

1965

## Current Legislation and Decisions

Edward A. Peterson

Charles A. Thompson

James E. Barnett

---

### Recommended Citation

Edward A. Peterson et al., *Current Legislation and Decisions*, 31 J. AIR L. & COM. 133 (1965)  
<https://scholar.smu.edu/jalc/vol31/iss2/5>

This Current Legislation and Decisions is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CURRENT LEGISLATION AND DECISIONS

## Voting Trusts in the Airline Industry

Over the past several years the voting trust has been frequently used in the airline industry. The airline companies have used it in attempts to divest themselves of control of other air carriers hoping to avoid the dual control prohibitions of the Federal Aviation Act of 1958. The Civil Aeronautics Board [hereinafter CAB] has been required to determine whether a controlling block of stock, placed in a voting trust, vests control in the voting trustees or leaves it in the beneficial owners of the stock. In rather similar situations, the CAB has reached contrary results, which will be examined here against a background of voting trusts in other areas.

### I. BACKGROUND

#### A. *In General*

The use of the voting trust was attempted as early as the 1800s. It was initially viewed by the courts as being against public policy and in many instances in violation of statutes which prohibited such devices. In early decisions it appeared to the courts to be contrary to public policy that a person—having no beneficial interest in stock—was allowed to vote the stock.<sup>1</sup> A New Jersey court in *Cone v. Russell* stated: “[W]here a person who has little or no actual ownership has the unrestricted voting power of a majority of the stock . . . the underlying and fundamental understanding . . . upon which the association [corporation] is founded is abandoned and broken.”<sup>2</sup> The skeptical view of the courts toward the voting trust was emphasized by Justice Pitney in the famous case of *Warren v. Pim* where he stated “[The voting trustee] is only a sham owner vested with a colorable and fictitious title for the sole purpose of voting upon stock that he does not own.”<sup>3</sup>

The prevailing view today is that voting trusts are not illegal per se<sup>4</sup>

---

<sup>1</sup> *Bostwick v. Chapman*, 60 Conn. 553, 24 Atl. 32 (Super. Ct. 1890); *State ex rel Schwartz v. O.&M. R.R.*, 6 Ohio C.C.R. 415 (Cir. Ct. 1892).

<sup>2</sup> *Cone's Ex'rs v. Russell*, 48 N.J. Eq. 208, 21 Atl. 847, 849 (Ch. 1891).

<sup>3</sup> 66 N.J. Eq. 353, 59 Atl. 773, 785 (Ct. Err. & App. 1904). This adverse view of the voting trust was further emphasized at p. 788 where Justice Pitney stated:

[I]n truth and in essence, and for all purposes of a court of equity, a voting trust that has for its sole object the permanent separation of the voting power from the substantial ownership of the shares is not a putting of the shares in trust. It is a putting of false evidence of share ownership into the hands of the trustee, for the purpose of enabling the trustee to represent himself as a shareholder at the stockholders' meetings, and thereupon be admitted to the election.

<sup>4</sup> *Mackin v. Nicoller Hotel, Inc.*, 25 F.2d 783 (8th Cir. 1928); *Moses v. Scott*, 84 Ala. 608, 4 So. 742 (1888); *Brightman v. Bates*, 175 Mass. 105, 55 N.E. 809 (1900).

and most corporate statutes now expressly permit them.<sup>5</sup> Many cases have held that a voting trust is a trust in the accepted equitable sense and is subject to the principles of trust administration.<sup>6</sup> Under the usual voting trust agreement trustees vote the stock in trust in the same manner as the owners and not as mere agents, although many variations such as non-binding consultation with the beneficiaries or binding instructions from all or a prescribed majority of the beneficiaries are possible. The voting trust places shareholder control in a limited number of persons who can control the corporation's activities by electing directors.<sup>7</sup> The trustees exercise the usual voting rights of the entrusted shares and, if the agreement provides, they may vote with respect to extraordinary corporate matters such as merger and consolidation. Generally, voting trusts are valid today, even in the absence of statute, unless an improper purpose or motive is found.<sup>8</sup>

### B. In Airlines

The voting trust is generally used in business by a small number of persons to acquire control or to preserve control against dissipation by sales, gifts or bequests. In contrast, the voting trust has historically been used in the airline industry by a single shareholder attempting to divest himself or itself of control of a corporation. In both situations the main object of the voting trust is control, but it is approached from completely different view points. Most airline cases involving the voting trust concern the issue of control and the problem of the CAB's jurisdiction. Both of these problems arise under Section 408 of the Federal Aviation Act,<sup>9</sup> which prohibits simultaneous control of two air carriers, except with CAB approval.

#### 1. Divestiture Cases

The CAB in the *Indiana-Ohio Local Service Case*<sup>10</sup> approved the use of a voting trust under certain specified conditions.<sup>11</sup> The agreement was

<sup>5</sup> See, e.g., Cal. Corp. Code Ann. Pt. 5, ch. 1, § 2230 (Deering 1962); Colo. Rev. Stat. ch. 31, Art. 4, § 17 (1963); Del. Code Ann. tit. 8, § 218 (1953); Fla. Stat. Ann. ch. 608, § 608.44 (1956); Ga. Code Ann. tit. 22, § 1863.1 (Supp. 1963); Minn. Stat. Ann. ch. 300, § 301.27 (1947); N.Y. Stock Corp. Law, § 50 (McKinney 1951).

<sup>6</sup> *Brown v. McLanahan*, 148 F.2d 703 (4th Cir. 1949); *A.F. Adams v. Clearance Corp.*, 35 Del. Ch. 318, 116 A.2d 893 (Ch. 1955), *aff'd*, 35 Del. Ch. 459, 121 A.2d 302 (Sup. Ct. 1956); *Jesser v. Mayfair Hotel, Inc.*, 316 S.W.2d 465 (Mo. 1958).

<sup>7</sup> See generally Ballentine, *Voting Trusts, Their Abuses and Regulation*, 21 Texas L. Rev. 139 (1942-1943); 1 Dewing, *Financial Policy of Corporations* 107 (5th ed. 1953).

<sup>8</sup> Dewing lists the four chief purposes of the voting trust as: (1) to carry out a judicial decree of the provisions of a statute requiring some measure of quasi-public operation of a private corporation; (2) to prevent passing of control into unfriendly hands; (3) to insure an embarrassed or reorganized corporation of permanently responsible management that will protect and conserve the interests of all; and (4) as part of the procedure of promoting a new corporation, to enable the promoters and bankers to dispose of a considerable portion of the voting stock and yet retain control.

<sup>9</sup> 72 Stat. 767, 49 U.S.C. § 1378 (1958). Discussed *infra* Section II.

<sup>10</sup> 16 C.A.B. 880 (1953).

<sup>11</sup> *Indiana-Ohio Local Service Case*, 16 C.A.B. 880 (1953) at 889. The conditions imposed by the Board were as follows:

(1) The prior approval of the Board should be obtained before the appointment or changes of trustees or directors, and before any modification, amendment, addition, termination, or cancellation of the voting trust agreement may become effective.

approved for an interim period pending completion of an agreement for permanent divestiture of control of Lake Central Airlines by Roscoe P. Weesner and William W. Weesner. Section 401 of the Federal Aviation Act<sup>12</sup> requires a finding by the CAB that a carrier is fit, willing and able to perform air services and to comply with the provisions of the act before certification can be given. Divestiture was necessary in the *Indiana-Ohio* case because Lake Central's management and controlling shareholders had violated various provisions of the act, and according to the CAB the violations exhibited Lake Central's unwillingness and inability to comply with section 401. The Board pointed out that its approval of the voting trust did not "constitute a determination that the Weesners no longer have 'control' of Lake Central"<sup>13</sup> within the meaning of Section 408 of the Federal Aviation Act.<sup>14</sup> The Board further emphasized that, if the question of control were before it in the case, it would be compelled to hold that the powers remaining in the beneficial owners under the voting trust vested at least negative control in their hands.<sup>15</sup>

Another voting trust was apparently approved in the *Arthur Vining Davis, Control Relationships Proceeding*.<sup>16</sup> Davis sought approval of a control relationship between himself, Mackey Airlines and others pursuant to section 408 of the act. The initial decision of the examiner showed Davis as the owner of 418,000 shares of Mackey out of 1,500,000 shares outstanding. Davis had executed a trust agreement placing all his shares of Mackey stock under a trustee's control. The examiner pointed out that the trust was irrevocable under Florida law for ten years unless modified and that modification was subject to approval by the CAB. The examiner found that Davis did not control Mackey Airlines, thereby granting implied approval of the voting trust utilized by Davis.<sup>17</sup>

*The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*<sup>18</sup> was initiated because of allegations in the pleadings of the

(2) The prior approval of the Board should be obtained before Lake Central may engage in any transaction which the Weesners have any substantial interest, directly or indirectly.

(3) During the life of the voting trust agreement previously referred to, certified copies of minutes of all meetings of Lake Central's board of directors and all meetings of the holders of trustee certificates should be filed with the Board.

(4) While serving as a director for Lake Central, or as attorney for the carrier, William H. Krieg should not otherwise act as attorney for the Weesners.

(5) The Board shall retain jurisdiction over this agreement for the purpose of renewing at any time approvals granted herein or imposing at any time, with or without hearing, such other conditions as it may find to be just and reasonable.

<sup>12</sup> 72 Stat. 754, 49 U.S.C. § 1300 (1958).

<sup>13</sup> *Indiana-Ohio Local Service Case*, *supra* note 11 at 889.

<sup>14</sup> The control provisions of § 408 originally appeared in the Civil Aeronautics Act of 1938, 52 Stat. 1001 (now Federal Aviation Act of 1958 [hereinafter called the act], 72 Stat. 767, 49 U.S.C. § 1378 (1958)).

<sup>15</sup> The trust was revocable by (1) the expiration of 10 years; (2) sale of 75% of the Lake Central stock; (3) termination of the carriers certificate of public convenience and necessity; (4) approval by the Board of the revesting of control in the Weesners; or (5) adjudication of bankruptcy or appointment of a receiver of Lake Central. This power of revocation was construed as negative control by the Board.

<sup>16</sup> 23 C.A.B. 130 (1956).

<sup>17</sup> The CAB did not review the examiner's decision because no exceptions were filed. It is arguable, due to the fact that Colonel Mackey owned the majority of the shares of Mackey Airlines and managed the Company, that Davis, despite his 418,000 shares, did not control the Company and the voting trust was of no consequence to the decision.

<sup>18</sup> 27 C.A.B. 155 (1958).

*New York-Florida Case*<sup>19</sup> indicating that Howard Hughes had acquired approximately eleven per cent of the outstanding shares of the Atlas Corporation's common stock. Since, in earlier proceedings, Hughes had been found to control TWA<sup>20</sup> and Atlas to control Northeast,<sup>21</sup> control of Atlas by Hughes would have constituted control of two air carriers without prior approval of the Board as required by statute. The CAB had rejected Hughes' plan for insulation from control of Atlas by use of a complex voting trust.<sup>22</sup> Hughes filed a petition for reconsideration of the order and expressly submitted himself to the jurisdiction of the Board, offering to place all his Atlas stock with a neutral bank or trust company under any form of trust agreement that the Board might propose. The CAB proposed a voting trust agreement<sup>23</sup> describing it as relatively simple, of short duration (three years) and as immobilizing any control which Hughes might have.

The essential elements of the Board's recommended voting trust agreement were:<sup>24</sup>

(1) The voting trust shall be irrevocable and may not be terminated or modified in any manner without approval by the CAB, except by sale or divestiture of the beneficial ownership by Hughes.

(2) The stock shall be voted by the trustees in accordance with the recommendations of the Atlas management.

(3) Prior to termination of the voting trust, Hughes shall divest himself of all interest in the stock unless the Board authorizes otherwise.

(4) Hughes is authorized to exercise pre-emptive rights to future Atlas stock offerings and such acquisitions shall become subject to the trust.

(5) The trustee shall issue voting trust certificates entitling the beneficial owner to dividends.

This form of trust apparently will be approved by the CAB as an insulation from control, but only after the Board has acquired jurisdiction for the purpose of section 408 of the act.<sup>25</sup>

One of the most recent and highly publicized uses of the voting trust is the Hughes Tool Company-TWA financing arrangement.<sup>26</sup> During 1960, in order to finance the cost of jet aircraft needed by TWA, Hughes Tool Company [hereinafter Toolco] was forced by the lending institutions to place its seventy-eight per cent stock interest in TWA in a voting

---

<sup>19</sup> 24 C.A.B. 94 (1956).

<sup>20</sup> Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944); TWA-Further Control by Hughes Tool Company, 12 C.A.B. 192 (1950).

<sup>21</sup> Atlas Corp., Control by Consolidated Vultee, 9 C.A.B. 921 (1948).

<sup>22</sup> CAB Order No. E-12457.

<sup>23</sup> Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case, 27 C.A.B. 155 (1958) at 157.

<sup>24</sup> See detailed discussion *infra*, section III-A.

