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JUDICIAL AND REGULATORY DECISIONS

JUDICIAL REVIEW: SEPARABILITY OF CERTIFICATION UNDER SECTION 801 FROM ACQUISITION UNDER SECTION 408

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AMONG the problems presented by the Civil Aeronautics Board's treatment of the *North Atlantic Route Transfer Case*¹ was one involving a further manifestation of the interaction of functions of the President and the Board under Section 801.² In the landmark case of *Chicago & Southern Air Lines v. Waterman Steamship Corp.*,³ the Supreme Court held that an order granting or denying application for certificate of convenience and necessity to engage in foreign air transportation, which is subject to the approval of the President under Section 801, may not be subjected to judicial review under Section 1006.⁴ An application and extension of this rule is to be found in *Trans World Airlines v. Civil Aeronautics Board et al.*,⁵ the most recent development in the North Atlantic Route determinations.

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¹ Prior to 1940, Pan American was the only air carrier authorized to engage in foreign and overseas transportation over the North Atlantic Route. The first competition came from American Overseas Airlines (formerly American Export Lines). American Export Air, Transportation Service, 2 C.A.B. 16 (1940). In 1944, after determination of postwar routes, other carriers were invited to submit applications for the various routes, resulting in the issuance of a third certificate of public convenience and necessity to Trans-World Airlines, Northeast Air, et al., North Atlantic Routes, 6 C.A.B. 319 (1945). In 1948, PAA and AOA instituted a proceeding with the CAB to obtain approval of a proposed acquisition by PAA of AOA; the proceeding was consolidated with other proceedings, and denominated the North Atlantic Route Transfer Case (Docket No. 3589 et al.). TWA was permitted to intervene, to oppose the acquisition.

² 52 STAT. 1014 (1938), 49 U.S.C. §601 (Supp. 1951): "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 482, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of a certificate issuable under section 481 (e) or any permit issuable under section 482 (c) or to the original terms, conditions, or limitations of any such certificate or permit."

³ 333 U.S. 103 (1948); reversing *Waterman Steamship Corp. v. CAB*, 159 F. 2d 828 (5th Cir. 1947), note 24 *infra*.

⁴ 52 STAT. 1024 (1938), 49 U.S.C. 646 (a) (Supp. 1951): "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this chapter, shall be subject to review by the circuit court of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

⁵ 184 F. 2d 66 (2d Cir. 1950). Other respondents joined with the CAB were PAA, AOA, and American Airlines (the latter owns a majority of AOA's stock). This cause was joined with *Sparks et al. v. Civil Aeronautics Board*, in which the petitioners, employees of PAA and AOA, moved to stay discharges which would result from the acquisition. Like instant case, the petitions were dismissed for want of jurisdiction. The *Sparks* petitioners only sought review (filed 19 U.S.L. WEEK 3235, March 5, 1951).

In 1948 Pan American (PAA) and American Overseas (AOA), both holding certificates to engage in air transport over the North Atlantic, instituted proceedings before the CAB to obtain approval of a proposed acquisition by PAA of AOA. The acquisition of control was to be accomplished by (1) PAA's acquisition of AOA's property, business and assets under Section 408⁶ of the Act, and (2) a transfer to PAA of AOA's certificate of public convenience and necessity under Section 401 (i).⁷ The Board's final order⁸ approving the acquisition was then approved by the President. On review, TWA argued that if the acquisition were allowed its competitive position would be injured, and that the procedure followed by the Board in promulgation of the order was improper.⁹ Respondents, relying on the *Waterman* holding, contended that review under Section 1006 is not available in instances in which Presidential approval is required under Section 801. Conceding that the *Waterman* rule was applicable to the issue of judicial review as to certification, TWA pointed out that the order relating to acquisition of assets, covered by Section 408, was not within Section 801, and would thus be the proper subject of review. The court concluded, however, that where the acquisition and certification are "inextricably mingled in the same proceeding," the Congressional purpose in granting discretion to the President as to foreign transport would be thwarted if judicial review were permitted.¹⁰

The basic point of conflict arises with the granting of power to Congress to regulate commerce with foreign nations,¹¹ as against the President's responsibility for the proper conduct of our foreign relations.¹² In the area of issuance of certificates, the determination, based upon the Board's technical and expert knowledge of the field, is submitted to the President prior to publication. In this respect, the CAB, as was suggested in the *Waterman* case, is acting as a body of investigators who assist the President in obtaining the needed data.¹³ To this data is then added the confidential information from diplomatic sources. The need for interposition of the President at this point cannot be fully appreciated without an understanding of the significance of foreign air transportation in our international policy and national defense.¹⁴ To carry on such commercial service today of necessity involves the machinery of diplomatic negotiation for access to, landing rights

⁶ 52 STAT. 1001 (1938), 49 U.S.C. §488 (Supp. 1951).

