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# CURRENT LEGISLATION AND DECISIONS

## Federal Tort Claims Act — Status of the National Guard Civilian Caretaker

Plaintiffs, survivors of the pilot and co-pilot of a Capital Airlines passenger plane, and Capital Airlines brought suit against the United States under the Federal Tort Claims Act.<sup>1</sup> The suit arose as a result of a mid-air collision between a Maryland Air National Guard jet plane and the Capital Airlines plane. The United States District Court for the District of Columbia found for the plaintiffs. *Held*: The pilot of the National Guard plane was acting in his civilian capacity as a "caretaker"<sup>2</sup> or "technician"<sup>3</sup> and was, therefore, an employee of the United States within the meaning of the Federal Tort Claims Act.<sup>4</sup> *United States v. Maryland ex rel. Meyer*, 322 F.2d 1009 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 954 (1964).<sup>5</sup>

In another case involving the same accident, but with certain passengers of the Capital Airlines plane presenting the claims, the United States Court of Appeals for the Third Circuit came to the opposite conclusion, reversing the lower court's decision. *Held*: The pilot, as a civilian technician, was not a federal employee within the meaning of the act so as to render the United States liable for his negligence.<sup>6</sup> *Maryland ex rel. Levin v. United States*, 329 F.2d 722 (3d Cir., 1964), *cert. granted*, 85 Sup. Ct. 149 (1964).

These two opinions present the major arguments on both sides of the question. Captain McCoy, pilot of the National Guard jet, was employed as a caretaker of federal property allotted to the National Guard. For this he received compensation from federal funds separate from, and in addition to, that which he received as a regular member of the National Guard.<sup>7</sup> The court in both cases considered two issues on the question of federal liability; whether Captain McCoy, as a civilian technician, was a

<sup>1</sup> 28 U.S.C. § 1346(b) (1951): This section provides:

Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

<sup>2</sup> 32 U.S.C. § 709(a) (1956). This section states: "Under such regulations as the Secretary of the . . . Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard."

<sup>3</sup> The two terms are interchangeable, although "technician" seems to be used more than "caretaker."

<sup>4</sup> See *United States v. Holly*, 192 F.2d 221 (10th Cir. 1951); *Elmo v. United States*, 197 F.2d 230 (5th Cir. 1952); *United States v. Duncan*, 197 F.2d 233 (5th Cir. 1952); *Courtney v. United States*, 230 F.2d 112, 57 A.L.R.2d 1444 (2d Cir. 1956); *United States v. Wendt*, 242 F.2d 854 (9th Cir. 1957).

<sup>5</sup> Also found in 8 Av. Cas. 17,677 (1963).

<sup>6</sup> The finding of the district courts that the sole proximate cause of the accident was the negligent conduct of the National Guard pilot was not challenged in either case on appeal.

<sup>7</sup> 32 U.S.C. § 709(a) (1956); see note 2 *supra*.

federal employee within the Tort Claims Act;<sup>8</sup> and whether at the time of the collision he was acting within the scope of his employment as such a technician.<sup>9</sup>

Judge Fahy, who delivered the opinion for a unanimous court in the *Meyer* decision, relied on a number of recent cases<sup>10</sup> stating that, although a member of a National Guard unit (Army or Air National Guard) is ordinarily not considered an employee of the United States within the meaning of the Tort Claims Act, he acquires such status as a "civilian caretaker."<sup>11</sup> The right of ultimate control is determinative,<sup>12</sup> and to Judge Fahy that right is in the United States, since it reserves the power to fix the salaries of caretakers,<sup>13</sup> and to issue regulations and instructions for their employment.<sup>14</sup> He concluded that the functions granted by the United States to the state adjutant general—supervision of the employment of civilian technicians—do not serve to supplant the right of ultimate control in the Government. He wrote, "Such supervision as was lodged in the state did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise."<sup>15</sup> An adjutant general's duties are to be performed in accordance with subsequent federal regulations issued by the Secretary of the Army or Air Force,<sup>16</sup> so the right of control remains in the United States.

Judge Smith, writing for the majority in the *Levin* case, came to the opposite conclusion. However, he was not joined in this part of the decision by his two associate justices, for Judge Staley dissented, and Judge Hastie concurred only on the issue of the scope of employment.<sup>17</sup> Judge Smith

<sup>8</sup> 28 U.S.C. § 2671 (1949):

"Employee of the Government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

This statute is not sufficiently definitive, and the courts refer to general principles of agency in determining federal employment. *Thomas v. United States*, 204 F. Supp. 896 (D. Vt. 1962); *Courtney v. United States*, 230 F.2d 112 (2d Cir. 1956). Generally, the employer-employee relationship is based on control or the right to control. The central issue is whether the servant is under the control of the person or entity who is alleged to be the master. Restatement (Second), Agency § 2 (1958).

<sup>9</sup> The Federal Tort Claims Act requires both federal employee status and negligent or wrongful action within the scope of that employment. See note 1 *supra*.

<sup>10</sup> *Williams v. United States*, 189 F.2d 607 (10th Cir. 1951); *Dover v. United States*, 192 F.2d 431 (5th Cir. 1951); *McCranie v. United States*, 199 F.2d 581 (5th Cir. 1952), *cert. denied*, 345 U.S. 923 (1953); *Slagle v. United States*, 243 F.2d 404 (5th Cir. 1957); and *Pattino v. United States*, 311 F.2d 604 (10th Cir. 1962), *cert. denied*, 373 U.S. 911 (1963). *But see O'Toole v. United States*, 206 F.2d 912 (3d Cir. 1953) which held that members of the National Guard of the District of Columbia are federal employees within the act.

<sup>11</sup> *United States v. Maryland ex rel. Meyer*, 322 F.2d 1009, 1012 (D.C. Cir. 1963).

<sup>12</sup> See note 8 *supra*.

<sup>13</sup> 32 U.S.C. § 709(f) (1956): "The Secretary [of the Army or Air Force] concerned shall fix the salaries of clerks, and caretakers authorized to be employed under this section, and shall designate the person to employ them."

<sup>14</sup> Authority to employ civilian personnel as caretakers (technicians) is vested in the state adjutant general, "subject to the provisions of law and such instructions as may be subsequently issued" under United States authority. Air National Guard Regulations No. 40-01, 20 Dec. 1954.

<sup>15</sup> *United States v. Maryland ex rel. Meyer*, *supra* note 11, at 1013.