<sup>25</sup> See Seaboard & Western Airlines, Agreements, 32 C.A.B. 1322, 1325 (1960). In this proceeding the CAB alluded to the form of trust agreement proposed in the *Hughes-Atlas* case and again set out the elements of a voting trust agreement which it apparently considers adequate to insulate an airline from voting control by another airline.

<sup>26</sup> Trans World Air., Control by Hughes, 32 C.A.B. 1363 (1960).

trust. These lending institutions provided 165 million dollars in exchange for TWA's notes and the power to control the airline's day-to-day operations. The CAB stated that the most significant features of the financing plan were the voting trust agreement, the option agreement and the note holders agreement which together assured that TWA's management would not be influenced by Toolco. The Board found that the plan of financing, including the voting trust agreement, was not inconsistent with the public interest.<sup>27</sup> It is interesting to compare this trust with those generally used in the business community. The Toolco-TWA trust, though imposed by the lending institutions for business purposes, is similar to other voting trusts used in the airline industry in that its primary purpose is to divest Toolco of control of TWA.

## 2. Jurisdiction Cases

In other recent cases involving the voting trust device, the issue has been whether the trust was used to circumvent the Board's jurisdiction under section 408.<sup>28</sup> Parties executing voting trust agreements have argued that their agreements comply with the CAB's proposed trust agreement as promulgated in *The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*.<sup>29</sup> The Pan American-National Airlines investigation<sup>30</sup> illustrates that this argument has been ineffective when the Board finds that the trust was used to circumvent its jurisdiction under section 408. The Board's investigation involved long-term leases and option and stock agreements between the two carriers. After the carriers exchanged stock and Pan American placed its National holdings in a voting trust, Pan American applied for disclaimer of jurisdiction or in the alternative approval under section 408. The applicants argued that the trust device used as an insulation from control of National was consistent with past cases in which approval of the Board had been granted. The CAB stated that there was a fundamental distinction between previous uses of the voting trust and the Pan American-National situation. In the previous cases the CAB had acquired jurisdiction over the control relationship and had "approved a trust arrangement conditioned as it deemed necessary and which it found satisfactory, on all the facts before it, to vindicate the public interest."<sup>31</sup> Pan American had attempted to escape the Board's jurisdiction by setting up the trust, whose terms were self-prescribed, and by asserting that the Board had no jurisdiction over the trust. In actuality the carrier was trying to prevent the CAB from determining whether the relationship was in the public interest.

In two recent cases before the Board, this position on voting trusts was reinforced. In *National Airlines, Inc. and Lewis B. Maytag Jr. Interlocking Relationships*<sup>32</sup> both National and Maytag filed applications for Board

<sup>27</sup> *Id.* at 1365.

<sup>28</sup> Discussed *infra*, section II-A.

<sup>29</sup> See note 18 *supra* and accompanying text.

<sup>30</sup> Pan American World Airways, Inc. and National Airlines, Inc., Agreements, 27 C.A.B. 611 (1958).

<sup>31</sup> *Id.* at 623.

<sup>32</sup> CAB Docket No. 14121 (12 March 1964); CAB Order No. E-20700 (15 April 1964).

approval of control under sections 408 and 409 of the act. Maytag owned a controlling portion of National Airlines common stock and was at the same time the beneficial owner of 48.98 percent of the total outstanding shares of Maytag Aircraft Corporation and 1001 shares of 1003 outstanding shares of Universal Service Corporation, a corporation engaged in a phase of aeronautics, which were held in a voting trust. The applicants argued that the voting trust was bona fide and was patterned virtually word-for-word upon the trust agreement recommended and approved by the Board in *The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*.<sup>33</sup> The examiner concluded that the applicants entered the voting trust agreement believing in good faith that the arrangement placed them outside the Board's jurisdiction, that they did not wish to circumvent the Board's jurisdiction and that the Sherman Doctrine<sup>34</sup> was inapplicable. However, the CAB stated in its order that "in the future it will not view the creation of a voting trust as an excuse for failing to seek Board action on relationships otherwise subject to section 408 or 409 of the act in advance of the establishment of the relationship or as a ground for waiver of the Sherman Doctrine."<sup>35</sup> The facts of the *Allegheny Airlines, Inc., Enforcement Proceeding*<sup>36</sup> were essentially the same as *Maytag* in that Allegheny purchased a majority of International Air Service's common stock and placed it in a voting trust. The CAB followed the reasoning in *Maytag*, dismissed the enforcement proceeding and ordered a hearing pursuant to section 408(b) of the act.<sup>37</sup>

The *West Coast Airlines, Inc., Enforcement Proceeding*,<sup>38</sup> recently decided, involved the acquisition by West Coast Airlines of 296,240 shares of Pacific Airlines without prior Board approval. The stock was immediately placed in a voting trust. The CAB Bureau of Enforcement filed a complaint and petitioned for enforcement alleging violations of section 408 of the act. The issue in these hearings was whether West Coast Airlines had insulated itself from control of Pacific Airlines by placing the stock in a voting trust. The CAB, by ruling that West Coast violated the act, relied upon its recent rulings in the *Maytag*,<sup>39</sup> *Allegheny*,<sup>40</sup> and *Pan*

<sup>33</sup> 27 C.A.B. 155 (1958).

<sup>34</sup> Sherman, Control and Interlocking Relationships, 15 C.A.B. 876 (1952). In this proceeding the Board promulgated the doctrine that an application under §§ 408 or 409 of the act will not be considered for approval as long as the action or relationship exists in apparent violation of the act, whether or not the action would be found consistent with the public interest. The doctrine could prove embarrassing due to the many business transactions which must be closed quickly. Because of this fact the Board has in several instances of technical violations of the act found exceptional circumstances and has waived the Sherman Doctrine. See, e.g., CAB Order No. 13517 (13 Feb. 1959); CAB Order No. 13130 (3 Nov. 1958).

<sup>35</sup> Application of National Airlines, Inc. and Lewis B. Maytag Jr., CAB Order No. E-20700 (15 April 1964).

<sup>36</sup> CAB Order No. E-20336 (6 Jan. 1964), modified, CAB Order No. 21280 (15 Sept. 1964).

<sup>37</sup> 72 Stat. 767, 49 U.S.C. § 1378 (b) (Supp. V 1959-1963).

<sup>38</sup> CAB Order No. E-22248 (1 June 1965).

<sup>39</sup> National Airlines, Inc. and Lewis B. Maytag Jr. Interlocking Relationships, CAB Docket No. 14121 (12 March 1964); CAB Order No. E-20700 (15 April 1964).

<sup>40</sup> Allegheny Airlines, Inc., Enforcement Proceeding, CAB Docket No. 14648 (15 Sept. 1964), *supra* note 36.

*American*<sup>41</sup> cases, because West Coast Airlines contested the Board's jurisdiction over the transaction.

The preceding examination of the use of the voting trust in the airline industry demonstrates that the Board has approved the use of the voting trust to insulate an airline from control by another airline when the trust is utilized as a temporary measure pending divestiture and when the transaction is in the public interest. However, the Board apparently requires certain provisions in the agreement and will not approve the use of the voting trust to circumvent the jurisdiction of the Board.

## II. SECTION 408 OF THE FEDERAL AVIATION ACT

Section 408(a)(5) and (6) makes it unlawful for an air carrier or any person engaged in any phase of aeronautics to acquire control of any air carrier or any person engaged in any phase of aeronautics, without approval of the CAB.<sup>42</sup> Under section 408(a)(7) it is unlawful to maintain a relationship in violation of one of the preceding subdivisions.<sup>43</sup> These provisions enunciate a well-established national policy that various forms of transportation should be mutually independent.<sup>44</sup> In short, "the plain policy of section 408(a)(5) is to make unlawful, in absence of the Board's approval, the unified control of certain types of enterprises which may have conflicting interests."<sup>45</sup> Section 408(a)(5) becomes applicable when control is acquired and the relationship or continuance of the relationship is unlawful unless the Board approves in accordance with section 408(b).<sup>46</sup> The standard used in applying section 408(b)<sup>47</sup> is the public interest, which has been construed to be the public interest in direct relation to statutory objectives, not a mere general reference to public welfare.<sup>48</sup>

<sup>41</sup> *Pan American World Airways, Inc. and National Airlines, Inc. Agreements*, 32 C.A.B. 611 (1958).

<sup>42</sup> 72 Stat. 767, 49 U.S.C. § 1378(a)(5)-(7) (1958):

(a) It shall be unlawful unless approved by order of the Board as provided in this section —

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

<sup>43</sup> 72 Stat. 767, 49 U.S.C. § 1378(a)(7) (1958) *supra* note 42.

<sup>44</sup> *Railroad Control of Northeast Airlines*, 4 C.A.B. 379 (1943); *American Export Airlines, Inc. — American Export Lines—Control—American Export Airlines*, 3 C.A.B. 619 (1942).

<sup>45</sup> *Air Freight Forwarder Case*, 9 C.A.B. 473 (1948).

<sup>46</sup> 72 Stat. 767, 49 U.S.C. § 1378(b) (Supp. V. 1959-1963). The pertinent parts of this section are as follows:

(b) Any person seeking approval of a consolidation . . . or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation . . . or acquisition of control . . . of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation . . . or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation . . . or acquisition of control. . . .

<sup>47</sup> See generally Legislative Note, 35 *Notre Dame Law* 131 (1959-1960).

<sup>48</sup> *Pan American Airways—Merger*, 2 C.A.B. 503 (1940). For other decisions dealing with section 408(b) see, e.g., *National Airlines, Inc. v. CAB*, 321 F.2d 380 (D.C. Cir. 1963); *United*



### A. Determinants Of Control

Three elements are necessary in order to vest the CAB with jurisdiction under section 408(a)(5). There must be an acquisition of control, the party sought to be controlled must be an air carrier and the acquirer must be engaged in a phase of aeronautics.<sup>49</sup> The Federal Aviation Act does not specifically define control, but section 413 states, "For the purpose of this title, whenever reference is made to control, it is immaterial whether such control is direct or indirect."<sup>50</sup> Due to the lack of definition in the act, the statute raises serious questions such as: What is control? How is control to be determined? What types of control can be exercised over a corporation? Once control has been approved, can there be a further acquisition of control by the same party, and (if so) does it require approval?

As early as 1918, Mr. Justice (then Judge) Cardozo in *Globe Woolen v. Utica Gas & Electric*<sup>51</sup> stated that a "dominating influence may be exerted in other ways than through a vote." The courts have consistently held that control is not a word of art, that it has no technical significance and, therefore, that the everyday meaning of the word must be utilized.<sup>52</sup> In a famous Federal Communications Commission case<sup>53</sup> the Commission found that 33.5 per cent of the voting stock was sufficient to control another corporation when taken in conjunction with other factors. On appeal the Supreme Court stated, "Investing [*sic*] the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case."<sup>54</sup> In leading cases concerning the construction of control under section 408(a)(5), the CAB has generally followed the Court's reasoning. *Railroad Control of Northeast Airlines*<sup>55</sup> presented the issue of whether two railroads had acquired control of Northeast Airlines under section 408(a)(5). The Board stated that the term control "does not necessarily depend upon the ownership of any specific minimum percentage of stock or other ownership rights. . . ."<sup>56</sup>

A. L.—*Western A. E., Interchange of Equipment*, 1 C.A.A. 723 (1940); *Acquisition of Marquette by TWA*, 2 C.A.B. 1 (1940), *modified*, *Acquisition of Marquette by TWA—Supplemental Opinion*, 2 C.A.B. 409 (1940). For an excellent discussion of § 408(b) see Barber, *Airline Mergers, Monopoly, and the CAB*, 28 J. Air L. & Com. 189, 219 (1961-62). For a thorough analysis of §§ 408(a)(2) and (3) see generally Allen, *Section 408 of the Federal Aviation Act: A Study in Agency Law Making*, 45 Va. L. Rev. 1073 (1959).

<sup>49</sup> *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C.A.B. 153, 155 (1944).

<sup>50</sup> 72 Stat. 770, 49 U.S.C. § 1383 (1958).

<sup>51</sup> 224 N.Y. 483, 121 N.E. 378, 379 (1918), *quoted*, in *Re Manchester Gas Co.*, 7 S.E.C. 557 (1940), and *Railroad Control of Northeast Airlines*, 4 C.A.B. 379 (1943). See *United States v. Union Pac. R.R.*, 226 U.S. 61, 95 (1912) where the Court stated: "We are not unaware that . . . there are other methods of control of a corporation than through such [majority of stock] ownership." See also *Natural Gas Co. v. Slaterry*, 302 U.S. 300 (1937); *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. 529 (6th Cir. 1915).

<sup>52</sup> See *Gulf Refining Co. v. Fox*, 11 F. Supp. 425, 430 (S.D. W. Va. 1935); *Eastern-Colonial Control Case*, 20 C.A.B. 629, 634 (1955).

<sup>53</sup> *Rochester Telephone Corp. v. United States*, 3 F.C.C. 467 (1937), *aff'd*, 23 F. Supp. 634 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939).

<sup>54</sup> 307 U.S. at 145.

<sup>55</sup> 4 C.A.B. 379 (1943).

<sup>56</sup> *Id.* at 381.

The real test appears to be whether there exists a de facto power of domination of "one legal personality by another" under the particular facts and circumstances of each individual case.

