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Notes, Comments and Digests

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CORPORATE CONTROL BY OTHER COMMON CARRIERS UNDER THE CIVIL AERONAUTICS ACT*

Of the many problems of economic regulation that have arisen from the Civil Aeronautics Act,[1] those under Section 408 are among the most numerous and perplexing.[2] The first occasion on which the courts have been faced with this section arose when Pan American Airways Company petitioned the Circuit Court of Appeals for the Second Circuit for review of two decisions of the Civil Aeronautics Board.[3] American Export Airlines, Incorporated, had applied to the Board for certificates of public convenience and necessity under Section 401 and had accompanied this with an application for approval of acquisition of control by American Export Lines, Incorporated,[4] under Section 408. The Board dismissed the application for approval on the ground that approval was not necessary since the control had been acquired before the applicant became an air carrier, *i.e.* before it received the certificate of convenience and necessity.[5] In fact the steamship company had organized American Export Airlines even before the Civil Aeronautics Act was passed.[6]

Pan American, which was an intervener in the proceedings, contended that the Board erred in granting the certificates without first approving of the "acquisition of control," and that such approval was required by Sections 408(a)(5) and 408(b).[7] The reasoning of the Board and of Export was that in creating the subsidiary the steamship company had acquired control of a corporation which was not an air carrier, and that when the subsidiary became

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* Pan American Airways Co. v. Civil Aeronautics Board et al. 121 F. 2d 810 (C. C. A. 2nd 1941).

1. 52 Stat. 973 (1938), 49 USCA §401 (Supp. 1940).

2. Melone, Controlled Competition: Three Years of the Civil Aeronautics Act (1941) 12 JOURNAL OF AIR LAW AND COMMERCE 318.

3. Pan American Airways Co. v. Civil Aeronautics Board et al. 121 F. 2d 810 (C. C. A. 2nd 1941).

4. American Export Lines, Inc. is a steamship line operating in the North Atlantic.

5. In the Matter of the Application of American Export Airlines, Inc., Docket No. 238; Board Order, Serial No. 581, July 12, 1940.

6. Export was organized in 1937, whereas the Civil Aeronautics Act became effective June 23, 1938.

7. 52 Stat. 1001 (1938), 49 USCA §488 (Supp. 1940). "Sec. 408(a) It shall be unlawful, unless approved by order of the Authority as provided in this section— . . . (5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever; . . ."

"Sec. 408(b) . . . Unless, after such hearing, the Authority finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe. . . . *Provided further,* that if the applicant is a carrier other than an air carrier or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of Section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operations and will not restrain competition."

an air carrier, the steamship company already had control, hence there was no "acquisition" under the Act. They contended that Section 408(a)(5) forbade the unapproved acquisition of a certain type of corporation, viz., an air carrier, and that the steamship company never performed such an act of acquisition. Therefore, it follows that if absence of approval here is not unlawful under Section 408(a)(5), then approval is not required under the second proviso of Section 408(b).

Thus the court faced two problems in this respect: 1. Is approval of acquisition under Section 408 a condition precedent to the granting of a certificate under Section 401?[8] 2. Do Sections 408(a)(5) and 408(b) apply to the case where a common carrier creates a subsidiary for the purpose of later becoming an air carrier?

In approaching the first of these problems the court gleaned no assistance from the terms of the Act itself. The complete absence of any statutory mandate or previous cases on this point left the court free to use its own discretion. The basis of the court's ruling that the certificates were properly granted without approval of acquisition must rest on other considerations.

