

REGULATING AIRMAIL TRANSPORTATION*

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I

AIR transportation from its infancy was intimately involved with postal service. The possibility of using aircraft to speed up mail communication and improve service in areas where ground facilities were slow or unsatisfactory was advanced in the first decade of powered flight, and experimental or occasional airmail services existed before World War I.¹ The war stimulated aircraft development in ways that improved load-carrying ability and reliability and held out the promise that aircraft could improve the speed of mail carriage even over terrain where ground transportation facilities were relatively well developed. By the end of the war, the U.S. Post Office Department was eager to begin airmail services, and development started in earnest in 1918.

In the immediate postwar period, it was still impossible to carry mail in aircraft at costs and rates which would permit profitable operation. This fact, coupled with strong interest in the military potential of air transport, led to government operation of airmail carriage. These efforts were technically successful, and by 1925, transcontinental service, including overnight New York-Chicago service, was being operated by the Post Office Department on a regular basis.² The service was by no means self-supporting, however. One estimate places the excess of government expenditures over airmail revenues in the period 1918-1927 at about \$14,000,000.³

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¹ A discussion of the early history of airmail transportation is to be found in Paul T. David, *The Economics of Air Mail Transportation* (Brookings Inst. 1934) [hereinafter cited as David].

² In the first fiscal year of New York-Chicago overnight service, 94% of scheduled miles were actually flown, a remarkable record considering the then-existing level of aeronautical technology.

³ This figure, derived from David, ignores capital equipment auctioned off or transferred to

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By the mid-1920's, when proposals were first introduced into the Congress to turn transportation of airmail over to private contractors, air transport economics had improved somewhat. Ton-mile costs were declining and speed and reliability, and thus the value of the services offered, were improving. Moreover, technical development was very rapid during the twenties, leading entrepreneurs to hope for very substantial improvement in the near future. As of 1925, however, payload had to be relatively light and of high per-pound value to be at all suitable for carriage by air. Given the discomfort, danger, and marginal speed advantage of the airplane, few passengers were willing to pay rates that would cover costs. Carriage of freight was out of the question, for all practical purposes. Mail was low in weight, high in value, and tendered by a government interested in promoting air transport and thus increasingly willing to arrange for airmail carriage at rates which exceeded the revenues that the Post Office could attract by offering airmail service. The components for constructing a special relationship between Congress, the Post Office Department, and the air carriers were all present by the 1925-1927 period. By 1930, the basic relationship had been established.

The first attempt by the government to turn airmail carriage over to private contractors⁴ was designed to avoid any subsidy by limiting payments to carriers to 80 per cent of revenues attributable to the mail they carried. The attribution requirement necessarily produced a complicated rate structure and presented other administrative difficulties. In addition, the non-deficit provisions made it very unlikely that contractors could operate profitably, and few bids were received under the original system. In 1926, before many of even these few bidders had commenced service, the Act was amended.⁵ The amendment was presented as a way of simplifying the rate structure by eliminating the revenue attribution requirement, but it also had the effect of permitting operation at a deficit by permitting payment on a poundage basis only generally related to revenue.⁶ Airmail postage rates were reduced in early 1927, raising revenues to the carriers from the result-

other government agencies when the Post Office ceased operations. Since much of the equipment was acquired as war surplus and transferred on a non-market basis, its value, which should be deducted from the net cost to the government, is difficult to determine. David estimates that the capital equipment was worth \$2,000,000 at most at the time of its disposition. Using this figure, he estimates a total loss to the government of \$12,000,000 in connection with establishing and running airmail services from 1918 through 1927. David 48-49.

⁴ Kelly Air Mail Act of 1925, ch. 128, 43 Stat. 805.

⁵ Act of June 3, 1926, ch. 460, 44 Stat. 692.

⁶ The Amendment provided that a maximum contract rate per *route* be set at a level equal to the old levels on routes of 1,000 miles. However, postal rates could be lowered without affecting contract rates, and routes shorter than 1,000 miles could be operated at the same payment level as thousand-mile routes, thus resulting in per-mile rates that increased as distance decreased. Both postal rate decreases and short routes widened the spread between cost to the Post Office Department and revenues received.

ing increase in volume and simultaneously increasing the size of the subsidy by reducing revenues to the Post Office for each unit of mail carried. The volume of mail tendered was still low, however, and costs of operation high. Even with the subsidy, few contractors operated profitably.

In 1928, further changes were made in the Air Mail Act which greatly increased the level of subsidy, created protected rights for airmail carriers, and set the stage for an enormous expansion in the degree of government involvement in the market for air transportation. The 1928 Amendment⁷ permitted halving the airmail postage rate, greatly increasing the mail volume. This increased volume (95 per cent in the first month under the new rate⁸) could be carried with the available capacity and therefore at virtually no extra cost to the carriers. Since contract rates were not renegotiated as contemplated, many routes which had been unprofitable became bonanzas for their operators. In addition, the low postal rates and high contract payments created marvelous opportunities for self-help. A carrier could mail heavy objects around its route system, paying no more than \$.00/lb. in postage and receiving payments of up to \$3.00/lb. David⁹ reports cases of carriers rebating postage to shippers to encourage them to mail large loads. In one instance discussed at a later hearing on a Post Office Appropriation bill, a carrier paid a shipper to airmail 4,000 lbs. of lithographs from Niagara Falls to California. Postage was \$6,000. The carrier received \$25,000 from the Post Office to carry them.¹⁰

As bountiful as this procedure was to many of the carriers, the 1928 Amendment contained another provision which promised even greater long-term benefits. As a *quid pro quo* for contemplated reductions in compensation (which never took place), the carriers were to exchange the contract rights awarded by competitive bidding in the 1925-1927 period for 10-year certificates conferring exclusive rights to carry mail over the routes covered, with rates to be determined by periodic negotiation with the Postmaster General.¹¹ This provision was greatly sought after by the carriers, who justified it in infant industry terms. It was argued that the certificates would provide stability, permit further investment, promote the development of air transportation, and prevent cessation of operations conducted at

⁷ Act of May 17, 1928, ch. 603, 45 Stat. 594.

⁸ David 82.

⁹ David 85.

¹⁰ David 85, at note 28.

¹¹ The maximum compensation payable under the 1928 Act was limited to the rates set by competitive bidding in the award of the original contracts. Given the rapidly improving technology of the period and the profits made in the 1928-1930 period, this limit was of little significance. Whatever significance it might have had was eliminated by the change in payment basis embodied in the Watres Act, note 13, *infra*.

a loss under competitive bidding.¹² The combination of high compensation rates and franchises thus made airmail contracts the key to profitable operation of an airline, given the economics of airline operation at the time.

Under the 1928 Amendment, even with its protective provisions, the Post Office Department was still principally a buyer of services operated for postal benefit. Non-mail objectives nominally played no part in determining what services were to be offered and what compensation was to be paid. Walter F. Brown, Postmaster General in the new Hoover administration, was apparently more interested in the development of air transportation than he was in the carriage of airmail at the lowest possible cost to the Department, however. His efforts resulted in the passage of the Watres Act of 1930,¹³ which changed postal airmail contracting from a method of procuring airmail transportation services to a vehicle for promoting, shaping, and regulating the entire air transport industry.

Brown's concerns are difficult to reconstruct, but appear to have included the following.¹⁴ Some airmail routes were being operated at a loss. Passenger lines were becoming more common, but virtually all were unprofitable. Some of these lines operated to cities that were situated between terminals already receiving airmail service from another carrier. Since only one contract was awarded over a given route, intermediate cities served by carriers other than the airmail contractor could not receive airmail service, even though the capacity and facilities for the service were in place. Other lines competed with mail carriers over some routes, but not others, and the Postmaster General seemed unwilling to award contracts to these carriers while they were potential or actual competitors to existing contractors. Aggregating fragmented services, eliminating route overlaps, and ensuring that competitors could not impede a carrier's opportunity to combine passenger and mail revenues apparently seemed to Brown the surest route to financial stability for the carriers and improved service to the public. In addition, he apparently worried about the risks of variability of traffic, and the effects of those risks on the willingness of contractors to invest in new equipment. It is not clear which of these perceptions and arguments were really important to Brown. What is indisputable is that Brown was very much interested in the development of passenger services, wanted to reduce competition and reorganize the route structure, wanted to support the airlines during their de-

¹² David 77-79.

¹³ Act of April 29, 1930, ch. 223, 46 Stat. 259.

¹⁴ David discusses Brown's objectives and concerns in a way that seems to reflect his own puzzlement over what Brown really believed (88-89), but emphasizes Brown's interest in subsidizing the carriers and severely restricting competition. David 98-99, 108-119. *See also*, Lucille S. Keyes, *Federal Control of Entry into Air Transport* 62-3, 67-8 (1951); Henry L. Smith, *Airways: The History of Commercial Aviation in the United States* 156 (1942).

velopment period, and saw airmail revenues as the instrument through which he could assist and shape the industry.

The Watres Act provided for compensation "at fixed rates per mile for definite weight spaces,"¹⁵ that is, for capacity offered rather than mail actually carried. It provided for initial award of contracts by competitive bidding, but empowered the Postmaster General to issue a ten-year certificate to any bidder who had satisfactorily operated an airmail route for a period of not less than two years. Once the initial contract period was over, rates were to be fixed annually by the Postmaster General. Certificate holders had to comply with . . . "all rules, regulations and orders that [might] be issued by the Postmaster General for meeting the needs of the postal service *and adjusting mail operations to the advances in the art of flying and passenger transportation*. . . ." ¹⁶ [emphasis added]. The Post Office Department was no longer a mere customer. It had become patron and regulator.

Brown lost no time in exercising every prerogative conferred on him by the Watres Act, in the process exercising a few that either exceeded his authority under the Act or in some cases simply contravened it. In a series of doubtful maneuvers ranging from attempts to establish new routes by using his route extension authority to conferences with the carriers in which markets were divided and bids were rigged, the Postmaster General rearranged the airline map.¹⁷ He established two new transcontinental routes and several important north-south routes, in the process eliminating some existing competition and effectively preempting would-be new entrants. The carriers awarded the new routes were predecessor companies to those (American and TWA) who operate them today. In fact, the route awards of 1930 and the years immediately following established a basic distribution of companies and routes that was largely unchanged until the 1950's and which still underlies the trunkline system. The competitive bidding requirements of the statute were circumvented by a combination of arranged bids (with side payments in the form of purchases by successful bidders of some would-be competitors) and liberal interpretation by the Postmaster General of the requirement that successful bidders be "responsible."

Brown also issued regulations that required mail carriers to offer passenger service, expanded the frequency of passenger schedules and encouraged the carriers to acquire more and better equipment.¹⁸ Some of these service improvements were mandated in pursuit of objectives that were not purely, or in some cases not at all, postal. The carriers were, of course, paid for these service improvements by the Post Office Department. In the process mail

¹⁵ Watres Act, ch. 223, 46 Stat. 259.

¹⁶ *Id.* 260.

¹⁷ David 111-113, 119-123, 123-135.

¹⁸ David 143.

compensation per ton-mile rose from \$5.14 in 1931 to \$8.37 in 1933.¹⁹ The uniform system of accounting adopted for mail carriers made no attempt to segregate mail costs from other costs. Less important than the particular rates or amounts paid was the relationship the new payment system and regulations established. The airlines were expected to operate and develop in a way generally satisfactory to the national, rather than particularly postal, interest. The Post Office was to pay the bills. Under this relationship, emphasis was placed on the need for air service in general and the needs of airlines in particular. The first generated pressures for airmail service on routes selected because they provided passenger services to places well represented in the political process. The second created expectations on the part of the carriers that mail rates would reflect their generalized "needs," rather than compensate them for services provided the Post Office. Both these emphases, but especially the second, influence the interaction between the carriers and the Postal Service today.

The manner in which contracts and certificates had been awarded and routes arranged became the subject of national attention and a Senate investigation in 1934.²⁰ Exposure of the conferences of 1930 (referred to in the Congress and press as "the spoils conferences") and the Postmaster General's assumption of authority in excess of that conferred upon him by the Watres Act led to the cancellation of existing contracts, a literally disastrous effort by the Army to fly the mail, and the passage of the Airmail Act of 1934.²¹ Authority to award airmail routes remained in the hands of the Post Office Department. Although no provision was made for formal certificates, the functional equivalent remained. The Act provided for the award of new contracts by competitive bids, with indefinite extensions for the successful bidders after the one-year period of the initial contract. After performance of the initial contract at the bid rate, compensation was to be set by the Interstate Commerce Commission at "fair and reasonable" levels.²² The principal effect of this statute was to remove the setting of rates for the carriage of airmail from the Post Office Department to the Interstate Commerce Commission. The evolution of the Post Office Department from customer to instrument of subsidy was complete. The needs of the Post Office Department no longer the paramount factor in determining which air services it would pay for. Furthermore, the Department could not determine the rates it would pay.