Shortly after the decision in the *Northeast* case, the CAB in *Pan American Airways, Inc., Acquisition of Aeronaves de Mexico*<sup>57</sup> reinforced its position by ruling that control is a factual matter to be decided by weighing all the evidence and drawing reasonable inferences and conclusions consistent with statutory objectives and purposes. The Board quoted the *Rochester* and *Globe Woolen* cases, concluding that when control is used in public utility statutes without qualification, no artificial restrictions are to be placed on the meaning of the word. The CAB again reviewed the construction of the term in *Pan American Airways Corporation, Acquisition of China National Aviation Corporation*,<sup>58</sup> citing the *Northeast* and *Aeronaves* decisions as clearly interpreting "control" under section 408.

The CAB's expansive view of control is illustrated by the *Eastern-Colonial Control Case*.<sup>59</sup> Here it said:

- (1) control is an issue of fact determined by the special circumstances in each case;
- (2) the voting of stock is not the only way that control can be exercised;
- (3) control does not depend upon the ownership of any specific quantum of stock or other ownership rights but rather refers to the amount of power and influence necessary to give one company actual domination or substantial influence over another;
- (4) control may be evidenced by power over another company's stock through affiliates, close business association, or power over stock holdings exercised in combination with other factors; and
- (5) the term "control" embraces every form of control and may cover a wide variety of situations of fact.

#### B. Further Acquisitions Of Control

The TWA-Toolco hearings have brought forth some of the most important rulings by the CAB in this area of the law. The Board's decision in 1948<sup>60</sup> is an example of the logical progression of the broad construction of the term "control" under section 408. The CAB initiated an investigation into a letter agreement between TWA and Toolco which, if consummated, would increase Toolco's holdings in TWA. Because the Board had previously granted approval of Toolco's control of TWA,<sup>61</sup> the 1948 hearings were concerned with whether there had been further or additional acquisition of control within the meaning of section 408. The Board ruled, as a matter of law, that there can be more than one acqui-

<sup>57</sup> 4 C.A.B. 494 (1943).

<sup>58</sup> 6 C.A.B. 143 (1944).

<sup>59</sup> 20 C.A.B. 629 (1955).

<sup>60</sup> *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company*, 9 C.A.B. 381 (1948).

<sup>61</sup> *Transcontinental & Western Air Control by Hughes Tool Company*, 6 C.A.B. 153 (1944).

tion of control of an air carrier and that, even though one air carrier presently controls another, the Board's jurisdiction can be asserted when such control is increased at a later time. The Board stated that approval of control under a particular set of circumstances in a specific case relates "to the quantum of control represented by the extent of ownership of stock in the controlled company at the time of the application."<sup>62</sup> The Board does not grant blanket unlimited *in futuro* approval of control relationships, unless such approval is clearly specified. The CAB ruled that an increased measure of control over TWA resulted from the conversion feature of the notes provided for in the letter agreement.

The decisions of the courts and the CAB give a broad construction to the term "control," to the effect that "when broadly construed, control may embrace every form of control, actual or legal, direct or indirect, negative or affirmative."<sup>63</sup> In short, both the courts and the CAB have consistently held that the term "control" is not to be considered as an unqualified or absolute concept, but involves the act or power of direction or domination under various circumstances.<sup>64</sup>

### III. CONTROL AND VOTING TRUSTS

#### A. CAB Requirements

Air carriers and persons engaged in phases of aeronautics have made use of the voting trust whenever it was advantageous to divest themselves of control of a second air carrier.<sup>65</sup> Although recent decisions by the CAB have dealt with control and voting trusts, the problem confronting the Board is whether the beneficial owners of stock placed in a voting trust are insulated from control of another air carrier. In considering this problem other questions arise in relation to the factors set down by the Board for determining an acquisition of control. For example, do these essential elements determine insulation from control by use of a voting trust? What application, if any, does the common law of voting trusts have? A related problem is whether approval of control, prior to the execution of a voting trust agreement, constitutes approval upon the reassumption of the voting interest in the stock.

The decision most frequently relied upon by those attempting to use the voting device is *The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*.<sup>66</sup> The CAB, as previously mentioned, promulgated

<sup>62</sup> Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company, *supra* note 60 at 388.

<sup>63</sup> Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943). For other decisions concerning control see, e.g., American Airlines, Control of Mid Continent Airlines, 7 C.A.B. 365 (1946); National—Caribbean—Atlantic Control Case, 6 C.A.B. 671 (1946); American Airlines Control of American Export Airlines, 6 C.A.B. 371 (1945); Western Air Lines, Acquisition of Inland Air Lines, 4 C.A.B. 654 (1944); Pan American Airways, Acquisition of Aerovias de Guatemala, 4 C.A.B. 403 (1943); American Export Airlines, Trans-Atlantic Service, 2 C.A.B. 16 (1940), *rev'd*, Pan American Airways Co. v. CAB, 121 F.2d 810 (2d Cir. 1941). *Accord*, SEC Rule 405, 17 C.F.R. § 230.405 (f) (Supp. 1947): "The term 'control' . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise."

<sup>64</sup> For related questions under statutes administered by the SEC, see 2 Loss, Securities Regulation 764 (2d ed. 1961).

<sup>65</sup> See text accompanying note 10, *supra*.

<sup>66</sup> 27 C.A.B. 155 (1958). See note 25 *supra*.

a voting trust agreement deemed acceptable as an insulation from control. The Board apparently considers the provisions of this agreement adequate to remove the beneficial owner from any possible violation of section 408 providing there are no other elements of control present. As shown in Section II, *supra*, an air carrier or person engaged in a phase of aeronautics cannot control another air carrier or person engaged in a phase of aeronautics, without prior Board approval. How does this "model" voting trust agreement accomplish this objective?

The first requirement is that the voting trust agreement be irrevocable. The courts have held that a mere statement in the agreement that a trust is irrevocable is insufficient to prevent termination by the sole settlor who is the sole beneficiary.<sup>67</sup> The trust agreement in the *Hughes-Atlas* case provided that the "voting trust is irrevocable and may not be terminated or modified in any manner whatsoever without approval of the Civil Aeronautics Board."<sup>68</sup> It should be noted that Hughes had submitted himself to the Board's jurisdiction and agreed to submit to any trust agreement acceptable to the Board. The compulsion which Hughes was under from the CAB is apparently sufficient to satisfy the requirement of irrevocability.<sup>69</sup> The Board permits a provision granting the beneficial owner the right to divest himself of the voting stock of the controlled corporation, thereby revoking the trust. A divestiture by these means disposes of the control problem which is the primary concern of the Board. In order to satisfy the element of irrevocability, the CAB apparently requires that it retain the power to approve modification or revocation of the voting trust agreement.

The second provision which the CAB requires is that the stock of a controlled corporation placed in a voting trust be voted in accordance with the recommendations of the management of the controlled corporation. Although the CAB requires this provision in order to completely divest a beneficial owner of control, it is questionable whether the requirement accomplishes this purpose. For example, should management be influenced by the person seeking insulation, such person could retain control of the corporation. If the beneficial owner retained the power, in some manner, to control the vote of the stock held in trust, even on specified issues, he would clearly be in a position to exercise some measure of control over the corporation whose stock was held in trust. Another undesirable feature of this provision is the possible self-perpetuation of the management. If the voting trustees are not allowed to vote in accordance with their own discretion, they are in fact stripped of their voting powers, and the management could perpetuate itself. Despite these objections, the CAB requires this provision. The agreement in the *Hughes-Atlas* case provided that the voting rights of the shares held in trust "shall be exercised by

<sup>67</sup> *H. M. Byllesby & Co. v. Droit*, 25 Del. Ch. 46, 12 A.2d 603 (Ch. 1940).

<sup>68</sup> *The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*, 27 C.A.B. 155, 158 (1958).

<sup>69</sup> *Cf. Pacific-Greyhound-Lines-Control and Merger*, 56 M.C.C. 415, 435, 436 (1950); *H. M. Byllesby & Co., and the Byllesby Corp.*, 6 S.E.C. 639 (1940).

the Trustee in accordance with the recommendations of the Atlas management as set forth in its proxy statement relating to the stockholder's meeting."<sup>70</sup> Provisions allowing the voting trustee to vote with the majority of the stockholders or to abstain when deemed necessary, in his own independent judgment, will apparently be scrutinized carefully, if not ruled insufficient by the Board.<sup>71</sup> Provisions permitting a majority of the voting trustees to act for the voting trustees are questionable unless the majority is appointed by someone other than the controlling shareholder. There appear to be many instances when a trustee's independent discretion would be the best device.

The third essential provision is that the beneficial owner completely divest himself of the beneficial interest in the stock held in trust prior to termination of the voting trust, unless other authorization is granted by the CAB. This requirement is necessary to prevent control of the corporation whose stock is held in trust when the trust is terminated. This provision is indicative of the Board's view that voting trusts should be used as a temporary measure while divestiture is being carried out by the controlling company in order to comply with section 408. Should a person or corporation be allowed to continue to own the stock after termination of the voting trust, such a person would be in violation of section 408, and the voting trust would accomplish no purpose in the eyes of the CAB. By requiring this provision the Board merely confirms its position as to one of the purposes of the voting trust which it presumes valid.

Another element required by the CAB is that settlors who acquire additional voting rights during the life of the trust place such rights in the voting trust. This provision is required in order that the settlor does not acquire additional voting stock with which he might exercise some measure of control.

A provision requiring the issuance of voting trust certificates to the beneficial owner is also an essential element. Under most state statutes, a voting trust agreement must provide for the issuance of voting trust certificates and the CAB requires that such agreements be executed in compliance with the applicable state law relating to voting trusts.

Finally, the CAB requires that the proposed trustees be neutral.<sup>72</sup> If the trustee is a bank or trust company, the beneficial owner cannot have had any past or present business dealings with the institution. If the trustee appointed is an individual, past or present affiliation with the beneficial owner will not be tolerated. These provisions attempt to insure that persons or institutions appointed as voting trustees will not be subject to the will of the beneficial owner when voting on corporate matters. If provisions of

---

<sup>70</sup> The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case, 27 C.A.B. 155, 159 (1958).

<sup>71</sup> Brief for the Bureau of Enforcement, p. 28, West Coast Airlines, Inc., Enforcement Proceeding, CAB Docket No. 14605 (28 June 1964).

<sup>72</sup> Cf. the independent trustee provisions of the Trust Indenture Act of 1939, 15 U.S.C. 77jjj (1958). See 2 Loss, Securities Regulation 729 (2d ed. 1961) for a discussion of these provisions in the Trust Indenture Act.

this nature were not required, it is possible that the beneficial owner could exert pressure to influence the voting trustee's decisions.

The CAB can be expected to approve the use of a voting trust with the preceding provisions, unless other elements of control exist, if the person attempting to use the voting trust device submits himself to the Board's jurisdiction and the Board finds the relationship to be in the public interest.

### B. Recent And Pending Hearings

The problems of jurisdiction and insulation from control are illustrated in the *West Coast Airlines, Inc., Enforcement Proceeding*<sup>73</sup> recently decided by the Board. In June 1963, without prior approval of the Board, West Coast Airlines exercised an option to purchase 296,240 shares of common stock of Pacific Airlines, or 34.8 per cent of the outstanding shares. On 24 June 1963, a voting trust agreement was executed between West Coast and the Wells Fargo Bank, involving the Pacific stock acquired by West Coast.<sup>74</sup> West Coast's requested waiver of the Sherman Doctrine<sup>75</sup> and approval of the voting trust was denied by the CAB. On 28 June 1963, the Bureau of Enforcement docketed a petition for enforcement and a complaint alleging violations of section 408(a)(5) and (7). On 5 October 1964, the Board refused to dismiss the enforcement proceeding and on 1 June 1965 ruled that West Coast had violated the act, but that a cease and desist order would not be in the public interest because on 18 May 1964 West Coast, by a bona fide sale, disposed of its Pacific stock. West Coast had consistently denied that the Board had jurisdiction over the proceeding, alleging that the voting trust had insulated it from control of Pacific because the Pacific stock was placed in a voting trust immediately upon acquisition. Because of the recent decisions in *Maytag*<sup>76</sup> and *Allegheny*,<sup>77</sup> the Board ruled that West Coast had violated the act and decided a cease and desist order should not be issued. However, had West Coast submitted to the Board's jurisdiction, the terms of the voting trust in relation to control under section 408 would have been carefully scrutinized. Control is a factual question to be determined in relation to the special circumstances of each case.<sup>78</sup> The 34.8 per cent ownership of stock would have been immaterial to the Board's decision relating to control because the parties stipulated that this percentage standing alone constitutes acquisition of control under section 408. The only issue would have been whether West Coast could in any way influence or dominate the actions of Pacific despite the existence of the voting trust.

---

<sup>73</sup> CAB Order No. E-22248 (1 June 1965).

<sup>74</sup> Since the time of the original agreement the Wells Fargo Bank had been succeeded by the Omaha National Bank as trustee.

<sup>75</sup> Sherman, Control and Interlocking Relationships, 15 C.A.B. 876 (1952). See note 34 *supra*.

