

1952

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### Recommended Citation

Leila M. Foster, *Mutually Exclusive Applications and the C.A.B.*, 19 J. Air L. & Com. 366 (1952)  
<https://scholar.smu.edu/jalc/vol19/iss3/9>

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# JUDICIAL AND REGULATORY DECISIONS

Department Editor: Leila M. Foster\*

## MUTUALLY EXCLUSIVE APPLICATIONS AND THE C.A.B.

**I**N *Northwest Airlines, Inc. v. CAB*,<sup>1</sup> Northwest successfully secured a reopening of the proceedings on a new route case and the consolidation of its application with those of its competitors.

The Board had originally instituted a proceeding to determine whether Capital Airlines, Inc. should be granted a certificate to operate nonstop flights between Cleveland and New York.<sup>2</sup> American Airlines' application for the same route was consolidated on formal motion. Following hearings, the examiner recommended the grant of Capital's application. Northwest filed an exception to the examiner's report expressly objecting to the grant without the consolidation of its own application for the same route, which had been pending at the time the Board instituted the original proceeding.

Upon judicial review the Board contended that as the grant to Capital was not a new route, the grant could be made without first hearing Northwest's application. The Board also asserted its grant to Capital and the application of Northwest were not mutually exclusive<sup>3</sup> so that a comparative hearing<sup>4</sup> was not necessary. But even if these applications were mutually exclusive, the Board claimed it was under no duty to grant a consolidated hearing<sup>5</sup> as Northwest did not make a timely petition.

The Court of Appeals for the District of Columbia rejected the Board's contentions and reached a contrary holding. The court set aside the grant to Capital and remanded the case to the Board with instructions that the proceedings be reopened and Northwest's application be consolidated.

Except for the issue of timeliness, the Northwest case presents a factual situation as close to being on all fours with *Ashbacker Radio Corp. v. FCC*<sup>6</sup> as is possible under the Civil Aeronautics Act.

In the *Ashbacker* case two applicants, Fetzler and Ashbacker, had applied for the same broadcasting frequency. The Commission held that because simultaneous operation on the same frequency would result in intolerable electrical interference to both, the two applications were mutually exclusive. Fetzler's application was granted and Ashbacker's was designated for a hearing. Upon review of this action all of the judges of the Supreme Court agreed that when the grant of one application foreclosed the grant of another, the subsequent hearing to the latter required by the statute became a mere formality. The members of the Court parted company, however, on the question of whether or not a grant must be withheld in its entirety until both applicants had been heard. The minority was of the opinion

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<sup>1</sup> *Northwest Airlines, Inc. v. C.A.B.*, 194 F. 2d 339 (D.C. Cir.), 1952 U.S. Can. AvR 80.

<sup>2</sup> *Milwaukee-Chicago-New York Restriction Case*, 11 C.A.B. 310 (1950).

<sup>3</sup> Applications are mutually exclusive when the grant of one forecloses the grant of another or when the Board determines that certifying more than one carrier would result in competition deemed undesirable in the public interest due to the effect on existing carriers or on the applicants themselves.

<sup>4</sup> Comparative hearing: A hearing for the purpose of comparing the merits of one or more applications with applications considered in another hearing.

<sup>5</sup> Consolidated hearing: A hearing embracing two or more conflicting or non-conflicting applications.

<sup>6</sup> *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945).

that the statute did not preclude a conditional grant if the agency found the public interest would be furthered by making the service available as soon as possible;<sup>7</sup> the majority felt that Congress intended mutually exclusive applicants to receive an equal opportunity to obtain the grant. In effect, the Court extended mutually exclusive applicants the same right as applicants generally, the right to receive a hearing for an available license, in holding that when two bona fide applications<sup>8</sup> are mutually exclusive, one cannot be granted without a hearing to both.

In the Northwest case the following factors similar to those of the Ashbacker case were present:

- (1) A new route proceeding<sup>9</sup>
- (2) Mutually exclusive applications
- (3) The grant of one mutually exclusive application without a hearing to both
- (4) A timely petition for a hearing

The decision in *Seaboard & Western Airlines v. CAB*<sup>10</sup> emphasizes the importance in an Ashbacker situation of (1), a new route proceeding. Seaboard sought consolidation of its application for a North Atlantic route with a hearing on the proposed merger of Pan American Overseas Airlines. The plaintiff alleged that a consideration of the entire North Atlantic pattern was involved in the merger hearing and a decision in that case might determine the disposition of its application. The Board contended that it proposed to consider the North Atlantic pattern only as it might make reallocation of existing routes between the existing carriers a condition to its approval of the merger and that such reallocation would not affect in any way the disposition of Seaboard's application. The court sustained the Board's refusal to consolidate on the ground that the proceeding was merely for the modification of existing certificates and not to fix new routes.<sup>11</sup>

The case of *Eastern Air Lines v. CAB*<sup>12</sup> points up the significance of factor (2), mutually exclusive applications. Eastern endeavored to secure consolidation of its application containing a large amount of service not local and feeder line type in character with the New England case, a proceeding involving local and feeder service only. Eastern asserted that failure to receive consolidation would result in a denial of a hearing on those services in its application which conflicted with those in the process of hearing. The Board contended that since there were many over-lapping applications in its files, consolidation was of necessity a matter of administrative judgment.<sup>13</sup> The court refused to order consolidation but stated, "we have no reason to suppose the Board will grant any certification

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<sup>7</sup> As a practical matter, the assurance necessary to encourage the first applicant to go forward with his service would most likely fatally prejudice the second's chance of displacing him.

