FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

THE REUBEN H. DONNELLEY CORPORATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9079. Complaint, April 13, 1976—Final Order, Jan. 10, 1980

This order requires, among other things, a New York City firm to cease, in connection with the publication of the Official Airline Guide—North American Edition, or any successor publication, from failing to publish connecting flight listings for commuter air carriers in the same manner as those published for certificated air carriers; or otherwise arbitrarily discriminating against any air carrier or class of air carrier in the publication of such listings.

Appearances

For the Commission: *James C. Egan, Jr., Steven A. Newborn, Elizabeth J. Keefer* and *W. Risque Harper.*

For the respondent: *William H. Buchanan*, New York City and *Elroy H. Wolff, Thomas J. Hearity* and *George W. McBurney, Sidley & Austin*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating Section 5 of the Federal Trade Commission Act, (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

"Direct flight" means scheduled passenger air transportation service which, regardless of the number of stops between cities of origin and destination, does not require a change in aircraft;

"Connecting flight" means scheduled passenger air transportation service which requires a change in aircraft between cities of origin and destination served by separate direct flights, whether such change in aircraft involves more than one air carrier or a single air carrier.

II. Respondent

2. Respondent, The Reuben H. Donnelley Corporation, is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal [2]office and place of business at 825 Third Ave., New York, N. Y. It is a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., 299 Park Ave., New York, N. Y., which in 1974 had combined operating revenues in excess of $504 million and total assets in excess of $345 million. Respondent is engaged, *inter alia*, in the publication, distribution and sale of various publications relating to travel and transportation, including the "Official Airline Guide—North American Edition" ("OAG"), a bi-monthly publication which combines the flight schedules and fares of all scheduled airlines in the United States, Mexico, Canada and the Caribbean into one directory.

III. Jurisdiction

3. From offices located at 2000 Clearwater Drive, Oak Brook, Illinois, respondent distributes and sells the OAG to subscribers located throughout the United States. The policies, acts and practices of respondent as alleged herein at all times relevant hereto have been in or have affected commerce within the meaning of the Federal Trade Commission Act.

IV. Nature of Trade and Commerce

4. The OAG is now and at all times pertinent hereto has been the only publication distributed and sold in the United States that combines the passenger flight schedules of all domestic air carriers, and it is now and for many years has been the standard reference for airline ticket offices, travel agents, businesses, and the public generally in ascertaining available flight schedules between city pairs in North America. Approximately 172,000 copies of each bi-monthly OAG issue are sold to such subscribers.

5. Scheduled air passenger transportation service in the United States is advertised, sold and furnished to the public by (1) air carriers whose routes and fares are regulated by the Civil Aeronautics Board pursuant to certificates of convenience and necessity or other economic authority issued by it ("certificated air carriers"); (2) air carriers

operating pursuant to Part 298 of the Economic Regulations of the Civil Aeronautics Board without regulation of routes or fares ("commuter air carriers"); and (3) air carriers whose routes and fares are regulated in varying respects by exclusive authority of the individual State in which each such carrier's operations are limited and confined ("intra-state air carriers"). [3]

6. Certificated air carriers consist of "trunkline" air carriers whose routes include service between and among major metropolitan airport facilities in the United States and North America; "local service carriers" whose operating authority is limited to short-haul service as distinguished from service rendered by trunkline air carriers; and "foreign air carriers" which, *inter alia,* also offer short-haul service in North America pursuant to recognized certificates or equivalents issued by their sovereign governments. A substantial portion of passengers flying local service and foreign air carriers begin or end their journey on connecting flights with trunkline air carriers.

7. Commuter air carriers operate either short-haul service between major metropolitan airport facilities and surrounding smaller community airport facilities, or between such smaller communities, or both. A substantial portion of passengers flying commuter air carriers either begin or end their journey on connecting flights with trunkline air carriers.

8. Intra-state air carriers operate direct flight service over routes between major metropolitan airport facilities and smaller communities or between such smaller communities, or both, within the same state.

9. Except to the extent that competition has been restrained, lessened and eliminated by the acts and practices of respondent as alleged by this complaint, in many instances individual commuter air carriers are engaged in substantial competition with one or more certificated air carriers by offering both direct and connecting flight schedules between the same city pairs, and individual intra-state air carriers are engaged in substantial competition with one or more certificated air carriers by offering direct flight service between the same city pairs.

10. Significant elements of competition between certificated air carriers and commuter air carriers and between certificated air carriers and intra-state air carriers include flight departure times in relation to flights of each other, inclusion of these schedules in the OAG, and the sequence in which such schedules are published in the OAG.

11. At all times hereinafter referred to, publication policies of the OAG have been formulated and/or modified by respondent following consultations with certificated air carrier members of the Air Traffic

Conference of America, a division of the Air Transport Association of America, and the OAG continuously has represented itself as being the "Standard Reference of the Air Traffic Conference of America. [4]

V. Acts, Practices, and Methods of Competition

12. For many years, and at least since 1969, respondent has maintained a publication policy with respect to the content and format of the OAG pursuant to which schedules of available flights between city pairs are published in separate categories in the following sequence when and where applicable: (1) direct flights of certificated air carriers; (2) connecting flights of certificated carriers; (3) direct flights of intra-state carriers, and (4) direct flights of commuter air carriers. Within each such category, flights are listed chronologically by order of departure.

13. For many years, and at least since 1971, respondent has refused to accept for publication any schedules of connecting flights of commuter air carriers, even though commuter air carriers offer and sell such service to the public and have made requests of respondent for inclusion of said schedules in the OAG.

14. For many years, and at least since 1971, respondent has refused requests of intra-state and commuter air carriers to publish their direct flight schedules in the OAG on the same terms and conditions as apply to the publication of direct flight schedules of certificated air carriers by integrating the schedules of all air carriers serving given city pairs into single chronological listings.

15. In refusing to modify its OAG publication policies as aforesaid, respondent has solicited and relied upon the views of certificated air carrier competitors of commuter and intra-state air carriers acting under the auspices of the Airline Guides Committee of the Air Traffic Conference of America.

16. The effects of respondent's OAG publication policies as aforesaid are and have been to foreclose commuter air carriers from disseminating information as to available connecting flight schedules to the public; to suggest and/or advise the public that direct flights of certificated air carriers are to be given preference over those of intra-state and commuter air carriers; and to lessen the competitive significance of schedules of direct flight departure times of intra-state and commuter air carriers in relation to those of certificated air carriers. [5]

17. As a result of the acts, practices, and methods of competition as alleged, competition in the development, advertising, offering of sale, and sale of scheduled passenger air transportation in the United States

has been, or may be, stabilized, controlled, hindered, lessened, foreclosed or restrained.

VI. Violation

18. The acts, practices, and methods of competition alleged herein by respondent, both individually and in combination with others, constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by James P. Timony, Administrative Law Judge

March 6, 1979

Preliminary Statement

By a complaint issued on April 13, 1976, The Reuben H. Donnelley Corporation ("Donnelley") is charged with a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. [2]

Respondent Donnelley is a subsidiary of the Dun & Bradstreet Companies, Inc., which in 1974 had combined operating revenues of over $500 million and total assets of about $345 million. Donnelley is a publishing company which publishes the "Official Airline Guide—North American Edition" ("OAG"), a directory of flight schedules and fares for scheduled air transportation. The OAG is published twice monthly and is sold to air carriers, travel agents, businesses and the general public.

The complaint alleges that the OAG is the only publication sold in the United States that combines the passenger flight schedules of all domestic air carriers and that it is the standard reference for ascertaining flight schedules between city pairs in North America.

Scheduled air passenger transportation in the United States is provided by three categories of airlines: certificated air carriers, commuter air carriers, and intrastate air carriers. The complaint alleges that Donnelley has refused to publish flight schedules for commuter and intrastate air carriers on the same terms as apply to the publication of flight schedules of certificated air carriers. More specifically, the complaint alleges that respondent has refused: (1) to publish in the OAG schedules of connecting flights involving commuter air carriers,[1] and (2) to chronologically integrate schedules of commuter air carriers and intrastate air carriers with those of certificated air carriers.

[1] In December 1976, respondent started publishing the connecting flights of commuter air carriers.

The complaint further alleges that Donnelley violated Section 5 "individually and in combination with others," stating that Donnelley's policies have been formulated and modified by respondent "following consultations" with certain certificated air carriers, and that Donnelley has "solicited and relied upon the views of certificated air carrier competitors" in refusing to change its publication policies. [3]

By an answer filed May 28, 1976, respondent admitted some but denied many of the allegations of the complaint. Among the more important issues raised by the answer, respondent: (1) denied that significant competition exists among the three categories of air carriers; (2) stated that there are numerous sources of passenger flight schedule information other than the OAG; (3) stated that it had solicited the views of certificated air carriers concerning separate listing of certificated air carriers, commuter air carriers, and intrastate air carriers, but that it has neither relied nor acted upon those views; (4) stated that these matters are not subject to the jurisdiction of the Federal Trade Commission; and (5) stated that the relief sought, compelling Donnelley to publish flight schedule listings in a manner conflicting with Donnelley's judgment, would violate the First Amendment to the United States Constitution.

Pursuant to prehearing orders, counsel for the parties stipulated that (1) the complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers; and (2) the complaint does not allege unlawful effects on companies other than air carriers, including potential competitors of the respondent in the sale and distribution of passenger flight schedules for domestic air carriers. (Joint Statement filed September 24, 1976.)

After issue was joined, respondent filed a motion to dismiss, asserting that the Commission lacks subject matter jurisdiction over the acts of a publisher who sells and distributes information about air carriers who are themselves subject to CAB jurisdiction. The claim was based on Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(2), which provides that carriers subject to the Federal Aviation Act of 1958 are exempt from the Commission's jurisdiction.

By an order dated September 21, 1976, I invited the CAB to file an *amicus* brief commenting on the issues presented by the complaint. On February 2, 1977, the General Counsel of the CAB filed an *amicus* brief denying, in effect; that the CAB had primary jurisdiction over this matter, or that the CAB had sanctioned the conduct alleged in the complaint. The *amicus* brief states that it is "clear that the [4]exercise of Commission jurisdiction would not cause a collision with the Board's jurisdiction over air carrier competition." After further briefing, I

denied the motion to dismiss by an order dated March 30, 1977. By an order dated July 12, 1977, the Commission denied Donnelley's petition for extraordinary review, holding that there had been no abuse of discretion.

Respondent Donnelley sued in the United States Court for the Northern District of Illinois to prevent further action in the administrative proceeding. I set hearings in the administrative case to begin on September 9, 1977. Well into the defense of the case, I received on November 13, 1977, an order from United States District Court Judge Bernard M. Decker, finding lack of Federal Trade Commission jurisdiction, enjoining further hearings, and ordering that the Commission dismiss the complaint. *Donnelley Corp.* v. *FTC*, 1977–2 Trade Cases ¶ 61,721 (N.D. Ill. 1977).[2] By an order dated December 20, 1977, Judge Decker vacated his previous order enjoining further administrative proceedings, holding that Donnelley had failed to exhaust its administrative remedy.[3] *Donnelley Corp.* v. *FTC*, 1977–2 Trade Cases ¶ 61,783 (N.D. Ill. 1978). [5]

This interruption in the administrative proceeding resulted in an eleven month delay.[4] Defense hearings in *Donnelley* resumed on October 16, 1978, and ran through November 17, 1978. Complaint counsel had rebuttal on December 1, 1978.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and the exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding. The following abbreviations have been used:

CX – Complaint counsel's exhibit, followed by its number and the referenced page(s);

RX – Respondent's exhibit, followed by its number and referenced page(s);

CPF – Complaint counsel's proposed findings;

RPF – Respondent's proposed findings. [6]

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[2] I therefore set Dkt. 9080, *Kaiser Aluminum & Chemical Corp.*, for trial, to commence December 1, 1977.

[3] On cross-appeal, the United States Court of Appeals for the Seventh Circuit held on August 2, 1978, that venue in Chicago was improper and transferred the case to the district court in Washington, D.C. *Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). Ruling from the bench, Judge Gesell dismissed Donnelley's complaint on September 28, 1978.

[4] Before the administrative hearings in the *Donnelley* case could resume, I finished the trial in the *Kaiser* case, wrote the initial decision in *Amway Corporation*, Dkt. 9023, which I had deferred to start the *Donnelley* hearings (initial decision filed June 23, 1978), and wrote the initial decision in the *Kaiser* case (initial decision filed October 13, 1978).

FINDINGS OF FACT

Glossary

1. A "certificated air carrier" is an air carrier that holds a certificate of public convenience and necessity issued by the Civil Aeronautics Board ("CAB") authorizing the air carrier to fly its routes in commerce in the United States. (Fugere 210; 49 U.S.C. 1371–72)

2. The CAB has created by regulation a classification of air carriers known as "air taxi operators" which operate smaller airplanes (not more than 7,500 pounds payload and having thirty or fewer passenger seats) but which do not hold a CAB certificate. (14 CFR 298)

3. "Commuter air carriers" do not hold CAB certificates. An air taxi which flies passengers on at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which such flights occur, is a "commuter air carrier." (14 CFR 298.2(f)) An air carrier may operate as a commuter air carrier on some of its routes while holding CAB certification on other routes. (CX 188A–F; Nelson 4395)

4. An "intrastate air carrier" is an air carrier which operates solely within a state of the United States and which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB. (Griffin 884) An air carrier may operate as an intrastate air carrier on some of its routes while operating as a commuter air carrier on other routes. (Dzendolet 2624–26)

5. A foreign air carrier is any person, not a citizen of the United States, who engages in air transportation between any place in the United States and any place outside thereof. (49 U.S.C. 1301(38)) [7]

6. "Trunk air carriers" are certificated air carriers which operate across the country. An example of a trunk air carrier is American Airlines. (CX 196D; CX 196Z80–Z81) "Local service air carriers" are certificated air carriers. In the late 1940's the CAB started certifying these carriers to provide air service to smaller cities. A federal subsidy payment program was instituted for these carriers. They have since evolved from "feeder" airlines into "regional" carriers with only certain of their operations eligible for subsidy. An example of a local service or regional carrier is Piedmont Airlines. (CX 108 at 7; CX 196Z77)

7. "Replacement carriers" are commuter carriers which agree to substitute for local service carriers on routes that the certificated carriers are obligated to serve but are not doing so at a profit. (CX 107 at 9)

8. A "city pair" is two cities between which there is scheduled airline service. (Fugere 211)

9. A "direct flight" is a flight between a city pair, either nonstop, or, if there are stops, normally involving no change of aircraft or flight number. (Complaint and Answer ¶1; Fugere 211)

10. A "connecting flight" is two or more direct flights used in conjunction with each other to provide transportation between a city pair. (Answer ¶1; Fugere 212)

11. "On-line connections" are connections between two or more direct flights of the same air carrier. (Fugere 211)

12. "Interline connections" are connections involving direct flights of at least two separate air carriers. (Fugere 212).

13. "Interline agreements" are agreements among and between carriers, involving a variety of business arrangements such as ticketing, reservation procedures, joint use of facilities, joint reservations. Such agreements are filed with and approved by the CAB. (Fugere 212–13)

14. "Free or industry connections" are connections submitted by air carriers to respondent and published by respondent without charge to the air carrier based on limitations established by respondent. (RX 66Z18–Z62; Fugere 213–14; Nelson 2487) [8]

15. "Paid connections" are connections which do not qualify as free connections under the limitations established by respondent, and they are published by respondent at the expense of the air carrier that requests the listing. (RX 66Z18–Z62; Fugere 215; Nelson 2502–03)

Respondent

16. Respondent, The Reuben H. Donnelley Corporation ("Donnelley"), is a corporation organized, existing, and doing business under the laws of the State of Delaware, with its principal office and place of business at 825 Third Ave., New York, New York. It is a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., 299 Park Ave., New York, New York. Donnelley is engaged in the publication, distribution and sale of publications relating to travel, including the Official Airline Guide-North American Edition ("OAG"), a twice-monthly publication which combines into one directory the passenger flight schedules and fares of substantially all the scheduled air carriers in the United States, Mexico, Canada and the Caribbean. (Complaint ¶2; Answer ¶2)[5] In 1962, Donnelley acquired the OAG from its publisher, American Aviation Publications, Inc. (CX 24A; Reich, 1181)

[5] Effective January 1, 1979, Official Airline Guides, Inc., a Delaware corporation and a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., assumed responsibility for publication of the Official Airline Guide, formerly published by the Transportation Guides and Services Division of The Reuben H. Donnelley Corporation. (RPF p. 7)

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Interstate Commerce

17. Respondent is now and has been at all relevant times engaged in selling and distributing the OAG to subscribers located throughout the United States, from its offices located at 2000 Clearwater Drive, Oak Brook, Illinois, and from other Donnelley facilities. Respondent is therefore engaged "in commerce" and its business activities "affect commerce," within the meaning of the Federal Trade Commission Act. (Complaint and Answer ¶¶3, 4; Fink 1370; Budzic 3092; Davidoff 3170) **[9]**

Official Airline Guide

18. The OAG was first published as early as 1943 under the title "Universal Airline Schedules." (CX 52C) At first it merely reproduced timetables of each scheduled air carrier. (RX 19D, RX 572, RX 573)

19. In 1958, the OAG started publishing flight schedule listings in the "to-city" format which currently is used in the OAG, rather than simply in a series of individual air carrier's timetables. (RX 19D) The OAG organized flight schedule listings by displaying in alphabetical order the cities to which there was scheduled air carrier passenger service, displaying under each of these cities in alphabetical order the cities from which there was scheduled air carrier passenger service to the city of destination. (RX 258, 571, 573, 574)

Publishing Policy

20. Before December 1, 1976, respondent published in the OAG four separate categories of airline schedules in the following sequence:

Certificated Air Carrier - direct flights (published with no headings).
Certificated Air Carrier - connecting flights (published under the heading "Connections").
Intrastate Air Carrier - direct flights (published under the heading "Intra-State").
Commuter Air Carrier - direct flights (published under the heading "Commuter Air Carriers").

(Complaint and Answer ¶12; CX 174; RX 7A; RX 16A) **[10]**

21. Before December 1, 1976, respondent published in the OAG three categories of direct flight schedules: certificated carriers (including foreign and replacement carriers), intrastate, and commuter carriers, with each category separate and in chronological order:[6]

[6] *See* CX 113, pp. 1101–02 for letter symbols of airlines; CX 113, pp. 1107–11 for explanation of other abbreviations. (First 9 lines under "Los Angeles" in above schedule deal with fare information.)

Freq. Leave Arrive Flight Class Eq Ml S

To SANTA ANA, CALIF. PST SNA

LOS ANGELES, CALIF. PST LAX

INTRA - STATE

COMMUTER AIR CARRIERS

(From CX 113 at 951, showing certificated carriers (here Hughes Airwest (RW)) listed above intrastate carriers (here Air California (OC)) and commuter air carriers (here Golden West (GW)).) [11]

22. Before December 1, 1976, respondent published in the OAG schedules for connecting flights for certificated carriers only. Connections on commuter carriers were not published in the OAG. (Complaint and Answer ¶13):

To HARTFORD, CONN. EST BDL

MONTREAL, QUE. EST YUL

CONNECTIONS

COMMUTER AIR CARRIERS

(From CX 113 at 401, showing connecting flight listings for certificated carriers placed before direct flight listings of commuter air carriers (here Pilgrim (PM).)

23. On December 1, 1976, respondent began publishing two addi-

tional categories of service, commuter air carrier connections and intrastate air carrier connections, and changed the order of display. (Complaint and Answer ¶13; RX 214; Woodward 4189) [12]

24. On December 1, 1976, the display of categories and service in the OAG was changed to the following order:

> Certificated Air Carrier direct flights (published with no heading).
> Commuter Air Carrier direct flights (published under the heading "Commuter Air Carriers").
> Intrastate Air Carrier direct flights (published under the heading "Intra-State Air Carriers").
> Certificated Air Carrier connections (published under the heading "Connections")
> Connections involving Commuter Air Carriers or Commuter Air Carriers/Certificated Air Carriers (published under the heading "Commuter Air Carrier Connections").
> Connections involving Intrastate Air Carriers or Intrastate/Certificated Air Carriers or Intrastate/Commuter Air Carriers (published under the heading "Intra-State Air Carrier Connections").

(RX 214; RX 258)

Foreign Air Carriers

25. Though they hold no CAB certificate, foreign air carriers have their schedules chronologically merged in the certificated air carrier columns in the OAG. (Complaint and Answer ¶¶5, 12; Ceresa 987, 988, 1000, 1004) [13]

26. Connecting flight information for foreign air carriers was in the OAG even before December 1976 (CX 174) and is included with certificated air carrier connections:

To KINGSTON, JAMAICA EDT KIN
From Philadelphia Pa/Wilm'ton, De-Cont.

(From RX 258 at 536, showing foreign carrier (BW) listed with certificated connections.)

27. Of the 118 air carriers now listed by the OAG as certificated, 79 are foreign air carriers. (RX 517 at 1498)

Replacement Carriers

28. In 1967, the CAB approved a contract between Allegheny Airlines (a certificated carrier) and an air taxi operator pursuant to which the air taxi operator provided service over routes which were certificated to Allegheny. [14](RPF 68) This arrangement (known as "Replacement Flights") permits Allegheny to maintain its route authority and provide service to smaller communities with small aircraft at much lower cost than would be incurred using Allegheny's larger aircraft. (Howard 2727–29, 2735–36) At present, Allegheny has CAB-approved contracts with twelve commuter air carriers ("Allegheny commuters") pursuant to which such commuter air carriers provide service on behalf of Allegheny to some 27 communities. (Howard 2714, 2727)

29. Allegheny commuters' schedules in the OAG have been since 1967 and still are merged chronologically with certificated air carrier direct flights and certificated air carrier connecting flights. (CX 190; Nelson 3414) Prior to December 1, 1976, Allegheny commuters' connecting flight information was in the OAG. (CX 174)

30. Since September 1, 1969, the flight schedules for Allegheny Commuters, both direct and connecting, have been chronologically merged in the certificated air carrier columns in the OAG with a symbol in the shape of a square following the flight number (CX 174 at 3; RX 130; RX 131, RX 132):

To New York N.Y/Newark, N.J. EDT NYC

Philadelphia Pa/Wilm'ton, De EDT PHL

	[illegible]	P	[illegible]	E	EA	418	FnYB	725	0
X67	[illegible]	P	8:31a	E	AL	7410☐	A8	ND2	0
	8:15a	P	9:15a	E	AA	613	FY3	707	0
X67	9:50a	P	[illegible]	E	AL	[illegible]☐	A8	ND2	0
X67	10:15a	P	11:00a	E	AL	[illegible]☐	A8	ND2	0
X6	10:30a	P	11:27a	E	NW	225	FY3	727	0
NW 226 EFFECTIVE JUN 8									
X6	11:00a	P	11:39a	E	NW	226	FY3	727	0
NW 226 DISCONTINUED AFTER JUN 7									
X7	12:15p	P	12:55p	E	AL	[illegible]☐	A8	ND2	0
	12:15p	P	[illegible]	J	DL	718	FY3	D9S	0
X67	2:20p	P	[illegible]	E	AL	74[illegible]☐	A8	ND2	0
	3:25p	P	4:07p	J	TW	[illegible]	F3	DC9	0
TW 844 EFFECTIVE JUN 9									
	3:23p	P	4:10p	J	TW	544	F3	DC9	0
TW 844 DISCONTINUED AFTER JUN 8									
X67	4:25p	P	4:53p	E	AL	74[illegible]☐	A8	ND2	0
	4:27p	P	5:12p	J	TW	706	FY3	725	0
TW 736 EFFECTIVE JUN 9									
	4:55p	P	5:43p	J	TW	236	FY3	707	0
TW 836 DISCONTINUED AFTER JUN 8									
X6	5:55p	P	6:40p	E	AL	74[illegible]☐	A8	ND2	0
6	6:20p	P	7:15p	J	PA	110	FY	707	0
PA 110 NO LOCAL TRAFFIC									
	6:30p	P	7:14p	J	NA	[illegible]	FY3	727	0
X67	[illegible]	P	8:10p	E	AL	74[illegible]☐	A8	ND2	0
7	7:30p	P	8:05p	E	UA	740	FY3	DC8	0
UA 740 DISCONTINUED AFTER JUN 9									
	7:40p	P	8:22p	E	UA	[illegible]	FY3	727	0
UA 460 DISCONTINUED AFTER JUN 9									
	8:25p	P	8:59p	E	EA	556	FY3	725	0
X6	[illegible]	P	9:15p	E	TW	54	FY3	707	0
TW 54 DISCONTINUED AFTER JUN 8									
	8:35p	P	9:22p	J	AA	60	FY3	[illegible]	0
AA 60 EFFECTIVE JUN 9									
	8:45p	P	9:29p	E	NW	53	FY3	[illegible]	0
X6	8:45p	P	9:29p	J	NA	422	FY3	725	0
X2	9:50p	P	10:25p	E	UA	618	FY3	DC8	0
UA 618 DISCONTINUED AFTER JUN 9									
	11:15p	P	11:40p	E	EA	559	FY3	727	0
COMMUTER AIR CARRIERS									
	7:30a	P	[illegible]	J	AA	512	A	ND2	0
	10:15a	P	11:00a	J	AA	534	A	ND2	0
	[illegible]	P	3:45p	J	AA	536	A	ND2	0
	4:05p	P	4:55p	J	AA	538	A	ND2	0
	7:15p	P	8:35p	J	AA	540	A	ND2	0
X67	10:20a	P	11:00a	E	NQ	3	A	PAZ	0

(From CX 112 at 1109.) **[15]**

In the "Abbreviations and Reference Marks" section of the OAG, the symbol is defined as follows:

[Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Air Carrier Pursuant To A CAB Approved Agreement. (RX 571 at 4)

31. In addition to the Allegheny commuters, 30 commuter air carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny Commuters in the OAG. (Nelson 3462)[7]

To ANVIK, ALASKA ADT ANV

From ANIAK, ALASKA ADT ANI

[illegible]

HOLY CROSS, ALASKA ADT HCR

[illegible]

(From RX 258 at 85, showing commuter replacement flights for Wien Air Alaska.)