<sup>76</sup> National Airlines, Inc. and Lewis B. Maytag Jr. International Relationships, CAB Docket No. 14121 (12 March 1964); CAB Order No. E-20700 (15 April 1964). See text accompanying note 32 *supra*.

<sup>77</sup> Allegheny Airlines, Inc., Enforcement Proceeding, CAB Order No. 21280 (15 Sept. 1964). See text accompanying note 36 *supra*.

<sup>78</sup> See notes 53 & 54 *supra* and accompanying text.

The trust agreement in *West Coast* simply stated that the trust is irrevocable. As previously shown, a provision of this nature is insufficient to insulate a company from control by another.<sup>79</sup> The Bureau of Enforcement argued that there were several ways that the trust could be revoked.<sup>80</sup> If the trust was in fact revocable, *West Coast* could have at its convenience dominated the corporate affairs of Pacific, and the trust would not have insulated Pacific from control by *West Coast*. The trust granted the trustee the power to vote the stock in the same manner as a majority of the stockholders, provided that in the exercise of its own independent judgment, the trustee could have abstained from voting on any matter. This provision apparently was an evolution from a provision that the trustee could at all times exercise its independent judgment, except as to any proposal to consolidate or merge Pacific, which was contained in a trust agreement previously rejected by the Board. If a proposed merger or consolidation arose the trustee was to vote in accordance with *West Coast's* instructions.<sup>81</sup> A provision of this type was unacceptable, for a definite measure of control over Pacific was retained by *West Coast*. The present provision, however, appeared sufficient if no influence over the trustee was exercised by *West Coast*. Any amount of influence as to voting rights would have provided at least indirect control over Pacific.

The neutrality of the original trustee, the Wells Fargo Bank, had to be maintained in order to insure insulation from control. If the trustee had had close business associations with *West Coast*, these associations could easily have represented sufficient power to control or influence Pacific. The Bureau of Enforcement had stated that Wells Fargo was not a neutral trustee<sup>82</sup> and that its subsequent resignation and the appointment of a successor trustee would not cure the violation of section 408. The CAB found, based on the examiner's initial decision, that even though voting control was removed, other vestiges of control over Pacific remained with *West Coast*, and absence of one of the preceding elements prevents insulation from control.

The TWA-Toolco proceedings began in 1944 and have continued periodically.<sup>83</sup> The present hearings before the CAB are the result of the financing arrangement executed in 1960.<sup>84</sup> TWA requested modification of

<sup>79</sup> See notes 67 & 68 *supra* and accompanying text.

<sup>80</sup> Brief for the Bureau of Enforcement, p. 21, *West Coast Airlines, Inc., Enforcement Proceeding*, CAB Docket No. 14605 (28 May 1964). The Bureau pointed out that the trust was revocable by (1) sale, (2) assignment and (3) default on a loan.

<sup>81</sup> Brief for the Bureau of Enforcement, p. 28, *supra* note 80. Under the agreement *West Coast* could control any merger of Pacific Airlines.

<sup>82</sup> Brief for the Bureau of Enforcement, p. 30, *supra* note 80. A letter to the Wells Fargo Bank indicated that the trustee was to work for a merger of *West Coast* and Pacific.

<sup>83</sup> *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C.A.B. 153 (1944). In these proceedings the CAB approved Toolco's 45% interest in TWA. Since that time further control of TWA by Toolco has been approved, so that at the present time Toolco owns approximately 78.23% of the outstanding common stock. This motion was a culmination of previously filed motions. See CAB Order No. E-15430 (23 June 1960) and CAB Order No. E-15561 (21 July 1960).

<sup>84</sup> The principal features of the plan for financing the TWA jet fleet are: (1) delivery of \$72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, to certain banks, maturing serially 31 December 1961, and quarterly thereafter through 31 December 1964; (2) issuance of \$92,800,000 principal amount of 6½% Equipment Mortgages Sinking Fund Notes of

a prior Board order to enable it to finance a fleet of jet aircraft. As part of the arrangement the holders of TWA's Series A Sinking Fund Notes granted non-transferable options to Toolco to purchase all, but not less than all, of these notes, thereby giving Toolco the right to terminate the voting trust.<sup>85</sup> The exercise of these options is subject to the condition that, if the purchase requires the consent of any governmental authority, such consent shall have been obtained. The CAB granted the requested modification of its prior order, expressing the view that upon consummation of the arrangement fundamental changes in the control relationship between TWA and Toolco would take place.<sup>86</sup> The Board pointed out that the directors of Toolco could no longer enforce their dictates "or those of Toolco's controlling shareholder" on TWA. The Board further stated that upon reassumption of control of TWA by Toolco, approval of the Board under section 408 and a searching inquiry in relation to the public interest factors involved would be anticipated.<sup>87</sup>

Toolco recently expressed a desire to exercise the options, acquire the Series A Sinking Fund Notes, and terminate the voting trust. On 30 April 1964, Toolco filed a motion for disclaimer of jurisdiction over the proposed exercise of the options, or in the alternative a modification of the original order approving control and limiting the monetary transactions between the two companies,<sup>88</sup> or entry of an order under section 408 without a hearing. The Board ruled "that Toolco may exercise its option to acquire the TWA Notes described herein at such time as it submits a plan satisfactory to the Board which would effectively divest Toolco of the power to simultaneously control both TWA and Northeast."<sup>89</sup> The United States Court of Appeals for the Second Circuit ruled that the CAB should have held a hearing before issuance of its order permitting Toolco to reassume control of TWA and that the Board's ruling was an abuse of discretionary power and remanded the case to the CAB.<sup>90</sup> On 7 October 1964, Toolco filed a motion with the Board presenting a plan to divest itself of control of Northeast Airlines. This plan included, *inter alia*, a voting trust agreement. The CAB, on 25 March 1965, ruled

---

TWA, due 31 December 1972; and (3) issuance of \$100 million principal amount of interim subordinated promissory notes of TWA to Toolco in payment of the amounts owing by TWA to Toolco at interest rates not exceeding 7% to mature not earlier than 30 June 1973.

<sup>85</sup> These options are exercisable at a price of 115% of their principal amount at the present time. The original agreement provided for a 22% premium exercisable at that price until 31 March 1962. This premium is reduced one-half of one per cent for each preceding quarterly period. See note 26 *supra* and accompanying text.

<sup>86</sup> *Trans World Air., Control by Hughes*, 32 C.A.B. 1363 (1960).

<sup>87</sup> In a footnote to the opinion the Board pointed out that the option agreement requires a satisfactory opinion of counsel that the exercise of the option does not require government approval or that such approval has been granted and is in force. This could not prevent dissolution of the voting trust at the end of the ten year period, but the Board stated that Toolco could not resume direct control of TWA without prior Board approval. *Id.* at 1365.

<sup>88</sup> *Transcontinental & Western Air, Inc., Control by Hughes Tool Company*, 6 C.A.B. 153 (1944).

<sup>89</sup> *Hughes Tool Company*, CAB Order No. E-21057 (10 July 1964). Toolco had previously been granted approval for control of Northeast Airlines subsequent to the voting trust agreement. See *Toolco-Northeast Control Case*, CAB Order No. E-18470 (19 June 1962), *aff'd sub nom.*, *National Airlines, Inc. v. CAB*, 321 F.2d 380 (D.C. Cir. 1963).

<sup>90</sup> *Trans World Airlines v. C.A.B.*, 339 F.2d 56 (2d Cir. 1964).



that the Northeast voting trust was insufficient to divest Toolco's holdings in Northeast. The Board stated that the trust provided for financial assistance to Northeast by Toolco, and that it must be assumed that Northeast's management "will defer to Toolco's wishes since Toolco may be Northeast's only significant source of further financial aid."<sup>91</sup> The CAB apparently felt that Toolco retained the power to control Northeast. The Board must now decide whether Toolco still controls TWA even though the majority stock interest is presently held in trust, whether Toolco has relinquished control of TWA by the use of the voting trust, and whether reassumption or reacquisition of the voting interest in the stock necessitates approval by the Board under section 408 of the act. These problems are further complicated by the Toolco holdings in Northeast, for Toolco must divest itself of the interest before the CAB will rule on the reacquisition or reassumption of control over TWA. These problems must be viewed in relation to the provisions of the voting trust agreement, the tests promulgated by the Board which constitute acquisition or insulation from control, and the public interest factors.

TWA argues that Toolco has been divested of control of TWA by means of the voting trust and that a hearing on the public interest factors involved must be held before Toolco can reacquire control of TWA. In short, TWA contends that the prior orders of the Board<sup>92</sup> granting approval of control of TWA by Toolco are no longer in effect, and Board approval must now be granted in order for Toolco to reacquire control. TWA further alleges that Toolco wishes to reacquire TWA for the purpose of preventing prosecution by TWA of other suits presently pending against Toolco.<sup>93</sup>

Toolco contends that its use of the voting trust has not insulated it from control of TWA and that prior orders of the Board approving its control of TWA are still effectual. Based on this contention Toolco desires to exercise its option to purchase the Series A Sinking Fund Notes,<sup>94</sup> terminate the voting trust, and reassume control of TWA without Board approval.

The 1960 voting trust agreement between Toolco, TWA and the Voting Trustees does not appear to insulate TWA from control by Toolco within the meaning of section 408 of the act. The CAB considers irrevocability an essential factor in determining insulation from control.<sup>95</sup> The trust

<sup>91</sup> Wall Street Journal, 26 March 1965, p. 4, col. 2.

<sup>92</sup> Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944); Transcontinental & Western Air, Inc., Further Control by Hughes Tool Company, 9 C.A.B. 381 (1948); TWA—Further Control by Hughes Tool Company, 12 C.A.B. 192 (1950).

<sup>93</sup> TWA brought an anti-trust suit against Hughes seeking damages, divestiture of the TWA stock held by Toolco and injuries suffered as a result of violations of the antitrust laws. A default judgment in this case was rendered in the amount of \$45,000,000 before statutory trebling. See *Trans World Airlines, Inc. v. Hughes*, 32 F.R.D. 604 (S.D.N.Y. 1963), *aff'd*, *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602 (2d Cir. 1964), *noted*, 31 J. Air L. & Com. 47 (1965), *cert. dismissed*, 33 U.S.L. Week 3295 (U.S. 8 March 1965). Another suit is presently pending against Toolco and Hughes in the Chancery Court of the State of Delaware, Newcastle County. TWA seeks some \$35,000,000 in damages, based upon alleged breach of fiduciary duty. Jurisdiction has been obtained, Toolco has filed counterclaims, and discovery proceedings have been stayed pending appeal in the federal case.

<sup>94</sup> See note 85 *supra* and accompanying text.

<sup>95</sup> See note 66 *supra* and accompanying text.

indenture makes no mention of irrevocability and does not attempt to make the trust irrevocable.<sup>96</sup> The agreement states that it shall terminate on the earliest of the following dates: (1) 15 December 1970, unless the agreement is extended as provided; (2) the date on which the trustee under the Note Indenture executes an instrument acknowledging satisfaction or discharge of the same; or (3) the date on which an instrument is delivered to TWA, signed by the Notes Agent, terminating the agreement. The provision for termination by the Notes Agent relates to the option granted Toolco to purchase the Series A Sinking Fund Notes. If Toolco purchases the notes, it would have the power to direct the Agent to terminate the agreement, because the holders of these notes irrevocably agreed to terminate the agreement when TWA discharges the notes. It is apparent that this voting trust is revocable because of the option which Toolco may exercise at its discretion.<sup>97</sup>

The voting rights of the trustee under the agreement are an important factor in the determination of control. It is provided in the trust indenture that the action of a majority of the trustees<sup>98</sup> shall constitute the action of the trustees. The trustees are to act in the exercise of their sole and absolute discretion. This provision attempts to assure that the stock will be voted in accordance with the management of TWA, since the directors are elected by the shareholders, a majority of whose stock is held in the voting trust. Whether this provision complies with the CAB's requirement is questionable because it is possible for the voting trustees to vote contrary to the views of TWA's management. However, as discussed earlier, the trustee's independent discretion in many instances is the better provision. There is no provision in the agreement requiring divestiture of the Toolco holdings prior to the termination of the trust as required by the Board for insulation from control. Because this agreement was executed for purposes of financing, there is no reason why a provision of this type should be included in the trust indenture. Neutrality of the trustee or trustees is a stringent requirement of the CAB which appears to be absent from this agreement. Two trustees were appointed by the financial institutions which hold the Series A Sinking Fund Notes and the other trustee was appointed by Toolco. Toolco, by virtue of this provision, controls one-third of the voting trustees and the trustees as such cannot be termed neutral.

The courts have consistently held that stock ownership is not the only way that control of a corporation can be exercised. Toolco apparently can exercise its option to purchase the outstanding notes, and together with its representation among the trustees, is in possession of a definite measure of control. There was a change in the control by Toolco when

<sup>96</sup> It should be noted that the purpose of this voting trust agreement was to secure financing for TWA and not to insulate TWA from control by Toolco.

<sup>97</sup> See note 85 *supra* and accompanying text.

