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THE AIRLINES MUTUAL AID PACT:
A Lesson in Escalated Economic Warfare and
Abdicated Regulatory Responsibility

WILLIAM G. MAHONEY*

THE PENDULUM of societal opinion on any particular sub-
ject, especially if that subject has an emotional appeal, tends
to opposite extremes. In labor relations, which was but recently
denominated the master-servant relationship, society rejected the
economic exploitation of the young, the poor and the ignorant with
such firmness that a relatively few years later governmental agen-
cies sometimes conclude that perhaps we have gone too far in the
protection of the employee, and that a particular industry may
require aid in its economic disputes with its employees. So it is with
the Airlines Mutual Aid Pact.'

I. THE HISTORY OF THE PACT

The original Mutual Aid Pact was substantially different from
its 1976 descendant; it is doubtful it would have been approved
by the Civil Aeronautics Board or the courts if it originally had
appeared in its present form.

The history of the Mutual Aid Pact is one of continual expan-
sion. The original agreement6 was approved by the Civil Aeronau-
tics Board because it did not hinder achievement of the objectives
of Section 102 of the Federal Aviation Act,8 while the present one

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1 Stated simply, the Mutual Aid Pact is an agreement among commercial air-
lines whereby the signatory carriers contribute certain specified monies to a sig-
natory carrier which is undergoing a strike of its employees.

6 Six-Carrier Mutual Aid Pact, 29 C.A.B. 168, 173, recon. denied, 30 C.A.B.
90 (1959).

has been approved despite the fact that (or perhaps in part even because) it alters labor-management collective bargaining balance in favor of management and places additional “restraints (upon employees) consistent with collective bargaining.” In reaching these conclusions, the Civil Aeronautics Board stepped beyond its particular and peculiar area of expertise and statutory authority and into a special area of labor relations in which it had little expertise and no policy responsibilities. In the most recent CAB decision on the pact, the two dissenting members of the Board addressed the Board’s venture into the arena of labor policy administration as a regrettably partisan identification of the public interest with an increase in management bargaining strength. The Mutual Aid Pact thus developed, with the approbation of the Civil Aeronautics Board, from a defensive posture in 1958 to an offensive posture in 1970, the year in which it was last amended.

A. The Original Mutual Aid Pact

The original Mutual Aid Pact was executed on October 30, 1958, to be effective on October 20, 1958, between American, Capital, Eastern, Pan American, TWA and United airlines. It provided

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4 Airlines Mutual Aid Agreement, CAB Order No. 73-2-110, at 8-9 and 26 (February 27, 1973).
5 Compare Outland v. C.A.B., 284 F.2d 224 (D.C. Cir. 1960); with Mutual Aid Pact Investigation, 40 C.A.B. 559, 609-10 (1964).
6 Airlines Mutual Aid Agreement, supra note 3 at 2, 8 (Minetti and Murphy, dissenting):

[W]e regret that the Board’s majority opinion here goes as far as it does in seeming to identify the public interest with strengthening the bargaining position of carrier management in airline labor disputes, which is the evident purpose of the Mutual Aid Agreement. Such an air of partisanship between management and labor by a regulatory agency is antithetical to the national labor policy, and should be strictly avoided.

* * * *

In our view, the issue is not whether the strengthening of airline management’s bargaining position which obviously results from the 1969 mutual aid amendments is a good thing per se—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike.

7 Six-Carrier Mutual Aid Pact, 29 C.A.B. 168, 169-70, recon. denied, 30 C.A.B. 90 (1959). The concept of such a mutual assistance agreement had been
mutual assistance in the event the flight operations of any air carrier party were shut down by reason of (1) a strike called to enforce union demands in excess of or opposed to the recommendations of a Presidential Emergency Board appointed under Section 10 of the Railway Labor Act; or (2) a strike called before exhaustion of the procedures of the Railway Labor Act in disputes between carriers and employees; or (3) a strike which is "otherwise unlawful." This assistance was in the form of an agreement by the air carrier parties to pay to the strike-bound carrier the increased revenues of the other carrier parties attributable to the strike, less applicable added direct expenses. These were called "windfall payments." The Pact was for one year's duration and was filed with the CAB for approval under Section 412 of the Federal Aviation Act. CAB approval was opposed by the unions which represented airline employees.

In their presentation to the Board in support of the Pact, the participating airlines argued that the Pact was necessary because of an alleged imbalance in labor-management relations in the industry. In their joint brief to the Board, the participating carriers had stated:

The basic problem is one of imbalance in labor-management relations. Unions with which the airlines bargain have become so strong and have achieved such unity of collective action that, individually, the airlines have steadily been losing the economic capacity to deal with the unions on terms approaching equality.

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under consideration by the air transport industry since late 1956. Mutual Aid Pact Investigation, 40 C.A.B. 559, 597 (1964).


9 Id.


12 The International Association of Machinists (now the International Association of Machinists and Aerospace Workers); the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (now the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees); the Air Line Pilots Association, International; the Air Line Agents Association, International; the Transport Workers Union of America, AFL-CIO, and the Flight Engineers International Association, AFL-CIO.

The carriers went on to argue that this alleged imbalance grew out of inter-union and intra-union cooperation and concerted action in connection with contract negotiations and strikes. The participating carriers also argued that the payments provided for in the original Pact were "calculated to enable a carrier to bargain more effectively" in the face of unlawful union conduct or union demands which exceeded or conflicted with the recommendations of a Presidential Emergency Board and would thereby deter strikes.\(^4\)

The CAB conducted summary proceedings on the carriers' application, which did not include an evidentiary hearing, but did include briefs and oral argument and on May 20, 1959, issued Board Order No. E-13899 approving the Pact subject to a condition, among others, that the approval would not affect the rights and obligations of the parties or their employees under the Railway Labor Act.\(^5\) Member Minetti, the only present member of the Board who participated in the 1959 consideration, dissented.\(^6\)

In the 1959 decision the Board considered whether the Pact violated the Railway Labor Act and concluded that it did not. The decision was a negative one couched in the language that "we must conclude that the unions have failed to prove their contentions that the agreement violates the Railway Labor Act."\(^7\) The decision, however, rejected the participating carriers' contentions that the CAB's inquiry was limited to the question of whether or not the Pact violated the Railway Labor Act; rather the CAB considered the question of whether the Pact threatened, by aggravation of labor disputes, to hinder achievement of the objectives set forth in Section 102 of the Federal Aviation Act. The Board stated that its range of inquiry in this area was limited to considering the impact of the Mutual Aid Pact upon the stability and efficiency in air transportation that freedom from industrial strife would provide and that matters of general policy as to labor disputes were not the province of the Board but of the Congress.\(^8\) The CAB carefully delineated its limited role in affecting national labor policy in its consideration of the "public interest" aspects of the Pact:

\(^4\) Id. at 4.
\(^6\) Id. at 179.
\(^7\) Id. at 173.
\(^8\) Id.
We next turn to the question whether the agreement threatens, by aggravation of labor disputes, to hinder achievement of the objectives set forth in section 102 of the Federal Aviation Act. The public interest which we must guard, though not broadly one of employee welfare, includes attainment of a degree of stability and efficiency in air transportation that freedom from industrial strife will provide.

