

1947

Judicial and Regulatory Decisions

Recommended Citation

Judicial and Regulatory Decisions, 14 J. AIR L. & COM. 112 (1947)
<https://scholar.smu.edu/jalc/vol14/iss1/12>

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JUDICIAL AND REGULATORY DECISIONS

Department Editor: Edgar Vanneman, Jr.*

THE CAUSBY CASE AND THE RELATION OF LANDOWNERS AND AVIATORS — A NEW THEORY FOR THE PROTECTION OF THE LANDOWNER

*United States v. Causby et ux.*¹ involved a conflict between the Government's operation of an airport for Army planes and the use of nearby property as a home and chicken farm. The Causbys purchased 2.8 acres of land in 1934, located about one-third of a mile from a municipal airport, which had been used largely by private aircraft since 1928. In 1942 the United States leased a nonexclusive use of the airport, the lease being renewable until 1967, or six months after the war emergency, whichever occurred first. Approximately 4 per cent of the time in taking off and 7 per cent of the time in landing, the prevailing wind required aircraft using the field to fly directly over the Causbys' house and chicken breeding farm. The end of the runway was 2,220 feet from the house and 2,275 feet from the barn so the 30 to 1 safe glide angle approved by the Civil Aeronautics Authority permitted the planes to pass over the Causby property at a height of 83 feet, 67 feet above the house and 18 feet above the highest tree. Previous flights of smaller planes had not seriously disturbed the Causbys, but the heavy four-motored Army planes came over more frequently, made a louder noise, and at night made a greater glare with their lights. The Causbys asserted this disturbed their sleep, frightened them, and made them nervous. They also asserted that the noise and light frightened the chickens so much that about 150 had been killed by flying into the walls and that egg production had fallen off.

The findings of the Court of Claims clearly establish that these flights of heavy bombers had destroyed the use of the property as a commercial chicken farm, the peace and comfort of the plaintiff's home had been seriously interfered with, and the property had decreased in value.² Since at the time of this suit the Government was not suable in tort,³ the plaintiffs alleged that their property was taken for public use without just compensation in contravention of the Fifth Amendment.⁴ The Court of Claims found a servitude had been imposed on the land and a judgment of \$2,000 was rendered for the plaintiffs.⁵ On appeal to the Supreme Court the judgment was reversed for want of an additional finding of fact as to the exact nature of the easement taken, but the Court held that a servitude had been imposed on the Causbys' land which would merit a recovery under the Fifth Amendment.⁶

Justice Black dissented because the effect of the decision, in his view, was to limit, by the relatively absolute Constitutional barriers of the Fifth Amendment, future adjustments through legislation and regulation which might become necessary with the growth of air transport. According to Justice Black the Constitution does not contain such a barrier. His posi-

* Journal Editor, Legal Publications Board, Northwestern University School of Law.

¹ 328 U.S. 256, 66 S. Ct. 1062, 1946 USAvR 235 (1946).

² *Causby v. United States*, 60 F. Supp. 751, 755 (Ct. Cl. 1945), 1945 USAvR 1, 7.

³ This immunity, based on the attributes of sovereignty, was removed for the purpose of most tort cases by the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946) Title IV. But see notes 43, 44, 45 *infra*.

⁴ U.S. Const. Amend. V. "Nor shall private property be taken for public use, without just compensation."

⁵ *Causby v. United States*, 60 F. Supp. 751 (Ct. Cl. 1945), 1945 USAvR 1.

⁶ *Supra* note 1 at 1068, 1069.

tion was that this was really a tort action for noise and glare and that there was no Constitutional "taking." The Constitution gives Congress the power to deal with the navigable airspace and Congress has acted under this power to authorize the Civil Aeronautics Authority (Board) to establish the safe altitude of flight, including a safe glide angle for landing and taking-off. He concludes that Congress can be trusted to preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons while the courts do not have the techniques to handle these complicated problems.

The solution of the conflict of interest, *i.e.*, the freedom of locomotion versus the unrestricted enjoyment of one's property, has been debated by legal writers for many years.⁷ The problem was originally complicated by the feeling that there was an immutable doctrine to the effect that ownership of land extended to the periphery of the universe.⁸ Numerous writers exposed the fallacy of this belief,⁹ Congress denied it,¹⁰ and it is now clearly repudiated by the Supreme Court.¹¹

The status of the aviator in his relation to the property owner has also been an important legal question. The American Law Institute approached the problem with the concept that the airman has a "privilege" of flight.¹² This position was criticized as putting too great a burden on the flyer by requiring him to prove that his flight was justified, and of failing to recognize freedom of activity or movement, *i.e.*, "going places and doing things," as one of the fundamental interests of personality.¹³ In the *Causby* case the Court rejected the idea that the landowner has an unrestricted ownership of the airspace above his land and declared the air to be a highway in the public domain.¹⁴ Thus the aviator's freedom of flight¹⁵ would appear to be fully recognized so long as he observes the applicable laws. This, however, does not settle the borderline cases, such as the *Causby* case, nor explain the extent of the right remaining with the landowner. Numerous formulas have been suggested to determine the interest of the landowner in the superadjacent airspace of his land.¹⁶ They range from the unre-

⁷ Fagg, *Airspace Ownership and the Right of Flight* (1932) 3 J. Air L. 400; Hise, *Ownership and Sovereignty of the Air or Air Space Above Landowner's Premises with Special Reference to Aviation* (1931) 16 Iowa L. Rev. 169.