32. About 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuter air carriers but listed in the certificated air carrier category. (Nelson 2521) **[16]**

33. Certificated airlines are obligated to serve smaller communities pursuant to a CAB route authorization even though they do so at a loss. In that event, the CAB may authorize payment to the certificated carrier of a subsidy. Since 1954, such subsidy payments have amounted to well over $1 billion. (CX 107, p.7 n.1)

34. Replacement service allows the certificated carriers to fulfill their obligation by delegating the route to a commuter carrier. These replacement carriers, with their more fuel efficient airplanes, serve these smaller communities at a profit. (CX 106 at 16, 76) They cannot receive a federal subsidy. (CX 107 pp. 9–13) In 1975, there were 27 commuter carriers operating replacement service for 11 certificated carriers. (CX 107 p.10)

[7] Not all commuter carriers operating replacement service for other certificated carriers receive "Allegheny treatment." (RX 135A; Nelson 3466; Britt 2545)

Relevant Market

35. Respondent advertises that the OAG is the "standard reference of the Air Traffic Conference of America."[8] (CX 113, front cover) The OAG is the only complete listing of scheduled flights in North America. (CX 203B(1); CX 204A(1); CX 113 leaf between 2–3) The OAG is the primary source of flight schedule information to the flying public and the primary marketing tool for carriers. (May 565; Fugere 220) It is referred to in the airline industry as the "Bible." (Kyzar 1575; Griffin 851; CX 28B) **[17]**

36. In addition to the OAG, there are four competitive sources of information about scheduled passenger air transportation. These four sources are the ABC World Airways Guide ("ABC"); computerized schedule information; individual airlines' printed schedules; and radio, television and newspaper advertising. The record reveals that none of these sources offer a real alternative. (McKenna 904; Kyzar 1612; Muse 812) When asked if he could name any actual competitors of the OAG other than ABC, the former Executive Vice President of the OAG testified that there were no significant competitors. (Reich 1299)

37. The ABC is a listing of scheduled flights much in the same format as the OAG but is directed toward international travel. (CX 202B–C; Fugere 238)

38. In 1973 ABC had a total circulation of 1,792 in the United States and Canada while in that same year the OAG had a total circulation of 137,796 in the United States and Canada. (CX 45A)

39. A witness with 14 years experience in the airline industry had only seen one copy of ABC in his life. (May 567) Another representative of a certificated air carrier testified he had never seen a single copy while employed by that carrier. (Mueller 1525) Some air carrier witnesses had never heard of ABC. (Muse 814; Britt 2597)

40. The ABC does not compete with the OAG in providing domestic flight information. (May 567; Jaques 656, 660; McKenna 904; Fink 1410; Mueller 1525; Budzic 3093; Davidoff 3178; Howe 1868; Reich 1295, 1300; CX 202C)

41. SCIP is the acronym for Schedule Change Input Package. (Lobach 4125) SCIP tapes are computer tapes upon which airline schedule information has been coded. When the information on the SCIP tapes is called for by the operator of the computer terminal it is electronically displayed on a cathode ray tube ("CRT"). (Whiteside 454; McKenna 904) **[18]**

42. While many scheduled air carriers have access to SCIP tape

[8] The Air Traffic Conference of America is the trade association of certificated air carriers. (CX 203 (54); CX 204 (54))

capabilities, only a very small percentage of travel agencies and corporate travel offices use SCIP tapes. (May 568; McKenna 905–06; Ceresa 1012; Reich 1301–02; Davidoff 3153, 3154; Lobach 4219) SCIP tapes are not a marketing substitute for the OAG. (Autry 714; Griffin 854; Ceresa 1012)

43. The cost of a CRT for an office that does about three million dollars a year in business would be about fifteen thousand dollars a year. (Jaques 657) The cost of subscribing to the OAG is currently $98.44 annually. (RX 571, advertising leaf between pp. 2–3)

44. The use of computerized schedule displays has not changed the growth rate of the OAG. (Lobach 4231; Reich 1208)

45. Even those airlines, travel agents and corporate travel offices that do have computer scheduling capability also subscribe to the OAG. (Kyzar 1613; Budzic 3094)

46. The limited use of CRTs is due in part to the fact that SCIP tapes contain less flight schedule information than the OAG. (Budzic 3085; Lobach 4125; Fink 1428)

47. Most scheduled air carriers print their own individual flight schedules which they furnish to their passengers. These schedules contain only the carriers' own flights. (Fugere 237; McKenna 903; Ceresa 1011–12) The schedules usually have only local or limited distribution. (May 566; Whiteside 432; Autry 710; Muse 814; McKenna 903; Britt 2598) **[19]**

48. Individual timetables are also expensive. One witness testified that it cost his company approximately $.50 per schedule. (Muse 840)

49. Airlines, travel agents and corporate travel offices do not normally use individual flight schedules to obtain flight information and book flights. (Jaques 660; Fink 1415, 1416; Fugere 237; Autry 710; Griffin 852; Ceresa 1011–12; Davidoff 3154)

50. Scheduled air carriers sometimes use radio, television and newspapers to advertise their flights. In some instances those advertisements contain limited flight schedule information. Where flight schedule information is advertised, it is only shown for the individual carrier and even then it is limited to a few city pairs. Commuter carriers cannot afford to advertise nationally. (Fugere 236–37; Whiteside 433; May 566; Autry 710; McKenna 904)

51. Airlines, travel agents and corporate travel departments do not rely on radio, television or newspaper advertisements to obtain flight information and book flights. (Jaques 659; Fugere 237; Autry 710; Griffin 852; Davidoff 3154)

Conspiracy

52. The Airline Guides Committee is a committee of the Air Traffic Conference of America ("ATC"), a division of the Air Transport Association of America, ("ATA") the trade association of certificated airlines. (CX 203(43); CX 204(43); CX 89A) At Airline Guides Committee meetings, each certificated carrier was entitled to send one authorized representative and each representative had one vote. (Mueller 1497) The only persons entitled to vote at Airline Guides Committee meetings were authorized representatives of certificated air carriers. (Mueller 1500) **[20]**

53. On September 10, 1971, OAG staff sent a telegram to the ATC. The OAG stated that at the next meeting of the Airline Guides Committee the: "OAG would like to discuss the merger of Certificated, Commuter and Intrastate Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions." (CX 14)

54. On September 13, 1971, the ATC sent out to all members of the Committee the agenda of the meeting of the Airline Guides Committee to be held October 7, 1971. (CX 89)

55. Item 7 on the agenda, "Merger of Schedules," was proposed by Mr. Howe, the Publication Manager of the OAG, with the approval of Robert Parrish, the Publisher of the OAG. (Howe 1912–13; Reich 4218; Woodward 4216; CX 14; CX 89C)

56. Item 7 on the agenda of that meeting reads:

> OAG Staff has suggested that the Airline Guides Committee consider the merger of Certificated, Commuter and Intrastate carriers schedules in the guide publications. Direct flight listings would be listed together chronologically as currently shown.
>
> Additionally, Commuter and Intrastate carriers would have the opportunity to purchase online connections and Commuters would purchase connections with Certificated carriers and visa-versa [sic]. Only two categories of listings, direct and connections, would be required instead of the present four. OAG plans to provide further details at the meeting. Members, however, should be prepared to discuss their respective management opinions. (CX 89C)

57. Members of the committee did seek management opinions. (CX 102)

58. The meeting took place on October 7, 1971, at the Mayflower Hotel in Washington, D. C. (CX 89) **[21]**

59. Item 7 was discussed during that meeting. (Howe 1698; Mueller 1501–02) Representatives of the OAG were present during the discussion. (Mueller 1508; CX 9A–1)

60. The official minutes of the meeting, published by the ATC and

distributed to all certificated carrier members and to the OAG, state that "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." (CX 9H)

61. Notes of the meeting taken by Mr. Howe, the Publications Manager of the OAG, state that: "the carriers were with the exception of [American and National Airlines] against the merger of schedule listings." (CX 10D) He also stated that "[m]ost carriers felt that noncertificated carriers could be included in connections, though, this, of course, would weaken our argument against keeping them out of [merged] schedule listings." (CX 10D)

62. Mr. Howe's notes also state that one certificated carrier was concerned at the meeting that "non-certificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." (Howe 1769; CX 19C)

63. At the October 7, 1971 meeting the certificated carriers voted not to change the OAG's method of separate, descending listings of the schedules for certificated, commuter and intrastate carriers. (Howe 1872; CX 89C; CX 66A; Mueller 1502, 1508)

64. In 1975 of the 118 commuter carriers publishing schedules in the OAG, 78 purchased 408 subscriptions to the OAG. The remaining 40 may have purchased some additional subscriptions under individual rather than corporate names. (CX 135A) During that year certificated air carriers purchased over 30,000 subscriptions to the OAG, (CX 30)

65. Certificated air carriers are substantial customers of Donnelley products and services including subscriptions to the OAG and other publications, paid connections, and SCIP tapes. (e.g. CX 82B; CX 71) In 1975, seven certificated carriers paid Donnelley well over $3 million. (CX 71D; CX 73C; CX 77C; CX 80B; CX 82B)[9] **[22]**

66. Some certificated carriers attempt to use their position as large customers to influence respondent's publishing policies. (CX 118; CX 87)

Competition

Commuters

67. On April 15, 1975, there were 432 city pairs served by direct flights of both commuter and certificated air carriers. (CX 135E; CX 203(5))

68. In the year ending June 30, 1974, commuter air carriers served

[9] This figure does not include several of the larger air carriers such as American, Eastern, and Pan American, as well as other certificated carriers, who refused to supply this information, nor does it include substantial amounts paid by other certificated carriers. (CX 70; CX 74; CX 75; CX 78B CX 81B; CX 90; CX 91)

514 city-pair markets in which passengers totaled 1,000 or more. Eighty-two of those markets were also served by certificated carriers. In those 82 markets, commuters accounted for 872,300 passengers and the certificated carriers 4,053,760. The commuter share was 17.7%. The 872,300 passengers represented 19.6% of the 4,440,762 commuter passengers in 48 states that year. (CX 62B)

69. In that year there were 19 markets in which commuters had 10,000 or more passengers in competition with certificated carriers. (CX 62C)

70. In that same year there were 25 markets in which certificated carriers had 50,000 or more passengers in competition with commuter carriers. (CX 62C)

71. Certificated carriers generally operate large jet aircraft carrying 100 or more passengers and flying at more than 500 miles per hour. Commuter carriers typically operate two-engine, propeller-driven aircraft seating no more than 30 passengers ("commuter aircraft") such as the Beech-99 (15 passengers, 280 mph), Cessna 402 (10 passengers, 239 mph), Douglas DC–3 (28 passengers, 193 mph), DeHavilland DHC–6 Twin Otter (20 passenger, 209 mph), Piper PA–31 (8 passengers 270 mph), Britten-Norman Islander (10 passengers, 260 mph), DeHavilland Heron (four engine, 17 passengers, 195 mph), and Nord 262 (27 passengers, 240 mph). (RX 571, p. 30; RX 225–F) Here are pictures of commuter aircraft (CX 106 at 2, 38): [23]

Around the world, the busiest commuter airliners are the airliners built by Beech.

It's easy to see why, when you check the specs of the Beechcraft B99...the latest in the series. 283 mph cruise and an 832 mile range. A useful load of 5,100 lbs. Standard interior seats 15 passengers and a crew of 2. On a 2,200 hours-per-year utilization schedule, the direct cost-per-seat-mile is only 3.3 cents.

The Beechcraft B99 is a versatile workhorse performing a variety of missions for many different organizations. The operational flexibility possible with its outstanding combination of speed, range and payload makes it the most air transportation per dollar in its class.

For full information on the Beechcraft B99, write or call: J. M. Cook, Jr., Manager Airline Sales, Beech Aircraft Corporation, Wichita, Kansas 67201, (316) 689-7077.

Beechcraft Airliners fly with 49 organizations worldwide.

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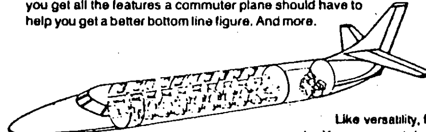
Washington, D.C.
Altair Airlines
Philadelphia, Pennsylvania
Bar Harbor Airways
Ellsworth, Maine
Britt Airlines
Terre Haute, Indiana
Cumberland Airlines
Cumberland, Md.
Cascade Airways
Spokane, Washington
Chautauqua Airlines
Jamestown, New York
Clark Aviation
Middletown, Pennsylvania
Colgan Airways Corp.
Manassas, Virginia
Command Airways, Inc.
Wappingers Falls, New York
Continental Oil Company Aviation
Houston, Texas
Fairways Corporation
Washington, D.C.
Freestate Aviation, Inc.
Gaithersburg, Md.
Henson Aviation
Hagerstown, Maryland
La Grande Air Service
La Grande, Oregon
Mesaba Aviation
Grand Rapids, Minnesota
MidState Air Commuter
Marshfield, Wisconsin
Mississippi Valley Airlines
LaCrosse, Wisconsin
Monmouth Airlines
Farmingdale, New Jersey
Parkinson Airways
Reading, Pennsylvania
Pocono Airlines, Inc.
Avoca, Pennsylvania
Rio Airways
Killeen, Texas
Royale Airlines, Inc.
Shreveport, Louisiana
S M B Stage Line
Muskogee, Oklahoma
Scheduled Skyways, Inc.
Fayetteville, Arkansas
Skyline Aviation
Winchester, Virginia
Skystream Airlines, Inc.
Plymouth, Indiana
Skyway Aviation, Inc.
Ft. Leonard Wood, Missouri
Suburban Airlines
Reading, Pennsylvania
Upper Valley Aviation, Inc.
McAllen, Texas
U.S. Dept. of Agriculture
Atlanta, Georgia
Vacation Airways
Washington, D.C.
Air Alpes
Chambery/Aix-les-Bains, France
Air Cape
Cape Town, Cape Province
Republic of South Africa
Air Gaspe, Inc.
Douglastown, Quebec Canada
Air Lowveld (Pty.) Limited
Johannesburg, South Africa
Air-Rouergue
Rodez-Marcillac, France
Atlantic Central Airlines
St. Johns, New Brunswick, Canada
Baron Air A. B.
Malmo, Sweden
Brunei Shell Petroleum Co. Ltd.
Seria, State of Brunei, Borneo
Business Flight Service
Emmaboda, Sweden
C. Itoh & Company, Ltd.
Bangkok, Thailand
Ministerio de Defensa Nacional
Santiago, Chile
Superintendencia do Desenvolvimento da Amazonia
Belem, PA Brazil
Touraine Air Transport
Tours, France

(CX 106 at 2)

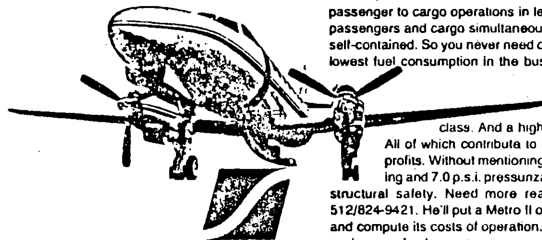
Your commuter service is programmed for profit.

METRO II is designed to help you increase it.

With the Metro II, you get an aircraft designed specifically as an airliner From scratch. Instead of a compromised older model. So you get all the features a commuter plane should have to help you get a better bottom line figure. And more.



Like versatility, for example. You can switch from passenger to cargo operations in less than 30 minutes. You can load passengers and cargo simultaneously. And the Metro II is completely self-contained. So you never need off-site equipment. You also get the lowest fuel consumption in the business. High utilization: over 3000 block hours yearly if you desire. The highest cabin volume. The greatest range in its class. And a high cruise speed of around 300 mph. All of which contribute to lower operating costs. And higher profits. Without mentioning jet-age comforts like air conditioning and 7.0 p.s.i. pressurization. Or incomparable designed-in structural safety. Need more reasons? Give Earl Morton a call 512/824-9421. He'll put a Metro II on your route, figuratively speaking, and compute its costs of operation. Then you can see for yourself the savings you've been missing.



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SWEARINGEN AVIATION CORPORATION
P.O. BOX 32486, SAN ANTONIO, TEXAS 78284
Telex 767-315

(CX 106 at 38)

[25]72. Some commuter carriers operate, pursuant to CAB authorization, four engine, pressurized, turboprop aircraft capable of carrying 50 passengers. (RX 571, at 30, 373; CX 107, at 46–47; CX 106 at 90–91)

73. Foreign air carriers listed as certificated air carriers in the OAG often fly "commuter aircraft" similar or inferior to the planes used by commuter carriers. (CSC Reply, at 57) Foreign air carriers are not subject to FAA safety regulation. (Ceresa 1002–03)

74. Allegheny commuter carriers operate commuter aircraft. (Beech 99, DeHavilland Twin Otter, DeHavilland Heron and Nord 262—CX 182L; Shorts SD3–30—RX 571 at 1058, CX 106 at 56–57)

75. Certificated air carriers sometimes fly commuter aircraft. (Mueller, 1515, 1517; CX 12C; Lang 3129–30; CX 112 at 205, 713, 624, 1129) They also fly some larger propeller driven aircraft. (Autry 697, Griffin 848; RX 258 at 976, 977; CX 112 at 91, 93, 340, 752, 1129; Mueller 1517) New York Airways flies helicopters and is listed with the certificated carriers in the OAG. (CX 258 at 783)

76. The airplanes used by commuter carriers are sometimes equivalent, identical or even superior to those flown by carriers listed with certificated carriers in the OAG. (CPF 98–101; CX 106 pp. 89–91) Some commuter air carriers are starting to use jet or turbojet airplanes. (CX 106 at 8, 84; Autry 774–75)

77. Commuter air carriers normally fly short routes averaging about 75 miles. Local service certificated carriers average 182 miles and trunk certificated carriers average 578 miles. (CX 106 at 92; McKenna 952) Most certificated carriers, with their larger planes, offer amenities (*e.g.*, food service, lavatories) not offered by commuter carriers. (RPF 184) In short flights, those amenities are not as important to passengers as the time schedule of the flight and the kind of airplane. (Jaques 669, 684; Autry 707) **[26]**

78. To many people, especially those on business trips, the time a flight leaves and arrives is the most important consideration. (Fugere 320; McKenna 958; Griffin 850–51; Jaques 660, 686; Nelson, 3472) Passengers can sometimes save time by using commuter connections rather than certificated connections. (CPF 95; May 577)

79. Of 665 airports in the country, 256 are served solely by certificated carriers, 210 solely by commuters and 199 jointly by both classes of carriers. (CX 107 at 34) Commuter facilities at airports are often not as good as those for certificated carriers. (CX 20F; CX 107 at 53–55) Some commuters share terminal space with certificated carriers. (CX 106 at 37, 74–75, 83) Commuter carriers sometimes use more favorably located airports than competing certificated carriers. (CPF 96; Autry 702; Dzendolet 2629)

80. The number of commuter carriers has been increasing. In 1960

there were five in the OAG, 1966 - 36, 1967 - 50, 1968 - 75, 1969 - 110, 1974 - 140, 1976 - 163. (CX 106 at 5)

81. Passengers carried by commuters increased from about 4 million in 1969 to over 7 million in 1975. (CX 106 at 3; RX 328D; RX 344Z22)

82. Since at least 1971, all certificated carriers have had interline agreements with most commuter carriers. These agreements provide for joint fares (at a discount), and through ticketing and luggage handling arrangements. (CX 106 at 62–75; CX 12B; CX 22B; CX 20D) Many commuters now share the computerized reservation systems of major airlines. (CX 106 at 68, 94; CX 20D)

83. Pilgrim, a commuter air carrier, competes with Delta, Eastern, United, TWA, Allegheny and American, all certificated air carriers, as well as an "Allegheny commuter" which is integrated with certificated carriers in the OAG. (Fugere 215–16, 240, 287; CX 112 at 5) [27]

84. Royale, a commuter air carrier, competes with Texas International, Delta Airlines, Southern and Braniff, all certificated air carriers. (May 554; CX 112 at 5)

85. Prinair, a commuter air carrier, competes with Eastern, a certificated carrier. (Ceresa 976, 1027; CX 112 at 5) Prinair competes as well as LIAT, ALM, Winair, Air BVI, Air France, Air Guadaloupe. (Ceresa 1000–01) These are all foreign air carriers which are integrated with certificated air carriers in the OAG. (CX 112 at 5; CPF 25)

86. Metro, a commuter air carrier, competes with Frontier Airlines, Texas International and Delta, all certificated air carriers. (McKenna 899, 902; CX 112 at 5)

87. Rocky Mountain, a commuter, competes with Aspen Airways, Frontier, Continental Airlines and Braniff, all certificated carriers. (Autry 693, 709; CX 112 at 5)

88. Allegheny, a certificated carrier competes with Altair, a commuter. (Howard 2855, 2857; CX 112 at 5) Altair also competes with "Allegheny commuters" which are treated as certificated carriers in the OAG. (Howard 2855; CPF 27)

89. Frontier, a certificated air carrier, competes with Rocky Mountain, Metro, Scheduled Skyways and other commuter carriers. (Mueller 1509, 1514; CX 112 at 5)

90. Texas International, a certificated air carrier, competes with commuters. (CX 41; CX 112 at 5)

91. Air New England, Inc., a certificated carrier, competes with commuter carriers. (CX 188B)

92. Commuter carriers competing with certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. (Fugere 379; Autry 695, 702; McKenna 901; May

562; Whiteside 411; Ceresa 1035) These certificated carriers also react to fares charged by the commuters. (Whiteside 411; Mueller 1510–11, 1514) [28]

Intrastate

93. Intrastate and certificated carriers often have served the same city pairs. For example, Southwest Airlines, which was an intrastate air carrier, competed on all its city pairs (over 25) with certificated carriers. (Muse 809–12) Air Florida and Air California, which were intrastate carriers, also competed with certificated carriers in various city pairs. (Griffin 848–49; Davis 1439)

94. Intrastate carriers fly airplanes comparable to certificated carriers. (Muse 807; Griffin 847; Davis 1430; Cooke 3333)

95. Certificated carriers have lost market share in various city pair markets as a result of intrastate competition. (Muse 890; Cooke 3327)

96. Intrastate carriers compete with certificated carriers. (Nelson 3394; Cooke 3326–29)

97. Prior to November 9, 1977, intrastate carriers were prohibited from exchanging passengers and luggage with certificated air carriers. On that date, by statute, some such interlining was allowed. 49 U.S.C. 1371(d)(4). The Airline Deregulation Act of 1978, Pub. Law 95–504, 92 Stat. 1706 (eff. Oct. 24, 1978) provides that intrastate air carriers may now become, in effect, certificated carriers providing interstate transportation upon receiving CAB authorization. Four (Air California, Pacific Southwest Airlines, Southwest Airlines and Air Florida) have already done so and their schedules will now be listed under certificated air carriers in the OAG. (RX 576) One air carrier in Illinois and three carriers in Alaska continue to operate as intrastate carriers. (RPF 328)

Safety

98. Regulations promulgated by the Federal Aviation Administration (FAA) govern the safe operation of aircraft with a gross weight of 12,500 pounds or less. (Schwind 3524) Most aircraft operated by commuter carriers are in this category. (Schwind 3573–74) [29]

99. The FAA has different, more stringent, regulations governing the operation of the larger aircraft usually operated by certificated carriers and by most intrastate carriers. (RX 196P–R)

100. The certificated air carrier industry has a better safety record than the commuter air carrier industry. (RPF 203–08; 211–13) The largest 50 commuter air carriers, which carry about 90% of all

commuter traffic, are statistically safer than the certificated air carriers. (Dzendolet 2666)

Reliability

101. Reliability of an air carrier measures whether it flies published schedules on time with listed equipment. The percentage of complaint letters received by the CAB regarding flights of certificated and commuter air carriers is about the same. (CX 135B) Commuters operated over 96% of flights scheduled in 1974, which is comparable with certificated carriers. (CX 107 p.5; CX 189B; McKenna 948–51) Certificated carriers and larger commuter carriers are more reliable than smaller, newer commuter carriers in performing flights at the scheduled time. (McKenna 920–21; Dzendolet 2642; Salfen 3272) Some commuters have better reliability records than almost all certificated carriers. (CX 20B)

Injury

Connections

102. The OAG publishes certain connections free based on various time and frequency factors. If a carrier wishes to have a connection that does not qualify as a free connection published in the OAG, it must pay the OAG to list that connection. These connections are known as "paid connections." (Findings 14, 15) Prior to December 1, 1976, the OAG would not publish free or paid connections for commuter air carriers. (RX 214) **[30]**