An important effect of the Watres Act, Brown's subsequent actions, and

¹⁹ David 149.

²⁰ Senate Special Investigation on Air Mail and Ocean Mail Contracts, S. Rep. No. 254, 73rd Cong., 2nd Sess. (1934).

²¹ Air Mail Act of 1934, ch. 466, 48 Stat. 933.

²² *Id.* 936.

the consequences of the 1934 Act was to discredit competitive bidding for airmail contracts in the minds of the public and the Congress. Although the Watres Act called for competitive bidding, this arrangement was subverted by the Postmaster General, creating doubts that a competitive bidding system could operate without collusion. The result of the 1934 Act was to cast doubt upon bidding in the opposite way—the guarantee of compensatory rates for an indefinitely long period of time once the initial contract year had passed created incentives for airlines to "buy in" to the business and placed a premium on the ability to survive the initial period while operating below cost. The bids received were absurdly low—some were stated in mills per mile—and were interpreted as evidence of "destructive competition" in the airline industry. Requests by the Postal Service for authority to contract competitively for airmail service have been made repeatedly since the late 1960's.²³ The carriers and the Civil Aeronautics Board have used the 1930-1935 experience as "evidence to engender and sustain the inconsistent fears that bidding would lead to collusion or excess competition." They have used these fears to persuade the Congress to reject the Postal Service requests. The fact that the previous Congressional attempts to use competitive contracting were doomed to failure by lawlessness and incompetent institutional design, rather than by any defect in the concept itself, has somehow receded into the background.

The Civil Aeronautics Act of 1938²⁴ was directed largely at the reduction or elimination of competition among airlines in providing passenger service, but it reduced further the Post Office Department's role as customer in determining the pattern of airmail services. The Post Office's power to contract for airmail service was completely extinguished and vested in the new regulatory agency (the Civil Aeronautics Authority, later the Civil Aeronautics Board). The Act provided:

- a. That no one could carry mail by aircraft without a Civil Aeronautics Board route certificate. Such certificates would be issued to those carrying mail on existing contracts.²⁵
- b. That new routes would be assigned to carriers by the Board when required by the public convenience and necessity, and that in determining whether such a certificate should be issued, the Board was to consider, among other things,²⁶ "The encouragement and development of an air-transportation system properly adapted to the present

²³ See text at 327 *infra*.

²⁴ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

²⁵ *Id.* § 401(a).

²⁶ *Id.* § 401(d).

- and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."²⁷
- c. Airlines were to file their schedules with the Postmaster General. He could then designate the flights on which the Post Office wished to transport mail. If the Post Office was dissatisfied with a schedule, the Postmaster General could order changes, refuse to allow changes proposed by the carriers, or even require new schedules to be added. However, if a carrier objected to the Post Office order, the Board was empowered to "amend, revise, suspend, or cancel" it. In other words, the Board had final authority to resolve schedule disputes between the carriers and the Post Office.²⁸
 - d. That the Board had the authority to fix the rates paid to the carriers for the transportation of mail.²⁹
 - e. Mail rates were to be set at a level that would satisfy the ". . . need of such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character required for the commerce of the United States, the Postal Service, and the national defense." In other words, mail pay was to continue to be the principal vehicle for direct subsidy of passenger and freight service.³⁰
 - f. The Post Office was given priority on air service over other traffic up to a Board-established "maximum mail load." The Board was also to determine the conditions under which mail in excess of the maximum was to be carried.³¹

In a series of rate decisions in the early 1950's³² the Civil Aeronautics Board (CAB) determined that the domestic trunklines no longer needed a subsidy component in their mail rates. (Other classes of carrier, for example, local service and Alaskan carriers, continued to receive subsidies and, with the exception of Allegheny, are being subsidized at present.) So-called "service mail rates" were established by the Board which were designed to

²⁷ *Id.* § 2(a).

²⁸ *Id.* § 405(e).

²⁹ *Id.* § 406(a).

³⁰ *Id.* § 406(b).

³¹ *Id.* § 405(f).

³² For example, *American Airlines, et al., Mail Rates*, 14 C.A.B. 558 (1951). *Capital Airlines, et al., Mail Rates*, 18 C.A.B. 457, 467 (1954).

compensate the trunklines for rendering airmail service without reference to overall "need." The Post Office continued to pay mail rates containing explicit subsidy to other classes of carriers and the Board still had authority to require Post Office subsidy payments to trunklines. In 1953, the Post Office was relieved of the obligation to make explicit subsidy payments to carriers. Thereafter, the Post Office paid only the service mail rate, while the Board paid out of direct appropriations any sums necessary to satisfy the "need" subsidy provision of § 406(b).³³ Although the Federal Aviation Act of 1958³⁴ mostly reenacted the economic regulation provisions of the Civil Aeronautics Act of 1938, the mail rate provisions³⁵ were rewritten to reflect this reorganization.³⁶

One result of the separation of direct airline subsidy from mail rates was to make the subsidy more readily identifiable and to increase Congressional pressure to reduce it. Several of the Board's responses to this pressure affected mail service. Subsidized service to low-traffic points was cut back in frequency and in many cases eliminated entirely through the so-called "use it or lose it" policy adopted by the Board in the *Seven States* case.³⁷ In addition, the transfer of some points from trunklines to local service carriers (done partly to produce internal subsidy) sometimes broke connections or changed the scheduling pattern so as to impair mail service. Other factors unrelated to subsidy were affecting airmail service. Cyclical variations in airline business conditions often led to flight cutbacks affecting mail service on trunklines as well as local service carriers. And the introduction of larger equipment by local service carriers sometimes resulted in reductions in flight frequencies or revisions of schedules which reduced the quality of service from the standpoint of the Post Office Department.

All these factors led the Post Office Department to seek authority from the CAB to contract for mail service when existing certificated service was unsatisfactory.³⁸ While the Board has always opposed postal contracting on terms that would take business away from certificated carriers, it did

³³ *Service Mail Rates, Reorganization Plan No. 10*, 17 C.A.B. 898 (1953).

³⁴ *Federal Aviation Act of 1958*, 49 U.S.C. §§ 1301-1542 (1962).

³⁵ *Civil Aeronautics Act of 1938*, ch. 601, § 406, 52 Stat. 998. (codified at 49 U.S.C. § 486). Replaced by *Federal Aviation Act of 1958*, 49 U.S.C. § 1376 (1962).

³⁶ *Federal Aviation Act of 1953*, 49 U.S.C. § 1376(c).

³⁷ The "use it or lose it" policy was established by the C.A.B. in the *Seven States Area Investigation*, 28 C.A.B. 680 (1958): "Unless a city enplanes an average of at least five passengers daily for the 12 months following the initial 6 months of service, we will . . . institute a formal investigation to determine whether that city should lose its service. . . ." 28 C.A.B. 756 (1958).

³⁸ The Postmaster General has always been reluctant to use his power to order carriers to put on additional schedules. In fact, the only such order ever issued was not issued until 1973, twenty-five years after the passage of the relevant statutory authority. See text at 350 *infra*.

change its regulations³⁹ in 1965 to permit the Post Office Department to contract for mail carriage with air taxi operators. The Board had already exempted this class of operators from the certification requirements of the Act⁴⁰ for the purpose of carrying passengers and freight, provided that they confined their operations to the use of relatively small aircraft.⁴¹ It extended this exemption to contract carriage of mail in aircraft of the same size as those usable in exempt passenger and freight service. The size restriction tended to keep costs fairly high (as it was designed to), but the attractions of late-night direct operation tailored to postal needs were sufficient to induce the Post Office Department to make extensive use of this authority. Such operations continue to the present day and have been expanded to include some rather high-cost late-night service in small jet aircraft operated between large cities.⁴² The economic effects of the Board's artificial restriction of contract service and the Postal Service's use of air taxis will be discussed in Section II.

In 1969, growing public, governmental and Congressional dissatisfaction with postal organization and performance led to proposals for a sweeping reorganization of the Post Office. Many of the provisions of the original postal reform bills⁴³ were intended to reduce the governmental, or "social" role of the Post Office Department by removing many restrictions which prevented the Department from moving mail at the lowest possible cost in an effort to subsidize or favor certain classes of users or suppliers. Among these were a major revision of the relationship between the Department, air carriers, and the CAB. H.R. 4 gave the new Postal Service the option of contracting with any certificated air carrier for service on its certificated routes at rates higher or lower than those prescribed by the CAB.⁴⁴ H.R. 11750 included as well provisions allowing contracts with any air carrier⁴⁵ for service between points where there was no certificated carrier or where the Postal Service determined that the service being provided by the certificated carriers was "not adequate for its purposes." The Board could

³⁹ Economic Regulation 445, 14 C.F.R. § 298.21(f) (1965).

⁴⁰ Civil Aeronautics Act of 1938, ch. 601, § 401 (codified at 49 U.S.C. § 481) replaced by Federal Aviation Act of 1958, 49 U.S.C. § 1371 (1962).

⁴¹ Until 1960, such operations were limited to aircraft with a maximum gross takeoff weight of 12,500 lbs. Economic Regulation 317, 14 C.F.R. § 298.11 (1961). These restrictions were liberalized for turbojet operations in 1968. Economic Regulation 548, 14 C.F.R. §§ 298.3, 298.21 (1969). Economic Regulation 549, 14 C.F.R. § 298.3, 298.21 (1969). The present limit is that the aircraft be designed to carry no more than 30 passengers or 7,500 lbs. of payload. 14 C.F.R. § 298 (1974).

⁴² United States Postal Service, Memo to: Mailers, 1, 7, 8 (1972).

⁴³ H.R. 4, 91st Cong., 1st Sess. (1969). H.R. 11750, 91st Cong., 1st Sess. (1969).

⁴⁴ H.R. 4, 91st Cong., 1st Sess. § 303 (1969) (adding § 6301(a) to 39 U.S.C.).

⁴⁵ Not just those certified by the Board to carry mail.

disapprove the latter contracts within 90 days, but the contracts were exempt from the certification and mail rate provisions of the Federal Aviation Act.⁴⁶ These provisions, especially those of H.R. 11750, would have restored competitive conditions in the supply of most airmail transportation, and were strenuously resisted by the trunklines and the Board.

This contracting authority paralleled in substance arrangements which had long been in existence with respect to postal purchases of railroad transportation.⁴⁷ The Postal Service was in effect to be given the option of procuring required service at Board-prescribed rates or voluntarily-negotiated service at contract rates. Where this option was available to the Postal Service in surface transportation, virtually no traffic moved at Interstate Commerce Commission rates. The Board and the carriers correctly identified these provisions as a threat to their existing arrangement.⁴⁸ They and their supporters did not oppose the authority on the grounds that the Postal Service needed the protection of an agency designed to protect the traveling and shipping public. Rather, they argued that without the protection of the Board, rates for airmail transportation would be too low, that the public interest required that the Board protect the carriers from their powerful customer.⁴⁹ The Post Office Department strongly supported the measure on the grounds that the Board was preventing the Department from purchasing transportation at the lowest possible rates and inhibiting the custom-tailoring of air service to postal needs by stifling alternatives to the service provided by the scheduled carriers.⁵⁰

Postal reform in general was sufficiently controversial that Congressional deliberations extended into the second session of the Ninety-First Congress. By the spring of 1970, factors having nothing to do with transportation (a threatened postal strike, among other things) increased pressure to pass a bill. The Administration produced a new Bill (incorporating much of H.R. 4), introduced into the House as H.R. 17070. The Senate, which had previously held hearings on H.R. 4 and H.R. 11750, produced its own Bill (S. 3613), which differed significantly from the Administration Bill. The airmail provisions of the two bills differed radically. H.R. 17070, as introduced, expanded even the liberal airmail contracting authority of H.R. 11750. It

⁴⁶ H.R. 11750, 91st Cong., 1st Sess. §§ 1653(a), 1653(b), 1653(c) (1969).

⁴⁷ Act of July 28, 1916, ch. 261, § 5, 39 Stat. 412, 427.

⁴⁸ The Postmaster General was somewhat disingenuous in claiming that the contracting provisions would not affect most mail carried by air. Postal Modernization hearings before the S. Comm on Post Office & Civil Service, 91st Cong., 1st & 2nd Sess., pt. 1, at 385 (1969-70) [hereinafter cited as Postal Modernization].

⁴⁹ In the course of doing so, they cited the "disastrous" experience with contracting in the 1930's as evidence for the unworkability of direct airmail contracting, *Id.* 425 (Testimony of Stuart G. Tipton, Pres., Air Transport Ass'n).

⁵⁰ *Id.* 391, 392 (Testimony of P. G. Winston Blount).

provided for contracting authority with any certificated air carrier (including supplementals) over the routes or within the area in which they were certificated and by its terms extended authority to all such carriers to carry mail. (The supplementals were and are not certificated by the CAB to carry mail.) Rates were to be no higher than those prescribed by the Board for priority mail and no higher than Board-authorized airfreight rates for mail carried on a space-available basis.⁵¹ Other contracting provisions remained the same as in H.R. 11750.