⁸ Lord Coke stated the doctrine as "*cujus est solum ejus est usque ad coelum*" which is usually translated, "He who owns the land owns up to the sky." For a complete history of the maxim see Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law* (1932) 3 J. Air L. 329, 355-373, 531-551.

⁹ Kingsley & Maugham, *The Correlative Interests of the Landowner and the Airman* (1932) 3 J. Air L. 374; Bouvé, *Private Ownership of Navigable Air Space under the Commerce Clause* (1935) 21 A.B.A.J. 416; Hackley, *Trespassers in the Sky* (1937) 21 Minn. L. Rev. 773; Hotchkiss, *The Law of Aviation* (2d ed. 1938) §31.

¹⁰ "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States." 52 Stat. 1028 (1938), 49 USCA §176(a) (1945). "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." 52 Stat. 980 (1938), 49 USCA §403 (1945).

¹¹ *Supra* note 1 at 1065, 1071. See *Northwest Airlines v. Minnesota*, 322 U.S. 292, 302-303, 1944 USAvR 1, 10 (1944) (concurring opinion of Justice Jackson also rejects *ad coelum* doctrine).

¹² Restatement, Torts (1934) §194.

¹³ Green, *The Torts Restatement* (1935) 29 Ill. L. Rev. 582, 589-590; Hackley, *Trespassers in the Sky* (1937) 21 Minn. L. Rev. 773, 803.

¹⁴ *Supra* note 1 at 1068. Notice also that Congress has declared that there is a public "right" to freedom of transit in air space, *supra* note 10.

¹⁵ Green, *Flight of Aircraft—Right or Privilege?* (1935) 6 J. Air L. 201; Green, *Trespass by Airplane* (1936) 31 Ill. L. Rev. 499.

¹⁶ Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law* (1932) 3 J. Air L. 329, 347-355.

stricted ownership under the above-mentioned *ad coelum* doctrine to no ownership in unenclosed airspace. But here now there is a judicially sanctioned formula. The Court says, "The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense — by the erection of buildings and the like — is not material."¹⁷ This has been known as the "possible effective possession" theory as adopted by other courts in previous cases¹⁸ but does not appear to correspond with the test of actual use found in *Hinman v. Pacific Air Transport*¹⁹ cited by the Court. The problem will bear further judicial clarification.

The important contribution of the *Causby* case appears to be its extension of the remedies available to the landowner. Formerly it was thought that he was limited to tort actions in negligence, trespass, or nuisance.²⁰ One low, unintentional flight might become actionable as a negligent harm.²¹ An intentional invasion of a property interest can be viewed as a trespass.²² This would include cases of an actual physical touching of the land or the structures and emblements attached to it as well as invasions of the airspace immediately adjacent thereto.²³ Repeated invasions of the property may constitute a continuing trespass or nuisance.²⁴ But generally nuisance will consist of a disturbance of privacy, imminence of danger, or disturbance by noise, wind, or dust.²⁵ Most modern codes do not require a specific choice of remedy. But the plaintiffs in the *Causby* case were confronted with a serious harm imposed by the United States Government which was not suable in tort, so they were forced to go outside the usual scope of relief for injuries of this nature and allege that the United States had made such use of their property as to amount to a taking.

This was a case of first impression and there was little precedent for the holding other than the historical development in the body of law de-

¹⁷ *Supra* note 1 at 1067.

¹⁸ *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 210, 203 (C.C.A. 6th, 1932), 1932 USAvR 1; *Cory v. Physical Culture Hotel*, 14 F. Supp. 977, 982 (W.D.N.Y. 1936), 1936 USAvR 16; *Delta Air Corp. v. Kersey*, 193 Ga. 862, 869, 20 S.E. (2d) 245, 249, 1946 USAvR 264 (1942). Massachusetts courts have adopted the arbitrary theory that the landowner has title to the air space up to a height set by statute and any flights below this are at least technical trespasses. *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E. (2d) 575, 1942 USAvR 1 (1942); see *Smith v. New England Aircraft Co.*, 270 Mass. 511, 530, 170 N.E. 385, 393, 1930 USAvR 1 (1930).

