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## Case Notes

Robert A. McCulloch

Arthur L. Dent III

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# Notes

## Multidistrict Litigation: Termination of "Pretrial Proceedings" Under Section 1407—Judicial Experiments in Making the Practice Meet the Purpose of the Act

As a result of large scale antitrust litigation<sup>1</sup> of the last decade, Congress enacted the multidistrict litigation statute in 1968.<sup>2</sup> Codified in section 1407 of the Judicial Code, the statute provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.<sup>3</sup>

Although by the language of section 1407 transfer is solely for pretrial purposes, transferee courts have made findings, elicited stipulations and issued orders limiting the scope of the transferor court when the case is remanded for trial on the merits.<sup>4</sup> A growing body of commentatry, therefore, criticizes section 1407,<sup>5</sup> or at least

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<sup>1</sup> In the electrical equipment conspiracy actions, 1,912 separate actions containing 25,714 claims were brought in thirty-six federal districts. Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970).

<sup>2</sup> 28 U.S.C. § 1407 (1970).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970) (non-settling cases were later transferred to a third district for trial, see *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1970); *Reidinger v. Trans World Airlines, Inc.*, 329 F. Supp. 487 (E.D. Ky. 1971) (partial summary judgment granted).

<sup>5</sup> McElhaney, *A Plea for the Preservation of the "Worm's Eye View" in Multidistrict Litigation*, 37 J. AIR L. & COM. 49 (1971); Seeley, *Procedures for*

the judicial interpretations of the statute.<sup>6</sup>

An examination of section 1407 and an evaluation of the criticism reveal that a basic source of controversy stems from the failure of Congress to establish, or the courts to devise, a practicable procedure to keep the operation of the statute within its express terms. Section 1407 was designed to reduce congestion, avoid conflicting discovery demands, conserve judicial resources and promote sound, consistent results on the merits<sup>7</sup> by consolidating cases for pretrial purposes. To follow the letter of the statute by prompt remand after completion of discovery without any determination on the merits by the transferee court would violate the spirit of the statute by creating the problems multidistrict transfer was intended to alleviate: diverse courts facing lengthy trials on common questions; common witnesses testifying at each of these trials; many judges familiarizing themselves with volumes of common evidence; and the risk of conflicting determinations on the merits.

Although the courts have not spoken directly to this issue, a material factor prompting the courts to stray from the exact language of section 1407 by not immediately remanding these cases is the reluctance to abandon the benefits attained through multidistrict transfer. Transferee courts have, therefore, attempted to obviate the necessity of repetition in the transferee districts. Three methods have been used: (i) trial of a "test case" prior to remand of the transferred cases; (ii) consolidation of all cases for trial in the transferee or another district; and (iii) summary adjudication of all or a part of the common issues. Each method has its difficulties; none has proved satisfactory.

### I. THE TEST CASE METHOD

*Downey v. Trans World Airlines*,<sup>8</sup> brought after a mid-air collision near Dayton, Ohio, was one of thirteen actions filed in three districts and consolidated under section 1407 in the Southern Dis-

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*Coordinated Multidistrict Litigation: A Nineteenth Century Mind Views with Alarm*, 14 ANTITRUST BULL. 91 (1969).

<sup>6</sup> See the article by Mr. von Kalinowski in this issue.

<sup>7</sup> Peterson and McDermott, *supra* note 1, at 743.

<sup>8</sup> *Downey v. Trans World Airlines, Inc.*, Civil Action No. 3521 (S.D. Ohio 1970) (unreported); see *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798 (J.P.M.L. 1970).

trict of Ohio.<sup>9</sup> After discovery was completed, the transferee court selected one of the cases originally filed in that district and tried the merits prior to remanding the transferred cases.<sup>10</sup> The object of the transferee court was to avoid multiple trials by application of the doctrine of collateral estoppel to the remaining cases.

The weakness of this "test case" method, however, is that a "test case" may not result in complete disposition of matters before the court when plaintiffs are not pursuing the same legal theories or are asserting claims against different defendants. For example, in *Downey*, the "test case" involved allegations of negligence against Trans World Airlines and the owner of the other plane. The jury found negligence on the part of TWA but exonerated the owner of the other plane. The plaintiffs suing only the "exonerated" defendant were not collaterally estopped by the verdict and thus would be able to retry their cases. Assuming the doctrine of mutuality will not be applied, the class of persons bound by collateral estoppel is generally smaller than the class that can take advantage of it. Therefore, other plaintiffs will not be bound by the previous decision in favor of the defendant against whom they are asserting their claims, even though that defendant would have been bound had the jury found him liable. If however, mutuality of estoppel is applied, the defendant would not be bound by any decision that does not bind the plaintiff. This entitles a defendant to a separate trial against each plaintiff even though identical issues will be litigated in each trial. The theory rejecting mutuality is that the defendant's right to his day in court extends to the determination of all the issues;<sup>11</sup> a judicial determination of those issues should be conclusive of his right absent circumstances in which this would be unjust. To illustrate: when a defendant is found liable, but the jury awards a low damage figure, the defendant will not appeal.<sup>12</sup>

A successful variation of the "test case" method involved patent litigation in which the transferee judge obtained stipulations from

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<sup>9</sup> *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798 (J.P.M.L. 1970).

