

1952

Judicial and Regulatory Decisions

Recommended Citation

Judicial and Regulatory Decisions, 19 J. AIR L. & COM. 481 (1952)
<https://scholar.smu.edu/jalc/vol19/iss4/7>

This Current Legislation and Decisions is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

JUDICIAL AND REGULATORY DECISIONS

THE K.L.M. ACCIDENT AT FRANKFURT IN 1952— ANALYSIS OF APPLICABLE LIABILITY LAW

ON March 22, 1952, a KLM airliner fell near the Rhein-Main Airport at Frankfurt on the Main, in the USA Zone of Western Germany. Assessor Dr. jur. Hans Achtnich contributed an analysis of the legal aspects to the *Zeitschrift fuer Luftrecht*, (1952) vol. 1, pages 323-346, of which the following is an abstract.

The plane, a DC-6, was on a scheduled flight from Johannesburg (in the Union of South Africa) via Kano (in Nigeria), Rome (in Italy) and Frankfurt (in Western Germany) to final destination Amsterdam (in The Netherlands). Two persons survived: a stewardess on duty and a stewardess off duty travelling on a complimentary free pass with her husband, who was not an employee. 45 persons died. Ten were crew members. One was an employee travelling on company business on a free ticket from Johannesburg to Amsterdam. One was the complimentary free-pass husband of the off-duty stewardess from Rome to Frankfurt. The other 34 were pay passengers, eleven ticketed to Frankfurt and the other 23 to Amsterdam.

The cause of the accident was apparently a complete mystery, and the analysis is based on the assumption that there would not be enough evidence to justify any party in bearing the burden of proving either the presence of negligence or the absence of negligence.

I. Warsaw Convention aspects: The Union of South Africa had not ratified or adhered, and the Convention did not apply to the passengers whose flight started at Johannesburg.¹

The Netherlands had ratified the Convention and Nigeria had ratified, by British action, reconfirmed as to Western Germany. The Convention therefore covered the Kano passengers for either Frankfurt or Amsterdam.

Italy had ratified, but had not confirmed as to Western Germany. The Convention therefore covered the Rome-Amsterdam passengers but not the Rome-Frankfurt passengers.

A Nigeria-West Germany problem was caused by the fact that these two ratifying States were at war. While active hostilities had ceased, peace had not been restored. The questions were whether the Warsaw Convention, as a non-political treaty (1) had been terminated or merely suspended by the war if the latter (2) whether it revived when hostilities ceased or remained suspended until some later event. Preliminarily, Dr. Achtnich did not regard the German capitulation in 1945 as an event affecting Germany's ratification, which survived to the new government. As to termination or suspension by war; there is a conflict of opinion: the older theory is that war nullifies treaties; but there has been a long trend to uphold their validity despite war and to differentiate the effect of war as between different types of treaties—as political and non-political, and according to their subject matter. This Convention being non-political was,

¹ Under English and U.S.A. decisions, a passenger boarding this plane in Johannesburg would be under Warsaw conditions if his travel were the return half of a round trip ticket from a Warsaw country to Amsterdam. But apparently not if the return were to Frankfurt, unless there was a post-war Note exchange between the originating State and West Germany.

on that view, only suspended; and being concerned with air transport, it would revive as soon as the West German government recovered its sovereign authority to deal with air transport.² That power was still denied West Germany on the day of this accident. However, the Kano-Frankfurt passengers were travelling under Warsaw conditions because of the circumstances next described.

The Allied High Commission, seeking to settle the doubts as to the effect of the Convention during the Occupation, had asked the "Warsaw" countries to agree, by exchanges of Notes, that the Convention should be again in effect as between them and West Germany prior to the peace treaty. 14 States had complied, including Great Britain, whose action applied to Nigeria. As of the date of the analysis, the 14 States were: Brazil, Ceylon, Denmark, France, Greece, Great Britain, India, Jugoslavia, Netherlands, Pakistan, Sweden, Switzerland, Spain, the USA.

As between Italy and West Germany, the Convention had not revived, because Italy had not acted to revive it.³ It was reported that the International Chamber of Commerce, through its Aviation Committee, was actively urging the other "Warsaw" countries to re-establish the Convention by suitable exchanges of Notes.

II. *The IATA Tariff Conditions (version of 29 March 1949)* were applied by the KLM ticket to all passengers not directly governed by the Warsaw Convention. IATA provision, Article 16, §3, par. (a) states that the carrier does not pay damages unless there is proof according to "the applicable law" that the injury was caused by negligence or wilful misconduct. That is the reverse of the Warsaw rule as to burden of proof. It raised the question: what is "the applicable law?" The former IATA tariff of 1931 had been explicit on the point; it had said in Article 22 §4, paragraph I that the law was that of the forum—the *lex fori*: which in turn was the law of the place where the air carrier had its head office, because that was the only place where the tariff said it could be sued.