103. Paid connections cost approximately $2.30 per month per connection. (Whiteside 416) In 1975, Delta paid respondent over $160,000 to list paid connections in the OAG. (CX 69) TWA paid over $181,000 (CX 71); Braniff over $115,000 (CX 72); Allegheny over $280,000 (CX 73); Continental over $150,000 (CX 77); Northwest Airlines over $216,000 (CX 82B); and United Airlines over $300,000 (CX 80B; *see also* CX 23A(4); CX 70; CX 74; CX 75; CX 78; CX 81; CX 82; CX 91)

104. "Constructing a connection" refers to obtaining a connecting flight by using two direct flights listed in the OAG. "Constructing a connection" is difficult and time consuming. (Kyzar 1618; Ceresa 981–84; Fink 1353–58, 1371; Budzic 3107–08)

105. Before December 1, 1976, respondent refused to publish commuter air carrier connecting flight schedules in the OAG. (Complaint and Answer ¶ 13) At least as early as 1969 the OAG refused requests by commuter air carriers and their trade association to

publish connections for commuter carriers. (Autry 715, 725; McKenna 907; CX 55; CX 58; CX 203(31), (32); CX 204(31), (32); RX 114A–B; CX 19A; RX 19J) In 1968 and again in 1969 one certificated airline requested that such connections be shown. (RX 1B; CX 171P; RX 102)

106. Where connections are not listed in the OAG there is little chance that the availability of such service will be known by those booking flights or by the travelling public. (CX 28B)

107. Commuter carriers were substantially injured by respondent's refusal to print commuter connections. (Fugere 223, 309–12; Whiteside 409–10, 416–17; May 571; Autry 716–18, 725–26; McKenna 908, 943; Ceresa 980, 990) Commuter carriers have a great need for connecting flight information to be published in the OAG since 70% of their passengers are to or from certificated carriers. (CX 12B; RPF 139; Whiteside 413) Respondent's failure to publish commuter connections also injured the traveling public. (CX 189C; CX 20E) **[31]**

108. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for replacement carriers but not for commuters. (Fugere 248–49)

109. Commuters were injured by respondent's policy prior to December 1, 1976, of publishing connections for foreign carriers but not for commuters. (Ceresa 987–1002, 1013–14)

110. After the OAG started to print commuter connections, commuter carriers saw a substantial increase in connecting passengers. (Fugere 228–29; Autry 716; McKenna 908; Whitside 416–17)

111. In 1971 respondent knew that this problem was "critical" to the commuters and that they were anxious to buy connections in the OAG. (CX 19A; CX 15A) In 1975, respondent's top official recognized "there are a number of very efficient and reliable commuter carriers to whom a disservice is being done" because of the OAG's refusal to print commuter connections. (CX 201)

112. Donnelley has been publishing connections for certificated carriers in the OAG since it acquired the publication in 1962. (RX 573) After the Federal Trade Commission started the investigation which resulted in the complaint in this case being issued (RX114D; Reich 1273–74; Woodward 4170–71), Donnelley decided to publish connecting flight schedule listings for commuter and intrastate air carriers in October 1975. (Answer, Exhibit B) Donnelley announced this change on April 22, 1976, and started publishing connections for noncertificated carriers on December 1, 1976. (RX 214A; Lobach 4138)

Schedule Integration

113. About 1969, commuter and intrastate air carriers started requesting the OAG to integrate the schedules for all scheduled air

carriers—to list the flights of all scheduled air carriers in chronological order for each city pair. (Autry 718; McKenna 908; Reich 1194–96) [32]

114. Users of the OAG select the first acceptable flight listed in the OAG for the city pair. (McKenna 907) Even experienced users of the OAG read from the top of the page to the bottom and select the flight listed first ("first listing") (Ceresa 980; Lang 3135; Whiteside 406) The user of the OAG usually makes a choice of flight before ever reaching the commuter or intrastate categories. (Fugere 309–12; May 572; Muse 816; Griffin 851–52; Fink 1412) Airline sales personnel will book the first convenient flight in chronological order, even when that flight is not on their own airline. For this reason, some carriers have arranged to have their own custom schedules printed, showing their own flights first. (Fugere 352–54)

115. Being listed below certificated carriers in the OAG's flight listings results in an injury to commuter air carriers (Fugere 232–34; Whiteside 404–08; May 617–18; Autry 703, 716–18, 725; McKenna 943–47; Ceresa 980, 1032–34), intrastate carriers (Muse 823–25; Griffin 851), and to the travelling public. (Autry 702–03; Fugere 349–51)

116. The OAG lists certificated air carriers within any city pair in order of their time of departure. Where two flights leave at exactly the same time, the one that arrives first is listed first in the OAG. Prior to 1971, the carriers were listed alphabetically when flights had identical departure and arrival times. Thus, if an American Airlines flight and an United Airlines flight had identical departure and arrival times, the American Airlines flight would have been listed before that of the United Airlines flight. (CX 89B)

117. Because of complaints received from certificated air carriers, respondent started to consider randomizing direct flight listings in the OAG. For example, where two or more certificated flights had identical departure and arrival times, one flight would be selected at random to be listed first rather than alphabetical listing. (CX 9H, CX 123B) [33]

118. In an Airline Guide committee meeting in 1971, all carriers whose codes began with A–M opposed randomizing and all carriers except one whose codes began with N–Z favored randomizing. (Northwest was the exception. United is its main competitor.) All of the certificated carriers recognized the competitive advantage in being listed first. (CX 31–35; CX 88A–D; CX 98; Kyzar 1615) The publisher of the OAG also recognized this competitive advantage. (CX 36C)

119. In early 1972, respondent changed its policy and started randomizing direct flight listings where the flights left at about the same time (still keeping separate categories for certificated, commuter

and intrastate carriers). (CX 123) An IBM program was used to insure fairness in the random selection. (CX 123B) The OAG later similarly randomized connections. (CX 49G)

120. Allegheny insists on having Allegheny commuters listed with certificated carriers and not below with other commuters because first listing is a better marketing tool. (CX 128; Howard 2812–13)

121. Prior to the randomization controversy, certificated carriers tried to achieve first listing by changing their flight time to leave one minute earlier than their competition in order to be listed first. (CX 34, CX 35, CX 36A, CX 88A, CX 98N–Q; CX 185)

122. The importance of first listing is also indicated by the fact that several air carriers have commissioned the OAG to publish custom guides for use by the airlines' own reservation agents. (CX 52Z; Lobach 4129–30) These custom guides follow the OAG format, but list the flights of that carrier ahead of the flights of competing carriers. (CX 153, 154)

123. The ABC World Airways Guide, the OAG's competitor outside the United States, randomizes flight listings as well as integrating the schedules of commuters, intrastate and certificated carriers. (CX 36A, CX 39B; CX 12C)

124. SCIP tapes integrate the schedules of commuters and certificated carriers. (Fugere 277, 387; CX 11B)

125. The OAG international edition integrates flight schedules of foreign commuter airlines with those of foreign certificated airlines. (CX 12A) [34]

Discussion

The following discussion summarizes and supplements the findings of fact and presents conclusions of law.

Introduction

Scheduled passenger air transportation in this country is conducted primarily by air carriers holding certificates of public convenience and necessity from the Civil Aeronautics Board. "Trunk" certificated carriers usually fly between large cities and average almost 600 miles a trip. "Local service" certificated carriers usually fly between smaller cities and between small and large cities and average about 200 miles a trip. (Finding 77) These certificated carriers usually fly large jets carrying 100 or more passengers.

In the last two decades commuter air carriers have become increasingly important in passenger air transportation. These carriers

are not certificated by the CAB and they pick their own routes and set their own fares. They generally fly between small communities and between those towns and larger airports connecting with certificated carriers. Generally they fly smaller planes,[10] and average about 75 miles per trip. (Finding 77)

The number of commuters has increased from 36 in 1966 to 163 in 1976. (Finding 80) They carried over 7 million passengers in 1975. (Finding 81)

Because commuters can choose to enter or leave markets without CAB authorization, some of them have entered some heavy traffic markets in competition with certificated air carriers. (Findings 68–70, 83–91) About 20% of the passengers in these markets are carried by commuters. (Finding 68)

Commuters have been successful in the "feeder" role of carrying passengers to and from larger airports where they [35]can connect with certificated carriers. They do this so well that eleven local service certificated carriers have withdrawn from these routes, with CAB authorization, by entering into "replacement agreements," whereby the commuter carriers take over the route. Even though the local service carrier may have been losing money on these city pairs, and often was receiving a federal subsidy, the commuters, with their fuel efficient planes, can usually perform this service at a profit.[11] In 1975 there were 27 commuter carriers operating replacement service for 11 certificated carriers. (Finding 34)

Commuter air carriers are now an important part of the scheduled passenger air transportation industry.

Respondent publishes the Official Airline Guide. The OAG is the only complete list of scheduled airline flights in North America. (Finding 35)[12] It is the size of the Washington, D.C. "Yellow Pages" telephone book and it comes out monthly, with a mid-month supplement. It costs about $100 a year and is used by ticket agents for airlines, travel agents, and scheduling personnel for corporations. While there are other specialized sources of flight information, there is no substitute for the OAG. (Finding 36)

[10] The Airline Deregulation Act of 1978 increased the maximum size of commuter planes to those having a capacity of less than fifty-six passengers. 49 U.S.C. 1371, 92 Stat. 1732 (Oct. 24, 1978).

[11] Texas International, a certificated air carrier, charged a fare of $21 between College Station, Texas, and Dallas, and lost $41 per passenger. Davis Airlines, a commuter, charged $20 and made a profit. (CX 107 p. 9; CX 174 p. 155)

[12] The OAG also provides information about fares, equipment, airports, meals, stops, and ground transportation. (RX 571)

The OAG is arranged alphabetically by the city the passenger is going to; under each such city the cities from which the passengers are coming are also listed in alphabetical order. The schedules are divided into direct flights (without changing planes) and connections (involving a change of planes). Until December 1, 1976, respondent did not publish connections for commuter air carriers. (Finding 22) As a direct result of the Federal Trade Commission investigation in this case, respondent started publishing commuter connections on December 1, 1976. (Finding 112)

The OAG city pair format is further divided into categories by class of carrier: certificated carriers, commuter carriers, and intrastate carriers. The schedules of certificated [36]carriers have always come first. (Findings 20–24) The flights within each category are in chronological order. Users of the OAG choose a flight by reading the schedule from the top down and generally choose a flight before ever reaching the commuter or intrastate categories. (Finding 114)

Being close to the top of the schedule ("first listing") is competitively very important. For example, certificated air carriers, whose names placed them alphabetically below their competitors when both left at the same time, insisted that the listings be selected at random rather than alphabetically. (Findings 116–19)

Respondent's discriminatory policy has competitively injured commuter air carriers, especially respondent's refusal to publish connections since 70% of the commuters' passengers are connecting with other carriers. (Findings 106–10, 115)

Rather than the result of objective editorial decision, this policy has resulted from respondent's economic affiliation with the certificated carriers (Findings 64–66, 103) and from a conspiracy. At a meeting with OAG representatives on October 7, 1971, a committee of about twenty certificated carrier representatives voted to continue the OAG policy of separate carrier categories and of refusing to publish commuter and intrastate carrier connections. (Findings 52–63)

Respondent's main arguments for the discriminatory publishing policy have been that commuters were not reliable in flying according to their announced schedules and that they were not as safe as certificated carriers.[13] (Reich 1206) The record in this case shows that those arguments are baseless. (Findings 98–101) The only accurate relevant comparison of safety and reliability of air carriers can be made when they use similar airports and are flying over similar terrain in similar weather.[14] [37]

[13] Nothing in the record shows that intrastate carriers, which fly the same large jets as competing certificated carriers (Finding 94), are any less reliable than certificated carriers.

[14] (Dzendolet 2662–63.) The CAB qualifies its Schedule Arrival Performance publication for January 1979 with this statement:

(Continued)

Furthermore, respondent does indeed publish schedules for noncertificated carriers. To be consistent, then, respondent can only use the safety and reliability argument to show that the schedules of noncertificated carriers should be designated in some way. Respondent already designates replacement carriers such as the "Allegheny" commuters and publishes their schedules among the certificated carriers. (Findings 28–30) The same system could easily be used to designate noncertificated carriers.

Respondent fears that, if the schedules were merged, passengers would buy tickets on commuter flights without realizing that they would be flying on smaller aircraft. While this is possible in some cases, it is unlikely to happen frequently. Travel agents generally inform their customers whenever a smaller aircraft is involved in a flight. (RPF 242) Furthermore, this argument is not consistent with respondent's practice of publishing schedules of replacement and foreign carriers with certificated carriers,[15] even though those flights involve small aircraft. (Findings 28, 73)

But for the conspiracy found in this case, there is no good reason why respondent should not merge schedules in the OAG for certificated and noncertificated carriers. Respondent already does so in other publications. Respondent merges the schedules of similar carriers in the International edition of the OAG. In 1971 the Publisher of the OAG wrote (CX 12A–B):

> There is a question in our mind as to why we should continue separation of commuter air carriers in the United States when we actually merge the schedules of similar operations in our International OAG. Many of the small overseas carriers operate aircraft similar to those used by U.S. Commuters. Why penalize our own "small" airlines?

Another example of this inconsistent behavior exists. The 1978 Washington, D.C. commercial telephone directory ("Yellow Pages") contains a listing for "airline companies." The airline companies listed alphabetically thereunder include both certificated and commuter airlines. For example, American Airlines, Braniff International, Continental [38]Airlines and Delta Air Lines are certificated airlines. (RX 571 p. 1498) Altair Airlines, Inc.,[16] Colgan Airways Corp., Commuter Airlines, Cumberland Airlines, and Pioneer Airlines Inc. are commuter

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Since these data do not constitute a representative sample of any carrier's total flights or of the industry as a whole, they should not be used for intercarrier comparisons in any way except in individual markets. The results shown shall not be "extrapolated" to obtain a "system" average for any carrier.

[15] Some certificated carriers also fly small aircraft. (Finding 75)

[16] Altair became certificated in 1978 but at the time of the printing of the Yellow Pages it was a commuter. CX 258 p. 1221.

airlines. (RX 571 pp. 1499–1500) The publisher of the Yellow Pages is respondent Donnelley. (CX 24A)[17]

Other sellers of passenger air schedules also merge the certificated and noncertificated listings. The ABC World Airways Guide, the OAG's competitor outside of the United States, does so. (Finding 123) Computerized systems do so. (Finding 124) Respondent's reason for not merging the schedules was without doubt based on the conspiracy found herein, and not on the differences in the carriers they suggest.

The Meeting

In 1971 commuter air carriers were carrying over 4 million passengers, 70% of whom were connecting with certificated airlines. The OAG did not print commuter connections nor did it integrate their schedules with certificated airlines. Mr. Howe, the Publications Manager of the OAG, and Mr. Parrish, the Publisher, became convinced that this should cease and put their reasons in writing. (CX 11, CX 12, CX 15, CX 19) They found: that some certificated carriers wanted to purchase connections to noncertificated carriers; that noncertificated carriers were anxious to purchase connections (which would result in increased OAG sales); that this was a "critical problem" for noncertificated carriers; that commuter carriers may be "far superior" to small foreign airlines which appear in OAG and other international air schedule publications; that [39]changing the format to eliminate the separation of classes of carrier would save lines of copy and give the OAG a less confusing format; and that since foreign carriers, replacement carriers and some certificated carriers were flying small planes, "equipment is now a weak argument for continued separation." (CX 12C) The executives concluded that when the policy of separation of schedules was first established it was justified: "The scheduled Air Taxi or Commuter type of service was quite new, it was unregulated, at times it was unreliable, and there were many differences between the two services." (CX 12A) They stated that now however: "Over the intervening years these differences have been reduced in number and we are now convinced that in the interest of our subscribers and the future growth of the nation's air transportation system, these schedules should be merged as soon as it is feasible to do so." (*Ibid.*) The only reasons against the merger of the schedules

[17] Neither the Yellow Pages nor the CAB publication in footnote number 14 are in this record. While these documents at most are alternative evidence, *Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795, 803 (9th Cir. 1966), *cert. denied* 386 U.S. 932, respondent will have the "opportunity to show to the contrary," 5 U.S.C. 56(e), in a motion for reconsideration or before the Commission which has the ultimate factfinding responsibility in this proceeding. Administrative agencies should not "ignore the realities of life and disregard common knowledge" in reaching their decisions. *Continental Can Co.* v. *United States*, 272 F.2d 312, 315 (2d Cir. 1959).

noted by the executives were the "certificated carrier objection" and possible subscriber objections. (CX 11B)

They put the matter of merged schedules and commuter connections as "Item 7" on the agenda of the next meeting of the Airlines Guide Committee, for consideration by the certificated carriers. (Findings 52–56) The notice requested the representatives to seek management opinions of the subject. (Findings 56–57) The meeting took place on October 7, 1971 at the Mayflower Hotel in Washington, D.C. (Finding 58) Item 7 was the most important and primary subject discussed at the meeting. (Howe 1691–92) Peter E. McKenna attended the meeting representing Texas International, a certificated carrier. Mr. McKenna testified as to his recollection of the meeting (McKenna 910):[18]

Q. And can you recall any specific conversation or statement by any representative of the Reuben Donnelley Corporation relating to the question of the integration of commuter schedules into the OAG and the listing of commuter connections in the OAG?

A. Yes, I can. I recall a statement by Reuben Donnelley's Bob Parrish or Red Howe. I don't recall specifically who made the statement. **[40]**

The statement, I do recall, was in substance a statement to airline personnel—that they should determine—the airlines should determine whether they were going to do business with commuters or not.

That on the one hand, airlines were entering ticketing and baggage agreements, joint fares, a variety of interline activities, while on the other hand, he was being told to keep commuters out of the book.

The representatives of the certificated air carriers discussed the matter. A symbol next to the flight number would have satisfied some carriers. (CX 19C) One carrier "was concerned in that the non-certificated carriers had no restrictions on routes and *therefore could parallel the certificated carriers at will.*" (Finding 62; emphasis added.) The carriers voted. (Finding 63) Except for American and National Airlines, the carriers voted "against the merger of schedule listings." (Finding 61; CX 66A) They also agreed that to include commuter connections in the OAG would weaken their argument against merged schedules. (Finding 61)

After the Airline Guides Committee meeting, Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections. (Howe 1829–32) When the Airline Guides Committee was officially disbanded in 1973 because of allegations of conspiracy, the representatives of the certificated carriers agreed to continue to meet with the OAG in an unofficial capacity. (CX 67)

[18] From his demeanor on the stand, and based upon his whole testimony, I believe Mr. McKenna is a credible witness. While respondent produced other witnesses whose recollection was different as to this aspect of the meeting, I disbelieve those witnesses because of their bias, lack of recollection, or general appearance.

Conspiracy

Respondent has combined and conspired[19] with certificated air carriers to publish the schedules of the noncertificated carriers in the OAG in a discriminatory manner. **[41]**

This conspiracy injured the noncertificated carriers and had the purpose and effect of a *per se* illegal group boycott. Two analogous cases make the point, *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), involved a vertical conspiracy among manufacturers, distributors and Broadway-Hale, a retailer of household appliances, whereby the sellers agreed not to sell to the retailer's competitor, Klors, or to sell to it only at discriminatory prices and unfavorable terms. (359 U.S. at 213) Broadway-Hale "used its 'monopolistic' buying power to bring about this situation." (359 U.S. at 209) The Court held the conspiracy to be a group boycott and *per se* illegal, and that such group boycotts have not been "saved by allegations that they were reasonable in the specific circumstances" because "such agreements no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." (359 U.S. at 212)

The commuter carriers here have received discriminatory treatment because of a conspiracy between their competitors, the certificated carriers, and respondent. In *Broadway-Hale*, Klors received discriminatory treatment as the result of a conspiracy between its competitor, Broadway-Hale, and the suppliers. Both show *per se* illegal group boycotts.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); two Texas broker-dealers arranged with members of the New York Stock Exchange for direct-wire telephone connections used for trading securities over the counter. This private wire connection facilitated communication with other traders by [42]providing instantaneous market information about the latest offers to buy and sell. The temporary approval was rescinded pursuant to the rules of the Exchange. The Court held this to be a *per se* violation of the Sherman Act since it was a group boycott depriving petitioners of a valuable

[19] The complaint and notice of contemplated relief herein involve, in part, allegations of an unlawful combination between respondent and certificated air carriers (see paragraphs 11, 15 and 18 of the complaint; paragraph 1(c) of the notice of contemplated relief; Tr. 49–53). The complaint does not contain the word "conspiracy." As used in the language of antitrust law, the terms "conspiracy" and "combination" are derived from the Sherman Act which, in part, prohibits every "contract, combination . . . or conspiracy in restraint of trade," 15 U.S.C. 1. The gist of both terms is "whether or not there is a collaborative element present." *Pearl Brewing Co.* v. *Anheuser-Busch, Inc.*, 339 F. Supp. 945, 951 (S.D. Tex. 1972). It has been suggested that the terms are synonymous. *Id.* at 950 n. 1. Since there is a presumption against the use of redundant words in a statute, *FTC* v. *Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975), the terms probably have slightly different meanings. It may be that an unlawful "combination" can be established by evidence falling somewhat short of that necessary to establish an unlawful "conspiracy." Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd Ed. 1968).

business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. The member firms remained willing to deal with the petitioners for the purchase and sale of securities, but the Court held that this did not excuse the collective decision to deny petitioners the private wire connections: "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." (373 U.S. at 348–49 n. 5)

Respondent here provides the airline industry with the OAG. In *Silver,* the New York Stock Exchange provided the direct wire telephone connections. Commuter carriers can do business — though not as well — without fair treatment in the OAG's publication policy. In *Silver,* the Texas broker-dealers could conduct business without the direct wire service. The illegality springs from the collective denial of a valuable marketing tool.

Abuse of Economic Power

In addition to the unlawful combination, the complaint charges that the OAG is the only publication in the United States that has all of the passenger flight schedules of air carriers, and that respondent has abused its duty to treat in a nondiscriminatory manner all of those who rely on that service.

The complaint does not allege unlawful monopolization in the publication and sale of passenger flight schedules of domestic air carriers, nor does it allege unlawful effects on companies other than air carriers. No injury is alleged to potential or actual competitors of respondent in the publication and sale of passenger flight schedules of domestic air carriers.[20] Instead, the theory of competitive injury is that respondent has misused the OAG to discriminate against noncertificated air carriers.

The classic misuse of economic power has the purpose and effect of injuring competition in the market in which the [43]law violator is engaged.[21] Here, by contrast, the theory of the individual violation of Section 5 involves respondent's misuse (by discriminatory publishing policies) of economic power (the OAG) to the detriment of noncertificated air carriers—a market in which respondent does not compete.

The competitive injury of this theory, then, involves the use of economic power in one market with the effect of curtailing competition in another market. This theory has precedent. In *Atlantic*

[20] Stipulation filed September 24, 1976.

[21] *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1973); *United States* v. *Griffith,* 334 U.S. 100, 109 (1948).

Refining Co. v. *FTC*, 381 U.S. 357 (1965), the Court upheld a Commission order prohibiting a similar misuse of economic power. There, the oil company agreed to "sponsor" Goodyear tires, batteries and accessories ("TBA") to independent gasoline stations to which it sold gasoline. In return for this sponsorship the oil company was paid a commission on the TBA Goodyear sold to the gasoline station. Among the sources of "leverage" in Atlantic's hands, by which it influenced the buying decisions of the Atlantic gas station dealers, were its lease and equipment loan contracts with short term and cancellation provisions. (381 U.S. at 368) The TBA sold to the Atlantic gasoline stations was the market foreclosed by the arrangement. Atlantic used its economic power over the gas stations and injured competition in a market in which it did not compete. Similarly, here, respondent uses its economic power — control of the OAG — and injures competition in a market in which it does not compete — air passenger transportation.

La Peyre v. *FTC*, 366 F.2d 117 (5th Cir. 1966) is another analogous case. There the circuit court upheld a Commission order prohibiting, under Section 5, the leasing to shrimp canners of a patented shrimp peeling machine on a discriminatory basis. Respondents there were engaged in shrimp canning and leased the shrimp peeler to West Coast shrimp canners at twice the rate it charged Gulf Coast canners. The court upheld the finding that this was the use of monopoly power in one market (the patented shrimp peeler) resulting in discrimination and the curtailing of competition in another market (shrimp canning). (366 F.2d at 121)

Respondent here has also used its economic power in one market to discriminate and injure competition in another market. **[44]**

Relevant Market

There was no dispute in this record that the geographic market is the United States. (Complaint ¶4; Answer ¶4) The parties vigorously contest, however, the relevant product market.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), the Court stated the relevant product market test under Section 7 of the Clayton Act:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

The Court then described the criteria to be applied in determining the existence of a submarket, *ibid:*

The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

This test for submarket criteria may appropriately be used to define the relevant product market in a case under Section 5 involving abuse of economic power by control of a market. *Borden, Inc.*, Vol. 3 Trade Reg. Rep. ¶21,490, p. 21,498 (FTC Final Order, Nov. 7, 1978 [92 F.T.C. 669]).