No precedents in the aviation field lay before the court to help it in its determination. However, similar situations have arisen under the Motor Carrier Act of 1935.[9] Section 213(a) of that Act, which is comparable to Section 408 of the Civil Aeronautics Act, provides that it is lawful for a carrier other than a motor carrier to acquire control of a motor carrier only on condition that the Interstate Commerce Commission finds that the public interest would be promoted because the applicant was able to use motor service to the public advantage in its own operations.[10] An order of approval from the commission must be obtained. Of course, the decisions of the Interstate Commerce Commission which have come down under this section were not binding upon the Civil Aeronautics Board or upon the court, but the conditions are so nearly parallel in some respects that they were very properly used as guides. The leading case under Section 213 was *Pennsylvania Truck Lines, Inc.-Control-Barker.*[11] There approval of acquisition was at first denied on the ground that there would be competition with other railroads and truck lines; but on rehearing approval was granted to the extent that the service would be auxiliary and supplementary to the operations of the railroad. While the "auxiliary and supplementary" rule as set forth in this case and those under Section 213 that follow it, goes to the merits of the case, an issue with which the court here was not concerned, it is significant to note that the rule has also come up in cases involving an application for a certificate. In none of these cases was the certificate denied merely because the proposed operations were not auxiliary and supplementary to the operations of the parent. It is true, however, that in some instances the certificates were limited to the extent to which such operations were auxiliary and supplementary.[12] Herein

8. 52 Stat. 987 (1938), 49 USCA §481 (Supp. 1940). Section 401 requires all air carriers to obtain a certificate of public convenience and necessity and provides for the conditions and procedure for the granting thereof.

9. 49 Stat. 543 (1935), 49 USCA §301 (Supp. 1940).

10. *Id.* at 555, 49 USCA §313 (Supp. 1940).

11. 1 M. C. C. 101 (1936), 5 M. C. C. 9 and 49 (1937).

12. Kansas City Southern Transport Co., Inc., Common Carrier Application, 10 M. C. C. 221 (1938); Texas and Pacific Motor Transport Co. Common Carrier Application, 10 M. C. C. 525 (1938).

the Commission seems to have been inconsistent because in other cases it held that the rule of the *Barker* case under Section 213 was not germane in a proceeding on application for a certificate.[13] It was these latter cases which the court in the principal case chose to follow in holding that the Board properly granted the certificate to Export even though it should have considered the merits of the application for approval of acquisition.[14]

An analysis of these two conflicting types of cases will provide some justification for the court's choice. In those cases in which the granting of the certificate was limited by the "auxiliary and supplementary" rule any further operations would have caused wasteful competition and placed the applicant in an unfairly favorable competitive position. In the case at hand it was apparent to the court that the Board actually wanted to create domestic competition in the field of foreign air transportation,[15] and refused to adopt the principle of the *Barker* case. Therefore, in choosing between these two lines of cases, the court selected that which would better effectuate the apparent policy of the Board to limit Pan American's monopoly.

In the light of the Court's decision in respect to the second problem—namely, that approval of the steamship company's control over Export must be obtained from the Board—it does not seem inadvisable that the certificates were allowed to remain as granted. The authority of the Board under Section 408(e) to regulate completely any situation which it finds violates any of the provisions of Section 408 removes any necessity for further regulation by withholding a certificate. Thus the court in following the course which it did in respect to this problem, accepted the rulings under the Motor Carrier Act insofar as they gave effect to the Board's desire to create competition in overseas air transportation and at the same time did not weaken the Board's powers of economic regulation.

Under the second problem the court was required to meet the argument of the respondents (export) that Section 408(a)(5) did not apply to the case where a corporation became an air carrier at a time when it already was controlled by an outside carrier. The court regarded this as an "unduly literal interpretation"[16] of the section and held that the Board should not have dismissed the application for approval. This seems to be the more reasonable analysis of the words used, because the Board's position presented an anomalous situation in which the steamship company at one time did not control an air carrier and at a later time did control an air carrier, but at no time in the interim did it "acquire control" of an air carrier.[17] The court said that "to acquire control of any air carrier in any manner whatsoever" meant "to take all steps involved in obtaining control,"[18] and one of the steps

13. Santa Fe Trail Stages, Inc., Common Carrier Application, 21 M. C. C. 725 (1940); St. Andrews Bay Transport Bay Co. Extension of Operations 3 M. C. C. 711 (1937).

14. An interesting problem in connection with the merits of the application for approval is the possibility of a distinction if the steamship company had applied directly and not through a subsidiary. *Cf.* Illinois Central Railroad Co. Common Carrier Application, 12 M. C. C. 485 (1939).

15. 2 C. A. B. 16, 29 (1940).