But the new IATA tariff of 1949 does not reproduce former Article 22. We must therefore look to the general principles of private international law—or as we say the conflict of laws. Lacking an agreement of the parties as to the applicable law (namely a statement in the ticket contract), this situation calls for extended analysis, for this is a most contentious topic. Dr. Achtnich does not find any basis for a hypothetical (or implied) agreement between carrier and passenger as to the law applicable. The judge will therefore decide what law governs. Dr. Achtnich concludes that the law of the place of performance of the passage contract should be the applicable law.⁴ He considers that to be the law of the place of destination. And he reports that neither Amsterdam law nor Frankfurt law would give effect to the IATA provision as to burden of proof concerning liability. Both courts

² While the Warsaw Convention relates to air transport, it does not relate to any government's power to regulate air transport; it is merely a "uniform law" for the relations between air carriers and their passengers and shippers. Its revival in Germany might perhaps rather be related to the revival of international air carriage in that area, rather than to the government's power to control licenses for air carriers.

³ Although Italy and Germany were allies in the war from 1940 to 1944, Italy changed sides in 1944; had it remained a German ally to the end, it would seem that the Convention would never have been suspended between those two States.

⁴ The law of the place of breach—the place of the crash—might also be examined; in the USA the "wrongful death" law is at present almost universally found at the place of the crash. In England, the "proper law" of the contract might be sought.

would apply their over-riding or paramount local law to these in-bound international transportation contracts.⁵

III. Examining the Netherlands and German laws, these are the Netherlands Act of 10 Sept. 1936, Staatsblad 1936 no. 523, Articles 24, 29, 32 and the German LVG—Luft Verkehrs Gesetz of 26 January, 1943, sections 29-a, 29-b and 29-f. In each case the section last listed declares that the law is "zwingend"—paramount and over-riding, or as we might say a matter of public policy. Now it chanced that both countries have adopted the reversed-burden rule of the Warsaw Convention as their local law for aviation. Thus the IATA conditions, by invoking "the applicable law," have invoked in these cases the principles of the Warsaw Convention. By this indirect process, Warsaw principles govern the Johannesburg-Frankfurt/-Amsterdam and Rome-Frankfurt passengers.

And it is remarked that if the courts should look to the law of the principal office of the air carrier (KLM in Amsterdam) the same law and principles will be found there. Thus it is reasoned that the air carrier has the burden of proving no negligence, and that the passengers do not have the burden of proving the existence of negligence.

IV. But this does not end the problem. For the case-law precedents and rules of practice and of evidence of the countries differ. These are next analyzed, and there is mention of the pre-war German Convention case—the flight from Italy to Germany which ended in a crash in the Alps with the comment that it might not be followed today; and of the Ritts case, 1949 USAvR 65 (EDNY), and an American statement at an ICAO meeting (ICAO Doc. 6027, LC/124, p. 23).⁶

The possibilities of compulsory (or voluntary) personal accident insurance policies for passengers are also discussed, and the author favors this idea.⁷

V. Lastly, there is discussion of the situation of the employees who are travelling in the plane on free passes, but who have no flight duty. Those in the plane on company business, as the employee travelling from one post to another, are in the author's opinion covered by their workmens' compensation insurance; there is it seems a dispute as to whether they are "reisende"—passengers or "fahr-gaeste"—travel guests. He favors the view that they are not passengers as defined in the Convention, and that their classification under the IATA tariff is not controlling. As to those

⁵ This is a most interesting comment. In general, there has been immense opposition to the idea of applying the law of the place to which the traveller or the goods are going. The conservative European and English view is that the contract is judged by the law of the place where the contract was made—usually where the travel started. In ocean bills of lading, Belgium (since 1923) and the USA (since 1893) and the Philippines (since independence in 1948) apply their law to in-bound movements of goods, no matter where the shipments originate. But their policy in this respect has not been followed by the other maritime nations. The German comment seems to reach this result by using the IATA terms to get into the courts of the arriving country, and then by overriding the IATA liability provision on grounds of local public policy to substitute the local law for the contract valid where made at the place where the travel began.

⁶ Another difference might be in the kind of money awarded, and perhaps in the amount. Under the Warsaw scheme, the variation in the current equivalent of 125,000 poincaré francs should be small.