<sup>16</sup> Air National Guard Regulations No. 40-01, 20 Dec. 1954; see note 14 *supra*.

<sup>17</sup> Judge Hastie concurred on the question of scope of employment, but he added: "I do not reach the more difficult and far-reaching question, whether a civilian caretaker and technician . . . is a federal employee within the meaning of the F.T.C.A." In his dissent, Judge Staley concluded that a civilian caretaker is a federal employee, and that Captain McCoy was acting within the scope of his employment as a caretaker. *Maryland ex rel. Levin v. United States*, 329 F.2d 722, 732-34 (3d Cir. 1964).

first considered the cases which state that the federally recognized members of National Guard units<sup>18</sup> not in active service<sup>19</sup> are not employees of the United States within the meaning of the Federal Tort Claims Act.<sup>20</sup> He said that in those cases the following facts were regarded as of no significance: "The Guard member had qualified for federal recognition, was compensated directly from federal funds,<sup>21</sup> and was in possession and control of a federally owned vehicle involved in the accident."<sup>22</sup> However, in the *Meyer* case and in other cases upon which the court in that decision relied, these same facts were regarded as "significant and somewhat determinative."<sup>23</sup> Judge Smith also stated, "It is difficult for us to perceive how factors may be considered immaterial in one situation and material in another which is comparable."<sup>24</sup> To him the distinctions made between the two groups of cases were untenable. He concluded that the powers given to the Secretary of the Army or Air Force under the statutes<sup>25</sup> do not place civilian technicians in a category as federal employees:

It is evident that the only purposes of the pertinent statutes, and the regulations promulgated thereunder, were to insure the effective organization of the National Guard and to protect federal funds against unrestricted expenditure, both in the national interest. There is nothing in the legislation which would indicate that it was the intent of Congress to either interfere with the right of the states to organize the Guard or deprive the states of the right to employ, supervise and control such civilian personnel as were deemed essential to the support of the Guard. We are of the opinion that in their relationships to the United States there is no distinction between a federally recognized member of the Guard and a federally recognized maintenance technician employed in his civilian capacity.<sup>26</sup>

Consideration of the second issue (whether the deceased pilot was acting within the scope of his employment as a civilian technician) again resulted in conflicting decisions. A question of fact was involved which, under the Federal Tort Claims Act, is to be decided according to the applicable state law.<sup>27</sup> In this case, Maryland law, the applicable law, and the law generally<sup>28</sup> is that an employer is liable for personal injury or death caused by the tortious conduct of his employee only if at the time of the accident the employee was engaged in an activity within the scope of his employment and in furtherance of objectives within his line of duty.<sup>29</sup> The court in the *Meyer* case found that Captain McCoy was, in evaluating the performance of the aircraft and its equipment, exercising his duties as a civilian technician. Judge Fahy relied principally on the testimony of National

<sup>18</sup> "Federal recognition means acknowledgment by the Federal Government that a person appointed to an authorized grade and position vacancy in the National Guard meets the prescribed Federal standards for such grade and position." 32 U.S.C. App. § 1101.3 (1956).

<sup>19</sup> At the time of the accident involved in these cases the Maryland National Guard had not been placed in active federal service.

<sup>20</sup> Cases cited note 10 *supra*.

<sup>21</sup> Sums are appropriated annually by Congress for the support of the National Guard, to be apportioned as the regulations provide. 32 U.S.C. §§ 106-07 (1956).

<sup>22</sup> *Maryland ex rel. Levin v. United States*, 329 F.2d 722, 727 (3d Cir. 1964).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> See 32 U.S.C. § 709 (1956), note 13 *supra*. See also Air National Guard Regulations No. 40-01, 20 Dec. 1954, note 14 *supra*.

<sup>26</sup> *Maryland ex rel. Levin v. United States*, *supra* note 22, at 729.

<sup>27</sup> See 28 U.S.C. § 1346(b) (1951), note 1 *supra*.

<sup>28</sup> See 150 A.L.R. 1346 (1944).

<sup>29</sup> *Lewis v. Accelerated Transport-Pony Express, Inc.*, 219 Md. 252, 148 A.2d 783 (1959).

Guard officers. However, in the *Levin* case, Judge Smith, with Judge Hastie concurring,<sup>30</sup> stated that a technician's duties are exercised only on a "functional check flight" which requires a minimum of two men. There being only one qualified crewman, this flight could not qualify; and consequently, Captain McCoy was not exercising his duties as a civilian technician.

A third issue was raised in the *Meyer* decision, although it was not discussed in *Levin*. It concerns the National Guard Claims Act,<sup>31</sup> which provides, in part, that the Secretary of the Army, Secretary of the Air Force, or the Judge Advocate General may settle and pay a claim against the United States arising out of the acts of a National Guard member, expressly including the civilian technician. The amount that may be paid is limited to 5,000 dollars, and the National Guardsman must have acted within the scope of his authority. The question was raised whether this is an exclusive remedy, so that a claim against the United States arising out of an action by a member of a National Guard unit, whether a civilian technician or not, must be brought under the National Guard Claims Act.<sup>32</sup> The court decided that the legislative intent was not such as to limit liability of the Government for the negligent acts of its employees. The act merely provides an alternate remedy. That is, the claimant may choose to present his case under the National Guard Claims Act, which limits any payment to 5,000 dollars; or he may proceed under the Federal Tort Claims Act, which has no such limitation. Judge Fahy concluded that the only difference is that the first is an administrative remedy, while the second is a judicial one. Although this issue was not raised in the *Levin* opinion, it should come before the Supreme Court if upon rehearing the petition for writ of certiorari in the *Meyer* case is granted. Obviously, it will only be important if the Court decides that the civilian technician is a federal employee. For the present, the *Meyer* case provides the appellate case precedent on this issue.

Of the two decisions it would seem that Judge Fahy has more perceptively analyzed the congressional intent. In view of the relatively extensive regulation concerning civilian technicians,<sup>33</sup> it is apparent that Congress has placed them in a separate category. Regulations have been established,<sup>34</sup> regarding not only their qualifications, responsibilities and duties, but also concerning such matters as their political activities,<sup>35</sup> old age and survivors' benefits,<sup>36</sup> and unemployment benefits,<sup>37</sup> among others. The controlling question is whether through such regulations the Government has retained the right of control of these technicians so as to make them federal employees.<sup>38</sup> It is true, as Judge Smith points out in the *Levin* case, that the state adjutant general under these same regulations is authorized to

<sup>30</sup> See note 17 *supra*.