¹⁹ 84 F. (2d) 755 (C.C.A. 9th, 1936), 1936 USAvR 1 *cert. denied*, 300 U.S. 654, 1937 USAvR 173 (1937). Judge Haney, at page 758, says, "The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world." This has been viewed as making the landowner's rights depend, not upon *possible* use of such space, but upon *actual* use. Hackley, *Trespassers in the Sky* (1937) 21 Minn. L. Rev. 773, 799. It has also been called a "nuisance" theory since the right of recovery seems to depend on a showing of actual damage. Note (1943) 28 Corn. L.Q. 200.

²⁰ *Supra* note 1 at 1070 (dissenting opinion of Justice Black); Green, *Flight of Aircraft—Right or Privilege?* (1935) 6 J. Air L. 201.

²¹ *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. (2d) 761 (N.D. Ohio, 1929), 1929 USAvR 96.

²² *Hinman v. Pacific Air Transport*, 84 F. (2d) 755 (C.C.A. 9th, 1936), 1936 USAvR 1; *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385, 1930 USAvR 1 (1930); *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E. (2d) 575, 1942 USAvR 1 (1942).

²³ Hotchkiss, *The Law of Aviation* (2d ed. 1938) §34.

²⁴ *Warren Township School District v. Detroit*, 308 Mich. 460, 14 N.W. (2d) 134, 1944 USAvR 35 (1944).

²⁵ *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. (2d) 245, 1946 USAvR 264 (1942); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817, 1934 USAvR 166 (1933). See 140 A.L.R. 1362 for a summary of cases treating airports and flights of aircraft as a nuisance.

fining a "taking."²⁶ *United States v. Cress*,²⁷ a navigable water case, provided the rule that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."²⁸ The *Cress* case also held that the fee could remain in the landowner with the United States merely taking the right to use the land by flooding at will. The analogy is close in another respect in that the compensation required was half the value of the property, this being the same percentage fixed by the Court of Claims in the *Causby* case.

Reliance was also placed on *Portsmouth Harbor Land & Hotel Co. v. United States*²⁹ in which Justice Holmes took the position that it was possible to impose a servitude on land by firing coastal guns through the superadjacent airspace when this had the effect of limiting the utility of the land and causing a diminution of its value. The *Portsmouth Harbor* case was decided on an implied contract theory, rather than a "taking" under the Fifth Amendment, but this did not minimize the importance of the unusual servitude recognized.

An analogy for the remedy recognized in the *Causby* case can be found in the nuisance cases. Repeated trespasses and continuing nuisances, such as invasions of floods, fumes, dust, and vibrations from neighboring land, gave successive causes of action under the traditional common law view and damages could only be given for those causes of action which had arisen before the commencement of the action.³⁰ Injunctive relief or another suit were the only remedies for the future. But relief by injunction became discretionary with the court and was generally denied when the offending enterprise was public or semipublic in character.³¹ Even some private enterprises were allowed to continue under a doctrine of balancing of conveniences.³² Some jurisdictions then took the next logical step and assessed permanent damages under a "permanent nuisance" doctrine which extended to private enterprises as well as those having the power of eminent domain.³³ A clear definition of permanence has not been forthcoming but a more flexible practice now allows the plaintiff to elect to treat the nuisance as a permanent one if it appears that it will continue indefinitely and permits the jury to assess damages once for all on the basis of the depreciation in value of the plaintiff's property.³⁴ Since the plaintiff is precluded from claiming damages from a further continuance of the injury, a privilege comparable to an easement is conferred upon the defendant.³⁵

It would appear that the remedy given the landowner in the instant case has a basic similarity to recoveries allowed under the modern nuisance doctrines. But here we are dealing with an aviation problem that con-

²⁶ See Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 *Yale L.J.* 221.

²⁷ 243 U.S. 316 (1917).

²⁸ *Id.* at 328.

²⁹ 260 U.S. 327, 1928 USAvR 28 (1922).

³⁰ *Uline v. New York Cent. & H. R. R. Co.*, 101 N.Y. 98, 4 N.E. 536 (1886); *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S.E. 451 (1922).

³¹ *McClintock*, *Discretion to Deny Injunction Against Trespass and Nuisance* (1928) 12 *Minn. L. Rev.* 565.

³² Note (1933) 40 *W. Va. L.Q.* 59.

³³ This doctrine seems to trace its origin to *Town of Troy v. Cheshire R. Co.*, 23 N.H. 83 (1851). The decisions are collected and discussed by Justice Brandeis in *City of Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933), a leading case on the subject.

³⁴ *McCormick*, *Damages* (1935) §127. For an even more intensive treatment see *McCormick*, *Damages for Anticipated Injury to Land* (1924) 37 *Harv. L. Rev.* 574.

