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CURRENT LEGISLATION AND DECISIONS

COMMENT

A Critical Analysis of the Department of Transportation

I. INTRODUCTION

Having developed slowly over several decades, the American transportation system became a complex and vital mammoth by the middle of the twentieth century. Today 90 million motor vehicles and 97,000 private and commercial aircraft make up part of a transportation system that has required a private investment of over \$4.5 billion each year. Transportation is one of America's largest employers, utilizing well over 2.5 million men and women.¹ The terrific impact which the transportation industry has made upon the economy led planners to recognize the necessity of a coordinated system to facilitate the flow of travelers and goods in the most convenient and efficient manner. This was certainly no novel concern, for as early as 1936 the Senate had recommended a Department of Transportation or, in the alternative, the consolidation of all transportation programs in the Department of Commerce. In 1949 and again in 1961 congressional study groups recommended and promoted coordinated programs to be concentrated in a Department of Transportation. It came as no surprise, then, when on 2 March 1966 President Johnson presented to the House of Representatives a proposal for a Cabinet-level Department of Transportation (DOT).

In order to augment such a department, it was recommended that almost one hundred thousand government employees be brought together, along with some six billion dollars of federal funds then annually devoted to transportation. Such an assembly would include the Office of the Under Secretary of Commerce for Transportation, the Bureau of Public Roads, the Federal Aviation Agency (FAA), the Coast Guard, the Maritime Administration, the safety functions of the Civil Aeronautics Board (CAB) and the Interstate Commerce Commission, along with numerous inland shipping agencies. Thus, the Department of Transportation was created to:

Coordinate the principal existing programs that promote transportation in America; bring new technology to a total system, by promoting research and development in cooperation with private industry; improve safety in

¹ *Hearings on H.R. 13200 Before the Subcommittee of the House Committee on Government Operations*, 89th Cong., 2d Sess. 37 (1966) [hereinafter cited as 1966 *House Hearings*].

every means of transportation; encourage private enterprise to take a full and prompt advantage of new technological opportunities; encourage high-quality, low-cost service to the public; conduct systems analyses and planning, to strengthen the weakest parts of today's system; and develop investment criteria and standards, and analytical techniques to assist all levels of government and industry in their transportation investments.²

After lengthy and often hotly contested debates, at times resulting in compromises,³ the Department of Transportation became a reality on 15 October 1966. The department began functioning on 1 April 1967. It is the object of this comment to present an analysis of this new Cabinet-level Department insofar as it will affect the aviation industry. Through comparison with the advantages and shortcomings of the prior independent agency system and upon consideration of the major objections raised against the Department of Transportation Act, it may be possible to come to an understanding of what the future will likely hold for aviation within the DOT.

II. LEGISLATIVE HISTORY OF AVIATION

Although earlier air mail legislation marked the first instance of congressional involvement with aviation, the legislative history of aviation had its effective inception with the Civil Aeronautics Act of 1938, followed by Reorganization Plans III and IV of 1940. Under this act, civil aviation was administered by the Civil Aeronautics Authority (CAA), functioning as a division of the Cabinet-level Department of Commerce which had many interests and responsibilities other than aviation. Suffering from what has been called "stepchild" treatment, aviation witnessed a host of problems, due mostly to the lack of an independent and coordinated program.

The Civil Aeronautics Act of 1938 created an administrative set-up consisting of three groups: (1) the Civil Aeronautics Authority, which exercised quasi-legislative functions concerning economic and safety regulations; (2) the Air Safety Board, which was to investigate accidents; and (3) the Administrator, who performed executive functions such as the development of air navigation facilities and promotional work.⁴ Two problems with this organizational set-up emerged almost immediately. First, the Air Safety Board's authority in regard to investigation proved to be somewhat minimal because of the control exercised over the Board by the Authority. "The Air Safety Board had the power to investigate accidents, but no power to institute remedial measures. It could only make recommendations to the five-member Authority [CAA]. The Board's feeling of impotence was no doubt further accentuated by the five-member Authority's proclivity to reach decisions before the Air Safety Board could present its findings and recommendations."⁵

² 1966 *House Hearings* 42.

³ See Part IV *infra*.

⁴ *Hearings on S. 3010 Before the Subcommittee of the Senate Committee on Government Operations*, 89th Cong., 2d Sess. 197 (1966) [hereinafter cited as 1966 *Senate Hearings*].

⁵ 1966 *Senate Hearings* 198.

Second, the dual CAA functions of (1) prescribing safety regulations and (2) enforcing the same created a conflict of interest. Thus, by 1940, both the Government and the industry maintained that the responsibility for investigating accidents and maintaining a constant watch on air safety should be separated from the function of regulating civil aeronautics.⁶ The Reorganization Plan of 1940, then, was the congressional adjustment to the problems created by the Civil Aeronautics Act of 1938. The reorganization took the form of a transfer of the investigative, rulemaking, and economic regulatory functions to a new agency, the CAB; the responsibility for overseeing the CAB-created rules was to be carried out by the Administrator. Thus, "no single agency or individual was responsible for the regulation of air space. . . ." With the vast expansion of civil aviation after the Reorganization, it became apparent by the mid-fifties that new legislation was needed to deal effectively with the myriad of new problems confronting the CAA.

A. Federal Aviation Act of 1958

It remained for the Federal Aviation Act of 1958 to create a framework to discharge effectively the statutory duty of regulating and promoting the aviation industry. The products of that Act, the FAA and CAB, became two of the most efficient and best organized of all governmental agencies. The objective of the Act was to reduce the diffusion of governmental authority in the field of aviation, thereby strengthening and unifying control of the national airspace,⁸ and to regulate and administer matters relating to safety in flight. The control, regulation, and administration of the agency were vested in the Administrator of the FAA. The development of safety regulations relating to the manufacture and operation of aircraft and the certification of airmen, formerly within the purview of the CAB under the 1938 Act, was also transferred to the Administrator.⁹ Likewise, the function of amending, modifying, suspending, or revoking aircraft certificates was transferred to the Administrator.¹⁰ Included within the principal functions assigned to the Administrator was the responsibility for developing air traffic controls and regulations, administering the air traffic control of civil and military aircraft within the United States airspace, and operating related communication facilities and airport traffic control towers.¹¹

⁶ *Id.* at 201.

⁷ 1966 *House Hearings* 419.

⁸ Federal Aviation Act of 1958, § 307, 72 Stat. 749, 49 U.S.C. § 1348 (1964). An article appearing in 28 U. KAN. CTY L. REV. 35 (1960) indicated that the principle purpose of the Act was to create an independent agency (FAA) with authority to:

(1) establish, maintain and operate air navigation facilities, and provide for the consolidation of research and development of such facilities, (2) develop and operate a common system of air traffic control and navigation for the safe and efficient use of the airspace by both civil and military aircraft, (3) promulgate, administer and enforce safety regulations for the manufacture, operation and flight of aircraft, and (4) provide for the promotion, encouragement and development of civil aeronautics, both in the United States and abroad.

⁹ Federal Aviation Act of 1958, § 601, 72 Stat. 775, 49 U.S.C. § 1421 (1964).

¹⁰ Federal Aviation Act of 1958, § 602, 72 Stat. 776, 49 U.S.C. § 1422 (1964).

¹¹ Federal Aviation Act of 1958, § 307, 72 Stat. 749, 49 U.S.C. § 1348 (1964).

The Civil Aeronautics Board was continued under the provisions of the 1958 Act as an independent agency, similar in organization to its counterpart under the earlier act. However, the 1958 Act did change a number of its functions. The responsibilities of the CAB were, generally, twofold—economic regulation and safety. The Board was assigned the specific task of issuing certificates of public convenience and necessity and other permits authorizing commercial aircraft operations,¹² and the more general responsibility of establishing aviation's economic policy.¹³ In addition, the 1958 Act gave the Board exclusive authority to investigate aviation accidents and to determine the probable cause thereof,¹⁴ a function which the Board's Bureau of Safety had performed since the 1940 Reorganization. In addition to accident investigation, the safety function of the CAB under the 1958 Act also included the responsibility for providing a de novo review of orders of the Administrator amending, modifying, suspending, or revoking, in whole or in part, all types of certificates, *i.e.*, production certificates, airworthiness certificates, airman certificates, air carrier operating certificates, air navigation facility certificates, and air agency certificates.¹⁵

B. Conflicts Resulting From The 1958 Act

For the most part, the aviation team of the FAA and CAB was both an organizational and a functional success. As a consequence, a great deal of hesitancy was expressed by factions of the aviation industry concerning the transfer of aviation functions to the DOT.¹⁶ The Board had demonstrated its ability, with few exceptions, to remain independent of the FAA; however, those exceptions became an important part of the impetus for the creation of the DOT.¹⁷ Minus a team of competent traffic control specialists, the Board accepted the results of the FAA's self-

¹² Federal Aviation Act of 1958, § 401, 72 Stat. 754, as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1371 (1964).

¹³ Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964) provides a statement of the economic considerations the Board was directed to consider in the determination of its economic policy. They include, among other things, the following:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

¹⁴ Federal Aviation Act of 1958, § 701, 72 Stat. 781, as amended, by 76 Stat. 921 (1962), 49 U.S.C. § 1441 (1964).

¹⁵ Federal Aviation Act of 1958, § 609, 72 Stat. 779, 49 U.S.C. § 1429 (1964).

¹⁶ See Part IV, A *infra*.

¹⁷ In the House hearings testimony was heard concerning an area involving a lack of functional independence:

investigation when air traffic control had a possible effect on an accident.¹⁸ Moreover, when there was the possibility of air traffic control's having precipitated an accident, the FAA's Bureau of Air Traffic Management made an investigation of this aspect of the Administrator's responsibility. Occasions arose in which the practice of allowing the FAA to investigate itself produced unfortunate results.¹⁹

Another conflict appeared in instances in which the certification and licensing function of the FAA became an issue in an accident investigation. In August 1966 a Braniff Airway's BAC 111 broke-up in flight and crashed near Omaha, Nebraska. A trade magazine carried the following account of the conflict which developed between the two agencies:

Disagreement between staff members of the Civil Aeronautics Board's Bureau of Safety and the Federal Aviation Agency over the conduct of an investigation of the crash of a Braniff BAC 111 points up a possible sore spot in the organization of the new Department of Transportation. . . .

FAA staff members were disturbed by CAB's handling of the report by the engineering group of the accident investigation team. The report indicated by implication a possible need for more stringent certification regulations of T-tail jet aircraft, an FAA function.²⁰

One explanation of the lack of difficulty with which these two aviation agencies have generally functioned in conjunction with each other may lie in the fact that their responsibilities were, for the most part, separate, so that there was little opportunity for conflict. Only in the instances in which their responsibilities over-lapped did these difficulties arise. Thus, objections to the consolidation of *all* aviation functions in the Department of Transportation, which will be discussed at a later point,²¹ seem possibly to have been well taken.

III. THE ORGANIZATIONAL EFFECT OF THE DEPARTMENT OF TRANSPORTATION ON AVIATION

Almost all areas of aviation will feel the effect of the Department of Transportation, if only indirectly. The new Department cuts across the broad functions of the traditional independent agency system by establishing many new administrative units in the place of the old system, with each unit having efficiency and coordination as primary objectives. Unlike the agency system, these new functional units will in many cases have to deal with all facets of the transportation industry rather than with aviation alone.

"As more and more airspace is placed under positive control, and more and more aircraft rely upon FAA's air traffic control system for navigation and separation from other aircraft, there has naturally arisen a greater possibility of involvement of the air traffic control system in aviation accidents." 1966 *House Hearings* 408.

¹⁸ See generally Note, 30 J. AIR L. & COM. 281 (1964) for a discussion of this functional conflict.

¹⁹ See Part IV, C *infra*.

²⁰ Aviation Week & Space Technology, 19 Dec. 1966, p. 34.

²¹ See Part IV, A *infra*.

A. Federal Aviation Agency

All of the personnel and functions of the Federal Aviation Agency have been transferred to and vested in the Secretary of the new Department.²² It will lose its independent status and will henceforth be termed the Federal Aviation Administration, an "Operating Agency"²³ no longer reporting directly to the President but to the Secretary instead.²⁴ General and coordinated operational policies for the entire Department will be formulated at the secretarial level, while the Operating Agencies will be responsible for the development of day-to-day policy.²⁵

B. Civil Aeronautics Board

In contrast to the unit treatment afforded the FAA, the functions of the CAB have been fragmented by the creation of the new Department. Stated simply, the CAB will remain as an independent agency, retaining only its economic regulatory responsibilities, including the issuance of certificates of public convenience and necessity, while all of the Board's safety functions have been transferred to the Secretary.²⁶

²² Department of Transportation Act, § 6(c)(1), 80 Stat. 938 (1966).

²³ An "Operating Agency" is an operating arm, the purpose of which is to carry out the functions of the Department. The FAA, the Coast Guard and other organizations are in the group.

²⁴ General William F. McKeen, Administrator of the FAA, discussed the form the FAA will take after it is transferred to the DOT. "The agency will remain intact pretty much as it now is, and that the duties now performed by the agency, while under the bill transferred to the Secretary, would be redelegated . . . to the agency. . . ." 1966 *Senate Hearings* 253.

²⁵ 1966 *Senate Hearings* 702.

²⁶ Department of Transportation Act, § 6(d), 80 Stat. 938 (1966). The following table compares the procedures of the old and new accident investigation systems:

Steps	Aviation (CAB/FAA)	Department of Transportation
1. Notification.....	Notice of accident received by CAB Bureau of Safety.	Notice of accident reported to appropriate element of DOT.
2. Investigation.....	Investigation initiated by Bureau investigators.	Safety staff initiates an investigation.
3. Field investigation..	Field investigation under CAB direction (in all fatal or large aircraft accidents) includes teams specializing in structures, powerplants, etc. All other accidents investigated by FAA under authority delegated by CAB. (CAB, 901 accidents; FAA, 4540 accidents investigated in 1965.)	Safety staff element supervises investigation.
4. Product.....	Product of investigation, including team reports, laboratory analysis, etc. assembled.	Product of investigation is assembled for further disposition.
5. Hearing.....	CAB formal accident hearing (6 in 1965) with CAB member chairman. Receives product of investigation and additional testimony. (This step omitted in small aircraft and nonfatal accidents.)	Formal hearings will be held in the same circumstances as they are held under present law and procedure in agencies whose functions are being transferred. NTSB member would preside in major air accident investigative hearings and might participate in hearings involving marine, rail and highway accidents.

The responsibility of aviation accident investigation, although transferred to the Secretary, has been delegated to the National Transportation Safety Board. The entire investigative staff of the CAB's Bureau of Safety has been transferred to this organization, where the personnel of the old Bureau will continue to function as a unit. The actual investigation function of the National Transportation Safety Board (NTSB) is limited to the performance of aviation accident investigation, and because it is believed that aviation accident investigators can make valuable improvements in the accident investigation programs of other modes of transportation, the NTSB will also recommend to other operating components investigative techniques of proven worth. The purpose of the separation of the accident investigation function from the operating units of the Department is that of ensuring an entirely independent operation.²⁷ The original recommendation of the Department's planners was that the function of aviation accident investigation should repose in the NTSB; however, upon the insistence of certain elements of the aviation industry, the House of Representatives agreed to amend the Administration's original version of the bill by creating an Office of Accident Investigation, to be a staff office of the Secretary, in order to discharge this responsibility. It was believed that this amendment would retain the desirable checks

6. Record.....	Record of hearings, with exhibits, transmitted to Bureau of Safety.	Record, or other product of investigation, transmitted to appropriate element of DOT. NTSB regulations will provide for the manner in which reports of formal hearings will be prepared and handled in proceeding in which the Board participates.
7. Record completed..	Bureau of Safety completes record by adding technical data or reports or other information required.	Record, or other product of investigation, completed in appropriate element of DOT.
8. Evaluation.....	Bureau of Safety prepares proposed findings and evaluates information of record.	Appropriate element evaluates record or other product and prepares and/or reviews tentative findings.
9. Report.....	Report, including all evidence proposed findings prepared by Bureau of Safety, sent to full CAB.	Report, containing record, other products of investigation, and tentative findings sent to NTSB. NTSB regulations will cover procedures where NTSB member presides at investigative hearings as in major aviation accident cases. NTSB will be able to require further investigation in situations where other information is needed to supplement or support record prepared at investigative hearing as well as any other information needed by the Board for the conduct of its functions.
10. Determination recommendation.	Determination of probable cause issued by CAB. Recommendations made to appropriate agencies.	Cause or probable cause determined by NTSB.

²⁷ 1966 Senate Hearings 270.

and balances present in the previous agency system and would provide for the "unique" needs of aviation.

When the Senate considered the legislation, this particular aspect of the bill was subject to considerable debate. Ultimately the Senate version abolished the Office of Accident Investigation under the Secretary and transferred the accident investigation function, formerly reposing in the CAB, to the National Transportation Safety Board. Obviously, it was necessary to refer the bill to a conference committee. Although a number of compromises were made in the conference committee, the Senate version concerning aircraft accident investigation prevailed and was ultimately signed into law by the President.

C. *National Transportation Safety Board*

Section 5 (a) of the Act provides for the establishment of a National Transportation Safety Board, consisting of five members appointed by the President by and with the consent of the Senate. They may be removed only by the President, and then only for inefficiency, neglect of duty, or malfeasance in office.²⁸ "[T]he Board shall be independent of the Secretary and the other offices and officers of the Department . . . [and] shall report to the Congress annually"²⁹ The enactment vests in the NTSB, rather than in the Secretary, various functions, powers, and duties with respect to:

- (1) determining the cause or probable cause of transportation accidents and reporting the facts, conditions, and circumstances relating to such accidents; and
- (2) reviewing on appeal the suspension, amendment, modification, revocation, or denial of any certificate or license by the Secretary or by an Administrator.³⁰

The Board will operate with a limited staff. In order to achieve its ultimate objective of translating the findings of accident investigations into means for accident prevention, the Board is authorized to make recommendations to the Secretary for the conduct of special studies pertaining to safety in transportation. Thus, the former CAB functions of investigating aviation accidents, determining the probable cause of such accidents, and passing on review of certification and licensing decisions of the FAA have been transferred to the NTSB.

D. *The Independent Agencies*

The economic regulatory agencies are excluded from the new Department. Little testimony was heard on this facet of the bill; however, Frederick B. Lee, Director of the National Pilots Association, seemed to speak for the aviation industry when he agreed that the merger of all transportation regulatory agencies, including air transportation, in the new Department would be the "kiss of death."³¹ In retrospect, the exclusion of

²⁸ Department of Transportation Act, § 5(h), 80 Stat. 936 (1966).