<sup>8</sup> Applications which, if considered alone, might be granted. *Simmons v. F.C.C.*, 145 F. 2d 578 (1944).

<sup>9</sup> A new route proceeding may embrace not only the applications of a new company for a new service or applications of established airlines for entirely new extensions, but also applications of established carriers to add new cities to existing routes. *Westwood, Procedure in New Route Cases before the Civil Aeronautics Board*, 14 J. AIR L. & COM. 267 (1947).

<sup>10</sup> *Seaboard & Western Airlines v. C.A.B.*, 181 F. 2d 777, 1950 USAvR 520 (1949).

<sup>11</sup> A similar issue will arise if the Board contends that the proceeding involves a mere improvement in existing routes.

<sup>12</sup> *Eastern Air Lines v. C.A.B.*, 178 F. 2d 726, 1950 USAvR 55 (1949).

<sup>13</sup> In the *Southeast States Case* consolidation, virtually every application embraced in substance all or a part of the proposals of one or more applicants. *Southeast States Case*, Supp. Opinion, 8 C.A.B. 716 (1947).

for those routes in the New England case, or without considering Eastern's application. It follows that the Board's order denying consolidation does not foreclose petitioner as to any route covered by its application." As this language indicates, when applications are mutually exclusive as to only some of the routes applied for, the applicant may be entitled to a comparative hearing.<sup>14</sup> A half way point between including or excluding such applications in a consolidated hearing is to require severance of those routes not mutually exclusive.

The Court of Appeals of the District of Columbia is not alone in attaching importance to factor (3), the grant of one mutually exclusive application without a hearing to the other. In *Western Air Lines v. CAB*,<sup>15</sup> Western sought a stay of administrative proceedings in the South-West Renewal-United Suspension and West-Coast Renewal-United Suspension cases. Plaintiff also asked for review of a Board order denying its petition for consolidation into one hearing of those cases with its own application for the same routes. The Board contended that its refusal to consolidate had not denied any right of the plaintiff's and that consolidation would unduly delay the proceeding then in progress. The Court of Appeals of the 9th Circuit found the applications mutually exclusive because the Board did not intend to duplicate the routes, but held that inasmuch as the Board had not renewed the conflicting certificates and thus foreclosed a hearing to the plaintiff, the Ashbacker doctrine did not apply.

Factor (4), a timely petition for a hearing, is largely a matter of compliance with the Board's practices.<sup>16</sup> But when the Board is informed of an applicant's desire to have a hearing in some less formal fashion, strict compliance with the Board's practices may not be necessary.<sup>17</sup>

As long as the aviation route system continues to develop, the CAB will be faced with an ever-growing problem of disposing of mutually exclusive applications. Litigation of the last few years has not completely defined all the situations which result in a denial of an applicant's right to a hearing. Current disputes being carried to the federal courts are indicative of future decisions weighing the need for flexible and efficient administrative procedures against the need for protection of the right of an applicant to the fair hearing to which he is entitled.<sup>18</sup>

The Northwest case represents the first decision in which the courts have forced the Board to reopen a hearing and consolidate the application of an excluded carrier. In the fact situation of that case all of the following elements were present: (1) a new route proceedings, (2) mutually exclusive applications, (3) a timely petition for a hearing, and (4) a final grant without a hearing to both applicants. With the increase in aviation cases involving an Ashbacker problem, we may expect a more definite statement of the content and the importance of each of these elements.

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<sup>14</sup> In a case involving a new route application, a final grant, and timely request for a hearing, it is possible by a variation in the element of mutual exclusiveness to reach three different results: (a) When the application is mutually exclusive in its entirety, consolidation will be required. (b) When the application is mutually exclusive in part only, a comparative hearing may be required. (c) When the application contains no element of mutual exclusiveness, neither consolidation nor a comparative hearing will be required.

<sup>15</sup> *Western Air Lines v. C.A.B.*, 184 F. 2d 545, 1950 USAvR 456 (1950).

<sup>16</sup> Counsel informs us that it is the practice of the examiner to specify a period of ten days after the prehearing conference as the time within which new applications may be filed and considered for consolidation. *Western Air Lines v. C.A.B.*, *supra*, note 13, at 551.

<sup>17</sup> It would be harsh indeed to deny the applicant a fundamental right simply because of the informality of his approach. *Northwest Airlines, Inc. v. C.A.B.*, *supra* note 1, at 345.

<sup>18</sup> See *Air Transport Assn., Inc. v. C.A.B.*, petition for certiorari, 20 U.S. L. WEEK 3338; — U.S. — (1952).