Respondent argued that there are four services available to users of the OAG which compete with it: (1) advertising—radio, television and newspaper, (2) individual airline schedules, (3) computerized schedule information, and (4) the ABC World Airline Guide. [45]

Computerized schedule information comes the closest to competing with the OAG. This system involves a computer tape of schedule information and is used generally by one of the certificated airlines. The information is displayed at the counter of the ticket agent on a cathode ray tube. The tapes contain only the schedule information ordered by the airline and do not contain all of the flight schedule information available in the OAG. (Finding 46) The system is much more expensive than the OAG. (Finding 43) Only a small percentage of those needing access to flight schedule information have a computer system. (Finding 42) Even those who have a computer system still subscribe to the OAG. (Finding 45) The growing use of the CRTs by airline reservation agents has not diminished the growth of the sales of the OAG. (Finding 44)

The submarket analysis of *Brown Shoe* shows that the OAG is a distinct economic market. Neither computerized schedule information nor the other services are reasonable substitutes for the information published in the OAG.

1. Industry Recognition

Industry witnesses testified that they do not recognize as a substitute for the OAG advertising of flight schedules on the radio, television or print media (Finding 51), individual airline timetables (Findings 47, 49), computerized information (Finding 42), or the ABC World Airline Guide (Findings 39, 40). Even respondent's former Executive Vice President testified that there are no significant competitors of the OAG. (Finding 36) It is recognized in the airline industry as the primary marketing tool for air carriers and is referred to as the "Bible." (Finding 35)

2. Unique Characteristics

The OAG is the only complete listing of all scheduled flights in North America. Its cover proclaims that it is the "Standard Reference of the Air Traffic Conference of America," which is the trade association for certificated air carriers. (Finding 35) Advertising, individual airline timetables and computerized information do not have the massive detail available in the OAG. (Findings 45–47) **[46]**
The ABC World Airline Guide provides different information. (Finding 37) Where these services are used, they supplement the OAG, not substitute for it. (Findings 45, 51)

3. Price

There are substantial price differences between the OAG and the purported substitutes. Computerized information and individual timetables are vastly more expensive. (Findings 43, 48) Commuter carriers cannot afford to advertise outside of the areas in which they fly. Advertising is not a financially viable alternative to the OAG. (Finding 50)

The OAG is also the relevant market using the traditional market definition of monopolization case law.

The ultimate objective of the market analysis is to deliniate a market which conforms to an area of effective competition and to the realities of competitive practices. *L.G. Balfour* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971). A single product may be a relevant market. In *United States* v. *Grinnell Corp.*, 384 U.S. 563, 572–73 (1966) (*dicta*) the Court said that in monopolization cases under Section 2 of the Sherman Act, as in Section 7 cases under the Clayton Act, "there may be submarkets that are separate economic entities."[22] **[47]**

Where, as here, a conspiracy is found, the relevant product market may be narrow indeed. *International Boxing Club of New York* v. *United States*, 358 U.S. 242 (1959) (championship boxing matches); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947) (the replacement market for taxicabs in four cities); *United States* v. *Pullman*, 50 F. Supp. 123 (E.D. Pa. 1943) (furnishing and servicing sleeping cars for railroads); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733 (N.D. Ohio 1913) (tugboats in 14 of the 50 Great Lakes harbors). The market alternatives argument is irrelevant where, as here, there was a conspiracy to boycott. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 487 (1st Cir. 1952), the plaintiff wholesaler of fresh fruit and vegetables had been denied renewal of a lease in a building used as a market:

[22] Market deliniation under Section 5 of the Federal Trade Commission Act may be even less formal than under the Sherman or Clayton Acts. *Cf. FTC* v. *Brown Shoe Co.*, 384 U. S. 316, 320–22 (1966).

> Defendants contend . . . that a discriminatory policy in regard to the lessees in the Produce Building can never amount to monopoly because other alternative selling sites are available. The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization.

The OAG is a flight schedule information service for which there is no substitute. Respondent has conspired to discriminate in the publishing of information in the OAG to the detriment of noncertificated air carriers and the travelling public. The OAG is, therefore, the relevant product market in this case. [48]

Intent

Respondent argues that its publishing policy was intended only to insure the "integrity" of the OAG, and that it separates the classes of air carriers to avoid misleading the public. In fact, however, respondent has a substantial financial incentive to follow the will of the certificated carriers. This economic incentive distinguishes respondent's intent from the altruistic intent exonerating collective action.

The classic rule is that proof of specific intent in a monopolization case is not always required. *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948). The use of economic power may not be unlawful, however, if it is for an altruistic purpose.[23] Respondent's purpose therefore must be considered in deciding the individual conduct theory of the complaint.

Complaint counsel argue that "regardless of motive" it is the duty of a monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. (Brief p. 105) Complaint

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[23] Absence of anticompetitive motive may exonerate monopolistic or group conduct. *Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062. See also:

> *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). (A committee of certificated air carriers refused to list McQuade's tours in its tour program manual. The court refused to apply the *per se* test of collective refusals to deal because those arrangements have the purpose or effect of excluding or coercing competitors and here none of the members of the committee were in competition with McQuade and there was no evidence to suggest that the committee "applied its standards to McQuade in a discriminatory fashion." (467 F.2d at 187–88)).
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> *Bridge Corp. of America* v. *America Contract Bridge League, Inc.* 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). (Defendants' purpose was not to injure plaintiff but to protect the integrity of bridge tournaments.)
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> *Deesen* v. *The Professional Golfers' Ass'n.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (PGA's standards needed to prevent tournaments from being bogged down by great numbers of players of inferior ability.)
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> *Staff Research Associates, Inc.* v. *Tribune Co.*, 346 F.2d 372 (7th Cir. 1965) (Newspaper refused to allow employment agencies to advertise under "help wanted" section of classified ads but allowed ads under "help wanted - employment services.")
>
> *America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972), (Newspapers restricted X-rated movie ads to the name and telephone number of the theater.)

[49]counsel cite for this proposition *La Peyre, supra.* There the Commission's majority opinion held that, by discriminatory leasing of the shrimp peeling machines, respondents were injuring their own competitors since they also were engaged in shrimp canning. Commissioner Elman, in a separate opinion, stated that respondents were not discriminating in price to protect their interests as shrimp canners but rather to maximize their profits on the shrimp peeling machines. The Circuit Court held that under either finding[24] of motive respondents violated Section 5 (366 F.2d at 121). [50]However, Commissioner Elman's theory of the motivation does not disregard intent as an element of a Section 5 violation. He specifically stated that respondents' conduct "substantially and *unjustifiably* injured competition in the shrimp canning industry." (65 F.T.C. 799, 869 (1964) (Emphasis added.)) This reasoning leaves room for any altruistic purpose which might make a monopolist's conduct justifiable. *La Peyre* does not hold that motive is irrelevant to a Section 5 monopoly case.

As found herein, however, respondent conspired with the certificated carriers to discriminate against the noncertificated carriers, and even without an overt conspiracy respondent had a great economic incentive to please its largest customers whose cooperation makes possible the publishing of the OAG.[25] This motivation surely does not justify the unlawful acts by respondent.

Injury to Competition

Commuter airlines carry passengers in numerous city pairs also served by certificated carriers (Findings 67–70). While they generally fly smaller planes (Finding 71), commuters in some markets fly equivalent or even superior planes to those used by certificated carriers or foreign and replacement carriers listed with certificated carriers in the OAG. (Findings 72–76)

Commuters competing with certificated carriers are sometimes able to win substantial market share by more frequent schedules. (Finding 78) For example, a commuter carried 92% of the 140,000 passengers flying between Los Angeles and Ontario, California in 1973 (CX 61E), by scheduling 30 daily flights while the certificated carriers had five. (CX 174 p. 335)

Commuter carriers flying city pairs served by certificated carriers set their fares based on the fares charged by certificated carriers flying the same city pairs. Those certificated carriers also react to fares

[24] The Circuit Court erred in stating that: "We need not resolve these contrary findings as to motive." The court was bound to accept the majority Commission finding of the Commission as to motive, if it was based on substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487–88 (1951).

[25] (Nelson 2461)

charged by commuters. Such pricing decisions indicate competition. *United States* v. *duPont*, 351 U.S. 377, 400 (1956) [51]

Intrastate carriers often serve the same city pairs as certificated carriers. (Finding 93) They fly the same type of airplanes. (Finding 94) There is no doubt that intrastate and certificated carriers compete.[26] (Findings 95–96)

Since 1962 when it acquired the OAG, respondent has published schedule information showing connecting flights for certificated carriers. (Findings 20, 22, 112) Respondent also published connections for replacement flights and for foreign air carriers during that time. (Findings 26, 29, 108, 109) Until December 1, 1976, and after the Federal Trade Commission started the investigation which led to the complaint in this case, respondent refused to publish free or paid connections for commuter air carriers. (Findings 14, 15, 102, 112)

Commuters rely heavily on passengers who are connecting to or from certificated airlines. (Finding 107) When connecting flight information is not listed in the OAG, the availability of that service is often not known to those booking flights. (Finding 106)

Respondent's failure to publish connections for commuter air carriers was a discriminatory abuse of economic power and caused injury to commuters and to the travelling public. (Findings 107–109) After the OAG started publishing commuter connections, commuters received a substantial increase in connecting passengers. (Finding 110) Commuters also started buying a substantial number of paid connections in the OAG. For example, after the respondent finally allowed commuters' connections to be published, one commuter bought about 3,200 paid connections in the OAG monthly at $2.30 per connection. (Whiteside 416)

The OAG has for many years published schedules in separate categories for certificated, intrastate and commuter air carriers, with the certificated carrier schedule always being listed first. (Findings 20–24) Within each category, the flights are listed chronologically. (Finding 21) Foreign carriers are listed in the OAG with certificated carriers. (Findings 25–27) Most commuter carriers which have [52] entered replacement agreements with certificated carriers are listed in the OAG with certificated carriers. (Findings 28–34)

Users of the OAG, reading from the top down, typically select the first acceptable flight listed in the OAG for the city pair. This means that the choice of a flight is usually made before the user of the OAG reaches the categories for commuter or intrastate carriers. (Finding

[26] In the few months since the Airline Deregulation Act of 1978, almost all of the larger intrastate carriers have become certificated carriers. (Finding 97) Such interchangeability clearly demonstrates an area of effective competition. *United States* v. *Continental Can Co.*, 378 U.S. 441, 456–57 (1964)

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114) Even experienced users of the OAG overlook commuter listings. (Fugere 232–34)

Respondent performed a study for American Airlines and found that: "[w]hen American salesmen use the OAG they are prone to quote the first service displayed—even though it is competitive to American. (CX 52Z20) In selling its customer guide respondent refers to being listed first as presenting "the host carrier's service in the most advantageous manner." (CX 52D; CX 122) The OAG refers to being listed first as "preferential display of schedules." (CX 52Z)

Prior to 1971 carriers were listed alphabetically when flights had identical departure and arrival times. A TWA official, M.A. Brenner,[27] felt that this created an unfair advantage for carriers whose codes began with letters at the beginning of the alphabet. (CX 43) When this was brought to their attention at an Airlines Guides Committee meeting, the certificated airlines whose codes were toward the beginning of the alphabet opposed the change; those whose codes were toward the end of the alphabet were in favor of randomizing such listings. (CX 118)

Being listed below certificated carriers in the OAG's flight listings resulted in injury to noncertificated carriers. (Finding 115) One commuter carrier representative testified that he would pay $100,000 to be treated in the same manner as competing foreign air carriers which are listed as certificated air carriers (Ceresa 1014) A witness from a certificated carrier called by respondent testified that in the Dallas-Albuquerque market, up to 20 passengers per flight are gained by first listing. (Kyzar 1617) [53]

Injury to the Public

The complaint alleges that the effects of respondent's OAG publication policies have been, in part, "to suggest and/or advise the public that direct flights of certificated air carriers are to be given preference over those of intra-state and commuter air carriers." (Paragraph 16) The complaint further alleges that respondent's acts and these effects constitute a violation of Section 5. (Paragraph 18) While injury to the noncertificated carriers was the main part of complaint counsel's case, this allegation of injury to the consumers was also sustained.

When commuter connections were not published in the OAG, travel agents and airline booking agents often did not know of the existence of the commuter flight and therefore did not inform passengers who would wait for a certificated connection, sometimes losing an extra

[27] One of respondent's expert witnesses described Mr. Brenner as the "world's leading authority on airline schedules." (Cooke 3334–35)

business day in doing so. (CX 20E, CX 113 p. 817) If no certificated flight was available, the passengers would rent cars to go to their final destinations. (CX 189C) Passengers were overcharged because the ticket agents were not aware of the discount available through joint fares available in many markets. (CX 107 p. 14 n.1)

Respondent's policy of separate listings also injures the traveling public who may take more expensive, and inconvenient flights with certificated airlines merely because they were not informed of the commuter flight. (Finding 115; Autry 702–03)

Respondent's discriminatory practices in the publication of the OAG evolve from its close business relationship to, and financial dependence on, the certificated air carriers. (Findings 64–66, 103) With this motivation, respondent cannot use its economic power ethically to inflict injury on consumers, regardless of whether competition has been injured. This conduct is morally objectionable and detrimental to consumers and violates Section 5 of the Federal Trade Commission Act. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972).

Jurisdiction

Section 5 exempts from Commission jurisdiction "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958." 15 U.S.C. 45(a)(2). [54]Respondent is not an air carrier.[28] The competitive injury here, however, is to air carriers, and respondent argues that the exemption is for the business of air transportation and not for the status of being an air carrier. In *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), the court held that the similar exemption in Section 5 for common carriers subject to the Interstate Commerce Act was in terms of status and not business activities. (549 F.2d at 455) The court pointed out that, in contrast, Congress exempted the business activities—and not the status—of those subject to the Packers and Stockyards Act.[29] (549 F.2d at 455–56)

Principles of statutory construction show that the exemption should be limited solely to air carriers. The FTC Act is remedial legislation. *Sears, Roebuck & Co.* v. *FTC*, 258 Fed. 307, 311 (7th Cir. 1919). As such, it should be construed broadly so as to effectuate its purpose. *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). The exception to a broad grant of authority is to be narrowly construed. *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 218 (1961). The "burden of proving justification or exemption under a special exception to the prohibition

[28] Respondent admitted that: "Donnelley is not an air carrier or an indirect air carrier. . . ." Attachment A, p. 2, Answer to Motion of Respondent to Dismiss the Complaint for Lack of Jurisdiction, filed herein on September 1, 1976.

[29] The Packers and Stockyards Act exemption to Section 5 is only for "persons, partnerships, or corporations insofar as they are subject to" the Act. 15 U.S.C. 45(a)(2).

of a statute generally rests on one claiming its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

In *Branch* v. *FTC*, 141 F.2d 31 (7th Cir. 1944), the United States Court of Appeals for the Seventh Circuit recognized these principles. The Commission there found a correspondence school had violated Section 5 by unfair practices in the sale of text books to students residing in Latin America. The school argued that it was exempt from Commission jurisdiction since it was engaged in foreign commerce. The court upheld the Commission's jurisdiction, stating (114 F.2d at 36):

> This is a remedial statute implementing national policy. By it Congress is seeking to free foreign commerce of unfair trade practices, just as it has attempted to free **[55]** commerce between the States from such practices. We cannot assume that Congress intended to free only some of its foreign commerce from unfair trade practices. We are bound to give to the generic words used by Congress just as liberal a construction as the words are capable of in order to prevent such a partial protection to foreign commerce.

Similarly, Section 5 should be given a broad construction and the exemption for air carriers should not be extended to protect the unfair practices of respondent.

Congress has created no express exemption from FTC jurisdiction for the acts of respondent. *Cf., Perpetual Federal Savings & Loan Ass'n*, FTC Dkt. 9083, Vol. 3 Trade Reg. Rep. ¶ 21,371, at p. 21,291 (1977) [90 F.T.C. 608]. Nor has there been an implied exemption to the strong national policy expressed in the Federal Trade Commission Act.[30] CAB regulation is not so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. This case does not conflict with CAB regulation of air carriers.[31] Furthermore, the CAB has not exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation.[32] **[56]**

As noted above, in the memorandum opinion issued October 31, 1977, Judge Bernard M. Decker of the United States District Court for the Northern District of Illinois decided that the FTC lacks jurisdiction of this matter. *Reuben H. Donnelley Corp.* v. *FTC*, 1977–2 Trade Cases ¶

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[30] The test for implied immunity is stated in *United States* v. *AT&T Co.*, 1978–2 Trade Cases ¶ 62,247 at p. 75,547 (D.D.C. 1978).

[31] In an amicus letter filed herein on February 7, 1977, the General Counsel of the CAB stated that: ". . . [T]he Board does not believe that its own jurisdiction over air carrier competition would be compromised if the Federal Trade Commission Act were construed to give the Commission subject matter jurisdiction in this case." Pursuant to the Airline Deregulation Act of 1978, much of whatever authority of the CAB has had, including § 414 of the Federal Aviation Act, 49 U.S.C. 1384 (providing antitrust immunity) is transferred to the Department of Justice or abolished over the next few years. Pub. Law 95–504, Section 1601 (Oct. 24, 1978).

[32] While the agreements creating the Air Traffic Conference Committee have been filed with the CAB, the discriminatory publishing practices at issue in this case have not received CAB approval. In fact, the certificated carriers could not receive such approval because the agreements specifically exempted from the authority of the committee any subject affecting competitors. (RX 283A, Z–4, Z–7)

61,721. I respectfully decline to follow Judge Decker's analysis, for the above reasons and for those in the order denying the motion to dismiss, issued herein on March 30, 1977.

First Amendment

The order issued here requires respondent to publish schedules of commuter and intrastate air carriers on the same terms and conditions as it publishes schedules of certificated carriers. This would require Donnelley to publish the OAG in a format that differs from its present format. Respondent argues that this requirement constitutes impermissible censorship of the press in violation of the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[33]

Recent decisions of the Supreme Court have accorded some measure of First Amendment protection to commercial speech. *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The Court has not raised commercial speech on the same level of protection as noncommercial speech. *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Furthermore, the Court has reaffirmed the necessity of regulating false deceptive or misleading speech. *Virginia Board*, 425 U.S. at 771–72. ("The First Amendment . . . does not prohibit the state from insuring that the stream of commercial information flows clearly as well as freely. . . .")

The Court has made it clear that the press is not exempt from the antitrust laws. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945):

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to [57]protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

In *Lorain Journal* v. *United States*, 342 U.S. 143 (1951) the Court held that a newspaper had violated Section 2 of the Sherman Act and upheld an injunction preventing a newspaper, *inter alia*, from "refusing to publish any advertisement . . . or discriminating as to . . . arrangement, location . . . or any other terms or conditions of publication of advertisement or advertisements where the reason for

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[33] That the OAG is a directory and not a newspaper does not limit First Amendment protection. *Princeton Community Phone Book, Inc.* v. *Bate*, 582 F.2d 706, 710–11 (3rd Cir. 1978).

such refusal or discrimination is in whole or in part, express or implied, that the person or corporation submitting the advertisement or advertisements has advertised . . . in or through any other advertising medium." (342 U.S. at 157) The Court held that the injunction was not a "restriction upon any guaranteed freedom of the press." (342 U.S. at 155)

These cases clearly support the constitutionality of the order issued here, and show that the First Amendment is not abridged. [58]

Conclusions of Law

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, The Reuben H. Donnelley Corporation.

2. The acts and practices charged in the complaint took place in commerce, or affect commerce, within the meaning of the Federal Trade Commission Act.

3. There is no effective substitute for the OAG for scheduled air carriers wishing to disseminate flight information or for the consuming public wishing to obtain flight information.

4. While engaged in the sale and distribution of the OAG, respondent individually, and in combination with other companies, has unfairly discriminated in its listing policies for commuter and intrastate air carriers in the following ways:

(a) For many years and until December 1, 1976, respondent refused to publish connecting flights for commuter air carriers while at the same time publishing connecting flights for certificated air carriers and others in competition with those commuter air carriers; and

(b) For many years respondent has refused and continues to refuse to display commuter and intrastate air carrier flights chronologically with certificated air carrier flights and others.

5. The effects of respondent's discriminatory policies have been to injure: (a) commuter and intrastate air carriers which have lost business as a result of such policies; and (b) the public who have been unaware of the services of commuter and intrastate air carriers as a result of such policies.

6. Respondent's unfair methods of competition and unfair acts in commerce violate Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). [59]

Remedy

Respondent must be ordered to cease and desist the unfair practices described herein.

Respondent argues that, even assuming that its refusal to publish connections for noncertificated carriers violated Section 5, it has been publishing this information since December 1, 1976, and there is no evidence to show that it might revert to that practice if a cease and desist order is not issued. Contrary to respondent's assertion, there is evidence that but for this proceeding respondent might resume its former policy. There is evidence that the conspiracy proved in this case could easily be resumed. The representatives of the certificated airlines agreed to continue to meet with the OAG in an unofficial capacity. (CX 67) Further, respondent continues to discriminate against commuters by refusing to merge the schedules. (Finding 24) There exists some cognizable danger of recurrent violation. *SCM Corp.* v. *FTC,* 565 F.2d 807, 813 (2d Cir. 1977).

Respondent changed its policy only after, *and because,* the Federal Trade Commission started the investigation which led to the issuance of the complaint in this case. (Finding 112; Reich 1273–74; Woodward 4170–71) Stopping a practice after the government investigation starts does not show permanent abandonment. *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 47–48 (1960); *Cotherman* v. *FTC,* 417 F.2d 587, 594–95 (5th Cir. 1969); *Coro, Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Giant Food, Inc.* v. *FTC,* 322 F.2d 977, 986–87 (D.C. Cir. 1963). ". . . [N]o assurance is in sight that [respondent], if it could shake [the Commission's] hand from its shoulder, would not continue its former course." *Sears, Roebuck & Co.* v. *FTC,* 258 Fed. 307, 310 (7th Cir. 1919).

Although not raised as a defense, respondent has transferred responsibility for the publication of the OAG, effective January 1, 1979, to a related corporation. (Finding 16) The cease and desist order should, nevertheless, be directed at respondent. *P.F. Collier & Son Corp.* v. *FTC,* 427 F.2d 261, 271 (6th Cir. 1970). The question whether Official Airline Guides, Inc., is the successor to respondent, and therefore liable under the order, can be determined in a compliance proceeding. *Id.* at 272. **[60]**

ORDER

I

For the purpose of this order, the following definitions shall apply:

A. "OAG" refers to the Official Airline Guide - North American Edition.

B. "Certificated air carrier" refers to an air carrier that holds a certificate of public convenience and necessity issued by the United States Civil Aeronautics Board ("CAB") authorizing it to fly its routes.

C. "Commuter air carrier" refers to an air carrier which flys pursuant to an exemption set forth in Part 298 of the CAB's regulations.

D. "Intrastate air carrier" refers to an air carrier which operates solely within a state of the United States pursuant to the authority of the Federal Aviation Administration and state regulation and which performs scheduled flight service, but which does not hold a certificate of public convenience and necessity or foreign air carrier permit issued by the CAB.

II

It is ordered, That respondent, The Reuben H. Donnelley Corporation; its parent; subsidiaries; any concern controlled by respondent, including joint ventures; its successors and assigns; and its officers, agents, representatives, employees, **[61]**directly or indirectly, through any corporate or other device, individually or in combination, in the publication of flight listings in the OAG or successor publications shall forthwith cease and desist:

1. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the order of listing of those carriers in any city pair in the OAG.

2. From discriminating among the flight listings of commuter air carriers, intrastate air carriers and those of certificated air carriers in the opportunity offered those carriers to receive free connection listings or to purchase paid connection listings in the OAG.

3. Nothing in Paragraphs 1 and 2 of this order shall prohibit respondent from designating certificated, intrastate and commuter air carriers by appropriate symbols.

III

It is further ordered, That respondent (as that term is used in Section II) shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or its successors or assigns which may affect compliance obligations arising out of the order, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of the parent, subsidiaries or joint ventures of respondent. **[62]**

IV

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, respondent (as

that term is used in Section II) shall submit, in writing, to the Federal Trade Commission reports setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

Opinion of the Commission

By Pitofsky, *Commissioner*:

I. Introduction

In April 1976 the Federal Trade Commission issued a complaint charging The Reuben H. Donnelley Corporation ("Donnelley") with violations of Section 5 of the FTC Act, 15 U.S.C. 45. Donnelley, a wholly-owned subsidiary of Dun & Bradstreet Companies, Inc., is engaged, among other things, in publishing and distributing various publications relating to travel and transportation. The practices challenged in the complaint involve a Donnelley publication called the Official Airline Guide-North American Edition (the "OAG"). The OAG combines into one directory the flight schedules and fares of all scheduled air passenger transportation in the United States, Mexico, Canada and the Caribbean. The complaint focuses on the different treatment accorded in the OAG to the three different classes of United States air carriers furnishing scheduled air passenger transportation.

The three different classes of domestic air carriers are certificated carriers, commuter carriers, and intrastate carriers. Certificated carriers operate pursuant to "certificates of convenience and necessity" issued by the Civil Aeronautics Board (the "CAB"). One consequence of obtaining such a certificate is being subjected to extensive regulation by the CAB, especially with regard to routes and fares. Certificated carriers are authorized to fly large [2]jet aircraft, and, pursuant to route authority given them by the CAB, they provide service between the major cities of the nation, as well as between some smaller cities. Generally speaking, the large, well-known airlines in this country—such as American, TWA, etc.—are certificated carriers.