⁷ Furnishing passengers with an accident policy as part of the ticket has not been favorably received in the U.S.A. The courts will not uphold an antecedent agreement to settle for the policy instead of by litigation. Many passengers have already bought all the insurance that they want to have, or want to pay for. A good many passengers have no reason for insurance, being unmarried, without children or parents or others who look to them for support. Why should these pay an extra sum for their tickets, to benefit other passengers and the dependents of others?

who have no flight duty, and travelling for their own purposes although on a free pass, he prefers to classify them as "reisende"—passengers under the Warsaw Convention, like paying passengers, and states that the German and Netherlands laws would be the same.⁸

ARNOLD W. KNAUTH*

SEPARATION OF CONTROL BETWEEN SURFACE AND AIR CARRIERS

THE problem of surface carriers control over air carriers is again presented by the recent *National Air Freight Forwarding*¹ and *Continental Southern Lines*² cases. Section 408 of the Civil Aeronautics Act³ lists the requirements necessary before any merger or consolidation involving an air carrier will be allowed. As concerns surface carriers the Section provides that the C.A.B. is not to approve any merger or consolidation of an air carrier unless it first 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."⁴ The C.A.B. has interpreted this provision to mean that such air operations must be *supplementary and auxiliary* to the existing surface operations before any merger will be approved.⁵

It is undisputed that the requirements of 408 apply to all "mergers, acquisitions, and consolidations" involving air carriers. The controversy arises when the same requirements are also applied, or as the present view

⁸ In England carriers generally can by explicit contract arrange that they shall not be liable to passengers for negligent injuries; as to travel by air, England has just adopted Warsaw principles, somewhat modified. See analysis in 1952 US & Canadian AvR 145. In the United States, carriers may in many circumstances limit or avoid liability towards persons traveling on free passes, as well as towards persons who travel as attendants for animals.

* Partner, Lloyd, Decker, Williams and Knauth; Editor, United States and Canadian Aviation Reports.

¹ *National Air Freight Forwarding Corp. v. C.A.B.*, 197 F 2d 384 (D.C. Cir. 1952).

² *Continental Southern Lines, Inc. v. C.A.B.*, 197 F. 2d 397 (D.C. Cir. 1952), cert. denied, 21 U.S.L. Week 3098 (U.S. 1952).

³ 52 Stat. 1001 (1938), 49 U.S.C. §488 (1946).

⁴ Id. "Consolidation, merger, and acquisition of control.

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(5) For any air carrier or person controlling an air carrier, any other common carrier . . . to acquire control of any carrier in any manner whatsoever; "The act then goes on to say in (b) that provided certain requirements as to registration, etc. are met the Board shall give approval provided it shall not give approval if a monopoly would result, and "Provided further. That if the applicant is a carrier other than an air carrier or affiliated therewith . . . the Board shall not enter such 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 operation, and will not restrain competition."

⁵ The second proviso of 401 (b), *supra* note 3 has been interpreted by the Civil Aeronautics Board as meaning that such air operations as the proviso provides for must be supplementary and auxiliary to the existing surface operations and therefore incidental to them. Investigation of Local Feeder and Pick-Up Air Service, 6 C.A.B. 1, 7 (1944). Thus if the existing surface operations were between New York and Chicago then any air operations which would be permitted under the Board's interpretation of the proviso would also have to be between New York and Chicago and follow the same general route which the surface service followed.

stands, *considered* in proceedings under Section 401 of the Act.⁶ This section provides for the institution of new air service and sets out the requirements for the establishment of such original service. These provisions include: (1) the applicant must be "fit, willing and able" to perform the service, and (2) the public convenience and necessity must require the establishment of the service. These are the only requirements set forth in Section 401 as incident to the obtaining of certificates of convenience and necessity for the institution of original service. However, in recent years the courts and C.A.B. have consistently taken the view that the requirements of Section 408 are also to be *considered* in any proceeding under 401. Thus the 408 provision, preventing surface carriers from controlling air carriers except in cases in which the air service is *auxiliary and supplementary* to the existing surface operations, has been applied not only in 408 proceedings regarding mergers, acquisitions and consolidations but also in litigation brought under 401 for the establishment of original service. This policy has presently been re-affirmed in both the *Air Freight Forwarding* and *Continental Southern Lines Cases*.⁷

In the *National Air Freight Forwarding* case some 79 companies applied for certificates of convenience and necessity under Section 401, or for an exemption under Section 1(2)⁸ in order to engage in air freight forwarding operations.⁹ Section 1(2) provides that air carriers who are not engaged directly in the operation of aircraft in air transportation may be relieved from meeting the requirements of the Civil Aeronautics Act should the Board find it in the public interest. Since air freight forwarders at no time engage in the actual operation of aircraft but are still considered air carriers they would be entitled to such an exemption should the Board decide it to be in the public interest. In the instant case National Air Freight was not granted the exemptions. The Board's refusal was on the basis that the granting of such an exemption could not be in the public interest since it would result in the acquisition of an air carrier by a surface carrier within the meaning of Section 408, as the stock of National Air Freight was wholly owned by the Erie Railroad. Thus the C.A.B. is again applying 408 requirements to a non 408 proceeding, in this case a proceeding for exemption under 1(2).¹⁰ This policy was affirmed by the Court of Appeals of the District of