²⁹ Department of Transportation Act, § 5(f) and (g), 80 Stat. 936 (1966).

³⁰ Department of Transportation Act, § 5(b), 80 Stat. 936 (1966).

³¹ 1966 *House Hearings* 213.

these regulatory agencies seems to be the result of a number of considerations, two of which could have been the appeasement of an industry which took issue on many other points and an attempt to ensure the continuance of a system of checks and balances, a matter heavily attacked in other areas. The functional and policy impact which the economic regulatory agencies will have upon the objectives of the Department will be taken up at a later point.³²

IV. THE ACT: AREAS OF DISCONTENT AND POSSIBLE CONFLICTS OF INTERESTS

In construing legislation, the rule that "the intention of the law-maker constitutes the law"³³ has been applied repeatedly. Through studying the testimony before the congressional committees, one may discover the areas of disagreement and potential conflicts in interest which are inherent in the new bill.

A. Aviation Is "Unique"

In general, the group which favored passage of the contested provisions of the bill represented the Administration, while the antagonistic group normally represented the views of private aviation. One faction maintained that all of aviation should be excluded from the DOT. Representatives of this group maintained that "the problems of aviation are so unique and extraordinary that it is essential that there be a separate agency of the Federal Government to deal with this industry that is changing so rapidly."³⁴ Joseph B. Hartranft, Jr., President of the Aircraft Owners and Pilots Association (AOPA), stated his organization's position when he testified, "[T]he diversity of interests that must be served by such a secretary [of the DOT] could well reduce the effectiveness and blunt the initiative of those attempting to discharge the will of Congress in the aviation field."³⁵ It was suggested that aviation could be brought under the Department at some future date when experience with the system dictates that such a transfer would be in the public interest.³⁶ The general position of these diverse groups was voiced by the AOPA in the following manner:

Aviation is now the most progressive and dynamic transportation mode. Its vitality will only be enfeebled, its momentum slowed, its unique benefits deferred by amalgamating [*sic*] it with the other modes in an organizational structure devised for administrative convenience on the theory that they are all transportation. They are; but it would be like hitching a race horse, a quarter-horse, a Shetland pony and a Clydesdale into a team—they are all horses, but they don't work well as a team and there is little merit in trying to make one out of them.³⁷

The belief that "aviation with its unique problems of growth and rapid

³² See Part IV, *F infra*.

³³ *Stewart v. Kahn*, 78 U.S. (11 Wall.) 176 (1871).

³⁴ 1966 *Senate Hearings* 288.

³⁵ 1966 *House Hearings* 345.

³⁶ *Id.* at 373.

³⁷ 1966 *Senate Hearings* 323.

technological changes should be a separate agency with the Administrator reporting directly to the President of the United States"³⁸ illustrates the fear that inclusion of aviation in a monolithic transportation agency would result in a return to the pre-1958 neglect and indifference which plagued aviation under the Department of Commerce.³⁹ Having extricated itself from that painful position, and after several years of independent and productive growth, elements of the industry had no desire to return to the type of frustrating conditions witnessed in the fifties. They envisioned this possibility with aviation under the aegis of the Department of Transportation.

Although the fear expressed by these elements of the aviation industry may be appreciated, one finds it difficult to come to the same conclusions when the objectives of the Department are considered in light of present circumstances. Commenting on the objection to the inclusion of aviation within the Department on the ground that it is somehow "unique," the Senate Committee declared, "To leave outside of the Secretary's responsibility one of the most significant areas of Federal activity, would only continue the diffusion which the creation of the DOT is intended to overcome."⁴⁰ It was urged that any attempt at a unified transportation policy would be made impractical without the inclusion of this all-important aspect of the industry. Moreover, aviation is no longer in the position of a fledgling industry, easily injured in competition with other aspects of the economy. Najeeb E. Halaby, presently Senior Vice-president of Pan American World Airways, and past Administrator of the FAA, pointed out that now, ten years after aviation's experience with the Department of Commerce, there is a completely different environment. Agreeing that he would oppose aviation's return to the Department of Commerce, Halaby was quick to point out:

We are talking about a Department of Transportation . . . a Department whose Secretary's sole concern would be the advancement of the Nation's total transportation system and the efficient administration of the Federal programs relating to transportation services and safety. The FAA, as the largest component in terms of manpower, would certainly be a highly influential element of the Department of Transportation. The Secretary would need to exercise special care to avoid disrupting its delicate and critical functions, particularly those relating to the control of air traffic, safety standards and the support of the national defense.⁴¹

In sum, it certainly appears possible that the retention of the independent status of the FAA and the CAB's safety functions would have defeated the purpose of the DOT, and it is doubtful that their inclusion in the DOT will inhibit the continued growth of the industry.

³⁸ *Id.* at 290.

³⁹ *Id.* at 406. The fear was expressed by Clifford P. Burton, Executive Director, Air Traffic Control Association (ATCA), that a transfer of aviation into a large, bureaucratic department would amount to a return to a time prior to the 1958 Act when aviation was buried in the "basement" of the Department of Commerce, where the many other interests and responsibilities of the parent department stifled the growth of aviation.

⁴⁰ 1966 *Senate Hearings* 740.

⁴¹ *Id.* at 514.

B. *The Safety Function*

No area of the draft recommendation of the Department's planners underwent a more intensive attack than those provisions providing for the transfer of the whole of aviation safety to the new Department. Opponents of the transfer pointed to the fact that the CAB's Bureau of Safety had built-up over a number of years the enviable reputation of being one of the most competent organizations in this nation's government. They suggested that it would be unwise to disrupt a "winning team" by placing the responsibility for aviation safety in the NTSB, along with all modes of transportation, as was *originally* suggested by the President and the Department's planners.

Under Title VII of the Federal Aviation Act of 1958, the CAB was given the responsibility of investigating all accidents involving civilian aircraft, determining the probable cause of such accidents, recommending to the Administrator of the FAA measures designed to prevent similar accidents, making public all reports deemed by it to be in the public interest, and conducting special studies and investigations to reduce the number of accidents.⁴² Under Title VI, the CAB performed another very important function, *i.e.*, that of providing an independent *de novo* review of action taken by the FAA in denying, suspending, or revoking safety licenses, airworthiness certificates, air carrier operating certificates, and air agency certificates.⁴³

Objections to the inclusion of aviation safety in the Department were in part seemingly well founded. Frank M. McDermott, a transportation consultant whose testimony supported the Department as a whole, voiced a strong objection to the proposed inclusion of the aviation safety responsibility in the Department. It was his contention that the complexity of aviation accident investigation demanded the continuation of the CAB's Bureau of Safety in an environment completely independent of the Department of Transportation. Mr. McDermott outlined several factors which he believed required separate treatment of aviation accident investigation:

- (1) Aviation utilizes a third dimension which introduces a complexity almost beyond comprehension in terms of attempting to reconstruct the accident.
- (2) There is far greater reliance upon electronics in aviation, as well as reliance upon other parties such as air traffic controllers, or pilots of other aircraft.

⁴² Federal Aviation Act of 1958, §§ 701-03, 72 Stat. 781-82, 49 U.S.C. §§ 1441-43 (1964). 1966 *House Hearings* 130-31 dealt with the functions of the CAB under the 1958 Act. The Bureau of Safety performed the CAB's staff responsibility of investigating accidents and aided the Board in determining their probable cause. The Bureau was comprised of "176 employees, accounting for 21 percent of the Board's employees and 26 percent of its budget, with 69 employees being located in 10 field offices throughout the continental United States." In "the fiscal year 1965 the Bureau conducted 933 investigations and analyzed 5,014 investigative reports. There were 92 accidents involving air carrier aircraft, of which 11 involved fatalities, and approximately 3,100 accidents in general aviation, with 513 involving fatalities."

⁴³ Federal Aviation Act of 1958, § 602(b), 72 Stat. 776, 49 U.S.C. § 1422 (1964).

(3) There is the self-evident but complete inability to "stop" in mid-air. This feature alone tends to avoid many accidents on the ground.⁴⁴

Opponents of the DOT expressed the further apprehension that the procedural safeguards of the independent agency system would be lost in the new Department. Under the 1958 Act, the FAA function of establishing aviation regulations was detached from the CAB functions of accident investigation and determination of probable cause. Likewise, the responsibility for ruling on licenses and certificates was subject to review by a separate agency, the CAB. It was contended that these procedural safeguards could not be guaranteed in a single monolithic agency which controlled all transportation, for the Department would often be placed in the position of judging its own actions, *i.e.*, those of its "Operating Agencies."

The desirability of separation of interests was first recognized in the 1938 legislation. It was decided then that an agency could not reasonably be expected, in investigating an accident and determining its probable cause, to criticize its own efficiency in performing its regulatory duties or in installing, operating, or maintaining air navigation facilities.⁴⁵ As a result, safeguards were incorporated in the Civil Aeronautics Act, as well as in the 1958 Act, to prevent a conflict between the two functions. William K. Lawton, Executive Director of the National Business Aircraft Association, represented his organization's views on the problem of checks and balances when he stated, "While the Board [NTSB] is made independent of the Secretary by the bill's statement that 'In exercising these functions, powers and duties the Board shall be independent of the Secretary, and the operating units of the Department,' we feel appeals [taken from rulings on certificate and license applications] would actually be directed to the same jury which passed the original sentence."⁴⁶ Expressing the same view but more simply, Charles H. Ruby, President of the Air Line Pilots Association, pointed out that "the airman will be accused by the Department of Transportation and will receive his first and last hearing by the Department of Transportation. Desirable checks and balances are lost."⁴⁷

⁴⁴ 1966 *House Hearings* 405.

⁴⁵ 1966 *Senate Hearings* 197.

⁴⁶ *Id.* at 373.

⁴⁷ 1966 *House Hearings* 376. Frederick B. Lee stated the position of NPA when he said "[W]e feel that it is unwise to have such a Board [NTSB] with its power to review of certificate action operating within the Department. We do not feel it is proper that any board, no matter what mechanism was used to insure its 'independence,' could ever be wholly objective in an accident investigation in which their department or agency was involved." 1966 *House Hearings* 211. Generally, this was an objection well taken, for no other mandate of our governmental system is more basic than that of the requirement of checks and balances. These fears were reiterated before the Senate by the representative of the NBAA:

Again, this association urges that as the committee and the Congress continue into their examination of the proposed Senate bill 3010 that the committee and Congress vigorously assert that any accident investigating body and any quasi-judicial appeal or review function must and shall be completely divorced from any semblance of direct or indirect control exercised by any other governmental agencies or departments. An accident investigation body and any appeal function must have the status of an independent office. 1966 *Senate Hearings* 373.

In countering the arguments that checks and balances will be lost in a monolithic department and that the safety functions performed by the FAA and CAB are so unique as to make it impractical to include them in a department with all other modes of transportation, the Administration first pointed out that the system would be incomplete without the inclusion of an operational aspect as important as safety. It was reasoned that "accidents in various forms of transportation have many common elements . . . [and], since so many elements are involved, there will be a greater opportunity to improve investigative techniques and procedures by applying the lessons learned in one mode to problems in another."⁴⁸ The benefits of such an inclusion of aviation safety in a coordinated forum were detailed in a Staff Memorandum before the Senate:

The transfer of the CAB accident investigation functions to the Department and the determination of probable cause and appellate functions to the NTSB will have several advantages. Bringing aviation safety into closer association with other forms of safety activities will encourage a greater research into the many common elements of transportation safety. Increased research and the application of research findings in such common areas as human factors, i.e. fatigue, psychological [*sic*] stability, etc., and material and structural performance will be made easier and more complete by focusing transportation safety responsibility in a single agency.⁴⁹

It was agreed that determining probable cause in today's highly technological environment and performing the function of a review board both require extensive and detailed inquiry. In order to discharge these responsibilities effectively, there must be complete freedom from the distracting, partisan, or proprietary influences so often present when probable cause must be determined by the same body that is responsible for operations, rulemaking, surveillance, or investigation.⁵⁰ In answering complaints concerning the inclusion of the FAA and the safety functions of the CAB in the DOT, Congress expressed the belief that there would be no lack of independence of functions in the new Department. The members of the NTSB are to be appointed by the President and, thus, are entirely independent of the Secretary. The NTSB, then, was included in the DOT primarily for housekeeping purposes, and has the power to require the Department to carry out investigations and to do other related work. It was the belief of Congress that it would be a mistake to create the NTSB as an entity completely separate from the Department, for this would create another agency exercising transportation—safety functions. The opinion was expressed that a separate Board would be much more costly and, in fact, less effective than the proposed system.⁵¹

Moreover, the proponents of aviation inclusion pointed out that safety can no longer be an "incidental" function of a governmental agency, that the formation of the NTSB brings about the creation of a single body

⁴⁸ 1966 *Senate Hearings* 184.

⁴⁹ *Id.* at 741.

⁵⁰ *Id.* at 185.

⁵¹ H.R. REP. NO. 1701, 89th Cong., 2d Sess. 25 (1966).

concerned solely with this all-important function. The NTSB, it was argued, would make possible a coordination of this function and the development of a higher degree of expertise, while promoting the more efficient performance of the principle function of the CAB.

The transfer of this activity will also free the CAB from a significant workload item and enable the members to devote greater effort to their primary function, that of economic regulation. On the other hand, the NTSB will have the necessary independence in performing its quasi-judicial functions, while its members will be able to devote full time to furthering transportation safety activities.⁵²

Thus, the Administration refuted the arguments of the opponents of the bill by merely reaching the opposite conclusions, *i.e.*, that checks and balances will *not* be lost and that air safety *can* be adequately provided for in the DOT. Moreover, "no particular gain could follow from leaving any one mode of transportation to the supervision of other agencies of the government. To do so would be to destroy the very possibility of benefits in improvement and coordination that the Department is being organized to achieve."⁵³

C. *The Aviation Accident Investigation Function*

The hearings before both houses of Congress and the final activity in conference committee clearly indicate that the question of aviation accident investigation was one not easily solved. Those passing in judgment upon the merits and organizational structure of the bill were faced time and again with the argument that aviation, and particularly its need in the area of safety, is "unique" and requires special treatment apart from that afforded other aspects of the transportation industry. This argument and the fear expressed by some elements of the aviation industry that without separate treatment valuable checks and balances could not be guaranteed must have made a considerable impression, because a House amendment brought about the formation of the short-lived plan for an Office of Accident Investigation. Aviation accident investigation was to have been the sole responsibility of this organization and it was to have been separately placed within the structure of the Department. After the Senate's consideration of the bill and a resulting conference committee, the function came to its present resting place within the NTSB. The personnel of the CAB's Bureau of Safety have been transferred as a unit to this independent board where they will continue to discharge the responsibility of aviation accident investigation.

Alan S. Boyd, the recently-appointed Secretary of the Department of Transportation, was asked if he believed that the final placement of this important aspect of aviation safety would be agreeable to previously objecting elements of the aviation industry. Although agreeing that factions such as the Air Transport Association (ATA) would continue to oppose

⁵² 1966 Senate Hearings 741.

⁵³ *Id.* at 185.

any attempt to remove the CAB's safety function, the Secretary expressed his belief that not all members of the industry, or even all members of the ATA, joined in ATA's disapproval of the Department and that such a solution should satisfy most objections.⁵⁴ Responding to the same question, William F. McKee, Administrator of the FAA, stated that his agency would operate with no difficulty either way, *i.e.*, with the safety function solely in the NTSB or performed by the Office of Accident Investigation. He stated, "As we understand it, regardless of where it [the safety function] goes in the Department of Transportation, it will still be done separately and independently from the FAA and we subscribe to that principle."⁵⁵

Despite the optimistic statements of these key administrators, it is doubtful that immediate satisfaction among all elements of the aviation industry will result from the placement of this function in the NTSB. Frank M. McDermott expressed his disapproval of any transfer of safety functions and recommended that "the aviation safety and accident investigation functions relating to aviation should remain with the Civil Aeronautics Board, and that the CAB be provided with such resources, facilities, and manpower as to be completely independent of the Department of Transportation in this regard."⁵⁶ As an example of the conflict he feared, he cited an accident which occurred in December 1960, wherein two airliners collided over New York City. Both of these flights were operating under the air traffic control system of the FAA under instrument conditions. The Bureau of Air Traffic Management of the FAA, responsible for the operation of all air traffic control facilities, conducted an investigation of its own operation and produced the following findings:

Air Traffic Control procedures did not contribute to the cause of the accident.

Air Traffic Control personnel operated in accordance with established procedures and were not negligent in any performance which could be related to the cause of the accident.⁵⁷

The CAB accident investigation produced the following probable cause: "The Board determines that the probable cause of this accident was that United Flight 826 proceeded beyond its clearance limit and the confines of airspace allocated to the flight by Air Traffic Control."⁵⁸ And yet, spread clearly through the record of the hundred-plus suits filed against the two airlines and the federal government was the fact that the mid-air collision occurred because air traffic control lost track of one radar target and

⁵⁴ He stated:

[T]here are some of them [members of the aviation industry] who are quite satisfied with what has been proposed, particularly in view of the amendment . . . which provides that the Office of Accident Investigation shall be separate from the Federal Aviation Administration. Their concern as I understand it, and I can't say I am speaking for them, but their concern was that you have the FAA investigating itself, and this has been taken care of. 1966 *Senate Hearings* 694.

⁵⁵ 1966 *House Hearings* 138.

⁵⁶ *Id.* at 409.

⁵⁷ 1966 *Senate Hearings* 584.

⁵⁸ *Ibid.*

confused it with another.⁵⁹ Mr. McDermott contended, then, that there was not sufficient separation of functions between the former CAB and FAA, and that should the functions of the two agencies be transferred to one monolithic department, checks and balances would a fortiori be lacking.