Commuter carriers do not obtain certificates of convenience and necessity from the CAB, and they operate free of most of the regulations applied to certificated carriers. They are not required to apply to the CAB for route authority, which means that they can provide air service between whatever cities they choose. Many of the routes they fly are between two smaller, outlying communities, or between a smaller community and a major city. Commuter carriers typically provide scheduled service between cities which are relatively close, with the average route being only seventy-five miles. The main reason for this is that CAB regulations require commuter carriers to

use aircraft which are much smaller than those typically used by certificated carriers.

Like commuter carriers, intra-state carriers do not obtain certificates of convenience and necessity from the CAB. They operate solely within a state and do not engage in interstate air transportation. They are regulated solely by the individual states within which they operate. There are a handful of intra-state carriers operating in Florida, Texas, California, Illinois and Alaska.

Complaint counsel alleged in the hearings below that certain aspects of the manner in which Donnelley lists or has listed flight schedule information in the OAG favor certificated carriers over non-certificated carriers and result in serious competitive injury to non-certificated carriers. Responding to their arguments, the presiding administrative law judge (the "ALJ") held that the challenged listing practices violate Section 5 on two different grounds: (1) Donnelley has maintained them as the result of an illegal agreement between it and certain certificated carriers; and (2) Donnelley is a monopolist in the providing of flight schedule information, and as such it has a duty not to arbitrarily place one class of carriers at a significant disadvantage *vis a vis* a competing class of carriers. This second ground raises a policy issue which has perplexed antitrust *cognoscenti* for decades—whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power. We reverse the ALJ's holding that Donnelley entered into an illegal agreement, and we reverse in part and affirm in part his holding regarding Donnelley's duty as a monopolist. [3]

II. Facts

A. *The OAG.*

According to Donnelley, the OAG "[c]ombines the flights of all scheduled airlines in [the] U.S., Mexico, Canada and the Caribbean into one convenient source." CX 113.[1] In fact, it is the only complete listing of scheduled flights in North America. As such, the OAG is the main source of flight schedule information for the flying public and a primary marketing tool for air carriers.

The December 15, 1978 issue of the OAG runs to over 1500 pages and contains thousands of flight listings. RX 571. A full annual subscription, which entitles the purchaser to two updated editions per month,

[1] Complaint counsel's exhibits have been labeled "CX" and respondent's exhibits "RX".

was selling in December 1978 for $98.44. In June 1975 the OAG had a total circulation of over 169,000, and in November 1978 the total circulation of the first-of-the-month issue was 208,000. Most of the OAG's circulation goes to air carriers, travel agents, and businesses (which typically use it in connection with work-related travel by employees).

The predecessor publication to the OAG was published at least as early as 1943, under the title "Universal Airline Schedules". Donnelley acquired the OAG from its then-publisher in 1962. From its inception until 1958 the OAG simply reproduced the timetables of each scheduled air carrier which submitted this information for publication. In 1958 the OAG commenced publication of the "Quick Reference Edition", which embraced a new format still in use today—the "to-city" format. In the "to-city" format, all cities *to which* there is scheduled air carrier passenger service are listed in alphabetical order, each representing a destination point. Beneath the listing for each of these cities, all the cities *from which* there is scheduled air carrier passenger service to the destination city are listed in alphabetical order. Under each "from" city are listed all the flights departing there and arriving in the particular "to" city, with information about departure time, arrival time, fare, type of aircraft, name of airline, etc. [4]

From the time it purchased the OAG until after the complaint in this case was filed, Donnelley listed all the flights under each "from" city in separate groupings reflecting the class of carrier involved—certificated, commuter, or intra-state—and whether the flight was "direct" or "connecting".[2] The greatest number of categories listed under any "from" city was four. The categories and the sequence in which they were listed was as follows:

1. Certificated carrier direct flights (published with no heading).
2. Certificated carrier connecting flights (published under the heading "Connections").
3. Intra-state carrier direct flights (published under the heading "Intra-State").
4. Commuter carrier direct flights (published under the heading "Commuters").[3]

[2] A direct flight is a flight between two cities which does not involve a change of aircraft; a direct flight may be non-stop or there may be one or more stops. A connecting flight is two or more direct flights used in conjunction with each other to provide transportation between two cities; a connecting flight involves changing planes at some intermediate point between the point of origin and the final destination point.

[3] These four categories of air carrier service were always published in the same sequence (or if one or more of the categories was not available between the city-pair involved, in the same sequence minus the category or categories not offered).

The following examples, excerpted from an old issue of the OAG, should make all this somewhat clearer. [5]

Freq. Leave Arrive Flight Meals Eq. ... PST SNA

To SANTA ANA, CALIF. PST LAX

LOS ANGELES, CALIF.

[illegible]

INTRA-STATE

[illegible]

COMMUTER AIR CARRIERS

[illegible]

A person wishing to fly from Los Angeles, California to Santa Ana, California would turn to Santa Ana in the alphabetical listings of "to" cities, and then look for Los Angeles in the alphabetical listings of "from" cities under the Santa Ana heading. The first nine lines under the bold-faced "Los Angeles, Calif." have to do with fare information and are not flight listings. The next five lines, ending just above the bold-faced "Intra-State", are listings for certificated carrier direct flights; in this case the only certificated carrier flying between this city-pair is Hughes Airwest (denoted by the symbol RW in the fifth column). The seven lines under the bold-faced "Intra-State" are flight listings for the only intra-state carrier flying between the city-pair: Air California (shown by the symbol OC). Finally, in the lines below the heading "Commuter Air Carriers" are the listings for the flights by the only commuter air carrier flying this route: Golden West (shown by the symbol GW). There are no certificated carrier connecting flights shown here, which means there were no such flights from Los Angeles to Santa Ana at the time this issue of the OAG was published. [6]

The example below, listing flights to Hartford, Connecticut from Montreal, Canada, illustrates how the category of certificated carrier connecting flights fits into this format.

To HARTFORD, CONN.

MONTREAL, QUE.

CONNECTIONS

[illegible]

COMMUTER AIR CARRIERS

[illegible]

The fact that the first heading is "Connections" means there are no certificated carrier direct flights from Montreal to Hartford. Certificated carrier connecting flights are listed under the heading "Connections". The first eight lines under that heading contain fare information. In the lines below those, each two-line pair lists a connecting flight from Montreal to Hartford; all the air carriers involved in those flights are certificated carriers. Commuter carriers' direct flights are listed separately below, under the heading "Commuters". There would obviously be no intra-state carrier flights between these two cities.

B. *The Alleged Discriminatory Practices.*

Complaint counsel assert that two aspects of Donnelley's listing policy, as illustrated above, have unreasonably restrained competition between certificated carriers and non-certificated carriers. First, they point to the fact that no connecting flights are listed for commuter or intra-state carriers, even though both have such flights; they claim Donnelley's failure to list these flights in the OAG limited users' knowledge that such flights existed and thereby caused commuter and intra-state carriers to suffer [7]competitive injury.[4] Second, complaint counsel claim Donnelley has injured non-certificated carriers by listing the flights of the three classes of carriers in separate groupings in the OAG, with the certificated carriers' first. They argue that listing certificated carriers' flights before the other carriers' flights has led users to believe certificated carriers are preferable to the other two classes of carriers, and to choose the flights of certificated carriers over the flights of commuter and intra-state carriers in situations where

[4] Though complaint counsel assert on appeal that Donnelley's failure to list intra-state carriers' connecting flights has injured those carriers (Complaint Counsel's Answering Brief, at 19), Donnelley is correct when it says that the ALJ did not make such a finding (Respondent's Appeal Brief, at 51 n.45). In addition, the complaint makes no mention of intra-state carrier connections, alleging only that Donnelley "has refused to accept for publication any schedules of connecting flights of commuter air carriers" (Paragraph 13), and that the effect of this policy has been "to foreclose commuter air carriers from disseminating information as to available connecting flight schedules to the public" (Paragraph 16). Even though complaint counsel's Proposed Findings of Fact, at 40, do contain an assertion that Donnelley refused to list intra-state carriers' connecting flights in the OAG, there are no citations to the record which establish competitive injury to intra-state carriers. For these reasons, in the discussion that follows we discuss only commuter connecting flights.

they otherwise would not. They also argue that users of the OAG usually read the listings from top to bottom and choose the first convenient flight. Since certificated carriers' flights are listed first, many users pick one of their flights without even looking at the flights of non-certificated carriers.

1. Failure to list connecting flights of commuter carriers.

From before the time respondent acquired the OAG until December 1976, the OAG did not list connecting flights involving commuter carriers—that is, commuter flights which connected with either a certificated flight or another [8]commuter flight.[5] With no such information listed in the OAG, the only way a user could discover and purchase a commuter connecting flight was by "constructing a connection". This involves looking up two separate direct flights—one from the point of origin to some intermediate point, and one from that intermediate point to the desired destination—and putting them together so as to achieve the desired connection. To construct a connection, a user of the OAG must figure out for himself what cities in between the city of origin and the city of destination would be likely places to catch a connecting flight going to the city of destination. It was established at the hearing that constructing a connection is a difficult and time consuming process. *Initial Decision*, at page 30, Finding 104. The ALJ found that where the OAG does not list connecting flights between a city-pair, there is little chance that their availability will be known. *Id.* at Finding 106. It follows that if a certificated carrier's connecting flight is listed between a city-pair in the OAG and a commuter carrier's connecting flight is not, the certificated carrier has a significant competitive advantage.

Donnelley's publishing policy has always been that some connecting flights will be listed in the OAG free, depending on their convenience and frequency; all other connecting flight listings must be paid for by the carriers involved. By the amounts they have paid to obtain connecting flight listings in the OAG, certificated carriers have shown that they consider such listings to be an important competitive device. In 1975, Delta paid Donnelley over $160,000 to list connecting flights; TWA over $181,000; Braniff over $115,000; Allegheny over $280,000; Continental over $150,000; Northwest over $216,000; and United over

[5] Donnelley changed the OAG's format in this regard in December 1976, eight months after the complaint in this proceeding issued. The changed format, still used today, lists six separate categories of air service (rather than the original four) in the following sequence: 1) certificated air carrier direct flights; 2) commuter air carrier direct flights; 3) intra-state air carrier direct flights; 4) connecting flights involving only certificated carriers; 5) connecting flights which involve only commuter carriers or both commuter carriers and certificated carriers; and 6) connecting flights which involve only intra-state carriers. *See* the discussion of the effect of that change on this proceeding at page 46, n.41 *infra*.

$300,000. Seventy percent of [9]commuter carriers' passengers are connecting to or from certificated carriers. *Id.* at Finding 107. Thus the failure to list connecting flight information for commuter carriers deprived them of a primary marketing tool with respect to a large portion of their business.

This view was confirmed in a petition filed with the CAB by that agency's Office of Consumer Advocate:

> When such scheduled services [commuters' connecting flights] are not listed in the OAG there is little chance that the availability of such services will be known outside the immediate geographical area. Carrier personnel and travel agents may not be directing the traveling public towards the use of such services simply because they (the carrier personnel and travel agents) are not aware of the existence of the commuters air service. The general public, which to a large extent must rely on such industry professionals in such matters, will not be able to take advantage of commuter services, and air travel to numerous destinations appears to be far less convenient than it may be in fact. CX 28.

The importance of connecting flight listings was also recognized by various Donnelley officials. For example, Donnelley's present Senior Vice-President in charge of the OAG, Mr. Woodward, wrote in 1975 that a "disservice is being done" to commuters by refusing to publish their connecting flight listings. CX 201; *see also* CX 12B; CX 19A.

On appeal, Donnelley has offered no justification at all for this policy. During the hearings, it was established that in 1972 Donnelley had conducted a study on how much it would cost to begin listing separate groupings of commuter carrier connecting flights and intra-state carrier connecting flights. This study revealed that it would cost approximately $6000. RX 16A. The memo recording these findings goes on to say that adding the two additional groupings of flights "would be extremely detrimental" to the OAG. *Id.* But it gives no reason why this should be so. And, indeed, there is no evidence that Donnelley's decision to add the new connecting flight listings in 1976 has been detrimental at all. [10]

2. Failure to combine the listings of certificated, commuter, and intra-state carriers.

Since 1969 or thereabouts, commuter and intra-state carriers have urged Donnelley to "merge" the direct flight schedule listings of certificated, commuter, and intra-state carriers into a single chronological listing for each city-pair. *Initial Decision,* at p. 31, Finding 113. Donnelley has refused to do so.

Complaint counsel claim Donnelley's practice of listing the flights of the three classes of carriers in three separate groupings, with certificated carriers first, gives certificated carriers a significant competitive advantage over the other two. They say this happens, in

part, because listing the flights of certificated carriers before the flights of commuter and intra-state carriers suggests to the OAG's users that certificated flights are to be preferred over commuter or intra-state flights. But the main reason why Donnelley's separate listing policy has injured non-certificated carriers, we are told, is that users of the OAG read the flight listings from the top of the page to the bottom and pick the first flight leaving at a convenient time. Thus, since the flights of commuter and intra-state carriers are listed below those of certificated carriers, it is probable that a user will choose a certificated flight before he even gets to the flight listings for commuter and intra-state carriers.

The certificated carriers themselves have long recognized the advantage of having one's flights listed above those of competitors. Donnelley has always listed the flights of certificated carriers in chronological order. But prior to 1972, when different carriers' flights between a particular city-pair had identical departure and arrival times, the flights were listed according to the alphabetical order of the carriers offering them. Thus if an American Airlines flight and a United Airlines flight had identical departure-arrival times between a city-pair, the American flight would have been listed first. If the two flights had identical departure times but one arrived before the other, the one arriving first got first listing. This policy led to what was known as "jockeying" of flight times: carriers would change the departure time of a flight so as to leave one [11]minute before a competing carrier, or speed up the flight time so as to arrive one minute before.[6] *See Initial Decision,* at p. 33, Finding 121.

Some certificated carriers became increasingly dissatisfied with this alphabetizing policy and began to call for a policy of randomizing flights with similar departure-arrival times. TWA and United—both of which come toward the tail end of the alphabet—led the fight for this proposed change.[7] Finally, the Airline Guides Committee, which is part of the trade association of certificated carriers and which was in close contact with Donnelley officials regarding the content of the OAG,[8] placed a proposal to change to randomization on the agenda for its October 1971 meeting. At the meeting, Mr. Parrish (then the Publisher

[6] One extreme example of jockeying occurred in 1971 between American and TWA, on flights departing Los Angeles at 9:00 A.M. for Boston. TWA's flight arrived at 5:13 P.M. while American's flight arrived at 5:15 P.M.; so the TWA flight got first listing. In June, American reduced its flight time by two minutes so that it arrived at 5:13 also; this meant American got first listing since flights were listed according to the alphabetical order of the carriers when they had identical departure-arrival times. In August, TWA had reduced its flight time so that it was arriving at 5:08 while American had only gotten down to 5:09; so TWA got first listing again. In September, American had further reduced its flight time so that it was arriving at 5:08 too; the tie went to American.

[7] TWA conducted a study of the matter and compiled a report, which stated: "First listing is a significant advantage. . . ." CX 98I.

[8] Much more will be said regarding this committee in the discussion of the alleged conspiracy, at pages 29-35, *infra.*

of the OAG) asked for a show of hands of carriers favoring randomization and carriers opposing it. The result was that Donnelley found itself on the horns of a dilemma, as the following notation of one certificated carrier's representative shows: [12]

All carriers whose codes began with A–M opposed randomizing and all carriers except one whose codes began with N–Z favored randomizing. Northwest was the exception and this is easily understood since United is their prime competitor. CX 88A.

After considerable tugging and pulling by the A–M camp and the N–Z camp,[9] the OAG changed its policy in 1972 and started randomizing direct flight listings where the flights left at roughly the same time.[10] *Initial Decision,* at p. 33, Finding 119.

All of this leads us to conclude that listing the flights of certificated carriers in a separate grouping before the flights of commuter and intra-state carriers has put commuter and intra-state carriers at a competitive disadvantage.

3. Alleged justifications for the separate listing policy.

Of course, it does not follow that a listing policy which distinguishes between the three types of carriers is arbitrary, or flows from a bad motive. Donnelley vigorously defends its policy of separate groupings, claiming it is justified and even required. Donnelley argues that the [13]policy is based on the fact that each of the three classes of carriers has a different legal status—that is, each is subject to different laws and regulations—and provides a fundamentally different level of service. Separate grouping is therefore necessary, we are told, because Donnelley has a responsibility to make it as clear as possible what kind of air service is being offered.

Complaint counsel deny that the differences in the three classes of carriers are as extreme as Donnelley represents. And they claim that even if there are differences in the three classes of carriers so that it is necessary to put users of the OAG on notice as to what class of carrier they are choosing, the separate listing policy is unacceptable because it is exclusionary; a less restrictive alternative could be chosen—like listing all three classes of carriers' flights together and placing some symbol next to the commuter and intra-state carriers' listings.

[9] Both groups suggested the OAG would suffer economic repercussions if they did not get their way. For example, a vice-president of American Airlines said in a letter to Parrish, "[T]he 'paid connection' program which brings in an additional amount of revenue to your corporation may be drastically curtailed or perhaps discontinued by a number of the carriers should this plan [randomization] materialize." CX 118. Meanwhile, an official of United Airlines met with Mr. Reich, who was then Senior Vice-President of Donnelley in charge of the OAG, and gave him a similar message. The United official described it as follows in a memo to his superior: "[Reich said] that TWA is convinced that it is at a disadvantage because of the alphabetical listing. I frankly told Bill [Reich] that we too are unhappy and, as a large customer of Reuben Donnelley, want them to know what our position is." CX 87.

[10] The OAG later randomized connections as well.

Complaint counsel also argue that even if one accepts the argument about the three classes of carriers providing different levels of service, Donnelley's separate listing policy does not put users of the OAG on notice as to the type of service they are choosing because Donnelley allows "commuter-type" foreign carriers and some "favored" commuter carriers to be listed with the certificated carriers.

These arguments raise close factual issues about the nature and degree of the differences between the three classes of carriers. They are subject to different statutory provisions and differing degrees of government regulation. Section 401(a) of the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. 1371(a), provides that no air carrier shall engage in air transportation unless it has a certificate from the CAB authorizing it to do so. Section 401(d)(1) of the Act, 49 U.S.C. 1371(d)(1), states that the CAB shall issue the required certificate to the air carrier only:

> if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Chapter and the rules, regulations, and requirements of the [CAB] hereunder, and that such transportation is required by the public convenience and necessity. . . .

The air carriers which receive certificates issued under § 401 are certificated carriers. The CAB has adopted extensive regulations regarding how a § 401 certificate may be obtained, as well as how, where, and when the holder of such a certificate shall operate. [14]

Intra-state air carriers have traditionally not been subject to the Act or to CAB regulation. During the period with which the complaint is concerned, to retain its intra-state status—that is, to avoid becoming involved in interstate air transportation—an intra-state carrier could not accept passengers or baggage engaged in an inter-state journey, even though it would transport such passengers or baggage wholly within the borders of a single state.[11] Because of this fact, intra-state carriers have refused to accept passengers whose tickets showed them to be engaged in an interstate journey. Donnelley claims that these differences make intra-state carriers unique and require that their flights be listed separately.

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[11] Legislative developments occurring since 1977 have radically diminished the differences between certificated air carriers and most intra-state carriers. In November 1977 a new section was added to the Act providing that intra-state air carriers in California and Florida could accept passengers and baggage from certificated carriers and that joint fares, rates, and services between such carriers were subject to CAB regulation. Section 401(d)(4), 49 U.S.C. 1371(d)(4). This provision was broadened to include intra-state carriers in all states by Section 9 of the Airline Deregulation Act of 1978, Pub. Law 95–504, 92 Stat. 1705 (eff. Oct. 24, 1978). In addition, the Airline Deregulation Act amended the Federal Aviation Act to provide that intra-state carriers were entitled to apply to the CAB for certain interstate routes and, if their requests were granted, to become certificated air carriers. Of the seven intra-state airlines in existence in 1977, three have now received grants of interstate routes and become certificated carriers; as a result, all of their flights are now listed as certificated carrier flights. The December 15, 1978 issue of the OAG (RX 571) shows only six intra-state air carriers operating in the United States; their flights are listed separately from those of the other two classes of carriers.

Section 416(a) of the Act, 49 U.S.C. 1386(a), permits the CAB to establish classifications of air carriers "as the nature of the services performed shall require"; and § 416(b), 49 U.S.C. 1386(b), permits the CAB to exempt any air carrier or class of air carriers from the Act or rules or regulations adopted thereunder. Under § 416, the CAB has **[15]** created by regulation a classification of air carriers called "air taxi operators", of which commuter air carriers are a part. 14 CFR 298. Briefly, the regulations require that such carriers: (a) operate aircraft having thirty or fewer seats and a maximum "payload" capacity of not more than 7,500 pounds; (b) register with the CAB as an air taxi operator; and (c) maintain certain minimum liability insurance limits. The CAB has exempted commuter air carriers from virtually all the requirements of the Act and from the regulations applicable to certificated carriers. Donnelley argues that because certificated carriers are subject to strict regulation while commuters are not, certificated carriers are much more reliable than commuters in providing accurate flight schedule information; are safer than commuters; fly larger aircraft which are generally superior to those flown by commuters; provide amenities not available on many commuter flights; maintain superior airport facilities; and have special consumer protection obligations. These alleged differences will be taken up and discussed in order.

Donnelley has stated that it "is vitally concerned with the accuracy of the information contained [in the OAG] and with the reliability of the air carriers which list their services in the OAG." RX 221. Donnelley claims commuters have caused special problems in this regard because they frequently cease operations without notifying Donnelley.[12] When this happens, they say, listings for the discontinued flights may be published in the OAG for weeks or months before it is discovered that the airline has gone out of business. Complaint counsel point out correctly that several certificated carriers have also gone out of business. In addition, the ALJ found that the largest fifty commuter air carriers carry about 90% of all commuter traffic (*Initial Decision*, at p. 29, Finding 100), and there is no evidence that any of these carriers have been guilty of ceasing operations without informing Donnelley. Nevertheless, it appears that unannounced exit from the field does occur among smaller, newer commuter carriers. **[16]**

Donnelley argues that commuter carriers have a lower safety level than certificated carriers. Preliminary data for 1977 published by the National Transportation Safety Board reveal that the passenger

[12] Donnelley buttresses this assertion with the following facts: (1) as of 1968 approximately 25% to 30% of the "air taxi" industry (of which commuters are a part) turned over each year; (2) from 1970 through 1972 an average of thirty commuter carriers ceased operations each year; and (3) during the period from 1970 until October 17, 1978 the flight schedule listings of 168 commuter carriers had been removed from the OAG.

fatality rate for commuter carriers was 1.48 per 100 million miles flown, while the corresponding passenger fatality rate for certificated carriers was 0.04. RX 563. Complaint counsel argue that these figures are not comparable because measuring safety in terms of fatalities per million miles flown is misleading. They say commuters fly much shorter routes than certificated carriers and consequently have many more takeoffs and landings per million miles flown than do certificated carriers, and it is during takeoff or landing that accidents usually occur. But according to other National Transportation Safety Board statistics which were cited and relied upon in a report by the Committee on Government Operations of the House of Representatives,[13] the accident rate for commuter airlines during 1976 was 1.57 accidents per 100,000 *departures*, while the certificated carriers' accident rate was only 0.44 accidents per 100,000 *departures*. Complaint counsel argue that even accident rates based on number of departures are unreliable measures of the comparative safety of commuter and certificated carriers because commuters frequently fly to remote, outlying areas where certificated carriers are unwilling or unable to fly. These areas may have relatively worse terrain and weather conditions, and smaller, less-safe airports. They argue that to get a truly accurate comparison of the safety records of the two types of carriers, one would have to compile statistics regarding the safety records of commuter and certificated carriers for those city-pairs where the two compete. Though we agree that such a study would provide a more accurate statement of the comparative safety of the two, we are persuaded by the statistics cited above and by other evidence[14] that Donnelley had cause to believe that certificated carriers, on the average, are safer than commuter carriers. *Cf. Initial Decision*, at p. 29, Finding 100. [17]

Generally, certificated carriers fly larger, faster planes than commuters. One reason for this is that CAB regulations limit commuter air carriers to planes which have a capacity of no more than thirty seats and a "maximum payload" of 7500 pounds.[15] 14 CFR 298. Such planes usually fly at speeds between 200 and 300 miles per hour. *Initial Decision*, at p. 22, Finding 71. The larger jets typically operated by certificated carriers, on the other hand, carry 100 or more passengers and fly at speeds over 500 miles per hour. *Id.* However, the ALJ found

[13] Airline Deregulation and Aviation Safety, H.R. Rept. No. 930, 95th Cong., 2d. Sess. (1978) (hereinafter referred to as "H.R. Rept. on Aviation Safety"). RX 344.

[14] Certificated carriers and commuter carriers are governed in safety matters by different sections of the Federal Aviation Regulations, and the regulations governing certificated carriers are more stringent. *Initial Decision*, at p. 29, Finding 99.