⁷ 52 STAT. 989 (1938), 49 U.S.C. §481(i) (Supp. 1951).

⁸ Prior to the final order, which is the subject of this note, the Board originally had denied the application on June 1, 1950. The President approved the order on June 29, 1950, and returned it to the Board with his signature affixed. The next day, prior to publication, the President recalled his approval, and ordered the Board to approve the acquisition, with which it complied on July 10, 1950. TWA and Sparks et al. argued, inter alia, that the original order became effective the day the President signed it, that the subsequent order was ineffective for want of notice and hearing, and, as such, was a violation of due process. The court, however, held that the finality of the order depended on approval by the President, the final arbiter. 184 F. 2d 66, 71 (2d Cir. 1950).

⁹ Note 8 *supra*.

¹⁰ 184 F. 2d 66, 71 (2d Cir. 1950).

¹¹ U.S. CONST. Art. I, §8.

¹² U.S. CONST. Art. II, §§1 and 2. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (with authorization from Congress, President issued embargo on export of arms); *Prize Cases*, 2 Black 625 (U.S. 1862) (without authorization by Congress, President proclaimed blockade).

¹³ *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Hampton & Co. v. United States*, 276 U.S. 394 (1928).

¹⁴ "Congress may of course delegate very large grants of its power over foreign commerce to the President . . . The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are

in, and other privileges of the air over foreign countries furthermore, full disclosure of such data would serve only to imperil the national defense, and resolution of a foreign policy, infused with elements of prophecy, would otherwise be thwarted.¹⁵ Notwithstanding the strong policy arguments in favor of denying review under circumstances in which the President's discretion is involved, it is to be noted that, while the *Waterman* case was concerned specifically with the type of certification problem to which the Congress directed its attention in enacting Section 801,¹⁶ an added factor, that of acquisition of physical assets, not involved in the *Waterman* case, is the crux of the problem in the *Trans World* case.

Closer analogy to the fact-situation in *Trans World* might thus be found in *Pan American Airways Co. v. Civil Aeronautics Board et al.*¹⁷ In an action based upon a CAB order granting a certificate, but dismissing an application for acquisition of control,¹⁸ the court refused to review the certification, but as to the acquisition, held that such order did not require Presidential action under Section 801, for its validity "depends, in the case of the order dismissing the application under Section 408, upon questions in which the discretion of the President is not involved . . ."¹⁹ Although finding nothing inconsistent in the situation where the certificate is issued prior to approval of the acquisition, or even where the acquisition has been refused,²⁰ the court went on to reverse and remand the Board's action under Section 408. While, on its face, it appears to be strong precedent for separability of certification and acquisition, distinguishing factors are apparent. The *Pan American* court cited with approval the holdings of the ICC, in cases arising under the Motor Carrier Act, as standing for the proposition that the Board is not required to withhold the certificate until it has approved the acquisition of control, and that the issue as to whether the use of the mode of transport will promote the public interest relates only to the approval of the acquisition, and not to the certificate. The value of such an analogy in this area today is somewhat dubious, in light of the adamant refusal of the *Waterman* court to accept a comparison of decisions simply because the holdings were made in another phase of the transportation industry.²² Secondly, the fact that the prospective transferee was a steam-

pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." *Waterman*, note 3 *supra*, U.S. 103, 109 (1948). See also §802 (52 STAT. 1014, (1938) 49 U.S.C. §602 (Supp. 1951); prescribing the role of the Secretary of State in negotiations with foreign governments for establishment and development of air navigation.

¹⁵ *Waterman*, note 3 *supra*, 303 U.S. 103, 111 (1948).