The range of our inquiry, however, is limited to a determination of the effect of the agreement upon these statutory objectives. Matters of general policy as to labor disputes are not to be considered by the Board in assessing whether the agreement is adverse to the 'public interest.' It is the function of Congress, and not to the Board, to weigh the wisdom of such agreements as a factor in the furtherance of labor policies not directly related to the promotion of a sound air transportation system.19

In accord with this stated limitation of its functions in considering the Pact, the CAB found that "we must disregard allegations concerning the relative bargaining endurance of the parties unless the asserted imbalance in labor-management relations pose a threat to the development of a stable and efficient air transportation system." The Board concluded it could find no such threat: "After examining the record, we cannot conclude that the industry has been or, with the agreement, will be afflicted by such a disparity in economic power as to jeopardize the attainment of the statutory objectives."20

With this conclusion, the CAB opinion in substance rejected the carriers' principal contention regarding the problem confronting the air carriers in their labor relations: an alleged basic "imbalance in labor-management relations." Under these circumstances, the majority went ahead to approve the Pact—not on the basis that it was in the public interest, but on the negative basis that the unions had failed to make an "affirmative showing that the agreement is adverse to the objectives specified by the Congress."21

In so doing, the CAB specifically disclaimed any intent to determine whether or not the Pact was wise or beneficial in the promotion of harmony between labor and management in the air trans-

19 Id. (footnotes omitted).
20 Id.
21 Id. at 173-74 (footnotes omitted).
22 Id. at 177.
portation industry. This highly technical action of the CAB in approving the 1959 Pact appeared quite clearly in the fully quoted disclaimer of the majority opinion.\(^5\)

Member Minetti disagreed with the majority. He concluded that the Pact violated the Federal Aviation Act of 1958 and was adverse to the public interest. Member Minetti thought that "coercion" inherent in the Pact, "will destroy the practice while retaining the procedure of collective bargaining."\(^4\) His dissenting opinion emphasized the tendency of such agreements "to make belligerents of negotiators."\(^6\)

Member Minetti also emphasized the fact that the CAB did not have before it sufficient facts in relation to the scope of the Pact or its effect adequately to pass judgment upon it. He also concluded that the Pact was adverse to the public interest because it was disruptive of labor-management relations.\(^4\)

2 After painstaking review of this matter, we have concluded that the agreement must be approved. Our decision is predicated upon the standards contained in the Federal Aviation Act, and does not attempt to prescribe the most desirable method of adjusting labor-management problems. Congress has not invested the Board with the task of selecting the most salutory approach to labor-management relations; rather, Section 412(b) peremptorily commands that "The Board . . . shall by order approve any . . . agreement . . . that it does not find to be adverse to the public interest, or in violation of this Act; . . ." In performing our statutory function, we may do no more than measure the agreement against these standards in order to ascertain whether its effect would be so detrimental as to endanger achievement of the objectives laid down by Section 102 of the Act. Within this framework, the Board's order follows from the lack of any affirmative showing that the agreement is adverse to the objectives specified by the Congress. Thus our approval herein does not reflect any determination as to whether the agreement is a wise or beneficial step in the promotion of maximum harmony between labor and management generally, or in air transportation in particular. (Emphasis supplied.)

Id. (footnotes omitted).

\(^4\) Id. at 179 (italics omitted).

\(^5\) Id. at 183.

\(^6\) Member Minetti was forceful in his position, Id. at 189:

From all of the foregoing, I conclude that this mutual aid agreement must be disapproved as adverse to the public interest. The agreement strikes at the heart of the policy of the Railway Labor Act, a statute which embodies the wisdom acquired through years of trial and error in labor legislation. The public interest inherent in uninterrupted air transportation is not served by permitting management to pit itself openly and adamantly against good-faith bargaining with its employees. Air transportation will continue to progress only in an atmosphere of mutual management-labor re-
B. The 1960 and 1962 Amendments to the Mutual Aid Pact

On October 23, 1959, the six participating air carriers requested the Board to approve the continuation of the Mutual Aid Pact as constituted for a further period expiring on October 20, 1960. On March 22, 1960, before the Board had acted upon this request, the carrier participants filed an amendment to the Pact (executed on March 7, 1960) which broadened it to provide payments to struck carriers in situations where the strike had been called in the absence of a Presidential Emergency Board and despite the fact that the struck carrier had complied with the Railway Labor Act. Under the amendment, the Pact included all strikes, regardless of their underlying reason, and was the quid pro quo to the enlargement of the Pact by the inclusion of National Airlines, Braniff, Northwest, and of Continental, bringing the participating membership to ten trunk air carriers.27

The airline unions once again objected to the amended Pact and on June 20, 1960, the CAB instituted an investigation into the Pact. The Board's order recited that the ten participating carriers carried approximately ninety percent of all trunk line traffic in 1959 and that the extension of the Mutual Aid Pact both in terms of membership and scope indicated an intent to make it a long-term feature of labor-management relations in the industry.28 Before the hearings could be completed in the investigation which the Board had instituted, National and Continental had withdrawn from the Pact. National withdrew on December 31, 1961, because of dissatisfaction over the manner and methods pursued by Eastern in the implementation of its obligations under the Pact.29 On October 27, 1961, Continental gave notice of withdrawing because, in substance, Continental thought that it would always be on the paying and not the receiving end of the Pact.30

spect and cooperation. It will not do so by permitting air carriers, in a private agreement, to rewrite the Railway Labor Act by silencing the employee's voice in the determination of his wages and conditions of employment.

28 Mutual Aid Pact, 31 C.A.B. 977 (1960). This is the order instituting the investigation.
29 Record at 419, Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).
30 Id. at 390-91.
On March 26, 1962, also before the completion of the hearings in the CAB investigation, the participating carriers filed a document with the CAB executed on March 22, 1962, which further broadened the Mutual Aid Pact by amendment. This amendment provided additional payments for a carrier party in the event of a strike on the property of a carrier covered by the Pact if the so-called "windfall" payments received were less than twenty-five per cent of the struck carrier's normal air transport operations shut down as a result of the strike. This expanded Mutual Aid Pact was also the *quid pro quo* by which the number of carrier participants in the Pact was increased. The amended Pact became a part of the CAB investigation.\(^{31}\)

At these hearings, the participating air carriers advanced a different set of reasons for CAB approval of the Mutual Aid Pact. They now argued that the air transport unions had repeatedly misused their strike power against the airlines; that the airlines' remedies under existing laws were inadequate to protect against such abuses; that even where there was no abuse of the strike power the airlines were helpless to defend against "excessive and unwarranted contract terms;" and, that the mutual aid principle was necessary to protect the participating carriers against financial disaster.\(^{32}\)

The airline unions continued to oppose Pact approval on the grounds that mutual aid had hindered achievement of the objectives set forth in section 102 of the Federal Aviation Act by the aggravation of airline disputes; that the Pact defeated the purposes of the Railway Labor Act by increasing interruptions to interstate commerce thereunder; that the Pact did not foster sound economic conditions in air transportation; and that the arguments advanced by the carriers in favor of the Pact were lacking in factual substance.\(^{33}\)

On July 10, 1964, the Board, by a three to two vote, approved the Pact as amended for a period of three years subject to certain conditions.\(^{34}\) Vice Chairman Murphy concurred only to the extent of the windfall payments provided by the Pact while Mem-


\(^{32}\) Id. at 591-94.