³⁵ *Thompson v. Illinois Cent. R. Co.*, 191 Iowa 35, 179 N.W. 191 (1920); *Payne v. Bevel*, 99 Okla. 106, 225 P. 691 (1923).

cerns the relative rights of the landowner and the aviator. This use of the navigable airspace is a modern development of such importance that ordinarily it cannot be enjoined. Yet there is actual and serious damage to property by such flights. This damage is basic to recovery³⁶ but when it is present, the *Causby* case would appear to insist that recompense be made. Municipal airports now have the power of eminent domain³⁷ but this involves a duty to exercise it to prevent injury.³⁸ Land not taken by condemnation proceedings cannot be "taken" otherwise without liability. Of course there are limits to the remedy. A normal flight within the navigable airspace prescribed by legislation is not a "taking."³⁹ Take-offs and landings present the problem and in those cases the altitude of 500 feet provides no magic dividing line.⁴⁰ Likewise such actions will probably be strictly limited to comparable situations.⁴¹

While the recently enacted Federal Tort Claims Act⁴² may obviate the necessity of many suits under this theory, Section 421(a)⁴³ can be interpreted to exclude claims for incidental damage to property⁴⁴ despite the obvious intent of the framers of the Act to provide a substitute for prohibited private bills.⁴⁵ Judicial interpretation is needed. In any event the theory of the *Causby* case will be of special value in jurisdictions which do

³⁶ *United States v. 357.25 Acres of Land in Calcasieu Parish, La.*, 55 F. Supp. 461 (W.D. La. 1944), 1944 USAvR 36. This was a condemnation proceeding and the planes were to pass over the land in question at a height of 25 to 40 feet. It was unimproved land in open country. The jury found no damage so the Government's deposit was returned. See also *Portsmouth Harbor Land & Hotel Co. v. United States*, 64 Ct. Cl. 572 (1928) (claim was denied on rehearing for insufficient proof that any agent of the Government was authorized to take the land in question and that the Government intended to fire the guns over the property in time of peace).

³⁷ This is a statutory matter in most states.

³⁸ See *Richards v. Washington Terminal Co.*, 233 U.S. 546, 557 (1914); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 871, 20 S.E. (2d) 245, 250, 1946 USAvR 264 (1942); *Burnham v. Beverly Airways*, 311 Mass. 628, 635-636, 42 N.E. 575, 579, 1942 USAvR 1 (1942).

³⁹ Justice Douglas appears to assume that Congress, under the Commerce Clause, can make a reasonable definition of navigable airspace. This would seem warranted from the navigable water cases and the fact that the Fifth Amendment must be read in conjunction with the rest of the Constitution. *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945).

⁴⁰ *Cory v. Physical Culture Hotel*, 14 F. Supp. 977, 982 (W.D.N.Y. 1936), 1936 USAvR 16 *aff'd* 88 F. (2d) 411 (C.C.A. 2d, 1937), 1938 USAvR 15. "The height at which an airplane operator may pass above the surface without trespassing is a question depending for solution on the facts in the particular case, and this question is unaffected by the regulations promulgated by the Department of Commerce under the Air Commerce Act of 1926."

⁴¹ See *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 1928 USAvR 28 (1922) (dissenting opinion of Justice Brandeis).

⁴² Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946) Title IV.

⁴³ *Id.* at §421 "The provisions of this title shall not apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused."

⁴⁴ The House Committee's version omitted the exclusion of claims based on a "nuisance not involving negligence" because it deemed the general exclusion of claims based on authorized acts by government officers or employees exercising due care sufficiently broad to include this particular problem. H. Rep. No. 2245, to accompany S. 2221, 77th Cong., 2d Sess. (1942).

⁴⁵ Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946) §131. The purpose of §421(a) is also clarified by the Hearings before the Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (1942) 28, 33, 64-66; Armstrong and Cockrill, *The Federal Tort Claims Bill* (1942) 9 Law & Contemp. Prob. 327, 330.

not recognize the permanent nuisance doctrine.⁴⁶ Of course, the nature of the easement that may be taken is still an unanswered problem, as is the use that may be made of such an easement.⁴⁷ But future users of the remedy are not without a formula for the Court has said, "The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."⁴⁸

HAROLD D. NAGEL*

PARAMOUNT PUBLIC INTEREST IN DOMESTIC NEW ROUTE CASES

Applicants for certificates of public convenience and necessity to operate aircraft for hire as common carriers between places in interstate, overseas and foreign air transportation, as defined by the Civil Aeronautics Act of 1938, usually encounter the greatest difficulty in satisfying the Civil Aeronautics Board that the proposed transportation is required by the "public convenience and necessity."¹ In making this determination the Board has considered foremost the Congressional "Declaration of Policy" found in Section 2 of the Civil Aeronautics Act wherein in determining "public interest" and "public convenience and necessity" the Board is admonished to consider, among other things, the concern of the nation as a whole in an economically sound, efficient, and reasonably competitive air transportation system properly adapted to the present and future needs of foreign and domestic commerce, of the Postal Service, and of the national defense.²

In the earlier new route cases (distinguished from "grandfather" cases under Section 401(e) of the Act) the Board set up four tests or criteria of "public interest,"³ but in recent years has not enumerated these standards as such. An analysis of the Board's decisions to date on applications to operate competing services or new routes (other than local or feeder line services) indicates that the Board has consistently weighed three pri-

⁴⁶ McCormick, Damages for Anticipated Injury to Land (1934) 37 Harv. L. Rev. 574.