<sup>10</sup> McDermott, *A Plea for the Preservation of the Public's Interest in Multi-district Litigation*, 37 J. AIR L. & COM. 423, 445 (1971).

<sup>11</sup> See Moore & Currier, *Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); F. JAMES, *CIVIL PROCEDURE*, 595-603 (1965); Note, 35 J. AIR L. & COM. 289 (1970).

<sup>12</sup> *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

all parties agreeing to be bound by the results of the test case both at trial and on appeal.<sup>13</sup> District courts, however, have no coercive power to force the parties to agree to such a stipulation,<sup>14</sup> and because of an unwillingness to cooperate among air crash specialists,<sup>15</sup> the applicability of this practice will be limited.

## II. THE CONSOLIDATION METHOD

The second method employed by transferee courts to achieve the goals of section 1407 is transfer pursuant to section 1404(a)<sup>16</sup> upon the completion of pretrial proceedings. Section 1404(a) transfers for both pretrial and trial proceedings were employed prior to the inception of section 1407,<sup>17</sup> and the Judicial Panel on Multidistrict Litigation has indicated that sections 1404(a) and 1407 may be used in concert.<sup>18</sup> The Panel has established a precedent of transferring multidistrict air crash cases to the district where the crash occurred.<sup>19</sup> This satisfies the provision of section 1404(a) requiring transfer to a district where the case "might have been brought."<sup>20</sup>

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<sup>13</sup> *In re Butterfield Patent Infringement*, 328 F. Supp. 513 (J.P.M.L. 1970). This action may be unique because in each of 41 suits filed in 19 districts, the plaintiff was the same person.

<sup>14</sup> Federal rule 16 provides that in pretrial conferences the judge may attempt to have the parties stipulate certain facts, but short of partial summary judgment pursuant to rule 56(d) he has no power to force such a stipulation.

<sup>15</sup> McDermott, *supra* note 10, at 451.

<sup>16</sup> 28 U.S.C. § 1404(a) (1970). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

<sup>17</sup> *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Wright v. American Flyers Airline Corp.*, 263 F. Supp. 865 (D.S.C. 1967).

<sup>18</sup> 28 U.S.C. following § 1407 (Supp. 1972), amending 28 U.S.C. following § 1407 (1970) Rules of Procedure of the Judicial Panel on Multidistrict Litigation. Rule 15(b) provides: "Each transferred action that has not been terminated in the transferee court will be remanded to the district in which it is triable unless an order has been made by the transferee judge transferring the action to the transferee district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the latter event an order of remand shall be unnecessary to authorize further proceedings in the transferee district for all purposes including trial."

<sup>19</sup> *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798, 799 (J.P.M.L. 1970). "We have consistently held that the district containing the situs of the crash is generally the most appropriate transferee district for litigation of this type."

<sup>20</sup> The quoted phrase restricts transfer to a district in which venue would have been proper had the suit been filed in that district. This requires reference to 28 U.S.C. § 1391, the general venue statute, or to one of the specific venue statutes

Thus, at the completion of pretrial proceedings consolidated under section 1407, a section 1404(a) transfer of the cases for final disposition can be made to the judge who conducted the discovery proceedings.

At the present time there is a dispute over the power of courts operating within section 1407 to transfer the case under section 1404(a), specifically, whether the power is vested in the transferor or the transferee court.<sup>21</sup> The conceptual difficulty is that after a 1407 transfer is made, the case is in the transferee court only for pretrial purposes. Therefore, the transferee court obtaining jurisdiction by section 1407 could have no more authority than that section purports to convey. In *Pfizer, Inc. v. Lord*,<sup>22</sup> the only case that directly confronts this issue, the Second Circuit held the order may be made only by the transferee judge. In reaching this result, the Second Circuit reasoned that a section 1407 transfer is a transfer of the entire case, and once the Panel has ordered the transfer, the transferor court has no jurisdiction until the Panel remands the case.<sup>23</sup>

Therefore, since the concurrent use of section 1407 and 1404(a) transfers is permitted, and since the transferor court lacks jurisdiction to transfer, the only court that can do so is the transferee court. The court avoided the express language of section 1407(a) by finding that the mandatory remand provisions limit the power of the Panel but not the power of the transferee judge. The court bolstered this position by citing to the Panel's rules<sup>24</sup> that acknowledge by implication the authority of the transferee judge to enter a section 1404(a) order.<sup>25</sup>

The authority for successive transfers under sections 1407 and 1404(a) is Panel rule 15.<sup>26</sup> It is more difficult, however, to find authority for rule 15 itself. Section 1407 contains a sub-section

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located elsewhere. In air crash litigation the claim founded on diversity of citizenship may be brought where all plaintiffs or all defendants reside or where the claim arose.

<sup>21</sup> *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); von Kalinowski, *supra* note 6.

