

1970

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Recommended Citation

Fred J. Fowler, *Labor Law - Airline Mergers - CAB Approval*, 36 J. AIR L. & COM. 323 (1970)
<https://scholar.smu.edu/jalc/vol36/iss2/6>

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Labor Law — Airline Mergers — CAB Approval

Petitioner, the Airline Employees Association (ALEA), sought review in the United States Court of Appeals for the District of Columbia Circuit, of an order of the Civil Aeronautics Board (Board) approving the merger of Lake Central Airline into Allegheny Airlines. Prior to the merger, ALEA had represented some 400 passenger service employees under a collective bargaining agreement with Lake Central. Allegheny's employees in the same class were not union represented and the merger resulted in a class of 1,600 employees, one fourth of whom were ALEA members. Allegheny maintained that after the merger it would not recognize ALEA as the representative of the former Lake Central employees, nor would it recognize the terms of the ALEA-Lake Central contract. ALEA contended that the Board's refusal to require that Allegheny accept some or all of the terms of Lake Central's collective bargaining agreement with ALEA invalidated its approval of the merger. *Held, petition denied*: The Board's responsibility when approving airline mergers is limited to determining that the merger is consistent with the public interest, which includes considering the interests of affected employees. *Air Line Employees Association v. Civil Aeronautics Board*, 413 F. 2d 1092 (D.C. Cir. 1969).

Air Line Employees' case illustrates the problems that arise when the Board becomes involved in labor disputes between unions and airlines in merger situations. The basis for the Board's participation in these disputes is found in section 408 (b) of the Federal Aviation Act of 1958 (Act).¹ This section requires that the Board find the merger to be in the public interest, and gives the Board power to impose on the merger any conditions it deems necessary.² Although the Act does not require the Board to consider the interest of the employees in a merger situation, the Board has developed a policy of imposing various labor-protective provisions before approval.

The United Air Lines, Inc.-Western Air Lines, Inc., Acquisition of Air Carrier Property case³ forms the cornerstone for the Board's authority to impose labor protective provisions. In this proceeding, Western Air Lines, Inc. (Western), the United Air Lines, Inc. (United), sought Board approval of their contract in which Western agreed to transfer a certificate of public convenience and necessity for an air route to United and United agreed to purchase certain aircraft and other property from Western. The Air Line Pilots Association (ALPA) intervened asking the Board to re-

¹ 49 U.S.C. § 1378.

² Section 408 (b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1378 (b) (1964) provides that "Unless, . . . the Board finds that the consolidation, merger, . . . will not be consistent with the public interest . . . it shall by order approve such consolidation, merger . . . upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . ."

³ 8 C.A.B. 298 (1947).

quire that Western pilots be given their employment and seniority rights without prejudice as a condition for approval. Western's president testified that the pilots would continue to be employed by Western and that other competent employees would also be retained by Western. On the basis of this testimony, the Board did not consider ALPA's request.⁴ On a subsequent application by ALPA and other employees of Western, the Board reopened the hearing but insisted that the parties settle the matter themselves.⁵ Hearings and meetings between the parties having failed, the Board ordered certain labor protective provisions as a condition for approval of the United-Western merger.⁶

In the United-Western case, the Board noted that its imposition of the labor provisions was a matter of discretion.⁷ To support its authority under 408 (b) to attach such provisions to its order of approval, the Board cited three decisions⁸ of the Supreme Court dealing with the Interstate Commerce Commission's (ICC) authority over railroads.⁹ Moreover, the Board accepted the reasoning of the ICC and Congress as to what was "in the public interest" as applicable to airline mergers.¹⁰ In addition, the Burlington formula used to impose labor protective provisions in railroad abandonment cases served as the framework for the protective provisions.¹¹

The North Atlantic Route Transfer case¹² represents the next step in the development of labor protective provisions as conditions to mergers. This case arose when Pan American World Airways, Inc. (Pan American) sought Board approval of its acquisition of all the assets and the certificate of public convenience of American Overseas Airlines, Inc. (AOA). At the first hearing on the merger, the issue was raised as to what employee protective conditions the Board would impose in the event of approval of the consolidation. In particular, the employee crafts of AOA were concerned with how they would be integrated into the Pan American organization and retain their seniority. The Board initially took the position that the question of seniority integration was a matter to be determined by the crafts themselves.¹³ Although several of the groups did reach agreement,

⁴ *Id.* at 311.