⁴⁷ Note (1937) 8 Air L. Rev. 52.

⁴⁸ *Supra* note 1 at 1068. See also Opinion of the Attorney General of North Carolina (1946) C.C.H. Avn. L. Serv. No. 2308.

* Member of the Legal Publications Board, Northwestern University School of Law.

¹ Civil Aeronautics Act of 1938, Section 401(d), 52 Stat. 987 (1938), 49 U.S.C.A. §481 (Supp. 1946). Under Section 401(a) of the Act, no carrier may engage in air transportation unless it has in force a certificate of public convenience and necessity issued by the Board. 52 Stat. 987 (1938), 49 U.S.C.A. §481 (Supp. 1946).

² Civil Aeronautics Act of 1938, Section 2, 52 Stat. 980 (1938), 49 U.S.C.A. §402 (Supp. 1946).

³ (1) whether the new service will serve a useful public purpose responsive to public need; (2) whether the purpose can and will be served as well by existing lines or carriers; (3) whether it can be served by the applicant without impairing the operations of existing carriers contrary to the public interest; and (4) whether any cost of the proposed service to the Government in the form of mail subsidies or safety facilities will be outweighed by the benefit which will accrue to the public from the new service. *United A.L., Red Bluff Operation*, 1 C.A.A. 778 (1940).

mary factors in determining the paramount public interest in each fact situation presented.⁴ These factors are:

- (1) the benefit to the public from the new services;
- (2) the financial and economic interest of the air carriers involved; and
- (3) the desirability of competition.

Because of the wide differences in individual fact situations, the differing policies of Board members, and the apparent changing emphasis of the decisions, it is difficult to reconcile the numerous opinions of the Board and to anticipate the weight that may be given by the Board to each factor in new fact situations.

Although decided in May 1946, *The West Coast Case*⁵ is at this writing the most recent and comprehensive new route pronouncement of the Board on domestic new route applications (other than the area cases involving primary local or feeder line services). This case does much to indicate how the Board will treat new route applications during the postwar transition period of development of our national air transport system, and is perhaps illustrative of the treatment the Board may be expected to give the second and third factors. The Board, by a three to one decision, denied Western Air Lines' application for a route competing with United Air Lines between the enlarged traffic-producing cities of San Francisco, Portland and Seattle. It held, that in this case, financial and economic considerations outweighed the desirability of competition. The first factor (benefit to the public)⁶ which is usually concerned with such matters as single plane service, non-stop service, shorter routes, greater convenience to the users, etc., was not of great relevance in this opinion. The case was re-opened and decision on re-argument had not been handed down at this printing.

The Financial and Economic Factor. This factor divides into two aspects: (a) the diversion of passengers and revenue which the new service would cause to other carriers⁷ and (b) the increased economic security which additional revenue from the new route would bring one of the applicant carriers.⁸ The first aspect was given primary attention in *The West Coast Case*; i.e., the financial effect of the diversion of revenue passengers

⁴ It is well-established that the Board is the sole arbiter of the paramount public interest in domestic cases. *United A.L. v. C.A.B.*, 155 F. (2d) 169 (C.C.A.D.C. 1946). In international cases the Board is the sole arbiter as the President's advisor. *Pan American Airways Inc. v. C.A.B.*, 121 F. (2d) 810 (C.C.A. 2nd, 1944).

⁵ — C.A.B. — (Docket No. 250 et al., May 22, 1946).

⁶ The public benefit factor was important in *Braniff Air., Houston-Memphis-Louisville Route*, 2 C.A.B. 353 (1940); *Eastern A.L., Birmingham-New Orleans Non Stop Service*, 2 C.A.B. 596 (1941); *Braniff Air., Dallas-Kansas City Non Stop Op.*, 3 C.A.B. 19 (1941); *Continental A.L. et al., Texas Air Service*, 4 C.A.B. 215 (1943); *Eastern A.L. et al., Washington Service*, 4 C.A.B. 325 (1943); *American Air. et al., East-West California*, 4 C.A.B. 297 (1943); *Transcontinental & W. A., Detroit-St. Louis Non Stop*, 6 C.A.B. 471 (1945); *Braniff Air., Route No. 15 Restriction*, 6 C.A.B. 515 (1945).

⁷ This factor was important in the following cases: *National Air. et al., Daytona Beach-Jacksonville Op.*, 1 C.A.A. 612 (1940); *Pacific Alaska Airways, Seattle-Juneau Operation*, 1 C.A.A. 683 (1940); *Mid-Cont. Air., Twin Cities-St. Louis Operation*, 2 C.A.B. 63 (1940); *Eastern A.L., Chicago-Nashville Non Stop Op.*, 3 C.A.B. 24 (1941); *Transcontinental & W. A. et al., Detroit-Memphis Service*, 6 C.A.B. 117 (1944); *Western A.L. et al., Denver-Los Angeles Service*, 6 C.A.B. 199 (1944); *Colonial Air et al., Washington-Ottawa-Montreal*, 6 C.A.B. 481 (1945).