[15] The Airline Deregulation Act of 1978, Pub. Law 95–904, 92 Stat. 1705, increased the size of the aircraft which commuter air carriers may operate to a maximum capacity of fifty-six passengers.

that certificated carriers "sometimes" fly commuter type aircraft. *Id.* at p. 25, Finding 75.

Certificated carriers' flights frequently offer amenities which are not available on many commuter flights, like on-board meals, lavatories, etc. But the ALJ found that since commuter carriers normally fly short routes averaging only about seventy-five miles, these amenities are not as important to passengers as other factors such as the time schedule of the flight. *Id.* at p. 25, Finding 77. Certificated carriers often have better ground facilities—like ticket, baggage, and boarding areas—than commuter carriers. *Id.* at p. 26, Finding 79. In addition, CAB regulations impose on certificated carriers certain consumer protection obligations which commuters do not have; these include denied boarding compensation, baggage liability, and "no smoking" sections.

Granting that some differences do exist, complaint counsel claim Donnelley's argument about all the differences among certificated, commuter, and intra-state carriers is a red herring. They say Donnelley does not really honor the strict legal categorizations which are said to produce these differences. Specifically, complaint counsel say that Donnelley lists the flights of commuter-type foreign air carriers and certain favored commuter carriers with the flights of certificated carriers. [18]

Donnelley does list the flights of foreign air carriers with the flights of certificated carriers.[16] Complaint counsel argue that foreign carriers "fly no larger aircraft, are no safer, are no more reliable and are no more preferred by passengers than are commuter and intrastate carriers." Complaint Counsel's Answering Brief, at 27. The ALJ found that foreign carriers frequently fly small aircraft like the ones flown by commuter airlines, and that they are not subject to safety regulations issued under the Federal Aviation Act. *Initial Decision,* at p. 25, Finding 73. Donnelley responds that foreign carriers have a legal status very similar to that of domestic certificated carriers. They point to § 402 of the Federal Aviation Act, 49 U.S.C. 1372, which is more or less parallel to § 401 (governing certificated air carriers). Section 402(a) provides that "[n]o foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the CAB authorizing such carrier to so engage."[17] Under § 402(b), the CAB may issue a permit to a foreign carrier only:

[16] In fact, the ALJ found that of the 118 carriers now listed in the OAG as certificated carriers, 79 are foreign air carriers. *Id.* at p. 13, Finding 27.

[17] "Foreign air carrier" is defined in § 101(19) of the Act as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." 49 USC 1301(19). Section 101(21) defines "foreign air transportation" as "the carriage by aircraft of persons or property . . . in commerce between . . . a place in the United States and any place outside thereof." 49 U.S.C. 1301(21).

if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this chapter and the rules, regulations and requirements of the CAB hereunder, and that such transportation will be in the public interest.[18]

Donnelley argues that the fact that a foreign air carrier must obtain a permit from the CAB and subject itself to some CAB regulation means that it is like a domestic certificated carrier rather than like a commuter. Donnelley also claims that except for "a handful" of Caribbean foreign carriers, the foreign carriers listed in the certificated carrier section of the OAG include well-known overseas carriers like Air Canada, Air France, British Airways, etc. **[19]**

Complaint counsel also point to the fact that the flights of certain commuter "replacement" carriers are listed with the flights of certificated carriers in the OAG. A replacement carrier is a commuter carrier which enters into an agreement with a certificated carrier whereby the commuter provides service in place of the certificated carrier over some of the certificated carrier's routes to smaller cities. Such an arrangement allows the certificated carrier to maintain its route authority to the smaller communities and simultaneously serve those areas at the lower cost associated with operating smaller "commuter" aircraft. The main example of this is the replacement carriers serving Allegheny. These "Allegheny commuters" have had their flights listed with those of the certificated carriers since 1969. They are marked with a symbol in the shape of a square next to the flight number. In the "Abbreviations and Reference Marks" section of the OAG the symbol is defined as follows: "[Symbol] Following Flight Number Indicates A Replacement Flight Operated By A Commuter Air Carrier On Behalf Of A Certificated Carrier Pursuant To A CAB Approved Agreement."[19] Thirty commuter carriers operate replacement flights for certificated carriers Alaska Airlines and Wien Air Alaska, Inc. and receive the same display treatment as Allegheny commuters in the OAG. Altogether about 700 of the 50,000 direct flights listed in a recent issue of the OAG were replacement flights operated by commuters but listed in the certificated section. *Initial Decision*, at p. 15, Finding 32.

Donnelley argues that listing these commuter replacement carriers with the certificated carriers is not inconsistent with its previously stated policy on separate groupings because the replacement flights are listed with certificated flights only if the replacement arrangement arises pursuant to an agreement approved by the CAB. Donnelley also

[18] *Compare* Section 401(d)(1), relating to certificated carriers, at page 13, *supra*.

[19] It is complaint counsel's contention that if the listings of all three classes of carriers were combined, a marking like this one would be a sufficient means of putting a user of the OAG on notice that a flight was a commuter or intrastate flight.

claims that it enforces strict requirements concerning the operation of the replacement flights, including one that both the commuter replacement carrier and the certificated carrier identify the replacement flight as that of the certificated carrier. In this regard, Donnelley makes much of the fact that Allegheny commuters are flown under Allegheny's logo and colors, and that even their ticket counters and other ground facilities are made to look like Allegheny's. And they also point out that other commuter replacement carriers have been denied listing in the certificated section of the [20]OAG despite the fact that they operate their replacement flights pursuant to a CAB approved contract; the reason given by Donnelley for this in at least one case was that the commuter replacement flights were "operated under the name and in all appearances as a commuter. . . . There is no requirement similar to the Allegheny requirement that the airplanes, ticket counters and other facilities, etc., be made to look like [the certificated carrier being replaced]." CX 131A. It was established at the hearings, however, that at least one Allegheny commuter flight is flown under the commuter airline's colors and logo, rather than Allegheny's. Transcript, at 2572–75. In addition, it appears that the Alaska replacement carriers do not fly under the certificated carriers' colors and logo, but merely place a card or placard announcing the name of the replaced certificated carrier at the ticket counter and on the aircraft. Donnelley has offered no explanation for this inconsistency.

III. Discussion of Law

A. *Relevant Market.*

Since one of the theories of violation in this case involves an allegation that Donnelley is a monopolist, we must determine the relevant market within which Donnelley operates. There is agreement between the parties that the relevant geographic market in this case is the United States. *Initial Decision,* at p. 44.

Though the parties disagree over the relevant product market, the ALJ found that there are no substitutes for the OAG, and that it therefore comprises a separate product market in the providing of flight information about scheduled passenger air transportation service in the United States. *Id.* at pp. 16–19, Findings 35–51, and pp. 44–47. We believe this finding is correct. The OAG is the only complete listing of scheduled flights in North America; it is the primary source of flight schedule information for the flying public and the primary marketing tool for carriers. *Id.* at p. 16, Finding 35. It is referred to in the airline industry as the "Bible". Citing *United States* v. *E.I. DuPont*

de Nemours & Co., 351 U.S. 377 (1955), Donnelley argues that the ALJ wrongly excluded several reasonably interchangeable substitutes for the OAG; specifically, Donnelley mentions media advertising, computerized schedule information, and system timetables published by individual air carriers. But a review of the record convinces us that none of these is an effective substitute for the OAG. [21]

Air carriers do sometimes use radio, television, and newspapers to advertise their flights, and in some instances those advertisements contain limited flight schedule information. But when flight information is included in an advertisement, it is only for the flights of the particular carrier purchasing the advertisement and even then it is normally limited to a few city-pairs. *Initial Decision*, at p. 19, Finding 50. In addition, travel agents and corporate travel departments—a major sub-category of "purchasers", *see United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966)—do not normally use radio, television, or newspaper advertisements to obtain flight information and book flights. *Initial Decision*, at p. 19, Finding 51.

Many air carriers rely to some extent on computer tapes upon which airline schedule information has been coded. These are called "SCIP" tapes; SCIP is an acronym for Schedule Change Input Package. When the information on a SCIP tape is called for by the operator of the computer terminal, it is displayed on a cathode ray tube. Using SCIP tapes is much more expensive than using the OAG: the annual cost of a cathode ray tube for an office doing between $2,500,000 to $3,000,000 per year in business would be $15,000 to $16,000, while a year's subscription to the OAG costs $98.44.[20] Consequently, very few travel agencies or corporate travel offices can justify the cost of SCIP tapes. And even those airlines, travel agents, and corporations which have access to SCIP tapes also subscribe to the OAG and use it in conjunction with the SCIP tapes; this is because SCIP tapes normally contain less flight schedule information than does the OAG. Moreover, Donnelley itself is a major supplier of this purported substitute to the OAG, as it supplies SCIP tapes to twenty-five certificated carriers. Transcript, at 4127.

Most air carriers print and distribute their own individual timetables containing flight schedule information. These timetables generally contain flight schedule listings only for the carrier distributing them, and they usually have only local or limited distribution. These timetables are expensive: one witness testified that each timetable cost his company approximately $.50. Transcript, at 840. Airlines, travel

[20] *Cf. Int'l Boxing Club* v. *United States*, 358 U.S. 242 (1959), where significant price differences were emphasized in carving out a separate product market.

agents, and corporate travel offices normally do not use airlines' individual timetables to obtain flight information. [22]

The OAG is recognized in the industry as being unique and indispensable; there are substantial price differences between the OAG and its purported substitutes; and there are distinct users of the OAG for whom no other product will do. For these reasons, we hold that the OAG comprises a separate product market. *See Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).

B. *Competition Between Certificated and Non-Certificated Carriers.*

The ALJ found that commuter and intra-state carriers compete with certificated carriers. *Initial Decision,* at pp. 22–27, Findings 67–92. Donnelley asserts that there is only *de minimis* competition between certificated and non-certificated carriers and that the ALJ's finding should be reversed. We believe the ALJ's finding is supported by the record.

In April 1975 there were 432 city-pairs served by direct flights of both commuter and certificated carriers. CX 135E. In the one-year periods ending June 30, 1973 and June 30, 1974, commuter and certificated carriers competed in eighty-two city-pair markets in which passengers totaled 1,000 or more. For the period ending in June 1973 commuters accounted for almost 1,000,000 passengers in those eighty-two markets, while certificated carriers accounted for over 4,000,000 passengers. The passengers flying on commuter air carriers in those eighty-two markets during that period represented 17.5% of all commuter traffic in the contiguous forty-eight states for the period. For the period ending in June 1974 commuter carriers had almost 900,000 passengers in the eighty-two markets, and certificated carriers had over 4,000,000. The 900,000 commuter passengers represented 19.6% of all commuter traffic in the forty-eight states for that period. A report prepared by the CAB entitled "Commuter Carrier-Certificated Carrier Competition" states that there were "twenty-four markets in which commuters generated 10,000 or more passengers in [fiscal year] 1973 *in competition* with certificated carriers . . . " and "24 markets in which certificated carriers generated 50,000 or more . . . passengers in [fiscal year] 1973 *in competition* with commuter carriers . . . " CX 61 (emphasis added.) The report went on to say that "[c]ommuter market shares ranged from 0.49% to 35.31%."[21] [23]

Donnelley argues that competition is *de minimis* because the total number of passengers carried by commuter carriers in the period

[21] A CAB report by the same name prepared for the year ending June 30, 1974 had similar findings.

ending in June 1974 comprised less than one-half of 1% of the 190,000,000 passengers carried by certificated air carriers in scheduled domestic passenger service in 1974. But the same argument advanced by Donnelley here was rejected by the Second Circuit in *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir. 1961). In that case linen suppliers were charged with violating § 1 of the Sherman Act by allocating out-of-state customers. The court stated:

> Appellants seemingly rely on a *de minimis* exception; they argue that interstate customers' service amounts to only 1% of all service. But (even accepting appellants' figures) such 1% amounted in 1954 to $523,168 worth of business, a "volume of business . . . [which] cannot be said to be insignificant or insubstantial." That this substantial amount of interstate commerce amounted to only 1% of the total industry's volume is without significance. *Id.* at 573 (citations omitted).

See also International Salt Co. v. *United States*, 332 U.S. 392 (1947). If $500,000 is more than *de minimis* competition, then *a fortiori* the tens of millions of dollars of revenues involved in the carrying of passengers by commuter and certificated carriers in the city-pairs in which they compete is not *de minimis.*

The ALJ also found that there has been substantial competition between certificated and intra-state carriers. *See Initial Decision*, at p. 28, Findings 93–97. We concur in this finding. Certificated and intra-state carriers often serve the same city-pairs. Southwest Airlines, an intra-state carrier, competes in all twenty-five of its city pairs with certificated carriers. Air Florida and Air California, two other intra-state carriers, also compete with certificated carriers in various city-pairs. In addition, both an expert witness called by Donnelley and Donnelley's own Publication Manager testified that intra-state carriers compete with certificated carriers. Transcript, at 3326–29, 3394. [24]

C. *Jurisdiction.*

Donnelley has urged strongly throughout this proceeding that the FTC lacks jurisdiction over the "subject matter" of the complaint.[22] Upon review we conclude that the FTC does have jurisdiction in this proceeding.

[22] Early in the proceeding, Donnelley moved to dismiss the complaint on the grounds of lack of jurisdiction. The ALJ denied this motion and refused to certify the question to the Commission; and the Commission denied Donnelley's extraordinary appeal. Respondent thereupon sought injunctive relief in the United States District Court for the Northern District of Illinois. That court held that the FTC lacked jurisdiction and enjoined the Commission from further proceedings. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,721 (N.D. Ill. 1977). Shortly thereafter the same court vacated its order on the grounds that Donnelley had failed to exhaust its administrative remedies. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977–2] Trade Cas. (CCH) ¶61,783 (N.D. Ill. 1977). Both sides appealed and the Court of Appeals for the Seventh Circuit held that venue was improper in the Northern District of Illinois. *The Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). The case was then transferred to the United States District Court for the District of Columbia, where the court dismissed Donnelley's complaint for failure to exhaust administrative remedies.

Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1), bans unfair methods of competition and unfair or deceptive acts or practices. Section 5(a)(2), 15 U.S.C. 45(a)(2), states that the FTC is empowered to enforce this ban against persons, partnerships, or corporations "except banks, common carriers subject to the Acts to regulate commerce, *air carriers, and foreign air carriers subject to the Federal Aviation Act of 1958,* and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act. . . ." (Emphasis added.) On its face, this section appears to answer the question of whether the FTC has jurisdiction over Donnelley and its acts, practices, and methods of competition. Donnelley is not an air carrier or a foreign air carrier, and therefore the Commission apparently has jurisdiction. But Donnelley argues that the issue is not that simple. The key language of Section 5(a)(2) does not just exclude air carriers from *in personam* jurisdiction, Donnelley contends; rather, it excludes the whole subject of competition among air carriers from the FTC's "subject matter" jurisdiction. And this means that the FTC has no jurisdiction over this proceeding, because it "is limited exclusively to competition among air carriers." Respondent's Appeal Brief, at 8. [25]

Donnelley relies entirely on the 1921 case of *Fruit Growers' Express Inc.* v. *FTC,* 274 F. 205 (7th Cir. 1921), *cert. dismissed,* 261 U.S. 629 (1923). In that case the FTC struck down an exclusive dealing clause in a contract between Fruit Growers Express (which was not a common carrier) and certain railroads, claiming that it violated Section 3 of the Clayton Act, 15 U.S.C. 14. On appeal, the court noted that under Section 11 of the Clayton Act, 15 U.S.C. 21, jurisdiction to enforce Section 3 is divided among the FTC and certain other agencies. In relevant part, Section 11 states that jurisdiction is "vested in the Interstate Commerce Commission *where applicable to common carriers subject to the Interstate Commerce Act,* . . . and in the Federal Trade Commission where applicable to all other character of commerce . . . ." (Emphasis added.) Turning to the challenged exclusive dealing clause, the court noted that striking it from the contract would remove the railroads' only obligation to provide consideration, thus destroying the mutuality of the contract and rendering it unenforceable. This led the court to observe: "Such being the effect of the [FTC's] finding and order, the carriers were necessary parties." 274 F. at 207. The court continued:

> The words 'where applicable to common carriers' in section 11 of the Clayton Act must mean that where the facts involve common carriers, or the business of common carriers, then the jurisdiction is solely in the Interstate Commerce Commission. The action complained of involved common carriers and tended to very greatly affect their business. Respondent was therefore without jurisdiction. *Id.*

The court's holding turns on its finding that the carriers were necessary parties to an action which would impair their contractual rights, and on the fact that the "where applicable to common carriers" language of Section 11 is ambiguous and suggests subject matter jurisdiction.

The jurisdictional question on appeal before us now is different. Jurisdiction to enforce the FTC Act is vested solely in the FTC, but language in Section 5(a)(2)—"except air carriers and foreign air carriers"—operates *in personam* to exempt a very narrow class of businesses from the FTC's jurisdiction. A case more closely analagous to this case is *FTC* v. *Miller,* 549 F.2d 452 (7th Cir. 1977), involving an investigation of Morgan Drive Away, Inc., a common carrier subject to the Interstate Commerce Act. The FTC had adopted a resolution authorizing the use of compulsory process to [26]determine whether Morgan had violated Section 5 of the FTC Act—"including false or misleading advertising or misrepresentation in connection with the solicitation of persons to become owner-operators in the nationwide mobile-home transporting industry." 549 F.2d at 454. Morgan asserted that the FTC lacked jurisdiction to investigate it because it was a common carrier, pointing to Section 6(a) of the FTC Act, 15 U.S.C. 46(a), which states that the FTC shall have the power to investigate persons, partnerships, or corporations "excepting banks *and common carriers subject to the Act to regulate commerce* . . ."[23] (Emphasis added.) The FTC argued that this language did not deprive it of jurisdiction over Morgan because the investigation focused on Morgan's promotional activities, which were not subject to regulation under the Interstate Commerce Act. That is, the FTC argued that the jurisdictional exemption created in Section 6 did not operate *in personam* to exclude common carriers from FTC jurisdiction altogether, but rather only operated to exclude the FTC from "subject matter" jurisdiction over "activities" which were subject to regulation under the Interstate Commerce Act. The Court of Appeals rejected this argument, saying: "The exemption is in terms of status as a common carrier subject to the Interstate Commerce Act, not activities subject to regulation under that Act."[24] 549 F.2d at 455.

The court's language is equally applicable to the jurisdictional

[23] This Section 6 language ("excepting . . . common carriers") is almost identical to the Section 5 language quoted above ("except common carriers") and to the Section 5 language about air carriers ("except . . . air carriers"). But all of this language from Section 5 and Section 6 is different from the language of Section 11 of the Clayton Act—"where applicable to common carriers".

[24] The court did state elsewhere: "We need not decide whether the FTC is correct in its statement that the noncarrier activities of a common carrier do not fall within the scope of the Section 6 exemption." 549 F. 2d at 458. Thus, the court saved for another day the question of whether a company which engages in activities as a common carrier and in activities which are unrelated to being a common carrier would be entirely exempt from the FTC's jurisdiction, or whether its non-carrier activities might be reached by the FTC.

exemption in Section 5 for "air carriers and foreign air carriers subject to the Federal Aviation Act": the exemption is in terms of status as an air carrier subject to the Federal Aviation Act, not activities subject to regulation under that Act. [27]

In the injunction action regarding this proceeding in the Northern District of Illinois (*see* page 24 n.22, *supra*), the court held that "the phrase 'prevent corporations . . . except air carriers . . . from using unfair methods of competition' should be read to mean 'exercise jurisdiction over unfair methods of competition, except among air carriers.'"[25] [1977–2] Trade Cas. (CCH), at p. 72,943. The court relied entirely on *Fruit Growers' Express* and did not even mention *Miller* except for a citation on a side issue. *Id.* at p. 72,944. This total reliance on *Fruit Growers' Express* prompted the court to "redraft" Section 5(a)(2) of the FTC Act so as to make it identical to Section 11 of the Clayton Act, thereby making *Fruit Growers' Express* the controlling precedent.[26] The court explained that the FTC Act and the Clayton Act were both enacted in 1914 and are *in pari materia;* the purpose of Section 5(a)(2) is parallel to that of Section 11; there is some overlap between the substantive provisions of the two acts; and it would be an incongruous result for Section 11 to be different in any way from Section 5(a)(2). While the court applied a rigorous logic in its analysis, we believe it was pulling in the wrong direction. Given the fact that the *Miller* case is much more recent and is based on an additional sixty years' experience with the regulatory scheme in question, we believe Section 11 and *Fruit Growers' Express* should be brought into line with Section 5(a)(2) and *Miller*, rather than *vice versa*. It appears that the "against the grain" construction engaged in by the district court may have resulted from the following misstatement of who has the burden of establishing the contours of a special exception to a regulatory scheme:

> *Defendants [the FTC] have advanced no reason* why Congress should have exempted the subject of competition between air carriers from the FTC's jurisdiction under [28]the Clayton Act, and have given the same subject back to the FTC under §5(a)(2) of the FTC Act while simultaneously depriving it of jurisdiction over the carriers themselves.[27] *Id.* at 72,943. (Emphasis added).

[25] As we noted at page 24 fn. 22, *supra*, the district court subsequently vacated its order barring the FTC from proceeding against Donnelley.

[26] The Court took this approach in the face of its avowal that "Section 11 of the Clayton Act is more clearly phrased in subject matter jurisdiction terms than is Section 5(a)(2), and consequently *Fruit Growers' Express* does not directly control this case." [1977] Trade Cas. (CCH), at p. 72,942.

[27] The court's statement that Congress "exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act" is almost certainly incorrect in itself. The statement is apparently based on the court's belief that *Fruit Growers' Express* means that under the Clayton Act, the FTC does not have jurisdiction over any acts (by whomsoever) which affect competition among air carriers. But as we said before, the decision in *Fruit Growers' Express* turned on the fact that certain common carriers were adjudged to be necessary parties to that action. No one has even suggested that any air carriers are necessary parties to this proceeding.

Placing the burden on the FTC in this manner runs directly contrary to the Supreme Court's pronouncement that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

Even if we accept the court's approach to the jurisdictional issue, its finding of lack of jurisdiction in this proceeding is based on an erroneous factual assumption. The court stated:

> Defendants now seek to characterize the complaint as being based in part on plaintiff's abuse of its monopoly position, and the court agrees that there may be cases in which the FTC may properly exercise jurisdiction over restraints of trade in a non-exempt line of commerce despite their effect upon an exempt line. But in this case . . . [i]t is clear from the complaint that plaintiff is accused of working in cooperation with the major air carriers to stifle competition by smaller carriers. [1977–2] Trade Cas. (CCH), at 72, 943.

Thus the court's holding is based on an assumption that this is exclusively a conspiracy case. But the complaint alleges that Donnelley's acts, "both individually and in combination with others," are in violation of Section 5. Complaint ¶17. As [29]will be seen in the pages that follow, our finding of liability here is not based upon a finding of unfair competition "among air carriers." Rather, liability is based upon Donnelley's abuse of its monopoly position.

D. *Alleged Unfair Methods of Competition.*

1. The Alleged Conspiracy.

Complaint counsel allege that in 1971 Donnelley had decided to begin to publish connecting flight listings for commuter and intra-state carriers, and to combine the listings of all three classes of carriers into only two categories for each city pair—direct and connecting. They say key Donnelley officials then arranged to confer with certificated air carrier representatives at a formal meeting to determine whether the plan met with the certificated carriers' approval. At the meeting the certificated carriers voiced strong opposition to the proposal. Complaint counsel claim the Donnelley officials who attended the meeting carried this message back to their superiors, and a decision not to go through with the changes resulted. All of this adds up to an allegation that Donnelley and the certificated carriers agreed that Donnelley would not change its format so as to dispense with the listing practices challenged in this action.

If these allegations were proved, they could add up to an illegal conspiracy in restraint of trade. However, a close review of the evidence convinces us that there is some doubt whether anyone from

Donnelley entered into "an agreement, tacit or express", with the certificated carriers. *Theater Enterprises* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). The question is so close that a detailed summary of the events transpiring at the time must be set out.

As of 1971 the OAG had for many years published the direct flights of certificated, commuter, and intra-state carriers under three separate headings. And as of 1971 the OAG did not publish connecting flight listings for commuter and intra-state carriers at all. Prior to 1971 representatives of a trade association of commuter air carriers had urged Donnelley to change these policies, but Donnelley had refused.

In 1971 Parrish, who was then the Publisher of the OAG, and Howe, the Publication Manager,[28] changed their minds and concluded that commuter and intra-state connecting **[30]**flight listings should be published and that the listings of all three classes of carriers should be merged. In an August 18, 1971 memorandum entitled "Merge [sic] of Commuter Air Carrier Flights With Certificated Air Carriers",[29] Howe made a list of the "pros" and "cons" of changing Donnelley's format to incorporate these changes. He listed seven "pros", among which were simplification of the format (there would have been only two listings under each city-pair—direct flights and connecting flights—rather than the four they had then); "line savings"—that is, space saved by removing the headings "Commuters" and "Intra-state" everywhere they appeared in the OAG; "more paid connex potential"—that is, extra revenues realized from payments made to the OAG for the additional connecting flight listings; and "eventual change". Only two "cons" were listed: "certificated carrier objection" and "subscriber objections(?)".

