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ACQUISITION OF OPERATING AUTHORITY BY FOREIGN AIR CARRIERS: THE ROLE OF THE CAB, WHITE HOUSE, AND DEPARTMENT OF STATE

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ACQUISITION by a foreign air carrier of operating authority to come into the United States is extremely simple. One look at Section 402 of the Federal Aviation Act of 1958¹ confirms this. Thus subsection (b) of section 402 empowers the CAB to issue a permit on a simple finding that the carrier is fit, willing and able and that the transportation is in the public interest. Subsection (c) outlines the simplest type of formal specifications—a written application conforming to the Board's rules as to content, verification and service. Subsection (d) is procedural—public notice, protests or memoranda in support by opponents or proponents, a public hearing and a speedy (as possible) disposition. Subsection (e) permits the Board, guided by the public interest, to prescribe terms, conditions, limitations and length of the permit. Subsection (f) gives the Board authority to alter, modify, amend, suspend, cancel or revoke the permit after protest and memoranda, notice and hearing, and the traditional finding of public interest. Subsection (a) prohibits operating as a foreign air carrier without a permit and subsection (b) precludes the transfer of a permit without approval of the Board.

The simplicity of the foregoing is somewhat marred by the provisions of section 1102. This section cautions the Board that in exercising its powers, it shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country.² The provision has exerted a considerable influence on the Board's powers in the foreign air carrier field, since there are currently in effect over fifty air transport agreements with which the Board has to be consistent.³

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¹ 72 Stat. 731, 49 U.S.C. §§ 1301-1542 (1958).

² 72 Stat. 797, 49 U.S.C. § 1502 (1958). "In exercising and performing their powers and duties under this act, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided*, That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest."

³ 2 Av. L. Rep. ¶ 26305 (1963).

Perhaps the Board should consider itself fortunate that there is no reported case of mutual inconsistencies between these agreements. Each of the agreements represents a bargain made by the United States on the exchange of air routes—some good, some bad, and possibly some which are merely indifferent. But whatever their value the public interest is now shaped by these agreements, a public interest which may appear quite different than it would if it were based only on the evidence introduced in hearings.

However, the Board cannot regard itself too much a prisoner in its own domain, increasingly hemmed in by bilateral agreements engineered by the State Department. It is not merely the passive trier of the facts. Under the scheme of the Federal Aviation Act, section 802 gives the Board the right to help shape the bilateral agreements in the first place. This section reads as follows: "The Secretary of State shall advise the Administrator, the Board, and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."⁴

These sections considered together make it appear as if a degenerative legislative process has been created in the act. First the Board is told to hold a hearing; then it is admonished that the outcome of its hearing must be consistent with certain agreements arrived at outside the hearing room. Finally it is told that it is to participate with the State Department in the making of the agreements which will filter its discretion. Clearly this is a horrible example of a system promoting rank prejudgment based on extrajudicial facts.

To add a further element to the confusion. It is apparent under section 801 of the act that the Board itself is not the final arbiter, is not the final judge of the issues, and does not grant the foreign air carrier permit. These acts are performed by the President, who has the complete right of veto over the issuance of any foreign air carrier permit by the Board. The President is not confined to the record before the Board. As a matter of fact, it is expressly understood that he will go outside the record and solicit the views of the State Department and other executive departments in a controversial case. Currently the entire mass of executive information and views is channeled through the office of the Bureau of the Budget.

One further basic ingredient must be injected in the potpourri of legislative provisions governing the issuance of foreign air carrier permits. This is the rule that the action of the Board in issuing, granting, denying or otherwise acting with respect to any foreign carrier permit is not reviewable in the courts. Section 1006 of the act provides that "any order, affirmative or negative, issued by the Board or Administrator under this Act, *except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this act*, shall be

⁴ 72 Stat. 783, 49 U.S.C. § 1462 (1958).

subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia. . . .” (Emphasis supplied).

It appears obvious, with the foregoing provisions in mind, that the quasi-judicial cloak which is placed around the Board’s shoulders by section 402 shelters a framework which is anything but judicial. The findings the Board makes as to public interest are not reviewable in any court of law. Its advice to the President on the merits of a case is not revealed to anyone outside the Government until after the President has acted. The President need not follow the Board’s advice and, in making up his mind, he may abandon the record completely.

Does the fact that hearings on the issuance of foreign air carrier permits are not traditional hearings at all mean that the procedure set up is no good? Possibly so. Louis J. Hector, Member of the Board in 1959, thought so when bilateral agreements were involved and said as much in his concurring opinion in the *BOAC—Foreign Permit Amendment* case (addition of Tokyo).⁵

Hector addressed himself to the futility of ever intervening in a section 402 proceeding, because the Board always followed executive aviation agreements. This is not altogether so⁷ because a great deal can be done by way of “interpretation.” In the *BOAC* case Hector stated:

Northwest in this proceeding has built a powerful and compelling case. Its objections to the grant of Tokyo to BOAC have been skillfully presented and they have been supported with extensive factual data. Neither BOAC nor the Bureau of Air Operations, proponents of the BOAC certificate, have presented any real factual case. It is clear to me that were it not for the bilateral, Tokyo would not be granted to BOAC by this Board on this record.

If there was ever a case where the Board should exercise its purported independent power to find that a route granted in a bilateral is not in the public interest, it is this one. Having not done so here, the power has become so theoretical as to be nonexistent. I think it is time that we admitted that in reality it does not exist.⁸

Chairman Durfee answered Hector as follows:

To equate the Civil Aeronautics Board with the United States Government in this process is to overlook the division of functions provided for by Congress in the Federal Aviation Act. The Board has a role in which it is required to evaluate economic considerations; the State Department has a role as adviser to the President on diplomatic and foreign relations matters; and the final decision for the United States Government is with the President.⁹

This is the traditional defense of the section 402 machinery, and on the whole is believed right. The machinery in fact deals with three subjects for decision: (1) public interest, bilateral agreement in force; (2) public interest, no bilateral agreement in force; and (3) fitness, willingness and ability.

⁵ 72 Stat. 795, 49 U.S.C. § 1486 (1958).

⁶ 29 C.A.B. 583, 594 (1959).

⁷ See *Línea Aérea TACA de Venezuela, C.A.*, 7 C.A.B. 317 (1946); *Aerovías Nacionales de Colombia, S.A.*, 7 C.A.B. 149 (1946).

⁸ *BOAC—Foreign Permit Amendment*, *supra* note 6, at 595-96.

⁹ *Id.* at 594.

The first of these subjects is the issue troubling Member Hector. He says that the right of United States carriers to challenge the grant is illusory in these circumstances. However, it is illusory only when the procedure is regarded as an evidentiary hearing. When regarded as a last clear chance to make an outcry, the procedure is extremely effective—if only for the purpose stated. It must be remembered that a bilateral agreement signed by the United States is more than a scrap of paper and that it is most unlikely that the obligation will not be honored. On the other hand, the specific circumstances exposed by the complaining airline at the hearing may indicate an area in which the United States could fruitfully ask for consultation under the agreement and seek a modification of its terms. Thus the hearing would have served to bring into focus something measurably bad.

