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# COOPERATIVE AGREEMENTS INVOLVING FOREIGN AIRLINES: A REVIEW OF THE POLICY OF THE UNITED STATES CIVIL AERONAUTICS BOARD\*

BY BURTON A. LANDY†

## I. INTRODUCTION

TRADITIONALLY, the airline industry has been highly individualistic. Today's air carriers, almost without exception, are the product of these individualistic pioneering efforts. Yet, during the current decade, there has been a notable trend "to band together" rather than the traditional "go it alone" approach. A manifestation of this trend to join up was the merger movement of the early 1960's. This characteristic was due in large part to the poor financial condition of many of the airlines. As the jet transition took place and the financial health of the airlines improved, the merger wave subsided for a time, and the airlines seemed to return to their usual, independent way of doing business. However, even then cooperative agreements were sought, and today the use of such agreements among foreign airlines is particularly evident. Again, the reasons are basically economic, as many airlines have concluded that their resources in equipment and manpower are not sufficient to meet the competition of those airlines which can afford to remain independent.

The nature of these cooperative agreements and how the United States Civil Aeronautics Board (hereinafter CAB) looks upon these arrangements are basic, fundamental questions which foreign airlines must consider inasmuch as the policies of the CAB in this area ultimately affect their operations to and from the United States. Therefore, the purpose of this analysis is to review some of the cooperative agreements entered into by foreign airlines in the past and to evaluate the attitude of the CAB towards these arrangements.

## II. TYPES OF COOPERATIVE AGREEMENTS

Cooperative agreements between air carriers exist in a wide range and variety of forms; however, this article will only focus upon those cooperative agreements involving dry leases, wet leases, blocked space agreements, interchanges and pooling. It is appropriate, therefore, to review the definitions of these terms:

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*Dry Leases:* A dry lease in its usual form involves the lease of a bare aircraft by one party to another. In this lease, only the aircraft is made available by the lessor, and the lessee supplies the crew, fuel and exercises full operational control. Inherent in this arrangement is the total surrender of the aircraft by the lessor and its control by the lessee.

*Wet Leases:* A wet lease normally involves the lease of an aircraft with the fuel and crew to carry out the specific operation. A significant factor in this arrangement is whether the lessor or the lessee exercises operational control of the aircraft.

*Blocked Space Agreements:* Blocked space agreements are leases of a determined portion of an aircraft, such as the seats and/or cargo space. An agreed sum is paid by the lessee to the lessor regardless of the utilization made by the lessee of the leased space.

*Pooling:* Pooling, in general, can involve any cooperative agreement; however, in the United States, the term primarily designates agreements providing for splitting of revenues and/or costs.

*Interchanges:* An interchange involves the use of an aircraft owned by one airline over the routes of another airline in conjunction with flights over routes of the owner airline, which either preceded or succeeded the interchange flight. In each sector of the flight the aircraft is controlled and manned by a crew of the airline having authority to operate over such sector. In effect, one airline has merely "dry leased" the aircraft from the other. More than two airlines may enter into the interchange agreement so that there may be a succession of dry leases in which one aircraft belonging to one of the airlines involved is used over the routes of the other airlines.

Having defined the basic terms, it is appropriate to focus next on the United States air transport policy.

### III. POLICY STATEMENTS AND LAW

#### A. Policy Statements

The most comprehensive expression of the United States' policy is contained in the statement on International Air Transport Policy of April 1963.<sup>1</sup> This statement was prepared by a steering committee appointed by President Kennedy which consisted of representatives of the Federal Aviation Agency, Civil Aeronautics Board, State Department and other related governmental agencies and departments.

In approving the statement of policy, President Kennedy said:

The United States air transport policy takes into account all of the U.S. interests: The health and growth of our carriers, the contributions which air transport can make to our national security, and above all, the needs of the consumer—the traveller and shipper. It does so in a way which considers the legitimate needs of other nations, and the basic principles under which we

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<sup>1</sup> Press Release to A. M. S., Office of the White House Press Secretary (April 23, 1968).

conduct our international relations. I am directing the officials of this government concerned with air transport to be guided by this policy statement in carrying out their statutory responsibilities.<sup>2</sup>

The underlying policy throughout the statement favors "expansion, not restriction," whether by government or through intercarrier arrangements. The United States has determined that any policy or arbitrary restriction of capacity, division of markets by carrier agreements, encouraging high rates or curtailing services for which a demand exists would be harmful to the United States national interest and contrary to its basic policy of competitive enterprise.