In early September 1971 Howe and Parrish decided to discuss their idea for changing the OAG's format with representatives of the certificated carriers. They decided to go about this by presenting their proposal to the Airlines Guide Committee (the "AGC") of the Air Traffic Conference of America, which was a part of the Air Transport Association of America (the trade association of certificated carriers). The AGC had scheduled a meeting for October 7, 1971, and Howe sent the following teletype message to the AGC on September 10, 1971:

> OAG would like to discuss the merger of Certificated, Commuter and Intra-State Air Carrier schedules. OAG thoughts will be presented October 7. We would appreciate carriers coming to the meeting prepared to discuss their respective management opinions. Direct flight listings would be together chronologically as currently shown. Commuter and Intra-State Air Carriers would have the option to purchase on-line

[28] Howe reported directly to Parrish.

[29] It is clear from the contents of this memo that it is concerned with the listing of commuter and intra-state carrier connections as well.

connections with Certificated Carriers and vice versa. Only two categories of listings, direct and connections, would exist rather than the present four.

[31]On September 13, 1971 a bulletin containing the agenda for the October 7 meeting was sent to all members of the AGC. *See* CX 99. Item 7 on the agenda was entitled "Merger of Schedules". The description of this item on the agenda was in all material respects like the description in Howe's teletype message. It concluded with the statement that members "should be prepared to discuss their respective management positions."

At the AGC meeting Parrish presented the proposal for changing the format of the OAG and discussed it with the certificated carrier representatives present. At the end of the discussion, a vote was taken. *See Initial Decision*, at p. 21, Finding 63. Various persons present recorded the outcome. The official minutes of the meeting, which were distributed to all certificated carrier members and the Donnelley officials present, described it as follows: "During discussion [of Item 7] it became obvious that there was no support for the proposal, therefore, no further action was required." CX 9H. Howe's own notes state that "the carriers were with the exception of [American and National Airlines], against the merger of schedule listings." CX 10D. A subsequent memo prepared by him states that "[o]ne [certificated] carrier was concerned in that noncertificated carrier[s] had no restrictions on routes and therefore could parallel the [routes of] certificated carriers at will." CX 19C. The notes of the Allegheny representative at the meeting state: "No mix[,] vote very heavy." CX 89C. TWA's representative to the meeting wrote in a report to his superior: "[I]t was agreed not to merge the schedules." CX 66A.

Reich, who was then the Senior Vice President of Donnelley and the man with the final word on any changes in the format of the OAG (Transcript 1183–84), testified that he first learned of the October meeting shortly after it took place. He stated that he had no idea that plans had been made to discuss changes in the format of the OAG with certificated carrier representatives, and that he was surprised and distressed when he learned that this had been done. Transcript 1204–05, 1250. This testimony was not contradicted. He further testified:

I was very unhappy with Mr. Parrish because I had considered this subject to be thoroughly decided and . . . while there had been arguments advanced in favor of making this merger, I thought they had been resolved and, therefore, a proposal to change that, it seemed to me to be out of order. Transcript 1205–06.

[32]After he learned that the meeting had occurred, Reich conducted an investigation to determine what had gone on. Transcript 1775, 1889.

After the AGC meeting, and after the internal Donnelley discussions

which occurred when Reich learned of the October 7 meeting, both Parrish and Howe urged that the proposed changes in the OAG's format be made.[30] In effect, they urged that action be taken contrary to what they are accused of having agreed to with the certificated carriers. On November 29, 1971 Parrish sent a formal memo to Reich recommending that the listings of all three classes of carriers be merged, and that commuter flights be marked with a square beside the flight number.[31] *See* CX 12. By letter of December 10, 1971 Reich answered him, stating that he was opposed to merging the listings. *See* RX 111. He stated:

> I am much concerned about the reliability of the service performed by the commuter carriers as of this date both from a standpoint of adherence to schedules and safety. It would seem to me that our best present policy would be to wait until the CAB has taken a greater responsibility in connection with these carriers and has, in effect, given its seal of approval to their operations.

This letter from Reich constituted the last word on the subject, and the changes were not made.[32]

[33]In determining whether Donnelley was influenced not to change the OAG's format as a result of the October 7 meeting, we must determine whether some person at Donnelley was influenced by the meeting and can be said to have agreed, expressly or tacitly, with the certificated carriers not to change the format. Since Parrish and Howe, who attended the meeting "on behalf" of Donnelley, came away from the meeting urging that the format be changed, it is impossible to say that they were influenced by the meeting or that they agreed not to make the changes, even though some of the certificated carriers represented at the meeting believed they had agreed. Therefore, we must focus on Reich and what we can infer about his state of mind, as he was the person who had ultimate responsibility for deciding whether to go through with the proposed changes. He testified that when he first learned of the meeting and began to investigate, he was informed that the certificated carrier representatives at the meeting "didn't all feel strongly one way or the other" about the proposed changes in the format of the OAG (Transcript at 1250), and that "there was evidence that [the certificated carriers] were on both sides." (Transcript at 1218). However, Howe testified that when Reich found out about the meeting he sought out background documents to

[30] Howe testified at the hearings that he changed his mind back and forth on this matter many times. Transcript at 1832. But several days after the October 7, 1971 meeting he sent a memo to Parrish recommending merger. *See* RX 10.

[31] It is clear from the memo that Parrish was also recommending that the OAG publish connecting flight information for commuter and intra-state carriers.

[32] Except that the OAG did begin to list connecting flight information for commuter and intra-state carriers in December 1976. See the discussion of this at page 8 fn.5, *supra*.

discover what had gone on (Transcript at 1889); and given the flavor of the notes and memos prepared by Howe concerning the meeting, it is unlikely that Reich could have been told anything other than that the certificated carriers strongly opposed the proposed changes. But in any event Reich testified that even if the certificated carriers had been for the proposed changes, he still would have refused to make them:

> We would have adopted exactly the same policy we did. We were not concerned with [the certificated carriers]. That was one of the reasons I was unhappy with Parrish. This was a decision we wanted to make without any input from other sources. We were jealous you might say of our privacy in publishing the guide. Transcript at 1208.

There is no evidence that Reich, who made the decision not to change the format of the OAG, was even considering any proposed changes, or was influenced to retain the OAG's previous listing policy because of the certificated carriers' expressed desire. In light of Reich's uncontradicted [34]testimony that he made the decision on his own, we conclude that there is not adequate proof to demonstrate that a conspiracy existed.[33]

In reaching this finding, we reverse the ALJ's determination that Donnelley did conspire with certificated air carriers. The ALJ based his holding that a conspiracy existed on a finding that after the October 7 meeting with the certificated carriers, "Mr. Howe and Mr. Parrish changed their minds about merging schedules and printing commuter connections" (*id.* at p. 40), and on a finding that air carriers are "substantial customers" of Donnelley and pay it several million dollars a year for various goods and services (*id.* at p. 21, Finding 65). The evidence conclusively establishes, however, that Howe and Parrish continued to urge the changes in the OAG's format even after the October 7 meeting. And the fact that the certificated carriers had substantial leverage over Donnelley, because of their many [35] purchases from it, does not prove that Donnelley entered into an illegal agreement with those carriers. Finally, we think it is crucial that the ALJ, in setting out the evidence relating to the alleged conspiracy,

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[33] Complaint counsel point to the fact that Donnelley failed to call Parrish as a witness, noting that he actually attended the meeting as the Publisher of the OAG. They argue that this failure to call him should give rise to an inference unfavorable to Donnelley, and cite *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), as support. In that case, the Supreme Court did draw an inference unfavorable to the defendants based on their failure to call persons with key knowledge of the events to testify. *See also Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 175 (1973); *NLRB* V. *Dorn's Transp. Co.*, 405 F.2d 706, 713 (2d Cir. 1969). But in *Interstate Circuit*, the defendants "failed to tender the testimony, at their command, of any officer or agent . . . who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action." 306 U.S. at 225. By contrast, in this proceeding Reich and Howe, who may be said to have had information equal to Parrish in regard to the facts in question, testified at length. This is important because "there is a general limitation . . . that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved." *Wigmore on Evidence*, § 287, at pp. 286–87 (*Little, Brown & Co.* 1977) (emphasis in the original); *see also NLRB* v. *Dorn's Transp. Co.*, *supra*, at 713 (the testimony of the person who was not called was "critical"). We see no basis on which to conclude that Parrish, if he had testified, would have provided information "superior" to that of Howe and Reich.

failed to consider Reich's role at all. As we said earlier, Reich was the pivotal figure in the conspiracy drama, and his decision not to carry out the proposed changes in the OAG was not shown to be the product of an agreement.

E. *Duty of a Monopolist.*

1. The legal standard.

Since we find that a conspiracy between Donnelley and the certificated carriers was not established, we must turn to the question of whether Donnelley, as a monopolist, had some duty under the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage. Stated another way, we must determine whether, as a matter of law, the owner of a "scarce resource"—here, the OAG—must exploit that resource in a manner which creates no unjustified or invidious distinctions among competitors seeking access to that scarce resource.[34] If it is determined that Donnelley did have such a legal duty, then we must consider whether Donnelley breached this duty and thereby violated the FTC Act, by failing: (a) to publish connecting flight information for commuter carriers; and/or (b) to combine the flight schedule listings of all three classes of carriers. **[36]**

It is important to note how this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations. In *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass 1953), *aff'd per curiam,* 347 U.S. 521 (1954), the court held that United Shoe had monopolized the market in shoe machinery in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The court's holding was based on a finding that United Shoe had obtained its monopoly power by, *inter alia,* engaging in practices which had "operated as barriers to competition". 110 F. Supp. at 297. Foremost among these was its "lease-only" policy, under which it refused to sell its machines. Because this policy eliminated a "second-hand" market in shoe machinery and

[34] Previous discussions of whether a monopolist has some duty not to discriminate have typically stated the issue so as to involve a monopolist's treatment of its customers or suppliers. In this case, air carriers are required to pay for most connecting flight listings, so with regard to Donnelley's failure to list certain connections, we are considering its behavior toward customers of a sort. Direct flight listings, on the other hand, are published in the OAG free; therefore, with regard to Donnelley's failure to combine the listings of all three classes of carriers, we cannot say that the air carriers are customers or suppliers. But whether the affected carriers sell to Donnelley or purchase from it is relatively unimportant. What is important is that, due to Donnelley's monopoly power in the market of information about scheduled passenger air transportation, the OAG is a scarce resource to which an air carrier must have access if it is to compete effectively.

raised barriers to new entrants, it was found to have injured United Shoe's actual and potential competitors in the production of shoe machinery and, in turn, to have helped maintain United Shoe's existing monopoly power. Here, by contrast, none of Donnelley's challenged acts is alleged to have maintained or enhanced its monopoly power in the market the OAG dominates.

In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), Otter Tail was a vertically integrated company which generated electric power, transported it over its electric transmission lines, and distributed it "at retail" to towns in its geographic area. Otter Tail had a monopoly in electric transmission lines in the area. When several towns refused to renew Otter Tail's franchise to distribute power at retail (having chosen to undertake this operation for themselves), Otter Tail refused to supply electric power at wholesale to the towns or to allow its electric transmission lines to be used to transport power from elsewhere. The Supreme Court found a violation of Section 2 of the Sherman Act. One of the grounds for this holding was that Otter Tail had used its monopoly power in one market (transmission lines) to enhance a monopoly in another market (retail distribution).[35]

[37]In this case though, Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market.

The question we are presented with is outside the mainstream of law concerning monopolies and monopolization. Indeed, there is very little law squarely on point. The seminal case regarding our question is *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd sub nom. LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966) (*"LaPeyre"*). In *LaPeyre*, the Peelers Company held certain patents which gave it a monopoly in manufacturing and distributing machinery which peeled shrimp. This machinery was virtually indispensable in the shrimp canning industry because of the high cost of peeling shrimp by hand. Peelers had a lease-only policy, and their leasing charge was two times higher for canners located in the Northwest United States than for those located on the Gulf Coast. Peelers explained that the reason for this difference was that the Northwest shrimp were smaller than the Gulf Coast shrimp and required twice as much hand labor to process. Peelers argued that even though a machine to process the smaller Northwest shrimp cost no more to build or maintain than a machine to process the larger Gulf

[35] *See also Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), where the court upheld a cause of action alleging that the only licensed television station in a Florida town had used its monopoly in broadcasting to further its plan to create a monopoly in the preparation of television advertising. The court stated: "The theory is that [defendants] used their legal monopoly power in a separate but related field in which a monopolistic regulated industry is not the national policy." *Cf. United States* v. *Griffith*, 334 U.S. 100 (1948), for an example of horizontal extension of market power from one geographic market to another.

Coast shrimp, their machines were substitutes for hand labor and they were entitled to set the leasing charge for the machines so as to reflect the amount of hand labor saved. In essence, their claim was that they were maximizing their profits by setting the price in each area to reflect what the market would bear.

The same family which owned Peelers Company also owned Grand Caillou, a shrimp canning business on the Gulf Coast. The Commission seized on this fact and held that Peelers' discriminatory pricing policy was an unfair method of competition under Section 5 because it was intended to protect Grand Caillou from the competition of the Northwest canners. In a thoughtful and prescient concurring opinion, Commissioner Elman took a slightly different approach:

> [T]he problem of this case is . . . the duty, if any, of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers.
>
> . . . Respondents enjoy a complete monopoly of an economically significant and commercially important product market, *i.e.*, machinery for processing shrimp for canning purposes. Firms possessing monopoly power . . . are . . . subject, under the antitrust laws, to some [38]of the obligations of fair and equal treatment borne by publicly regulated utilities. *See, e.g.*, *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R. R. Assn..*, 224 U.S. 383. A course of conduct that would be lawful if engaged in by a non-monopolist may, therefore, be an unfair method of competition when engaged in by a monopolist.
>
> . . . . Respondents, by charging a monopolist's discriminatory price, have prevented the equalization of processing costs made possible by the invention of shrimp processing machinery, and have thereby prevented Northwest canners from competing effectively.
>
> . . . The result, which is not dictated by efficiency . . . but by monopoly power, is clearly opposed to the objectives of anti-trust policy . . . . In the circumstances respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power. It has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5. 65 F.T.C. at 867–69.

On appeal, the Fifth Circuit affirmed the idea of a special obligation on the part of a monopolist not to injure customers:

> [T]he problem of this case is . . . the duty of a lawful monopolist to conduct its business in such a way as to avoid inflicting competitive injury on a class of customers. . . . The majority found that petitioners were attempting to protect their own interests as shrimp canners (Grand Caillou) from the competition of the Northwest canners. Commissioner Elman did not agree on the question of motive. His rationale was that the petitioners were simply attempting to maximize their profits, and that they were charging what the traffic would bear with, as it happens, discriminatory results. We need not resolve these contrary findings as to motive. [39]
>
> Both the majority and Commissioner Elman found that the central characteristic was the same—the utilization of monopoly power in one market resulting in discrimination

and the curtailment of competition in another. . . . [T]here is abundant evidence in the record in support of the Commission's conclusion that Peelers leasing procedure is innately discriminatory and anti-competitive in its effect and that in circumstances of the instant case, the refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5." 366 F.2d at 120–21.

In the recent case of *Fulton* v. *Hecht*, 580 F.2d 1243 (5th Cir. 1978), the Fifth Circuit reaffirmed the Commission's approach in *LaPeyre*. There, a South Florida dog-track operation, the alleged monopolist, refused to renew its racing contract with the plaintiff, who raised and raced greyhounds. Plaintiff claimed this action was taken because of unfavorable testimony he had given about defendant before the state board which regulated dog tracks. Sidestepping the issue of whether defendant possessed monopoly power, the court held that plaintiff had failed to make out a conventional Section 2 case "because he did not present any evidence that [defendant] used its power to enhance or maintain its position." *Id.* at 1247. The court then moved to plaintiff's alternative claim that under Section 2 "a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent market." *Id.* The court held that defendant had no such duty. But it said:

This is not to say that a monopolist's behavior having inevitable anticompetitive or other undesirable economic effects solely in an adjacent market can never violate any of the antitrust statutes. E.g., this court has held that § 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45, prohibits a monopolist from discriminating between buyers in the price he charges for his product. See *LaPeyre* v. *FTC*, 366 F. 2d 117 (5th Cir. 1966). Thus, under §5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an **[40]**adjacent market. Such a duty is no help to the instant plaintiff because his action is based on § 2 of the Sherman Act, and there is no private cause of action for violation of the FTC Act. *Id.* at 1249 fn.

See also Laitrim Corp. v. *King Crab, Inc.*, 244 F. Supp. 9 (D. Al. 1965); *cf. Peelers Co.* v. *Wendt*, 260 F. Supp. 193 (W.D. Wash. 1966).

Aside from the precedent cited above, there are collateral lines of authority which support imposition of some duty on a monopolist not to discriminate in dealing with persons who compete with one another in an adjacent market. Such a duty—which we will call a duty not to be "arbitrary"[36] —would be consistent with common law principles of fair dealing, such as those that apply to innkeepers, common carriers, and businesses affected with a public interest. *See* Sullivan, *Antitrust*, § 48, at p. 125 (West 1977). Judge Learned Hand once stated that "Congress has incorporated into the Anti-Trust Acts the changing standards of

[36] *See* pages 44–45, *infra*, for a discussion of what we mean by the term arbitrary.

the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States* v. *Associated Press,* 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945).

Imposing on a monopolist a duty—whether the standard is not to be unreasonable or not to be arbitrary—would also be consistent with action taken by the Supreme Court in important joint venture cases. In *United States* v. *Terminal Railroad Ass'n.,* 224 U.S. 383 (1912), several railroad companies had joined together to form the Terminal Railroad Association, which had gained control of all the rail routes of access to St. Louis. These "proprietary companies" agreed among themselves that unanimous consent would be required before a non-member railroad could be admitted to the Association or use the facilities. The Supreme Court held that the combination of all the routes of access under the exclusive ownership and control of less than all the railroad companies needing to use them constituted a violation of both Section 1 and Section 2 of the Sherman Act. Significantly, from the point of view of the case now before us, the Court ordered the Association to provide that all other railroads could become members of the Association, or use the Association's facilities, on reasonable and non-discriminatory terms. In *Associated Press* v. *United States, supra,* more than 1200 newspapers belonged to Associated Press ("AP"), a cooperative **[41]**association engaged in the collection, assembly, and dissemination of news. AP By-Laws prohibited all members from selling news to non-members, and granted each member power to block its non-member competitors from membership. The Court found that, although AP did not have a monopoly in its field, it was the largest news agency and denial of an opportunity to acquire news from it could be a significant disadvantage to "the publication of competitive newspapers." *Id.* at 13. The Court held that the restrictive By-Laws constituted a violation of Section 1 and entered an order stating that AP could not maintain By-Laws which permitted discrimination against applicants-for-membership who competed with existing members.

Those two cases are different from the case at hand in that they both involved an association of horizontal competitors who controlled a competitively important facility that "unassociated" competitors lacked and could not reproduce. *See* III Areeda and Turner, *Antitrust Law,* § 729g, at p. 243 (Little, Brown & Co. 1978). Nevertheless, the Court's orders demonstrate a concern that "scarce resources" be made available on a non-discriminatory basis. *Cf. Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). And if a duty not to discriminate unreasonably can be imposed on a joint venture conferring significant competitive advantages on its competitor-members, it is a small step to

impose a duty not to be arbitrary on a monopolist who controls a scarce resource which cannot be duplicated by the joint efforts of companies seeking to use it.

Policy reasons for imposing a duty not to be arbitrary are compelling. Since we are dealing with a monopolist, the victimized customer or supplier cannot turn to an alternative source. Thus, a refusal by the monopolist to deal, or to deal otherwise than on discriminatory terms, essentially means the disfavored person suffers a competitive disadvantage which cannot be avoided. Such a result should not come about from an arbitrary decision by the monopolist. Moreover, arbitrary decisions may affect resource allocation in the adjacent market—that is, favor one competitor over another for reasons entirely divorced from considerations of efficiency or willingness of the disfavored seller to compete effectively. *See* Sullivan, *supra,* § 48, at p. 131. It is inconsistent with the fundamental goals of antitrust to permit such results if they can be avoided at acceptable costs. [42]

Formidable policy reasons have been advanced in opposition to the existence of such a duty. For example, it has been argued that banning arbitrary refusals to deal by monopolists would place antitrust enforcers in the undesirable position of determining the legality of refusals based on social, political, or even personal reasons. The example has been given of a monopoly movie theater which refuses to admit men with long hair, or a monopoly newspaper which refuses to publish advertising from cigarette manufacturers. *See* III Areeda and Turner, *supra,* § 736a, pp. 270–71. But under the standard we are enunciating now, neither of these examples would trigger antitrust scrutiny. Presumably there is no competition among persons who attend movies, and therefore arbitrarily excluding one group of patrons or another would not inflict a competitive injury. Similarly, refusing to publish ads for all cigarette companies would not place any of those companies at a disadvantage *vis-a-vis* a competitor. Certainly, it would be unwise to offer antitrust enforcement as a knight errant, bound to right every wrong inflicted by dominant companies; the goal here rather is to protect a *competitive* process by outlawing arbitrary monopoly behavior that inflicts a competitive injury.[37] But even when it is so limited, it is probably true that imposing a duty not to be

[37] The result here may be inconsistent to some extent with the theory of the *Colgate* doctrine, *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919). In *Colgate* the court recognized the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal", at least in the absence of any purpose to create or maintain a monopoly. Here there is no such purpose, but we believe the philosophy of *Colgate* must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way.

arbitrary will require antitrust enforcers to occasionally pass on the legality of refusals based on social, political, or personal reasons.[38] However, notions of fair dealing are part of the inheritance antitrust law received from [43]the common law.[39] *Cf. United States* v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943); Sullivan, *supra*, § 48, at p. 125. And this inheritance should not be shunned because it may produce hard cases.

Another reason often advanced in opposition to imposing a duty not to be arbitrary is that refusals to deal at all will not be the only question presented; rather, there will be questions concerning discriminatory terms which do not amount to a total refusal to deal. Such questions, it is argued, will inevitably lead courts into complex issues regarding what constitutes a reasonable price, whether terms are really comparable, and so on. Thus, an order directing a seller to deal on reasonable terms, or to not be arbitrary, will lead a court or agency to specify what constitutes reasonable terms and to police compliance over time—a regulatory role that courts have wisely shunned whenever possible. Since these problems are seen as unavoidable, it is urged that this problem should be left to the legislature.

We agree that it is generally undesirable for courts to place themselves in a position of monitoring the pricing activities or other variable, on-going activities of a monopolist. But we are reviewing a refusal by Donnelley to list certain connecting flight information, and to group the listings of all carriers together—matters not involving pricing questions at all. As is demonstrated in the application of the law to the facts of this case, *infra*, we feel comfortable scrutinizing Donnelley's conduct on the two challenged issues to determine whether the policies were arbitrary, and drafting an order which will not involve [44]unusual supervisory burdens.[40] In addition, we feel that this is not necessarily an area that should be left to the legislature. There are too many varied bottleneck monopolies in this country to expect that the problem would lend itself to resolution through a single sweeping formulation. On the contrary, this is a prime area for the

[38] Consider, for example, a monopoly newspaper refusing to take ads from a particular cigarette company because of the style of prior ads or the political views of its president.

[39] Indeed, "fairness" is the express standard mandated by Congress in Section 5 of the FTC Act. Since this proceeding was instituted under Section 5, we have no occasion to decide whether any similar duty not to be arbitrary can be imposed on monopolists under Section 2. We see no persuasive reason, however, why a similar duty would not arise under the Sherman Act.

[40] It is important to note the qualifying conditions that apply here. As already noted, the arbitrary action by a monopolist must cause a competitive injury, and the doctrine is more easily applied where it does not put the court in an on-going regulatory role. In addition, this is not a case where a seller is attempting to go out of business and the court is asked to mandate continued operations; here it's clear that the OAG will continue to publish and the only issue involves its format. Finally, an order mandating a certain format in publication would not require the OAG to increase its capacity significantly or incur other major expenses. There, too, a court might be reluctant to act since it could not guarantee the monopolist a return on investment necessary to expand capacity or make major changes in operations. *See* III Areeda & Turner, *supra*, § 729g at p. 243 n.25.

case-by-case approach embodied in the common law and carried out by adjudicative tribunals. Moreover, by commanding the Commission to seek out and stop "unfair methods of competition", the legislature has already spoken. That standard, like the common law, was meant to be flexible and capable of application to new and changing economic conditions.

We come finally to the question of how to define the term "arbitrary." In spite of the broad language in *LaPeyre* and *Fulton* v. *Hecht, supra*, we do not suggest that a monopolist must always deal on precisely equal terms or that a court or the Commission should measure the reasonableness of a monopolist's conduct *vis-a-vis* those with whom it deals against an inflexible standard. Rather, we should limit ourselves to a concern with conduct which results in a substantial injury to competition and lacks substantial business justification. In examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration. Where there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers, or others wishing to deal with it. [45]

Of course, we cannot in this opinion anticipate and react to the multitude of fact situations that could arise. Our application of this standard to the facts of Donnelley's publication policies should provide some indication of what we mean by "arbitrary".