In almost all cases, however, the outcry will not be heeded, because it merely repeats facts and dogma which have been considered by the executive when the bilateral was executed. This is as it should be, for the policies and economics of the bilateral deal have been thoroughly examined by the Board and the State Department before and during the negotiations and, in most cases the carriers involved have been given a wholly adequate opportunity to comment. Thus the machinery of section 402 gives the injured United States carrier the right to make a final, forceful protest against the execution of a bilateral commitment.

The right to make a protest does not, however, involve the right to have the agreement set aside or renegotiated. Bilateral agreements are entered into for the benefit of the commerce of the country as a whole, not that of any individual air carrier or carriers. Bargains may involve trading route improvements in one section of the world for the United States for a new route for a foreign country in a totally different section of the world. Benefits received by a United States carrier are seldom the equal of the detriments it suffers. The more philosophical carriers will reflect that the detriments they suffer in one negotiation will be retrieved by the benefits received in the next. In any event, an air carrier suffering imposition of foreign competition as consideration for benefits accorded abroad to another United States carrier, has not suffered a justiciable harm.¹⁰

In these circumstances the hearing-that-is-not-a-hearing is both adequate and appropriate. An orderly procedure is provided for bringing the squawks of an "injured" airline to the attention of the Board and the President. White House machinery provides for circularizing the decision of the Board to the other interested government departments for comment before the opinion is given to the President for approval. The carrier views thus get the attention of the top levels in government.

If Hector's advice were followed all this would be dispensed with, and the only recourse of the carrier would be to attempt to find a way to influence White House decision outside the Board. This of course still

¹⁰ *Colonial Airlines v. Adams*, 87 F. Supp. 242 (D.D.C. 1949).

may be possible, but the White House is protected by the fact it may always insist that the carrier put his case to the Board in the prescribed manner, whereas were the Hector views adopted no prescribed course would exist.

Another singular virtue of the hearing-which-is-not-a-hearing is that because of its remoteness from judicial norms, the foreign government involved may be advised beforehand of a pending adverse decision of the Board. This affords foreign governments an opportunity to take the setback gracefully. Face may be saved through withdrawal of an application. Possible conditions may be suggested to meet the announced difficulties. The fact that the decision does not need to be kept under tight judicial security permits the handling of a delicate matter with maximum diplomacy. For the foregoing reasons the section 402 hearing-that-is-not-a-hearing is better adapted to its task than either a full-fledged hearing with judicial review or no hearing at all à la Hector.

Of course, where there is no bilateral agreement in effect, the prejudgment aspect vanishes, and the section 402 proceeding becomes an orderly method for collecting facts and arguments upon which the Board can base its recommendations. Even though no appeal to court lies and even though the President may go outside the record of the case, the adversary process is likely to be entirely adequate for informing the Board and the President.

Here again, the lack of right to appeal to the courts is probably a good thing. Certainly, if the Board or the President turns down the foreign carrier applicant, a right of appeal would put the court in the diplomatic hot seat. If the application should be granted, even greater diplomatic difficulties could be expected. So long as the customary practice in foreign countries is to have a chosen instrument airline, state-owned in whole or in part, to perform its air transportation, the grant or denial of traffic rights will be a diplomatic matter.

The issues of fitness, willingness and ability can be heard in a wholly traditional hearing without too much diplomatic embroilment. On the other hand, they can be dealt with just as well by the executive. If the fitness, willingness or ability of the foreign carrier is marginal, the best approach is to advise the foreign country of the deficiency.

The proof of the value of the section 402 procedure is that it has worked reasonably well over the years. Assuming we agree that we must admit foreign carriers to our shores if we are to operate to theirs, the procedure established is remarkably well-adapted to both the bilateral and non-bilateral situations.

While the power to issue or to deny a foreign permit is lodged in the President, the formulation of the opinions which advise him and upon which he usually acts is the Board's. During the years the Board has developed, through these opinions and their tacit approval by the President, a fairly extensive body of policy. The remainder of this article is devoted to a discussion of these policies.

In the early days of the Civil Aeronautics Act, administration of the foreign air carrier section was not too difficult. Pan American Airways was the mainstay of the United States foreign aviation activity. It had extended its original line from Miami to Cuba, down the east coast of South America, and throughout Central America. At the time the act was adopted in 1938, Pan American had agreements with many countries in Latin America and elsewhere giving it landing rights and sometimes even a franchise to operate through the territory of those foreign countries. The principal overseas foreign company looking toward operating to the United States was Imperial Airways of the United Kingdom. However, the importance of transoceanic aviation was only just beginning to make itself felt and was potential rather than actual.

Because the negotiation for landing rights had in large part been conducted by the carriers themselves, there were no requirements that reciprocal rights be granted to the foreign carriers. Obviously it was not possible for a private United States company to make any such undertaking. However, private negotiations were not adequate for the British who exacted the requirement that Imperial Airways be permitted to come into the United States. The predecessor of the CAB, the Secretary of Commerce, debated whether he could enter into an agreement fixing an international route with the United Kingdom. Homer Cummings, then Attorney General of the United States, in an opinion which has never been published in the *Opinions of the Attorney General*, but which is found set forth in full at page 295 of the *Aeronautical Statutes and Related Material*, revised 1 July 1963, considered this problem, and said " 'No' and again 'Yes'." However, the State Department and the Board decided that it would be a better policy for the government to negotiate landing rights in foreign countries rather than the private carriers. In fact private negotiation of such rights inevitably would affect the Board's decision as to what carrier to authorize to operate the route. If an exclusive right were obtained from Country X by Carrier A, it would be difficult for the Board to authorize Carrier B to fly into the country instead of Carrier A. Consequently, a policy statement was issued jointly by the two agencies, which is now incorporated in Section 12 of Part 399 of the Board's Economic Regulations. It currently reads: "It is the policy of the Board (jointly with the Department of State) that, as a general rule, landing rights abroad for United States flag air carriers will be acquired through negotiation by the United States Government with foreign governments rather than by direct negotiation between an air carrier and a foreign government."

The foregoing policy statement actively injected the Board into the negotiation of foreign air routes—in obtaining rights for United States carriers abroad and in granting the reciprocal rights to the foreign countries in respect of their designated carriers. From that time the issue of pre-judgment by the Board and the general utility of section 402 hearings was up for debate.

One of the landmark cases in the foreign air carrier field was decided by the Board early in 1941. This was the case of *Trans Canada Airlines—Permit to Foreign Air Carrier*.¹¹ Trans Canada had applied not only for a route between Toronto and New York (which was covered by the bilateral agreement existing between the two countries) but also for a route between Toronto and Buffalo, which was a route granted to an American carrier under the same bilateral arrangements. The Board stated: "This arrangement precludes the operation by a Canadian carrier of the route between Toronto and Buffalo, one of the routes requested by the applicant herein. . . ."¹²

Immediately after having made the foregoing statement, the opinion proceeds to make a much quoted holding. It said:

While, under section 1102 of the act, we are required to perform our duties consistently with the provisions of this arrangement, there is nothing therein which dispenses with the requirement of section 402(b) that we find that the services to be operated exclusively by a Canadian carrier are required by the public interest and that such carrier is fit, willing and able to perform such services.¹³

In the same case the Board examined the question of what constituted the public interest and decided that this interest is the national interest and that "public" is not limited to the public "within the corporate limits of the cities which the proposed application would link together."¹⁴

This case elicited from the Board another consideration which, however, has not remained in the Board's decisional repertory. The Board held¹⁵ that the relationship that the proposed service bears to the development of a nationally and economically sound air transportation system must be examined since new service should fit logically into the existing air transportation system. In this connection the Board appears to be saying that a route grant to a foreign carrier must be justified by a logical inter-meshing into the national transportation system. If this type of thinking were to be applied to the North Atlantic, it is apparent that the present number of carriers could not possibly be justified.