The area of air carrier pooling is specifically treated in the policy statement as follows:

4. *Air Carrier Pooling.* It is a common practice for foreign carriers to form combinations or pools which divide revenues or traffic on a particular route or market. Our dealings with foreign carrier pools must be on a case-by-case basis. We must not encourage pools which substantially reduce competition to the detriment of the system we seek. In considering the possible effect of such foreign pools, their size or market power and their intentions or attitudes toward a basically competitive system are clearly relevant factors.

There are times when it is suggested that U.S. carriers participate in such pools. We believe such arrangements will generally impair the benefits competition can bring to the system, and it will be difficult to limit the arrangements once this practice has begun. Therefore, U.S. carriers will be permitted to participate in them only when the national interest requires.<sup>3</sup>

Section 9 of the same policy statement recognizes that more intensive consideration in the Foreign Aid Program should be given to the contributions that international and regional aviation programs can make to the economic development in developing countries.<sup>4</sup>

While the foregoing is governmental policy as set forth by the President of the United States, the Congress of the United States has legislated on the subject. Specifically, the following sections of the Federal Aviation Act are pertinent.

### B. *Federal Aviation Act*

The CAB is charged with the responsibility for administering the economic aspects of the Federal Aviation Act.

#### 1. *Section 402.*

Section 402 requires that a foreign air carrier show it is "fit, willing and able properly to perform" air transportation. It sets out the procedure for application for a permit and grants the Board the power to prescribe terms and conditions for the regulation of the permit.<sup>5</sup>

#### 2. *Section 408.*

Section 408, in the absence of Board approval, prohibits certain monopolistic, and restraint of trade practices, such as:

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Federal Aviation Act of 1958, § 402, 72 Stat. 757 (1958), 49 U.S.C. § 1372 (1964).

- (a) Consolidation and merger of two air carriers;
- (b) purchases, leases or agreements by one carrier to operate the properties of another air carrier; or
- (c) acquisition by one air carrier of the control of another air carrier, and related activities.<sup>6</sup>

### 3. Section 411.

Section 411 provides for Board investigation of alleged unfair or deceptive practices or unfair methods of competition in air transportation and sales activities. If the Board finds any unfair practices, it is empowered to hold hearings and to issue cease and desist orders.<sup>7</sup>

### 4. Section 412.

Section 412 requires every air carrier to file copies and memorandums of all agreements for pooling or apportioning earnings, losses, traffic, services or equipment, or relating to rates, classification, safety, economy and efficiency of operation, or for controlling, regulating or eliminating competition, regulating stops, or for other "cooperative working arrangements." The Board will then approve or disapprove such agreements, depending upon their effect on the public interest and any violations of the Act.<sup>8</sup>

### 5. Section 416(b).

Section 416(b) provides that the Board may exempt air carriers from other provisions of the Title if it feels that the application of the rule would be an undue burden on the airlines and would not be in the public interest. This section specifically deals with "air carriers" and does *not* provide an exemption for "foreign air carriers."<sup>9</sup>

## *C. CAB General Policy On Wet Leases*

The Civil Aeronautics Board Procedural Regulations outline the CAB's position on wet leases to foreign air carriers, as follows:

### 1. Section 399.19

(a) The Board defines wet leases as those in which the lessor provides both the aircraft and the crew for a performance period of over 60 days.

(b) The wet lease will be authorized by the Board if it is deemed to be in the public interest by meeting the following criteria:

(1) The operations under the lease will not have a significant adverse competitive impact on any United States carrier. The Board will consider such factors as relative size, financial strength and route competition of the carriers involved.

(2) The United States carrier must either have an urgent need for additional utilization of its equipment, or need more revenue. The Board considers financial conditions, and its goal is the promotion of a healthy competitive system.

<sup>6</sup> Federal Aviation Act of 1958, § 408, 72 Stat. 767 (1958), *as amended*, 74 Stat. 901, 49 U.S.C. § 1378 (1964).

<sup>7</sup> Federal Aviation Act of 1958, § 411, 72 Stat. 769 (1958), 49 U.S.C. § 1381 (1964).