⁶ 52 Stat. 987 (1938), 49 U.S.C. §481 (1946). "Certificate of public convenience and necessity. (d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

⁷ *National Air Freight Forwarding Corp. v C.A.B.*, *supra* note 1; *Continental Southern Lines, Inc. v. C.A.B.*, *supra* note 2.

⁸ 52 Stat. 77 (1938), 49 U.S.C. §401 (2) (1946), "'Air Carrier' means any citizen of the United States who undertakes . . . to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest." In *Universal Air Freight Corp.*, Investigation 3 C.A.B. 698 (1942) air freight forwarders were held to be air carriers and therefore they could be given an exemption as under section 1(2) since they filled the requirements as laid down by the section.

⁹ Air freight forwarding companies, are companies who collect air freight and transport it to the airport and then when the cargo reaches its destination they distribute it to the various addresses. They at no time engage in any actual flight operations, always confining their activities to the ground services of collecting and distributing the freight which the airlines carry.

¹⁰ 52 Stat. 977 (1938), 49 U.S.C. 401 (2) (1946), *supra* note 8.

Columbia in disposing of the case and was approved again seven days later by the same court in the *Continental Southern Lines* case.¹¹

In the latter case, the plaintiff, an air carrier, was seeking to have transferred to a bus company certain certificates for which it had applied under Section 401. It was contended that the plaintiff need not meet the requirements of Section 408 since that Section referred only to a surface carrier acquiring an air carrier. The court, however, affirmed the C.A.B.'s decision to deny the transfer, stating in effect that it need not even be considered whether Section 408 applies in reverse to air carriers acquiring surface carriers. The transfer still could not be approved unless the Board thought it to be in the public interest and "the concept of public interest as regards transfer is just as broad as in original certification proceedings and includes the policies and standards of Section 408." Thus once more the court has shown approval of the policy of including 408 standards in non 408 proceedings, here a 401 proceeding for original certification.

Although Section 408 clearly applies to mergers, consolidations, etc., the language of the Section gives no indication of its applicability to the granting of certificates of "convenience and necessity" needed for new operations. Seemingly all the requirements for such certificates are set out in Section 401.¹² Prior to 1941 the Civil Aeronautics Board held that in obtaining a certificate of "convenience and necessity" it was only necessary to meet the requirements of 401,¹³ that is, that the applicant be "fit, willing and able" and that the public need require the proposed service. The purpose of 408 was said to prevent the elimination of existing competition between air and surface carriers and not to prevent surface carriers from originating new service and therefore the requirements regarding the former should not be applied to the latter. This line of reasoning was abruptly halted, however, when the Second Circuit Court of Appeals in *Pan American Airways v. C.A.B.*¹⁴ stated that the ability to meet the standards of Section 408 would be *considered* in granting a certificate under 401. Following this decision the C.A.B. in conforming to the court's interpretation of the provision went even further and in the *American Export Lines* case¹⁵ held that the standards in 408 constituted a legal condition to be met before any certificate would be granted under 401. Thus air operations were closed entirely to surface carriers unless the surface carrier first met the requirement of the second proviso of Section 408 (b) which is the "supplementary and auxiliary requirement."¹⁶

The Board, however, in the *Local Feeder and Pick-Up Air Service* and *American President Lines* cases¹⁷ moved away from this extreme position. It no longer held that the second proviso of 408 (b) was a legal condition but that the policy embodied in 408 was only to be *considered* as "one of the standards which guide the Board in determining whether the public convenience and necessity requires the issuance of a certificate to a surface carrier applicant." Thus technically 408 became a restriction but not necessarily a prohibition as regards a 401 proceeding. For practical purposes,

¹¹ *Continental Southern Lines, Inc. v. C.A.B.*, *supra* note 2.

¹² 52 Stat. 987 (1938), 49 U.S.C. §481 (1946), *supra* note 5. The requirements include (1) that the applicant be fit, willing and able, and (2) that the public convenience and necessity require the initiation of the proposed new service.

¹³ *American Export Lines, Inc., Transatlantic Service*, 2 C.A.B. 16, 46-47 (1940).

¹⁴ 121 F.2d 810 (2d Cir. 1941).