\(^{33}\) Id. at 589-91.

\(^{34}\) Id. at 567-68.
ber Minetti voted to disapprove the Pact in its entirety.\(^{35}\) Once again, the Board’s approval was ‘negative” in nature, being based upon a kind of burden of proof resting upon the unions to demonstrate that the Pact was adverse to the public interest. The Hearing Examiner\(^{36}\) had recognized that during the period of operations under the Mutual Aid Pact there had been a steady deterioration of labor relations in the airline industry characterized by an increasing number of strikes and an increase in the severity and length of such strikes; however, the Hearing Examiner found that because of obfuscation and uncertainty produced by the crew complement controversy it could not be determined whether the Mutual Aid Pact had acted as a causative factor in this deterioration.\(^{37}\) The majority opinion accepted this reasoning, and concluded that the fact of deterioration during the period of operation of the Pact covered by the record did not raise a presumption that the deterioration was caused by the Pact; nor did this fact alone make out a \textit{prima facie} case that the Pact violated the public interest.\(^{38}\)

During the period of operation pursuant to the Board’s approval, the CAB faced effort to extend the mutual aid principle into the local service industry. This effort appeared in the form of a Mutual Aid Pact between American and Mohawk which was disapproved by a four-to-one CAB vote in Order No. E-24213, dated September 23, 1966. The Board’s opinion recited that since “there is a real prospect that Mohawk’s subsidy will be increased by reason of its participation in the agreement and we can find no offsetting public benefits justifying such a possible increase of subsidy burden, we conclude that the Agreement is adverse to the public interest.”\(^{39}\)

\section*{C. The 1967 Renewal Application}

The CAB’s 1964 aproval of the Mutual Aid Pact expired on July 19, 1967. On December 31, 1966, Continental Airlines completed its withdrawal from the Pact, leaving only seven participating air carriers (the original members plus Braniff). On May 2,

\(^{35}\) Id. at 564.

\(^{36}\) Hearing Examiners have since been designated Administrative Law Judges by the Civil Service Commission.

\(^{37}\) Mutual Aid Pact Investigation, 40 C.A.B. 559 at 627 (1964).

\(^{38}\) Id. at 562-63.

1967, these carriers filed a joint application with the CAB for permanent approval of the Pact, as amended, without further proceedings. This application was opposed by the airline unions.40 The CAB then instituted an investigation which "[would] furnish a means for a complete reexamination of the issues previously considered by the Board in the light of such new matters as may have developed since 1964." 41

The major thrust of the participating carriers in the 1967 application was the contention that the Mutual Aid Pact was essential to their financial protection against strike losses. Much of the evidence involved the forty-three day 1966 strike of the airline mechanics represented by the International Association of Machinists and Aerospace Workers against Eastern, Northwest, TWA, United and National.42

On March 7, 1969, Hearing Examiner Arthur S. Present issued his Initial Decision finding that the Mutual Aid Pact was neither adverse to the public interest nor in violation of the Federal Aviation Act of 1958, as amended, and approving the Pact for an indefinite period subject to routine conditions.43 The union parties filed a petition for discretionary review, which was granted by the Board on July 23, 1969.44 While this review was pending before the CAB, the participating carriers once again broadened the scope of the Pact by new amendments.

D. The October 31, 1969, Amendments to the Mutual Aid Pact

The new amendments were filed with the CAB, on October 31, 1969.45 On December 2, 1969, the master agreement was filed; it contained the amendments submitted to the CAB on October 31, 1969, along with certain other language. These amendments provided:

1. The levels of supplemental payments under the Pact were in-

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40 The Air Line Dispatchers Association, the Air Line Pilots Association, the Allied Pilots Association, the Brotherhood of Railway and Steamship Clerks, the Flight Engineers International Association, the International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.

41 CAB Order No. E-26000 (November 17, 1967).

42 Airlines Mutual Aid Pact, CAB Order No. 70-7-114, Initial Decision at 18-19, 23-26 (March 7, 1969).

43 Id. at 44.

44 See CAB Order No. 70-7-114 (March 7, 1969).

45 Airlines Mutual Aid Pact, CAB Order No. 70-7-114 at 1 (March 7, 1969).
creased from the twenty-five per cent of a struck carrier’s normal operating expenses—as the 1962 amendments provided—to fifty per cent during the first two weeks of a strike, forty-five per cent for the third week, forty per cent for the fourth week, and thirty-five per cent for any period thereafter;

2. The annual maximum liability of any one participating air carrier for supplemental payments was increased by doubling that liability from one-half per cent to one per cent of the carrier’s air transport operating revenue for the carrier’s previous calendar year;

3. The conditions of entry were altered to permit any trunk carrier to join the agreement by November 15, 1969, without a waiting period or back payment. (Under these arrangements, National Airlines and Western Air Lines became parties to the Pact);

4. The conditions of withdrawal were modified to provide that withdrawal might take effect at the end of any calendar year beginning December 31, 1972, provided that one year’s notice of withdrawal was given; and

5. The arbitration provisions were modified to provide that disputes concerning the amount of any payment would be subject to arbitration. Previously, only disputes over the requirement to make or the right to receive payment were subject to arbitration.46

The unions took the position that the CAB could not consider and act upon the agreement then pending before it; that agreement had been significantly altered by the October 1969 amendments and there had been no evidentiary hearing on the Pact as so amended. The unions contended that in the absence of such a hearing CAB action would violate due process. The CAB, however, on July 27, 1970, approved the agreement as amended without hearing.47 Members Murphy and Minetti dissented on the ground that the record before the CAB was incomplete. They stated that the case should be remanded to the Hearing Examiner for further proceedings.48

The unions filed a petition for reconsideration of the order and

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46 Id. at 9-10.
47 Id. at 16.
48 Id., Dissenting Statement 8, Minetti and Murphy, Members.
the CAB, upon reconsideration, determined that the Pact, as amended, had not been the subject of an evidentiary hearing, and therefore remanded it for such a hearing. Before any further procedural steps were taken, however, the carriers once again broadened the Pact by still another amendment.

E. The December 1970 Amendment to the Mutual Aid Pact for Local Service Carrier Participation

On December 10, 1970, the Pact was further expanded by amendment to permit local service carrier participation. Paragraph one of the amendment provided:

1. Notwithstanding the provisions of paragraph 2 of the agreement,
   (a) any local service carrier holding a certificate of public convenience and necessity issued by the CAB may become a party to the Agreement by forwarding signed counterpart copies of the Agreement and of this Amendment to each of the other parties to the Agreement, to every other such local service carrier, and to the CAB for filing by December 29, 1970;
   (b) such adherence to the Agreement shall become effective as of 0001 January 1, 1971;
   (c) any such local service carrier not adhering to the Agreement in the manner provided in subparagraph (a), above, may do so in the manner described in paragraph 2(b) of the Agreement, provided that it also sign and forward to each of the other parties, to every other local service carrier, and to the CAB a counterpart copy of this Amendment.

Paragraph two made the provisions of the Mutual Aid Pact fully applicable to any local service carrier becoming a party thereto:

2. Subject of paragraph 1(b), above, the provisions of the Agreement, including Paragraph 2, shall be fully applicable to any local service carrier once it becomes a party to the Agreement.

