act,¹ persons affected by CAB orders pursuant to Section 408 are afforded, *inter alia*, immunity from the antitrust laws. Even absent express limits on such antitrust immunity, the Supreme Court has held that such statutory exemptions for regulated industries "are to be very narrowly construed."²

Congress in enacting Section 414, moreover, has expressly and narrowly confined the scope of the antitrust immunity provided.

Section 414 provides:

"Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, *insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.*" [Emphasis supplied]

The courts and the CAB have made it clear that the scope of the antitrust exemption provided by the words, "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order" is strictly limited, and does not provide any antitrust immunity to subsequent or unrelated activities and transactions.³

In the "Toolco" case,⁴ the court rejected the very proposition being suggested hereby Justice, viz., that CAB approval under Section 408 provides antitrust immunity to all aspects of an acquisition. Defendant, Hughes Tool Company (Toolco), contended that all of its allegedly anticompetitive acts complained of by TWA were immunized under Section 414, because of the CAB's earlier approval of Hughes' acquisition of control of TWA.

The district court disagreed and ruled, as to the CAB orders of approval.⁵

"These orders did not give Toolco a license to engage in any other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of 'acquisition of control,' not activities engaged in by the controlling party subsequent to acquisition, which may be illegal." [Emphasis supplied]

The court pointed out that the limiting language in Section 414 has not been found in any decided case to afford antitrust immunity as to anything more than the possible antitrust violations present in the acquisition itself, saying:

"This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or attempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order." *Id.* at p. 110.

Finally, said the court, the courts in all events retain jurisdiction under the antitrust laws to determine the scope of the immunity resulting from such CAB approval:

"It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. *River Plate & Brazil Conferences v. Pressed Steel Car Co.*, 227 F. 2d 60 (2d Cir., 1955); *Putnam v. Air Transport Ass'n of America*, supra. The cases of *American Airlines v. Standard Air Lines*, 80 F. Supp. 135 (S.D.N.Y. 1948) and *United States v. Railway Express Agency*, 89 F. Supp. 981 (D. Del. 1950), relied on by Toolco are not in point." *Id.* at p. 112.

In upholding the jurisdiction of the lower court, the Court of Appeals for the Second Circuit affirmed these conclusions, saying:⁶

¹ 49 U.S.C. Sec. 1384.

² *People of State of California v. Federal Power Commission*, 369 U.S. 482, 485-486, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962); *Maryland & Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880 (1960).

³ *McManus v. C.A.B.*, 286 F. 2d 414 (CA 2, 1961), cert. den., 81 S. Ct. 1649, 1268; 366 U.S. 928, 6 L. Ed. 2d 388; reh. den., 81 S. Ct. 1918, 366 U.S. 973, 6 L. Ed. 2d; *Trans World Airlines, Inc. v. Hughes*, 332 F. 2d 602 (CA 2, 1964), cert. dism., 85 S. Ct. 934, 380 U.S. 248 13 L. Ed. 2d 817, 818 (1965); *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F. 2d 441, 446 (CA 2, 1968).

⁴ *TWA v. Hughes*, et al., 332 F. 2d 602 (1964).

⁵ *TWA v. Hughes*, et al., 204 F. Supp. 106, 110.

⁶ *TWA v. Hughes*, et al., 332 F. 2d 602, 610. The Supreme Court has even suggested that the agency may properly limit the total number of its approvals in order to minimize the number of transactions that may result in antitrust exemption. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, et al., 390 U.S. 261, 274, 19 L. Ed. 2d 1090, 88 S. Ct. 929 (1968).

"Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions. Title 49 U.S.C. § 1384 extends such immunity only 'insofar as may be necessary to enable such person to do anything authorized, approved or required by such order.' As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give § 408 such a carte blanche effects would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship."

Not only is the extent of the immunity granted by Section 414 thus limited, but Section 414 itself is extremely narrow. The Attorney General has stressed on two occasions that the Section 414 exemption must be secured "in the precise manner and method prescribed by Congress."⁷ "Whole areas" of the antitrust laws, therefore, may be regarded as "not touched by this exemption," e.g., *exclusionary* activity.⁸

Even if some of the *means* (e.g., acquisition of control) of a conspiracy to exclude a competitor may have received CAB approval, the resulting Section 414 immunity would not extend to the exclusionary end of such a conspiracy. This results from the application of the principle that "lawful means may not be used to accomplish any illegal combination and conspiracy."⁹

In fact, in the area of exclusionary activity, the CAB actually has an affirmative role in the *enforcement* of the antitrust laws, by reason of the unfair competition provisions of Section 411 of the Aviation Act. The Board has manifested an acute awareness of the antitrust significance of Section 411,¹⁰ which is, of course, patterned after Section 5 of the Federal Trade Commission Act.¹¹ Activities violative of the Sherman Act have been held to constitute an "unfair competitive practice" under Section 5 of the Federal Trade Commission Act, and would therefore be unfair competitive practices under Section 411 of the Federal Aviation Act.¹² The Board has likewise specifically approved application of the prohibitions of Sections 7 and 10 of the Clayton Act to a proposed transaction.¹³ In addition, the Board has used its other statutory powers, e.g., its minimum rate order powers,¹⁴ for basically antitrust purposes. It follows that "the antitrust laws are an effective force before the courts and indeed before the Board" in the field of exclusionary antitrust activity.¹⁵

Apart from these limitations on the scope of Section 414 immunity, the Board in applying the Act does not regard its orders of approval as being *in perpetuity*. It has been the Board's customary practice to retain jurisdiction in proceedings arising under Section 408, for the stated purpose of imposing, from time to time, such other terms and conditions on its approval as it may find just and reasonable.¹⁶

⁷ 40 Ops. Att'y 335, 338 (1944); 41 Ops. Att'y Gen., 333, 340 (1957), both citing *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 226 (1940).

⁸ *Ailes*, "Regulated Industry and Antitrust," 32 ABA Antitrust L.J. 215, 224 (1966).

⁹ *Atchison T. & S. F. Ry. v. Aircoach Transport Ass'n*, 253 F. 2d 877, 887 (D.C. Cir., 1958); *McGovern, Antitrust Exemptions for Regulated Industries*, 20 Fed. B. J. 10, 15-17 (1960). Similarly, statutory immunity may not apply if the acquisition itself were pursuant to an illegal combination or conspiracy, particularly if the whole of the combination and conspiracy were never submitted to the CAB, or if the combination or conspiracy were of such a nature as to be beyond the authority of the regulatory agency to approve.

¹⁰ 72 Stat. 769 (1958); 49 U.S.C. Sec. 1381 (1964).

¹¹ 52 Stat. 1028 (1938), 15 U.S.C. Sec. 45(a) (6) (1964). A specific deferral of antitrust responsibility to the Civil Aeronautics Board is contained in Section 5(a) (6) of the Federal Trade Commission Act, which exempts "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958."

¹² *Air Cargo, Inc.*, 9 CAB 468, 470 (1948). See, *Pan American World Airways v. United States*, 371 U.S. 296 (1963), where the Attorney General's complaint was dismissed on the ground that the CAB could cope with the matter under its authority over unfair competitive practices under Section 411, even though the matter had been pending in the courts for nine years and had been brought by the government in the first place at the urging of the CAB. Cf. *Pan American-Panagra Acquisition Case*, Order E-19789, pp. 7-8.

¹³ *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962).

¹⁴ *Air Freight Rate Investigation*, 9 CAB 340 (1948).

¹⁵ *Ailes*, *op. cit.*, note 8.

¹⁶ See *Eastern Air Lines, Remmert-Werner Acquisition*, Order E-25973 (1968) at p. 42, citing *Reeve Aleutian Airways, Acquisition of Reeve Alaska Airmotive*, 25 CAB 118 (1957); and See *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962).

The courts have sustained this view of the Act, holding that if complaints regarding the activity approved by the order come to the Board's attention, the Board is justified in reopening the case and considering the matter anew.¹⁷

Clearly, a complaint based upon subsequent or unforeseen anticompetitive effects would come within this sanction.¹⁸ Thus, if an acquisition approved by the CAB does prove to have anticompetitive effects, the existing practice under the Act affords an adequate remedy for dealing with the problem.

Over and above this continuing surveillance of the CAB, if alleged anticompetitive effects of the transaction constitute a *violation* of the antitrust laws, the courts retain antitrust jurisdiction at all times to afford appropriate remedy, notwithstanding the Board's primary jurisdiction over interstate air commerce.¹⁹

Finally, the Supreme Court's recent decision in *Carnation Co. v. Pacific West-bound Conference*, 383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 709 (1966), makes clear that the courts retain antitrust jurisdiction even in the face of statutory antitrust immunity, where *damages* rather than an injunction are being sought, and the transaction in question is not "arguably lawful" under the administrative exemption from the antitrust laws.²⁰

These limitations and qualifications of the antitrust exemption of Section 414 afford ample safeguards against any unintended anticompetitive effects of the proposed legislation.