<sup>98</sup> One of the three trustees was appointed by Toolco and the other two trustees were appointed by the holders of TWA's Series A Sinking Fund Notes. Present holders of the Notes are (1) Equitable Life Assurance Society of the United States, (2) Metropolitan Life Insurance Company and (3) Irving Trust Company (as agent for itself and a group of banks).

the voting trust was executed. However, Toolco still exercises a significant influence over TWA.

The preceding examination of the voting trust agreement indicates that certain elements of control have been retained by Toolco despite the voting trust agreement; however, Toolco has apparently given up working control of TWA to the voting trustees. The Second Circuit has ruled that the CAB must hold a hearing under section 408(b) to determine whether Toolco's proposed acquisition of the TWA stock is in the public interest.<sup>99</sup> The court did not expressly find that there would be an acquisition of control by Toolco, if the option was exercised and the voting trust terminated. However, the court did imply that there would be an acquisition of control and that the CAB had itself expressed this opinion.<sup>100</sup>

The working control of TWA was relinquished. Upon exercise of the option by Toolco, the reassumption of working control is a further acquisition of control within the meaning of section 408(a)(5). Under the unique circumstances of this case, control of TWA by Toolco existed, was partially given up, and now will be reacquired upon exercise of the option and cancellation of the voting trust. The voting trust insulated Toolco from working control of TWA but reacquisition of this working control constitutes a further acquisition of control under section 408(a)(5) which requires a hearing under section 408(b) to determine whether such acquisition is in the public interest. Since the jurisdiction of the CAB rests, *inter alia*, on an acquisition of control, the Board can be expected to find that there was a further acquisition by Toolco over TWA.

#### IV. CONCLUSION

Despite the somewhat confused development of the voting trust device in the airline industry, it is possible to classify the decisions of the CAB in relation to the use of the device. Voting trusts have been used by airlines and persons engaged in phases of aeronautics to divest themselves of control of air carriers whenever they felt that it was to their advantage. Attempts have been made to avoid the jurisdiction of the CAB under section 408 of the act by placing a controlling block of stock in a voting trust and denying that the Board has the power to approve or disapprove the control relationship involved. The voting trust has also been utilized as a temporary measure to provide the controlling company with an opportunity to divest itself of the controlling interest of another airline's stock. Finally, the voting trust has been used in financing arrangements. The CAB has announced its position on some of the above mentioned uses of the voting trust in relation to control and insulation from control and can be expected to clarify the remaining questions in the near future. When the Board detects that a voting trust is being used to circumvent its jurisdiction under section 408 of the act, it will find that the company is in violation of section 408(a)(7). Previously, when a company entered

<sup>99</sup> *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56 (2d Cir. 1964).

<sup>100</sup> See note 87 *supra* and accompanying text.

into a voting trust prior to Board approval of the control relationship, believing in good faith that the agreement placed it outside the Board's jurisdiction when in fact it did not, the Board held the Sherman Doctrine<sup>101</sup> inapplicable and processed the case on its merits under section 408(b). The Board has stated that in the future it will not view the creation of a voting trust as an excuse for failure to seek advance Board approval of relationships otherwise subject to sections 408 and 409. In short, the Board will not allow the voting trust to defeat its jurisdiction and prevent it from making a decision in relation to the public interest factors under section 408(b).

Historically the CAB has approved the use of the voting trust as a temporary measure until a company can divest itself of a controlling block of stock. Apparently, the Board will continue its approval of this use of the voting trust. However, when it is used in this manner, the Board will require that the voting trust agreement comply with the agreement set out in *The Hughes-TWA-Atlas-Northeast Airlines Possible Common Control Case*,<sup>102</sup> which presumably insulates one company from control by another provided no other elements of control exist. The use of the voting trust for financing purposes is apparently acceptable by the CAB. Although this particular use of the device does not directly involve control or insulation from control, it can lead to some very complicated problems as seen in the pending TWA-Toolco proceedings.

The single most important factor in relation to voting trusts, as viewed by the CAB, is that it have jurisdiction over the voting trust, no matter what the purpose of the trust. Insulation from control by use of the voting trust can be accomplished only when the requisites of the Board are met in the voting trust agreement and no other elements of control are present. The CAB has indicated that, when considering a control relationship, each voting trust will be examined in relation to the facts present in each case. The Board can be expected to follow this case-by-case approach in a manner consistent with the preceding policies. This approach seems to be the most acceptable, for control is a factual matter to be determined by the circumstances present in each case.

*Edward A. Peterson*

---

<sup>101</sup> See note 34 *supra*.

<sup>102</sup> 27 C.A.B. 155 (1958) at 157.

## Jurisdiction — Vexatious Litigation — State Injunction Against Federal Suit

In early 1961, the City of Dallas, Texas, announced its decision to build an additional runway at its overloaded municipal airport, Dallas Love Field. A group of forty-six local property owners, including their attorney James P. Donovan, brought a class action on 3 April 1961 seeking to enjoin the building of the runway on various grounds. A Dallas County District Court granted summary judgment in favor of the city.<sup>1</sup> During the pendency of the case, and while the property owners exhausted all possible appellate opportunities, the City of Dallas was prevented from proceeding with issuance of bonds and, for lack of funds, from construction of the runway. Texas law requires the state Attorney General to certify the validity of airport revenue bonds before they may be issued,<sup>2</sup> but the Attorney General will not certify if there is any pending litigation concerning or affecting such bonds. After this litigation had run its course, the city obtained certification of its bond issue. However, on 24 September 1962, the day bids on the bonds were to be received, attorney Donovan filed suit<sup>3</sup> in the United States District Court for the Northern District of Texas. The plaintiffs were 120 Dallas citizens, including Donovan, twenty-seven of whom were plaintiffs in the original class action. The filing of this action prevented the city from issuing the bonds,<sup>4</sup> and faced with another long delay in getting the runway project underway, the city sought a writ of prohibition from the Texas Court of Civil Appeals<sup>5</sup> to prevent Donovan and the other plaintiffs from prosecuting the case in federal court. The Court of Civil Appeals refused to issue such orders,<sup>6</sup> but a petition for mandamus to the Supreme Court of Texas brought a reversal<sup>7</sup> and the Court of Civil Appeals duly issued a writ of prohibition on 16 April 1963.<sup>8</sup> After Donovan contested the city's

---

<sup>1</sup> Affirmed, *Atkinson v. City of Dallas*, 353 S.W.2d 275 (Tex. Civ. App. 1961), *error ref. n.r.e.* (Tex. 1961), *cert. denied*, 370 U.S. 939 (1962).

<sup>2</sup> Tex. Rev. Civ. Stat. Ann. art. 1269j-5, § 3 (1963). "The Revenue Bonds . . . shall not be finally issued until approved by the Attorney General of Texas. . . ."

<sup>3</sup> *Brown v. City of Dallas*, Civil Cause 9276, N.D. Texas, 24 September 1962.

<sup>4</sup> Because no one would bid on them while such a suit was pending. This suit was filed just hours before the bids were to be received. Brief for Respondent, pp. 5, 31, *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

<sup>5</sup> The Court of Civil Appeals for the Fifth Supreme Judicial District sitting at Dallas is one of thirteen intermediate civil appellate courts in the Texas judicial system.

<sup>6</sup> *City of Dallas v. Brown*, 362 S.W.2d 372 (Tex. Civ. App. 1962).

<sup>7</sup> *City of Dallas v. Dixon*, 365 S.W.2d 919 (Tex. 1963).

<sup>8</sup> The Writ of Prohibition read in part as follows:

It is . . . ORDERED, ADJUDGED and DECREED that the said James P. Donovan, individually and as attorney . . . of the Respondents . . . and the Respondents . . . individually and as a class of taxpayers and residents and landowners in the vicinity of Love Field, together with all other persons similarly situated, are hereby prohibited from prosecuting, urging or in any manner seeking to litigate,

motion to dismiss in the federal court<sup>9</sup> and appealed the dismissal to the United States Court of Appeals for the Fifth Circuit,<sup>10</sup> the Court of Civil Appeals found Donovan and eighty-seven of his clients guilty of contempt of court.<sup>11</sup> After serving his jail sentence, Donovan obtained a writ of certiorari from the United States Supreme Court directed to the Supreme Court of Texas and the Texas Court of Civil Appeals.<sup>12</sup> *Held*: The state court was without power to enjoin petitioners' in personam action from being relitigated in the federal court.<sup>13</sup> *Donovan v. City of Dallas*, 377 U.S. 408 (1964).

The problems of repetitious and vexatious litigation and multiplicity of suits have troubled the courts since the early days of the federal system. "Vexatious litigation" and the power of the courts to deal with it

---

as attorney and/or plaintiffs . . . *Brown v. City of Dallas*, now pending in the United States District Court for the Northern District of Texas, Dallas Division, and they . . . are further prohibited and enjoined from filing or instituting any litigation, lawsuits or other actions seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field . . . or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport revenue bonds heretofore issued . . . or that might be issued . . . for the construction of the . . . runway. . . .

Although the writ is entitled "Writ of Prohibition and Ancillary Orders," it is in reality an injunction, as that extraordinary remedy is commonly understood. See High, *Extraordinary Legal Remedies*, §§ 762-63 (1874). Eden, *Injunctions* 14 (2d Amer. ed. 1839) states that:

A prohibition . . . issues only from a superior court . . . and is directed to the judge of the inferior court, as well as to the parties in the cause. An injunction on the other hand, where its object is to restrain proceedings in another court, is directed only to the parties; neither assumes any superiority over the court in which they are proceeding, nor denies its jurisdiction; but is granted on the sole ground that from certain equitable circumstances, of which the court that issues it has cognizance, it is against conscience or [*sic*] the party to proceed in the cause.

While agreeing that the title of the writ was technically incorrect, the Supreme Court of Texas states:

[I]ncorrect identity of the writ sought is of no significance. Relators seek from the Court of Civil Appeals a writ directing the plaintiffs and their attorney to desist from further prosecution of *Brown v. City of Dallas* in the United States District Court. If they are entitled to that relief, necessary and proper writs, by whatever names they may be called, should be issued. *City of Dallas v. Dixon*, 365 S.W.2d 919, 922 (Tex. 1963).

Later in the same opinion, the Texas Supreme Court cautioned that:

The Court of Civil Appeals may not, however, order or direct dismissal of *Brown v. City of Dallas*. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of *Brown v. City of Dallas* would invade the jurisdiction of the United States District Court to control its own docket. *Id.* at 927.

<sup>9</sup> Donovan filed an answer to the city's motion to dismiss, and excepted to the court's dismissal.

<sup>10</sup> Donovan also requested the District Court to enjoin the Texas courts from interfering with the federal suit. *Donovan v. Supreme Court of Texas*, Civil Cause CA-3-63-120, N.D. Texas, dismissed, 9 May 1963; *cert. denied*, 375 U.S. 878 (1963).

<sup>11</sup> *City of Dallas v. Brown*, 368 S.W.2d 240 (Tex. Civ. App. 1963). Eighty-seven of the clients were each fined \$200 while attorney Donovan was given the maximum sentence of twenty days imprisonment in the county jail. Both the Supreme Court of Texas and the United States Court of Appeals for the Fifth Circuit denied applications for writ of habeas corpus which Donovan sought while in jail. (No opinions).

<sup>12</sup> *Donovan v. City of Dallas*, 375 U.S. 878 (1963).

<sup>13</sup> The judgment of the Supreme Court of Texas in the mandamus action was reversed and that of the Texas Court of Civil Appeals in the contempt proceedings was vacated. The case was remanded to the Texas Court of Civil Appeals to determine whether it "would have punished petitioners for contempt had it known that the restraining order . . . was invalid." In succeeding hearings, the Texas court held that it would not have, and refunded the fines. *Brown v. City of Dallas*, 384 S.W.2d 724 (Tex. Civ. App. 1964).

has been variously defined.<sup>14</sup> A discussion of the Connecticut court contains one of the better definitions:

It is well settled that equity may enjoin vexatious litigation. . . . This power of equity exists independently of its power to prevent a multiplicity of actions. It is based on the fact that it is inequitable for a litigant to harass an opponent, not for the attainment of justice, but out of malice. To be vexatious, litigation must be prosecuted not only without probable cause but also with malice.<sup>15</sup>

In the instant case, the Supreme Court of Texas made a specific finding that the litigation over the runway had "reached the point of vexatious and harassing litigation."<sup>16</sup>

Mr. Justice Black, in the majority opinion, posed the question to be decided as "whether a state court can validly enjoin a person from prosecuting an action in personam in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter."<sup>17</sup> Citing cases which pertain to instances of in rem or in personam simultaneous litigation,<sup>18</sup> but which did not consider vexatious litigation, the Court ignored state and federal precedents to the contrary,<sup>19</sup> and ruled

<sup>14</sup> See, e.g., *Meredith v. John Deere Plow Co.*, 261 F.2d 121, 124 (8th Cir. 1958); *Calvo v. Bartolotta*, 112 Conn. 396, 152 Atl. 311 (1930); *Poole v. Mississippi Publishers Corp.*, 44 So. 2d 467, 476 (Miss. 1950); *O'Laughlin v. O'Laughlin*, 6 N.J. 170, 78 A.2d 64, 68 (1951); *Thompson v. Samson United Corp.* 203 Misc. 48, 113 N.Y.S.2d 607, 609 (Sup. Ct. 1952). Cf., *Vestal, Repetitive Litigation*, 45 Iowa L. Rev. 525 (1960).