F. The Board's Disposition of the 1969 and 1970 Amendments

Since the Pact as modified by the 1969 and 1970 amendments is the latest version to be approved by the Civil Aeronautics Board

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49 CAB Order No. 70-11-110 (November 23, 1970).
50 Airlines Mutual Aid Agreement, CAB Order No. 73-2-110, Initial Decision, Appendix A at 10 (February 27, 1973).
51 Id. at 11. As noted above, there had been prior effort between American and Mohawk to extend the principles of the Pact to the local service. See note 35 supra and accompanying text.
and the first to be passed upon by the courts, it will be considered in more detail than its predecessors.

1. The Initial Decision of the Administrative Law Judge

The Pact as modified by the 1969 and 1970 amendments ultimately went to hearing before Administrative Law Judge Arthur S. Present, the hearing officer who had approved the renewal of the Pact in 1969. This time, however, his decision was otherwise. While he approved the Pact as it had existed prior to the October 1969 amendments, he held invalid the amendments of October 31, 1969, December 2, 1969, and December 10, 1970, which increased the level of supplemental payments to a struck carrier from thirty-five to fifty percent of that carrier's normal operating expenses, depending upon the length of the strike; increased a member carrier's annual maximum liability from one-half to one per cent of its air transport operating revenue for the previous calendar year; and included participation by local service carriers. The decision of Judge Present approved the Mutual Aid Pact as not adverse to the public interest or in violation of the Federal Aviation Act provided it was amended to eliminate the objectionable provisions. The required amendments, it held, would be operative from the effective date of his decision.

Judge Present based his decision to disapprove the increased payments to struck carriers upon his conclusion that "the increased level of mutual aid creates certain perils which may undermine the objectives of the [Federal Aviation] Act. These risks are so serious as to justify disapproving the increased level of payments." He found that a carrier could "utilize the higher level of payments as a consideration in determining when it is opportune to settle a strike" and cited the record example of TWA which "was financially better off during the two-day strike is incurred in 1970 than if it had fully operated on those days." The judge also noted that Mohawk operated at a profit during a strike period with mutual aid but at a net loss without a strike even though it received 592,000 dollars in subsidy payments during the latter period. He then con-

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Initial Decision, supra note 46, at 41-43.

Id.

Id. at 25.

Id. at 26.

Id. at 27.
cluded that the "higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation."\footnote{Id.}

The Administrative Law Judge based his decision to disapprove the increase in a carrier's liability from one-half to one percent of its prior year's operating revenue on his conclusion that this increase could impair the financial condition of certain carriers.\footnote{Id. at 29-30.} He found that the one percent limitation was not the true ceiling of carrier liability since the limitation applied only to "supplemental" and not to "windfall" payments. He cited the example of Eastern Air Lines whose total payments exceeded the "supplemental" payments by some two hundred twenty-seven percent and exceeded two percent of Eastern's 1969 air transport operating revenue.\footnote{Id. at 31.} Also cited was the reduction of United Air Lines' working capital from an estimated 47,225,000 dollars to 17,520,000 dollars as of December 31, 1970, because of its mutual aid liability as well as the payment by Pan American of 9,404,000 dollars in 1970 on the basis of a year (1969) in which its rate of return was negative, seventy per cent of those payments being "supplemental" payments.\footnote{Id. at 30.} The judge also noted that the record indicated "no important attention" was paid by the carriers to the financial conditions of paying and receiving carriers in formulating the provisions of the Agreement.\footnote{Id. at 28.} In addition, he recognized that there had been an "extraordinary shift in balance of (mutual aid) payments toward 'supplemental' payments" since the 1969 amendments.\footnote{Id. at 30-31.}

The Administrative Law Judge found that of the 187,485,000 dollars paid out under the Pact from 1958 through June 1971, forty-five percent, or 84,368,250 dollars was attributable to the four strikes since the inception of the 1969 amendments and that twenty-seven percent of the total mutual aid payments since 1958, or 49,688,000 dollars were reflected in the "supplemental" pay-
ments made in connection with four strikes in the twenty month period between October 1969 and June 1971.3

The hearing officer concluded that the "dangers are apparent and outweigh the benefit that may be obtained by struck carriers from the additional financial support afforded by the augmented level of mutual aid."4 His decision that local service carriers should be excluded from the Pact was based upon the conclusion that their participation would be inconsistent with both the public interest as well as with the statutory scheme reflected in section 406 of the Federal Aviation Act, 49 U.S.C. section 1376.5 This conclusion was based on a number of findings:

1) Local service carrier members would pay struck members from their working capital which would include subsidy receipts at a time when shut down and ineligible for the receipt of subsidy monies when on a "closed rate;"
2) Trunk line carriers which did not receive subsidy would also receive subsidy monies by payments to them from local service carrier working capital;
3) Subsidy payments are made during a strike to local service carriers on an "open rate" and therefore mutual aid would be unnecessary;
4) Many local service carriers were in serious financial condition and should not be subjected to the liability of mutual aid payments;
5) If local service carriers as a group tend to gain more in money from mutual aid than they would pay into it, then they should not be included because "the financial results of the trunkline carriers . . . indicate they can ill afford such a drain on their resources," e.g., in 1970, the rate of return was one and one-half percent; and
6) The record presents no "urgent need" for local service carriers to join mutual aid or that local service carriers have been or are "especially inviting targets for union attempts to establish industry precedents."6

On the day the Initial Decision of the Administrative Law Judge was issued, the amendments providing for increased payments to struck carriers and increased liability of member carriers

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3 Id. at 30.
4 Id. at 32.
5 Id. at 38.
6 Id. at 33.
7 Id. at 33-38.
had been in effect for some twenty-nine months, and the local service carrier amendments had been in effect for fifteen months without CAB approval. During that period struck carriers had received and member carriers had paid out 83,585,000 dollars.

2. The Board Decision and Order

Exceptions to the Initial Decision were filed with the CAB by all parties. On February 27, 1973, by a three to two vote, the CAB reversed the Initial Decision and approved the amendments as submitted, subject only to a condition that

No payment or obligation incurred pursuant to the Agreement shall be claimed as an expense for purposes of computing the need of such carrier for compensation payable by the Board under Section 405 of the Federal Aviation Act; nor shall any carrier be entitled to receive any compensation payable by the Board for payment made or obligations incurred by that carrier pursuant to the Agreement.

The Board's approval was limited to a period of five years.

a) The Majority Opinion

Three members of the CAB voted to approve the Mutual Aid Pact and its amendments as submitted. They determined the primary issue to be "Whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of a strike on a reasonable basis in circumstances where such a settlement was possible."

The three-member majority concluded that the mutual aid payments could not become "a significant factor in prolonging a strike...

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68 The local service carrier amendments had been in effect except for a short period between July 23, 1970, when the Board approved the October 1969 agreements without a hearing, and November 23, 1970, when the Board reversed itself after receipt of petitions by the unions for reconsideration of its action. Id. at 1-2.