16. Pan American Airways Co. v. Civil Aeronautics Board et al. 121 F. 2d 810, 815 (C. A. A. 2nd 1941).

17. *Cf.* The dissenting opinion of Board Member Ryan, 2 C. A. B. 16, 51 (1940).

18. Pan American Airways Co. v. Civil Aeronautics Board et al. 121 F. 2d 810, 815 (C. C. A. 2nd 1941).

involved in obtaining control in this case was the obtaining of a certificate to operate. Thus the "acquisition" was not complete until the certificate was granted and the granting of the certificate consummated an act for which approval of acquisition was necessary.

In the matter of precedent the court did not find as much help as in the other problem. The motor cases under Section 213 were not useful in deciding whether approval of acquisition was necessary because none of them was analogous to Export's situation. It is improbable that such a problem would arise under the Motor Carrier Act for two reasons. First, motor line territories are more fully exploited than air lines, so that an outside carrier would be more likely to take over an existing motor service than to try to create a new one in competition with those already there. Second, the definition of a motor carrier postulates existing operations,[19] whereas to constitute an air carrier there must be merely an undertaking.[20]

A common method of solving problems of statutory construction is to inquire into the intention of the legislature. The failure of the court to consider this even though counsel raised the issue indicates that the evidence of intention was not sufficiently conclusive. Yet its significance is not entirely ephemeral. The history of federal legislative activity in the field of transportation manifests a desire on the part of Congress for direct economic regulation. The Panama Canal Act of 1912, which in effect amends the Interstate Commerce Act, forbids railroads or other carriers from having any interlocking relationships with any water carrier operating through the Panama Canal or elsewhere if the railroad competes with it for traffic.[21] Also, as has been pointed out, the Motor Carrier Act of 1935 legalized such relationships between motor and other carriers only after a finding that the other carrier could use such services to the public advantage in its own operations and approval of the whole transaction by the Interstate Commerce Commission. Just as in the Civil Aeronautics Act, the language used is susceptible to an interpretation such as the Board made here. However, it appears to have been the desire of Congress to prevent the railroads from gaining such a degree of control over the motor carrier industry that they might stifle the competition it offers.[22] If some method were left so that they could, the intention of Congress would be thwarted. It seems apparent that Congress did not intend to have such an interpretation placed upon the Motor Carrier Act. The same applies to the Civil Aeronautics Act. The

19. 49 Stat. 544 (1935), 49 USCA §303 (Supp. 1940). Sections 203(a) (14) and (16) define "common carrier by motor vehicle" and "motor carrier." These definitions were explained in Crichton-Purchase-C. Lewis Lavine, Inc., 35 M. C. C. 661, 663 (1940).

20. 52 Stat. 977 (1938), 49 USCA §401 (Supp. 1940). "Sec. 1(2). 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation . . ." The Interstate Commerce Commission would not consider an application under §213 unless the vendor carrier was already operating. Crichton-Purchaser-C. Lewis Lavine, Inc., 35 M. C. C. 661 (1940).

21. 37 Stat. 566 (1912), 49 USCA §5(10) (1929).

22. Mr. Sadowski, speaking in the House of Representatives on Section 213, said, ". . . (I)t is the intent, and it is important to the welfare and progress of the motor carrier industry, that the acquisition of control of the carriers be regulated by the Commission, so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation." 79 Cong. Rec., July 31, 1935, at 12206.

language repeatedly used in explaining Section 408 in both Houses was: "this section prohibits consolidations, mergers, or interlocking relationships between air carriers and between air carriers and certain other types of companies unless approved by the Authority."[23] The term "interlocking relationships" is a broad one and indicates an intention on the part of Congress to include all possible situations. There is good reason for concluding, therefore, that the decision of the court effectuated the Congressional policy.