The Senate Bill was much more confining. It provided for contracting only with scheduled airlines over routes for which they were certificated or with air taxis, unless there was no service certificated between the points involved. Contracts with scheduled carriers had to involve a minimum of 5000 pounds per flight, no more than 5 per cent of which could be letter mail.⁵² Since the Post Office Department was mainly interested in carrying high-value letter mail by air at lower rates than those prescribed by the CAB, these restrictions rendered the proposed authority unattractive. From the airline point of view, they made good sense. The carriers could continue to carry letter mail at the Board-prescribed rates, unless it was accompanied by enough new business in the form of mail that was not then moving by air to make up for any lost revenue resulting from the carriage of letter mail at the lower rates that would result from contracting. The Post Office Department had already obtained authority to contract with air taxis by CAB regulations,⁵³ so the Senate Bill gave the Department nothing new in that respect. In any event, the aircraft size limitations imposed by the CAB on exempt carriers prevented, as they were designed to, air taxis from providing effective competition for the scheduled airlines except in special circumstances. The Senate Bill was reported out and passed as S. 3842 with the contracting provisions only slightly liberalized. The final version of the Senate Bill had a contract minimum of 1000 pounds per flight, up to 10 per cent of which would be letter mail.⁵⁴

H.R. 17070 was reported out to the House floor with only one change in the contracting provisions. In response to CAB and airline criticism, the provision allowing contracts with certificated carriers (§853(a)) was changed to allow the CAB to disapprove such contracts during a 90-day period between the time of filing and the effective date. This provision paralleled the requirement as to contracts where the Postmaster General found existing

⁵¹ H.R. 17070 (as introduced April 16, 1970) §§ 853(a), (b), (c), 91st Cong., 2nd Sess. (1970).

⁵² The other 95% would be made up of magazines and other "time-value" second class mail, parcels, and anything else the Postal Service decided to ship by air. S. 3613 (as introduced March 19, 1970) 91st Cong., 2nd Sess., § 5502(a) (1970).

⁵³ See *supra* at 327.

⁵⁴ S. 3842, 91st Cong., 2nd Sess., § 5503(a).

scheduled service to be inadequate (§853(c)). The requirement did little to mollify the airlines and the CAB, since the 90-day period was considered to be too short to allow the Board to act.

In the debate before the full House, the contracting provisions of the House Bill ran into very heavy fire. Harley O. Stagers, Chairman of the Committee on Interstate and Foreign Commerce, strongly objected to Postal Service contracting on both substantive and jurisdictional grounds. The substantive grounds were a rehash of the basic arguments against competition in the supply of airline services. Mr. Stagers cited the collusion that had occurred under Postmaster General Brown and claimed that contracts posed a threat to airline safety.⁵⁵ The ranking minority member of the committee raised the equally dreaded, if inconsistent, prospect of cutthroat competition.⁵⁶ These arguments, of course, had been raised during committee hearings and it is difficult to know whether they would have been sufficient to overcome the House's normal reluctance to amend the work of a committee which has held hearings on and written a bill. They were combined, however, with the argument that the relationship of the Postal Service, the CAB, and the carriers properly belonged within the jurisdiction of his Commerce Committee, which ordinarily handled transportation regulatory matters, and that the Post Office Committee had usurped this jurisdiction by including the contract provisions.⁵⁷ This argument evoked a sympathetic response from members of other committees, such as Public Works⁵⁸ who felt that their own jurisdictional prerogatives had been slighted in the preparation of other portions of the legislation. Despite a vigorous defense by the Chairman and other members of the Post Office committee,⁵⁹ and Mr. Conte's attempt to cast the committee bill as a compromise by proposing even more liberal contracting authority,⁶⁰ the House approved Mr. Stagers' amendment deleting all contracting authorization from the Bill.⁶¹

This turn of events provides an interesting illustration of the processes that produce and maintain government regulation at public expense. The airlines had experienced relatively little difficulty in establishing government protection during the period when the Post Office Department was interested in pursuing an active role in shaping their development. As mail played a diminishing role in airline operations (a process materially aided, as

⁵⁵ 116 Cong. Rec. 20,458 (June 18, 1970) (remarks of Rep. Stagers).

⁵⁶ *Id.* at 20461 (remarks of Rep. Springer).

⁵⁷ *Id.* at 20462.

⁵⁸ *Id.* at 20459 (remarks of Rep. Gray).

⁵⁹ *Id.* at 20459-60, 20469.

⁶⁰ *Id.* at 20459 (proposal of Rep. Conte).

⁶¹ *Id.* at 20469.

we have seen, by Post Office Department actions and subsidy), the airlines were able to extend the pattern established in their dealings with postal authorities to the passenger-carrying aspect of their business. This was accomplished without opposition from the Post Office, which must have seen the cartelization of passenger operations as a development which would reduce postal support of airlines over the long run. As the Post Office came under pressure to improve the efficiency of its own operations, airmail transportation rates established by a body whose mission was to protect airline revenues presented an obvious opportunity to economize. But by that time, airline regulation had acquired its own patrons and its own institutions. The congressional forces which had extended the techniques of airline cartelization pioneered by the Post Office Department were now institutionalized in the Commerce Committee, a body much more powerful than the Post Office Committee. The Post Office Committee was concerned principally with postal needs and felt no institutional obligation toward the airlines or the CAB. As long as the contract provisions remained within its jurisdiction, postal economy would be the dominating factor in determining their content. But the Commerce Committee existed as an advocate for airline and CAB interests, for whom postal economy was desirable only if it could be achieved at no cost to the carriers. This committee naturally opposed contracting authority for the Postal Service.

Although Mr. Dulski, the chairman of the Post Office Committee, rightly pointed out during the debate that a bill as complicated as the Postal Reorganization Act necessarily cut across jurisdictional lines, we can speculate that his failure to consult the Commerce Committee on the airmail contracting provisions was not entirely accidental. Whether his committee would have been better off by consulting the Commerce Committee and ignoring their advice or by taking the course the chairman took is immaterial. As long as the interests of the airlines and the CAB were well represented in the Commerce Committee, no way could be found to reintroduce competition into even so small a part of the modern airline industry as mail carriage without creating a jurisdictional battle. And the existence of the jurisdictional dispute made it possible for the chairman of the Commerce Committee to form a coalition on the House floor between those who favored eliminating the contract provisions and those who were interested in preserving the jurisdictional prerogatives of their own committees on future matters that might affect them. Congressional committee organization played a major role in denying the new Postal Service airmail contracting rights.

Jurisdictional matters seem also to have played a role in the Senate. The Senate Post Office Committee bills were quite restrictive on the contracting issue from their beginnings in the first draft of S. 3613. This may seem

inconsistent with the explanation offered for the posture of the Post Office Committee in the House, but on closer examination, a reconciliation is possible. The Senate is a smaller body than the House, and Senators sit on more committees and have more interaction with each other in the committee context than do Representatives. Senator McGee, for example, was a member of the Appropriations and Foreign Relations Committees as well as the Post Office Committee.⁶² In addition, the chairman of the Senate Commerce Committee (Senator Magnuson) was and is a very powerful figure in the Senate. The combination of McGee's relatively diluted (compared to Congressman Dulski's) interest in postal matters and his undoubted awareness of the Commerce Committee's interest in CAB matters is illustrated by the great deference shown that committee in the Post Office Committee report to the Senate. That report advised the Post Office Department that any problems with CAB rates or procedures or requests for authority to deal with any carriers not presently certificated to carry mail should be taken up with the Commerce Committee.⁶³

The jurisdictional matter was resolved in the Senate before the bill was drafted. Any inclination McGee may have had to contest the matter was undoubtedly further diluted by his apparent conviction that airmail contracting would save the Postal Service relatively little in proportion to its total budget while possibly having a considerable profit impact on financially insecure airlines,⁶⁴ who could be relied on to make their concerns known to the CAB and the Commerce Committee. The issue must have seemed to McGee one with a high risk and a low payoff. Even the inclination of the bill's coauthor, Senator Fong, toward more liberalized contracting authority⁶⁵ was apparently insufficient to force a confrontation with the Commerce Committee. An additional factor may have been the presence on the Post Office Committee of Senator Randolph, chairman of the powerful Public Works Committee, whose views on this issue were very strongly pro-airline. Without the prospect of a losing fight against powerful airline support, it is difficult to understand Senator McGee's curiously negative posture toward money-saving aspects of the Postal Service's desire to save money in procuring airmail service.⁶⁶

The final outcome of the controversy over contracting provisions of the Postal Reorganization Act of 1970 was determined in a House-Senate Conference on the conflicting bills. The House conferees were led by Mr. Dulski, whose enthusiasm for the Staggers amendment was predictably scant. The

⁶² 1970 Congressional Directory 178 (1970).

⁶³ Postal Reorganization, Senate Rep. No. 91-912, 91st Cong., 2nd Sess., 21 (1970).

⁶⁴ See Postal Modernization, 393-395, 398-400.

⁶⁵ 116 Cong. Rec. 21717 (June 26, 1970) (remarks of Senator Fong).

⁶⁶ Postal Reorganization, Senate Rep. No. 91-912, 91st Cong., 2nd Sess., 17-18 (1970).

presence of the Senate contracting provisions, limited as they were, afforded an opportunity to include at least some expansion of postal airmail contracting authority in the final bill. The slightly unusual result of the conference was a contracting provision⁶⁷ which followed the form of the Senate bill, but relaxed the weight restriction slightly.⁶⁸ It thus provided more liberal contracting authority than either of the bills supposedly being reconciled. Mr. Staggers was not pleased by Mr. Dulski's efforts on behalf of the House version of the bill and said so at some length on the floor of the House,⁶⁹ but both houses of Congress passed the Postal Reorganization Act in the form approved by the conferees.

Aside from issues related to contracting for airmail services, the only airmail transportation regulatory issue affected by the Postal Reorganization Act was that of distribution of mail business among competing air carriers. Since Board-established mail rates are higher than those for freight with similar characteristics and since most airmail is carried in space produced as a by-product of the production of passenger service, airmail is highly profitable to the carriers on an incremental basis. Carriers regard themselves as entitled to a "fair share" of this bounty, partially for reasons related to the history of mail pay set out above. The Postal Service has historically attempted to divide mail more or less equally between carriers offering approximately similar services, but has also historically taken the position that it is not obligated to do so. This issue will be discussed in more detail in Section II below, but the development of the Postal Reorganization Act's treatment of the problem is worth noting briefly.

H.R. 4 and H.R. 11750, the original postal reform bills, made no reference to the distribution of mail between competing carriers. Indeed H.R. 4's introductory section⁷⁰ emphasized the need for flexibility in Postal Service authority to procure mail transportation. By the spring of 1970, both the House (Administration) and Senate bills contained language whose meaning is still disputed, but which has been interpreted by airlines to establish a policy favoring equal distribution of mail business among competing schedules.⁷¹ The language in question, as finally enacted,⁷² states that:

In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and

⁶⁷ Postal Reorganization Act, 39 U.S.C. § 5402 (1973).

⁶⁸ S. 3842, 91st Cong., 2nd Sess., § 5503(a).

⁶⁹ 116 Cong. Rec. 27600 (Aug. 6, 1970).

⁷⁰ H.R. 4, 91st Cong., 1st Sess., § 101(3) (1969).

⁷¹ Previously, this matter had been covered by internal postal regulations. U.S. Postal Service, *Methods Handbook*, Series M-31-Air Service Instructions, § 142 Division of Mail.

⁷² Postal Reorganization Act, 39 U.S.C. § 101(f) (1973).

equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service.

When this provision first appeared in early drafts of S. 3613⁷³ its language was considerably more vague with respect to obligations toward competing carriers, and it became more specific as the bill went through the hearing and drafting process.⁷⁴ It appeared in the House bill substantially as enacted.⁷⁵ The Postal Service resisted this language and the airlines favored it. The denouement parallels the outcome of the battle over contracting authority. This dispute apparently took place largely behind the scenes and little if any reference to the language involved appears in the floor debates or the hearing record.

In summary, the Postal Reorganization Act of 1970 made few changes in the relationship between the Postal Service on one hand and the airlines and the CAB on the other. The Post Office Department failed in its attempt to get substantially increased authority to contract with the airlines individually and directly, rather than dealing with them collectively through the CAB. Notwithstanding the general rhetoric stating the intention of Congress to allow the Postmaster General more flexibility in running the Postal Service efficiently and economically, Congress may have reduced the Postal Service's ability even to select the airline schedules on which it would dispatch mail. The Act did provide emergency contracting authority,⁷⁶ air taxi contracting authority,⁷⁷ contracting authority for mail service between points not served by a certificated carrier,⁷⁸ and a very limited form of contracting with scheduled airlines.⁷⁹ But the first two basically reenacted authority already available to the Postal Service by statute⁸⁰ or regulation.⁸¹ The third was of only interstitial value. And the last provided authority of almost no value to the Postal Service.