69 CAB Order No. 73-2-110, Attachment 1 (February 27, 1973).

70 Airlines Mutual Aid Agreement, CAB Order No. 73-2-110 (February 27, 1973).

71 CAB Order No. 73-2-110 at 1.

72 Id.

73 CAB Order No. 73-2-110 at 8. This is the type of issue which the Board had specifically rejected as irrelevant to a consideration of the Mutual Aid Pact in its original decision. See text at 850-52 supra.
that otherwise was capable of settlement on a reasonable basis." They found that the purpose of the increased payments to struck carriers was to increase a "carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable" but that this purpose was not adverse to the public interest. The majority noted that other economic pressures existed which would prevent the carrier from being "significantly influenced" by reason of mutual aid payments "to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor." The economic pressures referred to by the Board were "the out-of-pocket losses occasioned within the strike period;" the "loss of profits which would have accrued had there been no strike;" and, the "loss of post-strike revenue" because of passengers changing their travel patterns during a particular carrier's strike.

Although the majority referred to the conclusion by Administrative Law Judge Present that National, Northwest and Mohawk had realized operating profits "during their strike periods, which were attributable to the new higher level of amended mutual aid payments, as well as TWA's decreases in losses," those conclusions were rejected because they were based on strikes which occurred "primarily in 1970, an atypical year which reflected losses by many carriers" and because they did not take into account the "anticipated profits which (the struck carriers) otherwise would have achieved, as well as post-strike losses." The majority then held that the operating profit realized by the named carriers during their strikes because of augmented mutual aid payments "[fell] far short of real profits" and concluded that the "losses from strikes despite mutual aid payments remain substantial and continue to exert tremendous economic pressure on the carrier's side of the bargaining table." The majority rejected the conclusion of the Administrative Law Judge that the existence of the higher mutual

74 Id. at 9.
75 Id. at 10.
76 Id.
77 Id. at 11.
78 Id. at 12.
79 Id. at 13.
80 Id. at 14.
aid payments created a dangerous tendency to prolong a strike. This rejection was based upon their findings that in the National Airlines strike the carrier had accepted a proffer of arbitration which had been rejected by the union; in the Northwest strike the union rejected arbitration before the company had indicated whether or not it was seeking to arbitrate; and in the Mohawk strike the union would not agree to arbitration only on part of the issues as the carrier desired but would only agree to arbitrating all of the issues in dispute.\footnote{Id. at 14-15.}

The majority then found that the record was "replete with evidence of the earnest and consistent good faith efforts of National, Northwest and Mohawk, as well as other mutual aid members affected by strikes, to find a resolution to their strikes."\footnote{Id. at 16.} They rejected the United States District Court findings of Northwest's Railway Labor Act violations during the 1970 strike of its clerical employees; the findings were categorized as "alleged Railway Labor Act violations" which were unrelated to any issue of prolongation of the Northwest strike. In any event, because of the "isolated instances of the nature of this alleged Railway Labor Act violation," the majority's conclusion that the Pact was consistent with the public interest remained unaffected.\footnote{Id. at 16, n.15.}

In concluding the portion of their opinion in which they held the increased payments under the Pact to be consistent with the public interest, the majority again stated their belief that the Pact "would [not] contribute to the unnecessary prolongation of strikes or otherwise upset a fair economic balance between labor and management in any manner which would be contrary to the public interest" because the amended Pact "does not relieve carrier management of significant economic pressure to settle a strike even though it may enable a carrier to survive a strike without permanent financial instability."\footnote{Id. at 17.}

The findings and conclusions of the Administrative Law Judge that the increased liability of the carriers under the Pact would
be detrimental to the public interest were rejected. This conclusion was justified by comparing, on a percentage basis, the level of supplemental payments paid by benefitting members with the level of benefits received by struck carriers. 85

The majority concluded that the Pact provided "substantial protection from financially crippling strike losses, at a cost which is reasonable" even though the amended Pact might result in imposing "a certain financial burden on carriers which may be financially weak." 86 This burden, however, "unlike potential strike losses, will not be a crippling one" 87 and would protect the carriers "most vulnerable to strike threats" from facing "a choice between acceding to demands creating expenses far exceeding strike losses or incurring strike losses resulting in ruinous financial instability." 88 The portion of the Administrative Law Judge's decision which would have excluded local service carriers from membership in the Mutual Aid Pact was rejected; his findings and conclusions were dismissed as "arguments and contentions." 89

The majority rejected the conclusion that there was no practical means for segregating subsidy funds from a carrier's general funds from which mutual aid payments might be drawn. They held that "subsidy payments normally make up a very small portion of a carrier's overall revenues" and "so long as Mutual Aid payment expenses are excluded from the subsidy computations, there was no reason to conclude that the Mutual Aid payments would, in any realistic way, be funded by subsidy payments." 90 The belief was again emphasized that Mutual Aid provides "local service carriers with significant protection against the financially crippling" effects of a strike. 91

The majority further rejected the conclusion that trunkline carrier payments to local service carriers are proportionately higher than local service carriers would have to make and therefore constitute a financial drain on certain weak trunkline carriers which

85 Id. at 18-20.
86 Id. at 20.
87 Id. at 20-21.
88 Id. at 21.
89 Id. at 21-24.
90 Id. at 22.
91 Id. at 23.
would be adverse to the public interest." It was concluded that the Pact provided reasonable assurance that the financial drain would be borne by those carriers which, on the basis of total revenues, "are in the best position to incur it" and, in any event,

it did not appear unreasonable . . . for the trunkline carriers to seek, and pay a price for, some protection against the possibility that a local service carrier, solely by reason of its relatively weak condition, might succumb to employee demands which otherwise would be unacceptable and which could then be demanded of the trunkline carriers as a new industry norm.93

The opinion concluded with a consideration of "the Mutual Aid Agreement as a whole."94 In this discussion the majority referred to a strike by employees of a carrier as "undue economic pressure;" and expressed tacit belief that absent the amendments to the Mutual Aid Pact, the employees of carriers could compel their employers to accept all their requests."95 The majority again emphasized belief in air carriers' peculiar vulnerability to strike threats and concluded that "additional restraints" which could be imposed upon labor by management with the approval of the CAB were "not contrary to the public interest."96

b) The Dissent

The dissenting members of the CAB disapproved both the increased "supplemental" payments to a struck carrier and the increased liability of member carriers as contained in the October 1969 amendments. They also stated they would "remand for further hearing the issue of whether an additional condition should be imposed precluding payment of benefits under the Agreement to a struck carrier which has violated the Railway Labor Act subsequent to the commencement of a strike." Finally, the dissenting members concluded they would approve the inclusion of the local service carriers in the Mutual Aid Pact as provided by the December 1970 amendments if their inclusion was made subject to the condition imposed by the majority.97

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92 Id. at 24.
93 Id. at 24.
94 Id. at 25.
95 Id. at 25-26.
96 Id. at 26.
97 Id. Dissenting and Concurring Opinion at 1.
At the outset of their opinion the dissenting members criticized what they perceived to be the partisan character of the majority's opinion. The majority had stated the issue in the case to be "whether mutual aid payments so shift the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of a strike on a reasonable basis in circumstances where such a settlement was possible." The type of criticism leveled at the majority's opinion is seldom found in federal agency opinions. The dissenting members strenuously disapproved of what, in their view, was the majority's injection of itself into the bargaining structure of the industry. They criticized the majority for identifying the public interest with a strengthening of air carrier bargaining power thereby effectively becoming "a partisan on the side of management against labor." The dissent rejected the issue as phrased by the majority:

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98 Supra note 69, at 8.