2. THE EXISTING ACT REQUIRES, AND THE CAB GIVES, GREAT WEIGHT TO ANTICOMPETITIVE FACTORS IN CONSIDERING APPROVALS INVOLVING IMMUNITY.

The immunity provision of Section 414, like those of other regulatory statutes, does not displace the antitrust laws. Rather, the agency involved is required to accommodate the policies of the antitrust laws and those of the regulatory statute. The Supreme Court said in *Silver v. New York Stock Exchange*, 373 U.S. 341, 349 (1963):

"The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating [actions] . . . Which may well have anticompetitive effects in general and specific applications."

The court then suggested the procedure to answer the problem:

"[T]he proper approach . . . in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at p. 357

We start from the fundamental proposition that certain of the regulatory agencies, including the CAB,²¹ are charged under the Clayton Act, Section 11, with an affirmative duty to enforce that antitrust statute to the exclusion of the particular regulatory statute, if the agency cannot grant antitrust immunity with respect to the particular transaction in question.²²

Where the agency can immunize the transaction, the Supreme Court has held, in summary, that: (a) the agency *must* consider the policy of the antitrust laws as part of the "public interest" standard of the regulatory statute involved;²³ (b) the agency may base its denial of approval solely on grounds of the transgression of the principles and policies of the antitrust laws;²⁴ (c) an antitrust viola-

¹⁷ *McManus v. Civil Aeronautics Board*, 286 F. 2d 414, 419 (CA 2, 1961); *TWA v. Hughes*, 332 F. 2d 602, 608.

¹⁸ See *Shulman-Western Joint-Loading Agreements*, 34 CAB 801 (1961), where the Board imposed subsequent conditions on its prior approval, based upon a third party complaint against anticompetitive effects later arising.

¹⁹ *Slick Airways v. American Airlines, et al.*, 107 F. Supp. 199, 210 (DNJ 1951), on reh. 107 F. Supp. 216; appeal dismissed, *sub nom. American Airlines, Inc. v. Forman*, 204 F. 2d 230 (3rd Cir.), cert. den., 346 U.S. 806, 74 S. Ct. 54, 98 L. Ed. 336 (1953), citing *Pennsylvania Water & Power Co. v. Consolidated Gas Electric L & P Co.*, 4 Cir., 184 F. 2d 552.

²⁰ *Cf. Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F. 2d 441, 447 (CA 2, 1968) where the court found the arrangement not "arguably lawful" in view of its *per se* antitrust violation.

²¹ The others are the FCC, ICC and the Federal Reserve Board.

²² *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S. Ct. 370, 88 L. Ed. 544 (1943). *Cf. Mackey-Midet Acquisition Case*, 24 CAB 51; *Pan American-National Agreements*, 28 CAB 960.

²³ *McLean Trucking Co. v. United States*, 321 U.S. 67 (1943); *Far East Conference v. United States*, 342 U.S. 570 (1952); *Minneapolis & St. Louis RR v. United States*, 361 U.S. 173 (1959); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Cf. Denver & Rio Grande Western RR v. United States*, 387 U.S. 485 (1967), where the Court held that the ICC must consider anticompetitive effects even under a statutory provision which carried no antitrust immunity. *Id.* at p. 493.

²⁴ *United States v. Radio Corporation of America*, 358 U.S. 334 (1959). It is not necessary that the agency determine a violation of the antitrust laws; it is enough that the "principles and policies of the antitrust laws" are offended. See, *National Broadcasting Co. v. U.S.*, 309 U.S. 190, 223-224 (1943).

tion is substantial evidence standing alone that the transaction is contrary to the public interest, unless other evidence detracts from the weight of that factor;²⁵ and (d) the courts will exercise ultimate control to ensure that the agency has accorded the required consideration of antitrust policy, by reviewing the findings to determine if there is substantial evidence to support them.²⁶

The Supreme Court's holding in the *Swedish American Line* case²⁷ has been viewed as portending an even more stringent standard of anti-competitive considerations, or applications thereof, by the agencies and the courts. This conclusion is supported by the recent decision of the Court of Appeals for the District of Columbia Circuit in *Northern Natural Gas Co. v. Federal Power Commission*, 399 F. 2d 953 (1968), wherein the Court reversed and remanded to the FPC because of inadequate consideration of antitrust policy. The Court said:

"But because competitive considerations are an important element of the 'public interest', we believe that in a case such as this the Commission was obliged to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important considerations." *Id.* at p. 961.

Furthermore, it is interesting to note that the Court—contrary to the inference of the Justice Department's testimony before the Committee that the CAB may lack antitrust "experience"—clearly considered that administrative agencies are competent to deal with the antitrust issues involved in such review. Commenting on the bar's objections to having to deal with both the agency and Justice on antitrust issues, the Court said:

"... It appears that this problem could be alleviated if the regulatory agencies were conscientiously to examine the antitrust implications of their actions, thereby taking much of the burden from the Department of Justice. . . ." *Id.* at p. 959, fn. 4, [Emphasis supplied]

In the view of the D.C. Court of Appeals, then the CAB is not only competent to deal with the various anticompetitive issues which may be presented, but can and should relieve the Attorney General of much of this burden in proceedings before the Board.

In practice, the CAB has always given full recognition to and consideration of the antitrust laws in passing upon transactions which would be immunized by the operation of Section 414.

In *Air Cargo, Inc.*, 9 CAB 468 (1948) the CAB gave recognition to the Supreme Court's decision in *McLean Trucking Co.*, and possibly went beyond that decision, for it stated:

"... We are not bound by this [antitrust] decision in approving agreements under section 412 of the Civil Aeronautics Act. However, in making such a determination we cannot ignore the purposes of the antitrust laws. The Supreme Court has held that in conferring authority similar to that exercised by us under section 412, Congress neither made the antitrust laws wholly inapplicable nor authorized the administrative agency to ignore their policy. Also, since our approval of cooperative agreements between air carriers gives such agreements immunity under the Federal antitrust laws, we must be concerned with the objectives of those laws as interpreted by the courts." [Emphasis added; footnotes omitted]

In the *Local Cartage Agreement Case*, 15 CAB 850 (1952) the CAB even went further and stated:

"The other basic consideration is that the Board, in determining whether an agreement is adverse to the public interest under section 412 of the Act, cannot ignore the question of whether such an agreement may run counter to the principles and purposes of the antitrust laws. The approval of an agreement under section 412 exempts the agreement from the operation of the antitrust laws by virtue of section 414. While this exemption demonstrates the Board's power to approve agreements which otherwise would violate the antitrust laws, it also imposes upon the Board, in determining the effect on the public interest of agreements for which approval is sought, the duty to evaluate such agreements in the

²⁵ *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien* (Swedish American Line), 390 U.S. 238 (1968).

²⁶ *Seaboard Airline RR v. United States*, 382 U.S. 154 (1965). There is an increasing tendency by the courts to invoke the "substantial evidence" rule to require additional agency justification for approvals involving antitrust implications. See, *Sabre Shipping Corp. v. American President Lines, Ltd.*, 285 F. Supp. 949 (USDC, N. Y. 1968), citing the *Volkswagenwerk* and *Swedish American Line* cases, *supra*, as evidencing "a growing reluctance on the part of the Commission to grant immunity under the Shipping Act where to do so would grant immunity for an antitrust violation." *Id.*, at p. 956. Cf. *Northern Natural Gas Co. v. FPC*, *infra* p. 13.

²⁷ *Supra*, note 25.

light of antitrust policy and principles. *Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits.*" [Emphasis added; footnotes omitted].

There is no question but that this early decision of the CAB is substantially the same as the recent Maritime Commission standard upheld by the Supreme Court in the *Swedish American Line* case. The Board has thus from the beginning demonstrated a very serious concern and regard for the enunciated antitrust principles and policies.²⁸ It is clear that the Board has placed on the proponent a "substantial burden" under its "serious transportation need" criterion. See, *IATA Credit Agreements*, 30 CAB 1553, 1555 (1960). It is likewise clear that the CAB grants such immunity reluctantly, and only when convinced of the paramount need therefor. As noted in the *ATC Agency Resolution Investigation*, 29 CAB 258, 263 (1959):

"Although we are willing by our approval to exempt from the operation of the antitrust laws concerted action by carriers which is necessary [for efficiency and economy], we cannot extend the scope of such approval to activities calculated to restrict trade for a monetary saving which, viewed against the magnitude of the restraint, is insignificant." [Footnotes omitted]

The Board's concern for antitrust policy has been as far-reaching and all-inclusive as have the anticompetitive aspects of the various transactions it has considered. Thus, the Board has condemned concerted boycotts of third parties,²⁹ the apportioning of service between carriers in a given market,³⁰ the joint establishing of rates,³¹ various restraints of trade³² or diversion of traffic to other parties,³³ and a joint allocation of charter business on some basis other than "free play of competition."³⁴

The Board in the absence of a showing of serious transportation need³⁵ has even denied approval where the Department of Defense has objected to the transaction as merely "tending to violate antitrust policies and principles."