<sup>15</sup> *Bridgeport Hydraulic Co. v. Pearson*, 139 Conn. 186, 91 A.2d 778, 781 (1952).

<sup>16</sup> *City of Dallas v. Dixon*, 365 S.W.2d 919, 927 (Tex. 1963).

<sup>17</sup> 377 U.S. at 408.

<sup>18</sup> *Princess Lida v. Thompson*, 305 U.S. 456 (1939) (quasi-in rem actions involving a trust) and *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1923) (in personam actions). Reliance by the majority upon these two cases is the basis of the *Donovan* dissent's conclusion that "today's decision rests upon confusion between two distinct lines of authority in this Court, one involving vexatious litigation and the other not." 377 U.S. at 421. Indeed, the language of the Court in *Kline* presents an excellent argument contrary to the instant Court's majority opinion:

The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and *where the necessity, actual or potential, does not exist, the rule does not apply*. Since the necessity does exist in actions in rem and does not exist in actions in personam, *involving a question of personal liability only*, the rule applies in the former but does not apply in the latter. 260 U.S. at 235. (Emphasis supplied).

The instant case would certainly appear to present the "actual or potential necessity" required to support the rule and Dallas' much-needed multi-million dollar runway construction which had to abide the final settlement of the litigation involved much more than personal liability. More than two years had already elapsed when the Texas Court of Civil Appeals issued its injunction. Even so, the runway was not opened to traffic until 2 April 1965.

The litigation concerning the Dallas Love Field runway continues. Three weeks after the new runway was opened to traffic, *Donovan* filed suit on behalf of forty-five plaintiffs in federal district court seeking to enjoin the use of the runway until the City of Dallas purchases the air rights of the homeowners involved. *Crudgington v. League*, Civil No. CA 4-442, N. D. Texas, 24 April 1965. Defendants are the City of Dallas, the Federal Aviation Agency, FAA Administrator Najeeb Halaby, and Archie League, regional administrator of the FAA.

<sup>19</sup> *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941) (dictum); *Root v. Woolworth*, 150 U.S. 401 (1893); *Reagan v. Dick*, 76 Colo. 544, 233 Pac. 159 (1925); *Poole v. Mississippi Publishers Corp.*, 44 So. 2d 467 (Miss. 1950); *University of Texas v. Morris*, 162 Tex. 60, 344 S.W.2d 426 (1961). *Contra*, *Lyons v. Importers' and Traders' Nat. Bank*, 214 Pa. 428, 63 Atl. 827 (1906). There are also many cases discussing the right of the federal courts to enjoin state courts to protect their judgments. See, e.g., *Marks v. Pennsylvania R.R.*, 8 F.R.D. 242 (S.D.N.Y. 1948). For an exhaustive listing of cases see Note, *State Injunctions Against Proceedings in the Federal Courts*, 90 U. Pa. L. Rev. 714 (1942).

that the Texas state court was powerless to protect its judgment through injunction.<sup>20</sup>

The authors of the Judiciary Act of 1793, concerned with preserving the independence of the state courts, included a provision in section 5 prohibiting the federal courts from issuing any injunction to stay the proceedings of a state court.<sup>21</sup> Several early cases cited in *Donovan* illustrate the reluctance of the state and federal courts to interfere with each other but none of these deals with the matter of vexatious litigation.<sup>22</sup>

Because of the reluctance of the federal and state courts to interfere with each other, there are not many holdings in the area of vexatious litigation. There is sufficient precedent, however, to indicate that the Supreme Court in the instant case is not restating existing law, but is, to the contrary, setting new rules. The Court ventured into this area in *Toucey v. New York Life Ins. Co.*,<sup>23</sup> when it held that a federal court did not have the power to stay a proceeding in a state court merely because the claim in controversy had been previously adjudicated in the federal court. Several justices dissented,<sup>24</sup> their dissent becoming the basis for a congressional overruling of the *Toucey* holding in the 1948 revision of the Judicial Code.<sup>25</sup> Furthermore, as the dissent in *Donovan* points out, the Court had previously announced in dictum in *Baltimore & O.R.R. v. Kepner*,<sup>26</sup> that a state court had precisely the power exercised by the Texas court. Not only did the majority opinion in *Kepner* indicate the Court's recognition of such power,<sup>27</sup> but Mr. Justice Frankfurter also stated in his dissent that the majority did "not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious

<sup>20</sup> 377 U.S. at 413.

<sup>21</sup> "... nor shall a writ of injunction be granted to stay proceedings in any court of a state. . . ." 1 Stat. 335 (1793). An amendment in 1911 permitted injunctions where authorized by any law relating to bankruptcy proceedings. 36 Stat. 1162 (1911).

<sup>22</sup> The court cited *M'Kim v. Voorhies*, 2 U.S. (7 Cranch) 529 (1812) and *Diggs v. Wolcott*, 2 U.S. (4 Cranch) 63 (1807). As the dissent points out, the issue in *M'Kim* was whether a state court could stay proceedings on a federal court's judgment which had already been rendered when the state court acquired jurisdiction, while the *Diggs* situation was identical except the position of the courts was reversed. Neither of these cases involved harassment or vexatious litigation.

<sup>23</sup> 314 U.S. 118 (1941).

<sup>24</sup> Mr. Justice Reed's dissent, concurred in by Mr. Justice Roberts and Mr. Chief Justice Stone, contended that the controlling issue was the "power of a federal court to protect those who have obtained its decrees against an effort to force relitigation of the same causes of action in the state courts. *Questions of res judicata seem inapposite for the conclusion.*" (Emphasis supplied). 314 U.S. at 141.

<sup>25</sup> The Judicial Code now allows a federal court to enjoin state court proceedings when necessary "to protect or effectuate its judgments." 28 U.S.C. § 2283 (1958). The Reviser's notes to § 2283 state that:

The exceptions specifically include the words "to protect or effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey v. New York Life Ins. Co.* . . . vigorous dissenting opinion. . . .)

Therefore the revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision. *Ibid.*

<sup>26</sup> 314 U.S. 44 (1941).

<sup>27</sup> *Id.* at 51:

The real contention of petitioner is that, despite the admitted venue, [arising under the Federal Employers Liability Act] respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit. . . . Under such circumstances, petitioners assert power, abstractly speaking, in the Ohio court to prevent a resident under its jurisdiction from doing inequity. *Such power does exist.* (Emphasis supplied).



and oppressive foreign suits."<sup>28</sup> He further mentioned the "discredited notion that there is a general lack of power in the state courts to enjoin proceedings in federal courts."<sup>29</sup>

The view has long been held that a court of equity could enjoin vexatious, harassing litigation. Even in *Toucey*, the basis for the Court's holding was an interpretation of congressional intent in the provisions of the Judicial Code.<sup>30</sup> The Supreme Court itself said in *Insurance Co. v. Bailey*<sup>31</sup> that it was unnecessary to cite authorities for the proposition that "equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits" because it was "universally admitted."<sup>32</sup> A number of early writers reinforced the view that equity has long exercised the power to enjoin vexatious litigation. High, in his 1905 treatise on injunctions, said that while there was no reason why state courts could not interfere by injunction to restrain actions in the federal courts, the state courts had generally refused to do so.<sup>33</sup> Pointing out that the doctrine had been asserted that "state courts are wholly destitute of any power or authority for such interference," High argued that the better doctrine is that the state courts may protect their jurisdiction when it has attached over the controversy, by enjoining "parties who are amenable to their process and subject to their jurisdiction from afterward litigating the same subject in the federal courts."<sup>34</sup> Story, on the other hand, said in 1836 that "the state courts cannot injoin [*sic*] proceedings in the courts of the United States; nor the latter in the former courts." He concluded that this exception to the general rule that courts of equity may enjoin vexatious litigation was based upon "peculiar grounds of municipal and constitutional law," but cited no precedents for this sweeping statement.<sup>35</sup>

The Texas view on vexatious litigation had been established before the state supreme court ruled in *Donovan*. In *University of Texas v. Morris*,<sup>36</sup> the supreme court allowed a state district court to issue an injunction restraining prosecution of a suit by Morris in the New Mexico federal district court because he had already filed several suits on the identical matter in the state district court. Regardless of the various arguments as to comity and non-interference between state and federal courts, it is hard to fault the reasoning of the Supreme Court of Texas when it says:

While the courts are open to all persons for the litigation of their claims and demands, the judicial processes cannot be used for purposes of mere harassment in an effort to effect settlements. While the injunction . . .

---

<sup>28</sup> *Id.* at 55.

<sup>29</sup> *Id.* at 56.

<sup>30</sup> 314 U.S. at 139. See note 21 *supra*.

<sup>31</sup> 80 U.S. 616 (1871).

<sup>32</sup> *Id.* at 621.

<sup>33</sup> 1 High, Injunctions § 111 at 127 (4th ed. 1905).

<sup>34</sup> *Id.* at 128.

<sup>35</sup> Story, Equity Jurisprudence § 900 (1st ed. 1836). For an interesting discussion of the background of Story's "dogma" and the lack of precedent to support it, see Note, 90 U. Pa. L. Rev. 714, especially at 715 and 728 (1942).

<sup>36</sup> 162 Tex. 60, 344 S.W.2d 426 (1961).

should be employed sparingly and with care, the evidence here supports the trial judge's action. Morris has been deprived of no legal rights. He is free to litigate his claim . . . in the district court of the county where the transactions . . . took place. But he may not be permitted to file repeated suits in various forums for harassment purposes.<sup>37</sup>

Though the Supreme Court set a precedent of dubious value in *Donovan*, it must be admitted that there are many sound reasons for jealously protecting the independence of the state and federal courts. It would be intolerable if a state and a federal court could tit-for-tat enjoin proceedings in the other court, thus leaving the plaintiff with no forum at all. However, it is difficult to understand why different rules apply to the state and federal courts in this matter. It appears clear that had the positions of the courts in *Donovan* been reversed, an injunction by the federal court would have been justified under section 2283.<sup>38</sup> Indeed, a strong argument can be made that the Judiciary Act of 1793 and the present Judicial Code both amount to limitations on what would otherwise be an unquestioned right of both state and federal courts to enjoin vexatious litigation regardless of where it is filed.<sup>39</sup> Under the present Judicial Code, it is clear that a federal court may, as an exercise of its equitable discretion, protect or effectuate its judgment by enjoining proceedings in other courts, both state and federal, which constitute relitigation of matters already adjudged or which in some other manner impairs the effect of the judgment.<sup>40</sup>

Before the *Donovan* decision, there were several theories generally advanced as to why state courts, under no restrictions comparable to those imposed on the federal courts by the predecessors to section 2283, generally refused to enjoin federal court proceedings. One is based upon the idea that in order to achieve harmonious relationship between the two court systems, it is necessary that each observe the same general rules. Since the federal courts have been limited in injunctive power since 1793,<sup>41</sup> reciprocity would require the state courts to observe much the same limitations.<sup>42</sup> The other doctrine is similar, but couched in terms of comity; that, although in absence of statute neither is limited in injunctive power, since the federal courts have been limited by Congress the state courts bind themselves to the same rules under a doctrine of judicial comity.<sup>43</sup>

The Court brushes aside the contention that the writ of prohibition<sup>44</sup> of the Texas Court of Civil Appeals was directed to the parties, and not

<sup>37</sup> 344 S.W.2d at 429.

<sup>38</sup> See note 25 *supra*.

<sup>39</sup> Cf. *Baltimore & O.R.R. v. Kepner*, note 19 *supra*, at 53.

<sup>40</sup> *Williams v. Pacific Royalty Co.*, 247 F.2d 672, 675 (10th Cir. 1957); *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 950 (10th Cir. 1952); *Jackson v. Carter Oil Co.*, 179 F.2d 524, 526 (10th Cir. 1950), *cert. denied*, 340 U.S. 812 (1950). 1 Moore, Federal Practice 0.224 at 2614 (1961).

<sup>41</sup> See note 21 *supra*.

<sup>42</sup> Note, *Limitations on State Judicial Interference with Federal Activities*, 51 Colum. L. Rev. 84 (1951).

<sup>43</sup> See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930); Note, 90 U. Pa. L. Rev. 714 (1942).

<sup>44</sup> See extended discussion of the writ at note 8, *supra*.

to the federal court,<sup>45</sup> but the case cited<sup>46</sup> as authority in so doing is clearly distinguishable (as the dissent cogently points out).<sup>47</sup> It would appear that the better rule is the one announced by the 8th Circuit in *Meredith v. John Deere Plow Co.*<sup>48</sup> The court, in affirming the district court's issuance of an injunction to prevent vexatious litigation, stated that the answer to the appellant's contention that it was unconstitutional for a federal court to prohibit the institution of a suit in state court was "that the injunction issued does not reach at action on the part of a state court but at action on the part of appellant."<sup>49</sup> On the other hand, the Supreme Court has stated several times that the fact "that the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial,"<sup>50</sup> so the holding on this point is not a surprise.