<sup>22</sup> *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

<sup>23</sup> *Id.* at 124.

<sup>24</sup> 28 U.S.C. § 1407(f) (1970) provides: The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and with the Federal Rules of Civil Procedure.

<sup>25</sup> Panel rule 15(b), *supra* note 18.

<sup>26</sup> *Id.*

giving the Panel rule-making power "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure."<sup>27</sup> The House Judiciary Committee's report on the multidistrict litigation statute noted that "section 1404(a) transfers are available in those instances when transfer of a case for all purposes is desirable."<sup>28</sup> The Panel may have used this language to support rule 15, but the validity of such an interpretation is questionable because the same House report expressly limited multidistrict transfers to pretrial matters.<sup>29</sup> Having so limited the statute, it is doubtful whether Congress intended to permit broader transfers by combining section 1407 with the general transfer provisions of section 1404(a). The Panel has twice amended rule 15 since *Pfizer* was decided.<sup>30</sup> Each amendment gives the transferee judge more discretion in determining the manner in which transferred cases are handled after completion of pretrial proceedings. While these amendments make it clear that the Panel approves of *Pfizer*, it is equally clear that the Panel's rule making power is limited by the language of section 1407 and the restrictive intent with which it was passed. Thus, before the issue can be settled, an authoritative resolution of rule 15 must be made.

There are other conceptual difficulties with the result in *Pfizer*. For example, it is assumed that after a section 1407 transfer has been made, no court has jurisdiction for complete adjudication of the case because the section 1407 transfer has divested the transferor court of all jurisdiction while conferring only "pretrial jurisdiction" on the transferee court. Further, the transferee court manufactures plenary jurisdiction by entering a section 1404(a) motion ordering itself to transfer the case to itself for trial on the merits. While the transfer in *Pfizer* was to a third district for trial,<sup>31</sup> an additional problem will arise in a case when the transferee

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<sup>27</sup> 28 U.S.C. § 1407(f) (1970).

<sup>28</sup> 1968 U.S. CODE CONG. & ADM. NEWS 1898.

<sup>29</sup> *Id.* at 1902. This statement appears to be the authority for the Panel's statement that section 1407 and section 1404(a) may be used in combination. This may be an incorrect interpretation of the House report in light of language in the same paragraph stating the "experience of the Coordinating Committee [the forerunner of the Panel] was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience."

<sup>30</sup> See 28 U.S.C. following § 1407 (Supp. 1972); 28 U.S.C.A. following § 1407 (July 1972 Supp.).

<sup>31</sup> *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971). In *Pfizer*, Judge Lord sat by designation in the Southern District of New York to preside over consoli-

court under section 1407 and under section 1404(a) are the same. Section 1404(a) allows transfer "to any *other* district or division;" therefore making it impossible for the transferee court to satisfy the requirements of section 1404 by transfer to itself.

The more logical rationale for multidistrict practice using the consolidation method recognizes the jurisdiction of the transferor court is not lost but rather abated, and the transferee court has limited jurisdiction to the extent of the section 1407 transfer. Under this view, the transferor court would be the proper source of a section 1404(a) transfer. The practicality of this rationale is restricted, however, because there would probably be conflicting decisions on the propriety of the section 1404(a) transfer among the various transferor courts, while under the *Pfizer* theory, the risk of conflict does not exist because the transferor judge applies his decision to all cases.

### III. THE PARTIAL SUMMARY JUDGMENT METHOD

The essence of the partial summary judgment method is that in appropriate cases, the transferee judge who has supervised extensive pretrial discovery proceedings will have become familiar with the record and will be able to render summary judgment on the portions of the case that have been established by these proceedings. This method avoids duplication of effort in transferor districts on remand and thus eliminates one of the major reasons for not remanding transferred cases after discovery is complete.<sup>32</sup>

Partial summary judgment is particularly suited to air disaster litigation, since the actions are generally brought under the state wrongful death statute.<sup>33</sup> The particular statute applied depends

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dated antibiotic drug antitrust actions. At the conclusion of pretrial proceedings under section 1407, he transferred all actions to his home district in Minnesota for trial. Both the plaintiffs and defendants objected to the *sua sponte* transfer on grounds that a judge sitting under section 1407 has no power to transfer under 1404 and that even if he did, it was an abuse of discretion to transfer in this case. The Court of Appeals refused to find an abuse of discretion even though the district to which the actions were transferred contained none of the witnesses or evidence and was the originating district for only one of the actions. The transfer was due at least in part to the judge's inconvenience in being away from his home district.

<sup>32</sup> As indicated above, the reluctance of the courts to abide by the literal meaning of section 1407 stems from the lack of an efficient method to terminate the role of the transferee court.