The Board said:

"In the absence of such a showing, the Board is not prepared to approve, and thereby grant immunity from the antitrust laws, group-carrier activities with regard to the Defense Department's procurement program."

Similarly, even where it has approved a transaction as supported by a serious transportation need, the Board has in many cases imposed significant conditions on its approval, out of consideration for antitrust principles and policies. For example, in approving IATA cargo agency rules, the Board *excepted* their application within the United States, because it was "not consistent with the principles of the antitrust laws of the U.S. to grant immunity."³⁶

Section 408(b) makes express provision for the CAB's imposing terms and conditions or "such modifications as it may prescribe" in approving a transaction as being in the public interest. In this respect, Section 408 differs from either Section 409 (interlocking relationships) or section 412 (pooling and other agreements).³⁷

An examination of the cases before the CAB involving anticompetitive considerations discloses that the Board, as noted previously, has always been extremely

²⁸ To a similar effect, see: *IATA Credit Agreements*, 30 CAB 1553 (1960); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Prepaid Ticket Advice Resolution*, 31 CAB 1030 (1960); *Volumair Agreement*, 30 CAB 1007, 1009 (1960); *IATA Agreement Order E-20348*, p. 2; *IATA Agreement*, Order E-15020, p. 2; *North Atlantic Tourist Commissions Case*, 16 CAB 225.

²⁹ *IATA Credit Agreements*, 30 CAB 1553 (1960); *Local Cartage Agreement Case*, 15 CAB 850 (1952).

³⁰ *Pan American-Venezolana Traffic Arrangements*, 34 CAB 800 (1961).

³¹ *Eastern-Pan American-TCA Cargo Rates*, 35 CAB 887 (1962).

³² *IATA Teletype Ticketing*, 30 CAB 1543 (1959); *ATC Agreements Teletype Ticketing*, 31 CAB 941 (1960).

³³ *Six Carrier Mutual Aid Pact*, 29 CAB 168 (1959).

³⁴ *Volumair Agreement*, 30 CAB 1007 (1960).

³⁵ *Technical Committee for Contract Administration*, CAB Order No. E-26171 (1967). The "tend to" test, moreover, is the fundamental test of the Clayton Act, barring stock or access acquisitions where "the effect may be substantially to lessen competition, or to tend to create a monopoly." 64 Stat. 1125 (1950), 15 U.S.C. Sec. 18 (1964). In using the Clayton Act standard, the CAB has gone far beyond the literal, and much narrower "monopoly" test required by Section 408(b). *Northwest Airlines, Inc. v. CAB*, 303 F. 2d 395, 401 (DC Cir. 1962).

³⁶ *IATA Cargo Agency Rules*, CAB Order No. E-20348 (1964). Cf. *Western-Pacific Northern Merger*, E-25240, pp. 1, 2; *Air Freight Tariff Agreement Case*, 14 CAB 424, 425; *Emery Air Freight Corp., Declaratory Order*, Order E-22934, p. 2.

³⁷ Cf. *Pan American Airways, Inc., et al., Merger*, 2 CAB 503, 505 (1940); *United Air Lines Transport Corp.*, 1 CAA 739 (1940).

conscious of the antitrust implications, and as a result, has nearly uniformly imposed exacting conditions on its approval, if granted.³⁸

Moreover, it is evident that the CAB's concern in these matters and the kinds of such conditions which it consequently imposes, are strongly affected by the position of the Department of Justice, and other interested persons. It is standard procedure for the Board to consult the Department of Justice regarding the antitrust aspects of matters involving antitrust immunity as a consequence of CAB approval.³⁹ Section 408(b) of the Act expressly requires the CAB to notify persons known to have a "substantial interest in the proceeding" of the public hearing on applications for acquisition of control of an air carrier. The Board has viewed this provision as requiring it to notify the Attorney General, and has done so. It likewise deems the Attorney General to be a person entitled to object to a CAB order without hearing under the third proviso of Section 408(b).⁴⁰

Included among the specific factors frequently considered by the Board in determining whether a proposed acquisition is consistent with the public interest, as required by Section 408(b), are (1) whether there would be a lessening or elimination of competition in any of the affected areas,⁴¹ (2) whether there would be a conflict of interest between the two companies which might inure to the detriment of either.⁴²

The Board has stated that, in considering Section 408 transactions, it regards its "general statutory guide" to the public interest as being found in the policy declaration section of the Act, Section 102.⁴³

Section 102 provides:

"DECLARATION OF POLICY: THE BOARD

"Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

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

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

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

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

³⁸ See, e.g., *Air Cargo, Inc.*, 9 CAB 468 (1951); *Local Cartage Agreement Case*, 15 CAB 850 (1952); *Reeve Aleutian Airways, Acquisition of Reeve Alaska Air motive*, 25 CAB 118 (1957); *Pan American Acquisition of LACSA Case*, 35 CAB 343 (1962); *Shulman-Western Joint-Loading Agreements*, 34 CAB 801 (1961); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Prepaid Ticket Advice Resolution*, 31 CAB 1030 (1960); *National Air Taxi Conference Agreement*, 37 CAB 774 (1963); *Hawaiian Airlines Interlocking Relationship*, 35 CAB 878 (1962).

³⁹ See, *Local Cartage Agreement Case*, 15 CAB 850, 851 (1952); *Six Carrier Mutual Aid Pact*, 29 CAB 168, App. B L9 (1959); *Consolidated Airline Purchasing Corp., Order Approving Agreement* (1963).

⁴⁰ Testimony of Chairman John H. Crooker, Jr., before House Transportation Subcommittee on H.R. 8261, H.R. 8322 and H.R. 8323, Relating to Stock Control of Airlines, March 25, 1969, p. 9.

⁴¹ See, e.g., *American Airlines Acquisition of Mid-Continent Airlines*, 7 CAB 365 (1946); *Eastern Airlines, Remmert-Werner Acquisition*, Order E-25973 (1968).

⁴² See, e.g., *Maytag & Frontier Airlines, Inc., Approval of Control*, 27 CAB 756, 760 (1958); *The Florida Case*, 6 CAB 765, 790 (1946).

⁴³ 49 U.S.C. 1302 [Emphasis supplied]. "Public interest" as used in the Act is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives as outlined in Section 102 (formerly section 2): *Acquisition of Western Air Express by United Air Lines*, 1 CAA 739, 740 (1940); *Acquisition of Marquette by TWA*, 2 CAB 1, 4 (1940); *Pan American Airways, Inc., et al., Merger*, 2 CAB 503, 505 (1940); *Marine Airways-Alaska Transport Consolidation*, 3 CAB 315, 318 (1942); *Pan American-Matson-Inter-Island Contract*, 3 CAB 540, 545 (1942); *Western Air Lines, Acquisition of Inland Air Lines*, 4 CAB 654, 656 (1944); *Acquisition of Mayflower Airlines, Inc. by Northeast Airlines, Inc.*, 4 CAB 680, 681 (1944); *Acquisition of Cordova Air Service by Alaska Airlines, Inc.*, 4 CAB 708, 709 (1944); *Northern Consolidated Airlines, et al., Consolidation*, 8 CAB 110, 111 (1947); *Pacific Northern Airlines, Certificate Transfer*, 8 CAB 217, 221 (1947); *IATA Agreement, North Atlantic Fares*, 10 CAB 330, 331 (1949); *Air Freight Tariff Agreement Case*, 14 CAB 424, 425 (1951); and *ATC Agency Resolution Investigation*, 29 CAB 258, 308, 309 (1959); *Central Airlines, Inc., Merger*, Order E-25626, p. 3.