99 [W]e regret that the Board's majority opinion here goes as far as it does in seeming to identify the public interest with strengthening the bargaining position of carrier management in airline labor disputes, which is the evident purpose of the Mutual Aid Agreement. Such an air of partisanship between management and labor by a regulatory agency is antithetical to the national labor policy, and should be strictly avoided.

The Board's dilemma, of course, is a real one: under most circumstances, in view of its promotional role toward the air transportation industry and its regulatory responsibilities toward the traveling public, the Board is bound to regard whatever lowers airline costs as good, and whatever increases those costs as bad. Nevertheless, the Board cannot take that attitude toward airline wages without becoming a partisan on the side of management against labor. We do not suggest that the Board majority has here in any way deliberately set out to align itself with one side or the other of airline labor disputes. Nonetheless, it is difficult to read the majority opinion as a whole, with its recurrent emphasis on the 'stability' assertedly afforded by the Mutual Aid Agreement and on the 'reasonableness' of management positions (with no explicit recognition that union positions may be equally reasonable from the standpoint of the workers' interests), without deriving a distinct impression that the majority believes that strengthening management's bargaining power in wage disputes is an affirmatively beneficial thing.

However difficult it is for the Board to preserve a stance of total neutrality in labor-management conflicts, once the parties have fulfilled their statutory obligations under the Railway Labor Act, we believe the Board must bend every effort to do so. To that end, we would rigorously avoid making any judgments as to the reasonableness of either management or union positions and actions, either in general or in relation to particular disputes. We would recognize that 'reasonableness' in labor disputes is a term with no
In our view, the issue is not whether the strengthening of airline management’s bargaining position which obviously results from the 1969 mutual aid amendments is a good thing per se—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike.

On the issue of the increased “supplemental” payments under the October 1969 amendments to the Pact, the dissent agreed with the conclusions of the Administrative Law Judge “who heard the testimony of the witnesses” that such increased payments created a “distinct danger” that interruptions to airline service would be “prolonged by the level of payments available under the amended Agreement.” The dissenting members noted that the amendments were designed to provide payments which would exceed a struck carrier’s running expenses; consequently, it was now typical for a struck carrier to show a profit during a strike. The dissent noted that the majority admission that the increased “supplemental” payments were “bound to influence carrier managements in the direction of holding out against union demands,” but—according to the majority—such resistance would be maintained only against “unreasonable” demands. The dissent noted that “one man’s unreasonable demand is another’s reasonable request.” The dissent rejected the majority’s conclusion that air carrier managements would resist only “unreasonable” demands as a finding that was “both futile and contrary to the CAB’s proper role as a neutral in labor conflicts.”

The dissent also rejected the majority’s conclusion that airline wages have increased unduly because of the air carriers’ “peculiar vulnerability to strikes.” There was no evidence to support a finding that the air carrier industry was any more vulnerable to strikes

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fixed or generally agreed meaning, and one which inevitably takes on quite different connotations on opposite sides of the bargaining table. Supra, note 93 at 2-3 (footnote omitted).

100 Supra note 69, at 8-9.

101 Supra note 93, at 5.

102 Id. at 5-6.

103 Id. at 6, n.5.
than other service industries or perishable goods industries; further, national labor policy does not require that all industries be placed upon the same bargaining footing as hard-goods manufacturing industries. Numerous other factors were also listed which the dissenters believed had been ignored by the majority and which could have accounted for increases in wages in the airline industry.

The majority had refused to recognize the profits provided by the October 1969 amendments to a carrier during a strike because they considered them to fall "far short of real profits." In order to support that conclusion, the majority had held that because of a strike a carrier would lose its projected "normal" profits and would incur "post-strike losses." The dissenting members rejected this view of the profits realized by a struck carrier under the October 1969 amendments. They concluded that "the critical point is that under the 1969 amendments a struck carrier's mutual aid payments can be so generous that it can show an operating profit while its operations are shut down by a strike." This was a "fundamentally unhealthy situation, conducive to results adverse to the public interest, much as would be an insurance scheme which resulted in the insured collecting more than the value of his loss."

Since the evidence demonstrated that several of the carriers who had been struck since the October 1969 amendments had been operative had no profits to lose, and that strikes often occurred during the "off-season" when carriers normally expected to operate without profits, the "normal" profit loss relied upon by the majority was thought to be immaterial.

The majority's reliance upon "post-strike losses" was challenged since, in the opinion of the dissenting members, the record did not support a conclusion that "prospective post-strike losses increase in any simple way in direct proportion to the length of the strike."

The dissenters found that probably most prospective post-strike

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104 Id. at 7.
105 Id. at 7, n.6.
106 Supra note 69, at 14.
107 Supra note 93, at 8 (footnote omitted).
108 Id. at 8.
109 Id. at 8-9.
110 Id. at 10 (footnote omitted).
losses accrue immediately upon commencement of a strike and would not be greatly increased by a delay in settlement" and, in any event, because the "incidence and measurement [of post-strike losses] is a matter of great complexity and involves a considerable degree of speculation." The dissent concluded that it was "surely significant that the participating carriers have never been able to agree among themselves on a valid measure of post-strike losses, so as to permit their direct compensation under the Mutual Aid Agreement."

Regarding the majority's dismissal of member carriers' increased financial liability under the Pact, the dissenting members of the CAB agreed with the Administrative Law Judge. The Judge had pointed out that the Pact's provision for supplemental payments took no account of the current financial condition of the paying carriers and that the bulk of Mutual Aid payments since the 1969 amendments "took effect have been to otherwise highly profitable carriers from carriers who were currently either losing money or earning less than a reasonable return on investment." The dissent then quoted the amounts assessed against Pan American under Mutual Aid, noting that they exceeded the amount which the CAB found would have been diverted from Pan American by virtue of the acquisition of Caribair Airlines by Eastern Airlines; the CAB had held that this diversion "showed so great a danger to (Pan American's) financial integrity as to require disapproval" of that acquisition. The dissenting members concluded that "the price to those participating carriers already in financial difficulties is too high to be in the public interest."

The dissenters concluded that the majority had not adequately dealt with violations of the Railway Labor Act by carrier members occurring during strikes. The majority had ignored evidence that the strike involving Northwest had been prolonged because that carrier had insisted "on including in the back-to-work agreement provisions which the unions contended would require them to ratify

111 Id. at 10.
112 Id. at 9.
113 Id.
114 Id. at 11.
115 Id. at 12, n.11.
116 Id. at 12.
the carrier's Labor Act violations." The dissent believed it was "essential that mutual aid not be payable where a strike has resulted from a carrier's violation of the Railway Labor Act." The majority's "attempt to dispose of the Northwest-BRAC incident in a footnote" was criticized. The dissent as "entirely unsatisfactory," and the "attempt to shrug off the violation even if it did prolong the strike" was characterized as "wholly arbitrary." As noted above, the dissenting members concluded that the issue of the effect of Railway Labor Act violations upon the duration of the strike should be remanded for further hearing.