<sup>33</sup> Wolcott, *Collateral Estoppel and Other Practical Approaches to Commercial Air Crash Claims*, 13 N.Y.L.F. 509 (1967).



upon the facts of the crash and upon the conflicts of law rule of the transferor state.<sup>34</sup> The ability of the plaintiff to recover depends on proof of negligence on the part of a defendant; two issues must be determined—negligence and damages. The facts material to the issue of negligence are those of causation common to all plaintiffs and discoverable during consolidated pretrial proceedings. The items material to the issue of damages characteristically include matters most easily proven in the decedent's domicile such as his income and income potential, his family responsibilities and his position in the community.<sup>35</sup> A convenient practice, therefore, would be to make a final adjudication of liability in a consolidated proceeding in one forum with a separate trial and adjudication of damages in the forum located in the plaintiff's domicile. In appropriate cases,<sup>36</sup> partial summary judgment can be used for achieving this result, as contemplated both by Congress<sup>37</sup> and by the Panel.<sup>38</sup>

While the issue of damages is ordinarily incapable of being established as a matter of law, the evidence upon which liability issues are to be decided in aviation accident cases lends itself to summary adjudication. Air crashes often result in the death of the cockpit crew (the witnesses whose testimony would bear most significantly on the case). Consequently, preparation of an air crash case centers on reconstruction and expert analysis of the last moments of flight by collecting data from the cockpit voice recorder, the flight recorder, the reports of the air traffic controllers and the wreckage of the aircraft. This information is provided by the National Transportation Safety Board report or can be obtained through deposi-

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<sup>34</sup> *Van Dusen v. Barrack*, 376 U.S. 612 (1964) requires the transferee court to apply the conflicts of law principle which the transferor court would have applied. In these cases, the transferee judge is faced with complex problems due to his unfamiliarity with the laws of other states.

<sup>35</sup> *Representation of Survivors*, 11 AM. JUR. TRIALS §§ 12-17 (1966).

<sup>36</sup> Although rule 42(b) of the Federal Rules of Civil Procedure permits separate trials on the issues of negligence and damages, a jury determination of liability in the transferee court followed by remand and a subsequent jury determination of damages is impossible under a section 1407 transfer because of the limited nature of the transfer and because of constitutional objection arising from the fact that different juries would decide the issues of liability and damages, possibly denying the parties of a jury trial as guaranteed by the seventh amendment. See *O'Donnell v. Watson Bros. Trans. Co.*, 183 F. Supp. 577 (N.D. Ill. 1960); Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of Questionable Use of Rule Making Power*, 14 Vand. L. Rev. 831 (1961).

<sup>37</sup> 1968 U.S. CODE CONG. & ADM. NEWS 1898, 1900.

<sup>38</sup> J.P.M.L., *Manual for Complex & Multidistrict Litigation*, § 2.11 (1970).

tions.<sup>39</sup> This evidence is no more lucid when presented in the courtroom than if studied by a judge in chambers since the traditional opportunities for observation of demeanor and impeachment do not exist in absence of live witnesses. Furthermore, under the rules of the Panel, the transferee judge will have presided over numerous pretrial conferences<sup>40</sup> and will be thoroughly familiar with the record and with many intangibles that cannot be reflected in the record.

*Reidinger v. Trans World Airlines*<sup>41</sup> was an air disaster case that employed this method. In November 1967, a Trans World Airlines flight crashed as it made its landing approach to the Greater Cincinnati Airport, killing seventy of the eighty-two persons aboard.<sup>42</sup> Fourteen actions were brought in six federal districts, all of which were transferred to the Eastern District of Kentucky.<sup>43</sup> After more than two years of discovery, the transferee judge granted motions for summary judgment in favor of the plaintiffs and two of three defendants.<sup>44</sup> Trans World Airlines argued that the air traffic controllers had negligently failed to reroute the flight to a runway where all navigational aids were operative and the United States as the employer of the controllers was therefore liable. The defendant airline also asserted that the manufacturer of the altimeter was liable for improper design. The district court held: (i) the air traffic controllers had performed their obligation by giving correct information to the pilot, and the United States could not be liable as a matter of law; and (ii) there was no evidence to support the allegations against the instrument manufacturer.<sup>45</sup> On interlocutory appeal,<sup>46</sup> the Sixth Circuit reversed,<sup>47</sup> holding that in air crash cases,

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<sup>39</sup> See generally, Speiser, *Aviation Negligence Trials*, 13 N.Y.L.F. 498 (1967); *Airline Passenger Death Cases*, 8 AM. JUR. TRIALS 173 (1965).

<sup>40</sup> J.P.M.L., *Manual for Complex and Multidistrict Litigation*, § 1.1 (1970).

<sup>41</sup> 329 F. Supp. 487 (E.D. Ky. 1971). The airport is located in Kentucky across the river from Cincinnati.

<sup>42</sup> *Id.*

<sup>43</sup> *In re Air Crash Disaster at the Greater Cincinnati Airport*, 298 F. Supp. 353 (J.P.M.L. 1968). This count does not include 37 "tag along" cases transferred during the next six months.

<sup>44</sup> *Reidinger v. Trans World Airlines, Inc.*, 329 F. Supp. 487 (E.D. Ky. 1971).

<sup>45</sup> *Id.* at 491.

<sup>46</sup> 28 U.S.C. § 1292(b) (1970).