D. General Aviation

General aviation is growing faster than any other segment of the industry. The active fleet of general aviation aircraft now numbers approximately 100,000 planes, with more than 12,000 new aircraft being manufactured annually. These aircraft are flown by more than 400,000 pilots for personal transportation, business, and recreational purposes. In comparison, the fleet of commercial aircraft numbers slightly more than 2,000 planes.⁶⁰ Due to this disparity in numbers and the history of commercial aviation's impact upon general aviation, representatives of general aviation fear that as a result of the new Department, general aviation has been "tied to the tail of the commercial carrier's kites," insofar as receiving funds for airports, air traffic control, and the supporting services is concerned.⁶¹ The new Act makes no specific provision for general aviation, so it can only be anticipated that the Federal Aviation Administration, functioning as an Operating Agency in the new Department, will continue to have a great impact upon this aspect of aviation. Hence, general aviation's fear that the protection once enjoyed in the checks and balances of the CAB review function will be lost in the NTSB is understandable. It is submitted that the complaint of general aviation has some merit, not necessarily because of the possible injury due to the dominance of commercial aviation, but because of the basic premise upon which the Department is built—coordination. General aviation comprises a large and formidable portion of the aviation industry, and for the same reason that aviation, as a whole, should not be excluded from the Department, general aviation should be specifically provided for. The shortcoming is not that present treatment is inadequate, rather special organizational precautions must be taken in order to ensure continued and successful growth of this important arm of aviation. If this is not done now it will surely have to be done at a later date, after the Department suffers functional set-backs due

⁵⁹ Frank McDermott pointed out that:

[The] FAA, given the opportunity to investigate its own actions, did what perhaps any agency would do under similar circumstances; they reported a clean bill of health. The Civil Aeronautics Board, hampered by an inadequate staff (actually only one low-grade employee with background in air traffic control) was compelled to accept FAA's findings with respect to the air traffic control aspects of the investigation. The real cause was not disclosed until the depositions were ordered by the Court, at which time the Department of Justice offered to settle for 24%.

The hazard inherent in such a situation is apparent. If an agency is allowed to investigate its own operation, or even if it is allowed to exert any influence over the investigating agency, the chance of correcting any embarrassing deficiencies is considerably lessened. 1966 *Senate Hearings* 585.

⁶⁰ 1966 *House Hearings* 349.

⁶¹ William K. Lawton represented NBAA, as well as all of general aviation, when he expressed the feeling that "we foresee in this Department of Transportation a regression from the recently arrived status for general aviation, the largest operation of aircraft in the world . . ." 1966 *House Hearings* 227.

to its absence. The countering argument is that the existing system is adequate, that it has performed the task well in the past, and that it will continue to do so. However, in view of the increasing importance of this aspect of transportation, perhaps such an excellent opportunity as this should have been utilized in order to guarantee its continued advance.

E. Regulatory Agencies

"One of the aims of the Department is to correlate the policies of all transportation functions of the Federal Government. If the regulator [*sic*] functions of the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission remain outside the Department of Transportation, we do not see how effective control and policymaking over all transportation in the United States can be achieved."⁶² This opinion expressed by Frederick B. Lee, representing the National Pilot's Association, brings out what appears to be the most serious shortcoming of the new Act. There was not a great deal of discussion on this issue for no party with a particular interest in pressing the objection appeared before the hearings. Section 4(a) of the act creating the DOT provides that the Secretary shall, among other things, develop national transportation policies and programs, and make recommendations for their implementation.⁶³ The economic regulatory functions lodged in the CAB are not affected by the creation of the Department. Hence, the CAB is not bound by policies promulgated by the Secretary when the Board makes its determinations of public interest and public convenience and necessity for the development of aviation policy.⁶⁴ The position of the CAB on this matter was set forth in a prepared statement presented before the Senate committee by Charles S. Murphy, Chairman of the Civil Aeronautics Board, which provided, in part:

It seems clear that section 4(a) does not obligate the Civil Aeronautics Board to implement the national transportation policies and programs developed by the Secretary in exercising its economic regulatory functions under the Federal Aviation Act of 1958. Rather, insofar as the Board is concerned, the provision provides a basis upon which the Secretary may make recommendations to the Board concerning aviation matters

In sum, it is believed that enactment of section 4(a) would place the Secretary of Transportation in the same position with respect to Board proceedings as that presently occupied by other departments and agencies of the Government concerned with aviation matters or administering programs which may be affected by the Board determinations. Under established principles, a regulatory agency such as the Board considers the views and recommendations of other governmental components having responsibilities in related areas, and the normal method by which such consideration is afforded is by the participation of these other agencies in the regulatory proceedings.⁶⁵

In connection with the granting of subsidies⁶⁶ the President in his message

⁶² 1966 *House Hearings* 211.

⁶³ Department of Transportation Act, § 4(a), 80 Stat. 933 (1966).

⁶⁴ See Part II, A *supra*.

⁶⁵ 1966 *Senate Hearings* 244.

⁶⁶ Federal Aviation Act of 1958, § 406, 72 Stat. 763 (1958), as amended (1962), 49 U.S.C. § 1376 (1964).

proposing the Department of Transportation expressed the contrasting view that "the subsidy program will be coordinated with overall national transportation policy."⁶⁷ The opinion of the CAB concerning this aspect of its function, as it will be affected by the DOT, was also set forth in the Board's position paper as follows:

Section 8(a) of the bill amends section 406(b) of the Federal Aviation Act so as to provide that in administering the subsidy program, the Board shall take into consideration the standards and criteria prescribed by the Secretary of Transportation for determining the character and quality of transportation required for the commerce of the United States and the national defense.

This amendment is believed merely to embody the principles heretofore mentioned [elsewhere in the position paper] which require regulatory agencies to take into account the recommendations of other interested departments of Government and not to require the Board to apply the standards and criteria prescribed by the Secretary in administering the aviation subsidy program.⁶⁸

It appears, therefore, that irreconcilable conflicts may well arise out of the present organizational set-up, all to the definite detriment of the Department of Transportation. However, a recent article⁶⁹ co-authored by Howard C. Westwood and Alexander E. Bennett presented a favorable forecast of the relation of CAB policymaking to that of the Department.⁷⁰ Westwood and Bennett contend that the Secretary *will* have some influence upon CAB policies.

Although one may hope that the CAB will be able to rise above its vested interest in aviation, as opposed to transportation as a whole, this possibility seems rather remote. It is noteworthy that the CAB has often demonstrated a proclivity against cooperating with other modes of transportation if an interest beneficial to aviation was at stake.

It is difficult to believe that the CAB, in carrying out its economic functions, will not have a profound effect upon any attempt by the DOT to establish an industry-wide transportation policy. This effect may be readily appreciated by considering the "public interest" guidelines established for the CAB in carrying out its economic regulatory functions. Among the matters to be considered as being "in the public interest" are: the encouragement and development of an air transport system,⁷¹ the regulation of that system in a manner that recognizes its inherent advantages and that fosters sound economic conditions,⁷² the promotion of adequate, efficient service at reasonable rates without unjust discriminations or unfair or destructive competitive practices,⁷³ competition to the extent nec-

⁶⁷ 1966 House Hearings 41.

⁶⁸ 1966 Senate Hearings 245.

⁶⁹ Westwood & Bennett, *A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterward*, 42 NOTRE DAME LAW. 309 (1967).

⁷⁰ *Id.* at 362. It was urged that, "the Secretary of Transportation will be in a position to represent the executive view on transportation as a whole, which might take into account the various, occasionally conflicting, views of different departments, and which, in any case, may 'provide general leadership in the identification and solution of transportation problems.'"

⁷¹ Federal Aviation Act of 1958, § 102(a), 72 Stat. 740, 49 U.S.C. § 1302(a) (1964).

⁷² Federal Aviation Act of 1958, § 102(b), 72 Stat. 740, 49 U.S.C. § 1302(b) (1964).

⁷³ Federal Aviation Act of 1958, § 102(c), 72 Stat. 740, 49 U.S.C. § 1302(c) (1964).

essary for the sound development of the industry,⁷⁴ safety,⁷⁵ and the promotion of aeronautics in general.⁷⁶

The CAB has authority to approve combinations with different modes of transportation⁷⁷ but history has indicated a failure to do so in the majority of instances, preferring instead to protect its own interests.⁷⁸ The Board discharges and shall continue to discharge its responsibilities under a dual mandate: to regulate and to promote aviation.⁷⁹ Because the CAB has the primary responsibility of developing aviation policy through economic regulation, the Board's first allegiance will be to aviation. It is not surprising, therefore, that conflicts of interest may well develop between the CAB, in its attempt to discharge its legislatively—designated responsibility, and the comprehensive transportation policies formulated by the Secretary. Thus, it may not be possible for the Secretary to establish policies covering the entire spectrum of transportation with any expectation of effective success. Moreover, the problem which the Department will likely experience with the CAB may be only minor in comparison with those brought about by the more powerful Interstate Commerce Commission, which has also been excluded from the DOT.

It remains to be seen whether the apparent problem of CAB interference with the national transportation policy will materialize. Perhaps the cooperation of the CAB will be brought about through an exertion of pressure on the part of the Executive. One opportunity for such an exertion could arise from the fact that the importance of international carriage has grown immensely. The Board's international route decisions affecting both foreign and United States carriers have been subject to Presidential approval since 1938.⁸⁰ It has been asserted, "Were the Executive, through the Secretary of Transportation, to participate extensively in the Board's own proceedings [concerning foreign and domestic carrier certification in international carriage] before the Board arrives at its recommendation to the President, it could be questioned whether the Board would retain any function of substantial significance."⁸¹ Such a practice would possibly bring

⁷⁴ Federal Aviation Act of 1958, § 102(d), 72 Stat. 740, 49 U.S.C. § 1302(d) (1964).

⁷⁵ Federal Aviation Act of 1958, § 102(e), 72 Stat. 740, 49 U.S.C. § 1302(e) (1964).

⁷⁶ Federal Aviation Act of 1958, § 102(f), 72 Stat. 740, 49 U.S.C. § 1302(f) (1964).

⁷⁷ *Continental So. Lines v. CAB*, 197 F.2d 397 (D.C. Cir.), *cert. denied*, 344 U.S. 831 (1952); *Pan Am. Airways Co. v. CAB*, 121 F.2d 810 (2d Cir. 1941).

⁷⁸ On occasions affiliation of air and sea carriers has been approved, but the CAB has more frequently disapproved such alliances. *Northwest Airlines—Am. President Lines Agreement*, 9 C.A.B. 336 (1948); *American President Lines Petition*, 7 C.A.B. 799 (1947). Railway express has been permitted by the CAB to conduct some indirect air carriage traffic, but the Board has more often forbidden the entry by railroad-affiliated forwarders into air carriage. *National Air Freight Forwarding Corp. v. CAB*, 197 F.2d 384 (D.C. Cir. 1952); *Air Freight Forwarder*, 11 C.A.B. 182 (1949). There seems to have been an apprehension that these carriers would have a competitive advantage over forwarders offering only air carriage. Affiliation seems to have been permitted more frequently with motor carriers. *Consolidated Air Freight, Interlocking Relationships*, 20 C.A.B. 740 (1955); *Braungart, Interlocking Relationships*, 19 C.A.B. 456 (1954). Thus, the history of CAB operations seems to establish the understandable tendency to favor benefiting aviation over coordinating and cooperating with other modes of transportation for the benefit of the entire transportation industry.

⁷⁹ Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964).

⁸⁰ Civil Aeronautics Act, § 801, as amended, 72 Stat. 798, 49 U.S.C. § 1508 (1964).

⁸¹ See Westwood & Bennett, *supra* note 69.

about results similar to those experienced in the post 1938 era when the Civil Aeronautics Authority suppressed the effectiveness of the Air Safety Board.⁸² It should be pointed out, however, that while such route decisions are subject to the approval of the President, it might be difficult to bring much pressure to bear upon the Board through this means for the CAB would continue to make its own decisions, whatever part the Executive might have to play in the *proceedings*. The President's binding effect is restricted to approving or cancelling the certificate once it is granted.

V. CONCLUSION

The Department of Transportation will have an important effect upon aviation, as its formation will touch nearly every aspect of the industry. The new act transfers the former safety functions of the CAB to the NTSB, an included but apparently independent arm of the DOT. The FAA will be absorbed as an entity by the new Department, where it will serve as an Operating Agency and perform all of the functions for which it had responsibility as an independent agency. The Secretary of the DOT will have the responsibility for formulating coordinated policies for the whole of the transportation industry, as well as those for the Department's Operating Agencies. The CAB, however, will continue as an independent agency and it will continue to be the responsibility of that agency to formulate economic regulatory policy for all of aviation.

At this date certain questions raised by antagonistic elements of the aviation industry remain unanswered. It remains to be seen whether checks and balances between these separate offices and agencies will be preserved and whether general aviation will continue its high degree of growth and prosperity. The dual questions of greatest weight, however, are whether a coordinated system of transportation is functionally attainable and whether the DOT will be restricted in its attempt to accomplish the objective for which it was created by the excluded independent agencies.

Milton E. Douglass, Jr.

⁸² 1966 Senate Hearings 198.

NOTES

CAB and Labor Jurisdiction

I. INTRODUCTION

The CAB becomes involved in labor problems in two contexts. First, under Section 401(k)(4) of the Federal Aviation Act of 1958,¹ a carrier is required to comply with the Railway Labor Act² as a condition to obtaining and retaining a certificate of public convenience and necessity. If a labor union appears before the CAB, alleges that a carrier has violated the Railway Labor Act, and asks the CAB to revoke the carrier's certificate, does the CAB have the power to decide the question and, if so, is the CAB required to reach a decision on the matter? If the CAB does make the determination, what effect does the decision have on subsequent proceedings before either a system board of adjustment³ or a federal court?⁴ Conversely, what effect does a federal court determination have on later action before the CAB? In addition to 401(k)(4) violations, CAB involvement with labor disputes may also arise when the Board approves a merger under Section 408(b) of the Federal Aviation Act. Pursuant to that section, the Board has discretionary power to append such conditions to a merger as it deems necessary,⁵ including labor protective provisions, and the corresponding power to carry those conditions into effect. It should be noted at the outset that the problem of jurisdiction in labor disputes between airlines and their unions is an enigmatic one because the CAB, the federal courts, system boards, and the National Mediation Board (NMB) may all eventually become involved. This note will examine the problems that arise when the CAB becomes involved in labor disputes between unions and airlines in connection with airline mergers and under Section 401(k)(4) of the Federal Aviation Act.

II. MERGERS

In pursuance of the mandate of section 408, the CAB has been slowly

¹ 72 Stat. 754, 49 U.S.C. § 1371 (1964): "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45."

² 49 Stat. 1189 (1936), 45 U.S.C. §§ 181-88 (1964).

³ Railway Labor Act, § 204, 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1964).

⁴ In *Moore v. Illinois Cent. Ry.*, 312 U.S. 630 (1941), the Court found that in "major" disputes the federal courts have concurrent jurisdiction with the National Mediation Board [NMB].

⁵ Section 408(b) of the Federal Aviation Act of 1958, 72 Stat. 767, 49 U.S.C. § 1378(b) (1964) empowers the CAB to approve mergers "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe. . . ."

evolving its method of resolving labor problems, such as lay-offs and seniority, which are inherent in many mergers. The Board first imposed labor protective provisions in connection with approval of the United-Western merger in 1950⁶ and since then, the CAB has become increasingly more involved in labor difficulties. The United-Western merger was first ordered by the CAB in August 1947.⁷ The Board discussed the requests of intervenor labor organizations that employee protective conditions be attached to the sale, and at that time declined to impose any such conditions on the ground that "there is nothing that would indicate that any of the rights of Western's present employees on route No. 68 will be prejudiced by acquisition and operation of that route by United"⁸ This precipitated action by the Air Lines Pilots Association (ALPA), by which it requested reconsideration of the Board's order and the imposition of employee protective conditions. The employees of Western presented a similar petition. The CAB ordered all interested parties to settle the matter among themselves. Repeated hearings and meetings failed to resolve the situation until the 1950 hearings, in which the CAB finally imposed the requested labor protective provisions. Possibly because of the hectic furor raised by its deferral in the *United-Western* case, the CAB in *Braniff-Mid-Continent Merger*⁹ imposed comprehensive labor protective conditions immediately, a practice in which the CAB has been engaging ever since.

The extent of CAB power to impose protective provisions has been interpreted as being extremely broad.¹⁰ When the Board approved the merger of Pan American World Airways and American Overseas Airlines in 1953, the latter's flight engineers protested the CAB's approval of the provisions giving flight engineers of Pan American seniority over all the American Overseas Airlines engineers. In affirming the CAB's order, the Second Circuit Court of Appeals stated:

The authority of the Board to deal with proposed mergers of this type is as provided in Sec. 408 of the Civil Aeronautics Act of 1938, 49 U.S.C.A. Sec. 488. Its authority over the transfer of a certificate of public convenience and necessity is derived from Sec. 401, 49 U.S.C.A. Sec. 481, and its general powers and duties are as provided in Sec. 205(a), 49 U.S.C.A. Sec. 425(a)

⁶ *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950), *aff'd sub nom. Western Air Lines, Inc. v. CAB*, 194 F.2d 211 (9th Cir. 1952). The CAB stated:

Any doubts as to whether the general authority under sections 401(i) and 408(b) to attach conditions to an order of approval issued thereunder includes the power to impose conditions for the benefit of adversely affected employees are set at rest by three decisions of the Supreme Court. *United States v. Lowden*, 308 U.S. 225 (1939); *ICC v. Railway Labor Ass'n*, 315 U.S. 373 (1942); *Railway Labor Ass'n v. United States*, 339 U.S. 142 (1950). For present purposes, the net of these decisions is that although the Board need not impose conditions for the benefit of adversely affected employees in cases involving route transfers, acquisitions, and mergers, it may do so in its discretion.

Needless to say, CAB labor jurisdiction has come a long way since these sage remarks.

⁷ *United-Western, Acquisition of Air Carrier Property*, 8 C.A.B. 298 (1947).

⁸ *Id.* at 311.

⁹ 15 C.A.B. 708 (1952), followed quickly by *West Coast-Empire Merger Case*, 15 C.A.B. 971 (1952) *But cf.* discussion of *Aaxico* case in text accompanying notes 27-32 *infra*.

¹⁰ *Oling v. Air Line Pilots Ass'n [ALPA]*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

. . . . Although there is no express statutory grant of power to impose conditions which will lessen the adverse impact of a merger upon employees of the merged companies, such power is implicit as one necessary to the performance of the Board's duty to condition approval with due regard to terms which are just and reasonable in the interest of the public.¹¹

Moreover, in light of recent proceedings,¹² it is clear that the courts consider the CAB to be in full control. For instance, the Seventh Circuit has stated, "Not only have the courts consistently held that the Board has the jurisdiction to impose labor protective provisions including that for seniority integration, as a condition of merger approval but, in *Kent*, the reviewing court sustained the authority of the Board to formulate its own integrated seniority list."¹³

Once the Board imposes labor protective provisions as conditions for approval of a merger,¹⁴ the extent of subsequent CAB involvement is usually limited to overseeing integration of seniority and other provisions to ensure that its orders are carried out in a fair and equitable manner.¹⁵ The CAB generally has inserted a provision providing for neutral determination by an arbitration board if the parties are unable to agree among themselves.¹⁶ After agreement or after the Board award, any person disclosing a substantial interest in the order may seek a hearing before the CAB if it considers the agreement or award inequitable. The CAB reserves jurisdiction to make such amendments, modifications, and additions to the labor conditions imposed as it deems necessary to ensure a fair and equitable settlement.¹⁷ If the CAB turns down a petition for hearing, that is, if it considers the award fair and equitable, the petitioning party may appeal the refusal to the courts under Section 1006 of the Federal Aviation Act of 1958.¹⁸

¹¹ *Kent v. CAB*, 204 F.2d 263, 265 (2d Cir. 1953).