The Court's reliance upon *Princess Lida v. Thompson*<sup>51</sup> and *Kline v. Burke Construction Co.*<sup>52</sup> in stating that it was for the federal court to decide "whether or not a plea of res judicata in the second suit would be good"<sup>53</sup> appears to be misplaced.<sup>54</sup> The rule of these cases undoubtedly supports the Court's statement, but neither *Princess Lida* nor *Kline* is in point with the instant case. Both cases concerned simultaneous litigation in state and federal courts concerning the same subject matter, but in which neither state nor federal court had reached a decision. In *Donovan*, the state litigation was completed<sup>55</sup> before the federal suit was filed. Therefore, the only issue was whether filing the federal suit was vexatious and harassing. The Texas Supreme Court's holding<sup>56</sup> that it was should have been conclusive and the federal district judge agreed, saying:

The issues that are sought to be litigated in the case in the Federal Court have been held by the [Texas] Supreme Court to be the same as the issues which have been litigated in the Atkinson case. . . . [T]here is no justiciable issue, . . . all the issues have been decided. . . . [Y]ou are attempting to make me an Appellate Court for the Supreme Court . . . [but] your appeal is to the Supreme Court of the United States and not to this Court.<sup>57</sup>

---

<sup>45</sup> 377 U.S. at 413.

<sup>46</sup> *Peck v. Jenness*, 17 U.S. (7 How.) 320, 327 (1848).

<sup>47</sup> "In *Peck v. Jenness*, . . . the question . . . was whether a federal court 'was vested with any power or authority to oust' a state court of its properly established jurisdiction over a cause commenced in the state court long before any action was taken in the federal court." 377 U.S. at 420.

<sup>48</sup> 261 F.2d 121 (8th Cir. 1958).

<sup>49</sup> *Id.* at 125.

<sup>50</sup> *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940); *Hill v. Martin*, 296 U.S. 393 (1935).

<sup>51</sup> See note 18 *supra* and accompanying text.

<sup>52</sup> *Ibid.*

<sup>53</sup> 377 U.S. at 412.

<sup>54</sup> In its brief, the City of Dallas pointed out that "in this case a plea of *res judicata* is not an adequate remedy because the mere filing of the unmeritorious relitigation complaint has the instant effect of destroying the efficacy of the Texas court's judgment allowing construction of the runway and sale of the bonds." Brief for Respondent, p. 21. The dissent agreed. 377 U.S. at 415.

<sup>55</sup> See note 1 *supra*.

<sup>56</sup> See note 16 *supra* and accompanying text.

<sup>57</sup> *Brown v. City of Dallas*, Civil Cause 9276, N.D. Tex., 2 May 1963. (oral opinion unreported).

The instant decision applies, in effect, a double standard to the power of state and federal courts to protect and effectuate their judgments. It provides a weapon whereby persons opposed to public projects such as the Dallas airport addition in *Donovan* may use the courts to harass and delay. The method utilized by the plaintiffs is clear enough: file the case first in state court and exhaust every possible appeal, delaying each as much as possible. Then, refile in federal court, alleging a federal cause of action involving the same subject matter or diversity of citizenship and the whole process begins anew. Allowing this procedure will lead to unfortunate and unwarranted results. A small group should not be permitted to defeat the public's welfare through continuous, vexatious and harassing litigation. Congress repudiated a similar holding in *Toucey*,<sup>58</sup> it should do so again.

*Charles A. Thompson*

---

<sup>58</sup> See note 25 *supra* and accompanying text.

## Federal Courts — Change of Venue — Section 1404(a)

As a result of a commercial airliner crash in Massachusetts on 4 October 1960, numerous wrongful death actions were instituted by personal representatives in the United States District Court for Massachusetts and in the United States District Court for the Eastern District of Pennsylvania. In each forum venue was proper and diversity jurisdiction requirements had been met.<sup>1</sup> The defendants moved to transfer all the actions brought by personal representatives in Pennsylvania to the federal district court in Massachusetts under Section 1404(a) of the Judicial Code,<sup>2</sup> which authorizes the transfer of a civil action to any district where it "might have been brought," provided transfer is in the interest of justice and a more convenient forum will result. The defendants probably thought that after transfer, Massachusetts law, including the Massachusetts limitation on damages in wrongful death actions, would be applicable.<sup>3</sup> Pennsylvania had no such limitation. The Pennsylvania district court granted the defendants' motion to transfer,<sup>4</sup> although the plaintiffs had failed to qualify to bring suit as personal representatives in Massachusetts. Thereafter, the plaintiffs obtained a writ of mandamus from the United States Court of Appeals for the Third Circuit to vacate the order.<sup>5</sup> The Supreme Court granted a writ of certiorari.<sup>6</sup> *Held*: In situations governed by section 1404(a), only federal venue and jurisdictional requirements need to be considered in determining a defendant's unqualified right to transfer. After transfer, the substantive law applicable in the original forum must be applied in the transferee forum.<sup>7</sup> Reversed and remanded. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

### I. BACKGROUND

Prior to the enactment of section 1404(a), the Supreme Court, in

<sup>1</sup> 28 U.S.C. §§ 1391, 1332 (1961).

<sup>2</sup> 28 U.S.C. § 1404(a) (1961). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

<sup>3</sup> Mass. Gen. Laws Ann. ch. 229 § 2 (1955) provided: "If the proprietor of a common carrier of passengers . . . causes the death of a passenger, he . . . shall be liable in dollars in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . ."

<sup>4</sup> *Popkin v. Eastern Air Lines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962).

<sup>5</sup> *Barrack v. Van Dusen*, 309 F.2d 953 (3d Cir. 1962).

<sup>6</sup> *Van Dusen v. Barrack*, 372 U.S. 964 (1963).

<sup>7</sup> Plaintiffs had two main bases for their contention that transfer under section 1404(a) could not be allowed. The plaintiffs' first contention was that the substantive law of the transferee state would apply after transfer, and that the lack of capacity to sue under the law of the transferee state would be "an absolute defense" to the action in the transferee district court. Thus transfer would not have been in the "interest of justice." The plaintiffs also contended that *Hoffman v. Blaski*, 363 U.S. 335 (1960), established the rule that transfer must be denied unless, at the time the action was instituted, the plaintiffs had an unqualified right to bring that action in the transferee forum. Therefore, transfer would be prohibited, because the plaintiffs did not have an unqualified right under Massachusetts law.

*Gulf Oil Corp. v. Gilbert*,<sup>8</sup> approved the use of the doctrine of forum non conveniens in federal courts when jurisdiction was based on diversity of citizenship and venue was proper under general federal venue statutes. Forum non conveniens provided for the dismissal of a plaintiff's action which had been brought in an inconvenient forum. A defendant was protected from the unnecessary expense and trouble involved in a trial in an inconvenient forum. In short, a plaintiff could not choose an inconvenient forum in order to harass or oppress a defendant. However, unless the balance of convenience shown and proved by the defendant was strongly in favor of granting the motion to dismiss, the plaintiff's choice of forum would rarely be disturbed.<sup>9</sup> In applying forum non conveniens a court had to dismiss the action if the defendant's motion was granted, because transfer was not available. Following the *Gulf Oil* decision uncertainty existed as to whether forum non conveniens could be invoked when venue was fixed under special statutes.<sup>10</sup> In addition, the defendant's burden of proof would in many instances be too strict to sustain.<sup>11</sup> Without the benefit of a transfer provision, the dismissal power could work an undue hardship on a plaintiff who had instituted suit in a proper, but inconvenient, forum.<sup>12</sup>

In 1948 Congress enacted section 1404(a) to remedy the defects of forum non conveniens. The avowed purpose of the section was to provide a statutory right to apply "forum non conveniens" in federal courts. However, a most notable change from traditional forum non conveniens was that the power of dismissal was replaced by the power of transfer. In *Continental Grain Co. v. Barge FBL-585*, the Supreme Court defined the policy of section 1404(a), saying: "The idea behind section 1404(a) is that where a civil action to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one district court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court."<sup>13</sup> Thus, convenience of all parties, not merely that of the defendant, is apparently the basic characteristic of section 1404(a) according to the Court. If it is conceded that the section is at least to some extent based on the forum non con-

<sup>8</sup> 330 U.S. 501 (1947). For a discussion of forum non conveniens see Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929).

<sup>9</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

<sup>10</sup> In *United States v. National City Lines*, 334 U.S. 573 (1948), and *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941), it was decided that, in the particular situation, forum non conveniens could not be applied. In both cases, venue was fixed by special venue statutes. Section 12 of the Clayton Act was applicable in *National*, and Section 6 of the Federal Employers Liability Act was applicable in *Kepner*.

<sup>11</sup> The defendant had the burden of presenting "strong" evidence supporting his contention that the then present forum was very inconvenient for him.

<sup>12</sup> The plaintiff might discover that his claim had been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere.

<sup>13</sup> *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960). One district judge has stated that the purpose of section 1404(a) is "to afford relief to a defendant by placing him on an equal footing with plaintiff in the selection of a forum in which to have his case tried." *Trader v. Pope & Talbot, Inc.*, 190 F.Supp. 282, 283 (E.D. Pa. 1961).

veniens doctrine,<sup>14</sup> a fundamental conflict exists between section 1404(a) as construed in *Continental Grain*, and the traditional doctrine. As developed in state courts, the doctrine was used to protect a defendant from trial in an inconvenient forum, without consideration of the plaintiff's convenience.<sup>15</sup> Today, section 1404(a) may be used to secure a convenient forum for either plaintiff or defendant.

Cases construing the statute between 1948 and the ruling in *Hoffman v. Blaski*<sup>16</sup> may be divided into two categories. One group of decisions held that section 1404(a) was applicable to "all civil actions,"<sup>17</sup> and a second group held that the section was not a mere codification of the forum non conveniens doctrine. Section 1404(a) was intended to be much broader in scope than the doctrine, in that judges have greater discretion in applying section 1404(a) than existed under forum non conveniens.<sup>18</sup> Transfer is permissible although the extent of inconvenience shown would not have justified a dismissal under forum non conveniens.<sup>19</sup> Nevertheless, many of the major factors considered in deciding whether to dismiss under forum non conveniens are still to be considered in ordering transfer under section 1404(a).<sup>20</sup> In *Hoffman*, the defendant moved for transfer to a district where venue did not lie and jurisdiction was lacking. The Supreme Court interpreted the "might have been brought" clause of section 1404(a) to mean that a defendant may move for transfer only to a district where venue would have been proper and jurisdictional requirements could have been met at the time the action was originally instituted. In addition, the Court ruled that a defendant may not transform an improper district into one proper for transfer by waiving his venue privilege and submitting to the jurisdiction of the "improper" forum.<sup>21</sup>

Few cases have considered definitively the question of whether a change of forum is to be accompanied by a change in applicable state substantive law. A split of authority existed among the circuits on this issue. Two well-known cases, *H. L. Green Co. v. MacMahon*<sup>22</sup> and *Headrick v. Atchison T. & S. F. Ry.*,<sup>23</sup> reached the conclusion that there should not be a

<sup>14</sup> Revision of Title 28 U.S.C., Report of the House Committee on Revision of the Laws on H.R. 7124, 79th Cong., 2d Sess., p. A 127. Section 1404(a) ". . . was drafted in accordance with the doctrine of forum non conveniens. . . ."

<sup>15</sup> Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929).

<sup>16</sup> 363 U.S. 335 (1960).

<sup>17</sup> See *Ex Parte Collett*, 337 U.S. 55 (1949); *Kilpatrick v. Texas & Pac. Ry.*, 337 U.S. 75 (1949); *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949). See generally 1 Moore, *Federal Practice* 1760-66 (2d ed. 1961). The problem was whether section 1404(a) applied to civil actions governed by special venue provisions, in addition to being applicable to civil actions governed by the general federal venue provisions.

<sup>18</sup> See *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955); *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360 (4th Cir. 1949).

<sup>19</sup> 1 Moore, *Federal Practice* 1787 (2d ed. 1961).

<sup>20</sup> *Norwood v. Kirkpatrick*, *supra* note 18. The factors are set out in the *Gulf Oil Corp. v. Gilbert* decision and in *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

<sup>21</sup> *Hoffman v. Blaski*, 363 U.S. 335.

<sup>22</sup> 312 F.2d 650 (2d Cir. 1962).

<sup>23</sup> 182 F.2d 305 (10th Cir. 1950).

change in applicable state substantive law, and that the case should remain the same in all respects except location. Both decisions are also particularly significant in that each ruled that the statute of limitations of the transferor state is to apply after transfer, regardless of the fact that the statute of limitations in the transferee state would bar a suit originally filed in that state at the time of transfer.

## II. VAN DUSEN V. BARRACK

The present case establishes that any qualification of section 1404(a), and in particular the "might have been brought" clause, beyond the restrictions relating to venue and jurisdiction set forth in the *Hoffman* case, is not to be allowed. The Court held that state law of the transferee forum concerning a plaintiff's capacity to sue there, or for that matter, any law of that state which might frustrate or prejudice plaintiffs in their actions, is immaterial. Therefore, the plaintiffs' incapacity under Massachusetts law to bring suit originally in Massachusetts is not a bar to transfer to a federal district court in that state. Transfer to Massachusetts is permissible because venue and jurisdiction are proper in that state.