¹⁵ *American Export Airlines, Inc., American Export Lines, Control*, 3 C.A.B. 619 (1942), Supplemental opinion, 4 C.A.B. 104 (1943).

¹⁶ 52 Stat. 1001 (1938), 49 U.S.C. §488 (1946), *supra* note 4.

¹⁷ *Investigation of Local Feeder and Pick Up Air Service*, 6 C.A.B. 1 (1944); *American President Lines Ltd., Petition*, 7 C.A.B. 799 (1947).

however, 408 still remains a prohibition, for the Board has consistently required that the proviso be met before any certificate of convenience and necessity will be issued.¹⁸ This policy has just been re-affirmed as to Section 401 in the *Continental Southern Lines*¹⁹ case and even extended in the *National Air Freight Forwarding*²⁰ case to include 1(2) thus applying 408 standards to a proceeding for exemption.

The C.A.B., by reasons of its decisions, has established a policy virtually identical with that the I.C.C. is presently applying under similar provisions of the Motor Carrier Act.²¹ Thus in the latter case whenever a railroad seeks a certificate of convenience and necessity to originate motor carrier operations it is met with the same problem facing surface carriers in instituting air operations; namely, the requirements for merger and consolidation are *considered* in regard to applications for original service. Thus for all practical purposes any motor carrier service permitted is required to be "supplementary and auxiliary" to the existing rail service. This application of the requirements governing mergers to the granting of certificates for original service, however, was not accomplished without controversy. More than once the I.C.C. has changed its position as to whether this policy was justified under the wording of the Motor Carrier Act and if so just how far it should be carried.²²

The C.A.B. has generally put forward three major arguments in support of its policy of strict separation of surface and air carriers: (1) such separation is necessary in order that air commerce be protected and fostered, (2) the separation protects against the establishment of monopolies in the transportation field, and (3) Congressional intent requires the separation.

¹⁸ For a more detailed historical account of the various changes in Board policy with regard to section 408 and its application to the other sections of the Act see Schnorr, *Participation of Steamship Companies in Air Transportation*, 34 Cornell L.Q. 588 (1949).

¹⁹ *Continental Southern Lines, Inc. v. C.A.B.*, *supra* note 2.

²⁰ *National Air Freight Forwarding Corp., v. C.A.B.*, *supra* note 1.

²¹ 54 Stat. 906 (1940), 49 U.S.C. §5 (2). "Unifications, mergers, and acquisitions of control. Provided, that if a carrier by railroad subject to this chapter . . . is an applicant in the case of any such proposed transactions involving a motor carrier, the Commission shall not enter such an order (approving the transaction) unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

49 Stat. 551 (1935), 49 U.S.C. §307 (a) (1946). Issuance of certificates of convenience and necessity. ". . . (a) Certificate shall be issued to any qualified applicant . . . if it be found that applicant is fit, willing and able to perform the service proposed, and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required . . . by public convenience and necessity."

²² In *Pennsylvania Truck Lines, Inc., Barker* 1 M.C.C. 101, Supplemental opinion 5 M.C.C. 9 (1936), which dealt with an application for a certificate of convenience and necessity, the Commission stated that "the financial and soliciting resources of the railroad could easily be so used in this field (motor transportation) that the development of independent service would be greatly hampered and restricted with ultimate disadvantage to the public." Accord, *Kansas City Southern Transport Co., Inc., Common Carrier Application* 10 M.C.C. 221 (1938), Supplemental opinion 28 M.C.C. 5 (1941), and *Rock Island Motor Transit Co., Purchase, White Line Motor Freight* 40 M.C.C. 457 (1946).

Contra, Burlington Transportation Co., Common Carrier Application 33 M.C.C. 759 (1942). Plaintiff company which was railroad controlled sought a certificate of convenience and necessity authorizing operations of motor carriers between Salt Lake City and San Francisco. The certificate was issued and in answering the objection that the proposed service would not be supplementary and auxiliary to existing rail operations the Commission said that in certificate proceedings it did not need to be and thus the standards of Section 5 were not applied in a 207 proceeding.

Both the C.A.B. and I.C.C. have stated consistently as a general policy that the various fields of transportation should be mutually independent.²³ The chief argument put forth in support of this policy is that it fears surface carriers, having larger investments tied up in their surface operations, would tend, should they be permitted to control air carriers, to favor such surface operations to the resulting detriment of the air carriers.²⁴ The C.A.B. then points to its duty to protect and promote air service²⁵ and asserts that it is toward that end that the policy of separation was evolved.