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

It has already been noted that the CAB construes its authority over unfair competitive practices under Section 411 of the Act to comprehend activities violative of the Sherman Act.⁴⁴

In addition to these general statutory guides to the CAB, Section 408(b) expressly prohibits the Board from approving an acquisition as being in the public interest in the following circumstances:⁴⁵

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

As the CAB views this Proviso, the Board will approve an acquisition of control of an air carrier unless "we find it to be inconsistent with the public interest or that it comes within the other limitations of the section."⁴⁶ Thus, once the Board determines that the monopoly and competitive restraint criterion of 408(b) is transgressed, it cannot approve the acquisition. In applying the criterion of the Proviso, the Board in practice has actually considered whether the transaction results in creating a monopoly or restraining competition or jeopardizing another air carrier.⁴⁷

Moreover, as pointed out by Judge Friendly, in the Second Circuit decision cited by the Department of Justice in its testimony, the Board has actually applied broader antitrust concepts than required by a narrow reading of the First Proviso of Section 408(b), by relying on the general public interest tests of Section 102 of the Act:⁴⁸

"However, the Board has escaped the straitjacket that would have been imposed by reading the proviso as a limit on its consideration of competition in passing on applications under § 408. It has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anti-competitive effects less extreme than those limned in the proviso in determining whether the transaction will be 'consistent with the public interest' as defined in § 102, see, e.g. *American Airlines, Acquisition of Control of Mid-Continent Airlines*, 7 C.A.B. 365, 371-372, 377-378 (1946)"

Judge Friendly added,

"The true construction of § 408(b) as to transactions with anticompetitive effects thus is that the Board cannot approve a transaction if its effects will be so extreme as to violate the proviso but must approve others if, but only if, it finds the disadvantage of any curtailment of competition to be outweighed by 'the advantages of improved service.' *McLean Trucking Co. v. United States*, *supra*, 321 U.S. at 87, 64 S. Ct. 370, 88 L. Ed. 544." *Id.* at p. 519

The Board has also interpreted Section 408 as sanctioning temporary or interim relief where required in the public interest, despite the fact that the statute does not expressly provide for these measures. Thus, it has employed, where warranted by the public interest, summary procedures, similar to those it has employed in the establishing of temporary mail rates, notwithstanding the express requirement of Section 408 for a hearing.⁴⁹ The Board has relied on the broader provisions of Section 204(a) and of Section 1001 of the Act⁵⁰ for this purpose, as well as Section 102.

Finally, the Board has exercised conservatism and restraint in disclaiming jurisdiction of transactions under Section 408, and in exempting such transac-

⁴⁴ *Air Freight Rate Investigation*, 9 CAB 340 (1948).

⁴⁵ 49 U.S.C. 1378(b).

⁴⁶ *Pan American Airways, Inc., et al., Merger*, 2 CAB 503, 505 (1940). Cf., *North Central Airlines Inc. v. Civil Aeronautics Board*, 265 F. 2d 581, 584 9 (C.A.D.C. 1959), cert. den., 360 U.S. 903 (1959); *Northwest Airlines v. Civil Aeronautics Board*, 303 F. 2d 395 (C.A. D.C. 1962).

⁴⁷ See, *The Flying Tiger Line, Inc.-Mercury General American Corp. Acquisition*, Order E-23062, p. 6; Cf. *Eastern-Mackey Merger Case*, Order E-24427 & E-24428, p. 6; *Western Truck Leasing Co., Control and Interlocking Relationships*, Order E-26114, p. 3.

⁴⁸ *Butler Aviation Company v. Civil Aeronautics Board*, 389 F. 2d 517, 519 (1968).

⁴⁹ *Toolco-Northeast Control Case*, 34 CAB 583, 588 (1961).

⁵⁰ See, 49 U.S.C. 1324(a), which provides—

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under this Act."

Similarly, Section 1001, 49 U.S.C. 1481, provides in pertinent part that the Board may conduct its "proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice".

tions from the requirements of Section 408 pursuant to the exempting authority contained in Section 416(b) of the Act.⁵¹ Thus, the Board has denied "retroactive waivers" of its rules respecting purchase of air carrier stock during a period in which such transactions were prohibited;⁵² it has denied requested disclaimers of jurisdiction of transactions under Section 408;⁵³ and has denied waiver of its "Sherman Doctrine" requiring divestment of premature acquisitions prior to any CAB consideration.⁵⁴

Clearly, the CAB has given close scrutiny to the anticompetitive effects of transactions which would receive antitrust immunity as a result of its approval. Contrary to the inference of the Justice Department that such scrutiny, being under the "public interest standard of the Aviation Act" results in the "application of different legal tests" than under the antitrust laws,⁵⁵ it is equally clear that the CAB has given very great weight to the principles and policies of the antitrust statutes.

3. UNDER SECTION 408 THE CAB MAY AND DOES CONSIDER ANTICOMPETITIVE EFFECTS OTHER THAN IN AIR TRANSPORTATION

The Department of Justice argues that "the acquisitions to be reached by the proposed bills are basically different from the acquisitions now subject to the Aviation Act." Justice maintains that under the proposed legislation, "anticompetitive effects outside the air transportation industry either would receive no scrutiny at all, or would be considered only by an agency with no experience in or responsibility for the maintenance of competition outside of air transportation."

It is not believed that this is an accurate statement of the scope of the CAB's consideration of anticompetitive issues under the existing Act. Under Section 408(a) (5) the CAB must consider acquisitions of control of air carriers, not only by other air carriers, but by persons controlling an air carrier, by "other" common carriers, and by persons engaged in a phase of aeronautics.

Clearly, the Board, for reasons previously stated, may consider any anticompetitive effects of the acquisition on the acquirer as well as on the acquired air carrier. On its face, Section 408(a) (5) now embraces acquirers who are not within "air transportation". The Board has held, e.g., that a "person controlling an air carrier" under Section 408(a) does not itself make such person an "air carrier".⁵⁶

In the case of acquisitions by "other common carriers" the CAB plainly is called upon to deal with companies outside of air transportation, or even outside of transportation. While railroads, motor carriers, and water carriers are clearly within the contemplation of the statute, it would appear that non-transportation carriers (e.g., communications common carriers) might also be within the statute.

That Congress so intended is evidenced by the special definitions and statutory qualifications placed on the term "common carrier" as used in regulatory statutes other than the Aviation Act. The term is not defined in the Federal Aviation Act. But the other regulatory statutes define the common carrier contemplated in the statute, and the Communications Act expressly negates application to any other common carrier "not subject to this chapter".⁵⁷ All but the Water Carrier Act were in being when the Civil Aeronautics Act was being considered. Thus, Congress, fully aware of the language it had used historically⁵⁸ to limit jurisdiction

⁵¹ 49 U.S.C. 1386(b). See *Trans-Caribbean Airways, interlocking Relationships*, 34 CAB 777, 780 (1962). The CAB view is that under either a 416 exemption or a disclaimer of jurisdiction under 408, no antitrust immunity is conferred by Section 414. At least one commentator indicates that a 416 exemption order is a form of "approval" and would thus receive immunity under Section 414. Alles, "Regulated Industries and Antitrust," 32 A.B.A. Antitrust L.J. 218, 223.

⁵² See *Central Airlines, Inc., Mail Rates*, E-21930, p. 1.

⁵³ See *Drake Motor Lines, Inc., Order E-23810*, p. 3; *Hughes Tool Company, Acquisition of Control-Trans World Airlines, Inc., Order E-21057*, p. 4. Cf. *Universal Consolidated Industries, Inc., Disclaimer of Jurisdiction*, Order 68-12-86, p. 2. Similarly, the Board has later asserted 408 jurisdiction once disclaimed, where the *modus operandi* had changed. See *Minnesota Enterprises, Inc. & Edward L. Murphy, Jr., Application*, E-24942, p. 2, E-378; E-19014.

⁵⁴ *National Airlines, Inc., Control and Interlocking Relationships*, Order E-20701, p. 2.

⁵⁵ The suggestion has been made, in fact, that the opposite is true: viz., that although some lip service is paid to the principle that consideration be given to the expression of Congressional intent in the regulatory statutes, this does not, in practice, "appear to play any significant role." See Schwartz "Legal Restrictions of Competition in Regulated Industries," 67 Harv. L. Rev. 436, 441-443 (1954).

⁵⁶ *Air Line Pilots Ass'n., International v. Gulf American Land Corp.*, E-24642, p. 2.

⁵⁷ See Attachment A hereto which sets forth columnar comparisons of the definitions of common carrier contained in the Safety Appliance Act, the Federal Communications Act, and the three Parts of the Interstate Commerce Act.

⁵⁸ Some of it quite recently, as in the case of the Motor Carrier Act of 1935.

by various agencies to defined types of common carriers, did not elect so to limit the definition of "common carrier" which the Board was to consider in Section 408 and 409 cases.⁵⁹

In deciding whether Congress has conferred jurisdiction on an agency, the courts have frequently adverted to Congress' conscious selection of differing language in successive regulatory acts.⁶⁰ Under this test, the CAB is not limited to transportation "common carriers" in considering acquisitions of control of an air carrier.

Nor has the Board regarded itself as limited. It has in practice gone beyond the bare statutory provision for approval of acquisitions of an air carrier by "other common carriers." Thus, although section 408(a) does not in terms forbid a *person controlling* such "other common carrier" to acquire control of an air carrier without CAB approval, the Board has nevertheless, as a general rule, held Section 408(a) (5) applicable to such an acquisition.⁶¹

Similarly, while Section 408 does not *in haec verba* make unlawful the acquisition of control of a surface carrier by an air carrier without CAB approval, the Board has held that "the plain intent" of Congress was to make unlawful any acquisition under which an air carrier and "another common carrier" become subject to "unified control", and has taken jurisdiction of such acquisitions under Section 408.⁶²

In the case of acquisitions by "persons engaged in any other phase of aeronautics" the CAB's jurisdiction under Section 408(a) (5) is even broader, and potentially more removed from strict considerations of effects in air transportation.