<sup>31</sup> 32 U.S.C. § 715 (Supp. V, 1962).

<sup>32</sup> For an argument that the act is exclusive, see *The National Guard Claims Act*, 24 Fed. B.J. 197 (No. 2, 1964).

<sup>33</sup> 32 U.S.C. § 709 (1956); Air National Guard Regulations No. 40-01, 20 Dec. 1954; No. 40-101, 2 Jan. 1964; Air National Guard Civilian Personnel Manual (March 1958).

<sup>34</sup> See Air National Guard Regulations No. 40-101, 2 Jan. 1964.

<sup>35</sup> Air National Guard Regulations No. 40-101, 2 Jan. 1964: This section states: "[National Guard technicians] fall within the purview of the so-called Hatch Act (act of Aug. 2, 1939 (53 Stat. 1147) as amended (5 U.S.C.) 118i et seq.)."

<sup>36</sup> *Id.*, chapter 7, section 3.

<sup>37</sup> *Id.*, chapter 3.

<sup>38</sup> See note 8 *supra*.

employ, fix rates of pay (within maximum limits), establish work hours (a maximum of forty hours per week), and supervise and discharge employees. But as he also points out, these powers are "subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau."<sup>39</sup> It is evident that the Government has set out detailed "provisions" and "instructions" concerning these particular employees, as discussed above. No such detailed regulation is made for the regular National Guard member. These technicians have a special job—to care for federal property—for which they are specially compensated and separately regulated. Captain McCoy must be either an employee of the state of Maryland or of the United States. The state is authorized to employ him, to supervise him, and to discharge him; but in doing so it is limited by a multitude of federal regulations concerning most phases of his employment. Judge Fahy wrote: "The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States . . . for too much begins and remains with the United States in the case of these caretakers of federal property."<sup>40</sup> The civilian technician, therefore, is a federal employee within the Federal Tort Claims Act.

The question remains whether the National Guard Claims Act is an exclusive remedy for one injured by the acts of the technician. Judge Fahy concluded that the remedy is not exclusive, but alternative. That seems to be the better view, although there is some argument to the contrary.<sup>41</sup> There is nothing in that act which indicates that it is to be exclusive, or that it is to supersede the Federal Tort Claims Act. One is a judicial remedy; the other, an administrative one, and there is no expression of an intent by Congress to exclude one or the other. To give the act such an interpretation is to strain the meaning clearly expressed. Its purpose is to provide a remedy where there might otherwise be none.

Leo M. Favrot

As the *Journal* goes to print, the opinion of the Supreme Court, affirming the decision in the *Levin* case, has been received. The Court holds that the "civilian caretaker" is not a federal, but a state employee. *Maryland ex rel. Levin v. United States*, 33 U.S.L. Week 4405 (U.S. May 3, 1965). Along with Mr. Justice Douglas, the writer respectfully dissents.

L.M.F.

<sup>39</sup> *Maryland ex rel. Levin v. United States*, *supra* note 22, at 728, taken from Air National Guard Regulations 40-01, 20 Dec. 1954.

<sup>40</sup> *United States v. Maryland ex rel. Meyer*, *supra* note 11, at 1013.

<sup>41</sup> See note 32 *supra*.

## Administrative Law — Primary Jurisdiction — Antitrust Exemption

In federal district court,<sup>1</sup> Trans World Airlines [hereinafter TWA] obtained a default judgment against Howard Hughes and Hughes Tool Company (Toolco) in an antitrust suit wherein it was alleged that the defendants had attempted to monopolize interstate and foreign commerce in the furnishing of aircraft.<sup>2</sup> Toolco (owned one hundred per cent by Hughes) is TWA's majority stockholder, so in addition to treble damages and injunctive relief, TWA sought divestiture of Toolco's interest in TWA, which question was retained for further consideration. Defendants were granted leave to appeal limited to two questions: (1) whether the district court lacked jurisdiction of the treble damage action by reason of primary jurisdiction in the Civil Aeronautics Board [hereinafter CAB], and (2) whether the issuance of control and modified control orders by the CAB permitting defendants to take certain actions constituted a good defense to TWA's antitrust claims. *Held*: There is neither exclusive nor primary jurisdiction of this matter in the CAB. Thus, the district court had jurisdiction of the suit and the CAB orders did not immunize defendants from the operation of the antitrust laws. *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602 (2d Cir. 1964), *petition for cert. dismissed*, 85 Sup. Ct. 934 (1965).

### I. BACKGROUND—EXEMPTION, PRIMARY JURISDICTION, AND SUPERSESSON

The conflict between regulation of industry through administrative agencies and the federal antitrust laws remains a problem in the field of federal administrative law. In general, there have been two basic approaches to solving this conflict. One approach has been to enact legislative exemptions from the operation of the antitrust laws,<sup>3</sup> thus placing exclusive jurisdiction of certain matters with the federal agency. The other approach has been through court coordination of the regulatory scheme and the antitrust laws by accommodation of the conflicting policies of comprehensive regulation on the one hand and free and open competition on the other, with the overriding consideration being to serve the public interest.<sup>4</sup> This accommodation has been mainly effectuated by the use of

<sup>1</sup> *Trans World Airlines, Inc. v. Hughes*, 214 F. Supp. 106 (S.D.N.Y. 1963).

<sup>2</sup> *Id.* at 108. TWA alleged that defendants attempted to restrain commerce by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco; that TWA was required to boycott all suppliers of aircraft except Toolco in violation of Section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on condition that the purchaser or lessee would not buy or lease the goods of any competitor of the vendor or lessor, in violation of Section 3 of the Clayton Act.

<sup>3</sup> See, e.g., 15 U.S.C. § 18 (1958) (exempting from the operation of Section 7 of the Clayton Act transactions approved within their authority by the CAB, FCC, FPC, ICC, FMB, Secretary of Agriculture and, in some cases, the SEC); 46 U.S.C. § 814 (Supp. V 1961) (rate fixing and other agreements between water carriers approved by the FMB); 47 U.S.C. § 221(a) (1958) (telephone mergers approved by the FCC); 49 U.S.C. § 5 (1958) (railroad mergers approved by the ICC); and 49 U.S.C. § 5b (1958) (agreements between carriers involving rates approved by the ICC).