<sup>47</sup> *Reidinger v. Trans World Airlines, Inc.*, \_\_\_ F.2d \_\_\_ (6th Cir. 1972) (Civ. Nos. 71-1721 through 71-1735).

as in other tort cases, summary judgment is improper when there are conflicting factual contentions.<sup>48</sup>

In rendering this decision, the Sixth Circuit mechanically followed the time honored rule that determinations of negligence are peculiarly within the province of the trier of fact, making summary judgment proper only in rare cases.<sup>49</sup> The validity of this reasoning is questionable in the light of the facts of this case and more fundamentally with reference to the applicability of the general rule in the context of complex, multidistrict litigation; it allows a party to prolong final disposition of the suit notwithstanding strong evidence against him merely by making controverting contentions unsupported by any evidence.

The rule that issues of negligence are rarely susceptible of summary adjudication is well established and will not be quickly abandoned. An analogous device, the directed verdict, was historically subject to the same "scintilla" rule<sup>50</sup> that the Sixth Circuit applied in *Reidinger*. A majority of states, however, have now abandoned the scintilla rule and have established more liberal standards for directed verdicts.<sup>51</sup> In a situation such as *Reidinger* when proof will come from documents and reports and will not depend on demeanor or credibility of witnesses, insisting that an issue be decided by a jury becomes a merely a matter of form. The time has come to abandon the "scintilla rule" as applied to partial summary judgment motions in air crash cases. Unless a party is able to controvert his adversary's motion for summary judgment and can support his contentions with evidence, the motion should be granted.

#### IV. CONCLUSION

On balance, the "partial summary judgment" method of adjudi-

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* See also 6 J. MOORE, FEDERAL PRACTICE § 56.17[42] (1971) and the cases cited therein.

<sup>50</sup> The common law rule was that a "mere scintilla of evidence" was sufficient to overrule a motion for directed verdict and send a case to the jury, but this rule has been abandoned by most courts. 9 J. WIGMORE, EVIDENCE, § 2494 (3d ed. 1940); see also, Note, 18 DEPAUL L. REV. 322 (1968). *Reidinger* is an extreme case of "scintilla rule" reasoning because here, there was *no evidence* produced in discovery to support Trans World Airlines' contentions, whereas at least a "scintilla" of evidence is required to resist a motion for directed verdict under the older view.

<sup>51</sup> 9 J. WIGMORE, EVIDENCE, § 2494 (3d ed. 1940).

cating multidistrict cases appears to be the best of the three alternatives. It achieves all that section 1407 was designed to accomplish. Additionally, it simplifies conflict of laws problems and retains a modicum of respect for the plaintiff's choice of forum. An optimistic thought for those similarly inclined is that the superficial level of analysis by the Sixth Circuit in *Reidinger* may permit another court dealing with this problem to distinguish *Reidinger* for its failure to recognize the special problems of multidistrict litigation.<sup>52</sup>

Had the "test case" method been applied in *Reidinger*, only the plaintiffs pursuing the same legal theory as the test case would be bound by the determination. Thus, the "crew plaintiffs" who sued the instrument company and the United States would not be bound by the jury finding that only Trans World Airlines was negligent.

Had the consolidation method been applied, the transferee court would have had to determine which wrongful death statute applied to each plaintiff, and then would have to try the consolidated issue of liability, then the damage issues of each case separately. It is submitted that the consolidation method is inappropriate for air crash litigation because of the extensive evidence that must be heard on damage issues that are unique to each plaintiff, because of the influence of state law and because of the highly personal nature of a wrongful death suit that does not lend itself to consolidated adjudication.

Courts may find it useful to experiment with a combination of these methods. For example, given the *Reidinger* facts but with a stronger showing of negligence on the part of the instrument manufacturer, partial summary judgment could have been entered in favor of the air traffic controllers and a test case could have been used to dispose of the remaining issues in the case, to the extent that the legal theories of the parties were identical.

The superiority of the "partial summary judgment" method obtains only in situations when the facts are clearly established. While *Reidinger* is an ideal factual situation for the determination of all liability issues by partial summary judgment, in less clear-cut cases

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<sup>52</sup> The failure of the trial court and of the appellate court to draft their opinions in terms of multidistrict litigation rather than treating this matter as simply a question of tort law may limit the value of *Reidinger* as a precedent. Regardless of the result, in light of the recent creation of the multidistrict statute and the uncertainties previously described a clarification would have been in order.

this method can be used only to a limited extent. To the extent used, however, it can simplify and hasten the final disposition of each case.

*Robert A. McCulloch*

## **CAB Approval of IATA Rate Agreements: The Evolution of the Standard of Public Interest Under Section 412 of the Federal Aviation Act of 1958**

Section 414 of the Federal Aviation Act of 1958<sup>1</sup> exempts agreements between air carriers from the operation of the antitrust laws when the Civil Aeronautics Board finds them not to be adverse to the public interest pursuant to section 412.<sup>3</sup> The criteria applied by the CAB in making this determination for agreements submitted by the International Air Transport Association form the subject of this note.