As of 1975, the arrangements which regulate the interaction between the Postal Service and the airlines differ in no important economic respects from the arrangements established by the Airmail Act of 1934. There are a few differences: the Postal Service no longer provides explicit subsidy to the carriers, the governmental agency which protects the carriers from each

⁷³ S. 3613, 91st Cong., 2nd Sess., § 101(e) (1970) (first draft).

⁷⁴ S. 3613, 91st Cong., 2nd Sess., § 101(e) (1970) (14th committee print).

⁷⁵ H.R. 17070, 91st Cong., 2nd Sess., § 101(e) (1970).

⁷⁶ Postal Reorganization Act, 39 U.S.C. § 5001 (1973).

⁷⁷ Postal Reorganization Act, 39 U.S.C. § 5402(c) (1973).

⁷⁸ Postal Reorganization Act, 39 U.S.C. § 5402(b) (1973).

⁷⁹ Postal Reorganization Act, 39 U.S.C. § 5402(a) (1973).

⁸⁰ 39 U.S.C. § 6302 (1958) (Supp. III).

⁸¹ 14 C.F.R. § 298.21(f) (1965).

other and from the public is the Civil Aeronautics Board rather than the Interstate Commerce Commission, and securing the right to carry mail does not require deliberately taking a two-year operating loss as a prelude to a comfortable and profitable relationship. But even the replacement of Post Office requests for bids by route certificates now has little practical consequence, since by 1934 the Post Office selected many routes for other than postal reasons, and since the Postal Service can now award contracts for services not provided by certificated route carriers. Perhaps the only change of any significance is the ability to contract with air taxi operators and interstitial operators at rates not set by an outside agency. Most of the problems and controversies that prompted the Post Office Department to seek reform in the Postal Reorganization Act remain unresolved and continue to affect the prices and conditions on which the Postal Service purchases air transportation. These will be examined in the next section.

II

The principal contemporary issues in regulating airmail transportation are a product of the interaction of the regulatory history set out in Part I and the economic characteristics of airmail operations. Only about 6.3 per cent⁸² of the mail carried by air moves in aircraft exclusively devoted⁸³ to mail. Most is carried in aircraft which carry passengers and freight as well as mail, and the remainder is carried in aircraft which carry freight as well as mail. Most flights on which airmail moves are scheduled for the convenience of other-than-mail traffic and would be operated even if there was no expectation on the part of the carrier that mail would be tendered. For only a few non-contract flights (generally late at night, when the aircraft would otherwise be idle) do prospective mail revenues play a major role in the carriers' scheduling decisions. Thus most mail is carried in capacity created as a by-product of servicing other traffic.

Several technical characteristics of modern transport aircraft account for the by-product character of most airmail capacity. Under most conditions, airline aircraft can lift more passengers by weight than can be accommodated at acceptable levels of comfort and evacuation safety.⁸⁴ This is par-

⁸² Derived from Treasury, Postal Service, and General Government Appropriations, hearings before a Subcomm. of the House Comm. on Appropriations, 93rd Cong., 2nd Sess., pt. 2, at 168, and Air Carrier Traffic Statistics Dec. 1974, at 4 (Civil Aeronautics Bd.). Virtually all mail-only movement is provided under contract by air taxi operators. Therefore, this proportion has been derived by subtracting the ton-miles moved by certified domestic air carriers in 1973 from the total Postal Service intercity air transportation workload, comparing the remainder to the total.

⁸³ "Dedicated," in Postal Service terminology.

⁸⁴ This is not true for an aircraft operated from runways appreciably shorter, or from airfields

ticularly true of modern jet aircraft, but is generally true for most aircraft being flown at less than maximum designed range. In addition, historically high fares (a by-product of regulation⁸⁵) have meant that airliners fly at relatively low load factors,⁸⁶ thus freeing still more weight lifting ability. Pressurized aircraft are designed with roughly circular fuselage cross-sections. The passenger deck floor is then placed just below the widest point so as to maximize passenger compartment width at seat level. For all but the smallest aircraft used by certificated carriers, the fuselage cross-section leaves more space available below the passenger deck than is necessary to accommodate baggage and aircraft systems.⁸⁷ Thus, a by-product of modern passenger air transportation is the creation of additional space that moves with the passenger compartment at no added cost. Loads using this space can be flown for only the cost of handling plus a slight additional fuel cost. This space is rather odd-shaped and, for all but the largest aircraft, relatively small compared to the remaining weight lifting capacity with a typical passenger load over a typical stage length. It can be used most efficiently if the load is flexible in shape and high in density. Mail and certain freight items fit this description exactly.

Although passenger and cargo flights are not always ideally timed for postal purposes, by-product mail service on these flights is always the lowest cost way to move mail by air. Nevertheless, where available by-product service is very inconvenient or nonexistent, the Postal Service often finds that meeting service standards requires the use of contract air taxi service in dedicated aircraft. Since by-product service is provided at rates which are often considerably above incremental cost, fairly large quantities of mail can occasionally be moved in contract aircraft meeting the limitations of Part 298⁸⁸ at costs to the Postal Service only somewhat higher than by-product service. In most cases, however, contract service costs the Postal Service much more than by-product service. And the difference in resource cost is even greater than comparison of Postal Service costs would suggest.⁸⁹

Most mail carriage in combination aircraft is very inexpensive for the with density altitudes appreciably higher, or over ranges significantly longer, than those for which the designs were optimized, but these are unusual circumstances.

⁸⁵ Theodore E. Keeler, *Airline Regulation and Market Performance*, 3 *Bell J. Econ. & Manag. Sci.* 399, tab. 8, at 420 (1972). Comment, *Is Regulation Necessary?* *California Air Transportation and Regulatory Policy*, 74 *Yale L.J.* 1416 (1965) [by Michael E. Levine].

⁸⁶ G. Douglas & J. Miller III, *Economic Regulation of Domestic Air Transport* 145 (Brookings Inst., Studies in Reg. of Econ. Activity, 1974).

⁸⁷ For dimensions and capacities of modern transport aircraft, see 106 *Flight International* 551-559 (Oct. 24, 1974).

⁸⁸ See *supra* at 15-16.

⁸⁹ Data derived from Postal Oversight, hearings before the S. Comm. on Post Office & Civil Service, 93rd Cong., 1st Sess., pt. 2, at 139, 143, 144, 148-165 (1973) [hereinafter cited as *Postal Oversight*].

carriers to provide and very expensive for the Postal Service to replace. On a few flights, more mail and freight may be tendered than can be accommodated, and freight may be left behind to accommodate mail. Very occasionally, a flight may be so heavily loaded with passenger baggage that even mail will be refused.⁹⁰ But given the relatively low load factors at which most certificated service operates, mail and freight rarely compete for space and, given the cost of service in dedicated aircraft, the Postal Service must only very rarely find that it can procure contract service at overall costs competitive with using the certificated carriers. As we have seen in Part I, the carriers have been very effective in their political efforts to prevent the narrowing of this spread by making less expensive alternatives available (through contract) to the Postal Service. Even those efforts would not prevent the Postal Service from reaping the benefits of the low-cost by-product space if the carriers were in rate competition with one another. But rate competition was eliminated, first by the Post Office Department and later by regulatory legislation, and the result is rates set by a form of negotiation between the carriers and the Postal Service, with the CAB serving as both cartel organizer for the carriers and final arbiter.

The CAB's solicitude for the financial health of the carriers has led it to set minimum rates for airmail carriage which greatly exceed the incremental costs incurred by the carriers providing the service. Although much freight (which is rarely cheaper and often more expensive to carry than mail) has moved at rates designed to cover incremental costs and make a relatively small contribution to overheads,⁹¹ rates for priority mail carriage have been set on a fully-allocated cost basis.⁹² Freight rates have reflected the costs of available by-product capacity which would otherwise go unused,⁹³ as well

⁹⁰ Until October 13, 1973, mail was divided into "priority mail" and "space-available" mail. "Space-available" mail was first-class mail carried by air at a lower rate than airmail, if space was left after airmail was loaded. In the Postal Service's opinion, "space-available" mail was left behind too often, so a temporary all-priority rate was negotiated. Since then all letter mail has travelled on a "committed space" (that is, "priority") basis at a rate (25.01 cents/ton-mile) lower than the airmail rate (29.8 cents/ton-mile), but considerably higher than the "space-available" rate (16.9 cents/ton-mile). Postal Oversight pt. 5, at 145. An indication of how infrequently capacity limitations require choosing between mail and other traffic is the fact that during the period March 1, 1973-August 31, 1973 (under the two-class system), priority mail was not fully accommodated on only 627 (.03%) of the approximately 1,932,999 airline flights to which it was tendered, and space-available mail was not fully accommodated on only 10,122 (.5%) of the flights to which mail was tendered. (Data derived by calculation from Postal Oversight pt. 5, 147, 150.) Thus, baggage almost never precluded carrying other forms of traffic, and only rarely (.5% of the time) did mail fill all available space remaining.

⁹¹ Domestic Air Freight Rate Investigation, Docket No. 22859, at 15 (April 15, 1975). American Air., *et al.*, Mail Rates, 14 CAB 571 (1951). Minimum Rates Applicable to Airfreight, 34 CAB 263, 266 (1961).

⁹² For example, American Air., *et al.*, Mail Rates, 14 CAB 571 (1951).

⁹³ *Id.*

as the fact that for most shippers, there are relatively good substitutes for airfreight. Mail rates have reflected the lower quality of the substitutes for airline carriage of mail and the ability of the Board to shield the carriers from intraindustry competition.⁹⁴ The spread between rates and costs has provided a major incentive for supplemental carriers to seek authority to carry mail, either on a "fill-up" or dedicated vehicle basis.⁹⁵ By the same token, the profitability of mail carried at CAB rates explains the vehemence of scheduled airline objections to expanded procurement authority for the Postal Service to mail carriage by other classes of carriers.⁹⁶ It also accounts for the controversies that have arisen over the distribution of business ("division of mails") among scheduled carriers operating over the same routes.⁹⁷

CAB-established rates for loose-sack (non-containerized) mail are uniform⁹⁸ for all quantities tendered and do not reflect airline savings in handling costs that arise from consolidating mail into relatively few dispatches and savings in carriage cost arising from the use of large-capacity aircraft. (Neither do these uniform rates reflect the higher unit costs of handling very small dispatches, but these make up a very small proportion of the total mail shipped.) Coupled with the high spread between CAB rates and incremental cost, this rate uniformity has affected Postal Service choices in choosing between certificated and air taxi service to carry mail. Since the Postal Service is not permitted to reap full benefits from the economies of large-aircraft transportation of consolidated dispatches of mail, it faces distorted incentives in choosing between price and convenience in shipping mail by air. Moderately large shipments of mail can be consolidated for carriage in smaller, less efficient aircraft operated by air taxi operators on schedules "custom tailored" for the Postal Service at rates only slightly higher than the uniform rates. If the CAB rate for such shipments reflected either their economies relative to smaller shipments or the low incremental costs to the certificated carriers of carrying mail, or both, the spread between air taxi service rates and combination aircraft service rates would be very wide, and the Postal Service could be expected to use air taxi service less often. As it is, the relatively small difference between the uniform rates and the costs of the air taxi operators makes the convenience of custom scheduling very attractive.

⁹⁴ The Board appears to be in the process of enforcing wider use of fully-allocated costing in setting airfreight rates. Domestic Air Freight Rate Investigation, Docket No. 22859, at 17 (April 15, 1975).

⁹⁵ Postal Modernization 433.

⁹⁶ Postal Oversight, pt. 2, at 107, 243.

⁹⁷ Postal Oversight, pt. 2, at 213-214, 184, 239-242.

⁹⁸ Postal Modernization 416. See, for example, Capital Air., *et al.*, Mail Rates, 18 C.A.B. 457, 467 (1954); Domestic Service Mail Rate Investigation, 47 CAB 310, 357 (1967).

These rate characteristics have also exacerbated disputes between the Postal Service and the certificated carriers regarding the relationship between price and quality of service. The Postal Service has attempted to create competition (principally schedule, facility, and capacity competition) among carriers wishing to carry mail at CAB rates. The Postal Service has taken the position that it should either get better service from the airlines at the rates it pays, or be allowed to pay lower rates. And the Postal Service has been forced by the general rate structure to adopt somewhat irregular variations⁹⁹ on CAB procedures in order to get rates that reflect the economies of containerization.

Disputes between the carriers and the Postal Service, then, result from the fact that neither the CAB rate structure nor the transportation patterns it has fostered have reflected the basic economics of airmail carriage. These disparities, in turn, are the product of a regulatory pattern which reflects a complicated fifty-year historical relationship between the carriers and the Post Office Department. The impact of these factors can be examined more specifically by considering in detail the basic airmail issues unsatisfactorily resolved by the Postal Reorganization Act and some of the related disputes that have arisen since then. These problem areas include defining the authority of the Postal Service to contract for mail service and rates, determining the types of carriers who can carry mail, deciding what classes of mail should be carried by air, with what priority and at what rates, reconciling divergencies between the schedules of the certificated carriers and the requirements of the Postal Service, and dividing business among competing carriers.