As involved in this problem the question of public policy is important. Is the court's decision the most desirable one or would it have been better to have retained the Board's position? In his dissenting opinion, Board member Ryan pointed out that policy reasons apply identically to both situations because the result is the same—a common carrier controls an air carrier.[24] This is not entirely accurate, however. The principal arguments of policy in defense of the Board's position indicate a difference between the situations where an existing air carrier is acquired by a common carrier and where a subsidiary becomes an air carrier. To allow an existing air carrier to be acquired without approval would be to permit the parent company to become, in effect, an air carrier without any regulation of the change. This is not so where a certificate has to be obtained. However, the likelihood of successful regulation of acquisitions in certificate cases is subject to doubt. There are only two standards in Section 401(d)(1) for the discretion of the Board in making the otherwise mandatory grant of the certificate.[25] One is whether the applicant is ready, willing, and able to perform and to conform to the regulations; the other is whether the transportation is required by the public convenience and necessity. Regulation of interlocking relationships through this section is based upon the explication of public convenience and necessity as set forth in the policy section of the act.[26] Therein it is declared that public convenience and necessity require the fostering of sound economic conditions in the industry. Of course, in accordance with this the Board could place conditions in the certificate as it is authorized to do by Section 401(f); but its power to control consolidations in this manner would be limited. A carrier, by refusing to fulfill the conditions, could refrain from giving a necessary service and could place itself in a position to bargain with the Board. It is undesirable to allow any of the Board's decisions to be made under influences of this kind. The answer which Pan American made to this first argument of the Board was that under the Board's interpretation of Section 408(a)(5) a subsidiary could be acquired after its certificate was granted but before it had begun to operate and thereby avoid any regulation. The soundness of this depends upon the meaning of the words "undertakes to engage in air transportation." It is improbable that anything more than the possession of a certificate is required to create such an undertaking.[27]

The other argument which the Board made was little different from the one already stated and may be answered in the same way; namely, that because of the public interest in the industry, a company should not be allowed to vitiate the economic regulation exercised by means of conditions in the

23. 83 Cong. Rec., June 11, 1938, at 8863 (§410).
24. 2 C. A. B. 16, 50 (1940).
25. 52 Stat. 987 (1938), 49 USCA §481 (Supp. 1940).
26. *Id.* at 980, 49 USCA §402 (Supp. 1940).
27. See note 20 *supra*.

certificate by failing to perform those conditions and thereby gaining bargaining power over the Board. This second argument is that where an existing air carrier is acquired, the basis for authorization of the original certificate has changed. Like the first argument it indicates merely that it is more important to bring the normal case under Sections 408(a)(5) and 408(b), than this case. It does not show that as a matter of policy these sections should not govern the instant case.

The conclusion to be reached, then, is that there are no policy reasons capable of invalidating the remand which the court ordered for the purpose of approving the acquisition. Whatever strength there may be in the argument that direct and unencumbered supervision of such interlocking relationships is the preferable course of action, concurs with the old proverb that it is better to be safe than sorry.[28] This justifiable decision of the Circuit Court of Appeals as to the all-inclusiveness of Section 408(a)(5) raises a warning finger to any future contention that it does not apply to some other interlocking or control situation.

GRANT F. WATSON
JEROME SILBERG

28. It was suggested that if the Board's interpretation of §408(a) (5) were applied to the similar language of §408(a) (6), then an air carrier could create by the same method an airplane manufacturing company from which it could buy equipment cheaper. The fallacy of this argument is that a manufacturing company does not require a certificate, but becomes a manufacturing company at the moment of incorporation.

Revocation of Pilot's Certificate.—Appeal.—Motion for Stay of Order of Civil Aeronautics Board.—On February 28, 1941, the Civil Aeronautics Board issued its order serial number 914, In the Matter of Raymond Lee Kidd, Holder of Private Pilot Certificate No. 48357, revoking said pilot certificate. On March 26, 1941, Mr. Kidd filed a petition for review with the United States Circuit Court of Appeals for the Fifth Circuit in which he asked for a review of the Board's order and for a stay of the order pending consideration of the petition on the merits. This matter was set for argument by the Court on April 2. The Civil Aeronautics Board filed its "Points and Authorities * * * in Opposition to Prayers for Stay" in which it was argued that the Petitioner had made no showing that the Board had erred in any respect in entering the order complained of and that the Petitioner had not shown that he would be irreparably injured by denial of the stay. At the hearing, in his argument and opposition to the stay Counsel for the Board offered to argue the case on the merits at any time in order that Petitioner might have a review on the merits as speedily as possible. The Court stated that it would not take the responsibility, without a hearing on the merits, of authorizing a pilot to fly when the Board had concluded, after a hearing, that it was not safe to permit that pilot to continue flying. Accordingly, the Court denied the stay from the bench and set the case down for hearing on the merits on April 21, 1941, and ordered both parties to file briefs on or before that date. On April 18, 1941, Counsel for Petitioner requested a continuance. This was granted by the Court and the case passed to the November term. Subsequently, the case was set for hearing on the merits on December 9, 1941. On or about November 12, 1941, Petitioner

filed a motion to dismiss his appeal and on that day the Court entered its order of dismissal.