¹⁶ 83 CONG. REC. 6853-6854, 6858-6859 (1938). *Hearings Before Committee on Interstate and Foreign Commerce, H.R. 9738, 75th Cong., 3rd Sess. (1938)*, at 38, 40, 146.

¹⁷ 121 F. 2d 810 (2d Cir. 1941).

¹⁸ American Export Airlines, a subsidiary of American Export Lines, applied to the CAB for a certificate of convenience and necessity authorizing it to operate by air between the United States and Portugal, and for an order of approval of acquisition of control by the parent corporation. The CAB granted a temporary certificate, but dismissed the application on acquisition. The court, in affirming on review, felt that if it reviewed the action of the Board, it would "be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President might decline to approve." 121 F. 2d 810, 814 (1941).

¹⁹ 121 F. 2d 810, 815 (1941).

²⁰ "We find no provision in the Civil Aeronautics Act requiring the Board to withhold certificates until after approval of the control . . ." 121 F. 2d 810, 816 (1941).

²¹ 121 F. 2d 810, 815-816 (1941).

²² *Waterman*, note 3 *supra*, 303, U.S. 103, 106-108 (1948). Although this dicta would not serve to refute the well-established analogies among the various transportation fields as to tort, contract, and property concepts, the *Waterman* case would seem to indicate that the overlapping does not extend to the field of administrative law.

ship company, for which Section 408 does not require an approval of acquisition, or that it involved the acquisition by a subsidiary corporation of its parent rather than of one air carrier by another, might serve to render the *Pan American* case of little value; however, no basis for such arguments may be found in the precedents. Lastly, the basic vitality of the *Pan American* case must rest on the extent to which the *Waterman* case has nullified its effect. Although only the certification issue arose in the *Waterman* case, the question is still open as to how that court, divided 5-to-4, would have handled the problem of acquisition. Certainly the *Trans World* case, arising in the same circuit as the *Pan American* case, would appear to have reversed the earlier case on the basis of what the *Waterman* case might have held; otherwise, there is no basis on which to reconcile the transformation from a view of complete severability to the present view that the issues are "inextricably mingled." However, this argument would presuppose that *Waterman* overruled *Pan American*. On the contrary, the *Waterman* case was reviewed to resolve a conflict²³ between the 5th circuit²⁴ and the *Pan American* case, the Supreme Court reversing the 5th circuit.

Assuming, therefore, that the *Pan American* case continues to stand for the proposition that there are fact situations in which the President's discretion is not controlling, the next inquiry is as to the nature of those areas, based on both the statute and policy considerations. The test would seem to be the extent to which the participation of the President is allowed on the consideration of his responsibility for the integrity of our foreign affairs. In the *Waterman* case, the Solicitor General conceded that circumstances might arise where judicial review would be appropriate.²⁵ The various conditions precedent to issuance of a certificate, such as public notice and hearing under Section 401 (c),²⁶ and the requirements as to the terms and conditions of the certificate under Section 401 (f),²⁷ would constitute appropriate Board action, and therefore be reviewable. The *Waterman* court also assumed that its opinion was limited to orders of the Board which arise "by proceedings not challenged as to regularity."²⁸ The dissent was also concerned particularly with the possibility of lack of control over the Board's acting in a lawless manner.²⁹ As a further example of the argument that Section 801 does not give the President control over all such orders is the authority to issue orders fixing mail rates payable to both domestic and foreign carriers, which is vested exclusively in the Board under Section 406.³⁰

²³ *Waterman*, note 3 *supra*, 303 U.S. 103, 105 (1948).

²⁴ *Waterman Steamship Corp. v. Civil Aeronautics Board*, 159 F. 2d 828 (5th Cir. 1947). Upon the CAB's denial of *Waterman's* application for certification, *Waterman* appealed. The 5th Circuit disclaimed any power to review the President's action, but regarded any Board order as incomplete until court review, after which the completed action must be approved by the President; accordingly, it refused to dismiss and asserted jurisdiction.

²⁵ Government's Brief, pp. 52-53.

²⁶ 52 STAT. 987 (1938), 49 U.S.C. §481(c) (Supp. 1951).

²⁷ 52 STAT. 988 (1938), 49 U.S.C. §481(f) (Supp. 1951). (The certificate must permit the handling of foreign mail, but may not restrict the right of the carrier to add to or change schedules.) However, this exception is covered specifically in the last sentence of §801, note 2 *supra*.