One of the most dramatic illustrations of the influence of the CAB rate structure on relationships between the carriers and the Postal Service can be found in the longstanding dispute over the right of the Postal Service to contract for the carriage of mail by air. As we have seen,¹⁰⁰ the Postal Service energetically but fruitlessly sought essentially unlimited contract authority while the Postal Reorganization Act was making its way through the Congress. Postal Service attempts to expand its freedom to contract with certificated scheduled carriers were frustrated by the 750 lb/10 per cent letter-mail restriction, and its efforts to acquire the right to purchase services from alternative carriers such as supplementals were even less successful. Since the Postal Service was permitted by CAB exemption to contract with air taxi operators before the Postal Reorganization Act was passed, the legislative confirmation of this practice did not represent an expansion of procurement choices. Indeed, the only reason the Board and the Congress

⁹⁹ Postal Oversight, pt. 2, at 268-273, 291.

¹⁰⁰ *Supra* at 327-32.

permitted contracting with air taxis was that the equipment limitations elsewhere imposed on those operators were such that they could not provide the Postal Service with a cost-effective alternative for most mail service. The Postal Service continued to request greatly expanded contracting authority after the Postal Reorganization Act was passed, again pressing its case in the Postal Oversight Hearings of 1973.¹⁰¹ The carriers strenuously resisted the expansion of contracting authority in 1969 and 1970,¹⁰² and again in 1973.¹⁰³ The persistence of the Postal Service's efforts and the determination with which the carriers resisted are a product of the rate structure and regulatory patterns imposed by the CAB on the carriage of mail by air.

In brief, what the Postal Service hoped to gain from contracting with the scheduled certificated carriers were some service improvements, lower rates on high-volume shipments, and the benefits of service and perhaps even rate competition among carriers desiring postal contracts. While the airlines did not object in principle to schedule improvements, high-volume service innovations, or even some lower rates, they objected strenuously to the introduction of competition, correctly perceiving that competition would eliminate the possibility of controlling rate and service innovation so as to raise profits. The carriers realized that rate and service innovations would leave the Postal Service with an alternative to the high-rate loose-sack shipments that they were carrying so profitably. One might expect that saving public money by eliminating cartel rents being taken by air carriers from the Postal Service would appeal to a deficit-sensitive Congress and that carriers would find it difficult successfully to oppose proposals claimed to have this result. But the politics of postal reform in general, and airline regulation in particular, have a logic of their own. By this logic, the "need" of the air carriers for their monopoly profits on mail carriage meant that lowering the cost of airmail carriage was seen as an unacceptable method of reducing postal deficits.¹⁰⁴ The Postal Service reflected its understanding of the underlying political reality by presenting contracting proposals as principally directed at achieving service improvements, with cost savings coming as an almost regrettable, but inevitable, by-product.¹⁰⁵

The political history of the contracting issue makes generalizations about the "real" motives of the Postal Service (as of the scheduled airlines) dangerous, but a reasonably plausible synthesis can be attempted. To put the proposition in its most general form, the Postal Service has argued re-

¹⁰¹ Postal Oversight, pt. 5, at 142-143.

¹⁰² *Supra* at 327-28.

¹⁰³ Postal Oversight, pt. 2, at 107, 243.

¹⁰⁴ *Supra* at 331-32.

¹⁰⁵ Postal Modernization 390, 391.

peatedly that it wished to deal with air carriers on a customer-supplier¹⁰⁶ basis, with the Postal Service determining what services it wants and is willing to pay for and purchasing from competing vendors. It wishes to free itself from playing an externally-determined (by the CAB) role in a rate package designed to accommodate passenger and freight traffic. The freedom offered by contract would be procedural as well as substantive. At present, the rates that certificated scheduled carriers receive for carrying mail are set in "service mail rate" cases. These cases usually involve the rate for the current and recently past period. They take several years to decide, during which neither the Postal Service nor the airlines know what rate is to be paid for current or future transportation of mail. They only know the rate for the last "closed" period (which may have ended several years ago), so all mail carried at service mail rates is accompanied by "progress payments" based on the old rate, subject to a retroactive adjustment at the end of the period.¹⁰⁷ The Postal Service believes that carriage of mail at firm contract rates determined in advance would allow better planning by both the Postal Service and the airlines and greatly reduce the uncertainty costs imposed by the present system.¹⁰⁸ That the airlines are willing to carry mail without knowing how much they will, in the end, be paid for their efforts is one of the strongest pieces of evidence available to suggest that the CAB's role in setting mail rates is strongly protective of the carriers. Obviously, the carriers trust the Board to ensure that they are amply rewarded in the end with CAB rates higher than those which they could negotiate on their own by an amount sufficiently greater to make the uncertainty worth bearing.

Free to deal with the airlines as a buyer of services, the Postal Service evidently believes that it could move mail on existing flights at lower rates than those set by the Board and be in a position to use consolidation of business or higher rates to encourage services timed for the convenience of the mail. The uniform high rate set by the Board is neither low enough to reflect the incremental costs of mail carriage on flights scheduled to attract passengers and freight, nor flexible enough to reflect the costs of any particular operation tailored to the needs of the Postal Service. The Postal Service also implies¹⁰⁹ that only contract rates will allow it the flexibility to make full use of containerization, which typically involves a mix of space, equipment, and services by both carrier and post office very different from the dispatch of loose-sack mail. Certainly, the Postal Service would not make full use of containerization at loose-sack rates, since the only savings which it could

achieve would be internal costs of handling, but there is no reason in principle why Board rates could not be set for containerized mail and, indeed, something like that has occurred in the daylight container program, which is discussed *infra*.

The Postal Service has also claimed¹¹⁰ that it could increase the proportion of mail that moves by air if it were free to contract at rates related to the costs of handling and transporting the particular mail involved, rather than paying rates reflecting an average of many different costs and circumstances. For example, mail which currently moves by surface might be moved as fill-up mail in containers that would otherwise be only partly filled.¹¹¹

The basic source of most of the benefits the Postal Service expects to reap from contracting is increased carrier competition for its business. This competition could produce lower rates, or it might lead to better-timed schedules, extra mail handling, novel forms of service, or assured capacity. It might, for example, prevent the Postal Service from again being forced to give up the lower rates which were associated with the carriage of first class mail on a space-available basis in order to secure what it regarded as adequate levels of aircraft space committed to the carriage of mail.¹¹² The Postal Service apparently suspects that some carriers would find the mix of business and rates that the Postal Service could direct to it sufficiently attractive that they would offer more space on more conveniently timed schedules. But as long as the rates are negotiated for the whole industry with the Board protecting the interests of the carriers and assuring uniformity, and as long as Section 101 (f) is interpreted to require equal division of mail dispatched at CAB rates,¹¹³ carriers have little incentive to offer more favorable terms to the Postal Service. If the Board allows the special rate or service, other carriers will have an equal right to the business. If the new rate or service involves consolidation of dispatches, sharing the business may make it uneconomic. If the others cannot match the proposal, the Board may not allow it because of its effect on the non-participating carriers.

The scheduled carriers and the CAB have opposed expansion of the Postal Service's right to contract for air transportation for a variety of reasons. Among the most important of these is the argument that the existence of joint costs coupled with very low incremental costs of providing by-product space means that airlines competing for contracts would drive the price for carrying mail well below its present level, with the result that the mail would not pay its share of system costs.¹¹⁴ The claim is somewhat inconsistent with

¹⁰⁶ For example, Postal Modernization 393-403.

¹⁰⁷ Postal Oversight, pt. 5, at 4.

¹⁰⁸ Postal Oversight, pt. 5, at 142.

¹⁰⁹ Postal Modernization 391.

¹¹⁰ Postal Oversight, pt. 5, at 3.

¹¹¹ Postal Oversight, pt. 5, at 4.

¹¹² Postal Oversight, pt. 5, at 40, 41.

¹¹³ Postal Oversight, pt. 1, at 261-263.

¹¹⁴ Postal Oversight, pt. 2, at 107.

the carriers' accepting the need for, and indeed eagerly proposing, thousands of specific commodity freight rates at levels between incremental and fully allocated costs. In the past, the Board has approved general commodity freight rates based on fully allocated costs but insisted on applying them only to traffic which was not very price sensitive. When a carrier wished to capture the freight business of a shipper with a relatively price-elastic demand for air transportation, they negotiated a specific commodity rate for the particular product over a particular route. The carrier then filed that rate as an addition to the tariff. Although the tariff filing differs from a contract in that it is subject to suspension by the Board if the Board thinks it is too low and in that it is nominally available to all shippers of that commodity between the points for which it is filed, in practice a great many of these low rates have not been suspended and therefore the benefit has been confined to the one shipper who wished to move that commodity over that route. Obviously, the Board and the carriers feel that the Postal Service has fewer alternatives and should be forced to pay the equivalent of the general commodity rate. It should be noted that, however mistakenly, the Board has recently¹¹⁵ moved to put most freight rates on a fully allocated cost basis, which would make its treatment of freight and mail more consistent.

Other arguments for uniform rates well above incremental costs are based on the alleged need to finance below-cost services on lightly-travelled routes with excess revenues on high-density routes.¹¹⁶ A related argument is that since service is provided in both passenger-cargo and all cargo aircraft and since the proportion of traffic that mail represents differs greatly from flight to flight, incremental cost varies and rates have to be averaged to provide an overall profit.¹¹⁷ Both of these arguments tend to assume that there are some excessive and some deficient rates in the system, but that in the end it all "averages out" at a "fair" level.¹¹⁸ These arguments are ultimately based on a misconception which also seems occasionally to invade the thinking of the Postal Service, namely that there is some sort of "need" for postal transportation which is independent of what it costs to provide service, and that there is some minimum reasonable rate for that amount of service. If there is belly space available in a scheduled passenger flight at virtually zero incremental costs, the rates ought to reflect the situation, so that the Postal Service can make efficient choices in dispatching mail. The convenience of a primarily postal schedule should be balanced against the additional cost involved in getting service in dedicated vehicles or as a substantial portion of the available space on a prime-time cargo flight. And airlines should con-

¹¹⁵ Domestic Air Freight Rate Investigation, Docket No. 22859, at 17 (April 15, 1975).

¹¹⁶ Postal Oversight, pt. 2, at 107.

¹¹⁷ *Id.*

¹¹⁸ Postal Modernization 415.

sider rates based on incremental costs when establishing a flight schedule. The Postal Service has recognized this principle in planning such operations as the daylight container program.¹¹⁹ But its complaints that airlines were "refusing" first class mail dispatched at space-available rates¹²⁰ suggest either that it wanted something for nothing or that it did not understand the tradeoffs involved in using the lower rates.

A variation of the average cost and internal subsidy arguments which has been put forward by the carriers and the Board in defending the CAB's rate structure is the "system" argument.¹²¹ This is the assertion that airlines offer a complex network of services balanced among cargo, mail, and passengers and between service to smaller communities and service to larger communities. It is urged that any revision in the regulatory structure which would either lower rates on some segments or otherwise increase competition would ultimately degrade the total system by impairing the ability of the carriers to support low-density parts of the network. This argument is an updated version of the internal subsidy justification for regulation in general and is subject to the same defects I have identified elsewhere.¹²² If customers value the network aspect of the system, they will pay for it, and airline earnings will tend toward equality on more dense and less dense segments as investment is shifted toward profit opportunities. If subsidy for particular routes is deemed desirable for non-economic reasons, it is not at all clear why a particular class of people who happen to use related services but do not benefit directly from the uneconomic services should be singled out to support the unprofitable portions of the network.

Still another variation on this theme is the claim, popular in the Congress during the pendency of the Postal Reorganization Act,¹²³ that mail revenues are disproportionately important to the health of the industry, so the industry "needs" this contribution to profit. Implicit in this argument is the premise that the nation needs airlines and will not have them unless they are allowed to make supercompetitive profits on certain portions of their business. This claim, which would sound strange if it were given as a justification for price-fixing activity by a steel company, is no better grounded than the arguments already discussed. There is no reason why the considerable demand for airline service on the parts of passengers, shippers, and the Postal Service cannot be satisfied at rates that reflect the marginal costs of production or in the case of joint costs, at rates associated with maximizing output subject to the constraint that total revenue is equal to total cost.

¹¹⁹ Postal Oversight, pt. 2, at 247 (quest. #4).

¹²⁰ *Id.*, pt. 1, at 254, 255.

¹²¹ Postal Modernization 413, 414.

¹²² Comment [by Michael E. Levine], *supra*-note 85.

¹²³ *Id.* at 24-25.