In a similar case a stay was recently refused by the United States Circuit Court of Appeals for the Second Circuit.

On September 24, 1941, the Civil Aeronautics Board entered its order serial number 1265 suspending for a period of sixty days the commercial pilot certificate No. 1199 held by Hugh C. Robbins. On October 2, 1941, Mr. Robbins filed a petition for review of the order of the Board and a motion for a stay of the Board's order in the United States Circuit Court of Appeals for the Second Circuit. The "Points and Authorities of the Civil Aeronautics Board in Opposition to Motion for Stay" were filed with the Court. The hearing on the motion to stay was returnable on October 6th. At the hearing Counsel for the Board opposed the motion and offered to argue and submit the case on the merits immediately. The Court refused this offer. However, during Petitioner's argument all of the questions asked by the Court went to the merits. The Court inferred that no stay would be granted unless it was clearly indicated and shown by Counsel for Petitioner that there was merit in Mr. Robbins' petition for review. At the close of the argument the Court borrowed from Counsel copies of the transcript (of the hearing held by the Board). On October 8, 1941, the Court denied Petitioner's motion for a stay and on October 16, Petitioner filed a stipulation to dismiss.

Workmen's Compensation.—Status of Reserve Pilot Under Statute Determined by Yearly Earnings Whether Acting as First Pilot or Co-Pilot at Time of Accident.—Russel C. Mossman was an employee of the Chicago & Southern Airlines and was killed on August 5, 1936, when an airplane operated by said company crashed in St. Louis County, Missouri. A claim was brought by his widow, Melba May Mossman, against the employer before the Missouri Workmen's Compensation Commission. The Referee before whom the case was heard found in favor of the employer, after which the claimant appealed to the full Commission. The Commission affirmed the decision of the Referee, with one of the Commissioners dissenting. Claimant then appealed to the Circuit Court of St. Louis County, which again affirmed the award of the Commission. An appeal was then taken to the St. Louis Court of Appeals and the final decision of the Missouri Courts was rendered affirming the decision in favor of the employer.

Mossman had for some time been a first pilot, but on June 1, 1936, his status was changed to that of reserve pilot. As reserve pilot he would sometimes sit in the first pilot's seat and sometimes in the co-pilot's seat. When acting as first pilot he earned a first pilot salary computed on a rate of base pay plus flying time and when acting as co-pilot he received a co-pilot straight salary of $225.00 per month. At the time of his death he was acting as co-pilot in the plane.

The claimant contended that inasmuch as he was acting as co-pilot at the time of his death his status was that of a co-pilot and his pay was $225.00 per month. Under this theory the employee would be covered by

the Missouri Workmen's Compensation which covers such employees who earn less than $3600.00 per year. The employer contended that Mossman could not be considered to be a co-pilot merely because he was sitting in the co-pilot seat at the time of the accident but that he still must be considered to be a reserve pilot and his status must be based upon income earned by him as a reserve pilot. The evidence disclosed that during the period he had served as reserve pilot his earnings would have averaged $3753.00 for the full year period.

The Court of Appeals held that Mossman must be considered to be a reserve pilot whether he was acting as first pilot or co-pilot at the time of his death; that the Court would not adopt a construction which would compel it to rule that his status would change from day to day depending upon the specific task of that particular day. At all times he was held to be a reserve pilot. Therefore, inasmuch as his earnings exceeded the $3600.00 limitation of the Compensation Act, the Court declared that he was not under the Act and the decision should be in favor of the employer.

Claimant filed a Motion for Rehearing which was denied by the Appellate Court on September 12, 1941. *Mossman v. Chicago & Southern Airlines, 153 S. W. (2d) 799* (1941).