¹² *Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Hyland v. United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966).

¹³ *Oling v. ALPA*, 346 F.2d 270, 275 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Judge Major said, "[The] CAB has been entrusted by Congress with the power to make determinations affecting the protection of employees in merger cases. . . ." *Id.* at 276. Thus the CAB jurisdiction is much more compelling than when the CAB had discretion in the *United-Western* case in 1950. It should also be noted that mergers approved by the CAB are exempt from antitrust laws. *Pan American World Airways, Inc. v. Long*, 371 U.S. 296 (1963).

¹⁴ See, e.g., *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950), *aff'd sub nom. Western Air Lines, Inc. v. CAB*, 194 F.2d 211 (9th Cir. 1952).

¹⁵ See *Hyland v. United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966).

¹⁶ *Ibid.*

¹⁷ See *Oling v. ALPA*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

¹⁸ 72 Stat. 795, 49 U.S.C. § 1486 (1964):

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed . . . by any person disclosing a substantial interest in such order.

* * * *

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator.

* * * *

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States. . . .

The appeal provided by this section seems to be the exclusive remedy for an aggrieved person of interest in a merger situation. In *Oling v. ALPA*¹⁹ the plaintiffs sought a review by the CAB of a seniority list integrated by arbitration machinery. The CAB declined because it considered the list to be fair and equitable. Plaintiffs did not appeal the CAB decision to a court of appeals as provided in Section 1006 of the act but, rather, challenged the CAB-approved award in a federal district court. On appeal from a dismissal of this suit, the Seventh Circuit Court of Appeals held that the dismissal was proper. CAB "jurisdiction was invoked and pursued by plaintiffs to the point of an adverse decision, and they failed to seek relief therefrom by a review in the manner provided by Congress."²⁰ The court did not answer the question of whether CAB jurisdiction was exclusive. Judge Major said, "We do not reach the issue as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs."²¹ If plaintiffs had gone into the district court with precisely the same issues prior to the Board's decision that the integrated seniority lists were fair, would the district court have had jurisdiction? There would seem to be no statutory obstacles to block entering both the CAB forum and the federal district court and questioning the fairness of a finding by the arbitration board, provided both actions were commenced before either tribunal reached a decision. And if the federal district court reached a determination before the CAB made a finding, a question could be raised as to whether this would be *res judicata* as to the CAB proceeding.

The only reported case which has considered the point, *Hyland v. United Air Lines, Inc.*,²² resolved the first of the above issues in favor of exclusive CAB jurisdiction, thereby obviating the necessity of considering the *res judicata* question. In *Hyland* a group of pilots complained that the duty of fair representation had been violated by the bargaining representative when it acted in concert with the airline in formulating and approving the integrated seniority list after the merger. There were charges of bad faith, breach of contract, and failure by the system board to integrate the seniority lists in a "fair and equitable manner." The court posed the problem of "whether the charges in this complaint are of the type which only the CAB can hear."²³ Here, the plaintiffs went directly to the district court for a review of the fairness of the system board's decision, while in *Oling* the flight engineers sought judicial review of the Board's award only after they had received an unfavorable decision from the CAB. Yet the same result was reached in both cases, for in *Hyland*, the court found the issues to be within the exclusive jurisdiction of the CAB and, therefore, dismissed the district court action. In support of its decision, the court stated:

¹⁹ 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

²⁰ *Id.* at 278.

²¹ *Ibid.*

²² 254 F. Supp. 367 (N.D. Ill. 1966).

²³ *Id.* at 371.

This important area of the total complex of merger considerations cannot be subject to independent scrutiny and interference by the courts pursuant to a separate statutory scheme. The parties affected by the CAB merger order cannot be required to answer in different charges for actions taken under the CAB merger umbrella. Were this court to hear this case, it would be directly entering an area over which the CAB has properly reserved jurisdiction; were the relief prayed for to be granted here, the orders and interests of the CAB might be undermined. Congress cannot have intended such a collision.²⁴

Thus, if the decision in *Hyland* is upheld on appeal, the CAB would appear to be the exclusive initial forum for resolving disputes arising out of labor protective conditions surrounding approval of a merger, and court action would be limited to review under section 1006.²⁵ It should be noted that the *Hyland* court's use of the term *exclusive jurisdiction* is not precisely correct, for the courts undoubtedly have *jurisdiction* over fair representation cases,²⁶ whether they arise in connection with a merger or not. Thus, the principle would seem to be more aptly termed *primary jurisdiction*, notwithstanding any language in *Hyland* to the contrary. Since *primary jurisdiction* indicates concurrent jurisdiction between the court and the agency,²⁷ the action by the *Hyland* court can be properly viewed as a deferral to the agency's "expertise." However, if all forums will defer to the CAB all labor questions which affect a merger proceeding pending before the CAB, then the CAB's jurisdiction is exclusive in practice if not in theory.

Despite the apparent clarity achieved by *Oling* and *Hyland* as to jurisdiction and review of issues arising out of a merger, the CAB in *ALPA v. CAB*²⁸ recently introduced a third tangent which is still unsettled. When Aaxico Airlines merged with Saturn Airways, the CAB approved the merger itself, but because Aaxico and ALPA were involved in a labor dispute then pending before the federal district court in San Antonio, Texas,²⁹ the CAB held that no integration of flight crew personnel could be initiated until final settlement of that dispute.³⁰ ALPA objected to the merger approval, particularly on the ground that the CAB allowed the merger to become effective prior to a determination in the pending federal court action in which Aaxico was charged with numerous violations of the Railway Labor Act. ALPA based its contentions on Section 401(k)(4) of the Federal Aviation Act. Thus, for the first time the

²⁴ *Id.* at 372.

²⁵ 72 Stat. 795 (1958), 49 U.S.C. § 1486 (1964). The court, in dicta, overstated the case by saying: "[The] CAB has acquired extensive experience and expertise in the special areas of labor relations. . . ." 254 F. Supp. at 372.

²⁶ *Vaca v. Sipes*, 35 U.S.L. WEEK 4213 (U.S. 27 Feb. 1967); and *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

²⁷ See generally 2 DAVIS, ADMINISTRATIVE LAW §§ 19.01-.09 (1958).

²⁸ 360 F.2d 837 (D.C. Cir. 1966).

²⁹ *Aaxico Airlines, Inc. v. ALPA*, Civil No. 2996, W.D. Tex., 12 July 1963, *rev'd*, 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964). The case was being heard on remand at the time of the CAB action. In reversing, the Fifth Circuit held the dispute was minor and remanded the case to the district court for hearing of certain issues and referral to the System Board of Adjustment. See Note, 31 J. AIR L. & COM. 271 (1965).

³⁰ *Saturn-Aaxico Merger Case*, CAB Docket No. 15675, 1 June 1965, *review denied & order modified in minor respects*, CAB Order No. E-22680 (21 Sept. 1965).

CAB found itself doubly involved in labor problems, having both section 401(k) (4) jurisdiction and merger jurisdiction. ALPA made strenuous objections to the merger approval and appealed the approval order, claiming that the CAB had abused its discretion.³¹ Although the CAB refused to withhold approval, it decided that this labor dispute was sufficiently important to require postponement of flight crew integration until the dispute was settled, while all other facets of the merger would be allowed to proceed. The court held that this action was not an abuse of discretion, and in the course of its opinion stated: "At least in the circumstances of this record, we attribute to a pending labor dispute no such overwhelming dominance of the discretion vested in the CAB by Congress to weigh all factors relevant to the public interest. . . ."³² Subsequently, the system board found for ALPA in the Aaxico-ALPA rift, which decision was enforced by the courts, and integration of Aaxico and Saturn pilots has since been accomplished.³³

In sum, several points should be noted. CAB discretion under section 408(b) is seemingly very broad, and its determinations as to how many or how few labor protective conditions should be imposed will not be easily overturned on appeal.³⁴ However, CAB discretion in labor disputes was apparently truncated somewhat by dictum in *ALPA v. CAB*, where the court in reviewing the Saturn-Aaxico merger stated: "The CAB would, of course, be derelict if, in approving the merger, it refused to take any cognizance that such a dispute existed."³⁵ Henceforth, the CAB should heed this dictum and consider any existing labor dispute involving one of the merging carriers. If such a dispute is not in the process of resolution before another forum, could the CAB refer the dispute to a more competent forum and decline to integrate seniority lists pending determination by such forum? If it did not refer to another forum and did not act on the dispute itself, a refusal to take cognizance of it would probably be an abuse of discretion.

Certain guidelines have been formulated to aid the CAB in its decisions involving labor. It has been the practice of the Board to impose protective conditions as a part of the merger approval and to retain jurisdiction to ensure a fair and equitable settlement of the problems.³⁶ While the CAB evidently feels that protection of the working forces is an important consideration in the merger situation, it will not normally act where other

³¹ *ALPA v. CAB*, 360 F.2d 837 (D.C. Cir. 1966). The CAB also decided correctly, according to Judge McGowan, that Aaxico's past violations were not indicative of its future demeanor regarding continued violations of the Railway Labor Act, so as to preclude it from ever living up to the certificate condition that it comply with the Railway Labor Act. For this finding, the court relied on *Great Lakes Airlines, Inc. v. CAB*, 294 F.2d 217 (D.C. Cir.), *cert. denied*, 366 U.S. 965 (1961).

³² *ALPA v. CAB*, *supra* note 31, at 840.

³³ Award: *Aaxico Airlines, Inc. and Air Line Pilots Ass'n*, 47 Lab. Arb. 289 (1966). *Enf'd*, *Aaxico Airlines, Inc. v. ALPA*, Civil No. 2996, W.D. Tex., 3 March 1965, (supplemental order 12 March 1965), *aff'd per curiam*, 61 L.R.R.M. 2560 (5th Cir. 1966).

³⁴ However, the CAB's discretion is probably not unlimited. See discussion of *Aaxico* case in text accompanying note 35 *infra*.

³⁵ *ALPA v. CAB*, 360 F.2d 837, 840 (D.C. Cir. 1966).

³⁶ See, e.g., *Oling v. ALPA*, 364 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

forums are already coping with a labor dispute involving one of the carriers. This presents somewhat of an anomaly. While labor protection seems to be an important part of the merger, it may not be so all pervasive that merger approval can be defeated due to an existing labor dispute, at least so long as the dispute is pending before another competent forum. For an agency not created as a labor board and not claiming any "expertise" in labor matters, the CAB has become rather deeply involved in union-management and inter-union labor disputes arising out of, and even those not directly a result of, mergers between two carriers.³⁷

III. SECTION 401 (K) (4)

The second avenue by which a labor dispute may come to the CAB is potentially a very busy thoroughfare, because Section 401(k) (4) of the Federal Aviation Act authorizes CAB enforcement of the breadth of the Railway Labor Act³⁸ in that it requires compliance with the Railway Labor Act as a prerequisite for holding a certificate of public convenience and necessity.

Under the Railway Labor Act³⁹ disputes concerning changes in rates of pay, rules, or working conditions not covered in a bargaining agreement—so-called "major" disputes—are subject to an elaborate dispute settlement procedure which involves mediatory efforts by the National Mediation Board (NMB).⁴⁰ Major disputes may come before the federal courts in several ways, such as for settlement of the question of whether the dispute is major or minor,⁴¹ or in a suit for injunctive relief to maintain the status quo while the dispute procedures of the act are pending.⁴² However, the outcome of these major disputes is ultimately left in the hands of the parties, with self-help as the final remedy.⁴³ Disputes arising out of interpretation of an existing term in a collective bargaining agreement—so called "minor disputes"—have as their exclusive remedy submission to a System Board of Adjustment created by agreement between the parties.⁴⁴ The courts have no initial jurisdiction over minor disputes except to compel submission to the system board⁴⁵ and, as noted above, to

³⁷ See, e.g., *Saturn-Aaxico Merger Case*, CAB Docket No. 15675, 1 June 1965, *review denied* & *order modified in minor respects*, CAB Order No. E-22680 (21 Sept. 1965).

³⁸ 72 Stat. 754 (1958), 49 U.S.C. § 1371 (1964).

³⁹ 44 Stat. 577 (1926), as amended, 49 Stat. 1189 (1936), 45 U.S.C. §§ 151-88 (1964).

⁴⁰ See 44 Stat. 582 (1926), 45 U.S.C. § 156 (1964).

⁴¹ See, e.g., *Aaxico Airlines, Inc. v. ALPA*, 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964), noted 31 J. AIR L. & COM. 271 (1965); *Flight Eng'rs Int'l Ass'n [FEIA] v. American Airlines, Inc.*, 303 F.2d 5 (5th Cir. 1962).

⁴² See, e.g., *American Airlines, Inc. v. ALPA*, 169 F. Supp. 777 (S.D.N.Y. 1958).

⁴³ See *Brotherhood of Locomotive Eng'rs v. Baltimore & O. R.R.*, 372 U.S. 284 (1963).

⁴⁴ Pursuant to the command of the Railway Labor Act § 204, 49 Stat. 1189 (1936), 45 U.S.C. § 184 (1964). A difference exists between the airlines and the railroads in this regard. In the railroad industry, minor disputes are referable to the NRAB which was created by § 3 of the act. It is an administrative agency. 44 Stat. 578 (1926), 45 U.S.C. § 153 (1964).

⁴⁵ In *Slocum v. Delaware L. & W.R.R.*, 339 U.S. 239, 244 (1950), the Supreme Court gave the system boards exclusive primary jurisdiction in "minor" disputes. See *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965); *IAM v. Central Airlines, Inc.*, 372 U.S. 682 (1963); *Brotherhood of R.R. Trainmen v. Chicago River & Ind. Ry.*, 353 U.S. 30 (1957); *Elgin, J. & E. Ry. v. Burley*, 372 U.S. 711 (1945); *Aaxico Airlines, Inc. v. ALPA*, 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964); *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F.2d 578 (6th Cir. 1963); and *FEIA v. American Airlines, Inc.*, 303 F.2d 5 (5th Cir. 1962).

determine whether a dispute is "major" or "minor." The awards of a system board are enforceable by the courts and are seemingly binding as to the merits of the dispute.⁴⁶ In addition to its involvement with major disputes, the NMB under Section 2, Ninth of the Railway Labor Act⁴⁷ has the power to determine representation disputes. These administrative determinations are generally not reviewable by the courts, the result being that the determination is final and binding on the parties.⁴⁸ Each of these procedures may involve an allegation that the carrier has violated the Railway Labor Act, which allegation may bring 401(k)(4) into play. The disputes have generally been settled in the context of the particular procedure,⁴⁹ but where the particular procedure fails to result in a solution and a party alleges a violation of section 401(k)(4), CAB jurisdiction attaches regardless of whether another forum has jurisdiction. The anomalous result is that the CAB has broader jurisdiction to resolve Railway Labor Act violations than any other forum, administrative or judicial.

However, the mere fact that a petition is filed under 401(k)(4) does not necessarily mean that the CAB will reach a decision on the matter, for a hearing and/or determination of the allegations by the CAB has been held to be discretionary.⁵⁰ While section 401(k)(4), in using the word "shall" rather than "may," imposes a mandatory duty on the carrier to comply with the Railway Labor Act, section 401(g),⁵¹ the procedural section on enforcement, states: "The Board upon petition or complaint . . . may . . . suspend any such certificate . . . or may revoke any such certificate . . . for intentional failure to comply . . . [with section 401(k)(4)]." This discretionary language has allowed the courts and the CAB to make 401(k)(4) a watered-down section, possibly violated but not necessarily enforced.

To date, there have been few cases involving the CAB in labor disputes under 401(k)(4). However, those reported seem to have delineated the circumstances which will give rise to CAB involvement. *Flight Eng'rs Int'l Ass'n (FEIA) v. CAB*⁵² is a good example of the CAB's "discretion"⁵³ to refuse to hear a 401(k)(4) complaint. In that case FEIA, the certified bargaining agent for the flight engineers on Eastern Air Lines, filed a

⁴⁶ *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965); *IAM v. Central Airlines, Inc.*, 372 U.S. 682 (1963); *Hyland v. United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966); and *Capitol Airways, Inc. v. ALPA*, 237 F. Supp. 373 (M.D. Tenn. 1963), *aff'd in part, rev'd in part*, 341 F.2d 288 (6th Cir.), *cert. denied*, 381 U.S. 913 (employer), 381 U.S. 952 (employee) (1965).

⁴⁷ 48 Stat. 1168 (1934), 45 U.S.C. § 152, Ninth (1964).

⁴⁸ See Comment, 32 J. AIR L. & COM. 249 (1966).

⁴⁹ *Ibid.* In major and minor dispute situations the complaining party is seeking a remedy for action which allegedly violates the act in regard to the procedure involved, *i.e.*, violation of the agreement in minor disputes which is for the System Boards; violation of the major dispute procedures or noncompliance with the act which is for the courts to enforce.

⁵⁰ However, this discretion is probably not unlimited. See discussion of *Aaxico* case in text accompanying note 35 *supra*. As the courts and the CAB have noted, there may be a "duty" to proceed in an appropriate case. See, *e.g.*, *FEIA v. CAB*, 332 F.2d 312 (D.C. Cir.), *cert. denied*, 372 U.S. 945 (1963); and *ALPA v. Southern Airways, Inc.*, Enforcement Proceeding, 36 C.A.B. 430, 433, 464, *petition for review withdrawn* (5th Cir. 1962).

⁵¹ 72 Stat. 754 (1958), 49 U.S.C. § 1371. See also Comment, 32 J. AIR L. & COM. at 250 n.7.

⁵² 332 F.2d 312 (D.C. Cir. 1964).