While this may mean that certain users (including from time to time the Postal Service) will pay more for certain services or get less of certain services than they would at an artificially uniform rate, output will be better tailored overall to the value placed on the resources used to produce it. Keeping mail carriage rates at higher-than-necessary levels simply contributes to an inefficient pattern of production of airline services as a whole, although it may benefit particular users in particular circumstances.

It should be emphasized that nothing in this analysis requires that the mail rate always be lower than freight or passenger rates. It may be more efficient for postal users to bear a relatively high proportion of capacity costs on certain flights. If the Postal Service particularly wants service at a time relatively unattractive to passengers and shippers, mail rates should be set high relative to the others. Then passenger and freight rates can be lowered to attract greater total revenues and thus pay for more output than would result from a different distribution of capacity costs. Under such circumstances the Postal Service might be led to conclude that its rates were unfairly high, but such a rate structure would make possible Postal Service use of capacity whose total costs could not otherwise be covered, thus leaving the Postal Service better off. In those instances, especially "profitable" Postal Service would support "needed" airline service to the general benefit, but also to the particular benefit of the Postal Service. But this does not justify uniform mail rates higher than passenger and freight rates. Such rates do not take into account the costs and demands associated with any particular flight, and would produce efficient results on particular flights only by coincidence.

The Board and the carriers regard contracting as unnecessary as well as undesirable. They have argued that all that the Postal Service wants to achieve through additional contracting authority—except lower rates on mail now carried by the airlines—can be gotten by using existing mechanisms.¹²⁴ The Board is said to be flexible enough to allow lower rates for classes of mail not now carried by air, as long as high rates for existing classes of mail are not eroded. The tariff mechanism could be used to achieve this, much as freight shippers and carriers use the tariff mechanism to negotiate specific commodity rates.¹²⁵ The carriers and the Board point out that the required service provisions¹²⁶ of the Federal Aviation Act already provide the Postal Service with a mechanism for tailoring schedules and service to its requirements. And they argue that the Postal Service has not used the contracting provisions¹²⁷ of the Postal Reorganization Act, and

¹²⁴ Postal Modernization 418, 419.

¹²⁵ *Id.* at 413.

¹²⁶ Federal Aviation Act 49 U.S.C. § 1375(b) (1958).

¹²⁷ *Supra* note 63.

that its failure to do so proves that expanded contracting authority will only be used to lower rates on existing traffic and not to expand the flexibility of service and enable new postal traffic to move by air.¹²⁸ The Postal Service rejoins that as long as the Board can suspend tariffs which it feels are too low and set the rate for any service which carriers are ordered to provide by the Postmaster General, these provisions will not produce the needed improvements in service and rate structure.

Finally, the Board and the carriers charge that although the Postal Service has repeatedly testified that it wants merely to be treated as an airline customer, it is requesting in the form of unlimited contract authority a status not available to any other airline user—the ability to deal with the carriers free of the Board's regulation.¹²⁹ The Board claims that it is not airline-oriented, but rather public interest-oriented, and that the public interest requires consideration of the needs of the carriers, other shippers and passengers, and the public at large in setting mail rates and regulations. In effect, the carriers and Board charge the Postal Service with being preoccupied with saving money at the expense of the greater public weal. This posture has the political virtue of making the Postal Service's search for operating economies seem petty and self-serving while the Board's and carriers' efforts to preserve above-cost rates for carrying mail take on the character of a crusade for public good. The tactic is an inspired one and has, as noted above, resulted in the odd spectacle of a Congress nominally concerned about Postal Service efficiency and the elimination of deficits championing excess payments of public funds to private carriers in the name of a higher public purpose.

This approach to the Congress is undoubtedly more successful than it might otherwise be as a result of its natural evolution from the history of Post Office-airline relations set out in Part I. The claim on postal monies as an especially important source of profit support would seem much less public-oriented if it were not descended from the historic role of mail pay as the main support for fledgling carriers and the main public instrument in shaping the modern domestic airline industry. The case for fully-allocated cost rates for by-product service owes much to the rate formula of the Airmail Act of 1934, which provided payment for capacity offered rather than mail actually carried in an effort to increase the output of the by-product service of the time—passenger transportation. And the Board's role in insulating the airlines from competition with each other in dealing with the Postal Service is an integral part of the regulatory scheme nominally enacted in 1938, but actually instituted in the provisions of the 1934 Act

¹²⁸ Postal Oversight, pt. 2, at 107.

¹²⁹ Postal Modernization 412-417.

giving the power to set rates for the renewal of airmail contracts to the Interstate Commerce Commission.

Most of the Postal Service's claimed benefits from contracting and most of the evils feared by the carriers are a product of the implicit absence of Board protection for the carriers, rather than from any feature of the contract mechanism itself. If contracting were allowed but all contracts had to have Board approval and the Board rejected all those that did not advance airline profits, contracting would probably not be very attractive to the Postal Service. Indeed, if the Board retained an active role, it is difficult to see how contracting would differ from the use of the tariff mechanism, a procedure which is supported by the Board and the carriers¹³⁰ and which the Postal Service professes to regard as cumbersome. The Postal Service has said that it would be willing to accept contracting subject to rapid Board review.¹³¹ Presumably, the Postal Service either believes that the Board could not review contracts within the period proposed or simply regards Board supervision as a temporary expedient to be discarded once the contract mechanism became entrenched. Although the Postal Service has occasionally aimed its criticisms of Board rate-setting at institutional techniques, rather than at the Board itself,¹³² it seems unlikely that any mechanism which involved active CAB protection of the carriers would produce results acceptable to the Postal Service. Conversely, any mechanism which resulted in individual airlines dealing with the Postal Service without the Board acting as cartel manager, whether on the basis of individual or general rates, specific tariffs, or contracts, would be likely to produce results more satisfactory to the Postal Service than the present arrangements.

The Postal Service's preoccupation with the contract mechanism as the vehicle for revolutionary change in its relationship with the scheduled carriers must rest either on a general preference for uniformity of institutional patterns among different modes of transportation procurement, or on some unarticulated political judgment that the contract concept has more promise for reducing the CAB's role in the process than any other. The carriers' resistance to the contract concept must similarly rest either on a judgment that the Board will be unable to monitor contracts with the vigilance that it can monitor uniform rates or tariffs, or on the political judgment that the contract issue with its overtones of the troubles of the pre-1938 era focuses Congressional attention on the legislative history of the regulatory scheme in a way that insures its survival. Whatever their intent, by casting their opposition to a smaller role for the Board in airmail transportation procure-

¹³⁰ See Postal Modernization 417, 427.

¹³¹ Postal Oversight, pt. 1, at 261.

¹³² Postal Modernization 389-393.

ment in terms of the historic contract issue, the carriers and the agency itself have created an effective Congressional shield for their own interests.

A related effort to develop contract alternatives to mail carriage by scheduled carriers at CAB-set rates has been the greatly expanded use of contracts with air taxi operators. Expenditures for air taxi services grew from about \$3.39 million in Fiscal Year 1968 to an estimated \$19 million in Fiscal Year 1974.¹³³ This very large increase is accounted for by both a considerable expansion in the scale of operations and a decision to use sophisticated (and expensive) jet aircraft on certain routes.¹³⁴ Air taxi operations are more expensive per ton-mile than any CAB-set rate.¹³⁵ The Postal Service uses them because they can often provide service on schedules more convenient for mail carriage than flights timed for passenger or cargo traffic by the scheduled certificated carriers.

The fact that air taxi rates are already higher than CAB rates might seem to suggest that use of air taxi service is independent of any defects in the CAB-established rate structure, but this is probably not the case. While there may be some mail which must be moved by the very fastest means possible, much of the mail carried by air taxis is first class mail whose senders did not value speed enough even to spend a few cents extra for faster handling by paying airmail postage.¹³⁶ The ability of the Postal Service to justify carrying this mail by air taxi depends on its ability to reconcile the resulting service improvements with the additional cost. To the extent that uniformly high CAB rates for loose-sack mail narrow the cost spread between air taxi service and combination service, they distort Postal Service choices. This is nowhere more apparent than in the Postal Service's use of cargo configuration executive jets to haul mail at ton-mile costs more than double the prevailing CAB rate. The Postal Service justifies this program because it improves service, but the unit cost advantage of larger airline type aircraft in off-peak use is so great that the certificated carriers would undoubtedly bid much lower than CAB rates in order to keep the business. They might, for example, operate night flights at very low passenger fares, with mail revenues paying a larger-than-usual share of the costs and the low fares attracting passengers who would otherwise find the late-night schedule unat-

¹³³ Treasury, Postal Service & General Government Appropriations, *supra* note 82, at 169, *id.* 91st Cong., 1st Sess. 626.

¹³⁴ See Air Taxi Study, prepared by Swygert Associates for the Air Transport Association of America [hereinafter cited as Air Taxi Study], reproduced in Postal Oversight, pt. 2, at 115, 119, 134-5, 155.

¹³⁵ The lowest ton-mile rate included in the comprehensive list of air taxi contracts found in Air Taxi Study, Postal Oversight, pt. 2, at 150-66, is approximately \$.35 per ton-mile, Lubbock, Texas—Abilene, Texas, Ross Aviation, *id.*, 162. CAB rates for certificated carriers are about \$.25 per ton-mile, *supra* note 90.

¹³⁶ Postal Oversight, pt. 5, at 145.

tractive. Money saved by using combination service could be used to improve mail operations other than actual air carriage.¹³⁷

Another potential source of contract competition for Postal Service traffic are the supplemental carriers. These carriers were created in 1962¹³⁸ as a class of charter specialists. Their CAB certificates authorize them to provide passenger and freight charter service in and between specified regions (for example, U.S. domestic). The certificates do not authorize them to carry mail on a regular basis. While the Postal Reorganization Act was being considered in the Congress, the supplementals requested that their certificates be changed to permit them to carry mail on a contract basis, both on regular passenger and freight charters and on *ad hoc* operations.¹³⁹ They suggested that Postal Service costs would probably be lowered as a result of the added competition and cited the military charter market as an example of both the type of arrangement they proposed and the likely result.¹⁴⁰ As far as I have been able to determine,¹⁴¹ the Postal Service was in favor of the proposal and it was incorporated into H.R. 17070 when that bill was introduced as the revised Administration Bill in 1970.¹⁴²

This proposal met the same fate as the other liberalized contracting provisions of H.R. 17070, but it presented interesting possibilities. Supplementals often operate a sustained series of charter flights between important tourist destinations, arranging their flights so as to eliminate empty legs (these are called "back to back" charters in the trade). In addition, many charter flights are booked months in advance, and the Postal Service could easily be notified of their impending operation. Charter flights produce by-product capacity which could be used to carry mail, much as do the scheduled

¹³⁷ A somewhat exotic justification for jet air taxi operations might be constructed under the following circumstances: Suppose the Postal Service were committed to provide the fastest possible service for a special class of priority mail regardless of rate, and to pass the increased costs on to patrons desiring such premium service. Suppose in addition that only late-night jet service could provide the rapid service needed and the scheduled carriers did not operate at those hours. If the priority customers were willing to pay the cost of a jet charter and the jet always had room for more mail than was tendered at priority rates then it would make sense to operate jet taxis and to carry non-priority mail on a fill-up basis. In reality, airmail is certainly not offered as a cost-no-object priority service, postal rates are not set to reflect the costs of jet air taxi, and many of the routes operated are too short for the extra speed of the jet to be significant. See, for example, Postal Oversight, pt. 5, at 65, where a Postal Service spokesman refers to a jet taxi being used to carry mail between Washington, D.C. and New York, a route over which the additional speed of a jet could save no more than 15 minutes over propeller service.

¹³⁸ Act of July 10, 1962, Pub. L. No. 87-528, 76 Stat. 143 *amending* 49 U.S.C. § 1301 (codified at 49 U.S.C. § 1301 (1963)).

¹³⁹ Postal Modernization 433.

¹⁴⁰ *Id.* 434, 435.

¹⁴¹ *Id.* 434. In 1973 the Postal Service indicated that it favored such authority for supplementals. Postal Oversight, pt. 5, at 139, 147.

¹⁴² H.R. Rep. No. 17070 § 853 (1970).

carriers (although supplementals carry more passengers per flight than do scheduled carriers using the same aircraft and hence use more of the weight-carrying capacity of any given flight). This by-product space is currently wasted, since the supplemental is not permitted to sell it, either to the Postal Service or, under most conditions, to private shippers other than the primary charterer. While the somewhat irregular nature of charter operations suggests that they will never be a major source of Postal Service transportation, such by-product space as they do provide could be made available at very low cost on a contract basis. The overall result of continuing the prohibition on supplemental carriers transporting mail is the same as with all the prohibitions on contracting—it prevents the efficient use of existing capacity and encourages wasteful patterns of operation by the Postal Service.