G. Court Review

Separate petitions for review of the CAB's approval of the Pact were filed with the United States Court of Appeals for the District of Columbia Circuit by the Air Line Pilots Association, International and six other unions jointly. On August 8, 1974, the Court of Appeals issued its decision affirming the CAB.

The court relied on the CAB's finding that the "record is replete with evidence of the earnest and consistent good faith efforts of [the Mutual Aid Pact Members] to find a resolution to their strikes throughout the course of difficult labor negotiations" and held that the "Board's approval of the Pact, as amended, [was] fully consistent with the national labor policy and the RLA [Railway Labor Act]."

The court held that it could not upset the CAB order unless it were unsupported by substantial evidence or unless its judgments "[f]all outside a zone of reasonableness." The CAB's lack of

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117 Id. at 13.
118 Id.
119 Id. at 14, n.16.
120 Id.
121 The six other unions were the Air Line Dispatchers' Association, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, the Communication Workers of America, the Flight Engineers' International Association, the International Association of Machinists and Aerospace Workers, and the Transport Workers Union of America.
124 Id. at 457.
expertise in labor matters was considered immaterial in light of its undisputed finding that "the employees retain substantial and effective bargaining power regardless of the Mutual Aid Agreement."125

The unions' claim of the tendency of the amended Pact to prolong strikes was rejected on the basis of the CAB findings that negotiations have seldom "erupted into strikes in recent years" and "significant pressures to settle remain on the airlines despite their participation in the Pact."126

With regard to the evidence demonstrating the Pact's provision for a struck airline to receive a financial profit during a strike, the court concluded that the CAB "reasonably believed" those profits should be compared with "normal profits" for a similar period and should include calculations of "post-strike losses."127 The court lamented the fact that the Board had not "addressed itself to the methodological problem inherent in estimating" the loss factors. The CAB had accepted the companies' figures, but held that the unions had not cited evidence to show the companies had "reached their estimates by misguided or meritricious methods." In any event, the court noted that since the CAB approved the Pact for only five years, "if the CAB's 'hypothecations' prove wrong, they may be corrected."128

Regarding the effects of the Pact upon the financial stability of its members, the court held the "Board concluded, not unreasonably, that the payments are not out of proportion to the protection offered."129 Finally, the court concluded that the CAB findings were adequately supported, the result reached was a reasonable one and "the claim of bias on the part of CAB, . . . [was] without substantial foundation."130 The United States Supreme Court denied the unions' petition for certiorari.131

125 Id. at 458, quoting CAB Order No. 73-2-110 at 8.
126 Id. at 459.
127 Id.
128 Id.
129 Id. at 560.
130 Id. at 460 n.33.
131 Allied Pilots Ass'n v. CAB; Air Line Dispatchers' Ass'n v. CAB; Air Line Pilots Ass'n v. CAB, 420 U.S. 972 (1975).
II. THE PROBLEM PRESENTED

The Mutual Aid Pact seems to have established itself, however tenuously, before the CAB, and the CAB's views would seem, for the time being at least, to have received judicial sanction. Given the tone of the courts' opinion and the quality of the CAB's dissenting opinion, it seems likely that the court would have upheld CAB approval of the Pact had one Board Member shifted his vote. Although the CAB and the courts may have disposed of the issue of the legal validity of the Pact, it is quite clear that the problems attendant upon the existence of the Pact have not been resolved with the issuance of the decisions of those tribunals.

In the course of his testimony before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, the witness for the labor organizations noted that the Mutual Aid Pact was unique among cooperative ventures by management or labor in this country; it prolonged interruptions to carrier service caused by strikes; it had produced no beneficial effects for the public or the industry; and, most significantly, it might well force the employees of the industry to counter in kind resulting in the catastrophe of "open economic warfare" in the air transport industry. The labor organizations' witness concluded that such a result could be avoided only by enactment of a law outlawing the Mutual Aid Pact.122

122 Hearings on H.R. 1234 Before the House Comm. of Public Works and Transportation, 94th Cong., 1st Sess. (1975) at 19, 24-25 [hereinafter Hearings on H.R. 1234];

The Mutual Aid Pact cannot be compared with any labor cooperative venture by any group of managements or labor organizations in any other industry. The railroad industry strike insurance plan is not comparable. That plan can only be used in the event of an illegal strike and then its benefits provide a bare subsistence level to the struck carrier.

In any event, it has not had an effect either upon collective bargaining relationships in the railroad industry or upon our national rail transportation policy.

The airlines' Mutual Aid Pact, however, prolongs interruptions to service because of its profit provisions; drains certain carriers who can ill afford it of much needed capital; and, encourages violations of the law. By removing the struck carrier's incentive to settle while the sufferings of striking and non-striking employees intensify, the Mutual Aid Pact seriously unbalances the equality of the parties at the airline collective bargaining table. On the other hand, the Pact has produced absolutely no beneficial effects for the public or the industry.
The conclusions of the labor organizations' 1975 testimony before the Congress fully confirm the statements of Board Member Minetti made some eleven years earlier in his dissent to the 1964 *Mutual Aid Pact Investigation* decision. In that dissent Member Minetti delineated the basic problem with the Pact: it creates, intentionally or not, "a picture of union irresponsibility" and what, understandably, could and has been received by labor as union hostility "to which the unions have responded with matching mistrust." It seems painfully obvious that action must be taken to resolve this deplorable and dangerous situation.

If the situation worsens, as it most surely will worsen as the Pact is continuously amended, expanded and approved by the Civil Aeronautics Board, the employees of the industry will be forced to develop methods of protecting themselves. Throughout the testimony of the air carrier witnesses who have appeared before the Board in proceedings related to the balance of collective bargaining strength in the industry such as the Mutual Aid Pact proceedings and the proceedings involving the establishment of a single bargaining agent for the industry called the Airline Industrial Relations Conference there was repeated reference to the carriers need to develop 'arsenals of weapons' to be used against the unions, as if collective bargaining was a kind of internecine warfare in which each side was out to beat the other to its knees. In our view, that has never been the object of the labor unions who are represented here today. We hope it never will be. But, if the employees are forced to defeat the Mutual Aid Pact in open economic warfare, as they will if driven to it, everyone will suffer, including those airlines who never have strikes but who pay, and pay, and pay, under the provisions of the Pact. Those who will suffer most, however, will be the employees and the public through loss of work, loss of service, and a more deeply depressed economy.

We have not as yet reached that critical stage but we are most assuredly approaching it. No union official wants such a catastrophe to occur. No responsible carrier official should desire it either, but shortsightedness has been the cause of many unwanted and unplanned tragedies. H.R. 1234 and H.R. 1320 are the only hope we now have of avoiding economic warfare in this industry; of preventing CAB sanctioned violations of law; of preventing prolonged interruptions to air commerce; and, of eliminating unnecessary and extreme drains on the capital resources of those carriers which maintain good labor relations.

We respectfully urge as imperative, the swift enactment of H.R. 1234 and H.R. 1320.