A holding from the early days which has been important to the foreign carriers is the holding by the Board in the case of *TACA, S.A. (El Salvador), Foreign Air Carrier Permit*.¹⁶ TACA had applied for a foreign air carrier permit, and Pan American attempted to introduce evidence that TACA did not possess authority from the Panamanians to operate over the Republic of Panama. The Board said, "We cannot agree with this contention since we are concerned with the issuance of a permit under the Civil Aeronautics Act and the authority of the carrier to operate in other countries is not an issue."¹⁷ This rule has continued to

¹¹ 2 C.A.B. 616 (1941).

¹² *Id.* at 618.

¹³ *Ibid.*

¹⁴ *Id.* at 619.

¹⁵ *Ibid.*

¹⁶ 3 C.A.B. 234 (1941).

¹⁷ *Id.* at 236.

the present time. The result is that foreign carriers are not required to show they have authorization from any foreign country (other than their own) to operate over the routes they seek from the CAB and that lack of such authority is not admissible evidence.

In the years immediately after the war the Board was in a benign mood so far as foreign carriers were concerned. It showed its pleasant disposition in a case involving a Mexican carrier by authorizing the carrier to operate temporarily to Brownsville on the United States side of the Mexican border. The airport at Matamoros (on the Mexican side) was undergoing repairs and the only way for it to serve Matamoros was through the Brownsville airport.¹⁸

The attitude of sweet reasonableness was further shown in CAB interpretation of bilateral agreements. The agreements between the United States and Sweden and the United States and Denmark each provided for service between points in those countries via intermediate points to New York or Chicago in the alternative. The Board interpreted this provision to permit the Swedish carrier to serve both New York and Chicago although not on the same flight.¹⁹ In passing it is interesting to note the tacit approval which the Board gave to agreements regarding competition between foreign carriers and United States air carriers operating over the same general routes. We find the Board saying in the *Swedish Intercontinental Air* case, "These companies and American Overseas Airline have reached an understanding that on a temporary basis they will conduct their respective operations and utilize their respective mechanical facilities in a manner to avoid duplication."²⁰ The Board was shortly to revise its opinion by disapproving a somewhat similar working arrangement between TWA and Air France.²¹

Another example of the Board's rather easy going acceptance of its responsibility to issue foreign air carrier permits is contained in the case of *Cuban Airlines, Air Carrier Permits*.²² In this case the applicants were two Cuban airlines sponsored by the Cuban Government, Compania Cubana de Aviacion, S.A. and Expreso Aereo Inter-Americano, S.A. The Board reacted in similar fashion, granting two foreign air carrier permits. However, the second one—that to Expreso—was limited to cargo only. In this case there was no bilateral air transport agreement in effect between the two countries, but the Board reasoned that if it wanted to have the route—Miami-Havana—served by United States carriers (a matter which it had already found to be in the public interest) it would have to give reciprocal rights to the Cuban carriers. The Board said:

If United States carriers are to be authorized to inaugurate and to continue to conduct operations to points in Cuba in accordance with the requirements

¹⁸ Aero-Transportes, S.A., Temporary Foreign Air Carrier Permit, 6 C.A.B. 383 (1945).

¹⁹ Swedish Intercontinental Airlines Foreign Air Carrier Permit, 6 C.A.B. 631, 635 (1945).

²⁰ *Id.* at 635.

²¹ Air France-TWA Agreement, 7 C.A.B. 163 (1946).

²² 6 C.A.B. 807 (1946).

of the public convenience and necessity, it is clear that principles of international reciprocity require that rights likewise be granted to Cuban companies to operate between the two countries. In view of the substantial traffic volume between Miami and Havana and the importance of maintaining close friendly relations with Cuba we conclude that the public interest will be served by service proposed by the two applicants before us.²³

Thus, the Board found it well within its powers to grant rights to foreign carriers notwithstanding the lack of a bilateral air transport agreement or other arrangement between the two governments.

The liberal tendencies which had been shown by the Board in the foreign air carrier permit field have taken other forms. In December 1944 delegates from all the western world were invited to attend the Chicago Conference on Civil Aviation. Documents which were produced by this Conference included the Interim Agreement on International Civil Aviation (which preceded the Chicago Convention), the Air Transit Agreement, and the International Air Transport Agreement.²⁴ The last-named agreement was actively sponsored by the United States delegation, but the United States was unable to convince any sizeable number of other delegations that such liberality was a workable principle. Since the United States itself denounced this agreement on 25 July 1946, the high tide of liberality may be said to have begun to ebb at that date.

An indication of that ebbing is the Board's action in the case of *Linea Aerea TACA de Venezuela*.²⁵ In this case three applications of Venezuelan carriers under the five freedoms agreement were consolidated for hearing and consideration. These carriers were TACA, Aeropostal, and Avensa. Of these only Aeropostal was designated by the Venezuelan Government, although it expressed no objection to the certification of the other two carriers. Lapsing liberality was shown first by the interpretation the Board placed on the Air Transport Agreement as not requiring certification by every foreign country of every airline of each contracting state. The Board examined the surrounding documents and the context of the undertakings in that agreement and concluded that in this particular case the requirements of reciprocity justified the certification of an international air service to the United States by a Venezuelan carrier. The Board then suggested that, inasmuch as bilateral air transport negotiations were underway at the time between Venezuela and the United States, the other two carriers await the outcome of these negotiations. It is true that the Board awarded to Aeropostal a route with two points in the United States—Miami and New York. This award is certainly consistent with the earlier liberal approach. However, the Board justified this by saying that the reciprocal desires of the United States to serve Venezuela were enough to justify service to two points by a Venezuelan carrier.

The Board also showed a retrenchment from liberality with an agreement with still another country—Colombia. In an exchange of notes

²³ *Id.* at 811.

²⁴ International Air Transport Agreement (Five Freedoms Agreement), 7 Dec. 1944, E.A.S. 487 (accepted by the United States 8 Feb. 1945). Denounced 59 Stat. 1701 (25 July 1946).

²⁵ 7 C.A.B. 317 (1946).

made in 1929²⁶ the governments of Colombia and the United States had agreed in effect that commercial aircraft of United States registry should have permission to land, fuel, make repairs, and discharge passengers, mail and cargo at the Atlantic and Pacific ports of Colombia. Reciprocally, commercial aircraft of Colombian registry had been granted permission to land at the Atlantic and Pacific ports of the United States. There was no limitation on these cross rights and, in accordance with the agreement, the applicant carrier had requested routes between Bogota and Miami and Bogota and New York. The Board met the issue posed by the Kellogg-Olaya Pact head-on by stating that what had been said could not have been said. The Board wrote:

While it appears that the 1929 agreement is mandatory upon both countries so long as it is in existence, it would not appear to be mandatory upon either country to grant to any air carrier of the other country any and all routes for which application may be made. On the basis of reciprocity we will authorize service by TACA at intermediate points in Jamaica and Cuba with or without intermediate points in Colombia on a route between Bogota and Miami. No United States air carrier operates between New York or Washington on the one hand and Colombia on the other.²⁷

Thus the Board, in the face of an agreement which clearly stated that carriers of each country would have rights to serve the Atlantic and Pacific ports of the other country, decided that the Colombian applicant should be confined to Miami.