⁸ This factor was important in *Continental A.L. et al., Denver-Kansas City Service*, 4 C.A.B. 1 (1942) (Continental strengthened); *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C.A.B. 552 and 4 C.A.B. 633 (1944) (National strengthened); *Transcontinental & W. A. et al., Detroit-Memphis*, 6 C.A.B. 117 (1944) (Mid-Continent strengthened); *Mid Continent Air. et al., Kansas City-New Orleans*, 6 C.A.B. 253 (1945) (Mid Continent further helped); and see note 15 *infra* for cases concerning Western.

which the new services proposed by Western would inflict on United. The majority decided that in the absence of other more important factors (and it found none) it would not expose an established carrier whose financial strength was showing a marked tendency to decline to additional impairment by authorizing a competitive service when the present service was satisfactory. Diversion of traffic has been considered important by the Board because of its view that an economically sound air carrier can render better service and compete more effectively, and also because financial self-sufficiency makes substantial airmail subsidies by the government unnecessary.⁹ The significance of diversion is primarily a matter of degree and has been considered controlling only where substantial. The percent of total revenue passenger mileage diverted held to constitute a substantial divergence has varied from only a few percent to 40% depending on the financial status of the airline affected by the divergence. In *The West Coast Case*, no finding was made as to the percentage of revenue United would lose by competition from Western, although the determination of the probable amount was feasible. Despite the importance generally given to diversion, however, several decisions have limited its significance by declaring that new services and routes would not be denied solely as a protection to a particular carrier or carriers.¹⁰

The dissent of Mr. Josh Lee pointed out that United's declining financial strength merely paralleled that of the air transportation industry generally in 1945 and asserted that general business trends should not be emphasized in determining the over-riding public interest in a coordinated system of air transportation. It is submitted that this view is questionable. In the early part of 1946, the air transportation industry was showing decreasing profits and mounting monthly deficits due to greatly increased operating expenses. This was true of United and most other domestic air carriers.¹¹ Private capital was showing less confidence in airline investments.¹² In this situation the majority of the CAB held that it would be unwise to subject any carrier to further impairment of revenue. More recent data tends to indicate that some carriers are solving their financial problems, but the policy of *The West Coast* opinion in protecting the financial position of a carrier by withholding competition would appear sound until the feasibility of profitable operations is clearly shown.¹³

⁹ However the airlines say, "It is no longer a question of subsidy. The government makes a big profit. It is probable that the results of the fiscal years 1943-1945 inclusive, will have produced a sufficient surplus of airmail revenues over total costs of the service to offset most of the cumulative deficiency of the preceding years." "A Review of Transportation Problems," March 20, 1946, Air Transportation Association of America. The rates of the four largest air carriers is 45¢ per ton mile; for other domestic air carriers it is generally 60¢ and higher. The government pays railroads 28¢ for slower service but charges the public 3¢ per ounce compared to the new 5¢ figure for airmail.

¹⁰ *Continental A.L. et al., Texas Air Service*, 4 C.A.B. 215 (1943); *Braniff Air., Houston-Memphis-Louisville Route*, 2 C.A.B. 353 (1940).

¹¹ *West Coast Case*, Appendix No. 4. Figures available at the time of the decision indicated that only Continental and Mid-Continent were showing a better net revenue position in 1946 than in 1945, and that Continental, Eastern, Hawaiian and Mid-Continent were the only lines of the 20 domestic air carriers that were able to show a profit. But these figures were for January and February only. See note 13, *infra*.

¹² *E.g.* The security underwriters of American Airlines had great difficulty in selling its new security issues in June 1946, an inflationary period when even new companies obtained large financing. *Time Magazine*, Vol. 48 No. 1, July 1, 1946.

¹³ Incomplete reports for 1946 indicate that a number of the airlines may be solving their difficulties. For the 1946 June quarter, United showed a 72¢ a share net income compared to 87¢ for 1945. For the 1946 September quarter, United's profits decreased from \$1,507,155 for 1945 to \$1,502,571 for 1946. For the entire year, it is probable that practically all the carriers will show either substantially lower profits or actual losses, however.