A notable example of CAB concern with anticompetitive effects "outside of air transportation" resulting from an acquisition of control under Section 408 is found in the very case cited (in another context) by the Department of Justice: *Butler Aviation Company et al. v. Civil Aeronautics Board*.⁶³ In that case, the (CAB under Section 408 approved, after hearing, the acquisition by an air carrier of a "fixed base operator" which was also engaged in the sale of business jet and short-takeoff utility aircraft. The acquisition was strongly opposed by competing fixed base operators and aircraft sales outlets. The Antitrust Division of the Department of Justice was also allowed to intervene.

In considering whether to approve the acquisition, the CAB made⁶⁴ extensive determinations of the anticompetitive effects, not only in the air transport field, but in the aviation service industry and in the business jet aircraft industry. The Examiner and the Board found that the acquisition would not restrain competition or create a monopoly in either of the nontransport industries involved.

It is interesting that on judicial review (by one of the competing opponents of the acquisition), the Department of Justice Antitrust Division filed the Government's brief,⁶⁵ in which it is not only acknowledged, but emphasized, that the CAB in passing on the acquisition had fully and properly considered the anticompetitive effects *outside of air transportation*.

The Department of Justice said.⁶⁶

"Contrary to the suggestion of Lear (Lear Br. 28), the examiner did not hold that the restraint of competition forbidden by Section 408(b) is limited to the control of air transportation. Indeed, at the outset of the proceedings, when Eastern and R-W filed answers in opposition to Lear's motion to intervene on the theory that restraint of competition was limited to the field of air transporta-

⁵⁹ Congress, moreover, returned to a restricted definition of common carrier immediately following the Civil Aeronautics Act of 1938, in the Water Carrier Act of 1940. Cf. Attachment A.

⁶⁰ *Alaska Airlines v. Civil Aeronautics Board*, 257 F. 2d 229, 230 (CADC, 1958); *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F. 2d 875, 880 (CADC, 1962); *Alcoa Steamship Company, Inc. v. Federal Maritime Commission*, 348 F. 2d 756, 758 (CADC, 1965). See also, *Border Pipe Line Co. v. Federal Power Commission*, 171 F. 2d 149, 151 (CADC, 1948).

⁶¹ *Transportation Corporation of America*, E-20785, p. 4, citing *Air Freight Forwarder Case*, 9 CAB 473 (1948); *Minnesota Enterprises, Inc. & Edward L. Murphy, Jr., Application*, E-24942, p. 2.

⁶² *Trans-Caribbean Airways, Interlocking Relationships*, 34 CAB 777, 779 (1961); *Trans-Caribbean Airways*, 37 CAB 710, 712 (1962).

⁶³ The proceeding before the CAB is embodied in Board Order E-25973, *Eastern Air Lines, Remmert-Werner Acquisition* (1968), 389 F. 2d 517 (C.C.A. 2d Cir., 1968).

⁶⁴ The CAB actually declined review of the Examiner's decision. Under Reorganization Plan No. 3 of 1961, 75 Stat. 837, 49 U.S.C. 1324, this makes the examiner's initial decision the action of the Board for all purposes, including appeal and review. *F.T.C. v. Flotill Prods., Inc.*, 386 U.S. 1003 (1967).

⁶⁵ *Butler Aviation Co. v. C.A.B.*, No. 31, 884, U.S. Court of Appeals for the Second Circuit, *Brief for Respondent*.

⁶⁶ *Id.* at p. 18.

tion, the Board permitted the intervention with instructions that the issue be fully explored. Subsequently, when Eastern moved to exclude from consideration any issue of restraint of competition in the field of sales of general aviation aircraft, the examiner denied that motion (Tr. 159). As a result, the question of whether Eastern's acquisition would have an effect on either the business jet aircraft or aviation service industry was fully explored, and the examiner concluded that the acquisition would not substantially lessen competition or tend toward a monopoly 'in air transportation, the executive aircraft industry . . . or in the aviation service . . .' (Tr. 1905). He therefore found it unnecessary to pass upon the jurisdictional issue. In our view, his conclusion is supported by the record." [Footnotes omitted]

The Department of Justice pointed out that the Examiner had devoted over 12 pages of his initial decision to a discussion of the "legal and factual problems presented by a consideration of the antitrust laws", the Supreme Court having held that a "five-page consideration of anticompetitive contentions surrounding the merger involved in *Minneapolis v. St. L. Ry. Co.*, 361 U.S. 173, at 188 (1960) was deemed 'extensive'."⁶⁷

The Department of Justice also stressed in its brief that the business jet and aviation service industries in the *Butler* case are not related in any substantial degree to "air transportation".⁶⁸ And it fully supported⁶⁹ the CAB's distinguishing the case, on anticompetitive considerations, from the Supreme Court's decision in the leading antitrust case of *Federal Trade Commission v. Proctor & Gamble Co.*⁷⁰

Finally, Justice agreed in its brief in the *Butler* case with the CAB's refusal to attach a condition to its approval of the acquisition under which the parties would have waived their antitrust immunity given by Section 414.⁷¹ In supporting the propriety of the CAB's refusal to attach this condition, the Government's brief stressed that "Butler or anyone else claiming injury will still have an opportunity to bring a treble damage action against Eastern on the ground that the acquisition violates the antitrust laws."

To this it added,

"In such proceeding, if Eastern should defend on the ground that Section 414, coupled with the Board's order, grants it immunity, the trial court will have an adequate opportunity to determine, as a matter of law, the scope of immunity flowing from the Board's order. Contrary to Butler's assertions, there is nothing in the Board's order which prevents Butler from 'taking advantage of their right to private antitrust enforcement'. Whatever immunity Eastern secures as a result of the Board's order will be the immunity conferred by Congress in Section 414, which the Board is not at liberty to change." [Footnotes omitted.]

The *Butler* case is not extraordinary. In other situations, the Board has given consideration to the anticompetitive effects of the transaction outside of air transportation, and has acted appropriately. Thus, in *Consolidated Airline Purchasing Corp., Order Deferring Action on Agreement*, Docket 14589, June 21, 1963, the Board approved the transaction, saying:

"Although there is no present indication that circumstances will, in fact occur where quantity purchases by CAPCO of a particular item have a significant impact on others participating in the market, the Board may further condition its order of approval herein as necessary. In this connection, the Board anticipates that it will be guided by the advice of the Justice Department as to the competitive pattern in industries with which the Board is not familiar." [Emphasis added]

Following the Board's order, the Department of Justice filed a statement with the Board, expressing concern over "the possible competitive impact upon industries other than air transportation" which might arise from the CAB's limiting successive purchases of the same commodity to only \$100,000. Deferring to Justice's views, the Board thereupon imposed an additional, and much more stringent condition, on its approval, saying:

"The Board previously recognized the possible antitrust implications of quantity purchases by CAPCO and accordingly tentatively concluded that a limitation of \$100,000 should be imposed upon any single purchase. In view of the comments

⁶⁷ *Id.*, at p. 16.

⁶⁸ *Id.*, at p. 28.

⁶⁹ *Id.*, at p. 28-37.

⁷⁰ 386 U.S. 568 (1967).

⁷¹ *Id.*, at p. 44. Note, however, that it is the Second Circuit's upholding of this aspect of the CAB's determination on judicial review to which Justice now objects in its testimony before the Committee.

made by Justice, we have decided that a further condition should be imposed to provide that successive quantity purchases of the same item from a single source should not exceed \$250,000 in value in any one calendar year. We believe this additional restriction will achieve the same objectives as those contemplated in Justice's proposed condition and at the same time afford CAPCO a reasonable scope and flexibility of operations."

This action by the Board rested squarely on considerations of the anticompetitive effects of the arrangement on industries outside air transportation, and "with which the Board is not familiar".

In the very case cited by Justice, of the "large and diverse conglomerate" with \$3 billion annual sales which controls an air carrier, the Board dealt with the potential anticompetitive effects of the acquisition of the carrier under Section 408, not solely with respect to air transportation, but as between aircraft manufacturers.⁷²

In deed, it would appear that in the vast majority of transactions involving "persons engaged in any other phase of aeronautics" the Board, by the very breadth of the classification, would be dealing with potential anticompetitive effects outside of air transportation. This is the almost inevitable result of the very broad holdings of the Board as to when an entity is a "person engaged in a phase of aeronautics".⁷³

In sum, the CAB is constrained by the existing sanctions, if not requirements, of the Act, as interpreted and applied by the Board and the Courts, to give full consideration to anticompetitive factors both within and without air transportation. The Board, moreover, has done so in practice, with the active participation of the Department of Justice.

Taken with the extremely limited scope of the immunity given by Section 414, there is no sound basis for the Department of Justice's proposed amendments to limit the scope of Section 414.