<sup>4</sup> Barrow, *Antitrust and the Regulated Industry: Promoting Competition in Broadcasting*, 1964 Duke L.J. 282.

the doctrine of primary jurisdiction.<sup>5</sup> The doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; and in such cases, the judicial process is suspended pending referral of such issues to the administrative body for its views."<sup>6</sup> Note that the doctrine applies only when jurisdiction is concurrent in both the agency and the court, and merely provides the answer as to whether a court or an agency should initially decide a particular issue. This is to be distinguished from the doctrine of exhaustion of administrative remedies which "applies where a claim is cognizable in the first instance by an administrative agency alone."<sup>7</sup>

The doctrine of primary jurisdiction has been said to be based on one, or both, of two reasons:<sup>8</sup> a need for uniformity of regulation,<sup>9</sup> and deference to administrative expertise.<sup>10</sup> The determination of whether the court should yield to an agency's primary jurisdiction can properly be called a jurisdictional ruling.<sup>11</sup> If a defendant asserts the defense of primary jurisdiction, the court must make a "judicial appraisal of the . . . interrelation of legislation . . . and other provisions of law which standing alone would empower a court to proceed. . . ."<sup>12</sup> If the need for uniformity is the basis, the doctrine is obligatory; that is, the court must require the parties to resort first to the agency.<sup>13</sup> But, it would seem that prior submission of the case to an agency is discretionary to the extent of determining what cases require administrative expertise. The Supreme Court has said, however, that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive."<sup>14</sup> Yet a mandamus petition was dismissed by a federal court of appeals because there was no clear statutory requirement of primary jurisdiction.<sup>15</sup>

The cornerstone of primary jurisdiction is *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*,<sup>16</sup> where the rule was originally designed to secure uniform-

<sup>5</sup> See generally 3 Davis, *Administrative Law Treatise* § 19 (1958); Jaffee, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 Yale L.J. 315 (1956); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 Harv. L. Rev. 436 (1954); R. von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929 (1954); Latta, *Primary Jurisdiction in the Regulated Industries and The Antitrust Laws*, 30 Cincinnati L. Rev. 261 (1961); Mitchell, *Primary Jurisdiction—What It Is and What It Is Not*, 13 ABA Antitrust Section Rep. 26 (1958); McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA Antitrust Section Rep. 57 (1958); Fulda, *A Critique of the Doctrine of Primary Jurisdiction*, 13 ABA Antitrust Section Rep. 68 (1958); Comment, 26 U. Chi. L. Rev. 598 (1959).

<sup>6</sup> *United States v. Western Pacific Ry.*, 352 U.S. 59, 63-64 (1956).

<sup>7</sup> *Id.* at 63.

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922).

<sup>10</sup> *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); *Far East Conference v. United States*, 342 U.S. 570 (1952).

<sup>11</sup> *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.) *cert. denied*, 346 U.S. 806 (1953).

<sup>12</sup> *Id.* at 232-33.

<sup>13</sup> *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

<sup>14</sup> *Whitney National Bank in Jefferson Parish v. Bank of New Orleans and Trust Co.*, 85 S. Ct. 551, 557 (1965).

<sup>15</sup> *American Airlines, Inc. v. Forman*, *supra* note 11. For a discussion of the facts involved see text accompanying note 65 *infra*.

<sup>16</sup> 204 U.S. 426 (1907).



ity of railroad rates. The Court held that a shipper seeking reparation because of an alleged unreasonable rate must primarily invoke redress through the Interstate Commerce Commission (ICC). The rule was then expanded to secure uniformity of tariff construction. In *Texas & Pacific Ry. v. American Tie*,<sup>17</sup> it was held that the determination of whether the term "lumber" in a tariff included oak railroad ties was a question of fact for the ICC. The Court said there was a need for uniformity since there was uncertainty as to whether "lumber" was used in an "ordinary" or a "special" sense. However, in *Great Northern Ry. v. Merchants Elevator Co.*,<sup>18</sup> the Court held that in tariff construction, when "the words . . . are used in their ordinary meaning,"<sup>19</sup> a solely legal question is presented and the need for primary jurisdiction disappears. When primary jurisdiction based on uniformity is required, the Court said, it is "because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission."<sup>20</sup> In *Hewitt-Robins v. Eastern Freight-Ways*,<sup>21</sup> the requirement of uniformity was held to be sufficiently served by allowing the ICC to determine the reasonableness of a routing practice, with a subsequent determination by a court of a common-law damage action.

The opinion in *Great Northern* also suggested the other rationale for primary jurisdiction—expertise.<sup>22</sup> This basis for the doctrine was then approved and ably explained by Justice Frankfurter's opinion in *Far East Conference v. United States*.<sup>23</sup> In that case, an organization of carriers had established a dual-rate system to give a lower rate to shippers who dealt exclusively with members of their conference. The Court dismissed an antitrust suit to give the Federal Maritime Board (FMB) an opportunity to hold a hearing and approve the dual-rate system. After the FMB gave its approval, the Court, in *FMB v. Isbrandtsen Co.*,<sup>24</sup> affirmed a decision which had set the approved rates aside. It was held that primary jurisdiction in the FMB in the first instance did not give it the last word in approving or disapproving the system. The Court said that in *Far East* the doctrine of primary jurisdiction was applied because "practical con-

<sup>17</sup> 234 U.S. 138 (1914).

<sup>18</sup> 259 U.S. 285 (1922). A shipper billed wheat to a point to be inspected and reconsigned to its ultimate destination. Under a railroad rule the charge for reconsignment was not applicable to grain "held . . . for inspection and disposition orders incident thereto. . . ." The dispute arose over determination of whether an order for reconsignment after inspection was a "disposition order incident" to consignment. 259 U.S. at 288-89.

<sup>19</sup> *Id.* at 291.

<sup>20</sup> *Ibid.*

<sup>21</sup> 371 U.S. 84 (1962).

<sup>22</sup> 259 U.S. at 291. "[A]cquaintance with many intricate facts of transportation . . . is commonly found only in a body of experts. . . ."

<sup>23</sup> 342 U.S. 570, 574-75 (1952).

It is "now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than the courts by specialization, by insight gained through experience, and by more flexible procedure.

*Cf.* *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 500-24 (1958) (Justice Frankfurter's dissenting opinion).

<sup>24</sup> 356 U.S. 481 (1958).

siderations dictate" that an agency makes a "preliminary, comprehensive investigation of all the facts," analyze them, and apply "to them the statutory scheme as it is construed."<sup>25</sup> The Court seemed to be holding that the dual-rate system was invalid as a matter of law. Apparently then, there was presented a question of law requiring preliminary analysis involving expertise.