2. Applying the legal standard to Donnelley's acts.

We believe Donnelley's failure to list connecting flight information for commuter carriers was arbitrary and in violation of the standard set out above.[41] The discussion at pages 7–9, *supra*, demonstrates that the failure to list this information caused commuter air carriers significant competitive injury. On appeal, Donnelley has offered no explanation whatsoever for its refusal to list commuter connecting flights, and we can conceive of no reason, particularly in light of the fact that Donnelley changed its policy on this score with apparent ease and no ill effects after the complaint in this case was issued.

From documents introduced at the hearing, it appears that Donnelley viewed the issue of listing commuter and intra-state connecting flights as being tied to the issue of merging the listings of all three classes of carriers (*see, e.g.*, CX 11; CX 12B), and decided not to list such connecting flights (until 1976, at least) because it had decided not to

[41] As we said at p. 7 fn.4, *supra*, there was no showing that Donnelley's failure to list intra-state connecting flights caused those carriers any competitive injury, and therefore we do not hold that such failure constituted a violation of Section 5.

merge the listings of all three classes of carriers. But in an internal Donnelley report prepared in 1972, it was revealed that commuter and intra-state connections could be included in the OAG in separate groupings for only $6000. Yet Donnelley did not change its format to include them until December 1976, eight months after this suit was brought. Furthermore, as we said before, Donnelley has made no mention [46]of any adverse effects resulting from the 1976 change in this policy. We hold that Donnelley's failure to list commuter connecting flights was arbitrary, caused commuter air carriers significant competitive injury, and constituted a violation of Section 5.[42]

Donnelley's failure to merge the listings of non-certificated carriers with those of certificated carriers has also caused significant competitive injury to non-certificated carriers. This is so because most users of the OAG read the listings of flights between a city-pair from top to bottom and pick the first convenient flight; therefore, listing the flights of certificated carriers before the flights of non-certificated carriers often results in users picking a certificated flight without even looking at the listings for non-certificated carriers. *See* pages 13–17, *supra*. [47]

We cannot say, however, that the failure to merge the listings of all three classes of carriers was arbitrary. Donnelley states that its separate listing policy is justified because each of the three classes of carriers has a different legal status and provides a fundamentally different level of service. They argue that separate listing is therefore required to put the OAG's users on notice as to what level of service is being offered in connection with a particular flight. In rebuttal, complaint counsel established that the differences between the three classes of carriers are less extreme than Donnelley claimed. *See* pages 12–17, *supra*. Complaint counsel also showed that Donnelley has been less than perfectly pure in carrying out its separate listing policy, as it lists the flights of commuter replacement carriers and some commuter-type foreign air carriers with the flights of certificated carriers. *See* pages 17–20, *supra*.

On balance, we find that Donnelley had a substantial business

[42] On appeal, Donnelley argues that no order should be entered regarding the publishing of connecting flight information, because it began to publish such information in 1976 and there is no evidence that it is likely to stop. But we do not believe that the discontinuance of a practice eight months after a complaint is issued against it is anything more than a reaction to the suit. *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960). Accordingly, we have entered an order provision regarding the listing of connecting flight information. And although we do not hold that Donnelley's failure to publish intra-state connections violated Section 5 (*see* page 7 fn.4, *supra*), the order in this case prohibits Donnelley from arbitrarily discriminating against *any* carrier or class of carriers in the listing of connecting flight information. We believe it is reasonable to extend the order to all air carriers because, even though complaint counsel did not attempt to show that intra-state carriers had been injured by not having their connecting flights listed, it is reasonable to assume that a failure to list the connecting flights of any class of air carrier would result in a competitive injury to that class. Extending the order in this way will serve to prevent future violations similar to those found here and is justified under our wide discretion to fashion "relief to restrain other like or related unlawful acts." *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959).

justification for its separate listing policy. The decision not to merge commuters' listings was based on Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers. And with respect to intra-state carriers, it appears that the legal requirement that these carriers not accept passengers or baggage engaged in an interstate journey led Donnelley officials to conclude that intra-state carriers should be carefully noted in the OAG as being different from other carriers. While we might have decided that it would be better and fairer to combine the listings of all three classes of carriers and denote commuter and intra-state flights by the use of some symbol, we cannot say that the different course Donnelley chose was so completely lacking in reasoned support as to be arbitrary.

F. *The First Amendment.*

The order entered by the ALJ in this case prohibited Donnelley from discriminating among the three classes of carriers in the order of listing of their flights or in the publication of connecting flight information. On appeal, Donnelley asserts that both of these prohibitions abridge their First Amendment rights and are unconstitutional. Since we reverse the ALJ's finding that Donnelley's failure to merge the listings of all three classes of carriers was in violation of the antitrust laws, we concern ourselves only with Donnelley's claim regarding connecting flight listings. And we reject Donnelley's contention that an order provision which relates to the content of the OAG is unconstitutional. [48]

Donnelley has engaged in conduct which violates Section 5 of the FTC Act, 15 U.S.C. 45. Given this fact, we are required to devise "a reasonable method of eliminating the consequences of the illegal conduct." *Nat'l Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978). The only conceivable method of remedying the consequences of Donnelley's prior illegal conduct is to order them not to discriminate arbitrarily against any air carrier or class of air carriers in the listing of connecting flights. The effect of this order may be to require Donnelley to publish information in the OAG which it might otherwise choose not to (as, indeed, it has in the past); but that does not mean that the FTC, as an arm of the state, has impermissibly intruded on Donnelley's First Amendment rights. In *Nat'l Soc'y of Professional Eng'rs, supra*, the district court had found the Society guilty of a violation of the antitrust laws for promulgating an ethical canon which prohibited competitive bidding; accordingly, it entered an order prohibiting the Society from adopting any policy statement, guideline,

etc., which stated or implied that competitive bidding is unethical. The Society argued before the Supreme Court that this order abridged its First Amendment rights. The Court dismissed this argument in short order:

> Having found the society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does "not make it . . . impossible ever to enforce laws against agreements in restraint of trade. . . ." In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may infringe upon rights that would otherwise be constitutionally protected, but those protections do not prevent **[49]**it from remedying the antitrust violations. *Id.* at 697 (citations omitted).

Cf. Lorain Journal v. *United States*, 342 U.S. 143, 155–56 (1951). We believe this language is dispositive of the First Amendment issue raised by Donnelley.

In reaching this conclusion, we reject Donnelley's contention that *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), is controlling. In that case the Court was required to pass upon the constitutionality of a Florida statute requiring any newspaper which assailed the personal character or official record of any candidate for political office to print free of cost any reply the candidate might wish to make. The Court found the statute violative of the First Amendment, but the language it used in doing so left it clear that the Court was talking about "political" speech and the special role of newspapers in the dissemination of such speech:

> [U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate. . . . A newspaper is more than a passive receptacle or conduit for news, comment and advertising. *Id.* at 257–58.

The OAG, by contrast, is not a newspaper, and it is *not even* a "passive receptacle or conduit for news, comment, and advertising"—it is a passive receptacle only for "commercial" speech.[43] Of course, the fact that the OAG **[50]**is not a newspaper and contains only commercial speech does not mean that it is not entitled to First Amendment

[43] Though not all of the listings contained in the OAG are paid for by the carrier involved, we believe the information contained therein still qualifies as commercial speech because it is information as to who is offering what service and at what price. *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Furthermore, the information contained in the OAG serves as the basis on which millions of private economic decisions are made, which in the aggregate have a substantial effect on how certain resources are allocated. *See id.*

protection. *See, e.g., Virginia State Bd. of Pharmacy, supra.*; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). But it does mean that it is not entitled to the same high level of protection that is applicable to other forms of speech. *See Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman* v. *Rogers* 47 U.S.L.W. 4751 (S.Ct. Feb. 20, 1979). We believe that the commercial speech in question in this case is radically different from the political speech involved in *Tornillo*, and that that case is therefore not controlling.

Concurring and Dissenting Opinion of Commissioner Bailey

I concur in this Opinion of the Commission with one exception: based on the legal standard set forth and a practical examination of the record evidence, I would go further than the majority and order Reuben Donnelley to merge all listings of competing certificated, commuter and intrastate flights.

The majority Opinion poses the policy issue presented in this matter to be ". . . whether antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, but which are arbitrary and result in competitive injury to customers, suppliers, or others vulnerable to its monopoly power."[1]

The majority's answer, in which I concur, is: antitrust liability may attach to practices of a monopolist which are not related to achieving or maintaining its monopoly power, if they are "arbitrary," which is defined as "conduct which results in a substantial injury to competition and lacks substantial business justification."[2]

Respondent was found to engage in two practices which inflicted substantial competitive injury. Its failure to list the connecting flights of commuter airlines was found to deprive the commuters of "a primary marketing tool with respect to a large portion of their business,"[3] and to afford the certificated carriers a "significant competitive advantage."[4] Likewise, respondent's failure to merge the listings of competing certificated, commuter and intrastate flights was found to cause "significant competitive injury to non-certificated carriers."[5] [2]

The majority found that respondent's failure to list commuter connecting flights was arbitrary, i.e. a practice inflicting substantial competitive injury and lacking in substantial business justification. I

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1 Slip Opinion at 2.
2 Slip Opinion at 44.
3 Slip Opinion at 9.
4 Slip Opinion at 8.
5 Slip Opinion at 46.

agree, noting that respondent offered no justification at all for this practice.

The majority found that respondent's failure to merge competing certificated, commuter and intrastate flights was not arbitrary because . . . "on balance" it finds that "Donnelley had a substantial business justification for its separate listing policy."[6]

Thus the majority has found a lack of substantial business justification in a situation where no justification at all was advanced. In order therefore to explore the meaning of the phrase "substantial business justification" beyond such a situation, it is necessary to examine respondent's reasons, which the majority finds to be "substantial," for not merging the listings of competing certificated, commuter and intrastate carriers.

The Opinion states:

> The decision not to merge commuters' listings was based on Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers. And with respect to intra-state carriers, it appears that the legal requirement that these carriers not accept passengers or baggage engaged in an interstate journey led Donnelley officials to conclude that the intra-state carriers should be carefully noted in the OAG as being different from other carriers.[7]

It is unclear to me which one of these arguments or whether all in combination constitute the "substantial business justification" found by the majority. I therefore examine them separately.

1. *Certificated air carriers are generally faster and more comfortable than non-certificated carriers.* It is true that CAB regulations limit commuter air carriers to planes which have a capacity of no more than thirty seats and a "maximum payload" of 7500 pounds.[8] Such planes usually fly at speeds of 200 to 300 miles per hour.[9] As a result of CAB regulations, then, commuter carriers, generally, are smaller and do not fly as fast as certificated carriers. It is also true, as the ALJ noted, that commuter carriers normally fly routes averaging only about 75 miles, and that therefore "comfort" factors may not be as important to travelers as other factors such as departure and arrival times.[10] There [3]are intrastate carriers which, generally, fly planes of equivalent size at equivalent speeds as certificated carriers.[11] Respondent now discloses in the OAG through the use of symbols such things as departure and arrival time (which implicitly discloses speed); the

[6] Slip Opinion at 47.
[7] Slip Opinion at 47.
[8] Slip Opinion at 17–14 CFR 298.
[9] Initial Decision, at p. 22, Finding 71.
[10] Initial Decision, at pp. 25–26, Findings 77, 78.
[11] Initial Decision, at p. 25, Findings 72–76.

number of intermediate stops, the type of aircraft, and the availability of meals or snacks (which discloses comfort factors). The relatively sophisticated consumers who use the OAG are thus apprised of speed and comfort factors, whether the flights are merged or separately listed.

2. *Certificated carriers are generally safer than non-certificated carriers.* Two government-sponsored studies (RX 196, RX 563) show that the fatality rate per 100 million miles flown and per 100,000 departures is slightly higher for commuters than for certificated carriers. There is no safety comparison study of certificated and non-certificated carriers for the city pairs in which they compete yet it is obvious that the area of the country flown in, weather and the airports involved are major factors in air safety.[12] Though the validity of what safety evidence exists is contested, safety is plainly a major concern to air travelers. If the purpose of separate listings were to apprise travelers that a safety risk might be involved in dropping down from the first category to select a flight, it is conceivable that even the contested evidence provides a justification for respondent's listing practice. However, respondent does not list individual carriers on the basis of their safety records, nor does the OAG in any way suggest that safety is involved in the way carriers are listed. The OAG (RX 571) contains at least forty pages of prefatory material explaining the various listings and symbols used in the guide. Safety is not mentioned. Thus the relatively sophisticated consumers who use the OAG are not apprised of comparative safety factors, whether the flights are merged or separately listed.

3. *Certificated carriers provide more reliable flight information for listing in the OAG.* There are two questions here. The first is whether non-certificated carriers are less likely to fly scheduled flights listed in the OAG than are certificated carriers. The three studies of scheduling reliability in the record[13], two of which were prepared by respondent, reveal that certificated and commuter reliability in this sense is roughly equivalent. Indeed, when measured by consumer complaints filed with the CAB (CX 135), commuters come out ahead of certificated carriers. The evidence available in the record shows that in 1974 96% of scheduled commuter flights operated, which is "comparable with certificated carriers."[14] The second reliability question posed is whether commuters so often go out of business without notifying respondents that consumers are inconvenienced by the unreliability [4]of commuter listings in the OAG. There is ample evidence that small

[12] Initial Decision, at p. 36, Transcript 2662–63, 2669.

[13] CX 135, CX 189, CX 187.

[14] Initial Decision, at p. 29, Finding 101.

commuter lines regularly enter and exit the market. However, testimony establishes that approximately 90 to 95% of passengers carried by commuters travel on 50 to 60 commuter lines, firms which respondent's own documents identify as stable.[15] In any event, respondent nowhere in the guide instructs users to be wary of any scheduling unreliability on the part of its separately listed non-certificated carriers or that the listings may no longer be valid. Thus the relatively sophisticated consumer who uses the OAG is not apprised of any "reliability" factor, whether the listings are merged or separated.

4. *Intrastate carriers are listed separately because of legal restrictions barring these carriers from accepting passengers or baggage involved in interstate journeys.* This legal restriction no longer exists.[16]

5. *The justifications considered as a group.* None of these reasons which Donnelley has advanced in justification of its separate listing practice seems to me substantial enough to justify the admittedly substantial anti-competitive effects of that practice. Neither do I believe that this is an instance in which these insubstantial reasons, when added together, become substantial. What Donnelley has shown, in sum, is that there may be some differences between a certificated and a non-certificated carrier: an intrastate carrier, while it may fly planes as fast and as comfortable as a certificated carrier, only flies intrastate; a commuter aircraft is generally smaller, flies at a slower speed and may not be as "comfortable" as a certificated carrier. It is also conceivable, though I am unpersuaded by the evidence in this record, that in city pairs where they compete (which is the only case in which the listings would be merged) certificated carriers are safer.

Even if I were to consider the differences in service, singly or in combination, to justify a substantial anti-competitive injury, respondent's failure to adhere to practices consistent with its own arguments undercuts their substantiality in my mind. Respondent lists any commuter serving as a "replacement" carrier for a certificated airline with the certificated carriers and denotes it by use of a symbol.[17] Significant numbers of foreign carriers, some of which fly no larger aircraft than commuters, are undocumented as being safer, are no more or less reliable, and surely are no more preferred by travelers, yet are listed with the certificated carriers.[18] Respondent also publishes the OAG international edition in which it merges all types of carriers engaged in foreign flights.[19] Respondent also supplies SCIP tapes, in

[15] Transcript at 948, 2666; CX 135.
[16] Slip Opinion at 14, Note 11; Initial Decision, at p. 28, Finding 97.
[17] Slip Opinion at 19–20.
[18] Initial Decision, at pp. 12–13, 25, Findings 25–27, 73.
[19] Initial Decision, at p. 33, Finding 125.

which it [5]apparently merges the listings, to twenty-five certificated carriers.[20]

In sum, then, I find myself in general agreement with the majority in this case, but would only go further on the question of merging the listings. The majority says:

> While we might have decided that it would be better and fairer to combine the listings of all three classes of carriers and denote commuter and intrastate flights by the use of some symbol, we cannot say that the different course Donnelley chose was so completely lacking in reasoned support as to be arbitrary.[21]

It is a very close question. But for the reasons outlined here, I would find Donnelley's separate listing practice to be arbitrary.

Final Order

This matter having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to affirm in part and reverse in part the Initial Decision:

It is ordered, That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is entered:

I

It is ordered, That respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide - North American Edition or any successor publication, shall forthwith cease and desist from failing to publish connecting flight listings for commuter air carriers pursuant to whatever guidelines govern the publication of connecting flight listings for certificated carriers. [2]

[20] Initial Decision, at p. 33, Finding 124.

[21] Slip Opinion at 47.

II.

It is further ordered, That respondent The Reuben H. Donnelley Corporation, and its parent, subsidiaries, successors and assigns, officers, agents, representatives, employees, and any concern controlled by it (including joint ventures), directly or indirectly through any corporate or other device, in connection with the publication of the Official Airline Guide - North American Edition or any successor publication, shall forthwith cease and desist from otherwise arbitrarily discriminating against any air carrier or class of air carriers in the publication of connecting flight listings for air carriers providing scheduled passenger air transportation.

III.

It is further ordered, That respondent The Reuben H. Donnelley Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations growing out of this order.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Jan. 14, 1980

ORDER DIRECTING ISSUANCE OF COMPULSORY PROCESS

By order of November 13, 1979, the Commission directed Chief Judge Daniel Hanscom, Deputy Chief Judge Ernest Barnes, and Deputy Executive Director Barry Kefauver to file affidavits concerning the circumstances of former ALJ Harry R. Hinkes' retirement and the negotiations leading to the execution of a contract with Judge Hinkes. In that order, and in a letter sent the following day, the Commission further requested that Judge Hinkes file an affidavit concerning this matter. Judge Hanscom, Judge Barnes, and Mr. Kefauver have complied with the Commission order. Judge Hinkes has not responded to the Commission request.

For the reasons stated in its November 13, 1979 order, the Commission requires the evidence of Judge Hinkes. We accordingly determine, pursuant to Section 9 of the Federal Trade Commission Act, to require by subpoena the appearance of Judge Hinkes for purposes of responding to the questions posed to him in our letter of November 14, 1979. The General Counsel is hereby directed to prepare and issue such a subpoena, and to seek enforcement of it if necessary. Judge Hinkes shall be deemed to have complied with such subpoena if he submits, within 20 days of the date of service, the affidavit requested by our letter of November 14.

Upon receipt of Judge Hinkes' affidavit or upon the taking of his statement, the Commission intends to invite the views of the parties as to the additional information, if any, that is necessary for the resolution of this matter.

It is so ordered.

Commissioner Pitofsky not participating.

IN THE MATTER OF

W.R. GRACE & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3002. Complaint, Jan. 14, 1980—Decision, Jan. 14, 1980

This consent order requires, among other things, a New York City operator of three home improvement store chains to divest the San Jose home improvement stores within one year from the effective date of the order. Should the firm reacquire any or all of the stores as a result of the enforcement of a form of security interest, it is required to divest the reacquired assets within six months of the reacquisition.

Appearances

For the Commission: *Allee A. Ramadhan* and *Gary D. Kennedy.*

For the respondent: *James T. Halverson, Sherman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that W.R. Grace & Co. ("Grace"), a corporation subject to the jurisdiction of the Commission, has acquired the stock of Daylin, Inc. ("Daylin"), a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. Definitions

1. For the purpose of this complaint the following definitions shall apply:

(a) "Home Improvement Store" means a retail establishment primarily engaged in selling hardware and tools, wood and non-wood building materials, plumbing and electrical equipment, paint and decorating materials, and lawn and garden tools and supplies in some significant respect to do-it-yourself customers for the building, maintenance, remodeling or decorating of gardens, homes, and apartments.

(b) "San Jose Area" means the San Jose, California Standard Metropolitan Statistical Area, as those terms are defined (and that area designated) by the U.S. Bureau of the Census.

II. W.R. Grace & Co.

2. Grace is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

3. Grace is an international chemical company with interests in: (a) natural resources, (b) industrial specialty chemicals, and (c) consumer operations.

4. As part of Grace's consumer operations, Grace operates three chains of home improvement stores: Channel Companies, Inc., a subsidiary operating such stores in New Jersey, New York, Connecticut, Delaware, and Pennsylvania; Handy City, a division operating such stores in the Southeastern United States; and Orchard Supply Building Co., a division operating such stores in the San Jose Area.

5. In the year ending December 31, 1977, Grace had total assets of $1,374,600,000 and sales and operating revenues of $3,976,233,000, which generated a net income of $140,480,000. In that year, Grace home improvement stores had estimated sales of $164,500,000. In the year ending December 31, 1978, Grace home improvement stores had estimated sales of $200,000,000.

III. Daylin, Inc.

6. Prior to March 21, 1979, Daylin was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 10960 Wilshire Boulevard, Los Angeles, California. On March 21, 1979, Grace acquired Daylin, and it is presently being operated as a subsidiary of Grace.

7. At the time of its acquisition, Daylin had interests in three areas: (a) health services and products, (b) apparel specialty shops, and (c) home improvement stores (operated by its Handy Dan subsidiary under the name "Handy Dan" or under the name "Angels.")

8. The Handy Dan subsidiary operated home improvement stores in the San Jose Area.

9. In the fiscal year ending September 3, 1978, Daylin had total assets of $190,261,000 and net sales and operating revenues of $333,400,000, which generated a net income of $9,552,000. In that year, Daylin home improvement stores had estimated sales of $190,000,000.

IV. Jurisdiction

10. At all times relevant herein, Grace and Daylin have been engaged in the ownership or operation of home improvement stores in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and the businesses of Grace and Daylin are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. Tender Offer Notice

11. On January 4, 1979, Grace announced its intention to make a tender offer to purchase the outstanding common stock of Daylin at a total price of $129,067,620. The acquisition was consummated on March 21, 1979.

VI. Trade and Commerce

12. The relevant line of commerce is retail store sales in the home improvement store business.

13. Prior to March 21, 1979, Grace and Daylin were actual competitors within certain local trade areas surrounding each Grace or Daylin home improvement store located within the San Jose Area.

VII. Effects

14. The effects of the acquisition of Daylin by Grace may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Grace and Daylin in the home improvement store business in the San Jose Area will be eliminated;

(b) actual competition between competitors generally in the home improvement store business in the San Jose Area may be lessened;

(c) concentration in the home improvement store business in the San Jose Area may be increased and the possibilities for eventual deconcentration may be diminished; and

(d) mergers or acquisitions between other home improvement stores may be fostered, thus causing a further substantial lessening of competition in the home improvement store business.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

the acquisition of Daylin, Inc., a corporation, by respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent W.R. Grace & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this Order the following definitions shall apply:

1. "Grace" means W.R. Grace & Co., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut with its principal offices at Grace Plaza, 1114 Avenue of the Americas, New York, New York.

2. "Daylin" means Daylin, Inc., a corporation that prior to the time of its acquisition was organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 10960 Wilshire Boulevard, Los Angeles, California.

3. "San Jose home improvement stores" mean the following home improvement stores that were owned by Daylin and acquired by Grace:

(a) 1975 Story Road
San Jose, California

(b) 865 Blossom Hill Road
San Jose, California

(c) 761 E. El Camino Real
Sunnyvale, California

(d) 1750 S. Bascom
Campbell, California

4. "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, or other business or legal entity.

5. "Home improvement store" means a retail establishment primarily engaged in selling hardware and tools, wood and non-wood building materials, plumbing and electrical equipment, paint and decorating materials, and lawn and garden tools and supplies in some significant respect to do-it-yourself customers for the building, maintenance, remodeling or decorating of gardens, homes, and apartments.

6. "Eligible person" means any person approved by the Commission.

I

It is ordered and directed that within one (1) year of the effective date of this consent order, Grace shall divest itself of all assets, title, interests, rights, and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, equipment, inventory, and other property of whatever description of the San Jose home improvement stores subject to the terms and provisions of this consent order. Divestiture may be accomplished by offering the San Jose home improvement stores either separately or jointly.

II

It is further ordered, That divestiture shall be made only to an eligible person and shall be in a manner which preserves the assets and business of the San Jose home improvement stores as going concerns and fully effective competitors.

III

It is further ordered, That pending divestiture required by this consent order, Grace shall not cause or permit any deterioration of the assets or business specified in Paragraph I of this consent order in a manner that impairs the marketability of any such assets or business; *provided, however*, that upon application to the Commission demonstrating good cause for ceasing to operate one or more of the San Jose home improvement stores, and upon approval by the Commission, Grace may cease to operate said home improvement store or stores.

IV

It is further ordered, That the divestiture ordered and directed by this consent order shall be made in good faith and shall be absolute and unqualified; *provided, however*, that an acquirer may give and Grace may accept and enforce any bona fide lien, mortagage, deed of trust or other form of security on all or any portion of any one or more of the San Jose home improvement stores. If a security interest is accepted, in no event should such security interest be interpreted to mean that Grace has a right to participate in the operation or management of such stores. In the event that Grace as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security interest reacquires possession of any one or all of the San Jose home improvement stores, then Grace shall divest the reacquired assets in accordance with the terms of this consent order within six (6) months of the reacquisition.

V

It is further ordered, That Grace shall within ninety (90) days from the effective date of this consent order and every ninety (90) days thereafter until divestiture is completed submit in writing to the Commission a report setting forth in detail the manner and form in which proposed respondent intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required.

VI

It is further ordered, That Grace notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance with the obligations arising out of this consent order.