²⁸ *Waterman*, note 3 *supra*, 303 U.S. 103, 105 (1948). This language construction was affirmed in *Seaboard & Western Airlines v. Civil Aeronautics Board*, 181 F. 2d 777 (D.C. Cir. 1949). This is the crux of argument in the *Trans World* case as to the regularity of the two orders issued by the Board (see note 8 *supra*).

²⁹ "Presidential approval cannot make valid invalid orders of the Board." *Waterman*, note 3 *supra*, 303 U.S. 103, 116 (1948). "The Board can act in a lawless way. With that in mind, Congress sought to preserve the integrity of the administrative process by making judicial review a check on Board actions." 303 U.S. 103, 117 (1948).

³⁰ 52 STAT. 998 (1938), 49 U.S.C. §486 (Supp. 1951).

For purposes of the *Trans World* case, however, the question looked more to the problem of separability than to that of regularity. The argument suggested³¹ would construe the final order as a dual entity: a statement by the Board that the carrier is fit, willing and able to fly the route, which the Board deems demanded by public convenience and necessity, and a statement by the President that the operation of the route has been coordinated with our foreign policy. The statutory standards³² required by the former would put the court in a position to settle that question conclusively, regardless of the President's determination on the latter. Petitioners in the *Trans World* case pointed out that in practice the Board had issued several orders without making them subject to, or obtaining, Presidential approval, even though overseas, foreign or territorial air transport was involved;³³ in answering this argument, the CAB pointed out that these were the result of a mere inadvertent failure rather than a conscious refusal to submit the orders to the President, and were decided before the *Waterman* case, which focused attention on the issue. The court rejected TWA's contention without discussion. In any event, the Board today, considering itself bound by the President's action in such instances, would be reluctant not to act in accordance with the *Waterman* view of the scope of authority of the President.³⁴ It is at this point that the problem arises: how far will the Board tend in submitting matters to the President, so as to conform to the "inextricably mingled" test.

To achieve separability, the proper line of inquiry might better be based on pure administrative policy considerations. Thus in the *Trans World* case, TWA might have succeeded by attempting to distinguish the factors and standards requisite for issuance of a certificate, on the one hand, and those for approval of an acquisition, on the other. When the Board passes on a certificate, it must determine that the carrier is fit, willing and able to perform such transportation properly. In deciding whether the standard is met, the factors involved are whether a useful public service, responsive to a public need, will be served thereby, whether this purpose can be served adequately by existing facilities, whether the cost to the government will be outweighed by the benefit which will accrue to the public from the new service, and whether the applicant can serve the purpose without impairing the operations of existing carriers.³⁵ The President must thus be bound, to some extent, by some of the same considerations. In passing on an application for acquisition, however, the Board looks to the standards of public interest set forth in Section 2,³⁶ weighs the factors of competition and

³¹ 15 J. AIR L. & C. 474, 477 (1948).

³² "Those orders which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down." *Waterman*, note 3 *supra*, 303 U.S. 103, 109 (1948).

³³ National-Caribbean-Atlantic Control Case, 6 C.A.B. 671 (1946) (application denied); American Airlines, Control of American Export Airlines, 6 C.A.B. 371 (1945) (approved); Acquisition of Cordova Air Service, by Alaska Airlines, 4 C.A.B. 708 (1944) (denied both acquisition and certification); American Export Airlines, Inc.-American Export Lines-Control-American Export Airlines, 3 C.A.B. 619 (194) (denied); Marine Airways, Alaska Air Transport-Consolidation, 3 C.A.B. 315 (1942) (approved); Wien Alaska Airlines-Acquisition of Mirow Air Service, 3 C.A.B. 207 (1941); Pan American Airways-Acquisition of Pan American Airways-Africa, Ltd., 3 C.A.B. 32 (1941) (approved).

³⁴ In the *TransWorld* case, early in the proceedings, in its order establishing the scope of the issues, the Board indicated that its order would be submitted to the President for his approval. Order No. E-2833 (R. 158, 161). See also *Pacific Northwest Hawaii Service* case, 9 C.A.B. 414 (1948); *Additional Service to Latin America*, 6 C.A.B. 857 (1946).

³⁵ 14 GEO. WASH. L. REV. 611 (1946); 15 J. AIR L. & C. 480 (1948).