This argument has been answered by critics²⁶ by showing that in all likelihood the Board's fear would never materialize, for surface carriers would still have to compete in their air operations with other independent and foreign airlines. Should the surface carriers actually try to discriminate against their air operations, as the Board fears, then they would lose out entirely to their competition who could then offer better and more complete service to the public. In reality combined air and surface operations serve the public interest through the establishment of joint and faster through service such as has resulted in many European countries in which combined air and surface operations are permitted.²⁷ An example of this type of improved service might be seen in instances in which rail or ship operations are extended only to a certain point beyond which air travel must be used. In such circumstances it is usually unprofitable for an independent air carrier to supply the required service, and thus the service, if it is to exist at all, must be furnished by the surface carrier. It is probable, however, that in such an extreme case as this the Board through use of its discretionary power would permit the operations whether they were surface controlled or not.

For its second major contention the Board points to the danger that should combined operations be permitted then surface carriers who are as a whole larger companies would be placed in a more competitively advantageous position over carriers not having surface connections. Opponents argue here that if mere competitive advantage is all that is gained then the Board has no right to interfere since "the provisions of the Civil Aeronautics Act do not confer upon the Board either the authority or the duty to attempt to equalize the competitive advantages of air carriers."²⁸ The Board's right to interfere, however, should be undisputed if the competitive advantage becomes such that threat of monopoly results. Concerning this issue Secretary of Commerce Charles Sawyer in his report to the President December

²³ Boston and Maine and Maine Central Railroads, Control, Northeast Airlines, Inc., 4 C.A.B. 379 (1943).

²⁴ National Air Freight Forwarding Corp. v. C.A.B., *supra* note 1.

²⁵ 54 Stat. 899 (1940), 49 U.S.C. (Preamble 1946). "It is hereby declared to be the national transportation policy of Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; . . . and foster sound economic conditions in transportation and among the several carriers."

²⁶ Tomlinson, *Surface Carrier Participation in Air Transportation*, 34 Geo. L.Q. 64 (1946).

²⁷ Schnorr, *Participation of Steamship Companies in Air Transportation*, 34 Cornell L.Q. 588, 592 (n) (1949). Swedish and Danish Airlines are 40% controlled by surface carriers, Norwegian 53% controlled by surface carriers, Portugal has all airlines controlled by surface carriers, and in France although exact percentages are not available, the French Line, a steamship company, is known to own a considerable interest in Air France.

²⁸ Brief for Petitioners, p. 26, National Air Freight Forwarding Corp. v. C.A.B., *supra* note 1. Reference made to Interstate Commerce Commission v. Duffenbaugh, 222 U.S. 42, 46 (1911). "The law does not attempt to equalize fortune, opportunities, or abilities."

1, 1949²⁹ stated that the basic objective of the Federal Transportation policy, which is the giving of economical and efficient transportation service to all, can best be accomplished through the maintenance of competition among the various fields of transportation. The C.A.B. has reasoned that the best way this policy can be effectuated is to maintain strict separation between those fields of transportation.

Critics have answered this proposition by saying that the differences in types of merchandise handled and cost, etc., between air and surface freight were too great to permit any real competition to exist between them.³⁰ This assertion of competition, however, may certainly be questioned, especially in view of the continued drop which railroads have sustained in freight and passenger traffic in favor of other forms of transportation, both motor and air.³¹ In any event it can hardly be disputed that the Board should keep careful watch and eradicate many detrimental monopolistic practices which present themselves.

The third general argument that the Board has put forth in support of their policy is the long-standing intent of Congress to keep the various fields of transportation mutually separate and to prevent the acquisition of one by the other.³² Thus it becomes the duty of the C.A.B. to put this Congressional intent into effect through the Board's decisions. The controversy still remains, however, as to whether this congressional intent extends so far as to require virtual conformance with Section 408 in a non 408 proceeding. The Board holds it does and has based this interpretation of the statute on the fact that the Civil Aeronautics Act is a regulatory statute and "policies of a regulatory statute become elements of the public interest to be weighed in any certification proceeding under that statute."³³ An opposing, though somewhat weak, argument is advanced however, that if Congress had intended to impose the same requirements for the issuance of certificates of convenience and necessity under 401 as are imposed in acquisitions of control under 408 then why are the requirements of the two sections as laid down in the statute different?³⁴

National Air Freight has filed a petition for re-hearing.³⁵ There is indication, however, that the policy so firmly established by the Board regarding surface carrier control over air carriers will not be changed even should the petition be granted and the court's decision changed. Judge Prettyman's dissent in the case seems based mainly on the particular facts and not on the general policy involved, for he concurred shortly thereafter

²⁹ Issues Involved in a Unified and Coordinated Federal Program for Transportation: A Report to the President from the Secretary of Commerce, p. 25 (1949).