The second aspect of the financial factor is the increased economic security to Western which the additional revenue from the new route operation would bring. A number of previous decisions have been based on the desirability of strengthening weaker carriers, not because of their size, but because of their poor financial and economic status,¹⁴ and several of these cases were concerned with Western.¹⁵ Concurring opinions in some cases have stressed that the revenue and mileage positions of smaller carriers should be built up because any great disparity in size between carriers is not conducive to a balanced transportation system.¹⁶ However, the majority opinions have consistently held that size differential is not controlling in new route cases.¹⁷ In refusing an award to Western because of the diversion to United, although United is a much larger carrier, the Board in *The West Coast Case* affirms the majority policy.¹⁸

The Competitive Factor — On the third factor, the desirability of competition,¹⁹ the conflict between the majority and dissenting doctrines in *The West Coast Case* is illustrative of the Board's changing interpretation of this requirement. The original view of the Board, which the dissent of Mr. Lee followed in *The West Coast Case*, stressed that the policy of regulated competition contemplated by the Act required service over comparable or alternate routes between all major terminals, but not necessarily dupli-

¹⁴ See note 8 *supra*. Similar considerations have motivated commissions in other transportation fields. *Re Chi. and N. W. Ry. Co.*, P.U.R. 1917A 303 (Wis.); *The New England Divisions Case*, 261 U.S. 184, 189 (1923); *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277 (1937); *Contract Carriers, Inc., Common Carrier Application*, 41 M.C.C. 165, 170 (1942); *West Coast Bus Lines, Common Carrier Application*, 32 M.C.C. 619, 633 (1942).

¹⁵ *American Air. et al., East-West California*, 4 C.A.B. 297 (1943); *Transcontinental & W. A., North-South California*, 4 C.A.B. 373 (1943); *Western A.L. et al., Denver-Los Angeles Service*, 6 C.A.B. 199 (1944). And see *Acquisition of Western A.E. by United A.L.*, 1 C.A.A. 739 (1940).

¹⁶ "It seems to be a reasonable conclusion from the experience of rail carriers and air carriers alike that any great disparity in size between carriers is not conducive to a balanced transportation system." *Eastern A.L., Memphis-Greenville Operation*, 4 C.A.B. 429, 438 (1943) (concurring opinion); *Western A.L. et al., Denver-Los Angeles Service*, 6 C.A.B. 199 (1944) (concurring opinion); and see Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. of Pa. L. Rev. 231, 239 (anti-trust field).

¹⁷ *E.g.* "While there is nothing in the Act which requires us to maintain an equality of size or financial strength among the air carriers subject to regulation, the direction in the Act to foster sound economic conditions in air transportation and to improve the relations between and coordinate transportation by carriers makes it necessary that we keep in mind the financial position of carriers since its ability to provide public service will be affected by its financial position." *Northwest Air. et al., Chicago-Milwaukee-New York*, 6 C.A.B. 217 (1944) (majority opinion).

¹⁸ It should be noted that *The West Coast Case* also grants new local and feeder routes to new, small carriers over the protests of both United and Western. This is not inconsistent with the Board's policy that size of a carrier is not controlling. The Board has consistently held that the low traffic potential and marginal character of operation of local and feeder routes is not conducive to satisfactory or efficient operation by trunk line carriers with their large planes and luxury service.

Size is also important in airmail rate cases. Eastern, American, United and TWA have a uniform 45¢ per ton mile rate under this policy, and PCA, Chicago and Southern, Western, Hawaiian, Delta, Northwest, Braniff and National have a uniform 60¢ rate.

¹⁹ Competitive considerations were important in the following cases: *United A.L.-Western A.E., Interchange of Equipment*, 1 C.A.A. 723 (1940); *Export Air., Trans-Atlantic Service*, 2 C.A.B. 16 (1940); *Mid-Cont. Air., Twin Cities-St. Louis Operation*, 2 C.A.B. 63, 93 (1940); *Transcontinental & W.A., North-South California*, 4 C.A.B. 254 (1943); *Northeast Air. et al., Boston Service*, 4 C.A.B. 686 (1943); *Northeast Air. et al., North Atlantic Routes*, 6 C.A.B. 319 (1945).

cating services.²⁰ This competition was supposed to form a yardstick for measuring costs and preventing laxities in the service offered. The second view of the Board enunciated a strong but not conclusive presumption that competition is mandatory on any route which offers sufficient traffic to support competing services without an unreasonable increase in operating cost.²¹ Under this view Western would undoubtedly have received the award in *The West Coast Case* as it was shown that traffic along the West Coast was as great as several eastern routes which supported several carriers. A transition to the present view took place in *The Boston Service Case*.²² The concurring opinion of that case, which the majority in effect accepts as its philosophy in *The West Coast Case*, correctly pointed out that the use of a "presumption" was erroneous and that the regulated competition envisioned by Congress was not necessarily required to be fulfilled by duplicating, comparable or alternate services between major terminals, but that the "spirit of emulation" which spreads to routes that do not have direct competing service will usually provide sufficient competitive incentive.²³ The competitive factor is therefore now of equal importance with the financial factor and the public benefit factor; affirmative evidence must be presented to establish any one factor as paramount.