The question which now often plagues the courts is under what circumstances they should defer to administrative expertise. The obvious cases might be those involving the reasonableness of a company's practices established pursuant to agency regulations,<sup>26</sup> or perhaps rate classification questions, or any other cases containing problems which require "expert knowledge of multitudinous detail of intricate nature in a technical field."<sup>27</sup> However, where "no special familiarity with the complicated factual situations peculiar to the field is imposed,"<sup>28</sup> why should a court defer to an agency? Although *Great Northern* also confined expertise to technical matters,<sup>29</sup> one writer has suggested that this qualification is not a limitation of real significance.<sup>30</sup> Professor Jaffee has criticized overworking expertise and has suggested that primary jurisdiction situations cannot be resolved by this single abstraction.<sup>31</sup> He reads *Great Northern* as recognizing that expertness is a question of degree.<sup>32</sup> It is submitted, then, that there is no real guide as to when the need for expertise should call for the doctrine of primary jurisdiction to be applied; rather the court will look at each individual case and compare its facts to the statutory grant of power and the statutory purpose.

It must be remembered that the primary jurisdiction doctrine only requires that the court suspend proceedings until the agency makes certain fact findings.<sup>33</sup> The agency can sharpen facts and issues within its area of specialization, enabling the court to benefit from whatever contributions the agency can make to the solution. However, because the doctrine should not be used to force litigants to go through an expensive and delayed proceeding, inadequacy of a possible remedy before an agency may prevent its application.<sup>34</sup> Although, if some parts of the case are within the exclusive jurisdiction of the agency, the doctrine may be applied even though total relief is not possible in the agency.<sup>35</sup>

Supersession has also been suggested as a reason for recognizing an agency's primary jurisdiction.<sup>36</sup> However, when regulatory statutes within the particular industry supersede the antitrust statutes, the only court

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<sup>25</sup> *Id.* at 498.

<sup>26</sup> See *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951); *Adler v. Chicago and Southern Air Lines, Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941).

<sup>27</sup> *Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd.*, 174 F.2d 63, 66 (9th Cir. 1949).

<sup>28</sup> *Ibid.*

<sup>29</sup> 259 U.S. 285, 291 (1922).

<sup>30</sup> Convisser, *supra* note 5, at 330.

<sup>31</sup> Jaffee, *supra* note 5, at 1041.

<sup>32</sup> *Id.* at 1045.

<sup>33</sup> *United States v. Western Pacific Ry.*, 352 U.S. 59 (1956); *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958); see generally 3 Davis, *supra* note 5, at § 19.01.

<sup>34</sup> *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). It was held that an antitrust injunction could not be delayed by assertion of primary jurisdiction when the conduct complained of is not subject to administrative control, and, therefore no remedy existed under the regulatory act.

<sup>35</sup> *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946); *General American Tank Car Corp. v. Eldorado Terminal Co.*, 308 U.S. 422 (1940).

<sup>36</sup> Latta, *supra* note 5, at 267.

action can be judicial review as given in the Administrative Procedure Act.<sup>37</sup> Thus, supersession is the judicial pronouncement of implied legislative exemption,<sup>38</sup> and the agency has primary and exclusive jurisdiction over some matters alleged to be antitrust questions. Hence, supersession is not within the conventional meaning of primary jurisdiction,<sup>39</sup> although it has not always been clearly differentiated by the courts.<sup>40</sup>

But when are the antitrust laws superseded by regulatory statutes? Cases of this sort are found only where there is "plain repugnancy between the antitrust and regulatory provisions."<sup>41</sup> Repeals by implication are not favored,<sup>42</sup> and absent a "clear expression" of an intent to supersede the antitrust laws, any statutory power of exemption will be strictly construed.<sup>43</sup> One ground for supersession might be a pervasive regulatory scheme in an industry. This was suggested in *United States v. Radio Corporation of America* [hereinafter *RCA*],<sup>44</sup> where the Supreme Court found that the Communications Act did not embody a "pervasive regulatory scheme"<sup>45</sup> and the Federal Communications Commission (FCC) was not empowered to decide antitrust issues as such. It was held that an antitrust action lay despite prior approval of the conduct by the FCC. Since the Commission had already decided all the questions it was going to decide, the justification for primary jurisdiction in the FCC was also wanting. The question was really, therefore, one of estoppel, *i.e.*, was the Department of Justice estopped from bringing this action because of prior approval by another arm of the Government? Then, in *California v. Federal Power Commission*,<sup>46</sup> the Court found no pervasive regulatory scheme in the Natural Gas Act,<sup>47</sup> and thus no supersession.

If a regulatory statute exempts a specified practice or agreement, once such practice or agreement has been approved by an agency, no cause of action for violation of the antitrust laws will lie. However, exemption orders will be narrowly construed.<sup>48</sup> And, it appears that express agency approval is the only way to be exempted under such a statute.<sup>49</sup> In *Isbrandtsen* the Court said that until the FMB approves and thus legalizes conduct, any price-fixing agreements by shippers remain subject to the antitrust laws, even though the Board may be accorded primary jurisdiction. Furthermore, it has been held that the question of whether an agency has or has not approved a particular transaction is a question of

<sup>37</sup> 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-42 (1958); see Latta, *supra* note 5, at 276-77.

<sup>38</sup> Note, 58 Colum. L. Rev. 673, 681 (1958).

<sup>39</sup> McGovern, *supra* note 5, at 62.

<sup>40</sup> See *Far East Conference v. United States*, 342 U.S. 570 (1952). Although in *Far East* the Supreme Court purported to follow a previous holding in *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), that the "Shipping Act . . . supersedes the antitrust laws," and ordered the complaint dismissed, it stated that "a similar suit is easily initiated later, if appropriate." 342 U.S. at 576-77. See generally Mitchell, *supra* note 5, at 29-31.

<sup>41</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963).

<sup>42</sup> *United States v. Borden Co.*, 308 U.S. 188 (1939).

<sup>43</sup> *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 206 (1945).

<sup>44</sup> 358 U.S. 334 (1959).

<sup>45</sup> *Id.* at 350.

<sup>46</sup> 369 U.S. 482, 485 (1962).

<sup>47</sup> 52 Stat. 833, 15 U.S.C. §§ 717-717w (1938).