Postal Service dissatisfaction with airline schedules has been a major source of conflict between postal officials, carriers, and the CAB. The Postal Service has complained that the carriers schedule for passenger traffic, that this traffic does not move at prime mail hours (late night), and therefore that the Postal Service has only limited service at hours convenient to it. This claim was raised variously during the hearings on the Postal Reorganization Act¹⁴³ and during the Postal Oversight Hearings¹⁴⁴ as a justification for expanded contracting power, as an explanation for expanded use of expensive air taxi service, and as a reason why lower rates are justified. The Postal Service position is that the carriers have an obligation under the Federal Aviation Act to provide mail service, that this service should include service properly timed for mail, and that the Postal Service pays rates based on fully allocated costs and is therefore entitled to better treatment.¹⁴⁵

The carriers argue that mail represents only a fraction of the revenue generated by most flights and that it is impractical to schedule flights for mail alone. Where there is substantial mail revenue available at a certain hour, the carrier takes it into account in its scheduling.¹⁴⁶ The carriers claim as well that the Postal Service is too inflexible and rejects tenders of service on flights operating on schedules only a few minutes different from those it requests.¹⁴⁷ The intricate scheduling problems created for both the airlines and the Postal Service by a complex network of operations can make seemingly small problems of adjustment impossible.¹⁴⁸ Finally, the carriers and

¹⁴³ Postal Modernization 404.

¹⁴⁴ Post Office Reorganization hearings before the H. Comm. on Post Office and Civil Service, 91st Cong., 1st Sess., pt. 5, at 37 (1969) [hereinafter cited as Postal Reorganization].

¹⁴⁵ Postal Oversight, pt. 5, at 37, 38, 40, 41.

¹⁴⁶ See Postal Oversight, pt. 2, at 232.

¹⁴⁷ Postal Oversight, pt. 2, at 109.

¹⁴⁸ *Id.*, pt. 2, at 178, 179, 215.

the Board both point out¹⁴⁹ that the Federal Aviation Act empowers¹⁵⁰ the Postmaster General to order an airline to operate a schedule for the convenience of the Postal Service, the Board retaining its general power to fix "fair and reasonable" rates for such service.¹⁵¹

The Postal Service historically had been reluctant to use the required service provisions of the Federal Aviation Act, probably because it feared that CAB proceedings would take too long and that the Board would set compensation for such service at unacceptably high rates.¹⁵² The authority was unused for more than thirty-five years, and the Board and the carriers made effective use of that fact in opposing expanded Postal Service authority both in 1969-1970 and 1973. But in late 1973, Eastern Airlines informed the Postal Service that it intended to discontinue a Boston-New York-Atlanta late night flight that had been carrying substantial amounts of mail. On January 3, 1974, the Postmaster General issued an order¹⁵³ under 405(b) of the Federal Aviation Act¹⁵⁴ requiring Eastern to retain the flight. Eastern immediately appealed to the Civil Aeronautics Board, which issued an order¹⁵⁵ on January 11, 1974, granting review of the Postmaster General's order and postponed its effect pending final Board action. The Board took no further action in the matter for two months, notwithstanding the provision of 405(b) requiring it to "give preference to proceedings under this subsection over all proceedings pending before it." The Postal Service pointed this out to the Board in two motions for expeditious action, the second observing on March 8, 1974, that there had been other Board actions in the interim.

The Board responded on March 13 with an order¹⁵⁶ to show cause why the flight should not be continued provided compensation was paid. It reinstated the Postmaster General's order pending a final determination and set a temporary rate to be paid during the interim, subject to retroactive adjustment. The Board noted in its order that this was an important case of first impression that required a balancing of postal needs with its obligation to foster and promote economically sound air transportation.¹⁵⁷ In sub-

¹⁴⁹ *Id.*, pt. 2, at 107; Postal Modernization 413.

¹⁵⁰ Federal Aviation Act, 49 U.S.C. § 1375(b) (1963).

¹⁵¹ Federal Aviation Act, 49 U.S.C. § 1376(a) (1963).

¹⁵² See Postal Oversight, pt. 5, at 90.

¹⁵³ This Order and the subsequent pleadings and Civil Aeronautics Board Orders form Docket 26290 and are on file in the Docket Section at the Civil Aeronautics Board in Washington, D.C. The Docket, which is public record, will not ordinarily be published, but the Board Orders in the proceeding may ultimately be published in Civil Aeronautics Board Reports.

¹⁵⁴ See *supra* note 126.

¹⁵⁵ Order 74-1-15, Jan. 11, 1974. See *supra* note 153.

¹⁵⁶ Order 74-3-59, March 13, 1974. See *supra* note 153.

¹⁵⁷ *Id.* at 2-3.

sequent argument, Eastern urged¹⁵⁸ that there was a fuel shortage, that belly capacity was available on flights at other hours, that the Postal Service tender (12,000-16,000 lbs. per night) was insufficient to justify the operation of a Boeing 727 (the minimum size aircraft that would accept the Postal Service containers), and that the schedule pattern in this market was not different from other markets in which no such order had previously been issued. The Postal Service reiterated¹⁵⁹ its complaints that the carriers gave insufficient importance to mail needs in scheduling flights and then cited the CAB's own testimony,¹⁶⁰ given during the hearings on the Postal Reorganization Act, to the effect that contract authority was not needed because the Board stood ready to cooperate with the Postal Service in the exercise of its rights under 405(b). It noted that the other markets cited by Eastern were being served other ways, two by the sort of jet air taxi service to which the airlines had so vehemently objected in the Postal Oversight Hearings the summer before.

Since it was clear that the Board was going to allow the Postal Service to require the schedule, the principal dispute in connection with the final order was over rates. This debate reproduced in microcosm most of the historic differences between postal authorities and the carriers over costing methodology and rate levels. The show-cause order had set a rate based on the then-existing temporary mail rate (recall that mail rates are frequently "open" during the period for which they are in effect), with a minimum of \$2,500 per flight. The Board was here applying its historic method of using fully allocated costs over the whole system, modifying it to reflect the required character of the service only by providing a minimum in case very little mail was tendered. Eastern, on the other hand, requested a rate based on incremental costs for that flight, plus "fully allocated" overhead and a 12 per cent rate of return. As Eastern calculated it, this method would have yielded a payment of \$10,350 per flight.¹⁶¹ The Postal Service generally supported the Board's use of regular mail rate. On May 20, 1974, the Board issued a final order adopting the regular temporary mail rate (subject to revision when that rate became final) and the \$2,500 minimum. In its order, the Board noted that although the rate adopted would not cover fully allocated costs, it would cover incremental costs and make a "substantial contribution" toward overheads.¹⁶²

This controversy reflects an interesting reversal of positions by the con-

¹⁵⁸ Eastern Airlines Notice of Objection, March 20, 1974, CAB Docket 26290. See *supra* note 153.

¹⁵⁹ U.S. Postal Service Notice of Objection, March 22, 1974, CAB Docket 26290. See *supra* note 153.

¹⁶⁰ Post Office Reorganization, pt. 3, at 1147.

¹⁶¹ Eastern Airlines Answer, March 27, 1974, Docket 26290. See *supra* note 153.

¹⁶² Civil Aeronautics Board, Order 74-5-93, May 20, 1974, p. 3. See *supra* note 153.

tending parties. The Postal Service, ordinarily an opponent of system-wide uniform rates, was perfectly willing to support them when, as here, the result was a rate lower than it was likely to be on an individual contract basis. (We can deduce that the minimum amount for which Eastern was willing to operate this flight was more than the mail revenues it would earn at regular rates from the fact that Eastern originally discontinued it.) Eastern, which we can assume ordinarily favored system-wide mail rates which did not reflect the low incremental costs associated with mail carriage on most of its flights, found the virtues of system rates which were "fair" overall unappealing in this instance. The Board seemed unlikely, given its initial two-month silence, to act more expeditiously this time than in the past, but found itself able to go forward with the matter five days after receiving a Postal Service threat to litigate the delay. Some implications of these ambiguities of position will be discussed in Part III, *infra*. However, one inescapable conclusion is that many disputes between the Postal Service and the carriers are unavoidable results of efforts by each party to extract maximum benefits from a rate structure that permits wide deviations between price and marginal cost.

Another example of disputes created by the rate structure is the so-called "division of mail" problem. During the subsidy era, the Post Office Department used mail pay to encourage the airlines to operate more capacity than could be supported by passenger and freight traffic. The Civil Aeronautics Act of 1938 continued this method of subsidy. Since mail was the instrument of subsidy, mail rates were set so that each carrier was paid a rate that would allow it to operate the desired level of capacity. Since a rate could only be paid if the mail were carried, the Post Office adopted the practice of dispatching mail equally to flights of approximately equal postal value. The practice came to be known as "division of mail." It tended to reduce the differences between subsidy mail rates paid to each carrier, and created some incentives for rivalry¹⁶³ to provide schedules convenient to the Post Office.

After the subsidy era ended, division continued. It is not at all clear why the Post Office Department should have found it advantageous to continue the practice, but for the carriers equal division helped keep service rivalry

¹⁶³ Some of this service rivalry still exists, even though mail payments are ordinarily a relatively small proportion of a flight's total revenue and hence operations are usually scheduled to attract passengers rather than mail. Some adjustments to attract mail dispatches will be made and, particularly at off-peak hours, mail payments will occasionally represent a significant proportion of a flight's potential revenue and a carrier will adjust schedules to attract mail. In recent years, as the Postal Service has placed more emphasis on reducing airmail procurement costs, it now often values price reductions at least equally with service improvements. As a result, carriers now have considerable incentives to discover methods of price competition that are compatible with the Board's regulatory and rate structure.

within bounds. When a carrier considered adding service convenient to the Post Office, it had to consider the probable reaction of a rival "entitled" to an equal share of the mail if the service were matched. The obstacles posed by any indivisibilities in the production of mail capacity (common in by-product service at relatively low load factors) would be magnified by the obligation to split the business, thus tending to limit schedule rivalry for mail revenues and to distribute more equally among rivals any economic profits from mail carriage. Ultimately the Post Office came to see division as an obstacle in its efforts to increase carrier competition for mail business. By 1969, the Department's attempts to gain near-absolute freedom in airmail transportation procurement clearly included an intention to abandon the division concept. Indeed, this intention was the motivating factor behind ultimately successful carrier attempts to include § 101(f) in the Postal Reorganization Act.

An important test of the degree to which § 101(f)¹⁶⁴ restricts the Postal Service's right to dispatch mail as it sees fit occurred in 1973, virtually contemporaneously with the Postal Oversight Hearings. Effective February 5, 1973, the Postal Service decided to drop division and substitute a policy of consolidating traffic for tender unless dividing would produce a "clear benefit" to the Postal Service.¹⁶⁵ Carriers offering important service or rate improvements were to continue to receive consolidated dispatches even if rivals duplicated the original improvement, until superior service was offered and the process repeated. This new policy was buttressed by Postal Service interpretation of § 101(f) that read the "fair and equitable distribution" clause as applying only if the Postal Service would gain no advantage from consolidation. Since other language in § 101(f) enjoined the Postal Service to "give highest consideration to the prompt and economical delivery of all mail", and the Postal Service believed that both technical savings and the economic benefits of competition could be achieved by consolidation of dispatches to carriers offering new service or rate benefits, the Postal Service argued that it was legally entitled to end the division program.¹⁶⁶ Given the spread between rates and costs on most flights, dropping the division program could be expected to produce considerable carrier rivalry, and it did.

¹⁶⁴ "Postal policy. (f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations." 39 U.S.C. § 101 (1970).

¹⁶⁵ U.S. Postal Service, *Methods Handbook*, Series M-31, § 142.1 (1973), reproduced in *Postal Oversight*, pt. 2, at 196-7.

¹⁶⁶ U.S. Postal Service, answer to Motion for Issuance of Order to Show Cause, July 9, 1973, at 3-4, CAB Docket 23080, *et al.*, reproduced in *Postal Oversight*, pt. 2, at 205, 207-8.

As part of an effort to introduce containerization on a large scale into airmail service, the Postal Service adopted a policy of consolidating non-priority mail for dispatch to the first carrier to offer container service in a market. Since many markets involved mail volumes such that relatively little business (mostly priority airmail being dispatched to the next convenient flight) would be left for non-containerized carriers, not being the first to offer such service meant a very substantial loss of business. This program was coupled with an attempt to obtain a favorable rate for containers shipped during daytime (which is an off-peak period for mail and freight). In March, 1973, under circumstances that came to be disputed,¹⁶⁷ Flying Tiger Lines, an all-cargo carrier then carrying relatively little mail, offered the Postal Service containerized service on both priority and nonpriority bases. The offer of nonpriority service was accompanied by an application to the CAB requesting approval of a low non-weight-related charge per container for the service.¹⁶⁸ On March 28, 1973, the Postal Service began tendering mail to Flying Tiger and making "progress payments" at the requested rate pending approval of the application. United and other airlines immediately offered equivalent service but, pursuant to the new policy, the Postal Service consolidated dispatches to Flying Tiger.