During the period shortly after the war the Board exercised its powers and duties in the foreign air carrier field to provide a helping hand to the foreign air carrier in getting started over a new route. An example of this helpfulness is shown in the case of *Philippine Air Lines, Air Carrier Permit*.²⁸ There the carrier, lacking DC-4 and DC-6 aircraft with which to perform its proposed transpacific operations, had made arrangements with Transocean Airlines, a United States nonscheduled carrier, to furnish the aircraft in return for the issuance of stock and to lease other aircraft if the need should arise. The Board stated that insofar as section 402 of the act is concerned, "We find nothing adverse to the public interest in the fact that Transocean charters planes, with crews, for use in certain air transport services offered by PAL. . . ."²⁹

In another helpful action, the Board amended the foreign air carrier permit of BOAC issued pursuant to the grandfather clause to eliminate the two-flight-a-week limitation contained in their permit.³⁰

Still another way in which the Board worked out an amicable solution with foreign carriers was in the case of the *Scandinavian Airlines System, Foreign Air Carrier Permits*.³¹ It will be recalled that the three Scandinavian countries each had a national airline authorized to operate to

²⁶ Kellogg-Olaya Pact, Department of State Press Release, 23 February 1929.

²⁷ 7 C.A.B. 149, 154 (1946).

²⁸ 8 C.A.B. 101 (1947).

²⁹ *Id.* at 107. Interestingly enough, the Board now appears to be returning to its wet-lease liberality. See § 399.19 as revised 16 April 1965.

³⁰ BOAC, Amendment of Foreign Permit, 8 C.A.B. 930 (1947).

³¹ 8 C.A.B. 676 (1947).

the United States, each pursuant to a foreign air carrier permit issued to it by the Board. However, the three carriers decided to pool their resources, pool their franchises, and effectively merge their properties into one operating unit under the name Scandinavian Airlines System—a "consortium." Notwithstanding the rather obvious antitrust implications of the elimination of intra-Scandinavian competition over the North Atlantic, the Board readily found means to approve the issuance of a single permit to the consortium. It held that the definition of "association" in the definitions part of the act embraced an association of three airlines which, therefore, constituted a single person. It readily surmounted the difficulty that the consortium airline would not be effectively controlled nor substantially owned by nationals of any one of the three countries concerned. It pointed out that this was merely a permissive feature of the bilateral agreements which could be utilized by the Board if it so desired. It did not so desire, and consequently a permit could be issued to the consortium notwithstanding the lack of ownership and control in any one country. While the result appears to be right and consistent with the provisions of Article 79 of the Chicago Convention, which specifically authorizes pooling agreements and joint operating organizations,³² the result would have been less predictable if issued in 1960.

Another illustration of the Board's helpfulness is *Peruvian International Airways, Foreign Air Carrier Permit*.³³ In that case there was in effect a bilateral agreement negotiated between Peru and the United States. It contained the usual clause permitting the United States to withhold or revoke a permit issuable to the Peruvian carrier in the event that substantial ownership and effective control were not in nationals of Peru. However, concurrently with the signing of the bilateral agreement four sets of notes were signed which permitted the Peruvians to show only thirty per cent ownership in nationals of Peru for the first ten years of operation.³⁴ When the case came on for hearing, however, it appeared that there was some dispute as to whether Peruvian nationals owned even thirty per cent of the stock. Under one set of exhibits the amount of stock subscribed by Peruvian nationals would be only seventeen per cent. Nevertheless, the Board found that it would not be in the public interest to exercise the right to withhold a permit to Peruvian Air.

Another example from this period of the Board's willingness to do a little bit more for the foreign carrier than required by the law of the particular case before it is *Swissair, Air Carrier Permit*.³⁵ In that case a bilateral agreement had been executed between Switzerland and the United States. Under the agreement airlines of Switzerland were to be authorized to pick up and discharge international traffic in passengers, cargo and

³² Article 79: "A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be state-owned or partly state-owned or privately owned."

³³ 8 C.A.B. 229 (1947).

³⁴ *Id.* at 230.

³⁵ 8 C.A.B. 626 (1947).

mail at New York on the following route: "Switzerland, via intermediate points (non-traffic stops), to New York in both directions."³⁶ Certainly under this language it can be said that the Board would not be compelled to grant Swissair any intermediate stop on the route between Switzerland and New York. The Board nevertheless did grant such intermediate points, these being Shannon, Ireland; Santa Maria, Azores; and Gander, Newfoundland. In so doing the Board specifically discussed the question as follows:

The bilateral air transport agreement between Switzerland and the United States is unusual in that the phrase "via intermediate points (non-traffic stops)" was inserted in the description of the route allocated to Swiss airlines. However, Trans World Airlines, which presently serves Geneva via Gander, Newfoundland, and Shannon, Eire, has been accorded traffic rights by the Swiss Government at these intermediate points. Consequently it would appear that, in the absence of affirmative proof demonstrating a specific intent to restrict the activities of the Swiss carrier at intermediate points, the phrase in question should be taken as merely descriptive in character and not intended to preclude the Board from granting unencumbered traffic rights at the intermediate points. Such a holding would be in accord with the requirement of section 1102 of the act that exercise of the Board's powers and duties be consistent with any "obligation" assumed by the United States in an international agreement such as the bilateral in question, since the insertion of the phrase "non-traffic rights" in the Swiss air carrier route description did not impose an "obligation" upon the United States not to grant full traffic rights at intermediate points to a designated Swiss air carrier. Rather the United States agreed in effect to grant at least non-traffic rights and may dispense additional rights without in any way acting in violation of the subject agreement. Furthermore, inasmuch as the United States Government has uniformly maintained that American carriers should be accorded full rights to engage in fifth-freedom traffic on international routes, within the usual limitations of its bilateral agreements, it would be inconsistent for this Board to deny a similar right to this applicant.³⁷

The basic generosity of the Board toward foreign carriers in the period between 1945 and 1950 is shown by the case of *TACA, S.A., Foreign Air Carrier Permit*.³⁸ In that case TACA's permit to operate between El Salvador and the United States was up for renewal. At the time of the original issuance of the permit ninety-eight per cent of the outstanding stock of the carrier was held by a holding company—TACA Airways S.A., a Panamanian corporation. That control remained the same. However, the stock of the Panamanian corporation in the first issuance of the permit had been held in large part by TWA whereas in the amendment proceeding evidence showed that the Waterman Steamship Corporation held effective control of the parent TACA company. It will be recalled that the Waterman Steamship Corporation had applied to the Board directly for the issuance of a certificate of public convenience and necessity and that the Board had turned it down.³⁹ Under the circum-

³⁶ *Id.* at 627.

³⁷ *Id.* at 629-30.

³⁸ 10 C.A.B. 130 (1949).

³⁹ Additional Service to Latin America, 6 C.A.B. 857 (1946).

stances the Board could hardly have been blamed had it decided to turn Waterman Steamship down again. Certainly it would appear that a company which failed to obtain a certificate of public convenience and necessity for a route should not be permitted to take on the hat of a foreign country and in that guise obtain a foreign air carrier permit for the same route. The Board, however, stated:

Thus in one sense Taca's application, coupled with the favorable action requested by the Central American republics, amounts to a joint request to embody in a permit to one Central American carrier rights reciprocal to those extended by the Central American Government to Pan American Airways.