⁵ United-Western Acquisition of Air Carrier Property, 11 C.A.B. 701, 702 (1950), and *sub nom.* Western Air Lines, Inc. v. C.A.B., 194 F.2d 211 (9th Cir. 1952).

⁶ *Id.* at 713. The Board ordered "(T)hat the approval granted in order serial No. E-772, . . . is made subject to the following additional terms and conditions:

1. Western shall, upon written request, submit to arbitration the following questions:
 - a. . . .
 - b. The amount which each of such employees should be paid by Western to compensate them for monetary losses sustained in each of the following categories:
 - (i) Loss of salary attributable to furlough or termination of employment;
 - (ii) Loss of salary attributable to reduction to a lower-paying position;
 - (iii) Moving expenses and transportation charges incurred as a result of being forced to accept a position in a different locality; . . ."

7. *Id.* at 707.

⁸ Railway Labor Executives Ass'n. v. United States, 339 U.S. 124 (1950); ICC v. Railway Lab or Executive's Ass'n., 315 U.S. 373 (1942); United States v. Lowden, 308 U.S. 225 (1939).

⁹ United-Western, Acquisition of Air Carrier Property, *Supra* Note 5, at 707.

¹⁰ *Id.* at 708.

¹¹ See 15 U. PA. L. REV. 195, 200.

¹² 14 C.A.B. 910 (1951). The Board made its decision in five orders, this representing its final determination.

¹³ *Id.* at 912.

four crafts did not. Efforts by the National Mediation Board to settle the dispute were also futile; thus, the Board ordered a comprehensive plan for protection of the employees including the integration of seniority on the basis of length of service.¹⁴

The importance of the order in North Atlantic is that for the first time the Board has indicated a willingness to formulate a plan to protect employees in a merger.¹⁵ Although the Board reiterated that the integration of seniority lists should be done voluntarily or by arbitration,¹⁶ it noted that section 408 gave it authority for the actions it took.¹⁷ It is also interesting to note that the Board again referred to Supreme Court decisions of the ICC's authority over railroads¹⁸ in support of its order. The Board even went so far as to state that its action ". . . to integrate employees involved in the consolidation upon a fair and equitable basis is a just and reasonable condition to (its) approval of the acquisition, and well within the spirit and rule of the *Lowden* (a case handled by the ICC) case."¹⁹

The door having been opened by the *United-Western* and *North Atlantic Route Transfer* cases, the Board has continued to impose labor protective provisions similar to those developed by the ICC.²⁰ Moreover, the courts have interpreted this self-imposed power of the Board as being very broad.²¹ Thus it appears that any petitioner, as ALEA in the instant case, seeking to have a Board approval vitiated by court action will have an extremely difficult battle. Attempting to have any discretionary ruling invalidated often proves to be next to impossible.

If, however, a party is determined to attack a Board order, he may appeal to the courts as provided by statute.²² The problem that often arises here is that the order of the Board is, as in the instant case, simply the adoption of the trial examiner's decision.²³ The Board in this case took the position that even though the adoption of the examiner's report is considered the action of the Board,²⁴ a party must seek discretionary review from the Board before appealing to the court. The court really avoided deciding the necessity of exhausting administrative remedies before appealing and ruled that since another union had been denied discretionary review, ALEA's right to court review was established even if the Board's contention was

¹⁴ *Id.* at 928.

¹⁵ *Id.* at 928-930.

¹⁶ *Id.* at 914.

¹⁷ *Id.* at 916.

¹⁸ *Id.* at 916.

¹⁹ *Id.* at 917.

²⁰ In the *Braniff-Mid-Continent Merger Case*, 15 C.A.B. 708 (1952) certain provisions of the Washington agreement of 1936 which developed from a national collective bargaining agreement in the railroad industry were adopted. In the *Delta-Chicago and Southern Merger Case*, 16 C.A.B. 647 (1952) and in the *Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954), the Burlington formula and the Washington Agreement with certain modifications again formed the model for the labor provisions. This standard model was also applied in the *United-Capital Merger Case* 33 C.A.B. 307 (1961).

²¹ *Oling v. Air Line Pilots Ass'n (ALPA)*, 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965), *Kant v. C.A.B.* 204 F.2d 263, 265 (2d Cir. 1953).

²² 49 U.S.C. § 1486 (1964).