The impact was dramatic. In the first month of the new program, Flying Tiger carried more than five times as much mail as in the previous month.¹⁶⁹ According to United, Flying Tiger's share of mail traffic in the ten markets initially involved rose from 6.6 per cent to 37.7 per cent.¹⁷⁰ By July, three more carriers, Continental, Northwest, and Western, had made proposals in markets other than those served by Flying Tiger, and the Postal Service was tendering containers to them. United's response was to file "defensively" a proposal to match the competing service, but the Postal Service continued its policy of tendering mail to the carriers initiating the improvements. The Postal Service clearly intended to continue to promote a competitive en-

¹⁶⁷ Both in their lawsuit and at the Postal Oversight hearings, the carriers accused the Postal Service of having negotiated the daylight container rate and service, contending that as a result the program was being carried on pursuant to a contract within the meaning of § 5402(a) of the Postal Reorganization Act. 39 U.S.C. § 5402(a). The Postal Service denied having negotiated, U.S. Postal Service Answer *supra* note 166, at 3, and both the Postal Service and Flying Tiger denied the existence of a contract. Postal Oversight, pt. 2, at 291. But it is clear from both the complexity of the program and A. S. Razetti's (New York Regional Director of Logistics for the Postal Service) memorandum of March 26, 1973, reproduced at Postal Oversight, pt. 2, at 249, that substantial coordination between the Postal Service and Flying Tiger must have occurred prior to the airline's filing for the new rate.

¹⁶⁸ Petition of Flying Tiger Line, Inc., CAB Docket 25343. See note 153, *supra* for source information on CAB Dockets.

¹⁶⁹ Affidavit of Andrew M. deVoursney, July 24, 1973, at 6. Reproduced in Postal Oversight, pt. 2, at 266, 271.

¹⁷⁰ *Id.*

vironment in which carriers would offer service and rate improvements in an effort to greatly increase their share of the combined mail traffic on any given segment.

The excluded carriers turned to the courts, claiming that the Postal Service had violated the mandate of § 101(f) of the Postal Reorganization Act in not fairly and equitably distributing mail business among carriers offering similar services. The carriers were assisted in this contention by exchanges between Senator McGee and Postal Service witnesses in the March Postal Oversight Hearings which had made fairly clear that the legislative intent of the Congress had been to impose division on the Postal Service by means of § 101(f).¹⁷¹ The carriers filed suit on July 30, 1973. By August, the Postal Service, apparently fearing a definitive adverse ruling on the meaning of § 101(f), and perhaps looking forward as well to a resumption of the Postal Oversight Hearings, had settled the suit and agreed to divide containers among carriers offering competing services and even to rotate them among carriers in markets which could fill only one container per day.¹⁷² Nevertheless, the Postal Service continued to assert the position that § 101(f) did not mandate division of mail. In a written answer to a question addressed to them by Senator McGee, Postmaster General Klassen stated that:

... nothing could be more *unfair and inequitable* [emphasis in original] than a forced division of mail which deprives a carrier, who had come forward with a proposal that will materially advance prompt and economical delivery by modern methods of the traffic that is necessary to the economic success of his proposal. Nothing in the Act, as we understand it, requires any distribution of mail that would be uneconomic . . . or discourage advances in promptness, economy, and modernization.¹⁷³

The division issue and the required service problem illustrate different aspects of the difficulties inherent in restraining competition and imposing uniform rates on postal purchases of air transportation. For most operations, the uniform rates produce economic profits, which make dividing business among carriers a major source of political conflict. In addition, the criteria used for division (traditionally, frequency of service) may exclude a carrier from its "rightful" share of the business. In that event, the carrier may well attempt to increase its share of the business by competing.¹⁷⁴ In most industries in which profits are produced by maintaining fixed rates, quarrels over divisions of business are a major threat to stable noncompetitive market arrangements. The legislation governing the airline industry attempts to prevent rate competition for market shares by giving the Board the power to

¹⁷¹ Postal Oversight, pt. 1, at 260-63.

¹⁷² Postal Oversight, pt. 5, at 39.

¹⁷³ *Id.* at 138, 143.

¹⁷⁴ See for example, Postal Oversight, pt. 2, at 290-91.

disapprove rates it regards as unreasonably low. But the Board's inability to set rates quickly created the tradition of "progress payments" on "open" (not formally approved) rates which Flying Tiger exploited so successfully. Unless the Board is prepared to suspend all innovations until it approves the associated rates, opportunities for competition will continue to exist. If the Board were to adopt the policy of suspension, it would find itself pressed to defend itself in Congress against Postal Service charges of inflexibility.

Ironically, the Board's difficulty in requiring Eastern to retain the Boston-Atlanta flight stems from the same sources as the "excess competition" problem. The political acceptability of fixed uniform rates depends very heavily on variants of the cross-subsidy argument. For the Board to openly approve a much higher rate when a carrier found a particular flight financially unattractive because of poor passenger or freight traffic would greatly hamper its ability to defend the uniform rates on the much greater number of flights operated primarily for passengers and freight where mail revenues greatly exceed the cost of providing mail service as a by-product.

Perhaps the most interesting facet of these episodes is their illustration that the form in which rates are established is unrelated to their content. The Eastern rate was set under the Board's standard procedure (§ 406 of the Federal Aviation Act), and the Flying Tiger and subsequent container rates were set under that authority as well. Both of those results could have been equally well achieved as specific commodity rates in a tariff proposal or as contracts. The common denominator of the rather favorable outcomes for the Postal Service (from a rate standpoint) was the Board's inability for political reasons to protect the carriers. The Postal Service's preoccupation with contracting as a cure for its problems in dealing with the airlines misses the central issue. Contracting, tariffs, or rate setting (with temporary rates and progress payments) all can produce competition among carriers for the Postal Service's business, *if the Board allows them to*. Contracting subject to Board approval is no more likely to produce competition than any other method, and no less. Tariff approval and rate setting can take as much or as little time as contract approval. The crucial issue is the political environment in which the CAB operates. If that environment is favorable to operating a government-run cartel for the carriers, the Board will do so. If not, competition will arise very quickly.

Of course, the Postal Service is right in one respect—maximum benefits from competition would be achieved by a contracting regime outside the jurisdiction of the CAB. This would eliminate the possibility of anticompetitive activity on the part of the Board as well as saving litigation, delay, and uncertainty costs. But given the political history of contracting, the Congressional history of airline regulation, and the carriers' potent Con-

gressional position (reaffirmed in hearings and votes since 1969) elimination of the Board's role in mail rate setting is very unlikely. An open question therefore remains as to whether a more flexible strategy aimed at relaxing rather than eliminating CAB control of the rate setting and tariff process, thus releasing the very strong underlying market forces that characterize the industry, could successfully introduce many of the benefits of competition into postal air transportation procurement.

III

There appears to be a kind of historical momentum to the regulatory process. Once a relationship is defined between a government agency and a regulated party, it resists even explicit governmental efforts to change it. The subsidy relationship between the Postal Service and the airlines was established early in the airlines' history, and despite at least two explicit attempts at revision (the separation of subsidy from mail pay in Reorganization Plan No. 10 of 1953 and the attempt by the Administration to create an independent non-subsidized and non-subsidizing Postal Service in 1970), mail rates still reflect an effort to give the carriers revenues in excess of those which they would receive if prices reflected marginal costs. To be sure, the degree of forced subsidy and airline protection differs from time to time and situation to situation. The carriers won high rates for loose-sack mail carriage in the 1973 compromise over mail priority, but the Postal Service reaped some of the benefits of competition in the Daylight Container Mail program. When the CAB feels Congressional pressure to operate flexibly and quickly, it can and does. The Board set a rate for Eastern Airlines Boston-Atlanta required service very rapidly once it became apparent that the Postal Service was in a position to embarrass it. But overall mail rates still take years to set and are obsolete once final. Despite the occasional Postal Service "victories" cited, the Postal Service deals with a CAB that reflects airlines successes in obtaining Congressional protection.

Congressional solicitude for the airlines is manifested in areas other than rates and has endured long past the time when airlines could be considered an "infant industry". Division of mail was initiated by the Postal Service to implement a subsidy program that encouraged airline development by overpaying carriers for transporting mail. The carriers have successfully resisted efforts to change this practice even though the subsidy program that justified it is no longer in effect and notwithstanding the impact of the program on the ability of the Postal Service to procure mail transportation more efficiently. This suggests that where government-created supercompetitive profits exist, apportioning the benefits among favored parties is a delicate job. Once a compromise is devised that apportions the profits while suppressing rivalry,

the beneficiaries of the policy will have sufficient interest in and means to resist changes in the pattern.

The respective roles of the CAB and the Postal Service on mail transportation issues represent another piece of data in the large and growing body of evidence that much regulation represents a government service in organizing producers to the detriment of both overall economic efficiency and consumer welfare.¹⁷⁵ The Postal Service here is the Government acting in the role of consumer or customer. If regulation were a process aimed at producing either long- or short-term consumer benefit, one would expect that the Postal Service would support rather than oppose CAB or other regulatory intervention in the mail procurement process. But at least since 1969, the Postal Service has generally¹⁷⁶ sought to eliminate or reduce the role of the CAB in its dealings with air carriers, as it succeeded in virtually eliminating the Interstate Commerce Commission in its dealings with surface carriers. The Postal Service has been unsuccessful in doing so, mostly due to Congressional solicitude for the financial welfare of the scheduled certificated carriers. Undoubtedly, some would object that the Congressional role is necessary to save the Postal Service from the long-term consequences of its present desire to promote competition in the supply of air transport services. But it is unclear why the Postal Service alone among government agencies cannot be trusted to take the long view of its own welfare, let alone the public interest, and why another agency such as the CAB can be expected to have a better view. And it is particularly unclear why the Postal Service would want to pursue policies that would eliminate important suppliers and why the Postal Service's successes in contracting with surface carriers without eliminating them should not reassure Congress on this point.

What is there about the organization costs or political characteristics of air

¹⁷⁵ See for example, Paul W. MacAvoy, *The Economic Effects of Regulation* (1965); Gabriel Kolko, *Railroads and Regulation: 1877-1916* (1965); Lucille S. Keyes, *supra* note 14; R. H. Coase, *The Federal Communications Commission*, 2 *J. Law Econ.* 1 (1959). Attempts at a general theory can be found in George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Manag. Sci.* 3 (1971); and Richard A. Posner, *Taxation by Regulation*, 2 *Bell J. Econ. & Manag. Sci.* 22 (1971). Theories of regulation are discussed and a bibliography of studies of regulation provided in Richard A. Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ. & Manag. Sci.* 335 (1974).

¹⁷⁶ In formulating its stance toward CAB regulation, the Postal Service has occasionally exhibited the same ambivalences that are characteristic of many customers of regulated industries. Believing that regulation in general imposes higher costs on it, the Postal Service favors unlimited contracting authority, that is, deregulation. At the same time, it retains the hope that regulation can bestow benefits by forcing carriers to provide below-cost service in some situations and eagerly uses the power of the CAB (for example, in the Boston-Atlanta dispute with Eastern). The Postal Service has exhibited this same ambivalence in the area of railroad transportation, where it has successfully fought to retain the power to require service at ICC rates while filling virtually all of its surface transportation needs through unregulated contracts.

carriers that has made them more successful at influencing Congress than the Postal Service? The Postal Service, a single entity, should have lower coalition costs than a group of carriers. And the unpopularity of taxation and the opportunity to lower subsidies to the Postal Service by lowering transportation procurement costs should help produce Congressional support for the Postal Service position. What is the secret of airline success in Congress? Why has the Postal Service succeeded in eliminating the Interstate Commerce Commission as a factor in its dealings with surface carriers but failed in its attempt to circumvent the Civil Aeronautics Board?

Absent well-accepted and developed theories of regulation and Congressional behavior, we can only speculate. An initially appealing answer to the questions presented might lie in the appeal of the *status quo*, especially when coupled with a combination of an existing government agency (the CAB) and intensely interested private parties (the scheduled carriers). But the Postal Reorganization Act of 1970 disturbed many existing relationships. And why could not the carriers who might benefit from expanded contract authority, such as supplementals or the more efficient scheduled carriers, form an equally effective coalition with a much larger government entity, the Postal Service? The suggestion that the answer lies in the combination of historical momentum mentioned previously and monopoly profits to support a private lobbying effort founders on the fact that the peculiar nature of airline regulation forces the carriers to expend monopoly profits in excess service quality.¹⁷⁷ And in any event, why should the Civil Aeronautics Board and the air carriers have been treated differently from the Interstate Commerce Commission and the surface carriers? Perhaps the answer lies in the committee structure of the Congress, as suggested in Part I. But surface carriers come under the same committee jurisdiction as air carriers. Why would the same committee structure produce inconsistent results? These questions suggest that recent efforts to discern theories of regulation, bureaucracy, and Congressional influence and behavior are not misplaced. Unfortunately, the theories are not yet sufficiently developed to allow confident analysis.

¹⁷⁷ G. W. Douglas & James C. Miller III, *supra* note 86.