In 1946, IATA submitted a resolution to the CAB that established the machinery for implementing the organization's objectives,<sup>3</sup> including the establishment of world-wide regional traffic conferences for the purpose of considering rates and "all [other] international air traffic matters involving passengers, cargo, and the handling of mail."<sup>4</sup> When this proposal was made, the only power the CAB possessed over individual rates set by American international air carriers was that the Board could determine and prescribe just and reasonable maximum or minimum rates for overseas air transportation. The exercise of this power was limited to situations when the carrier's rates were found to be unjustly dis-

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<sup>1</sup> 49 U.S.C. § 1384 (1970). This section provides: "Any person affected by any order under section . . . 1382 of this [Act] shall be . . . relieved from the operations of the 'antitrust laws' . . . ."

<sup>2</sup> Federal Aviation Act of 1958 § 412, 49 U.S.C. § 1382 (1970). Section 1382(a) provides: "Every air carrier shall file with the Board a true copy . . . of every contract or agreement . . . affecting air transportation, . . . between such air carrier and any other air carrier, foreign air carrier, or other carrier . . . relating to the establishment of transportation rates, fares, charges, or classifications. . . ." Section 1382(b) provides: "The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this [Act], and shall by order approve any such contract or agreement . . . that it does not find to be adverse to the public interest, or in violation of this [Act]. . . ."

<sup>3</sup> IATA Traffic Conference Resolution, 6 C.A.B. 639 (1946).

<sup>4</sup> *Id.* at 640. Other matters to be considered by the traffic conferences were: tariffs and schedules; general conditions of carriage; traffic forms, documents and procedures; reservation codes and procedures; government forms, regulations, and procedures; ethics of advertising and publicity; and, all matters pertaining to agents.

criminary.<sup>5</sup> The CAB noted, however, that by virtue of sections 412 and 414, it could exert substantial power over the rates set by American international carriers when those carriers entered into rate agreements with each other or with foreign carriers.<sup>6</sup> In granting temporary approval to the IATA resolution, the Board considered the effect the rate agreements would have upon competition and concluded the Act requires "regulated competition" that avoids both the "stifling influence of monopoly" and the "economic anarchism of unrestrained competition."<sup>7</sup>

Since the first IATA rate proposal was submitted, the CAB has not applied a consistent standard in determining whether IATA agreements are "adverse to the public interest." Critics of the Board contend that the Board does not fully consider the public interest when it approves IATA rate agreements and therefore, the Board, in effect, subsidizes the IATA carriers.<sup>8</sup>

### I. PUBLIC INTEREST

From the outset, the Board recognized that the term "public interest" encompasses more than a general reference to "the public welfare";<sup>9</sup> public interest must have a direct relationship to the statutory function of the CAB, which is "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."<sup>10</sup>

When IATA submitted its first rate agreement, involving North Atlantic carriers, the Board stated that the rate structure failed to show a "reasonable relation between any conference rates and the attainable costs of operation", and therefore concluded that the

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<sup>5</sup> Federal Aviation Act of 1958 §§ 1002(d), (f), 49 U.S.C. §§ 1482(d), (f) (1970). These same provisions were contained in the Civil Aeronautics Act of 1938 §§ 1002(d), (f), 52 Stat. 973, at 1018-19, as were sections 412 and 414. See also Gazdik, *Rate-Making and the IATA Traffic Conferences*, 16 J. AIR L. & COM. 298 (1949).

<sup>6</sup> IATA Traffic Conference Resolution, 6 C.A.B. 639, 643 (1946).

<sup>7</sup> *Id.* at 643-44.

<sup>8</sup> See, e.g., the article by Mr. Pillai in this issue.

<sup>9</sup> IATA Agreement Providing for North Atlantic Passenger Fares, 10 C.A.B. 330, 331 (1949).

<sup>10</sup> Federal Aviation Act of 1958 § 102, 49 U.S.C. § 1302(c) (1970) (formerly section 2(c) of the Civil Aeronautics Act of 1938).

agreement was adverse to the public interest.<sup>11</sup> Accordingly, for future agreements to be approved as being in the public interest, IATA would be required to submit operating cost analyses enabling a comparison with the rate structures submitted for approval.

In *Local Cartage Agreement Case*,<sup>12</sup> the CAB disapproved an agreement between certain domestic air carriers to terminate the practice of tendering advance payments to independent truckers for services to be rendered to shippers of airfreight. In applying the public interest standard, the Board determined that the agreement's relation to the antitrust laws could not be ignored, since approval under section 412 automatically exempts the agreement from the operation of the antitrust laws under section 414.<sup>13</sup> The Board therefore concluded that when an agreement contains "elements significantly repugnant to antitrust principles," approval must be denied "unless there is a clear showing that the agreement is required by a serious transportation need or in order to secure important public benefits."<sup>14</sup>

The Board has subsequently applied the *Local Cartage Agreement* case standard to certain IATA agreements, requiring either a showing of "serious transportation need" or "important public benefits" to be derived,<sup>15</sup> but has not consistently applied this standard to all IATA agreements. For example, in *IATA Credit Agreements*,<sup>16</sup> the Board disapproved an agreement because there had not been a clear showing of "serious transportation need" or "important public benefits"; on the other hand, in *IATA Group Fares Agreement*<sup>17</sup> and *IATA Agreements re Passenger Fares*,<sup>18</sup> the CAB approved agreements without even mentioning the *Local Cartage Agreement* case standard.<sup>19</sup> Thus, it was not clear when this standard would be applied to IATA agreements, if it would be applied at all.