<sup>48</sup> *United States v. Borden Co.*, 308 U.S. 188 (1939); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

<sup>49</sup> See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940). "Congress had specified the precise manner and method of securing immunity. None other would suffice." See Fulda, *supra* note 5, at 70.

law for the court and not the agency.<sup>50</sup> A fortiori, it is the province of the court to determine what conduct can be approved by an agency.<sup>51</sup> According to Professor Fulda's interpretation of *Isbrandtsen*, a court decision that an agency has no legal power to approve a particular agreement or conduct under any circumstances, should be a bar to primary jurisdiction in the agency.<sup>52</sup>

## II. THE CAB—EXEMPTION, PRIMARY JURISDICTION, AND SUPERSESSION

The Civil Aeronautics Act, as amended by the Federal Aviation Act of 1958,<sup>53</sup> vests jurisdiction in the CAB to regulate routes<sup>54</sup> and rates.<sup>55</sup> The Board also has power to issue orders approving consolidations, mergers, purchases and acquisitions of control of air carriers by other carriers or any person engaged in any other phase of aeronautics,<sup>56</sup> interlocking relations,<sup>57</sup> and pooling arrangements,<sup>58</sup> thus exempting from operation of the antitrust laws any person affected by such order "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."<sup>59</sup> The act also contains a saving clause which provides that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."<sup>60</sup> Furthermore, the Board is empowered to investigate and enjoin "unfair or deceptive practices" or "unfair methods of competition" by air carriers.<sup>61</sup>

An antitrust case which exemplified the Board's power of exemption was *Putnam v. Air Transport Ass'n of America*.<sup>62</sup> The action was by a travel agency operator against certain domestic airlines, an airline trade association and a division of the association. The airlines had agreed that they would sell tickets through only those travel agencies which had contracts with their trade association division and had empowered the division to make and cancel such contracts. Since the Board had approved this specific arrangement it was held that all the defendants were exempt from the operation of the antitrust laws in the appointment and removal of travel agencies under the Board order.

Although it is the province of the courts to say what their function is under the act,<sup>63</sup> there has been some conflict in decisions when the courts have tried to apply the primary jurisdiction doctrine to the CAB. In

<sup>50</sup> *River Plate & Brazil Conferences v. Pressed Steel Car Co.*, 227 F.2d 60, 63 (2d Cir. 1955). "When all that remains is for the Court to say what the plain words of the statute mean and whether the Board has acted, the doctrine of primary jurisdiction does not apply."

<sup>51</sup> See *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

<sup>52</sup> Fulda, *Competition in the Regulated Industries: Transportation* 443 (1961).

<sup>53</sup> 72 Stat. 754, 49 U.S.C. §§ 1301-1542 (1958), amending ch. 601, 52 Stat. 973 (1938) [hereinafter cited solely to 49 U.S.C.].

<sup>54</sup> § 401, 49 U.S.C. § 1371 (1958), as amended, 49 U.S.C. § 1371 (Supp. V 1962).

<sup>55</sup> § 404, 49 U.S.C. § 1374 (1958).

<sup>56</sup> § 408, 49 U.S.C. § 1378 (1958), as amended, 49 U.S.C. § 1378 (Supp. V 1960).

<sup>57</sup> § 409, 49 U.S.C. § 1379 (1958).

<sup>58</sup> § 412, 49 U.S.C. § 1382 (1958).

<sup>59</sup> § 414, 49 U.S.C. § 1384 (1958).

<sup>60</sup> § 1106, 49 U.S.C. § 1506 (1958).

<sup>61</sup> § 411, 49 U.S.C. § 1381 (1958).

<sup>62</sup> 112 F. Supp. 885 (S.D.N.Y. 1953).

<sup>63</sup> *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 364 (S.D.Cal. 1961). "Although the Civil Aeronautics Act sets forth the extent of the powers and duties of the administrative authority, it fails to delineate the scope of such functions as are necessarily left to the judiciary under the Act, thus confronting the courts with this responsibility."

*S.S.W., Inc. v. Air Transport Ass'n of America*,<sup>64</sup> primary jurisdiction was found to lie in the CAB in a case involving an antitrust matter. The complaint alleged that defendant had hindered and prevented plaintiff from obtaining ticket agencies, prevented competition, caused delay and refused vital maintenance at airports. Since the provisions of the Civil Aeronautics Act covered the dominant facts alleged, the Board was held to have primary jurisdiction to issue cease and desist orders against unfair or deceptive practices. Because the plaintiff had sought damages as well as injunctive relief, the district court was instructed to retain jurisdiction for possible injunctive relief against such alleged practices as were not covered by the act and to award damages, if any. Another court, however, took a different view of the primary jurisdiction to be properly accorded the CAB. In *Slick Airways v. American Airlines, Inc.*,<sup>65</sup> there was alleged a conspiracy to monopolize and restrain trade by excluding the plaintiff from the field of air freight transportation. The plaintiff sought an injunction and damages. Although it seemed that the charged conduct was again subject to the Civil Aeronautics Act, the court held contra, and said that the primary jurisdiction doctrine did not apply because the CAB could not provide remedial relief for past injuries to the plaintiff. It went on to say that "a conspiracy to restrain trade . . . being inherently secretive and furtive in nature is not the type of subject matter which would be dealt with by an order made under [Sec. 408 of the Civil Aeronautics Act<sup>66</sup>] . . . so as to be relieved from the operation of the antitrust laws."<sup>67</sup>

The apparent conflict in the above two cases was recognized by the court in *Apgar Travel Agency, Inc. v. International Air Transport Ass'n*.<sup>68</sup> The court discussed the opinions in both *S.S.W.* and *Slick* and said it would accept the *S.S.W.* reasoning. Again, this was an action for damages and injunctive relief for conspiracy to drive a ticket agency out of business because of its service to nonscheduled carriers. The primary jurisdiction doctrine was held applicable even though the Board did not possess remedial jurisdiction to determine the existence of a conspiracy under antitrust laws. Rather, the controlling factor, the court said, was that "considerations of administrative expertness and uniformity of regulation"<sup>69</sup> were significantly involved.

There is still some uncertainty in the doctrine's applicability, however. A later case, although not involving an antitrust action, seemed to apply the *Slick* reasoning. In *Fitzgerald v. Pan American World Airways, Inc.*,<sup>70</sup> it was held that since the CAB had no power to grant reparation for past misconduct or to approve past misconduct, an action by passengers who alleged violation of a statute prohibiting discrimination was not within the CAB's primary jurisdiction. The lack of the Board's power to give damages was stressed again in a case finding a cause of action existing in the federal courts.<sup>71</sup> However, in two other common-law damage actions,

<sup>64</sup> 191 F.2d 658 (D.C. Cir. 1951).