153 *Mutual Aid Pact Investigation*, 40 CAB 559, 566 (1964):
This record establishes beyond doubt that the unions from the outset have viewed the Pact as a direct attack on their bargaining integrity, and that this belief has been reinforced by the step-by-step process of amendment to broaden and extend the agreement
In the 1964 case, the majority opinion noted, "as an alternative to approval of the Pact the unions propose that 'the gap between negotiations, during which misunderstandings arise, which makes ultimate settlement of differences difficult if not impossible, be occupied with joint management-labor conferences.' " Such labor-management conferences have been an integral element of labor relations in the railroad industry for a decade. They have proved their worth repeatedly by fostering good labor-management relations and in solving many issues which otherwise could well have escalated into serious labor-management confrontations. Unfortunately, labor-management conferences of the type suggested by the unions in 1964 and used in the railroad industry since that time, have not been utilized in the air transport industry.

There is little doubt that the nation is faced with a continuing escalation in labor-management hostility in the air transport in-

both as to membership and coverage. It is not of critical importance whether the Pact was or was not so intended. The important thing is that the unions, not without some justification under the circumstances of the agreement's conception and expansion, have so viewed it.

Certainly no one could justifiably contend that all of the labor unrest that has occurred should be laid at the door of the Pact. Even less could it be contended that sole responsibility for the conditions that have come about should rest on management or labor. The important thing is that the Pact has created and nurtured a spirit of distrust that is destructive of the mutual confidence and respect which is essential to the successful negotiation and solution of problems in the emotionally charged atmosphere of labor-management relations.

The majority has accepted the examiner's finding that the evidence does not demonstrate a causative connection between the deteriorating labor-management relations and the Pact, or substantiate the predictions that the Pact will cause future labor unrest. To me, this is no answer to the problem before us.

I do not believe that this Board in fulfilling its responsibilities can close its eyes to known and critical facts. The Pact, intentionally or not, has from the outset created a picture of union irresponsibility and what, understandably, could and has been viewed by labor as union hostility. The unions have responded with matching distrust. The attitudes of labor and management toward each other have hardened. And so there have evolved reciprocal manifestations of lack of confidence and trust which, even with good-faith bargaining on both sides, are destructive of that atmosphere which must prevail if the industry is to avoid the industrial strife that poses a direct threat to the development of a stable and efficient air transportation system.

134 Id. at 563.
which the Civil Aeronautics Board seems to believe either does not exist or can be controlled at some future time by CAB, or perhaps by Congressional action. The public should not be required to sit by and await an explosion in the air transport industry which would require emergency legislation. The CAB, regardless of its views as to the right or wrong of the Pact, should have recognized the explosive character of the situation and set about to defuse it. Instead, it did nothing. The Court of Appeals, recognizing the CAB's restricted ancillary authority in labor relations, accepted the latter's finding that the Pact caused no particular labor-management problem. There seems to be little left for those who would eliminate the negative effects of the Mutual Aid Pact except appeal to the Congress.

III. THE PROPOSED LEGISLATIVE ELIMINATION OF THE PACT

Congressmen receive many constituent complaints during the course of a long strike, particularly where the struck airline is able to operate only a portion of its routes and can choose to operate "those on which its competitors were not participants in the Mutual Aid Agreement over those on which they were, and those on which it had competition over those on which it did not." With the demise of the railroads as a major carrier of intercity passengers, hundreds of American communities became dependent upon the airlines for long distance intercity passenger transportation. A prolonged interruption of that service can seriously affect the economy of these communities. When interruptions occur, the communities and their citizens make their views known to their representatives in the Congress.

For several years a number of bills which would outlaw the Mutual Aid Pact have been introduced in both Houses of Congress. Prior to 1975 these legislative proposals were not processed to hearing, perhaps because the Mutual Aid Pact was under consideration by the CAB and the courts, or perhaps because the pressures for the enactment of such legislation tend to wane with strike settlements. In the most recent session of Congress, however, bills

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138 In this connection, see Unterberger and Koziara, Airline Strike Insurance: A Study In Escalation, 29 INDUSTRIAL AND LABOR RELATIONS REV. 26 (1975).

139 Id. at 37.
prohibiting the Pact were introduced in both Houses of Congress\textsuperscript{187} and processed through hearings before the appropriate subcommittees of the House and Senate.\textsuperscript{188} Since these bills were not finally acted upon by the close of the 94th Congress, they probably will be re-introduced during the first session of the 95th Congress.

IV. A POSSIBLE SOLUTION

The industry's continued utilization of the Mutual Aid Pact is somewhat mystifying. Throughout all of the testimony and arguments presented to the CAB, the courts and the Congress over the past eighteen years of the Pact's existence, the air transport industry has never claimed that the Pact has accomplished any of its publicly stated purposes. There is no evidence that the union demands have been less or the settlements less because of the Pact; further, there is no evidence that the unions' bargaining power has been weakened, or that the number of strike days has been reduced.\textsuperscript{189}

On the other hand, the cost of the Pact to some airlines has been almost disastrous. Eastern, who could ill afford it, paid to its chief competitor, National, some thirty-seven million dollars between January 1971 and December 1975.\textsuperscript{190} Eastern has recently indicated it would like to be free of the Pact. Pan American withdrew its membership as of December 31, 1975.

Perhaps the members of the Pact believe that their labor costs would increase substantially without the Pact; or, while they may realize the Pact has not improved their situation, they may feel that it has at least prevented that situation from getting any worse. Whatever the reasons for the industry's adherence to the Pact, it seems obvious that the labor relations atmosphere in the air transport industry will not improve so long as the Pact exists; unfortu-

\textsuperscript{187} The Senate bill, S. 306, was introduced by Senator Gravel of Alaska with ten cosponsors and in the House of Representatives H.R. 1234 and related bills had some 75 co-sponsors.

\textsuperscript{188} Hearings on H.R. 1234; Hearings on S. 306 Before the Senate Comm. on Commerce, 94th Cong., 1st Sess. (1975).

\textsuperscript{189} While strikes have been somewhat fewer, at least in the past five years, their length has increased substantially. Indeed, between January 1, 1970, and December 1975, National and Northwest Airlines had been on strike 25% of the time. Hearings on H.R. 1234 at 22.

\textsuperscript{190} Id.
nately, it also seems obvious that the industry will keep the Pact in existence so long as labor relations remain in its deteriorated state. The resolution of this dilemma must be accomplished from outside the industry. The only non-industry agency now remaining which can accomplish that result is the Congress.

The Congress should amend the Railway Labor Act with a provision establishing a joint conference commission comprised of representatives of air carrier management and labor to deal with the labor relations problems arising between labor-management negotiation of collective bargaining agreements. It should provide this commission with a life of at least four years. The commission should be required to report back to the Congress after three years with recommendations, if any, for further legislative action. This type of conference committees has proved successful in the railroad industry; it should be given the opportunity to work in the air transport industry.

In order to permit the commission a chance of success, the major cause of labor-management hostility in the industry—the Mutual Aid Pact—would have to be eliminated. If the Congress were thereby to require both labor and management to start afresh, in an atmosphere of mutual self-interest, the industry, the employees and, most of all, the nation would be the beneficiaries.

A voluntary undertaking by management and labor to accomplish such an end would be far preferable to a solution initially imposed by law; however, a voluntary undertaking appears impossible and a responsible government cannot watch impassively as labor relations worsen and hostility rises in a vital industry. Action must be taken to resolve this problem; if the parties themselves, the Civil Aeronautics Board and the courts are unwilling, then the task must be accomplished by Congress.
Case Notes