In passing upon an application for a foreign air carrier permit the identity of the person controlling the applicant and the nature of that person's other activities are obviously elements of public interest which the Board may take into account. But, in our judgment, whatever disadvantages may result from the indirect control of Taca, S.A., by Waterman Steamship Corporation are outweighed by the fact that the application is sponsored by the Government of El Salvador and endorsed by other Governments of Central America, which have for some time extended operating rights to Pan American Airways.⁴⁰

Thus at the end of the 1940s the Board was in a position of regarding itself with having acted liberally in the foreign carrier field. This liberality was in no sense prompted by a desire to give the foreigners that which we would not give ourselves. On the contrary it was prompted by the recognition that only in granting rights to foreign carriers could we hope to get rights for our own carriers to operate abroad. Without doubt the Board—and even the entire United States carrier industry—felt confident that they could out-compete the foreign carriers in operating between the United States and foreign countries.

However, with the end of the 1940s United States carriers were beginning to take more and more direct action to avoid the impact of additional competition from foreign carriers. One of the first instances of this was the fight which Colonial Airlines put up in connection with the direct operation by Trans Canada between Montreal and New York. It will be recalled that originally the bilateral agreement between Canada and the United States provided for separate routes for Canadian carriers and United States carriers. Each route was to be operated by one carrier and one carrier only and no "double trackage" was to be permitted. With the advent of the Bermuda-type agreement where linear routes were spelled out on a reciprocal basis and multiple carriers could be and were being designated to operate over those routes, the situation changed. A revised agreement was negotiated with Canada, and Mr. Russell B. Adams, a member of the Board, was appointed chairman of the delegation.

The two delegations met and agreed upon a revision of the bilateral agreement. This revision included permitting Trans Canada Airlines (or any other airline designated by Canada) to operate over the profitable Montreal-New York route. Colonial Airlines—the United States operator

⁴⁰ TACA, S.A., Foreign Air Carrier Permit, *supra* note 38, at 134.

on the route—objected strenuously. Notwithstanding the objection, the agreement was signed and in due course the designated Canadian carrier, Trans Canada, petitioned the Board for the amendment of its section 402 permit. Thereupon Colonial Airlines began a sort of legal danse macabre seeking to avoid the consequences of this agreement. Colonial brought action against the Board to restrain further proceedings in the amendment of Trans Canada's permit on the ground that the act constituted an unconstitutional delegation of congressional authority to the President.⁴¹ The case was thrown out. The carrier raised the same point before the Board, and the Board rejected it.⁴²

Colonial contended that Trans Canada was not fit, willing or able to conduct the operation. It stated that the hearing on the section 402 permit application was merely a pro forma, miserable excuse for a hearing, since the Board had predetermined the right of a Canadian airline to operate Montreal-New York route in the bilateral negotiations. The Board rejected this argument. Colonial argued that the bilateral air transport agreement between Canada and the United States was in reality a treaty which had not been submitted for ratification and, therefore, was a nullity. The Board gave this short shrift. It then contended that Trans Canada was part of a huge transportation monopoly in Canada operating contrary to the policy of the Sherman and Clayton Acts, and moreover, that the applicant airline was controlled by surface interests. It, therefore, would be operating contrary to the policy of the Civil Aeronautics Act as interpreted by the Board. The Board said "No."

The Colonial case points up in all its facets the difficulties which a United States carrier may experience for political reasons entirely beyond its control. In the instant case Colonial had been consulted prior to the amendment of the bilateral air transport agreement with Canada. It undoubtedly had expressed its views through the Air Transport Association to the negotiators that the grant of a Montreal-New York route to a Canadian carrier would be disastrous to it and that such a trade should be avoided at all costs. However, the United States—at least in the eyes of those on the Board and in the aviation side of the State Department—regarded (and properly so) the public interest questions with a broader scan. The negotiators with Canada had more than Colonial's interests in mind. They had to consider the interests of other United States carriers operating into Canada, the interests of the United States traveling public, and the interests of still other United States carriers who might desire routes to Canada and beyond, for which payment in the coin of reciprocal traffic rights would have to be made.

Colonial stood to gain nothing from the new agreement except competition from a formidable competitor with new Viscount equipment. The final determination of whether it was to be saddled with this competition was not made by reference to standards of convenience and necessity.

⁴¹ Colonial Airlines v. Adams, *supra* note 10.

⁴² Trans Canada Airlines, Montreal-New York Service, 11 C.A.B. 209, 210 (1959).

On the contrary, it was bartered away by negotiators whose primary concern was to get as much in return for these competitive rights as possible. And the benefits received by the United States were then distributed to other carriers.

There is no doubt that Colonial was given the ability and opportunity to make its objections known at every turn in the proceeding. A possible exception to this might have been the fact that the official ATA observer at the conference was sworn to secrecy as to what transpired in the meetings. In any event, the possibility of competition on the Montreal-New York route had been made known to Colonial Airlines, and it had been given the opportunity to make its views known to responsible officials in the United States Government who formulated the policy. These opportunities, however, would not be regarded as a constitutional hearing in any sense of the word. At no time was Colonial given an evidentiary hearing when it would have done much good. When it finally was accorded the right to a hearing, the Board had already adopted, in effect, the policy of double tracking the Montreal-New York route and had given its approval to the amended agreement; and the State Department was in accord.

If there is one thing which will generally arouse a lawyer's sympathy, it is the fact that a person, although granted a hearing in form, has been deprived of the basic objective of a hearing—an impartial decision based on the facts adduced. In these bilateral air transport agreement cases, however, it may be well to question the basic precept. The defending carrier is not in any real sense deprived of a property interest. He is being subjected to competition or additional competition, but he certainly has no vested interest in freedom from competition. When he accepts his certificate of public convenience and necessity he is fully aware that the Board may certificate a second United States carrier to operate in competition with him. Any realistic appraisal of his rights to operate into a foreign country must also tell him that such rights may ultimately be conditioned on reciprocity. The original arrangement for Colonial had been fine indeed. The carrier had enjoyed an exclusive franchise to operate one of the most lucrative international routes in North America, but the pronouncements of section 401(i) should have put it on notice that exclusiveness could be terminated at any time.⁴³

In some instances the Board appeared almost capricious in determining whether or not it would impose restrictive conditions. For example, compare *Compania Dominicana de Aviacion, Air Carrier Permit*⁴⁴ with *BOAC, Amendment of Permit*.⁴⁵ These two cases show a notable difference in attitude as to the imposition of restrictions on foreign air carriers operating pursuant to bilateral agreements. In the case of the Dominican carrier

⁴³ "Sec. 401 [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371]

(i) No certificate shall confer any proprietary, property, or exclusive right in the use of any airspace, Federal airway, landing area, or air-navigation facility."

⁴⁴ 12 C.A.B. 767 (1951).