⁵³ See note 50 *supra*.

complaint with the CAB for alleged violations of Section 401(k)(4) of the Federal Aviation Act. The Director of the CAB's Bureau of Enforcement felt FEIA had reasonable grounds, and that a formal investigation of such alleged violations would be in the public interest. The complaint was docketed, with a notation to the effect that FEIA had previously filed two actions in a federal court in New York against Eastern for the same reasons. The previous actions had both resulted in a denial of the union's requests for interlocutory relief.⁵⁴ The CAB dismissed the complaint, reasoning that the public interest would not be served by a lengthy hearing held "solely to provide a forum for the adjustment of private grievances, particularly where an adequate remedy is available in the courts, and where, as here, there has been resort to the courts to the extent previously indicated."⁵⁵ On appeal from the dismissal, the court found that the CAB "does have a discretionary power to dismiss a complaint which states reasonable grounds for believing that the Act has been or is being violated when it reasonably concludes that it would be in the public interest to do so, although this discretion is subject to review."⁵⁶ The court further stated, "A reading of . . . [the two acts] indicates that the Board is not expected to act as a general labor board for the airline industry in all cases where a carrier has violated the Railway Labor Act [I]f the Board is denied . . . [the power to dismiss] that is the role it would be obliged to assume."⁵⁷ The CAB has also refused to hear a complaint where the petitioning party has submitted substantially the same issues to another forum which is either in the process of determining, or has already determined, the issues.⁵⁸ In the Saturn-Aaxico merger, ALPA has asserted violations of the Railway Labor Act by Aaxico to support its contention that the CAB should disapprove the merger. Nevertheless, the CAB approved the merger and ALPA appealed.⁵⁹ The court considered the CAB's refusal to determine the asserted labor violations understandable, since the dispute had come "to the CAB's attention at a time when the complaining party has long since acted successfully to get the dispute in process of resolution by a system board of adjustment"⁶⁰ The CAB itself has enunciated the same doctrine. In *Flight Engineers v. Western Air Lines*,⁶¹ the CAB upheld the Director of Enforcement's refusal to file a complaint against Western for asserted

⁵⁴ The first of these decisions was *FEIA v. Eastern Air Lines, Inc.*, 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); the second, *FEIA v. Eastern Air Lines, Inc.*, 243 F. Supp. 701 (S.D.N.Y. 1962), *aff'd on other grounds*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963). The court of appeals' affirmance of the second case was on the ground that in that action the union essentially was seeking to force Eastern to bargain with FEIA rather than ALPA as to the terms and conditions of employment of Eastern's pilot engineers when a substantial representation dispute existed, and that under the Railway Labor Act the courts lacked jurisdiction in such cases.

⁵⁵ *FEIA v. CAB*, 332 F.2d 312, 313 (D.C. Cir. 1964).

⁵⁶ *Id.* at 314.

⁵⁷ *Id.* at 315.

⁵⁸ *ALPA v. CAB*, 360 F.2d 837 (D.C. Cir. 1966).

⁵⁹ *Ibid.*

⁶⁰ *Id.* at 840.

⁶¹ 34 C.A.B. 834 (1961).

violations of the Railway Labor Act. The CAB pointed out that the same issues were then pending before the courts and a system board; thus, there were not sufficient grounds for the exercise of CAB jurisdiction. Moreover, in *ALPA v. Southern Airways, Enforcement*,⁶² the CAB refused to entertain a petition of the Southern Pilots Association, an organization created by replacement pilots, since ALPA and Southern Airways had entered into a collective bargaining contract pursuant to a prior CAB order and there was no showing that the carrier had failed to comply with the act.

There are, however, situations in which the CAB will entertain jurisdiction over 401(k)(4) violations. If the CAB is the initial forum, or there has been no prior binding determination by any other forum as to the rights of the parties or their compliance with the Railway Labor Act, the CAB has exercised its power and heard the complaint, as in *ALPA v. Southern Airways, Inc., Enforcement Proceeding*.⁶³ There, the major dispute procedures had been exhausted and the pilots were on strike. Replacements had been hired and the carrier insisted on, and refused to bargain over, super-seniority given the replacements. ALPA alleged that this was a violation of the Railway Labor Act and, thus, of 401(k)(4). Southern had challenged the Board's jurisdiction to hear the complaint. The trial examiner, in a well-reasoned discussion which was adopted by the Board, held that the CAB had jurisdiction since ALPA alleged a violation of the Federal Aviation Act and the CAB was the only agency which could revoke a carrier's certificate.⁶⁴ ALPA had brought a concurrent action in a federal district court, requesting injunctive relief and damages from Southern.⁶⁵ In reaching its decision prior to the CAB's decision, but after the examiner's initial decision, the court had stated that its jurisdiction was concurrent with that of the CAB in a labor dispute. The court rejected the request of Southern that, under the doctrine of primary jurisdiction, its action be stayed pending a final decision by the CAB, and held that Southern had not violated the Railway Labor Act. The court stated that although the same underlying dispute was involved, the action concerned issues of law only, not factual issues requiring appraisals by a special tribunal, and final determination by the CAB would be neither *res judicata* nor a guide to the court.⁶⁶ The CAB subsequently found that the carrier had violated the act and required the parties to resume negotiations, imposed certain conditions to govern them, and retained jurisdiction to ensure compliance.

The fact that the district court reached its decision prior to the final decision of the CAB is worthy of special emphasis. The court concluded that Southern was not under a duty to bargain with ALPA over the

⁶² 37 C.A.B. 765, *appeal dismissed as moot*, 323 F.2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

⁶³ 36 C.A.B. 430, *petition for review withdrawn* (5th Cir. 1962).

⁶⁴ *Id.* at 465-67.

⁶⁵ *ALPA v. Southern Airways, Inc.*, 7 Av. Cas. ¶ 17936 (M.D. Tenn. 1962).

⁶⁶ *Id.* at ¶ 17937. See text accompanying notes 83-92 *infra*.

seniority rights of strikers. The CAB, however, while it noted the court's decision, made an independent analysis of the facts and the law and reached a contrary result. The court had stated in its opinion that the examiner's decision was not binding on it;⁶⁷ the CAB, "by a parity of reasoning," concluded that "the Board must make its own determination on the issues of its proceeding, and that it is open to the Board to draw inferences and reach conclusions which may differ from those reached by the court."⁶⁸ Evidently, the doctrine of collateral estoppel, which in general prevents the same parties from relitigating previously litigated issues before a second forum was not considered applicable. In the area of administrative proceedings, however, there is always a question of whether the doctrine applies at all. The general rule seems to be that where the agency is involved in an adjudicatory proceeding, as here, the doctrine applies.⁶⁹ Thus, an order of the CAB would seemingly act as a bar to relitigating the same fact issues between the same parties in a subsequent action.⁷⁰ Conversely, a court decision is generally considered to be *res judicata* in a later administrative proceeding.⁷¹ However, the general rule may not apply in a 401(k) (4) proceeding. Since the CAB would not be a party in the court proceeding, the court's decision would probably not be binding on it,⁷² but the CAB would probably be derelict in its duty if it did not at least consider the court's decision.⁷³ Assuming that the CAB considers the court's decision, but fails to follow it, the CAB's decision is not binding on the court, and if the court's decision is not binding on the CAB, two forums having concurrent jurisdiction can reach contrary results, and both are valid.⁷⁴

Thus, the CAB has discretion to refuse to hear a complaint, and will seemingly refuse to act in cases in which the complaint is based on allegations which have been or are in the process of being determined by another agency or the courts. However, if it is the initial forum it may certainly exercise jurisdiction, as it did in *Southern Airways*, although

⁶⁷ See text following note 64 *supra*. This conclusion seems to be correct. See 2 DAVIS, ADMINISTRATIVE LAW 586 (1958), stating that an examiner's decision is not a final decision for *res judicata* purposes.

⁶⁸ *ALPA v. Southern Airways, Inc., Enforcement Proceeding*, 36 C.A.B. 430, 431, *petition for review withdrawn* (5th Cir. 1962). In *FEIA v. Western Airlines*, 34 C.A.B. 834, 835 n.7 (1961), the CAB expressly declined to dismiss on the basis that prior court decisions were binding on it.

⁶⁹ 2 DAVIS, ADMINISTRATIVE LAW §§ 18.02-.03 (1958).

⁷⁰ *Id.* at §§ 18.02-.03, .09. However, this may not apply on an agency-to-court basis. Whether a CAB ruling is ever *res judicata* in the courts is highly doubtful since, as the Supreme Court has stated: "We consider that the rulings, interpretations, and opinions of the Administration under this Act, while not controlling upon the courts by reason of their authority, do contribute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1947).

⁷¹ 2 DAVIS, ADMINISTRATIVE LAW § 18.11 (1958).

⁷² *Ibid.* The theory seems to be that the statutes of the agency give it primary responsibility to hear the dispute—sort of a "preferred forum." Davis thinks this point is crucial. *Cf. NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 682 (1951).

⁷³ *ALPA v. CAB*, 360 F.2d 837, 840 (D.C. Cir. 1966).

⁷⁴ *Cf. NLRB v. Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953); *Longshoreman's Union v. Juneau Corp.*, 83 F. Supp. 224 (1949), *aff'd*, 342 U.S. 837 (1952). See also JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 135-36 (1965).

such exercise is evidently discretionary also.⁷⁵ A concurrent suit filed in a federal district court while the action is pending before the Board is not necessarily ground for dismissal. This seems to be based on the theory that the CAB is the only forum which can revoke a certificate, and concurrent action by a court does not affect this basic fact. The only logical basis for denying a hearing in any case, if the above stated theory of exercise of jurisdiction is correct, is that there has already been a determination of the issue by another forum, adverse to the petitioning party, or, if the issue is pending before another forum, that a hearing would be duplicative and wasteful since the factual issue, which is the basis of the asserted 401(k)(4) violation, will be resolved in the other forum. Finally, the CAB has stated it will not determine an issue in a 401(k)(4) proceeding which is within the special competence of another agency, *i.e.*, an NMB representation determination,⁷⁶ or one which does not directly involve the conduct of the carrier.⁷⁷ This seems consistent with the above theory, however, since such issues are not claims of carrier violation and are incidentally involved with air transportation, if at all.⁷⁸

It was noted by the district court in *ALPA v. Southern Airways, Inc.*,⁷⁹ and by the CAB in its related proceeding,⁸⁰ that the jurisdiction of the two forums seems to be concurrent. But where a CAB finding under section 401(k)(4) has become final, as in *Holman v. Southern Airways, Inc.*,⁸¹ a federal district court, in a suit filed subsequent to the CAB determination, lacks jurisdiction to enjoin an airline pilots association from putting into effect a collective bargaining agreement entered into pursuant to the CAB's order. The *Holman* court said: "This Court is convinced that it does not have jurisdiction to grant the plaintiffs the relief they seek, in as much as jurisdiction to review orders of the CAB is vested exclusively in the Circuit Court of Appeals."⁸² *Holman* is distinguishable from the *Southern Airways* case in that in the latter case the two actions were relatively concurrent in time. ALPA initially went to the CAB, and before the CAB decision was reached ALPA filed in the district court. In *Holman*, the plaintiffs did not file in the district court until the CAB

⁷⁵ Both the courts and the CAB have talked in terms of a "duty" to proceed or of jurisdiction in "appropriate cases" only. See, *e.g.*, *FEIA v. CAB*, 332 F.2d 312 (D.C. Cir. 1964); *ALPA v. Southern Airways, Inc.*, Enforcement Proceeding, 36 C.A.B. 430, 433, 464, *petition for review withdrawn* (5th Cir. 1962). The conclusions as to when this "duty" exists are based on this writer's analysis of patterns existing in the cases in this area.

⁷⁶ See, *e.g.*, *ALPA v. Southern Airways, Enforcement*, 37 C.A.B. 765, *appeal dismissed as moot*, 323 F.2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); and *FEIA v. Western Air Lines*, 34 C.A.B. 834 (1961). This seems to be an application of an inter-agency primary jurisdiction doctrine.

⁷⁷ See, *e.g.*, *ALPA v. Southern Airways, Enforcement*, 37 C.A.B. 765, *appeal dismissed as moot*, 323 F.2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

⁷⁸ Consider, however, a claim of union/carrier duplicity against a group of employees. Depending on the characterization given the complaint by the CAB, it could easily hear or avoid hearing the complaint.

⁷⁹ 7 Av. Cas. ¶ 17936 (M.D. Tenn. 1962).

⁸⁰ *ALPA v. Southern Airways, Inc.*, Enforcement Proceeding, 36 C.A.B. 430, *petition for review withdrawn* (5th Cir. 1962).

⁸¹ 210 F. Supp. 407 (N.D. Ga. 1962). For a similar holding arising out of a merger approval see *Oling v. ALPA*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

⁸² 210 F. Supp. at 410.

had rendered its decision. Thus, a final order had been made and concurrent jurisdiction no longer existed. Therefore, a petition filed in a district court after a Board determination will be treated as an indirect appeal and, as such, will be rejected as being contrary to the statutory means of appeal provided.

As noted by the Board in *Southern Airways*,⁸³ the CAB is the *only* agency which can revoke a carrier's certificate. The CAB has, however, apparently applied a deferral of jurisdiction doctrine where the claim has involved a representation dispute which is within the special competence of the NMB,⁸⁴ or where the dispute involves contract interpretation and is pending before a system board of adjustment.⁸⁵ Deferral has been applied in two ways. First, the CAB has refused to re-examine or go behind the determinations of the specialized agency involved.⁸⁶ In other instances, the CAB has declined to act where another agency is then hearing the dispute.⁸⁷ In both areas, the "expert" forum is resolving, or has resolved, the dispute, and the CAB accords controlling weight to that decision. The reason for this practice seems to be that the CAB recognizes that, in these cases, it is dealing with labor disputes, pure and simple. There is no question within its claimed "expertise" and, more importantly, these other forums do possess the necessary "expertise" in labor matters and are available for resolution of the disputes.⁸⁸ This conclusion is supported by analogy to the merger cases.⁸⁹ In approving a merger, the CAB imposes conditions on the merging carriers which it considers fair and equitable, such as requiring seniority integration. But, rather than integrating the seniority lists itself, the CAB leaves this to the parties themselves or to neutral arbitration. Deferral to more competent agencies seems to be a laudable practice, for the CAB thereby gains the wisdom of those well-versed in the area of labor disputes.

However, no similar beneficial results are achievable by deferral of the CAB to the courts or vice-versa. As between the courts, which are neither technical nor expert bodies, and the CAB, the doctrine of primary jurisdiction seems inapposite. Neither forum has any claimed "expertise" which would necessitate a deferral for determination of a question within the special knowledge and experience of that forum. As stated by the CAB

⁸³ *ALPA v. Southern Airways, Inc.*, Enforcement Proceeding, 36 C.A.B. 430, *petition for review withdrawn* (5th Cir. 1962).

⁸⁴ See *ALPA v. Southern Airways*, Enforcement, 37 C.A.B. 765, *appeal dismissed as moot*, 323 F.2d 288 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964) (CAB could not review claims of union discrimination against employees nor would it look behind a NMB certification); *FEIA v. Western Airlines*, 34 C.A.B. 834 (1961) (NMB, in certifying the union, had found no merit to the union's allegation that the carrier had violated Railway Labor Act); and *FEIA v. CAB*, 332 F.2d 312 (D.C. Cir. 1964) (certification petition pending before NMB).

⁸⁵ *ALPA v. CAB*, 360 F.2d 837, 840 (D.C. Cir. 1966).

⁸⁶ See text accompanying note 84 *supra*.

⁸⁷ *ALPA v. CAB*, 360 F.2d 837 (D.C. Cir. 1966); *FEIA v. CAB*, 332 F.2d 312 (D.C. Cir. 1964).

⁸⁸ *Cf. CAB v. Modern Air Transport*, 179 F.2d 622, 624 (2d Cir. 1950), where the court said: "[There is no] question within the jurisdiction of an administrative tribunal . . . [which] demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal."

⁸⁹ See Part II *supra*.

in *Southern Airways*,⁹⁰ the availability of remedies by other agencies under the Railway Labor Act or by the courts in enforcing the duty of compliance "would not postpone resort to the remedy contained in the Federal Aviation Act under the primary jurisdiction doctrine. [Courts] . . . would [not] constitute an expert forum or technical body within the meaning of the doctrine of primary jurisdiction." Conversely, the CAB, while it is an expert forum with special knowledge in aviation matters, was not intended to act as a labor agency, and its competence in labor disputes must be considered as being somewhat short of the "expertise" required for proper application of the primary jurisdiction doctrine.

The only conclusion possible in this area is that the CAB will evidently defer to another agency with "expertise" where its decision will be binding on the merits.⁹¹ Aside from this deferral, concurrent jurisdiction exists between the courts and the CAB as to labor disputes for violations of the Railway Labor Act⁹² even though the CAB is the only forum which can revoke the carrier's certificate. The only essential distinction between the forums is the remedy available.

IV. CONCLUSION

The CAB has become involved in labor disputes in two contexts, mergers and 401(k)(4) violations. In the merger situation, labor conditions are imposed as a part of ensuring a fair and equitable adjustment of the rights and liabilities of the parties to the merger. Under 401(k)(4), however, the CAB, if it acts at all, acts as a general labor agency, resolving disputes unconnected with any other statutory function given it under the act. But explicit authority is given to the CAB to do so under 401(k)(4).

The unfortunate thing about 401(k)(4) is that it creates a forum for the hearing of alleged "unfair labor practices" which neither claims to be nor necessarily wants to act as a general labor agency. The only parties who can take advantage of this forum are the unions or disgruntled employees who are claiming union/carrier duplicity. This gives the union an additional forum in which to prosecute its claims, and if the *Southern Airways* decisions stand, the union has two chances at victory on the same issue. To avoid becoming a fourth baseline forum in union/carrier disputes, the CAB should decline to act on an alleged violation of the Railway Labor Act until one of the other forums, be it court, NMB, or system board, has found the carrier guilty of a Railway Labor Act violation, as in the ALPA-Aaxico bout. But this is not to say that 401(k)(4) should be repealed. There may be cases which present such exceptional circumstances that relief in the other forums would be inadequate or would come too late in time to be of any value. In such cases the CAB

⁹⁰ 36 C.A.B. 430, 466, *petition for review withdrawn* (5th Cir. 1962).

⁹¹ See text accompanying notes 63-64 *supra*.

⁹² That courts have jurisdiction to enforce the duties of the Railway Labor Act seems well settled. See *Virginian Ry. v. System Fed'n # 40*, 300 U.S. 515 (1930).

should be available to act. This would seem to be well within the CAB's discretion under applicable court decisions.⁹³ The mandate of section 401(k)(4) could be adequately protected without the CAB's assuming the role of a general labor board⁹⁴ by relying on other expert agencies to determine the existence of a violation of the Railway Labor Act. This exercise of restraint by the CAB would not have the effect of allowing another tribunal to decide an ultimate issue upon which the Board must base a certificate suspension or revocation. As a practical matter, the revocation of a carrier's certificate coincides so closely with its financial ruin that the carrier, faced with a decision by another tribunal that the carrier has violated the Railway Labor Act, will most certainly comply with the act rather than run the risk of revocation under 401(k)(4).