³⁰ National Air Freight Forwarding Corp. v. C.A.B., *supra* note 1, at 392. See also Henry, *The Impact of Air Freight on Surface Transportation*, 15 Law & Contemp. Prob. 47, 57 (1950) Air freight is inherently bound to be more costly than surface transportation. Average cost of air freight per ton-mile, even with an all freight airline operation, averages from 12 to 16 cents. As a comparison that of railroads per ton-mile 1.25 cents. In order for air freight operators to break even if government subsidies were removed the cost would even be higher.

³¹ Progress Report of the Senate Committee on Interstate and Foreign Commerce by its Domestic Land and Water Transportation Subcommittee pursuant to S. Res. 50, 81st Cong., 1st sess. p. 47 (1949). Except for the war years railroads show a steady decline in both freight and passenger traffic. In 1929 railroads carried 78.28% of the nation's freight, in 1949 they carried only 60%. An even greater drop may be seen in passenger traffic; in 1926 railroads carried 75.2% of the total while in 1949 they carried only 54% of the total.

³² C.C.A., *supra* note 3; M.C.A., *supra* note 21.

³³ National Air Freight Forwarding Corp., v. C.A.B., *supra* note 1 at 386.

³⁴ Baggett, *Are Surface Carriers Grounded by Law?* 31 Va. L. Rev. 337 (1945).

³⁵ Petition filed May 15, 1952.

in the *Continental Southern Lines*³⁶ case in which the same policy as concerns the application of 408 requirements to a non 408 proceeding was discussed and re-affirmed. It is believed that Judge Prettyman perhaps thought that the particular facts of National Air Freight did not warrant the application of 408 standards, but he seems to find no fault with the general policy as of *considering* these requirements in such proceedings.

That the problem is still unsettled may be seen in a recent proposed amendment to the Civil Aeronautics Act³⁷ which would have added after subsection (d) (1) of Section 401:

Provided, That nothing contained in this Act shall be construed as placing any special or different standards, requirements, or burdens of proof on any applicant that is an operator of ships . . . to engage in foreign or overseas air transportation.

The addition was introduced to free steamship lines from the C.A.B.'s restrictive policy of including 408 requirements in 401 proceedings. This proposed amendment was never passed, but the very fact that it was presented shows that the controversy over the Board's policy is far from ended. Regardless of the opposing arguments it appears that the Board's policy is basically sound. However, a more frequent use of the now seldom-exercised option to grant certificates under 401, or exemptions under 1(2) without requiring that the 408 requirements be met might prove beneficial. Such right would, under the present policy, be within the Board's discretion.

DIGEST OF RECENT CASES

LABOR — CROP DUSTING — FAIR LABOR STANDARDS ACT — VIOLATIONS OF MAXIMUM HOUR WORK WEEK — COVERAGE OF EMPLOYEES

Tobin v. Wenatchee Air Service, Inc.,

—F. Supp.—, 3 Avi. 17,931 (E.D. Wash. May 27, 1952)

The mechanics, linemen, partsmen and bookkeepers of a crop dusting company were found to be employees "engaged in the production of goods for commerce within the meaning of the (Fair Labor Standards) Act." They are not, however, employed in agriculture.

The employees of the defendant worked irregular time periods. The court concluded this situation existed by choice and was not required by necessity. The defendant guaranteed the payment of the same compensation per week regardless of absences or overtime work. The court found the employer had violated the statutory maximum for a work week at a straight salary and had not complied with the record-keeping requirements.

DAMAGES — LIMITATION OF LIABILITY — WARSAW CONVENTION — FREIGHT VALUE DECLARATION

L. & C. Mayers Company, Inc. v. Koninklijke Luchtvaart Maatschappij, N. V.,

108 N.Y.S. 2d 251, 3 Avi. 17,929 (Sup. Ct. February 28, 1951)

Under the Warsaw Convention liability of the shipper is limited to a specific recovery amount per weight, unless the shipper makes a special declaration of value to the carrier. In this case, the carrier had stamped on the airway bill a form in which a declaration of value could be made. The customs value had been written in the available space.

³⁶ *Continental Southern Lines, Inc. v. C.A.B.*, *supra* note 2.

³⁷ H. R. 3835, 80th Cong., 1st sess. (1947).

The plaintiff, a shipper who had lost merchandise through a plane crash, maintained that parol evidence could not be introduced to vary the terms of the bill. The defendant, the carrier, produced witnesses to show that the plaintiff had not made a declaration of the value and that if a value had been set according to the requirements, then the charges of the air freight would have been greater. The court approved the admission of the parol evidence as necessary to show the actual agreement and the non-compliance of the shipper with the requirements for relief from the liability limitation the carrier enjoyed.