⁴⁵ 12 C.A.B. 144 (1950).

the bilateral agreement between the Dominican Republic and the United States gave to the Dominican carrier one route between Ciudad Trujillo (now Santo Domingo) and San Juan, Puerto Rico, and another between Ciudad Trujillo and Miami, Florida. During the hearings concern was expressed that the applicant carrier would attempt to operate through flights between Miami and San Juan by way of Ciudad Trujillo. The applicant's witness testified that the company had no such intention, was going to operate the two legs on different days, and moreover, would be willing to accept a specific restriction in its permit prohibiting it from engaging in cabotage. The examiner approved this procedure and recommended that such a restriction be imposed. However, when the matter came to the Board it decided on its own motion not to include the restriction. It said:

It is our conclusion that the imposition of such a condition is unnecessary. In connection with that conclusion we should perhaps point out that even in the absence of a restriction the carrier is prohibited as a matter of law from carrying cabotage traffic between San Juan and Miami. Apart from this provision, the justification for this route from a public-interest standpoint rests on the establishment of service between Ciudad Trujillo and Miami, and between Ciudad Trujillo and San Juan, rather than on the establishment of additional service for the movement of traffic between Miami and San Juan. Accordingly, we shall expect the carrier to so conduct its operations as to insure that it does not engage in cabotage operations between Miami and San Juan.⁴⁶

The BOAC case involved a situation somewhat the reverse of the *Dominicana* case. In BOAC the carrier had requested its permit be amended to authorize operation over a route between the United Kingdom and the Bahamas via the intermediate point New York. The Bahamas are British territory so that the British carrier should have had a good case for operating turn-around services both between the Bahamas and New York and between New York and England. However, during the course of the hearing the British carrier stated that it was willing to accept a restriction in its permit prohibiting the operation of New York-Bahama turn-around service. The Board imposed this condition saying:

The Air Services Agreement between the United States and the United Kingdom of Great Britain and Northern Ireland, which became effective February 11, 1946, contains standards governing capacity which may be provided by air carriers over the routes described in said agreement. Notwithstanding this, the applicant agreed with the parties in this proceeding to a restriction in the permit it seeks prohibiting the operation of turn-around service between New York and the Bahamas. We will therefore impose a restriction prohibiting the operation of such turnaround service over that portion of the route. Such condition shall be without prejudice to future applications by BOAC consistent with the provisions of the Air Services Agreement, seeking removal of the condition. The imposition of this condition should not be deemed to be a finding by the Board that the provisions of the Bermuda Agreement are not, in and of themselves, sufficient to effect control of the frequencies or capacity that may be offered over any portion of the route in question.⁴⁷

⁴⁶ *Compania Dominicana de Aviacion*, Air Carrier Permit, *supra* note 44.

⁴⁷ BOAC, Amendment of Permit, *supra* note 45 at 149.

Notwithstanding the dozen years experience which the Board had acquired by 1950 in connection with its international work, it occasionally gave evidence that it had no conception of its very limited jurisdiction abroad. A nice illustration of this lack of consciousness is shown in the case of *LACSA, Foreign Air Carrier Permit*.⁴⁸ In that case Lineas Aereas Costarricenses, the national air carrier of Costa Rica, had applied for foreign air carrier permit to engage in foreign air transportation between San Jose, Costa Rica, and Miami, Florida, via the intermediate point Puerto Cabezas, Nicaragua. After finding that transportation by LACSA between San Jose and Miami would be in the public interest on the basis of fair reciprocity, the Board dealt with service to Puerto Cabezas. Here the Board apparently lost sight of the fact it was dealing with an international case involving points in foreign countries instead of at home. It said; "In view of the community of interest between San Jose and Puerto Cabezas, and the traffic potential at the latter point, we shall authorize LACSA to serve Puerto Cabezas as an intermediate stop on their route."⁴⁹

Clearly here, if the Board understood what it wrote, it was misconceiving its functions. What possible interest does the aeronautical authority of the United States have in "community of interest" between a point in Nicaragua and a point in Costa Rica for a Costa Rican carrier. Surely the assertion of such a fact is a bit of gratuitous effrontery by the United States. Interestingly enough, there was no discussion of the community of interest between Puerto Cabezas and Miami which would be within the Board's province to determine as involved in foreign air transportation.

The early 1950s saw a broadening exercise of the Board's jurisdiction under section 402 in that the Board began to condition the issuance of foreign air carrier permits on collateral matters not directly involved in the route cases. For example, one of the subsidiary concerns of the Board had been the fact that foreign carriers sometimes have raised the defense of sovereign immunity in suits against it on accident claims. For this reason the Board, after some debate, decided that the best method of handling a situation of this nature was to include the condition in the foreign air carrier permit, prohibiting the foreign air carrier from asserting the defense of sovereign immunity in any proceeding against it arising out of operations into or out of the country. The first of such cases was *El Al—Amendment of Permit*.⁵⁰

In the *El Al* case the Board refused to state an opinion as to whether the carrier could successfully assert the defense of sovereign immunity in the absence of the condition. In subsequent cases, the Board merely cited *El Al* as authority.⁵¹ As to this line of cases, the philosophical reproach can be made that no carrier—particularly one not dependent on the sovereign—has power to waive the sovereign immunity of its overlord. On the other

⁴⁸ 12 C.A.B. 232 (1950).

⁴⁹ *Id.* at 238.

⁵⁰ 14 C.A.B. 962, 964 (1951).

hand it appears that the condition is quite workable, since if the airline in fact is the alter ego of the sovereign it will have waived the immunity. If it is not the sovereign or a branch of the sovereign, it could not assert the defense of sovereign immunity in the first place. Thus the condition appears workable.

Although the Board was undoubtedly beginning to tighten up its grant of routes in the more heavily traveled parts of the world, it still showed an impressive willingness to permit foreign carriers to experiment with new routes—particularly those which appeared to offer no prospect of financial success. In the summer of 1954 the Scandinavians approached the United States with the idea that a great circle route from Scandinavia to the west coast of the United States would be in the interests of international aviation, would develop the traffic between the Scandinavian countries and the United States west coast and would not jeopardize any carrier. As a result the State Department entered into an exchange of notes with the Scandinavian countries under date of 6 August 1954, whereby reciprocal grants of routes were made over the polar regions between Copenhagen and Los Angeles by way of Greenland. The amended permit was rushed through.⁵²

Even today the Board does not always take a wooden stand with respect to foreign carriers. Thus, where no United States carrier can be expected to suffer, the Board can be quite liberal. A demonstration of this liberality occurred in the summer of 1964 when the Board issued "invitations" to the foreign carriers transiting Alaska to apply for stopover rights in that state so that European travelers on their way to Japan, and vice versa, could stop over in Alaska. Air France and SAS already held traffic rights between Europe and Alaska, and KLM and Lufthansa were invited to apply for such rights in addition to the stopover privilege. Permits were issued authorizing these operations on 27 January 1965. The fact that the Board did not "invite" the five carriers to apply for traffic rights between Alaska and Japan, in competition with Northwest Airlines, does not really mar the luster of the Board's performance.

One of the areas in which the Board has vacillated the most has been the realm of its jurisdiction outside the United States. In the case of *Transportes Aereos Nacionales*⁵³ the Board had before it an application by a Honduran carrier to operate between Tegucigalpa, Honduras, and Miami, Florida. For a reason not disclosed the carrier requested the right to serve Havana but only between Honduras and Cuba, and asserted it would not carry local traffic between Havana and Miami. The Board approved a reservation to this effect and stated, "Accordingly, the permit that we issue will be subject to the condition that TAN shall not engage in local air transportation between Miami and Havana."⁵⁴

⁵¹ E.g., *Transportes Aereos Nacionales, S.A.*, Permit Amendment, 16 C.A.B. 994 (1952); *Air Ambulance Service*, Foreign Permit, 16 C.A.B. 555 (1952); *Cariboo Air Charter*, 19 C.A.B. 671 (1954).