⁷² *Ling-Tempeco-Vought, Inc., Acquisition of Braniff International*, Docket No. 18940, Order No. E-25989, November 17, 1967. See also *United States Lines v. CAB*, 165 F. 2d 849 (CA 2, 1948) considering competitive effects on foreign steamship operators; *McManus v. CAB*, 286 F. 2d 414, 419 (CA 2, 1961), dealing with competitive effects among travel agents.

⁷³ The Board has held these entities to be engaged in a "phase of aeronautics":

a. Ownership and leasing of aircraft and engines: *Overseas National Airways*, 24 CAB 827 (1956); *Los Angeles Air Service, Inc., et al. Control and Interlocking Relationships*, 26 CAB 43 (1957); *Resort Refinancing Case*, 26 CAB 578 (1958); *American Airlines, Exemption*, 27 CAB 1112 (1958); *Purchase by Galco of American Airlines DC-7 aircraft*, 28 CAB 952 (1959); *Seaboard & Western Airlines, Inc., and Airborne Carriers, Inc. Acquisition and Control*, 29 CAB 1289 (1959); *Western Air Lines, Exemption*, 29 CAB 1311 (1959).

b. Travel Agency: *Frank V. Gondola, William E. Geiselman and Airborne Coordinators, Interlocking Relationships*, 24 CAB 592 (1957).

c. Oil Company Selling Aviation Fuel: *Flight Enterprises, Inc., and Transocean Corporation of California, Control of Bradley Flying Service, Inc.*, 27 CAB 562 (1958).

d. Specialized Packing Company for Two Family-Owned Freight Forwarders: *Barnett International Forwarders, Inc., et al. Interlocking Relationship*, 25 CAB 54 (1957); but see *Barnett International Forwarders, Inc., and Barnett International Airfreight Corp., Application for Approval of Interlocking Relationships*, 23 CAB 760 (1956).

e. Manufacturer of Aircraft Tires: *Frontier Airlines, Inc., Acquisition of Control by RKO General*, 41 CAB 498 (1964).

f. Aircraft Refueling Company: *National Airlines, Inc., and Lewis B. Maytag, Jr., Interlocking Relationships*, 40 CAB 161 (1964); *Flight Enterprises, Inc., and Transocean Corporation of California, Control of Bradley Flying Service, Inc.*, 27 CAB 562 (1958).

g. Aircraft Parts and Supply: *Robert C. and Janice M. Reeve, Reeve Aleutian Airways, Inc., et al. Acquisition, Interlocking and Control Relationships*, 16 CAB 100 (1952).

h. Military Aircraft Overhaul: *Flight Enterprises, Inc. and Transocean Corporation of California, Control of Bradley Flying Service, Inc.*, 27 CAB 562 (1958).

i. Sales and Management Consultant in Air Freight Forwarding: *Emery Air Freight, Interlocking Relationship*, 29 CAB 1351 (1959).

j. Research Corporation Created by Four Air Carriers to Formulate Air Cargo Development Program: *W. A. Patterson, et al. Interlocking Relationships*, 3 CAB 711 (1942).

k. Aircraft Ferrying Organization: *Pan American Airways, Inc., Acquisition of Pan American Airways-Africa, Ltd.*, 3 CAB 32 (1941).

l. Holding Company Deemed Engaged in the Aeronautical Activities of Its Subsidiaries: *American Export Airlines, Inc., Acquisition of TACA, S.A.*, 3 CAB 216 (1941).

m. Individual Persons Holding Major Portion of Stock of Aviation Company: *Central Airlines, Inc., Control Case*, 10 CAB 538 (1949).

ATTACHMENT A

Safety Appliance Act	Communications Act	Railroads	Motor	Water
§ 20. Who included in term "common carrier," as used in sections 17 and 18 of this title shall include the receiver or receivers of other persons or corporations charged with the duty of the management and operation of the business of a common carrier. (May 30, 1908, ch. 225, § 5, 35 Stat. 476.) § 22. Inspection of locomotives and appliances; definitions. When used in sections 23-34 of this title, the terms "carrier," and "common carrier" mean a common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the Interstate Commerce Act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The term "railroad" as used in said sections shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term "employees" as used in said sections shall be held to mean persons actually engaged in or connected with the movement of any train. (Feb. 17, 1911, ch. 103, § 1, 36 Stat. 913; June 7, 1924, ch. 355, § 1, 43 Stat. 659.)	§ 153. Definitions. For the purposes of this chapter, unless the context otherwise requires— (h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier. Communications Act—June 19, 1934, ch. 652, 48 Stat. 1064.	§ 1. Regulation in general; car service; alteration of line. (3) Definitions. (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.	§ 303. Definitions and exceptions. (a) Definitions. As used in this chapter— (14) The term "common carrier by motor vehicle" means any person who holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.	§ 902. Definitions. For the purposes of this chapter— (c) The term "common carrier by water" means any person who holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to chapter 1 of this title in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title.
Safety Appliance Acts. [Sections, chapters, etc. listed above.]	Interstate Commerce Act—Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474.	Part II of the Interstate Commerce Act—Aug. 9, 1935, ch. 498, 49 Stat. 493.	Part III of the Interstate Commerce Act—Sept. 18, 1940, ch. 722, Title II, § 201, 54 Stat. 929.	

Mr. FRIEDEL. Mr. Devine, do you have questions?

Mr. DEVINE. Mr. Chairman.

Mr. Tipton, getting back to the real basis here, you have lived with this act since it went in. You speak on the second page of an incompatible anomaly, the fact that you can't acquire without CAB authority. Has it taken all these years with this law on the books to suddenly discover that this is so incompatible as to take this *Western* case and this Pan American threat that has made this critical situation come up?

Mr. TIPTON. The anomaly has always been there, of course, and the existence of it has always been clear. It took these problems arising, indicating that the anomaly was not only an anomaly, but it was a rather harmful one, impairing the ability of the Board to maintain the policies of the statute, that brought this to a head.

You have stated it exactly right.

Mr. DEVINE. Well, you, of course, lived with this act longer than I have been here, and I have been in Congress 10 years. I don't recall any question ever having been raised about whether anyone else should be in the category to have CAB approval.

Mr. TIPTON. I don't think the question has been raised during this period.

Mr. DEVINE. Thank you, Mr. Chairman.

Mr. FRIEDEL. Just one brief thing here.

On page 2 of your statement, you say:

Recent public disclosures of possible acquisition of control of Pan American World Airways and Western Air Lines have focused legislative attention on the problem.

My question says here, you are just not speaking for Pan American or the Western Air Lines, you are speaking for all the airline companies?

Mr. TIPTON. Yes, that's right, our industry has reviewed this legislation, and the board of directors of the Air Transport Association passed on it, on Tuesday. It is a firm position of the air transport industry.

Mr. DEVINE. Do you know of anyone that opposes the legislation at all?

Mr. TIPTON. Not among my members.

Mr. DEVINE. I don't mean among your members. I mean anyone.

Mr. TIPTON. I don't know of anyone.

Mr. DEVINE. Has your organization heard from anyone in opposition to your position?

Mr. TIPTON. We have not.

Mr. DEVINE. Because again, this is one of these hearings, Mr. Chairman, where we have proponents of legislation, and that's all we ever hear from. I don't know whether the opposition was invited or knows about it.

I certainly don't know of any opposition myself.

Mr. FRIEDEL. I think it has been publicized though. I think if there was any opposition, we would have heard, and as far as I know, there have been no requests from anyone to be heard in opposition to the bill. There are some amendments suggested, but no opposition to the bill.

I want to thank you, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman.

Mr. FRIEDEL. You are a very fine witness, and it is always a pleasure to see you.

Our next and final witness will be Dr. Paul Cherington, Assistant Secretary for Policy and International Affairs, Department of Transportation.

STATEMENT OF PAUL W. CHERINGTON, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY J. THOMAS TIDD, OFFICE OF THE GENERAL COUNSEL

Mr. FRIEDEL. Dr. Cherington, you may proceed.

Mr. CHERINGTON. Thank you. Mr. Chairman, and members of the committee, I would like to introduce Mr. Tom Tidd of the General Counsel's Office of the Department of Transportation, who is on my left here. Since I am not a lawyer, and since we are getting into some legal problems, I suspect I will defer on some of them to him.

Mr. Chairman and members of the committee, I am Paul W. Cherington, the Assistant Secretary for Policy and International Affairs in the Department of Transportation.

I appreciate this opportunity to appear before the committee to discuss the problem of acquisition of control of air carriers. This problem is receiving attention for the first time as a result of recent trends in financial organization characterized by the so-called conglomerates.

The thrust of our existing laws is directed at the anticompetitive effects within the airline industry of mergers, consolidations, and other acquisitions. Thus, section 408 of the Federal Aviation Act presently prohibits, without the approval of the Civil Aeronautics Board, the acquisition of control of an air carrier only by other carriers or persons engaged in other phases of aeronautics.