²³ *Reorganization Plan No. 3*, 49 U.S.C. § 1324 (1964) allows the Board to delegate its function to a hearing examiner and to retain the right of discretionary review of his actions.

²⁴ *Id.*

right. Thus, it appears that unless the Board reserves jurisdiction to modify the labor provisions it imposes,²⁵ the petitioning party may go to the courts without first asking the Board to review its order.²⁶

This right of appeal under section 1006 of the Act²⁷ appears in reality to be the only remedy available to an aggrieved party. In *Oling v. ALPA*,²⁸ the Court of Appeals for the Seventh Circuit held that ALPA could not bring a collateral attack on the Board's approval of seniority integration in a district court since section 1006 specifically provided for appeal to a court of appeals. Although the court did not decide in *Oling* that the Board's jurisdiction was exclusive,²⁹ a district court in *Hyland v. United Air Lines, Inc.*,³⁰ ruled that complaints arising from the integration of a seniority list drawn up by the System Adjustment Board after the Board had approved the United-Capital merger was ". . . within the exclusive jurisdiction of the CAB."³¹ In its ruling, the court did note, however, that the Board had retained jurisdiction³² to modify the labor protective provisions it had imposed.

The position of the court established by *Oling* and *Hyland* was then modified somewhat in *ALPA v. CAB*.³³ In this case the Board had approved the Aaxico-Saturn merger imposing the standard labor protective provisions but had enjoined the seniority integration of flight personnel until a labor dispute between ALPA and Aaxico pending in district court was settled. ALPA was before the court claiming that the Board's finding that the merger was in the public interest was erroneous because of the existing labor disputes and possible violation of the Railway Labor Act by Aaxico. The court, in ruling that the Board had not abused its discretion, indicated that it was not the job of the Board to resolve all labor disputes between a carrier and its employees particularly when the matter was before a competent tribunal.³⁴

The decision in *ALPA v. CAB* naturally leads to the question of whether the Board can refuse to rule on certain labor disputes in merger situations when the dispute is not before another forum. This in essence was the problem presented by the instant case in a more subtle form. The petitioner, ALEA, relying on *John Wiley & Sons v. Livingston*,³⁵ claimed that

²⁵ See United-Capital Merger Case, 33 C.A.B. 307, 342 (1961) where the C.A.B. reserved jurisdiction "(To) make such amendments, modifications, and additions to the protective labor conditions imposed by paragraph 2(c) above as circumstances may require."

²⁶ See *Outland v. C.A.B.*, 284 F.2d 224, 227 (D.C. Cir. 1960) where Justice Burger said that judicial review was available without exhausting administrative remedies.

²⁷ 49 U.S.C. § 1485 (1964).

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

²⁹ *Id.* at 278.

³⁰ 254 F. Supp. 367 (N.D. Ill. 1966). The C.A.B. had also refused to pass on the issue of whether its jurisdiction was exclusive. *Delta-C&S Seniority List*, 29 C.A.B. 1347, 1350 (1959).

³¹ *Hyland v. United Air Lines, Inc.* 254 F. Supp. 367, 371, (N.D. Ill. 1966).

³² *Id.* at 372.

³³ 360 F.2d 837 (D.C. C. Cir. 1966); Note, 33 J. AIR L. & COM. 334 (1967).

³⁴ *ALPA v. CAB* 360 F.2d 837, 840 (D.C. Cir. 1966).

³⁵ 376 U.S. 543 (1964). Here the Supreme Court held ". . . that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, . . . the successor employer may be required to arbitrate with the union under the agreement."

Allegheny was bound by the collective bargaining agreements of Lake Central or was at least required to arbitrate the survival of the agreement. ALEA further contended that the Board's refusal to impose this condition on its merger approval was a violation of its discretion and should invalidate its order. The court of appeals looked at the standard protective labor provisions that were imposed and at the broad authority of section 404, and declared that the Board had performed its duty.

The interesting thing to note about the decision is that the Board simply adopted the trial examiners report as its order. In that report, the examiner ruled that the Board was not the place to apply the complexities of the *Wiley* doctrine. He felt that any dispute over representation rights was a matter exclusively for the National Mediation Board, and that any disputes over the survival of the bargaining agreement was for the courts. Neither he nor the Board, however, referred these disputed matters to the other forums. Query whether the Board did not abuse its discretion by recognizing the existence of a dispute and refusing to act on it or to refer it to the appropriate forum.

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