The Supreme Court further held that a change of forum pursuant to a section 1404(a) transfer is not to be accompanied by a corresponding change in applicable state substantive law. Thus, Pennsylvania law, including the Pennsylvania choice of law rules, is applicable in the district court in Massachusetts if a transfer occurs. The Court indicated that section 1404(a) is not intended to "narrow the plaintiff's venue privilege" or deprive him of any state law advantage which might result from the exercise of that privilege. Section 1404(a) is intended simply to "counteract the inconveniences that flowed from the venue statute by permitting transfer to a convenient federal court."<sup>24</sup> A defendant is not to receive a change of law as a bonus for a change of venue. This ruling not only has general significance, but is especially important in determining whether to transfer in the instant case. The transferor district court must look to the choice of law rules of Pennsylvania in order to determine whether to apply the Pennsylvania rule of damages or the Massachusetts rule. The Supreme Court of Pennsylvania has recently decided that the Pennsylvania rule of damages is to apply in many instances in Pennsylvania courts, rather than the damages rules of the *lex loci delicti*.<sup>25</sup> This Pennsylvania ruling could greatly influence the considerations pertinent to a decision on the convenience of parties and witnesses. The presence of material witnesses in Pennsylvania might preclude transfer to Massachusetts.

An apparent conflict exists between the *Erie* doctrine<sup>26</sup> and the decision to apply the law and policy of the transferor state after transfer. Briefly stated, the *Erie* doctrine is that a federal court sitting in a case in which jurisdiction is based on diversity of citizenship is to apply the statutory and case law of the state in which it sits. However, the Court was able

<sup>24</sup> *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964).

<sup>25</sup> *Griffith v. United Air Lines, Inc.*, 416 Pa. 3, 203 A.2d 796 (1964).

<sup>26</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).



to reconcile the conflict. Mr. Justice Goldberg reasoned that, although a superficial reading of the *Erie* doctrine might suggest that the transferee forum should apply the law of the state in which it sits, such an interpretation contradicts the underlying policy of *Erie*. That policy is that "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result."<sup>27</sup> Federal diversity jurisdiction should not enable a party to transfer a case and thereby avoid or change the result which would have been achieved in the courts of the state of original filing. The Court emphasized that the result in the federal court which decides the case should be identical, so far as legal rules determine the outcome of an action, with the result which would have been reached in the courts of the state of original filing.<sup>28</sup>

### III. CONCLUSION

Mr. Justice Goldberg's interpretation of *Hoffman* is a liberal one in that transfer will be promoted, because the state law of the transferee forum is immaterial in determining whether the plaintiff has an unqualified right to file suit originally in that state. However, the interpretation is restrictive in that there may not always be an alternative forum which meets the requirements of proper venue and jurisdiction. Actually, it appears that an interpretation which does not declare the "might have been brought" clause of section 1404(a) to be meaningless is, of necessity, intrinsically restrictive. For example, the districts to which transfer would be deemed proper under a particular interpretation might all be inconvenient, or there might not be a proper district for transfer at all. Perhaps the "broad remedial purpose" of section 1404(a) can become a reality only by eliminating the clause and thereby refusing to impose any restrictions on a judge's exercise of his discretionary transfer power.<sup>29</sup>

The possible consequences of the Court's interpretation seem for the most part to be quite beneficial. It is now possible to avoid litigation which in magnitude might approach a trial on the merits, because it is no longer necessary to determine whether a plaintiff, under the law of the transferee state, has an unqualified right to sue in the federal courts of that state. This in turn obviates much of the difficulty in, and necessity for, interpretation of foreign state law. Also, a plaintiff is not able to restrict transfer by failing to qualify to sue in an otherwise proper forum state.

The decision that a change of venue shall produce no change in appli-

<sup>27</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>28</sup> *Van Dusen v. Barrack*, *supra* note 24, at 638-39. Fed. R. Civ. P. 17(b) provides: "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . . [A personal representative's] . . . capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ." This rule ". . . must be interpreted similarly so that the capacity to sue will also be governed by the laws of the transferor state." *Van Dusen v. Barrack*, *supra* note 24, at 642. Thus, Pennsylvania law governing capacity to sue is paramount. The fact that Pennsylvania representatives failed to qualify to sue under Massachusetts law is immaterial.

<sup>29</sup>1 *Barron & Holtzoff*, Federal Practice and Procedure § 86.8 (Wright ed. 1960).

cable law is in conflict with traditional forum non conveniens doctrine as known in state and federal courts.<sup>30</sup> Under section 1404(a) the plaintiff, rather than the defendant, is protected, assuming of course that the plaintiff chooses an original forum in which laws favorable to his position will be applied.<sup>31</sup> The plaintiff's advantage would not have accrued to him had there been a dismissal under forum non conveniens. On the other hand, a defendant must remain content under section 1404(a), as was formerly the case under forum non conveniens, to exercise his power to "transfer" to a more convenient forum. No further or additional advantage results to the defendant.

A major consequence arising from the decision to apply transferor state law is that the defendant cannot use section 1404(a) as a forum-shopping instrument, and will seek transfer for reasons of convenience instead of possible advantage. Also, in deciding whether transfer is in the interest of justice, there will be no time-consuming, pre-trial inquiries into the validity of defenses the defendant might assert under the law of the transferee state. The most significant consequence is that the astute plaintiff forum shopper will seldom be deprived of the advantage he seeks in the law of the original forum, whereas the relationship between section 1404(a) and forum non conveniens furnishes substantial support for the view that one of the purposes of the section was to eliminate such advantages.<sup>32</sup> The power to deprive the plaintiff of an "inequitable advantage" should be recognized if section 1404(a) is to perform the function of the doctrine of forum non conveniens, as well as performing the function of a simple transfer provision.<sup>33</sup> Professor Currie offers suggestions as

<sup>30</sup> See Blair, *supra* note 15.

<sup>31</sup> The conflict of laws rules of the transferor forum also must be applied in the transferee forum. The Court in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), held that in cases in which jurisdiction depends upon diversity of citizenship, federal courts must also apply the conflict of laws rules prevailing in the state in which they sit.

It may be thought undesirable to let the plaintiff reap a choice of law benefit from the deliberate selection of an inconvenient forum. In a sense this is so, but the alternatives seem even more undesirable. If the rules of the state where the transferee district is located were to control, the judge exercising his discretion upon a motion for transfer might well make a ruling decisive of the merits of the case. Whether he should simply decide the appropriate place for trial, letting the choice of law bonus fall as it may, or include in his consideration of the 'interest of justice' the 'just' choice of law rule, the result is unfortunate. . . . A. L. I., Study of the Division of Jurisdiction between State and Federal Courts § 1306, at 65-66 (Tent. Draft No. 1, 1963).

<sup>32</sup> Professor Currie, in *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353, 361 (1955), expresses the view that the forum shopper will never be deprived of his advantage. However, the doctrine of forum non conveniens still has a very limited vitality in federal courts. Dismissal is proper if a foreign forum is more convenient, because transfer is allowed only within the federal judiciary. 1 Moore, *Federal Practice* 1788 (2d ed. 1961); 1 Barron & Holtzoff, *Federal Practice and Procedure* § 87 (Wright ed. 1960).

<sup>33</sup> Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. Chi. L. Rev. 341, 348 (1960).

Although the issue was not decided, the Court in the *Van Dusen* case also seemed to intimate that, should plaintiff, rather than defendant, move for transfer under section 1404(a), the transferee forum would not be bound to apply the law of the transferor state.

The Court did not decide whether the law of the transferor state relating to forum non conveniens was to be applied in federal courts in accordance with the *Erie* doctrine; if so, dismissal rather than transfer should be the result in certain instances, thus depriving the plaintiff of any advantage gained in the original forum. If state forum non conveniens rules do not apply, the result in a federal court could be quite different than the result which would have been reached

to how such a power can be established.<sup>34</sup> Legislative amendment of section 1404(a) giving district courts the power of dismissal as an alternative to the power of transfer might be desirable. Criteria for determining whether dismissal rather than transfer should be ordered will then have to be established. Perhaps such criteria might be found by reference to state law of forum non conveniens, and those criteria might be applied in conformity with the *Erie* doctrine.<sup>35</sup> An alternative to, and perhaps a better solution than, legislative amendment might be the invocation of constitutional limitations. The limitations could be applied by way of the due process, full faith and credit, privileges and immunities, or equal protection clauses of the federal constitution.<sup>36</sup> For example, a transferee federal court could refuse to apply the law of the transferor state in situations in which that original forum state has no "interest" in the application of its own law.<sup>37</sup> But in cases of truly conflicting interests, where both the transferor and transferee state have some degree of "interest," a constitutional basis for decision by a court will seldom be possible. Generally, in such cases transferor forum law will have to be applied in the transferee forum regardless of any contrary public policy or law which

---

in the courts of the state of filing. The question could not be answered by saying that state forum non conveniens rules are procedural, and therefore not applicable in federal courts. The *Erie* doctrine "... puts aside abstractions regarding substance and procedure and concentrates on a practical test: the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." Query, however, the extent of application and validity of the above rule today. See Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 Tul. L. Rev. 443 (1962); *Monarch Insurance Co. v. Spach*, 281 F.2d 401 (5th Cir. 1960); *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). "Whether it is a procedural matter depends upon whether the result is substantially affected, and that depends upon what law is applied after transfer, and upon the state law of forum non conveniens." Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. at 363.

<sup>34</sup> Currie, *supra* note 33.

<sup>35</sup> The Supreme Court's opinion in *Parsons v. Chesapeake & O. Ry.*, 375 U.S. 71 (1963), has, however, given rise to doubt whether this would be allowed. The Court stated that "a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under section 1404(a)." This statement should not preclude the exercise of a power of dismissal by the federal court applying state forum non conveniens theory. It should only preclude divestment of the discretionary transfer power.

<sup>36</sup> Compare Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9 (1958), with Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 Iowa L. Rev. 449 (1959). Professor Currie believes that the standard to be applied under both the due process and full faith and credit clauses is only whether the forum had such an interest as would warrant the application of its laws. Professor Weintraub agrees, but further believes that under the full faith and credit clause a further limitation is to be imposed if the interests of the forum are outweighed by the national need for full faith and credit to public acts, records, or judicial proceedings of a sister state. See Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. Chi. L. Rev. 463 (1960).

<sup>37</sup> The definition of "interest" must be couched in terms of constitutional limitation. A clear-cut case in which no "interest" existed is *Headrick v. Atchison, T. & S.F. Ry.*, *supra* note 23. Plaintiff was a resident of Missouri, the defendant was a Kansas corporation, and the injury occurred in California. Suit was filed in New Mexico; that state had no apparent interest in, or connection with, the suit other than being the site of the original forum. The California statute of limitations had already barred the action in California. Nevertheless, plaintiff was allowed to invoke the as yet unexpired New Mexico statute of limitations after transfer to California. This was a violation of the due process and the full faith and credit clauses. See *Watson v. Employees Liab. Assur. Corp.*, 348 U.S. 66 (1954); *Hughes v. Fetter*, 341 U.S. 609 (1951); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

may exist in the transferee state.<sup>38</sup> However, an exception to the general rule might be found. The application of the choice of law rules of the transferor forum state could be violative of the Constitution in a particular case, if those rules refer to the law of a state which has no "interest" in the application of its own law. It follows that the transferee forum should not be bound to apply such rules.

The decision in *Van Dusen v. Barrack* is just the first incision in an operation fraught with difficult and unforeseen problems. The constitutional question of lack of "interest" assumes major proportions. It seems quite possible that a plaintiff, rather than a defendant, will move to transfer under section 1404(a), thereby posing questions heretofore not considered. *Van Dusen* presents only a bare outline to guide the federal courts in the future application of section 1404(a).

James E. Barnett

---

<sup>38</sup> The Court mentioned the following New York cases: *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) and *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (1962), cert. denied, 372 U.S. 912 (1963), noted 29 J. Air L. & Com. 69 (1963). See Keefe, *Piercing Pearson*, 29 J. Air L. & Com. 95 (1963). These cases are noted as departing from the traditional choice of law rule in tort actions that the rights and liabilities arising from the tort are determined by reference to the law of the place of the tort. See Restatement, Conflict of Laws § 397 (1934). In each case it was determined that the damages law of the forum state (New York) would be applied rather than the damages limitation of the state where the wrong occurred. New York policy against damages limitation was the basis for the rulings. New York acted solely as an independent state in refusing to apply foreign state law in these cases, and therefore, such cases must be distinguished from the situation in which the state would be involved merely because of being the situs of the transferee federal court. In this latter capacity, the federal court of the transferee district should not be able to invoke the policy of the state in which it sits in order to prevent the application of transferor state law.

For a further discussion and analysis of the New York cases and subsequent developments, see: *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Griffith v. United Air Lines, Inc.*, 416 Pa. 3, 203 A.2d 796 (1964); Comment, 49 Iowa L. Rev. 934 (1964); Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1; Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1957).