⁵² *Transpolar Service Between California and Scandinavia*, 19 C.A.B. 321 (1954).

⁵³ *Transportes Aereos Nacionales, S.A.*, Foreign Air Carrier Permit, 11 C.A.B. 446 (1950).

⁵⁴ *Id.* at 451.

When the permit came up for renewal the Examiner included Havana as an intermediate point but without the restriction. National Airlines objected, and TAN agreed that the lifting of this restriction was not within the issues of the case. The Board, however, decided to solve the problem in a different way. They eliminated all reference to Havana in the permit. In so doing the Board said:

With respect to the naming of Havana as an intermediate point, subject to restriction against Havana-Miami service, we have concluded that it would be preferable to omit the naming of Havana entirely. So long as the applicant does not seek authority to carry Havana-Miami traffic, no useful purpose would be served by naming Havana in the permit. It is not necessary to include Havana in order to allow service between that point and other foreign points, for service between such points does not constitute 'air transportation' as defined in the Civil Aeronautics Act of 1938, as amended, and does not require authorization from the United States. In view of these facts, the new permit to be issued to the carrier will not include Havana as an intermediate point.⁵⁵

A similar interpretation was reached in the case of *Airwork, Ltd., London-Prestwick-New York Service*.⁵⁶ The Board stated in that case:

While Montreal is named as an intermediate point in the application, Airwork Limited has stated it has no intention of applying for authority to carry local traffic between Montreal and New York. We have, therefore, concluded not to name Montreal as an intermediate point in the permit. This will not preclude Airwork from providing service between Montreal and other foreign points, since such transportation is not 'air transportation' as defined by the Civil Aeronautics Act, as amended, and therefore requires no authorization from the United States.⁵⁷

A similar result was reached in the case of *Lineas Aereas Costarricenses, Foreign Air Carrier Permit*.⁵⁸

The Board reiterated this position in April 1956 in the second *Lufthansa* case. The Board said:

We therefore will grant the New York-Germany route recommended by the examiner with the exception of the intermediate point Montreal. Such action will not preclude the carrier from rendering the services it is now contemplating with respect to Montreal, that is the carriage of traffic between Montreal and Germany or other non-United States points intermediate thereto, since the carriage of such traffic would not constitute "foreign air transportation" within the meaning of our Act, and would not, therefore, require authorization under a section 402 permit.⁵⁹

This position was clear, straightforward and correct. It foreshadowed the parallel action which the Board was to take in connection with IATA resolutions relating to rates, fares and charges between foreign points.⁶⁰ In ruling on that question the Board specifically disclaimed jurisdiction

⁵⁵ Transportes Aereos Nacionales, S.A., Foreign Air Carrier Permit, 18 C.A.B. 377, 378 (1954).

⁵⁶ 18 C.A.B. 542 (1954).

⁵⁷ *Ibid.*

⁵⁸ 18 C.A.B. 552 (1954).

⁵⁹ Deutsche Lufthansa Aktiengesellschaft, Foreign Air Carrier Permit, 23 C.A.B. 396, 398 (1956).

⁶⁰ IATA Agreements—Rates, Fares and Charges, 26 C.A.B. 744 (1958).

with respect to such contracts, since it held that the fares, rates and charges in question did not directly affect air transportation:

Basically, our action herein disclaims jurisdiction as to various agreements pending before us for disposition, on the ground that, insofar as any facts which have thus far been presented would disclose, they do not 'affect air transportation' within the meaning of section 412 of the Act. In addition, as regards certain resolutions previously submitted and approved during the current fiscal year, we also disclaim jurisdiction and withdraw our prior approval of such resolutions as from the date of this order.⁶¹

All of a sudden, the Board decided to depart from the previously announced sound policy in a footnote in the *Compagnie Nationale Air France, Foreign Air Carrier Permit* case⁶² of 18 March 1960. The Board referred to a letter filed by Bureau Counsel. The note said in part:

Bureau Counsel has filed a letter emphasizing that his recommendation that Air France be granted a permit authorizing service between France and Los Angeles does not entail any traffic rights (including Canada-France traffic) or stopover privileges at Montreal. However, Air France could use Montreal as a technical stop on the route. As Bureau Counsel states, this position is not at variance with the examiner's findings and recommendation. It properly reflects the extent of the authorization to be granted Air France. It is unnecessary here to consider a specific restriction against any traffic or stopover rights at Montreal, since the carrier would require authorization pursuant to sections 1108(b) or 402, depending upon the rights sought.⁶³

So far as Bureau Counsel's position in this case is concerned, it undoubtedly had much merit. The grant of rights between Paris and Los Angeles for Air France had been made on a point-to-point basis. Traffic over this route was thin. The competitive equality of opportunity between the French carrier and the United States carrier on the route would have been destroyed if the French carrier could have partially supported its operations by combining traffic between France and Montreal with the traffic moving between Paris and Los Angeles. This was all the more true since the United States carriers had no rights between Montreal and Paris. Conceivably, if the French had available to them this additional source of revenue on the route, they could have mounted more frequencies than the United States carrier, and would have thus been able to compete for the west coast market more vigorously.

While the threat of unequal competition could probably best be countered by a specific numerical limitation in flight frequencies, such a provision is wholly contrary to the United States aviation philosophy of the last twenty-five years. However, had the parties wanted to solve the problem of equality of opportunity through a requirement that the route was to be operated non-stop, the provisions of section 1102 of the act plus the power to impose terms and conditions on the section 402 permit provided the Board authority with which to achieve its objective. In short, the

⁶¹ *Ibid.*

⁶² 30 C.A.B. 981 (1960).

⁶³ *Id.* note 1.

Board could have imposed the condition it sought as a means of implementing the undertakings in the agreement.

However, the Board did not do this. Instead, it said that it could take care of the matter under section 1108(b). This section is administered exclusively by the Board without presidential review. Whereas the *Air France* case contained only a whisper of what the Board intended to do, the Board made no attempt to hide its designs when it came to the case of *Lufthansa*.⁶⁴ Here the Board without hearing denied an application of the carrier to "combine its New York-Frankfurt service . . . with its service between Montreal and Frankfurt. . . ."⁶⁵ The Board said further:

We believe that authority to conduct scheduled operations in a manner that differs from that provided by the carrier's foreign air carrier permit should be granted only under unusual circumstances and upon a showing that a true emergency exists. Although the delay in delivery of new aircraft to Lufthansa may impede its ability to serve the Montreal market, there has been no showing that total capacity available between Montreal and Europe is inadequate.⁶⁶

This is simply a leap into the abyss. The German bilateral air transport agreement with the United States (unlike that with the French) specifically provided rights at intermediate points on the routes to this country. The Board's action prevented the exercise of this right. Thus the CAB, instead of carrying out its powers and duties in accordance with the provisions of an international agreement, was doing the contrary. Moreover, the action taken cannot be justified as imposing reasonable terms and conditions on the carrier.