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<sup>11</sup> North Atlantic Traffic Conference, 6 C.A.B. 845, 849 (1946).

<sup>12</sup> *Local Cartage Agreement Case*, 15 C.A.B. 850 (1952).

<sup>13</sup> *Id.* at 853.

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g., IATA Credit Agreements*, 30 C.A.B. 1553 (1960).

<sup>16</sup> *Id.* at 1555. The resolution provided that no IATA member should honor a passenger credit card other than a U.A.T.P. card or a member's credit card.

<sup>17</sup> 36 C.A.B. 33 (1962).

<sup>18</sup> 38 C.A.B. 1062 (1963).

<sup>19</sup> In both cases, the Board merely talked in terms of the public interest requirement found in section 412.



## II. THE CHALLENGE FROM THE SUPPLEMENTALS

In the early 1960's, the American supplemental carriers, which provide group fare charter services, challenged IATA rate agreements as being violative of antitrust principles.<sup>20</sup> In *IATA Group Fares Agreement*,<sup>21</sup> the supplementals contended that the IATA group fare proposal would effectively eliminate the supplementals from the transatlantic market and that group fares would be unjustly discriminatory.<sup>22</sup> The Board held the agreement was not adverse to the public interest since the group fares would provide a "means of meeting the public need for the lowest attainable economic fare level."<sup>23</sup> The CAB disposed of the supplementals' arguments, stating that the facts did not prove that non-IATA competition would be eliminated from the market and in view of the public interest factors favoring the reduced fares, restrictions on eligibility would not render them unjustly discriminatory.<sup>24</sup> Since the Board did not apply the *Local Cartage Agreement* standard,<sup>25</sup> but merely approved the agreement on the basis of nebulous public interest factors, it was uncertain what standard the CAB would apply when an agreement was challenged as being violative of antitrust principles. Thus, the problem lay in formulating a standard that would satisfy the principles of both antitrust law and the public interest.

In 1969, the CAB approved an IATA North Atlantic rate agreement despite the challenge of the supplementals, which were represented by the National Air Carrier Association (NACA). In May 1970, the Court of Appeals for the District of Columbia reversed the Board's order, holding that the findings were insufficient to support approval of the fares in view of the substantial antitrust questions that must be considered.<sup>26</sup> Although the court did not determine whether the agreement violated antitrust principles, it stated that when serious antitrust questions are presented, the Board

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<sup>20</sup> See, e.g., *IATA Group Fares Agreement*, 36 C.A.B. 33 (1962).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 34. The fares reflected a 38 per cent reduction from normal round-trip economy class fares and would be available to groups of persons that could demonstrate a prior affinity.

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 39, 41.

<sup>25</sup> See note 19 *supra*.

<sup>26</sup> *Nat'l Air Carrier Ass'n v. CAB*, 436 F.2d 185 (D.C. Cir. 1970).

cannot avoid them by merely finding that the public will benefit from the approval of the rate agreement; the Board must first answer the antitrust question: "whether the existence of a market structure conducive to maximum feasible competition will be imperiled by the approval of the agreement."<sup>27</sup>

The 1969 IATA agreement expired while the appeal was pending when one of the carriers withdrew. Subsequently, a new agreement retaining many of the 1969 fare agreement provisions was submitted, and the CAB approved all of the fare proposals in the new agreement.<sup>28</sup> In May 1971, the Court of Appeals for the District of Columbia held the CAB had sufficiently considered the antitrust questions by considering the impact the fares would have on competitors and affirmed the CAB's order.<sup>29</sup> In disposing of NACA's contentions, the court noted the recent *Statement of International Air Transportation Policy of the United States*<sup>30</sup> directed "the [g]overnment . . . not to allow enjoyment of the right to perform both scheduled service and charter service to result in decisive competitive advantages for scheduled carriers."<sup>31</sup> The court concluded that since an intent of the scheduled carriers to aggrandize their share of the market is assumed, the test for antitrust violations is not the existence of this intent, but "whether the particular means devised for the effectuation of this intent unduly jeopardize a 'market structure conducive to maximum feasible competition.'"<sup>32</sup>

An important aspect of the 1971 opinion is the court's discussion of the applicability of the *Local Cartage Agreement* standard to IATA agreements.<sup>33</sup> Over NACA's objection to the Board's view that the *Local Cartage Agreement* standard was not strictly applicable to every IATA agreement, the court noted that the CAB had already concluded that the making of fares by IATA is not per se adverse to the public interest; the filing of an IATA rate agreement does not always present the "question of whether the agree-

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<sup>27</sup> *Id.* at 194.

<sup>28</sup> *Id.* at 188-89.