MUNICIPALITY — PUBLIC AIRPORT — POWER OF A CITY TO LEASE AND TO HAVE CONSTRUCTED HANGER BUILDINGS

Pipes v. Hilderbrand,

—Cal. App.—, —P. 2d—, 3 Avi. 17,926 (April 29, 1952)

The power of a city to build and lease hangers was tested in a suit brought by general contractors against the Commissioner of Finance of the City of Fresno to force payment of the first installment of the construction contract. The city was to lease these buildings to a private airline. The city commissioners had authorized the Commissioner of Finance to make payment on the installment due, but the Finance official refused, questioning the city's action as *ultra vires*. It was contended that the contract and lease constituted an extension of credit to or in aid of a private corporation.

The court ordered payment made on the contract. The construction of buildings for a public airport was considered an implementation of a public purpose. The court found support in state legislation authorizing municipal development of airports, and in the city charter providing for the construction of public works. Mention was made of the provision for joint use of the airport facilities by both the city and the private company.

CERTIFICATES — CIVIL AERONAUTICS BOARD POWER TO SUSPEND — TRUNK LINE AIR CARRIER — FEEDER ROUTES — GRANT OF TEMPORARY CERTIFICATE TO LOCAL CARRIER

United Air Lines, Inc. v. CAB,

198 F. 2d 100, 1952 U.S. & CAvR 335 (7th Cir. July 8, 1952)

The United States Court of Appeals for the Seventh Circuit upheld the power of the CAB to suspend the certificate for small-city feeder routes of a trunk-line air carrier and to grant a temporary certificate for these routes to a local carrier.

The need for flexibility in regulating the fast-changing aviation industry was one reason for the court's decision. The authority of the Board to grant the certificates was cited in support of authority to modify.

Under section 401(h) of the CAA the Board is given the power to "alter, amend, modify or suspend any such certificate, in whole or in part, if the public convenience and necessity so require." Any change must be "partial," not "total," but may be "permanent" though "limited."

In answer to the claim of injury to the airline whose certificate is suspended under this authority the court noted the Board was prevented under earlier decision from changing the essential nature of the operations of the carrier. The public convenience and necessity may require the Board to use its power of modification or its power of suspension as to certain routes.

MUNICIPAL ORDINANCE — REGULATION OF FLIGHT ALTITUDE —
CONFLICT WITH THE CIVIL AERONAUTICS ACT —
PRELIMINARY INJUNCTION FOR THE AIRLINES

All American Airways, Inc. v. Village of Cedarhurst,

106 F. Supp. 521, 1952 U.S. & CAvR 302 (Ed. N.Y. July 1, 1952)

The Village of Cedarhurst passed an ordinance which prohibited the flight of aircraft over the town area at any altitude of less than 1,000 feet. This legislation conflicted with the provisions of the CAA and the rules and regulations passed by the CAB. The airlines sought a preliminary injunction against the enforcement of the ordinance. The United States District Court, finding the possibility of irreparable loss or damage to the airlines, granted the injunction.

The village, relying on *United States v. Causby*, 328 U.S. 256 (1946), maintained it had title to the airspace above its land. The power of the Administrator under the CAA to purchase, condemn, lease, or otherwise acquire easements or other interests in the air space was cited by the village as an example of Congressional recognition of the private ownership principle. Furthermore, it was argued that the airlines should seek their remedy in a state court and not a federal tribunal.

The court rejected the application of the airspace private property theory to this fact situation. The seriousness of subjecting use of air "highways" to "countless trespass suits" was pointed out by Justice Douglas in the *Causby* case. Moreover, the ordinance conflicted with federal statute and regulation governing the subject of minimum flight altitudes. The court refused to relegate the airlines to a state court and instead, granted the preliminary relief sought.

APPLICATION UNDER SECTIONS 408 AND 409 —
INTERLOCKING RELATIONSHIPS — VIOLATION OF THE
CIVIL AERONAUTICS ACT — APPLICATIONS HELD IN ABEYANCE

In re Sherman,

—CAB—(Docket 4109), 21 U.S.L.Week 2008 (June 6, 1952)

The CAB has announced that it will hold in abeyance any application for an interlocking relationship, merger, or acquisition under sections 408 and 409 of the CAA which it has reasonable ground for believing is filed by a petitioner who has taken illegal action. The Board will not pass on the application until the violation has been either stopped voluntarily or corrected by the Board's direction. The Board will adhere to its previously announced policy of considering the violation in light of the fact situation in determining whether the proposed relationship will be injurious to the public interest. Under normal conditions the consideration of violation will weigh heavily against the approval of the application.