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⁹³ Compare this with similar deferral of jurisdiction exercised by the NLRB where the same dispute is referable to an arbitrator under § 301 of the Taft-Hartley Act. See, e.g., *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1003 (1964); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). See also *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964); and *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n.6 (1962).

⁹⁴ See text accompanying notes 75-78, 83-89 *supra*.

Conflicts — Significant Contacts — Change in Decisional Law Pending Appeal

Four young men were returning to Pittsburgh, Pennsylvania, from a football game in Miami, Florida, in a private airplane piloted by one of the four. They ran into bad weather and the plane crashed near Brunswick, Georgia. A consolidated action was brought in Pennsylvania on behalf of the estates of the three passengers of the plane against the administrator of the estate of the deceased pilot. The parties did not initially question the application of Georgia law to the issues of liability and damages. Under the Georgia Guest Statute the burden was on the plaintiffs to show that the pilot was guilty of gross negligence. Judgment was rendered in favor of the defendant. Subsequent to the perfection of appeal, another case¹ was decided which was similar in nature to the case at bar. In that case the Pennsylvania Supreme Court held that the law of Pennsylvania (which required only proof of simple negligence) should govern the substantive rights of the parties. Basing their contention upon that case, the plaintiffs in the instant case asserted for the first time on appeal that Pennsylvania law should determine the liability of the defendant. *Held, reversed*: The plaintiffs' failure to assert at the trial the contention that the law of the place of the tort is not invariably controlling did not constitute waiver or preclude seeking the benefit of the laws of the forum which had the most substantial contacts with the parties. *Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897 (1966).

In order to determine the ramifications of the *Kuchinic* case, two issues must be considered. First, what law is the court to apply when there are two or more states with interests in the outcome? Second, what right does a party have to assert for the first time on appeal a change in the law that was formulated after the trial court has rendered its decision?

For the answer to the first issue, one must only look to the recent trend of decisions in the field of tort conflict-of-laws.² Although once the accepted rule of almost every state, and still the judicially endorsed principle in several,³ the doctrine of *lex loci delicti*⁴ has begun a rapid deteriora-

¹ *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

² For an excellent discussion of the *lex loci delicti* doctrine as it has been applied in the past see Wolens, *A Thaw in the Reign of Lex Loci Delicti*, 32 J. AIR L. & COM. 408 (1966).

³ Not all jurisdictions have departed from the doctrine of *lex loci delicti*. For a recent compilation of the jurisdictions that still apply the *lex loci* rule, see Annot., 95 A.L.R.2d 12 (1964). In *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W. 2d 408, 412 (1965), the court stated that "the great weight of authority in this country still follows this rule." More recently, in *Rubitsky v. Russo's Derby, Inc.*, 70 Ill.2d 482, 216 N.E.2d 680, 681 (1966), the court remarked, "Where an action is brought in Illinois for a tort committed in another state, the substantial law of the latter will be applied by the Illinois Court."

⁴ This doctrine was clearly set forth by Mr. Justice Holmes in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904). He stated:

But when such a liability [wrongful death] is enforced in a jurisdiction foreign to

tion in the face of newer, more flexible alternative rules.⁵ Courts are no longer content to apply a mechanized principle whereby the substantive rights and liabilities of the litigants are to be determined by the law of the place of the wrong.⁶ The first Restatement recognized two exceptions to the traditional conflicts rule: the forum is to apply its own procedural rules,⁷ and the forum is to apply its own law when the law of the place of the wrong is contrary to a strong public policy of the forum.⁸ Some courts, in order to circumvent the rigidity imposed by the *lex loci* rule, have characterized certain substantive issues, including the damages issue, as procedural and thereby subject to the law of the forum.⁹ Other courts have created further exceptions to the *lex loci* rule in order to justify application of their own law rather than the law of the place of wrong.¹⁰ It is clear that the courts are beginning to awaken to the fact that the place of the accident may be entirely fortuitous in some instances and, therefore, that it should not be the lone determinative factor.¹¹ The forerunner in this move-

the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was not subject to law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation . . . but equally determines its extent. (Citations omitted.)

⁵ Wolens, *supra* note 2, at 414.

⁶ RESTATEMENT, CONFLICT OF LAWS § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

⁷ *Id.* § 585.

⁸ *Id.* § 612.

⁹ See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 42, 172 N.E.2d 526, 539, 211 N.Y.S.2d 133, 137 (1961) (damage limitation classified as procedural); *Walton School of Commerce v. Stroud*, 248 Mich. 84, 226 N.W. 883 (1929); *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 153, 98 N.W. 918 (1904).

¹⁰ In *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955), a question arose concerning intrafamilial immunity, and a child was permitted to recover from his parent under the law of the domicile. Application of *lex loci* would have resulted in a denial of recovery. See also *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939) (workmen's compensation); *Hartness v. Aldens, Inc.*, 301 F.2d 228 (7th Cir. 1962) (public policy); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (marital relationship); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (decedents estate law); and *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928) (contract action instead of tort).

¹¹ In *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961), the court stated that

An air traveler from New York may in a flight of a few hours duration pass through several of those commonwealths. His plane may meet with disaster in a state he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one state and end in another. The place of injury becomes entirely fortuitous.

There, the court applied the policy that the law of the domicile rather than that of the state in which the injury occurred should govern the rights of the litigants. However, the law of the state where the accident occurred may be held to have the most significant interest. In *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), both parties were New York domiciliaries and were spending the summer in Colorado when the accident occurred. In holding that the Colorado Guest Statute governed the rights of the parties, the court said that since these parties had come to rest in Colorado, "they had chosen to live their daily lives under the protective arm of Colorado law." 209 N.E.2d at 795.

ment was *Babcock v. Jackson*,¹² wherein the New York Court of Appeals rejected the doctrine which gave each state exclusive sovereignty and jurisdiction within its own territory to control every transaction carried on within the state. They reasoned that this doctrine did not take into account the practical considerations, as well as the legitimate interests, of other jurisdictions.

From the *Babcock* decision forward, the highest courts of many states have decided to break with tradition and to apply rules of law whereby the interests of all jurisdictions can be considered in light of each other in an effort to find the law which should determine the rights and liabilities of the parties.¹³ Similarly, in 1966 the Supreme Court of New Hampshire chose to adopt and follow the second Restatement,¹⁴ which made the law of the state which has the most significant relationship with the occurrence and with the parties involved determinative as to the parties' rights and liabilities.¹⁵ According to the Restatement, the court in making this determination is to consider the issues involved, the character of the tort, and the relevant purposes behind the laws of the interested states.

In another recent case, *Clark v. Clark*,¹⁶ the court accepted this interest-oriented approach over the traditional *lex loci delicti* rule, and set down specific considerations to guide the court's determination of which state law to apply. No single consideration is to be given paramount importance in this determination, but the court should weigh each factor in the light of all the others.¹⁷ The first of these considerations is the predictability of results. Adoption of a predictable choice of law protects the justifiable expectations of the parties. It also assures uniformity of decision regardless of forum, thus discouraging "forum shopping."¹⁸ A second consideration

¹² 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 742 (1963). In 1954 the New York court in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), had recognized a similar inflexibility of the conflict-of-laws rules in the field of contracts and adopted in its place a most significant contacts theory. This theory weighs the contacts and interests of the respective jurisdictions to determine the specific bearing these matters have on the issue before the court.

¹³ This conclusion was reached by the Pennsylvania Supreme Court in *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964). In that case the plaintiff was enroute from Philadelphia to Phoenix, Arizona, when the defendant's airplane crashed in Colorado and the plaintiff was killed. Suit was brought in Pennsylvania, where the plaintiff sought to apply the Pennsylvania law, there being a higher measure of damages in that state than in Colorado. The court said that Pennsylvania's interest in the amount of recovery of its citizens was far greater than Colorado's interest, which it termed "purely fortuitous." In overruling the doctrine of *lex loci delicti*, the Pennsylvania Supreme Court adopted the more flexible rule which calls for applying the law of the state which has the most significant relationship with the events surrounding the tort and with the parties. In 1966 the Minnesota Supreme Court also decided to depart from the traditional doctrine of *lex loci delicti*. It recently handed down decisions in the cases of *Kopp v. Rechtzigel*, 141 N.W.2d 526 (Minn. 1966) and *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966) in which it stated that it

would weigh the interests of the domiciliary state, whether Minnesota or otherwise, to the extent it is constitutionally permissible, against any peculiar concern the state of the tort or the forum state will have. Such an approach will reflect all of the factors relevant to the issues rather than blindly defer to the state which may have experienced only a trivial and transitory brush with the parties to the litigation.

142 N.W.2d 66 (Minn. 1966).

¹⁴ RESTATEMENT (SECOND), CONFLICT OF LAWS § 379(1) & (3) (Tent. Draft No. 9, 1964).

¹⁵ *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966).

¹⁶ 107 N.H. 351, 222 A.2d 205 (1966).

¹⁷ The following considerations are taken directly from the opinion of the New Hampshire Supreme Court in *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205-09 (1966).

¹⁸ *Id.* at 208.

is the maintenance of reasonable orderliness and good relationship among the states in our federal system. Open disregard for another state's interests is violative of the federal system; therefore, each court must refrain from applying the law of a state which does not have a substantial connection with the total facts and with the particular issue being litigated. Simplification of the judicial administration of the forum is a third consideration. It may well be easier for a court which applies its own procedural rules to apply its own substantive law also, for it understands its own law better and therefore could do a better job of administering justice under it. A fourth consideration is inherent in the obvious fact that every court is more concerned with the advancement of its own state governmental interests than with those of other states. A state may have a strong public policy which differs from a sister-state viewpoint. While this occasionally happens and must be considered, in most instances the only real interest that a state government has is that of fair and efficient administration of justice. Finally, a fifth consideration, too often disguised, is the court's preference for what it regards as the sounder rule of law, as between the competing ones. Thus, the *Clark* court recognized the principle that each court should, and will, determine what it considers to be the law that should govern a particular case and not merely which jurisdiction is best suited to decide it. If the law of some other state is antiquated, then the court should apply its own law instead. If it is its own law which is obsolete, then another state's law might be applicable. This sort of determination was not relevant under the automatic *lex loci*-vested interests test. *Clark* and other recent cases indicate, then, that the courts no longer feel constrained to adhere to *lex loci delicti*; consequently, there is no longer a need "to stretch the loopholes of the system to achieve a just result in particular cases."¹⁹

A particularly unique situation was presented in the case at bar when the Pennsylvania Supreme Court adopted a new rule after the instant case had been tried but while appeal was pending. Throughout the course of the trial the parties had assumed *lex loci* to be the only applicable rule and did not argue otherwise at the trial. On appeal, the plaintiff asserted for the first time the right to have the case decided under the recently changed rule of law.²⁰ The defendant objected on the ground that the plaintiff had not asserted this right at the trial and had thus waived any right it had to bring it up on appeal.²¹ Ordinarily, an appellate court will not review matters which were not raised below,²² but here the appellate court was also faced with the principle that it must apply the law *as it*

¹⁹ Wolens, *supra* note 2, at 413.

²⁰ The plaintiff maintained that it would be too much to expect lawyers and litigants not only to preserve error as to mistakes under the then applicable law, but also to anticipate future changes in the law.

²¹ The defendant contended that the plaintiff had a right to argue, but did not, the rationale that the law of *lex loci delicti* did not always apply. He asserted that the plaintiffs had done this in the *Griffith* case. The defendant admitted that if the plaintiff had objected to the application of Georgia law when the case was tried, he would have been entitled to the benefit, if any, of the rule set forth in the *Griffith* case.

²² *In re Erie Drug Co.*, 416 Pa. 41, 204 A.2d 256 (1964).

currently exists.²³ Although there are no cases in Pennsylvania which have dealt with the effect of a change in decisional law pending appeal, there is a general accord among other jurisdictions that an appellate court will apply a change in law to all pending cases.²⁴ In *Chase v. American Cartage Co.*²⁵ the trial court had entered judgment based on the Wisconsin law existing at the time of trial, which imputed a driver's negligence to a guest passenger. Pending appeal, this decisional rule was changed by the Wisconsin Supreme Court to the effect that there would no longer be imputation of negligence in such a case. The court in *Chase* said: "A lawful change in judicial rule not amounting to a rule of property or its equivalent by a court of last resort becomes effective at once and thereafter, upon subsequent appeals, operates alike upon acts coming within it whether occurring before or after its commencement."²⁶ Likewise, in *Board of Pub. Instruction v. Budget Comm'n*,²⁷ the court stated that it was compelled to take judicial notice of its own decisions and that justice required that the case at bar be decided in the light of a recent change in the law.²⁸ Moreover, in a related instance, the Third Circuit Court of Appeals has held that it will decide a case on appeal from a federal district court in the light of a change in the decisional law by the state supreme court, where the jurisdiction of the district court was based on diversity.²⁹

In view of the rule adopted in other jurisdictions, the Supreme Court of Pennsylvania held that unless the rights of the litigants are vested and will be adversely affected, the latest decision is applicable to a case that has not completed its course through judicial appeal.³⁰ An additional consideration was given to the fact that the court had on prior occasions³¹ given the benefit of a change in the law in order to prevent injustice, especially where the parties could not have changed their position in reliance on the trial court decision. The court stated³²

²³ *Shaw v. Village of Hempstead*, 20 App. Div. 2d 663, 246 N.Y.S.2d 557, 558 (1964).

²⁴ See *American Reciprocal Insurers v. Bessonet*, 241 Ore. 500, 405 P.2d 529 (1965); *Shaw v. Village of Hempstead*, 20 App. Div. 2d 663, 246 N.Y.S.2d 557 (1964); *Yates v. St. John's Beach Dev. Co.*, 122 Fla. 141, 165 So. 384 (1935); *Lober v. Kansas City*, 74 S.W.2d 815 (Mo. 1934); and *Chase v. American Cartage Co.*, 176 Wis. 235, 186 N.W. 598 (1922).

²⁵ 176 Wis. 235, 186 N.W. 598 (1922).

²⁶ *Id.* at 599.

²⁷ 167 So. 2d 305 (Fla. 1964).

²⁸ *Id.* at 306.

²⁹ *Abraham v. National Biscuit Co.*, 89 F.2d 266 (3d Cir. 1937). In addition, the effect of overruling a decision is retrospective as well as prospective. *Buradus v. General Cement Prods. Co.*, 356 Pa. 549, 52 A.2d 205 (1947), *affirming* 159 Pa. Super. 501, 48 A.2d 883 (1946); *City of Philadelphia v. Schaller*, 148 Pa. Super. 276, 25 A.2d 406 (1942).

³⁰ The Pennsylvania court relied on its previous decision in a closely related field, *i.e.*, statutory interpretation. See *Buradus v. General Cement Prods. Co.*, 159 Pa. Super. 501, 48 A.2d 883 (1946), *aff'd*, 356 Pa. 349, 52 A.2d 205 (1947).

³¹ *In re Reamer's Estate*, 331 Pa. 117, 200 Atl. 35 (1938), where the court corrected a decision in a previous appeal of the same case which had been made palpably erroneous by an intervening decision; and more recently in *Brubaker v. Reading Eagle Co.*, 422 Pa. 63, 221 A.2d 190 (1966), where the court ordered a new trial to permit the plaintiff to bring his allegations within the actual malice requirement of *New York Times v. Sullivan*, 376 U.S. 254 (1964). Although *Brubaker* the plaintiff was deprived of his original verdict by a change in the law, the case illustrates the court's objective of assuring each litigant a fair adjudication on the merits.

³² 222 A.2d at 901. See also *Lobalzo v. Varoli*, 422 Pa. 5, 220 A.2d 634 (1966); *Bell v. Yellow Cab Co.*, 399 Pa. 332, 160 A.2d 437 (1960).

that the effective administration of justice requires that a litigant either raise all his objections at trial or be deemed to have waived them on appeal. But the court recognized that in the instant case this would have been to no avail, for under the prevailing law at the time of the trial the plaintiff did all that could be reasonably expected. It would only have a deterrent effect on the administration of justice if the plaintiff were required to urge every conceivable theory it could think of at the trial stage, for the court would then be required to consider and rule on each theory.

Having determined that the plaintiff had not waived his right to assert at the appellate level a change in the law affecting his position, the court then decided which substantive law should apply to the instant case. In its decision on this point, the Pennsylvania Supreme Court chose to follow the same rationale that it applied in the *Griffith*³³ case, *i.e.*, that the forum with the most significant contacts should control the substantive law. This court, as have many others,³⁴ recognized the fact that there are many factual situations in which more than one jurisdiction has contacts with the transaction. It is in determining which law to apply that it must decide which contacts are nominal and which are substantial. The Pennsylvania court recognized that Georgia in enacting its Guest Statute had a valid purpose,³⁵ but this is just one of the factors which are to be considered. Others are the place of domicile of the parties (here Pennsylvania), where the transaction was entered into (here Pennsylvania), and where it was intended to terminate (here Pennsylvania). Furthermore, Pennsylvania had a definite interest in the settlement of the estates of its four deceased residents. The court found that Georgia's only contact with the present case was as situs of the accident and was wholly fortuitous, whereas Pennsylvania was the state with the most significant interest in defining the legal consequences adhering to the relationship here involved.³⁶

Thus, the deterioration of the doctrine of *lex loci delicti*, while relatively lethargic at first, is becoming a more rapidly moving process. Although much concern has been expressed³⁷ about giving power to one state to apply its substantive laws to actions which arise beyond its territorial

³³ *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

³⁴ See, *e.g.*, *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966); *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957); and *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

³⁵ In passing its statute, Georgia undoubtedly intended either to protect insurance companies from collusive suits or to prevent ungrateful guests from suing their hosts. *Kuchinic v. McCrory*, 222 A.2d at 900-01.

³⁶ *Id.* at 900.