With the growth of the conglomerate merger, the possibility arises that the acquisition of control of an air carrier by a noncarrier might be contrary to the public interest because of improper financial manipulation or the involvement of foreign interests. In dealing with this new development, we ought to be clear and precise as to the issue involved. That issue is not whether conglomerates per se are good or bad or whether control of an airline by a conglomerate is good or bad. The question, rather, is this, How and to what extent should the acquisition of control of an airline be regulated so as to assure that its operations are fully consistent with and contribute to the effectiveness and efficiency of the Nation's air transportation system, the postal service, and the national defense? The Department of Transportation believes that the resolution of this important public issue can best be made by providing the Civil Aeronautics Board with the authority and responsibility to assess, on a case-by-case basis, acquisitions of air carrier control, provided that the Board's scope of review is appropriately limited.

There are three bills before the committee: H.R. 8261, H.R. 8322, and H.R. 8323. H.R. 8323 would make it unlawful, unless approved by the Civil Aeronautics Board, for a person to acquire control of an air carrier or of any person engaged in any phase of aeronautics.

H.R. 8322 would make it unlawful, unless approved by the Board, for any person not engaged in the business of transportation or a business reasonably incidental or economically necessary or appropriate to the operations of an air carrier to acquire control of an air carrier. We believe both of these bills are unduly restrictive and go further in regulating acquisitions than warranted by existing or foreseeable circumstances.

H.R. 8261 would require any person owning more than 5 percent of the capital stock or capital of an air carrier to submit a report of his interest to the Board at least annually. The bill also makes it unlawful without the approval of the Board for any person to acquire control of an air carrier and provides that any person owning beneficially 5 percent or more of the capital stock or capital of a carrier shall be deemed to be in control of the carrier unless the Board finds otherwise. The bill would require the Board to notify the Attorney General of any hearings regarding acquisitions of control and would add the Attorney General to those who could request a hearing as to the effects of an acquisition.

We would endorse H.R. 8261 if the point of presumptive control were raised to 10 percent. This would still permit the Board to inquire into any stock acquisition but would not require it to do so in many cases where control was obviously not at issue.

The Board, in its testimony before this committee last Tuesday, recommended amendments which would permit it to exempt certain acquisitions and expedite the issuance of its order in appropriate circumstances. As examples of possible exemptions, the Board cited small carriers, air taxis, and air freight forwarders. We strongly endorse such an exemption since it would remove from Federal scrutiny many small acquisitions not involving substantial issues of public policy. Indeed the committee might well consider, in our opinion, limiting Board review, by statute, to the certificated air carriers.

There are three questions that must be confronted in any legislation to be reported by this committee dealing with the acquisition problem. First, how is the question of "control" to be defined and at what point should the acquisition of stock in an air carrier be presumed to constitute "control"? Second, what should be the Board's scope of review in reviewing a proposed acquisition of control in an air carrier? Put differently, what standards should the Board be authorized to use in making a judgment whether or not to approve the proposed stock purchase? Third, how should the relevant antitrust considerations be considered? Let me briefly take up each of these questions in turn.

(1) H.R. 8261 properly, in our judgment, makes the question of "control" the central issue to be considered by the Board. This, we feel, is the principal subject of attention. If, as a matter of fact in an individual case, the person proposing to acquire stock in an air carrier will, as a result, gain control, the Board should have a full opportunity to assess the effects on air transportation. When such "control" is acquired will necessarily depend on the facts and thus it should be treated as it is in H.R. 8261. There is, though, the additional point: At what point should there be a presumption of control? As stated above, we would suggest the use of a ten percent standard rather than the five percent standard used in H.R. 8261. This would seem to be a somewhat more realistic threshold and it would not preclude the Board

from determining, in a given instance, that control had been gained with a smaller percentage of stock ownership.

(2) A non-air-carrier's acquisition of control of an air carrier, particularly where the acquirer may be denominated a "conglomerate", can raise a great many questions about the effect on air transportation. It would be a mistake, in our judgment, however, to authorize or encourage the Board to engage in a boundless search for evidence relating to every conceivable pro or con that might be involved. Such an expansive inquiry could be used by the management of the to-be-acquired carrier to perpetuate its control, without regard to the likely actual effects on the carrier's transportation operations. In any event, it could lead to lengthy delays in the resolution of particular cases.

In considering the acquisition's consistency with the public interest, the Board should not attempt to weigh all the imponderables associated with the acquirer's anticipated management of the carrier but should confine its review narrowly to the purchaser's capacity to fulfill the responsibilities imposed by the applicable certificates of public convenience and necessity. Beyond this determination, only two substantive issues appropriately warrant scrutiny: the effect of the acquisition on competition in air transportation and foreign control. We would urge this Committee to make clear in any report on H.R. 8261 that it anticipates that the Board will interpret the legislation narrowly along these lines rather than expansively.

(3) Any acquisition of control of one company by another may conceivably lessen competition. This is no less true when the acquirer is a conglomerate organization or when the acquired firm is an air carrier than in any other situation. In recent weeks the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has spoken publicly about the economic implications of conglomerate mergers. The problem with which H.R. 8261 deals must be considered in the larger context of our overall national antitrust policy. In examining H.R. 8261 we have concluded that by authorizing the Board to approve acquisitions of air carriers by non-carriers the bill may have the effect of immunizing such transactions from the operation of the antitrust laws. This presents serious risk of unintended legal consequences. Section 414 of the Federal Aviation Act, as you know, states that "any person affected by" an order under section 408 is relieved from the operation of the antitrust laws "insofar as may be necessary to enable such person" to comply with the order. In the case of an acquisition of an air carrier by a conglomerate enterprise the competitive effects may be felt as much outside of air transportation as within it. Because of its breadth section 414 thus could confer antitrust immunity that would go beyond air transportation and subsume aspects of the economy that lie well outside the established jurisdiction of the CAB. Consequently, we feel that consideration should be given to changes in the measure so that it would not have the consequence of sheltering the parties from the antitrust laws. For fuller development of this point we would, of course, defer to the opinion of the Department of Justice.

In summary, we recommend that the provision in H.R. 8261 which prohibits the acquisition of control by an air carrier without Board approval be retained, that the point of presumptive control be raised to 10 percent, that the Board be granted the discretion it seeks with

respect to simplifying procedures and granting exemptions—or, alternatively, that the legislation be limited to certificated air carriers—and that the area of the Board's inquiry be clearly delineated by the committee.

That concludes, Mr. Chairman, my formal statement.

Mr. FRIEDEL. I want to thank you, Dr. Cherington, for your very fine statement.

I have no questions to ask.

Mr. Pickle?

Mr. PICKLE. Mr. Cherington, how long have you been Assistant Secretary for Policy and International Affairs?

Mr. CHERINGTON. A couple of weeks.

Mr. PICKLE. The Chairman suggested that you might give the committee some of your background.

Mr. CHERINGTON. Well, Mr. Pickle, from 1948 to 1950 I was Executive Assistant to the Civil Aeronautics Board Chairman, and from 1950 until about 2 weeks ago I was the professor of transportation at the Harvard Business School. I came down here with Secretary Volpe—

Mr. PICKLE. I see.

Mr. CHERINGTON (continuing). And was sworn in about 10 or 12 days ago.

Mr. PICKLE. Well, since you haven't been in office particularly long, am I to assume that you or your particular agency or section of the DOT had not expressed themselves with respect to the *Trans-Pacific* case?

Mr. CHERINGTON. The *Trans-Pacific* case?

Mr. PICKLE. Yes.

Mr. CHERINGTON. No, sir, we have not expressed ourselves.

Mr. PICKLE. Did your division express itself to the President in opposition to the *Trans-Pacific* case that had been granted by the CAB?

Mr. CHERINGTON. What—

Mr. PICKLE. Did the Department of Transportation recommend to the President that these cases be held up, this determination on these *Trans-Pacific* cases be held up?

Mr. CHERINGTON. Not since I have been there.

Mr. PICKLE. But so far as you know, then, that the Department of Transportation did not recommend to the President that this case be held up?

Mr. CHERINGTON. I do not believe so, no, sir.

Mr. PICKLE. That seems somewhat strange, that they would not ask the Department of Transportation, particularly the agency that was concerned with this directly, what your feelings would be on it.

I wonder why the case was held up.

Mr. CHERINGTON. Well, I cannot really tell you, Mr. Pickle. I assume that the President wanted to reexamine the case.

Mr. PICKLE. Well, I understood it was because of the involvement on international affairs. That is why I assumed that you as Assistant Secretary for Policy and International Affairs would have been asked, or would have made a recommendation, if that were the case concerned.

Mr. CHERINGTON. Well, with respect to holding it up, or whether the President should hold it up, we were not asked, so far as I know.

Mr. PICKLE. The record is that you did not make a recommendation that it be held up.

Mr. CHERINGTON. No, sir.

Mr. PICKLE. Now let me ask you, are you saying, in your testimony, that a conglomerate, or a noncarrier, if it gained control of a carrier, could operate in the public interest if the primary test is, as you said on page 2, "whether its operations are fully consistent with and contribute to the effectiveness and efficiency of the Nation's air transportation system, the Postal Service, and the national defense"?