<sup>29</sup> Nat'l Air Carrier Ass'n v. CAB, 442 F.2d 862 (D.C. Cir. 1971).

<sup>30</sup> 6 Weekly Compilation of Presidential Documents 804 (June 29, 1970); 63 Dep't State Bull. 86 (July-Dec. 1970).

<sup>31</sup> 63 Dep't State Bull. 86, 88 (July-Dec. 1970).

<sup>32</sup> Nat'l Air Carrier Ass'n v. CAB, 442 F.2d 862, 865 (D.C. Cir. 1971); Nat'l Air Carrier Ass'n v. CAB, 436 F.2d 185, 194 (D.C. Cir. 1970).

<sup>33</sup> Nat'l Air Carrier Ass'n v. CAB, 442 F.2d 862, 870-71 (D.C. Cir. 1971).

ment is a violation of the antitrust laws."<sup>34</sup> Accordingly, the Board can proceed directly to determine whether the agreement is adverse to the public interest; if the Board, however, finds that the agreement is "unfairly designed and directed in purpose and effect to the elimination of legitimate competitors," then it is not within the public interest.<sup>35</sup> Thus, the Board's decision must be viewed in terms of "whether the existence of a market structure conducive to maximum feasible competition will be imperiled by approval of the agreement."<sup>36</sup>

### III. OPEN COMPETITION

As observed earlier, the Board has approved the concept of rate-making by IATA and has determined that the resulting control of international scheduled carriers afforded the CAB is a desirable goal.<sup>37</sup> The alternative to IATA rate-making would be to allow each individual carrier to set their own rates and file individual tariffs with the CAB. Such open rate competition, however, can have a disastrous effect on American carriers since the CAB has little control over the rates set by individual foreign carriers.

In August 1971, the members of IATA could not reach an agreement concerning North Atlantic fares effective in February 1972. Consequently, several foreign carriers filed individual tariffs containing significant rate reductions.<sup>38</sup> Notwithstanding the Board's authority to require that discriminatory fares be discontinued,<sup>39</sup> the Board could do very little to control the rates set by the foreign carriers.<sup>40</sup> This lack of power to deal with the impending open rate situation was brought to the attention of Congress and a bill was

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<sup>34</sup> *Id.* at 870.

<sup>35</sup> *Id.* The court did note, however, that even though it was not clear how the *Local Cartage* standard differed from the statutory public interest standard, the record seemed to indicate that the Board found that the standard was met in this case by evidence of both "serious transportation need" and "important public benefits."

<sup>36</sup> *Id.* at 871.

<sup>37</sup> IATA Traffic Conference Resolution, 6 C.A.B. 639 (1946); *see also* IATA Traffic Conference Resolution, 9 C.A.B. 221 (1948).

<sup>38</sup> TIME, Sept. 6, 1971, at 58.

<sup>39</sup> Federal Aviation Act of 1958 §§ 1002(d), (f), 49 U.S.C. §§ 1482(d), (f), (1970).

<sup>40</sup> *See* text at notes 1-5 *supra*.

introduced giving the Board direct authority over foreign carriers.<sup>41</sup> At subsequent hearings, a NACA representative presented evidence indicating the disastrous effect the foreign carrier rates would have on both American supplemental and scheduled carriers.<sup>42</sup> On March 22, 1972, a bill was passed amending the Federal Aviation Act of 1958 to give the CAB authority, subject to disapproval by the President, to suspend or reject tariffs in international air transportation the CAB finds to contain unlawful rates.<sup>43</sup> When exercising its new powers, the CAB is required to consider: the need in the public interest for low-cost and efficient transportation; the need of the individual air carrier for revenue sufficient to offer efficient transportation; and, whether the rates will tend to monopolize competition.<sup>44</sup>

#### IV. CONCLUSION

As a result of the 1970 and 1971 *NACA* cases and the 1972 amendments to the Federal Aviation Act of 1958, it is clear that both the courts and Congress have seen fit to impose a duty on the CAB to consider the effect of IATA rate agreements on competition, as well as the provision of low-cost and efficient air transportation. Thus, the CAB is now equipped with a standard that can consistently be applied to IATA agreements to effectively protect the public interest. In addition, by virtue of the 1972 amendments, the CAB is now given power to protect the public interest when rates are set on an individual basis rather than through the IATA conference machinery.

*Arthur L. Dent III*

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<sup>41</sup> S. 2423, 92nd Cong., 1st Sess. (1971).

<sup>42</sup> *Hearings on S. 2423 Before the Subcomm. on Aviation of the Comm. on Commerce*, 92nd Cong., 1st Sess. at 48 (1971). The president of NACA, Mr. Edward J. Driscoll, pointed out that the proposal submitted by Lufthansa would cause Pan American to lose approximately \$42 million and TWA \$37.5 million. In addition, the supplementals would sustain about a 19½ per cent reduction over 1970 yields.

<sup>43</sup> Act of March 22, 1972, Pub. L. No. 92-259, 86 Stat. 96.

<sup>44</sup> *Id.* § 1002(j)(5).



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