<sup>8</sup> Federal Aviation Act of 1958, § 412, 72 Stat. 770 (1958), 49 U.S.C. § 1382 (1964).

<sup>9</sup> Federal Aviation Act of 1958, § 416(b), 72 Stat. 771 (1958), 49 U.S.C. § 1386 (1964).

(3) The wet lease must not involve revenue or profit sharing by the United States air carrier-lessor.

(4) The lease must not impair the United States carrier's ability to fulfill its certificate obligations.

(5) The United States air carrier must not place undue reliance on wet leasing as a source of revenue.

(c) Approval by the Board of a wet lease will be subject to the following conditions:

(1) If the foreign air carrier is in established international air service with its own equipment, wet leasing arrangements with a United States carrier may be approved for an initial one-year period. Additional periods may be granted up to a maximum of two years from the beginning of the wet lease arrangement.

(2) If the foreign air carrier is in an early stage of development, the leasing arrangement may be approved for a maximum period of two years. However, the foreign carrier must demonstrate that it will be in a position to establish an independent operation at the end of the two-year period.

(3) If the wet lease is entered into solely to enable the foreign air carrier to replace equipment on an emergency basis, the lease may be approved for up to a six-month period.<sup>10</sup>

#### IV. SIGNIFICANT CASES

During the past ten years, there have been a number of cases before the CAB involving cooperative agreements of foreign air carriers. Some of these cases concern arrangements between a United States air carrier and a foreign air carrier. Other arrangements have been between foreign air carriers.

##### *A. Cooperative Agreements Between United States Carriers And Foreign Air Carriers*

###### *1. VIASA—Pan American Airways.<sup>11</sup>*

In 1961, VIASA and Pan American entered into an agreement concerning traffic arrangements as to scheduling and exploitation of the market on the New York/Caracas sector. The agreement, which was subject to governmental approval, had been negotiated to improve the position of both airlines in this sector. It was filed with the CAB but rejected shortly thereafter.

The Board held that the agreement was inconsistent with United States International Civil Aviation policy and with the Bilateral Air Transport Agreement between the United States and Venezuela in that it placed arbitrary restrictions on the rights for the carriage of traffic granted to the United States in the agreement. Additionally, it was feared that ap-

<sup>10</sup> CAB Procedural Regulations, Sec. 399.19 as added by Amendment No. 6, 30 Fed. Reg. 5625 (1965).

<sup>11</sup> In the matter of an agreement between Pan American World Airways, Inc., and Venezolana Internacional de Aviacion, S. A., relating to certain traffic arrangements. Order disapproving agreement: CAB Doc. No. 15385 (OSN E-17354) Aug. 23, 1961, 34 C.A.B. 800 (1961).

proval of this agreement would establish an undesirable precedent which might open the door to demands for similar cooperative agreements with United States flag carriers throughout the world. The Board also held that approval of the agreement which apportioned the proposed service by the two carriers between New York and Caracas restrained competition in the market, contrary to provisions of the Federal Aviation Act.

### 2. *Seaboard—Lufthansa*.<sup>12</sup>

In October 1961, Seaboard filed with the CAB copies of an agreement with Lufthansa relative to the purchase by Lufthansa of cargo space on aircraft operated by Seaboard on the New York/Frankfort sector. The terms of this agreement provided that Lufthansa would purchase on each flight 20,000 pounds of capacity, and that full payment was to be made whether or not the entire 20,000 pound capacity was utilized. Seaboard urged that this arrangement would provide it with substantial fixed revenue which would aid materially in the financing of a modern fleet of cargo aircraft which, incidentally, could be made available to the military in times of emergency.

In this case, the Board recognized that the acquisition of a new type of aircraft resulted in sharply increased capacity and influenced Seaboard to seek means of using this capacity, particularly in view of Seaboard's then financial situation. Under these circumstances and for a limited period, such an arrangement warranted favorable consideration by the Board. The CAB, however, took the position that its action on the agreement should not enable Lufthansa to control, to hold out, to advertise and to identify as its own the services being performed by Seaboard, and appropriate conditions designed to preclude these effects were attached to the approval.