<sup>65</sup> 107 F. Supp. 199 (D.N.J. 1952), *appeal dismissed* 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

<sup>66</sup> *Supra* note 56.

<sup>67</sup> 107 F. Supp. at 207.

<sup>68</sup> 107 F. Supp. 706 (S.D.N.Y. 1952).

<sup>69</sup> *Id.* at 712.

<sup>70</sup> 229 F.2d 499 (2d Cir. 1956).

<sup>71</sup> *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360, 364-65 (S.D. Cal. 1961).

the CAB was held to have primary jurisdiction to determine reasonableness of an air carrier's practices and rules,<sup>72</sup> although the doctrine would not have applied if the issue had been a violation of a rule.<sup>73</sup>

While all of these cases had discussed the CAB's primary jurisdiction, when *Pan American World Airways, Inc. v. United States*<sup>74</sup> [hereinafter *Panagra*] came to the Supreme Court it was held that the antitrust laws had been superseded by Section 411 of the Civil Aeronautics Act,<sup>75</sup> which invests the Board with power to issue cease and desist orders to protect the public interest from air carriers who engage in "unfair . . . practices or unfair methods of competition." An injunction was sought by the government alleging that the defendant airline had violated antitrust laws by dividing territories and allocating routes between itself and another airline.<sup>76</sup> The Court found that the type of activities alleged were basic to the regulatory scheme,<sup>77</sup> and that the Board had sufficient power to either approve or enjoin the activity.<sup>78</sup> However, the Court refused to hold that there were no antitrust violations left to enforce,<sup>79</sup> and made it clear the decision was confined to the "narrow questions presented,"<sup>80</sup> which involved the "division of territories, allocation of routes, and the affiliation of common carriers with air carriers."<sup>81</sup> Furthermore, the Court did not say whether or not a private party could bring a civil suit in the courts; rather it indicated that if damages had been sought this might have been a case of primary jurisdiction rather than supersession.<sup>82</sup>

*Panagra* helps to show the spectrum of the supersession theory as it now stands. Here the matters involved were basic to a regulatory scheme, and the antitrust laws were superseded to the extent that alleged unlawful conduct could be approved or enjoined. The *RCA* case, on the other hand, illustrates that in an industry where there is no pervasive regulatory scheme, the antitrust laws are not superseded when the alleged unlawful conduct is not subject to agency approval. Therefore, unless the court

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<sup>72</sup> *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951); *Adler v. Chicago and Southern Air Lines, Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941).

<sup>73</sup> *CAB v. Modern Air Transport, Inc.*, 179 F.2d 622, 624 (2d Cir. 1950).

<sup>74</sup> 371 U.S. 296 (1963). See Davis *supra* note 5, at 12 (Supp. 1963); 1963 U. Ill. L.F. 284; 1963 Duke L.J. 743; 63 Colum. L. Rev. 923 (1963); 38 N.Y.U.L. Rev. 593 (1963).

<sup>75</sup> *Supra* note 61.

<sup>76</sup> 371 U.S. at 298. *Pan American, W.R. Grace & Co., and Panagra* (the first two defendants named each owned fifty per cent of the latter) were charged with violation of Sections 1, 2 and 3 of the Sherman Act. It was alleged that a market division of air traffic in South America was part of a 1929 agreement by which *Panagra* was formed; that *Pan American* and *Grace* conspired to monopolize a portion of the air routes between the United States and South America; and that *Pan American* used "its 50% control over *Panagra* to prevent it from securing authority from the CAB to extend its route from the Canal Zone to the United States."

<sup>77</sup> Note the seeming constriction in *Panagra's* test (matters basic to the regulatory scheme) from the test in *RCA*, *supra* note 44 (an entire Act of Congress constituting a pervasive regulatory scheme).

<sup>78</sup> Although Justice Brennan, dissenting, doubts the Board's power to approve the activities alleged. 371 U.S. at 332.

<sup>79</sup> 371 U.S. at 305.

<sup>80</sup> *Id.* at 313.

<sup>81</sup> *Id.* at 312.

<sup>82</sup> In a footnote, the Court considered what the situation would have been if a remedy (such as the award of damages) had been sought which the CAB could not give: "If it were clear that there was a remedy in this civil antitrust suit that was not available in a section 411 proceeding before the C.A.B., we would have the kind of problem presented . . . where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted." 371 U.S. at 313 n. 19.

finds a regulatory scheme pervasive, the limit to which supersession can be extended depends upon the determination of which matters are basic. This assumes, of course, that the agency can grant the type of relief sought, or can at least approve the conduct alleged to be unlawful. In the final analysis, however, supersession might merely depend on whether the critical issues posed in the antitrust case actually fall within the policy-making competence of the regulatory agency.<sup>83</sup>

### III. TWA v. HUGHES

The court here unanimously found no exclusive or primary jurisdiction in the CAB and no immunity of the defendants from the operation of the antitrust laws.<sup>84</sup>

Toolco had contended that modifications of the original control order,<sup>85</sup> approving specific intercompany transactions involving the acquisition of aircraft,<sup>86</sup> constituted a good defense to this antitrust suit.<sup>87</sup> The court said, however, that CAB approval did not extend beyond the transactions expressly ruled upon by the Board.<sup>88</sup> It said that "these individual and narrow Board orders" could not carry "approval of every transaction which Toolco might choose to effect in the exercise of control" without perverting the "entire regulatory structure of the Aviation Act."<sup>89</sup> None of the activities engaged in by Toolco, alleged to be in violation of the antitrust laws, were necessary to the exercise of Toolco's control relationship under the Board orders.<sup>90</sup>

Toolco alternatively had asserted that under the Supreme Court's holding in *Panagra*, the antitrust laws had been superseded to the extent that Congress had placed within the exclusive jurisdiction of the CAB the regulation of everything which might flow from approved transactions.<sup>91</sup> But the court noted "striking dissimilarities between the operative facts in *Panagra* and those in the instant case": (1) in *Panagra* the CAB had power to deal with alleged unlawful activities directly, while in this case the alleged activities were unrelated to any specific function of the Board; (2) in *Panagra* two of the defendants were air carriers clearly subject to the sanctions available to the CAB under Section 411 of the Civil Aeronautics Act,<sup>92</sup> but in this case none of the defendants was an air carrier subject to the sanctions authorized by section 411; and (3) here, TWA was seeking damages, while in *Panagra* the Government was seeking injunctive relief.<sup>93</sup> In determining questions of exclusive jurisdiction, the court said the issue was whether the federal courts had been excluded from

<sup>83</sup> McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA Antitrust Section Rep. 57, 62 (1958).