³⁷ Many recent articles have been written concerning the relative merits of *lex loci delicti* and that of dominant interests. See, *e.g.*, Wolens, *supra* note 2; O'Rourke, *A Numerical Evaluation of Babcock*, 37 N.Y.S.B.J. 243 (1965); Webb and Brownlie, *Survival of Actions in Tort and the Conflict of Laws*, 14 INT'L & COMP. L.Q. 1 (1965); and Ker, *New York and the Conflict of Laws: A Retreat*, 18 STAN. L. REV. 699 (1966). See generally Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1233 (1963); and Keefe, *Piercing Pearson*, 29 J. AIR L. & COM. 95 (1963).

limits,³⁸ the trend is definitely in that direction. This more flexible approach enables the court where the suit is filed to consider all the factors involved before determining which of two or more competing state interests is to govern the substantive rights of the parties. *Clark* and *Kuchinic* are proper steps in the direction of breaking down a system which no longer has a place in our increasingly complex society characterized by its many multi-state transactions. In addition, *Kuchinic* indicates that when a state supreme court adopts a new conflicts rule, the new rule can be argued in a case that is on appeal, notwithstanding the fact that only the traditional rule was in effect and argued below.

Ben J. Kerr III

³⁸ *Ex parte* First Pennsylvania Banking and Trust Co., 247 S.C. 506, 148 S.E.2d 373 (1966). The court there set down, in an automobile collision case, that "as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; & that no tribunal established by it can extend its process beyond that territory so far as to subject either persons or property to its decisions." (quoting from *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)).

International Law—The Three Mile Limit or More— It's Anyone's Guess

An action was brought against the Employers Mutual Casualty Company by Mrs. Eugene W. Samuels to recover on an insurance policy issued by that company on the life of her husband. Mr. Samuels was an officer of a Texas corporation, which had subscribed to the Texas Workmen's Compensation Act and had obtained a Workmen's Compensation insurance policy containing a voluntary compensation endorsement specifically covering Mr. Samuels. The insurance company agreed to pay if Samuels sustained death or injury "in the United States of America, its territories or possessions, or Canada." Samuels was killed in an airplane crash twenty-one miles out in the Gulf of Mexico east of Port Isabel, Texas. The parties stipulated that the only issue was whether Samuels was killed within the United States. *Held*: The "territorial waters" of the United States extend three marine leagues¹ from the state of Texas into the Gulf of Mexico. The sea beyond the territorial waters, the "high sea," forms no part of the territory of any nation. Therefore, the death in the instant case did not occur within the United States or its territories or possessions. *Employers Mut. Cas. Co. v. Samuels*, 407 S.W.2d 839 (Tex. Civ. App. 1966).

Sovereign powers have traditionally claimed ownership of the waters surrounding their shores; however, it has also been generally recognized that international law limits the marginal sea which is subject to the control and sovereignty of the contiguous State. Beyond this point, the marginal or territorial sea becomes the high sea, over which no State can claim ownership, sovereignty or jurisdiction.² The most widely recognized seaward boundary, the three-mile limit,³ had its inception in the remote past and is, in all probability, an outgrowth of the principle, described by Bynkershoek in 1703, that:

a state can take possession of the waters washing its shores and hold such adversely against the world, as far as it can control and make that possession effective by cannon from its shores,—that therefore, to the extent of the cannon-shot from shore, marginal waters are subject to possession, occupation and, therefore, ownership.⁴

Somehow the range of a cannon shot was eventually translated into a dis-

¹ Three marine leagues equals nine nautical miles or 10.359 statute miles.

² *United States v. California*, 332 U.S. 19 (1947); *The Vences*, 20 F.2d 164 (E.D.S.C. 1927), *aff'd*, 27 F.2d 296 (4th Cir.), *cert. denied*, 278 U.S. 635 (1928); *Cunard S. S. Co. v. Mellon*, 262 U.S. 100, 122-24 (1923); *The Mariana Flora*, 24 U.S. (11 Wheat.) 1 (1826). For an extensive and well written article on the history and development of the three mile limit see Heizen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597 (1959).

³ Texas and Florida have a nine mile or three league limit. *United States v. Louisiana*, 363 U.S. 1 (1960).

⁴ J. Scott, Introduction to BYNKERSHOEK, *DE DOMINO MARIS* 17 (Scott ed. 1923).

tance of three miles⁵ and "by 1900 the three-mile or one [marine] league limit had been positively adopted or acknowledged as law by twenty of the twenty-one states [of the world] which claimed or acknowledged a territorial sea at that time."⁶

In more recent times, the problem has become more acute in the international legal arena and has been under consideration by international bodies. In 1930, the Hague Conference for the Progressive Codification of International Law failed to adopt a uniform territorial limit for nations with coastal boundaries.⁷ The International Law Commission meeting, held prior to the Geneva Conference on the Law of the Sea in 1958,⁸ found that although there was no uniformity among States as to the extent of the territorial sea, international law should not permit a territorial sea beyond twelve miles. Moreover, it was noted that some States have adopted boundaries of greater or less than three miles. The Commission then recommended that the limit of the territorial sea should be fixed by internal conference.⁹ At the 1958 Geneva Conference the United States was firmly convinced that the three mile limit was not only well established, but that it was the most advantageous for all nations. However, the United States expressed its willingness to explore other possibilities and finally offered a compromise proposal that the territorial sea be extended to six miles, with the right of the coastal states to regulate fishing for another six miles subject to certain historical fishing rights. This proposal failed to receive the required two-thirds of the votes needed to pass. Thus, despite the findings of

⁵ Bynkershoek never mentioned the range of the cannon, when he declared that a nation could exercise its sovereignty over waters within the cannon range of shore, and at the time of his statement it might be noted that no existing cannon had a range of three miles. MOUTON, *THE CONTINENTAL SHELF* 195-98 (1952). Nevertheless cannon range eventually came "to be used as the equivalent of three miles; even though the measure of three miles was not used as the equivalent of cannon range." Heizen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 618 (1959). An impression was created that there is a territorial belt three miles wide extending out from the shores of nations which is in their control and jurisdiction. Thus, the three mile limit has taken the place of the cannon-shot rule on the "statute book of the modern maritime world," although certain European nations did attempt to claim a distance greater than three miles from their shores. Walker, *Territorial Waters: The Cannon Shot Rule*, 22 BRIT. YB. INT'L L. 210, 231 (1945). In 1691, Denmark declared a neutrality zone off its coasts. Denmark claimed that territorial waters extended to the limits of eyesight, or four or five leagues from the shores. At this point France had long adhered to the cannon-shot rule. However, the French were willing to allow a belt narrower than four leagues. One source has described the meeting between the two countries as follows:

It is probable that in these negotiations we find the meeting-place of two distinct currents of practice. On the one hand, there is the practice of France and other Powers as to neutrality in war-time, based on cannon range of actual cannon, i.e., protection to be given to those seeking refuge. . . . On the other hand, there is the practice of the Northern Powers of Europe fixing a territorial coastal belt measured by mileage—a practice which appears to have far more in common with the later three mile limit than does the cannon range doctrine. Walker, *supra* at 216.

Denmark and France never reached an agreement as to the limit of the territorial waters in question; consequently, Denmark maintained its four or five leagues until 1745, when the King of Denmark reduced the neutrality zone of Denmark to one league. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* 209, 211 (1942).

⁶ Heizen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 632 (1959).

⁷ *Id.* at 637.

⁸ Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607 (1958).

⁹ *Id.* at 614.

the preliminary International Law Commission and the recommendations of the United States, the Geneva Conference failed to set a uniform limit upon the territorial sea.¹⁰ A second Geneva Conference was held in 1960, but again no positive action was taken.¹¹ As a consequence of the lack of a clear international law limit upon ownership of the marginal sea, many nations have considered themselves free to establish unilaterally their own boundaries. For instance, several South American nations claim ownership of up to two hundred miles of their contiguous waters.¹² Thus, there seems to be no effective international law limit upon a sovereign's power to declare ownership of its contiguous waters.

It is, then, apparently within the power of the sovereign to declare the point at which its seaward boundaries end and, correspondingly, the distance from its shores at which the "high sea" begins. In 1793 the United States by promulgation of the executive department adopted the three mile limit.¹³ The following year, Congress enacted a statute which required the federal district courts to "take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."¹⁴ This statute marked the first instance of legislative recognition of the three mile limit. More than one hundred years later the Supreme Court, in *Cunard S. S. Co. v. Mellon*, stated: "It is now settled in the United States that . . . the territory subject to its jurisdiction includes . . . a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles."¹⁵

Due to subsequent executive and legislative actions, however, this rather definite statement as to the applicability of the three mile limit to the United States is now subject to question. That is, several recently enacted statutes may be interpreted as extensions of the boundaries of the United States.¹⁶ The first of these statutes followed on the heels of three Supreme Court decisions¹⁷ in which the Court held that the submerged lands off the shores of sea-side states belonged to the Federal Government. Congress yielded to the outraged cries of the states having boundaries on the sea and granted these states title to the submerged lands off their shores. In doing so, however, Congress established inconsistent boundaries for the various sea-side states by the passage of the Submerged Lands Act.¹⁸ It de-

¹⁰ *Ibid.*

¹¹ Manley, *The Geneva Conferences on the Law of the Sea as a Step in the International Law Making Process*, 25 ALBANY L. REV. 17 (1961).

¹² Heizen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 644 (1959).

¹³ A note was sent to the British Minister, Mr. Hammon, on 8 November 1793, by Secretary of State Jefferson, informing him that the United States claimed the one marine league or the three mile limit as the boundary of the United States. 1 MOORE, DIGEST OF INTERNATIONAL LAW 702-03 (1906).

¹⁴ Act of 5 June 1794, ch. 50, § 6, 1 Stat. 384 (1845).

¹⁵ 262 U.S. 100, 122-24 (1922).

¹⁶ Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331-43 (1964); Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301-13 (1964).

¹⁷ *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

¹⁸ Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301, 1312 (1964).

fined the boundaries in terms of those existing at the time each state became a member of the union or as later approved by Congress, but it put a limit on the distance to which the boundaries could extend, *i.e.*, not more than one marine league into the Atlantic or Pacific Oceans nor more than three marine leagues into the Gulf of Mexico. Thus, Texas and Florida, the only states bordering on the Gulf that claimed more than three miles when they became states,¹⁹ acquired a limit of three leagues under the Submerged Lands Act, whereas all other coastal states acquired one league boundaries. This apparent inconsistent treatment of state boundaries presents two areas of uncertainty with respect to the presently effective boundaries of the United States: (1) does the United States now claim ownership of three leagues of territorial waters off the shores of Texas and Florida; and (2) has the United States now effectively abrogated the three mile limit for the entire nation and substituted in its place a three league limit? In extending the *boundaries* of the states of Texas and Florida to three leagues into the marginal sea, the act would seem to amount to an assertion of United States sovereignty, for otherwise the Federal Government would not have been able to make the grant. Correspondingly, this principle would apply to waters that lie off the shores of states other than Texas and Florida as limited by the Submerged Lands Act. It would seem, then, that the marginal sea between three miles and three leagues from the shores of states other than Texas and Florida, not having been granted to the adjacent states, is subject to the sovereignty of the Federal Government. It must be noted, however, that the executive department at least, still subscribes to the three mile limit—witness the 1958 Geneva Conference²⁰—so that no conclusion can presently be reached as to whether the Submerged Lands Act is an effective declaration that the United States now claims a territorial sea of three leagues.

A 1953 statute, The Outer Continental Shelf Lands Act,²¹ extended further the federal ownership of resources in the submerged lands. This act was a codification of the Presidential Proclamation of 1945,²² which asserted federal control of the resources of the continental shelf of the United States, *i.e.*, the animal and mineral resources of the seabed contiguous to its shores. However, it was expressly provided that the high seas and air above them would in no way be affected and that free and unimpeded navigation would exist. The "continental self" refers to a continuous land mass of the submerged sea which is nothing more than an extension of the land into the sea, usually at a depth of less than 200 meters.²³ The act declared that it was "to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition"²⁴

¹⁹ *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1, 36-65 (1960); Gross, *The Maritime Boundaries of the States*, 64 MICH. L. REV. 639, 642 (1966).

²⁰ Dean, *supra* note 8.

²¹ Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331-43 (1964).

²² 13 DEP'T STATE BULL. 485 (1945).

²³ *Employers Mut. Cas. Co. v. Samuels*, 407 S.W.2d 839, 842 (Tex. Civ. App. 1966).

²⁴ Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331-43 (1964).

Its primary purpose was to assert ownership of and jurisdiction over the subsoil and seabed, as well as the artificial islands and fixed structures thereon. A case which considered the nature of the Continental Shelf Act, is *Guess v. Read*,²⁵ in which a helicopter crashed off the coast of Louisiana at a distance of nine miles. The court in that case held that the accident occurred outside the boundaries of the United States because the boundaries of Louisiana only extended to a distance of three miles. In discussing the Outer Continental Shelf Lands Act the court held that the subsoil and seabed did not include the sea and the air above the continental shelf; therefore, the United States had no sovereignty over that part of the sea in which the accident occurred because this was deemed to be part of the high seas. Thus, this statute does not seem to be an effective extension of sovereignty of the United States, because the sea above the continental shelf is expressly excluded from the control of the Government.

In addition to the Submerged Lands Act and the Outer Continental Shelf Lands Act, a recently enacted statute asserted a degree of federal control over the marginal sea. This act granted United States fishermen the right to an exclusive fisheries zone extending twelve miles from the coastal shores of the coastal states.²⁶ The statute resulted from the fact that during the months preceeding its enactment, "there has been a tremendous increase in the taking of fishery resources . . . within 12 miles of U.S. shores."²⁷ It was felt that these limited fishing resources should be protected. Under the statute, the United States has the right to exercise the same exclusive rights in respect to fisheries in this zone as it does in its territorial sea. It could be argued that this statute amounts to an assertion of ownership of twelve miles of contiguous sea; however, it appears that the degree of control to be exercised by the Government over the waters themselves is not so extensive as to amount to ownership thereof.

Thus, Congress has apparently extended the boundaries of the United States to three leagues into the marginal sea by passing the Submerged Lands Act, but there is seemingly no effective extension of *full* sovereign rights past that point. Moreover, it now seems to be conclusively established that the states themselves have no power to extend their boundaries past those established by Congress.²⁸ For instance, California attempted to make all of the area in the Santa Barbara Channel within its boundaries, but a federal court held that it could not extend its boundaries past the three mile limit.²⁹ Another court on the same situation held that the waters off the state of Hawaii lying more than three miles from the mainland and from the islands consist of waters of the high seas and not

²⁵ 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962).

²⁶ 80 Stat. 908 (1966), 16 U.S.C.A. § 1091 (1966).

²⁷ U.S. Code Cong. & Ad. News, 89th Cong., 2d Sess. 3284 (1966).

²⁸ *United States v. California*, 363 U.S. 1, 51 (1960); 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 407-25 (2d ed. 1929); BURDICK, LAW OF THE AMERICAN CONSTITUTION 272-82 (1922).

²⁹ *Hooker v. Raytheon Co.*, 212 F. Supp. 687 (S.D. Calif. 1962).

the territorial waters of Hawaii.³⁰ The Court in *United States v. Louisiana*,³¹ voiced the rule that only Congress can establish a state's boundaries:

The power to admit new states resides in Congress. The President on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. It is sufficient for purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter.

In the present case the insurance policy covered the deceased if he was killed within the boundaries of the United States,³² but the accident occurred twenty-one miles off the coast of Texas. Since the accident happened over that portion of the continental shelf of the United States which is outside the three league limit, it is evident that the deceased died outside the United States. The boundary of Texas is set at three marine leagues, and all waters past that point are considered the high seas. The plaintiff argued that a Texas statute³³ extending the boundaries of Texas to twenty-seven marine leagues into the Gulf of Mexico correspondingly extended the boundaries of the United States to that point. The court noted to the contrary that only Congress can extend a state's boundaries and that the Federal Government has "consistently maintained the position that such waters [the waters above the continental shelf]—are part of the high seas and, therefore, subject to the control of no nation."³⁴ Therefore, the Texas statute could not have had the effect of establishing United States ownership of the marginal sea up to twenty-seven miles from the Texas coast. An accident that occurs twenty-one miles from the Texas coast, then, does not occur within the United States. It remains to be decided, however, just how far the seaward boundaries of the United States actually do extend. The Submerged Lands Act apparently signals federal ownership of the marginal waters of three leagues, and it is possible that the recent fishing statute could be interpreted as a federal assertion of ownership of twelve miles of marginal sea.

Lawrence R. Jones, Jr.

³⁰ *CAB v. Island Airlines, Inc.*, 235 F. Supp. 990 (D. Hawaii 1964).

³¹ *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

³² To some extent it is well established that the states may exercise their authority over their citizens on the high seas. *Skirtoes v. Florida*, 313 U.S. 69 (1941). It has been held that a birth on the high seas did not occur within the United States, thus it is difficult to see how a death on the high seas may be considered to be within the United States. *Law Mow v. Nagle*, 24 F.2d 316 (9th Cir. 1928).

³³ *TEX. REV. CIV. STAT. ANN.*, art. 5415a (1962).

³⁴ *Employers Mut. Cas. Co. v. Samuels*, 407 S.W.2d 839, 847 (Tex. Civ. App. 1966).

RECENT DECISIONS

DOMESTIC

Airport Lease Agreement — Reasonableness — Injunctive Relief

In 1964 United Airlines and other carriers entered into a lease agreement with the Port of New York Authority covering the use by United and the others of the facilities at LaGuardia Airport. United agreed, among other things, "to observe and obey all rules and regulations which may from time to time during the term hereof be promulgated and enforced by the Port Authority. . . ." The Port Authority had then in force a set of rules and regulations, including a rule prohibiting the use of any airport by jet aircraft without its permission. The Port Authority had, pursuant to certain agreements with the FAA, undertaken to extend runways 4-22 and runways 13-31 to accommodate jet aircraft. On 9 April 1964, prior to the extension of the runways, United and the other airlines, requested permission of the Port Authority to operate its jets on runways 4-22 and 13-31, asserting that prior to the completion of the extended runways, they did not propose to conduct 727 operations on runways 4-22 unless the Port Authority and the airlines had agreed that operations could be conducted on these runways at tolerable noise levels. Thereafter, the Port Authority granted each airline such permission on the condition that use of these runways would be permitted only if the flights were planned so as not to exceed a specified noise level in the communities underlying the flight path. The airlines conducted no take-offs or landings on these runways during the following two years. In the spring of 1966, when the work on runways 4-22 was completed but work was continuing on 13-31, the FAA authorized aircraft to use runways 4-22 pursuant to a Tower Bulletin which established a preferential runway system for LaGuardia Airport, and required each pilot to use the preferential runway assigned to him by the FAA Air Traffic Control Tower unless the pilot requested and obtained a different clearance.¹ However, by designating these runways as available, the FAA was *not directing* that the runways be used. The Port Authority quickly notified United and the other airlines that the Port Authority had not given permission to use runways 4-22 for 727 activity and that the terms of the agreement between the Port Authority and United were still in effect.