The question is, then, if that is the test, in your judgment, a conglomerate could well operate a carrier, and could operate it and meet this test, and should receive approval of the CAB?

Mr. CHERINGTON. Yes, sir. I do not think this is a necessary bar to a conglomerate acquiring an air carrier.

Mr. PICKLE. Well, one other question: You are concerned about section 414, and you state on the testimony in page 6:

Section 414 thus could confer antitrust immunity and go beyond air transportation and subsume aspects of the economy that lie well outside the established jurisdiction of the CAB.

Could you give an example of how this would go beyond the realm of transportation, and might do some damage or violence to our system?

Mr. CHERINGTON. Well, I believe that Mr. McLaren cited a couple of instances. How real a problem this is, in terms of the substance or in terms of the legal interpretation, I don't know. But it seemed to us that it was desirable that the doubt be removed on this point. In terms of the legal aspects, I would defer to Mr. Tidd, here, to comment.

Mr. PICKLE. I would be glad to hear his comments.

Mr. TIDD. Well, I am certainly no expert in this, and I would confess that most of my understanding of the section has been derived from conversations with attorneys in the Department of Justice. As Mr. McLaren cited in his statement, the concern is the uncertainty of what a conglomerate might arguably say they have to do to comply with the CAB order. Because of the diversity of the conglomerate's activity, some actions thus covered by the order might be completely unrelated to the immediate operation of the carrier.

Mr. PICKLE. I understand that concern that you have on it. I am also somewhat concerned that you would say this would be going too far, because it would go beyond the realm of transportation, but you don't give me a specific instance, and you say also in the same breath that you are not an expert in this field, and yet you testified that you would have grave concern that we shouldn't make it this broad.

Mr. TIDD. Well, I defer to Justice as to the gravity of the concern.

Mr. PICKLE. But your testimony is that it would be going too far. Now what is your statement? Not Justice's, but yours?

Mr. TIDD. I thought we said that it left an area of uncertainty.

Mr. CHERINGTON. I think, Mr. Pickle, if I may say so—

Mr. PICKLE. It may well have an area of uncertainty, and I don't question that. But I want to know specifically how to put it effectively.

Mr. FRIEDEL. In other words, as I understand it, you are not opposed to H.R. 8261, but you want to make sure that it only applies to specific carriers, like air taxis or whatever parts of the aviation industry concerned. Am I correct in that?

Mr. CHERINGTON. We would prefer if it were confined to certificated air carriers, to the trunklines, the international certificated carriers, the supplementals, and so on, and would eliminate the air taxis and the so-called third-level carriers.

With respect to section 414, possibly we are seeing things under the bed that aren't there, but we would not wish this bill, if it becomes an act, to be used to provide CAB approval of an acquisition or a merger beyond the air carrier portion, and since there appears to be some ambiguity about this we think it would be desirable that consideration be given to clarification.

Mr. PICKLE. Mr. Chairman, I wondered if the gentlemen testifying would give to the committee further testimony, written testimony, that might contain instances where you would have this particular concern.

Mr. CHERINGTON. Yes, we would be glad to do that, Mr. Pickle.

Mr. PICKLE. Thank you. That's all, Mr. Chairman.

(The following letter was received by the committee:)

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., April 2, 1969.

HON. HARLEY O. STAGGERS,
Chairman, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my testimony before your Committee March 27 dealing with the acquisition of control of airlines, Representative Pickle asked me to furnish for the record examples of situations in which antitrust immunity might be conferred on a party to a Board proceeding that would affect non-transportation aspects of the economy. As I explained in my testimony, section 414 of the Federal Aviation Act, which is applicable to orders issued pursuant to section 408, provides that "any person affected by" such an order is relieved from the operation of the antitrust laws "insofar as may be necessary to enable such person" to comply with the order. It is the breadth of this immunization provision which, in the context of acquisitions of air carriers by non-air transportation enterprises, inspired Mr. Pickle's request.

Let me identify two hypothetical cases.

Illustration A: Assume that a major steel producer, not heretofore engaged in any aspect of transportation or aeronautics, were to plan to acquire control of a major airline. If legislation of the type reflected by H.R. 8261 were to become law, such an acquisition of control would require approval of the Civil Aeronautics Board. On the further assumption that such approval were to be granted, a situation might arise in which another major steel company were to propose the purchase of the first steel company. Such an affiliation could readily fall within the reach of the antitrust laws because of its potential adverse effects on competition. However, if the second steel company were to file an application for CAB approval, as would seem to be required because the to-be-acquired firm was engaged in aviation, and if the Board were to grant its approval, the merger between these competing steel producers might be deemed to be immunized from the antitrust laws by section 414.

Illustration B: Assume that a large corporation engaged in the production of chemicals contemplated merger with a large competing chemical manufacturer. Such a merger, under normal conditions, would pose a serious risk of antitrust violation. To reduce this risk, or eliminate it, assume that the prospective selling firm were to acquire a small air carrier. The company thereupon files an application for CAB approval. Assuming that its application is approved, it proceeds with its plan to sell its stock or assets to the other chemical producer. By filing a further application for approval of this disposition of control of a firm with an air carrier subsidiary, the parties could conceivably obtain antitrust immunity for their affiliation, even though the relative significance of the air carrier to the merged corporate entity might be highly insignificant.

In citing these illustrations I do not mean to suggest that the courts would necessarily interpret the immunity provided by section 414 as broadly as these illustrations might indicate, but I do feel that without further clarification or modification of the proposed legislation that there is serious risk that CAB approval of air carrier acquisitions could have the effect of conferring antitrust immunity for mergers or sales of control where there might be an adverse effect on competition in nonair transportation sectors of the economy.

Sincerely,

PAUL W. CHERINGTON,
Assistant Secretary for Policy and International Affairs.

Mr. FRIEDEL. Well, I want to thank you.

Mr. Dixon, our counsel, may have some questions.

Mr. DIXON. Mr. Cherington, Mr. Tipton testified, there are two trunk carriers which might be above 10 percent as far as stockownership is concerned.

Now your testimony would cover all certificated air carriers. Do you know how many are in the 10 percent or above, single stockownership category?

Mr. CHERINGTON. No, I don't know that number exactly. I can think of at least one or two, and there may very well be more. From time to time in the past there have been others.

Mr. DIXON. Which ones do you have in mind right now?

Mr. CHERINGTON. Western and Northeast. The latter is undoubtedly more than 10 percent in the hands of Storer Broadcasting.

More than 10 percent of TWA was, but probably no longer is, in the hands of a single owner. Braniff, I am sure, is one with a single holding of more than 10 percent.

Mr. DIXON. Well, one of the things that concerns me is how to make an argument when the time comes to make an argument to the committee for the merits of 10 percent, of 5 percent, or 3 percent, or 8 percent, or 20 percent, as against a broad gauge of actual or legal control.

And I am looking for help in that area. I don't know whether you can furnish that today or some other time. I have been listening to each witness for that help, and I still find no magic in any particular percent.

Mr. CHERINGTON. I don't believe we would be able to furnish you with the magic either, Mr. Dixon. I don't think there is any. As long as the Board is empowered to dig into the substantive question of control, we think that the threshold probably should be somewhat higher than 5, but I think we would be hard pressed to put a very specific rationale on 10 rather than 12, or 9, or some other number such as that.

Mr. DIXON. Thank you, Mr. Chairman.

Mr. FRIEDEL. All right, I mentioned yesterday where the CAB had approved a helicopter service to be owned and operated by eight or nine airlines, trunk carriers. Would they be limited to 5, 10, 15 or 20 percent?

Mr. CHERINGTON. Mr. Chairman, no one would be limited to any particular control percentage but, obviously, that particular case would come under CAB scrutiny, because the ownership is going to be in the hands of a group of air carriers. For that reason, it would come in for Board approval under the existing statute.

I forget how many trunkline carriers there are, but let's say there are eight. If these were eight chainstores, and they got over 10 percent, under our proposal, they would have to get Board approval.

But I don't see that that is any bar to their owning the helicopter company.

Mr. FRIEDEL. In other words, when you speak of 5 percent or 10 percent, they are not limited to it, they can go beyond that, but not without the approval of the CAB.

Mr. CHERINGTON. That sets up a presumption of control, and sets the wheels in motion to provide Board approval, or Board disapproval, as the case may be.

Mr. FRIEDEL. Well, I want to thank you, Doctor, and this meeting now stands adjourned.

Mr. CHERINGTON. Thank you.

(Whereupon, at 2 :50 p.m., the subcommittee adjourned.)



Mr. BARNES. Well, I want to thank you, Doctor, and this meeting
 now stands adjourned.
 Mr. GARRISON. Thank you.
 (Whereupon, at 2:50 p.m., the subcommittee adjourned.)