³⁶ 52 STAT. 980 (1938), 49 U.S.C. §402 (Supp. 1951). "Public interest" as used in the Act is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives, including those set forth in Section 2 of the Act which directs the Board, in the exercise and performance of its powers

monopoly, the need for a balanced system, and price, and arrives at a balancing conclusion.³⁷ The distinction is most readily apparent from a consideration of the factor of price. As a rule, the Board has taken a liberal attitude toward price, but will disapprove an acquisition if found to be excessive. Thus, as in the *Pan American* case, the carrier could be certified, but not have the wherewithal, the physical assets, with which to operate the route. To obviate this inconsistency, however, the CAB could follow its approach in the *Mayflower*³⁸ case, where the Board issued a conditional approval, approving the purchase *and* the transfer of certificate on the condition that the purchase price would not exceed a certain amount. While there was an initial reluctance to approve the price of assets other than those of a physical nature,³⁹ there is now adequate authority for including such intangibles as goodwill and prospective earnings in the purchase price.⁴⁰ Were such operating rights given an independent value, as within the concept of property, it would violate all earlier holdings to the effect that a certificate of convenience and necessity is in the nature of a permit or license, personal in nature, rather than a property, contract, or franchise right.⁴¹

These are the considerations inherent in determination of an acquisition which are not necessarily the proper subject-matter to be raised in analysis of whether or not a certificate should be issued. Once severability is conceived, the interaction of Sections 801 and 1006 should create no further obstacle. In the final House bill, Section 1006 provided for review of ". . . any orders . . . except those not properly subject to review by the courts of law." Prior to enactment, Congress substituted the present provision limiting the exemption from review to orders affecting foreign air carriers. Notwithstanding the extension of the *Waterman* case, this change would seem to have indicated an intent that all other orders be open to the courts. To avoid Presidential control over *all* phases of foreign, overseas and territorial air commerce, contrary to the intent of Congress, Section 1006 must be so construed; otherwise, only the Congress, by amending Section 801 so as not to include Sections 408 and 406, can avert the nebulous test of holding issues "inextricably mingled."

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and duties under the Act, to consider, among other things, as being in the public interest." *United Air Lines Transport Corp.-Acquisition of Western Air Express Corp.*, 1 C.A.A. 739 (1940); *Braniff Airways, Inc., et al., Acquisition of Aerovias Braniff, S.A.*, 6 C.A.B. 947 (1946). It might be argued, however, that the concept of public interest is to be found in certification also. See §§401(i) and 412(b) (52 STAT. 989 (1938)), 49 U.S.C. §481(i) (Supp. 1951), and 52 STAT. 1004 (1938), 49 U.S.C. §492(b) (Supp. 1951).

³⁷ Woods, *What are the Considerations of the Board in an Application for Acquisition of Assets?* 37 GEO. L. J. 66 (1948). For balancing of factors, see *American Airlines-Acquisition of Control of Mid-Continent Airlines*, 7 C.A.B. 365 (1946).

³⁸ *Acquisition of Mayflower Airlines, by Northeast Airlines*, 4 C.A.B. 680 (1944) (The transferee was willing to pay more, but the Board limited the price to \$10,000).

³⁹ *Acquisition of Marquette by TWA*, 2 C.A.B. 1 (1940).

⁴⁰ *Western-United, Acquisition of Air Carrier Property*, 8 C.A.B. 298 (1947); *Acquisition of Marquette by TWA*, 2 C.A.B. 409 (1940). Criticized strongly in 48 COL. L. REV. 88 (1948), 61 HARV. L. REV. 523, (1948), 15 U. OF CHI. L. REV. 343 (1948).

⁴¹ *Cannonball Transportation Co. v. American Stages*, 53 F. 2d 1051 (S.D.E.D. Ohio 1931); *In re Moritz*, 174 Neb. 400, 23 N.W. 2d 545 (1948). The argument in the dissent in the *Western-United* case, note 40 *supra*, that the certificate is a public grant, and cannot be assigned value as such, is consistent with these cases. Furthermore, §401(f) of the Act (52 STAT. 990 (1938)) 49 U.S.C. 481(j) (Supp. 1951) provides that: "No certificate shall confer any proprietary property, or exclusive right . . ."

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