¹ The FAA bulletin established that runways 4-22 would be the last priority but that planes would not be directed to use the preferential runways when certain adverse conditions existed or when the reported surface wind is in excess of a fifteen knot cross wind component.

During the month of August 1966, each of the defendant airlines performed take-offs and landings from runways 4-22 at the direction of the FAA Air Traffic Control Tower. The Port Authority asked for a federal decree enjoining the defendant airlines from using runways 4-22 until the completion of runways 13-31, alleging that the airlines had agreed to abide by the regulations of the Port Authority and not to use runways 4-22 for jet aircraft operations prior to the extension of *both* runways 4-22 and runways 13-31. The airlines answered that they had agreed to abide by "reasonable" regulations of the Port Authority but that the regulations have become unreasonable and that there was no reason to await the completion of runways 13-31 before permitting the use of runways 4-22. *Held, injunction issued*: When dealing with a quasi-public corporation with the experience and expertise of the Port Authority, it is not for the court to substitute its judgment for that of the Port Authority. The court's function is only to determine, in the light of all the circumstances, whether the particular regulation was so unreasonable as to violate the understanding between the parties. Under the circumstances, the regulations in question were found to be still reasonable since they (1) abated the aircraft noise in the area affected, (2) restricted the airlines for only a short time until the work on the other runways was completed, and (3) the Port Authority made available appropriate and safe runways at Kennedy or Newark when crosswinds at LaGuardia prohibited the use of all but runways 4-22. *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F. Supp. 745 (E.D.N.Y. 1966).

The opinion considers the agreement between the Port Authority and the airlines as a restrictive covenant limiting the airlines' use of the runways under their lease. This characterization lends support to the opinion in that (1) a covenant in the lease runs between the airlines and the Port Authority only so that their rights are not affected by any action of the FAA, and (2) the violation here is in the category of a technical trespass upon real property so that the landlord is entitled to injunctive relief against a tenant who violates such a covenant without showing irreparable damage or loss. The court does, however, imply a further standard: the regulations which become part of the covenant must be "not unreasonable" to be entitled to enforcement in equity. This last reservation apparently applies when the terms of the covenant are regulations of some quasi-public corporation or agent.

Although the FAA has the authority to regulate the flight of aircraft through the navigable airspace of the United States, the fact that the FAA gave the option to the pilot to request a new clearance when directed to use certain runways was seized upon as evidence that the FAA did not intend to pre-empt the Port Authority in regulation of air carriers' use of the runway facilities. The court buttressed this conclusion by noting that the FAA had made no effort to intervene in the suit. The implication is that had the FAA chosen to intervene, the court would have

² Cf. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

afforded it controlling weight. Such an implication recognizes the language of *Allegheny Airlines, Inc. v. Village of Cedarhurst*³ which held that the federal regulatory system has pre-empted the field, at least where the federal scheme conflicts with a municipal ordinance. The court distinguished the instant case on the basis that there was no actual conflict here between the FAA's directions and the Port Authority's regulations since the carriers could always request a clearance to use an alternate airport when conditions were such at LaGuardia that the FAA, in the promotion of safety, would allow only the use of runways 4-22. The Authority's adherence to its position under the agreement may have inconvenienced the carriers involved to some extent, but it is not a sufficiently direct conflict that it necessitates nullification, particularly when the municipal regulations are included in the terms of a lease freely entered into by the parties.

J.D.R.

Collisions — Air Traffic Control — Government Liability

Action was brought against the United States under the Federal Tort Claims Act to recover damages for wrongful death and destruction of property resulting from a collision between a military and a commercial airplane. The plaintiff alleged that the pilot of the government aircraft was negligent in his performance and that this was the proximate cause of the crash. In addition, the plaintiff maintained that the government employees operating the Washington Control Center, which was guiding the commercial airplane, were also negligent in failure to maintain a proper lookout and in failing to give warning of approaching aircraft, and that their negligence was likewise one of the proximate causes of the accident. *Held*: Both the pilot, individually, and the United States were guilty of actionable negligence, such concurrent negligence being the proximate cause of the crash. *Maryland v. United States*, 257 F. Supp. 768 (D.D.C. 1966).

The actions of the government pilot in negligently causing the collision with the commercial airplane was held to be beyond the scope of his employment and, accordingly, the government could not be held liable for his actions on the basis of *respondeat superior*. The government was liable, however, for the actions of its employees at the Control Center. These employees violated their duty to use due diligence in observing and detecting on the radarscope any traffic or obstructions in the vicinity of the aircraft being controlled (*i.e.*, the commercial airplane) and to immediately warn the pilot of any impending danger. The historic function of air traffic control is to avoid collisions between airborne planes. While this duty is not absolute as yet, and while the government cannot be

³ 238 F.2d 812 (2d Cir. 1956).

considered as an insurer of safety, due care must nevertheless be exercised to discharge it adequately. In a case such as this, it has long been the rule that injuries or damages may be the consequence of the concurrent negligence of two or more persons and that the negligence of each may be a proximate cause of the result. Under such circumstances, each negligent person, or his employer, as the case may be, is liable for the total damages incurred. Here, both the pilot, in his individual capacity, and the government, through the failure of its employees to give proper warning, are liable for the entire amount of damages awarded.

B.J.K. III

Airman's Certificate — Multi-engine Rating — Suspension

While petitioner was the holder of an airman's certificate with commercial pilot privileges and airplane single-engine land and instrument ratings, he took instructions in flying twin-engine aircraft. Upon completion of the instructions, the flight instructor endorsed in the petitioner's log book that he was ready for a multi-engine rating flight test. Thereafter, the petitioner made three appointments for the flight test. For some reason the inspector assigned for the first test was unable to give it. The second test was cancelled because of bad weather conditions, and the petitioner failed to appear at the time designated for the third appointment. Though petitioner failed to secure a multi-engine rating as required, he flew a multi-engine airplane from Chicago to Naples, Florida, accompanied by his wife, mother-in-law, two daughters, and a domestic servant. During his return flight with the same people on board, he encountered icing conditions and the aircraft crashed, killing four of the occupants and seriously injuring the petitioner. Petitioner seeks to review a CAB order which suspended his pilot's certificate for six months by asserting that he was, in fact, qualified for multi-engine aircraft, but that the FAA unreasonably frustrated his efforts to take the necessary flight test, and, moreover, that the word "passengers" in section 61.131(b)¹ of the Regulations, which he allegedly violated, means fare-paying passengers only—thus excluding him from the application of that provision. *Held, affirmed*: A pilot cannot be permitted to disregard licensing requirements. The term "passengers" in the applicable regulation includes non-paying members of a pilot's family and the domestic servant who accompanied them. *Somlo v. CAB*, 367 F.2d 791 (7th Cir. 1966).

Petitioner contended that as he was qualified for a multi-engine rating,

¹ At the time of appellant's violation, section 61.131(b) provided:

A commercial pilot may not serve as pilot in command of an aircraft carrying passengers or operated for remuneration other than one of the category and class for which he is rated, and in the case of large aircraft, of the type for which he is rated. 27 Fed. Reg. 7965 (1962).

that issuance of that rating was a mere formality, and that he would have received his rating but for the unreasonable and arbitrary refusal to give him his test. If the court upheld these contentions, anyone who considers himself qualified for a rating and feels the FAA has not fairly dealt with him would be entitled to disregard licensing requirements which are designed to insure technical skill and which have a substantial and close relationship to public safety. It is clear that a pilot may not become a law unto himself, and that "delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society. . . ."²

It also seems apparent that the purpose of the prohibition against carrying "passengers" in section 61.131(b) is the safety of the occupants of an airplane which the pilot has not established his qualifications to fly. Whether those on the plane were paying passengers is irrelevant as the term passenger "in common parlance . . . describes a physical status rather than a technical legal status."³ Thus, deliberate violation of section 61.131(b), together with a record not disclosing any arbitrary FAA action, justifiably authorized the CAB to suspend petitioner's certificate.

E.S.K.

Procedure — Res Judicata — Requirement of Privity

In a previous action Aircraftsmen, Inc., successfully sued Jay Kirkman, d/b/a Kirkman's Flying Service, for labor and material used in repairing his airplane. In allowing recovery, the trial court overruled Kirkman's defense that Aircraftsmen had failed to service the plane properly. Subsequently, Kirkman, as independent executor and trustee of the estates of Ann Slade Kirkman and Georgia Pearl Kirkman, filed the instant suit for damages to this same airplane which had been purchased for the decedents by Kirkman in his capacity as trustee. The plaintiff based the suit on the failure of Aircraftsmen to service the plane properly. Aircraftsmen filed a motion for summary judgment, contending that the principle of res judicata applied so as to render the issue of failure to service properly, determined in favor of Aircraftsmen in the prior case, foreclosed as between the parties in the present case. Kirkman contended that the decision against him individually in the prior suit should not be binding against the estates of the two Kirkman women. The trial court granted defendant's motion for summary judgment. *Held, affirmed*: The parties to both suits being in privity, the determination in the prior trial that Aircraftsmen had properly serviced the airplane was binding on the parties in the present suit. *Kirkman v. Aircraftsmen, Inc.*, 408 S.W.2d 736 (Tex. Civ. App. 1966).

² Poulos v. New Hampshire, 345 U.S. 395, 409 (1953).

³ Vogrin v. Hedstrom, 220 F.2d 863, 866 (8th Cir.), *cert. denied*, 350 U.S. 845 (1955).

Founded upon the principle that litigation should end at some point,¹ the doctrine of *res judicata* requires that issues determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.² Privy within the purview of the principles of *res judicata* has been defined as including "the mutual or successive relationship to the same rights of property."³ The court in the instant case noted that "the same airplane and the same issues were involved in both cases"; however, it brushed rather lightly over the requirement of privity. After alluding to the fact that the airplane was purchased after Kirkman became trustee of the estates of the two Kirkman women, the court, noting that Kirkman continued to use the plane in his flying service, seemingly implied that the allegation that the plane did not belong to Jay Kirkman was a mere subterfuge invented to avoid the effect of *res judicata*.⁴ The decision is manifestly correct and represents a caveat to those plane owners who make the mistake of lackadaisically defending a claim for repairs when they have an outstanding claim against the repairman for damage arising out of a failure to use due care in making those repairs which has not been consolidated in the repairman's suit.

M.M.W.

Merger — Labor Dispute — CAB Discretion

The Air Line Pilots Association (ALPA) intervened in a merger proceeding before the CAB, contending that approval of a merger between Saturn Airlines, Inc. and Aaxico Airlines, Inc. would not be in the public interest. ALPA's contention was based, first, on the long standing labor dispute between it and Aaxico,¹ and second, on the allegation that the merger was a sham for the sole purpose of transferring Saturn's transatlantic certificate to Aaxico without presidential approval as required by Section 801 of the Federal Aviation Act.² ALPA had instituted procedures provided by the Railway Labor Act to settle its dispute prior to the filing of the merger application.³ In approving the merger, the CAB imposed standard labor protective conditions, retained jurisdiction to enforce the award of the System Board of Adjustment which was hearing the ALPA/Aaxico dispute, and prohibited integration of the seniority lists

¹ See, e.g., *Bros., Inc. v. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963); *Stanolind Oil & Gas Co. v. State*, 136 Tex. 26, 145 S.W.2d 569 (1940).

² *Turner v. Jackson*, 273 S.W.2d 641 (Tex. Civ. App. 1964) *error ref. n.r.e.*

³ *Wilson v. Henwood*, 337 S.W.2d 194 (Tex. Civ. App. 1960) *error ref. n.r.e.*

⁴ *Kirkman v. Aircraftmen, Inc.*, 408 S.W.2d 736, 737 (Tex. Civ. App. 1966). "The airplane was purchased long after Jay Kirkman qualified as trustee. We are unable to find any authority under this record or under the statutes of this state permitting the trustee to purchase an airplane and to use the same as a business for hire as was done here."

¹ For the history of this dispute and decision referring it to a System Board of Adjustment, see 31 J. AIR L. & COM. 371 (1965).

² 72 Stat. 782 (1958), 49 U.S.C. § 1461 (1964).

³ See note 1, *supra*.

of the two carriers until the dispute was settled. The CAB found no merit to ALPA's contention that Saturn, the smaller company, was to be the surviving carrier merely to avoid presidential approval of the transfer of the transatlantic certificate. ALPA appealed the CAB's decision. *Held, affirmed*: Approval of the merger was not an abuse of CAB discretion and was supported by the evidence. *ALPA v. CAB*, 360 F.2d 837 (D.C. Cir. 1966).

The court felt that the CAB was not required to act as a general labor agency, and the action taken—retaining jurisdiction to insure compliance with the System Board award—was sufficient, and stated, "we attribute to a pending labor dispute no such overwhelming dominance of the discretion vested in the CAB by Congress to weight all factors relevant to the public interest consideration in a merger case."⁴ The court went on to state that section 401(k)(4), which requires compliance with the Railway Labor Act as a prerequisite to holding a certificate of public convenience, does not require a different result since that section does not mean the CAB itself must resolve all labor disputes, especially where the dispute is in the process of resolution by a competent labor agency. As for the contention that the merger was a sham to avoid presidential approval of the transfer of the certificate for transatlantic flights, the court pointed out that there were excellent business reasons on both sides for the merger, and that the bargaining positions of the carriers were not so disproportionate as to make the choice of leaving Saturn as the surviving corporation irrational.

A.J.H. II

CAB — Route Abandonment — "Use It Or Lose It"

In August 1960, the CAB authorized and certificated North Central Airlines to provide the Michigan cities of Cadillac, Reed City, and Pontiac with one daily round-trip air service. In awarding the air service, the CAB required each city to enplane a minimum of five outbound passengers a day—the familiar "use it or lose it" standard.¹ Almost two years later, in July 1962, North Central petitioned the CAB alleging that public convenience and necessity required an amendment of its certificate deleting the air service to the three communities. The cities had failed to maintain the required average minimum of five passengers a day; therefore, under the "use it or lose it" policy, the Board ordered a deletion of the service to these cities. The communities appealed from this order alleging that the CAB, in failing to first establish a standard

⁴ 360 F.2d at 840.

¹ For a thorough discussion of the "use it or lose it" standard and its application to route abandonment, see Dockser, *Airline Service Abandonment and Consolidation—A Chapter in the Battle Against Subsidization*, 32 J. AIR L. & COM. 496 (1966).

of performance for the certificated airline before applying the "use it or lose it" policy to them, had wrongfully delegated its statutory authority to the airline. They attempted to show that the scheduled flights offered by the air carrier were not sufficient in number nor at convenient times, and thereby the air carrier, by manipulation of its schedule, could hold the cities under the five passengers a day minimum required by the Board to prevent termination of service under its "use it or lose it" policy. *Held, affirmed*: There was substantial evidence to support the finding of the Board that service to the three cities should be deleted in the public interest. *City of Pontiac v. CAB*, 361 F.2d 810 (6th Cir. 1966).

The court found that the record disclosed that the Board had weighed and considered all of the relevant factors and, having done so, had determined that the public interest was best served by deleting the air service. The court then quoted from Mr. Justice Frankfurter's opinion in *Phelps Dodge Corp. v. NLRB*:²

The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Although the agency in *Phelps Dodge* was the NLRB, the instant court felt that the same principle would apply to matters which Congress entrusted to the CAB and, therefore, looked only to see whether there was substantial evidence to support the Board's finding.

W.C. S.

Federal Courts — Findings — "Clearly Erroneous"

Appellant was in the business of leasing airplanes. Contemporaneously with the purchase of the plane in question, the appellant leased it to a third party who subsequently defaulted in his payments. As a result, the appellant brought this action against the seller for loss resulting from the failure of the lessee to make a substantial cash down payment as seller had allegedly represented he would. The district court, sitting without a jury, rendered a decision for the seller. *Held, affirmed*: The findings in support of the judgment for the seller were not clearly erroneous in light of the sharply conflicting oral evidence and the absence of written evidence pertaining to the down payment. *Airfleet Leasing Corp. v. Arkansas Aviation Sales, Inc.*, 368 F.2d 526 (8th Cir. 1966).

The appellate court noted that the economics of the transaction tended to support the appellant's contention. Normally, a corporation leasing to one having an option to buy will not lend a proportionately large part of

² 313 U.S. 177, 194 (1941).

the purchase price unless it is assured that the purchaser has enough of his own money invested to be motivated to pay the balance of the price to protect his original balance. However, nowhere in correspondence between the parties was there any reference to the requirement of a down payment by the lessee. While deciding that the appellant was not required to meet the more exacting standard of "clear and convincing" proof, the Eighth Circuit decided to apply the "clearly erroneous" standard within the meaning of Rule 52, Federal Rules of Civil Procedure. In view of the conflicting evidence, the court could not conclude that the trial court's findings were clearly erroneous.

P.O.W.

FOREIGN

Warsaw Convention — France — Internal Flights

Father Loison, pilot and member of the Flying Club of Caen, having aboard a gratuitous passenger, Marcel Rioult, husband of the plaintiff-appellee, crashed the plane, killing both Marcel and himself. Father Loison was forewarned of the possible risks of inclement weather in the region of his destination, yet he neglected upon departure to assure himself of the existing weather conditions at that destination. Plaintiff brought suit against the insurance company of the flying club, alleging inexcusable fault (negligence) of the pilot for failure to heed the weather warnings. The trial court rendered judgment in the amount of 70,000 francs on the basis of fault of the pilot. The appellate court reversed; the Supreme Court overruled and affirmed the trial court award. The court of renvoi upheld the trial court. *Held, affirmed*: The fault of the pilot was inexcusable, and the award was upheld with interest. *Mutuelle D'Assurances Aériennes (Insurance) v. Rioult*.*

There was no specific finding of inexcusable fault at the trial court level. The appellate court, however, made such a specific finding within the meaning of the law of 2 March 1957 dealing with the responsibility of air carriers. This law adopted the Warsaw principles and limits, and made them applicable to flights solely within France. Accordingly, the appellant-insurance company asked the court to invoke the limitation provided by Article 22 of the Warsaw Convention to limit the liability to 41,000 francs. The court held, however, that this original Warsaw limitation was not applicable since The Hague Protocol, also incorporated into the domestic law of France, had doubled the limitation for accidents arising out of inexcusable fault. Awards such as this are common in those European countries which have enacted the principles of the Convention as part of the domestic law of the country.

* This summary is from a translation of the complete report of the case as set out in 1966 *Revue Française de Droit Aérien* 237. Translator: Randy Williams.