The "interference" philosophy of the Board was carried even further in the second *Philippine Air Lines* case. There the CAB inserted the following footnote in its opinion granting a permit to Philippine Air Lines:

PAL has indicated that it intends to operate the route across the Pacific with a stop at Tokyo for local Manila-Tokyo passengers, even if PAL does not obtain stopover privileges at Tokyo for U.S. traffic or the inclusion of Tokyo in its foreign air carrier permit. Such a plan of operation would require that the carrier obtain appropriate authority pursuant to section 1108(b) of the act.⁶⁷

In this case it is to be noted that there was no bilateral agreement in effect, and there was certainly no agreement on the part of Philippine officials, tacit or otherwise, to the action of the Board. It is submitted that without positive help from section 1102 giving effect to a specific international agreement providing for such restriction, the Board could not impose one under section 402, far less under section 1108(b). A condition imposed under section 402(e) attached to a foreign air carrier permit must be reasonable and must relate to the authorization to which it is attached. An attempt to control an act of consolidation taking place 7,000 miles beyond the borders of the United States is wholly extra-territorial

⁶⁴ CAB Order No. E-16887 (1 June 1961).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ CAB Docket 11714.

and is the primary concern of the country where the cargo is loaded, the country of destination of the cargo, and the country of the carrier. The extra-territorial adventure which the Board first embarked upon in the *Lufthansa* order appears doomed not only by logic but by the provisions of section 1110, which reads:

Whenever the President determines that such action would be in the national interest, he may, to the extent, in the manner, and for such periods of time as he may consider necessary, extend the application of this act to any areas of land or water outside of the United States and the overlying airspace thereof in which the federal government of the United States, under international treaty, agreement or other lawful arrangement has the necessary legal authority to take such action.⁶⁸

In the very recent case in the Court of Appeals for the District of Columbia Circuit, *American Airlines, Inc. v. Civil Aeronautics Board*,⁶⁹ the court held that it was not barred by the *Waterman* case⁷⁰ from examining the statutory authority of the Board in any action subject to the approval of the President. While the court in the *American Airlines* case held that the Board did possess the requisite authority in the matter in question (jurisdiction to authorize split charters), the inroads the decision made on the *Waterman* doctrine are extremely interesting in connection with any matter which can be considered ultra vires for the Board. While the *Waterman* case applies to United States-flag carriers, the thrust of the *American Airlines* case would, it is submitted, be equally applicable to foreign carriers. Thus, if the Board imposed a restriction either under 1108(b) or by way of condition under section 402 involving the extra-territorial application of the act, it is believed that recourse might be had to the Court of Appeals under the *American Airlines* case.

The Board may, however, now be veering away—at least slightly—from the absolutist position of the *Philippine Air Lines* case. For example, when Swissair applied to the CAB for a foreign air carrier permit to serve Chicago via intermediate points from Switzerland, it did not request Montreal as such an intermediate point for traffic purposes. However, during the course of the hearing it did indicate that it intended to serve Montreal in commerce between Switzerland and Canada as part of the operations on the route. After the permit had been issued by the CAB, the applicant applied for an order from the Board in the alternative either disclaiming jurisdiction or granting it authority to combine Montreal traffic with traffic from Chicago. In its application it stressed the fact that Montreal was a point directly on the great circle course between Switzerland and Chicago and that no United States carrier was authorized to operate between Chicago and Montreal or between Chicago and Europe via Montreal. In short, there was no direct competition with any United States carrier. In acting on the petition under section 1108(b) the Board granted the request for the right to consolidate for an indefinite period.

⁶⁸ 72 Stat. 800, 49 U.S.C. § 1510 (1958).

⁶⁹ Civil No. 18590, D.C. Cir., (1965).

⁷⁰ *CAB v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

Although it did not pass on the challenge to its jurisdiction, it did not disagree.

The latest instance involving section 1108(b) powers arose in the case of *Scandinavian Airlines System*.⁷¹ There the carrier requested authority to consolidate Montreal-Scandinavian traffic with its Los Angeles-Scandinavia operation. The principle here was somewhat akin to that in the original *Air France* case since it involved combination of traffic on a polar route. Initially the staff turned the applicant down, but upon appeal to the Board the staff was reversed by a three-to-two decision. In so doing the Board said:

Assuming *arguendo* our authority to act, the inability of SAS to conduct the operations in question without authorization from us under section 1108(b), and that denial of the requested authority would in no way be contrary to the United States-Scandinavian bilateral air transport agreements, we are satisfied that, in this case, the grant of the requested authority to SAS for a period of six and one half months will enable it to increase the efficiency of its operations on this route without substantially affecting the capacity it is likely to offer between Los Angeles and Scandinavia.⁷²

While the extra-territorial ghost has by no means been laid to rest, it is probable that several nails have been driven through its coffin.

One of the most interesting cases involving foreign carriers, United States-flag carriers, the Board, and the State Department concerns the effect—or lack of effect—of the *Ashbacker*⁷³ doctrine on foreign carrier route applications. In the spring of 1964 Lufthansa German Airlines applied to extend its Germany-New York route to Jamaica and thence to points on the west coast of South America. Braniff and Panagra both intervened and moved to consolidate the case with the then pending New York-Caribbean-South America proceeding for the purpose of comparative consideration. The *Ashbacker* doctrine had many times been held applicable as between U.S. carrier applicants but this was the first time that any such claim had been made with respect to a foreign carrier.

The Court of Appeals took the matter under advisement and heard oral argument on the question in September 1964. By a two-to-one majority⁷⁴ the Court ruled that *Ashbacker* did not apply to applications filed by foreign carriers pursuant to bilateral agreements; that the Board's denial of Braniff's and Panagra's request based on *Ashbacker* was therefore not a "final order"; and that consequently the matter was not reviewable by the Court of Appeals. A petition for rehearing en banc was denied by the Court en banc⁷⁵ and subsequently a petition for certiorari was denied by the Supreme Court.⁷⁶

The foregoing discussion is not intended to be exhaustive of all the aspects of the CAB-State Department-White House relationship in the

⁷¹ CAB Order No. E-20143 (31 October 1963).

⁷² *Ibid.*

⁷³ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

⁷⁴ *Pan American-Grace Airways, Inc., v. CAB*, 342 F.2d 905 (D.C. Cir. 1964) *cert. denied* 85 Sup. Ct. 941 (1965).

⁷⁵ 342 F.2d 905.

⁷⁶ 85 Sup. Ct. 941.

foreign carrier field or of the problems which each of these branches must meet in day-to-day dealing with foreign carrier route matters. New questions arise all the time and will continue to do so. Perhaps one reason for this is that our carriers are private carriers and we have no "chosen instrument" to perform our operations abroad. For these reasons negotiations with foreign countries will frequently "rob Peter to pay Paul" in terms of the routes exchanged. In the early 1950s there was some effort to meet this problem by the introduction of legislation which would have required all air transport agreements to be in the form of treaties. This would have had the effect of transferring the problem to the Senate Committee on Foreign Relations, but it would inevitably introduce such great delays⁷⁷ that the bargaining power of the United States would be blunted. The national good requires that we keep the bilateral agreements in executive hands. The present procedure appears to give the individual air carriers the maximum protection of their legitimate interests.

⁷⁷ *E.g.*, the Senate has not yet acted on the Hague Protocol to the Warsaw Convention signed in 1955.