The Public Benefit Factor — The remaining and often foremost factor, the benefit to the public from the new service, was not of great importance in *The West Coast Case* and may best be illustrated by reference to the *Denver-Los Angeles Case*.²⁴ Prior to this opinion, transcontinental passengers to Los Angeles had the choice of through plane single company service by American and TWA, or of connecting service at Salt Lake City with Western's Route No. 13 to Los Angeles and United's Route No. 1 to the East.²⁵ About 41% of Western's total revenue passenger mileage came from transcontinental passengers using Route No. 13, and this revenue helped support Western's less profitable routes. It was estimated that about 80% of the total traffic expected to use United's proposed route from Denver to Los Angeles would be transcontinental. Hence, Western contended that if United were awarded the new route, these transcontinental passengers would be diverted from their Route No. 13 to United. On the other hand, United contended that the passengers on this transcontinental route obviously would prefer through service by United rather than having to

²⁰ *United A.L.-Western A.E., Interchange of Equipment*, 1 C.A.A. 723 (1940), *Export Air., Trans-Atlantic Service*, 2 C.A.B. 16, 34 (1940); *Mid-Cont. Air., Twin Cities-St. Louis Operation*, 2 C.A.B. 63, 93 (1940).

²¹ *Transcontinental & W.A., North-South California*, 4 C.A.B. 254 (1943); *Colonial Air. et al., Atlantic Seaboard Op.*, 4 C.A.B. 552 (1943).

²² *Northeast Air. et al., Boston Service*, 4 C.A.B. 686 (1944).

²³ The concurring opinion in the *Boston Service Case* quoted the Report of Federal Aviation Commission, January, 1935, 61-62: "We have been fully convinced by all we have seen and heard that the present high quality of American air transport is due in large part to the competitive spirit that has existed throughout its development. There has been little direct point-to-point competition on identical routes, and what has existed has been comparatively unimportant. Of much greater benefit has been the availability of two or more alternative routes, served by different companies, between widely separated centers . . . Perhaps of even greater importance, however, is the spirit of emulation that exists even between organizations that could not by any conceivable possibility be in direct competition with each other. If any airline running from coast to coast acquires faster and more comfortable airplanes, it takes but little time for the patrons of a line running up and down the Mississippi Valley to complain if it fails to make the same advances."

²⁴ *Western A.L. et al., Denver-Los Angeles Service*, 6 C.A.B. 199 (1944).

²⁵ TWA received the majority of this business, while the United-Western connection generally secured less than 15% of the passengers. Before the war, day passengers had to change planes at Salt Lake City while on sleeper planes the passengers remained aboard and the carriers changed crews. *United A.L.-Western A.E., Interchange of Equipment*, 1 C.A.A. 723 (1940). The Denver-Los Angeles route had not been flown previously chiefly because of the lack of aircraft which could easily fly over the mountainous area.

change planes at Denver, and the public interest thereby would be better served by a decision for United. The Board's opinion, recently affirmed by the Court of Appeals,²⁶ held that the public interest in maintaining Western as a strong regional carrier was paramount to the public interest represented by the convenience of the great majority of persons who would use this new route.²⁷

The above discussion attempts to analyze how the Board weighs the three principal factors — the Public Benefit Factor, the Financial and Economic Factor, and the Competitive Factor — to determine which is paramount according to the particular facts involved. The flexibility of the Board's formula is demonstrated by pointing out that new facts in both the *West Coast* and *Denver-Los Angeles* cases could lead to reversal without any change in standards by the Board. For example, if Western demonstrated that United's profit position is strong enough to stand the diversion of competing service, the Board could hold that the desirability of competition outweighed the financial factors. And at the same time, such additional routes might give Western increased financial security to withstand the diversion caused by giving United a through transcontinental route to Los Angeles. With the four engine long range aircraft now available to the airlines, the public benefit from through-plane-one-company service is even more apparent,²⁸ and recent statements by Chairman Landis indicate that he realizes that the DC-3 pattern of domestic air routes is clearly unsuitable for operation with the more modern equipment.²⁹ Thus in awarding certificates of convenience and necessity for new routes, the Board's function is primarily the analysis of complex factual situations to determine which factor at that time represents the paramount public interest.

E. V. Jr.

²⁶ *United A.L. v. C.A.B.*, 155 F. (2d) 169 (C.C.A.D.C. 1946).

²⁷ This was contrary to the Examiner's opinion that "while the route will have a serious adverse effect upon Western, the record demonstrates that the benefits which can be secured by the transcontinental operation will outweigh the disadvantages to Western." The Examiner's Report, p. 28, *The Denver-Los Angeles Case*.

²⁸ *American Air., Consolidation of Routes*, — C.A.B. — (Docket No. 932 *et al.*, Sept. 23, 1946).

²⁹ These speeches by Mr. Landis were given on December 12 and 13, 1946, at the Harvard Club of Washington and the Harvard Law School Forum in Cambridge. See *American Aviation Daily*, Vol. 48, page 215.