<sup>84</sup> *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 610 (2d Cir. 1964). "Title 49 U.S.C. § 1384 extends such immunity only 'insofar as may be necessary to enable such person to do anything authorized, approved or required by such order'."

<sup>85</sup> *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C.A.B. 153 (1944).

<sup>86</sup> 332 F.2d at 610. "In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted on TWA."

<sup>87</sup> *Id.* at 610.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* Cf. *Putnam v. Air Transport Ass'n of America*, *supra* note 62.

<sup>91</sup> 332 F.2d at 608.

<sup>92</sup> *Supra* note 61.

<sup>93</sup> 332 F.2d at 607-09.

consideration of the activities by Congress, not whether the CAB could consider such matters.<sup>94</sup> Noting the "basic to the regulatory scheme" test of *Panagra*, the court herein held that TWA's complaint drew into issue activities that fell "without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction."<sup>95</sup>

In dismissing Toolco's primary jurisdiction argument, the court recognized the CAB's expertise "in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers,"<sup>96</sup> but saw no need for the exercise of such expertise in dealing with the charges alleged by TWA. Furthermore, it said there was no need "for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be unlawful under the antitrust laws."<sup>97</sup>

#### IV. CONCLUSION

These cases involving airlines thus indicate that the subject matter of an antitrust suit may be within the exclusive jurisdiction of the CAB only when Board action has exempted the conduct in question or where the action concerns matters basic to the regulatory scheme which are "precise ingredients of the Board's authority. . . ."<sup>98</sup> If a complaint alleges unlawful activities outside the scope of the Board's power or seeks damages, then the antitrust laws are not superseded.<sup>99</sup>

In the light of the instant case, *Panagra* lacks sweeping application to other situations where the matters involved are not precise ingredients of the Board's authority. Rather, *TWA v. Hughes* lies somewhere between *Panagra* and *RCA* in discussing supersession. Reasonable limits must be placed upon the exclusive jurisdiction of regulatory agencies. Congress has provided that the primary responsibility of the Government for ferreting out antitrust violations should be with the Department of Justice and has designated that a federal court will be the primary forum for the determination of such matters. To have found supersession here would have paved the way toward making the CAB an arbiter in all private antitrust cases involving an airline.

In the area of primary jurisdiction, there still appears to be unresolved conflict in applying the doctrine to the CAB in antitrust matters. Although the cases in which the Board has been accorded primary jurisdiction have involved actions against air carriers where the Board has power to

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<sup>94</sup> *Id.* at 609.

<sup>95</sup> *Ibid.* For another example of this "small fraction" of antitrust problems, see *Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd.*, 174 F.2d 63 (9th Cir. 1949). Defendant, in an antitrust action, was registered as a non-certificated, irregular air carrier under CAB economic regulations, and was thus exempted from the Civil Aeronautics Act's requirement that an air carrier be certificated. The Board was held to have exclusive jurisdiction over defendant as long as the exemption lasted, because it had reserved power to terminate, suspend or revoke the certificate of registration.

<sup>96</sup> 332 F.2d at 609.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Panagra*, 371 U.S. 296, 305 (1963).

<sup>99</sup> However, in the instant case, it would appear that even had an injunction been granted, there would have been no conflict with *Panagra*. Enjoining such activities as alleged here would not interfere with the CAB's regulatory function because the court still finds that the matters are not basic to the regulatory scheme of the Civil Aeronautics Act. See Fulda, *A Critique of the Doctrine of Primary Jurisdiction*, 13 ABA Antitrust Section Rep. 68, 78 (1958).



issue cease and desist orders, all of the cases indicate that where a determination is needed requiring administrative expertise or uniformity of regulation, deference should be given to the Board if the plaintiff is seeking an injunction against conduct appearing to be subject to the Civil Aeronautics Act. The conflict arises through interpretation, *i.e.*, deciding what kinds of conduct are subject to the act, and what kinds of conduct require expertise or uniformity. Yet, perhaps inconsistency inheres in the doctrine because of its very nature,<sup>100</sup> and because it seeks to provide flexibility.<sup>101</sup> It is submitted, however, that interpretation should be the only source of inconsistency. The question of the kind of relief sought ought not to be of any functional significance until the court has first determined whether the subject matter calls for such uniformity or expertise as to require the doctrine's operation. A complaint seeking damages should only be a factor in determining exclusive jurisdiction.

Although *TWA v. Hughes* does not resolve the conflict, it does offer a guide as to what matters involving an airline and its controller do not require uniformity or expertise. After the CAB has approved control<sup>102</sup> and issued its orders, if the controller attempts to monopolize commerce by requiring the airline to boycott the controller's competitors and by refusing to finance aircraft acquisitions unless the airline agree to purchase from no supplier other than the controller, then the Board is not entitled to primary jurisdiction. If the CAB has already acted, the rationale behind *Far East*, where the FMB had never considered the agreement, disappears, and there arises a situation somewhat analogous to *Isbrandtsen*. In fact, primary jurisdiction was specifically held inapplicable in an antitrust case where the CAB had already acted upon the agreement involved.<sup>103</sup> The court in the instant case believed that the disposition of the matters alleged "would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry."<sup>104</sup>

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<sup>100</sup> Mitchell, *Primary Jurisdiction—What It Is and What It Is Not*, 13 ABA Antitrust Section Rep. 26, 41 (1958). "Inconsistency is to some extent inherent in the application of the doctrine because different courts will have different ideas on how statutory purposes and the respective roles of courts and administrative agencies can best be accommodated."

<sup>101</sup> "[T]he outstanding feature of the doctrine is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies." CAB v. Modern Air Transport, Inc., 179 F.2d 622, 625 (1950).

<sup>102</sup> Because Toolco had placed its stock in TWA in a voting trust in 1960, it appears that Toolco, since then, has not actually been TWA's controller within the meaning of Section 408 of the act. 332 F.2d at 609. A more recent case, *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56 (2d Cir. 1964), seems to reinforce this conclusion by holding that the Board must hold "a hearing before issuing its order permitting Toolco to resume control of TWA." 339 F.2d at 62.

<sup>103</sup> *Putnam v. Air Transport Ass'n of America*, 112 F. Supp. 885 (S.D.N.Y. 1953).

<sup>104</sup> 332 F.2d at 609.