### 3. *Air Afrique—Pan American Airways*.<sup>13</sup>

In January 1964, Pan American filed with the CAB copies of an agreement with Air Afrique, a multi-national company established pursuant to the Treaty of Yaounde and owned by a number of African republics. Said agreement provided for the leasing by Pan American of seats and proportionate cargo space to Air Afrique on flights of Pan American. In 1964, Air Afrique already had a substantial air transport system in operation and owned and operated both piston and jet aircraft which were used in regional and intercontinental routes respectively.

Here, the Board concluded that the agreement represented a cooperative working arrangement between a United States air carrier and a foreign air carrier within the meaning of section 412 of the Act. The Board commented that the agreement probably would not warrant approval if aviation policy grounds alone were to be controlling. However, the United States Department of State advised the Board that it supported

<sup>12</sup> Agreement Between Seaboard World Airlines, Inc., and Deutsch Lufthansa Aktiengesellschaft filed pursuant to Sec. 412 of the Federal Aviation Act of 1958, *as amended*, relating to blocked space arrangements. Agreement CAB Doc. No. 15873, *as amended*; agreement CAB Doc. No. 17708 (OSN E-21042) July 9, 1964.

<sup>13</sup> Air Afrique, CAB Doc. No. 15007 (OSN E-24597) May 21, 1964, 40 C.A.B. 759 (1964).

approval of the agreement on broader "national interest grounds." The reasons advanced by the State Department were:

- (a) That such arrangements were considered a valid transitional instrument for the development of air transport relations with developing countries;
- (b) that the provision of service was warranted on economic grounds; that the market was then inadequate to support normal service by both United States and foreign flag carriers; that it was anticipated that a normal exchange of traffic routes would be economically feasible at some future date; that the foreign flag carrier was organized on a rational economic basis; and that the proposed arrangement was likely to contribute towards its economic viability; and
- (c) that the arrangement supported the United States objective of encouraging regional carriers for long-haul operations of several nations.

The Board concluded that the criteria set forth by the State Department applied to the agreement under consideration, and that these criteria would preclude any substantial threat to the maintenance and development of a competitive international air transport system. Therefore, it granted its approval.

#### 4. *Airlift—Alitalia*.<sup>14</sup>

In February 1964, Airlift and Alitalia entered into an agreement for the use, on the Milan/New York City sector, of a DC-8 cargo aircraft owned by Airlift. Airlift applied to the CAB for an exemption from the provisions of the Federal Aviation Act to the extent necessary to operate the flights. Alitalia's position was that it did not have the crews necessary to operate the DC-8, but that if it decided to purchase its aircraft in the future, it would then qualify its own pilots and limit the lease to the aircraft alone. A price per round trip was agreed upon, and there was a provision for a sharing of the profit if more than a specified amount of freight was carried.

In this case, the Board approved in part, and denied in part, the agreement. It permitted the services to be operated for a six-month period, provided that the profit-sharing financial provision was eliminated. The Board indicated that it would look with favor on a subsequent agreement under which Airlift would lease the aircraft, and Alitalia would provide the crew.

The CAB therefore reaffirmed its policy against long-period chartering of aircraft by a United States carrier to a foreign carrier. It, nevertheless, made an exception to that policy inasmuch as a dispute between the United States and Italy concerning the bilateral agreement was then pending and in arbitration. The Board took into consideration this "unusual circumstance" to justify departure from its traditional policy. In addition, the case also clearly confirmed the policy of the United States against revenue sharing.

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<sup>14</sup> Application of Airlift International, Inc., for an exemption pursuant to § 416(b) of the Federal Aviation Act of 1958, as amended. CAB Doc. No. 15081 (OSN E-20635) March 31, 1964, 40 C.A.B. 948 (1964).



## B. *Cooperative Agreements Between Foreign Air Carriers*

### 1. *TAP—Alitalia*.<sup>15</sup>

Transportes Aereos Portugueses (hereinafter TAP) presented to the CAB a request for a foreign air carrier permit, along with a proposed agreement with Alitalia under which TAP would initially offer services by utilizing space leased on the Lisbon/New York portion of each flight operated by Alitalia between Rome and New York. The agreement provided that TAP would lease one half of the space of Alitalia's aircraft operating between Lisbon and New York at an agreed rental. Either party could terminate the agreement, although the record showed that the intent was that the agreement would last for five years. At the end of this period, Alitalia-leased flights would be gradually phased out. As the traffic increased, TAP's intention was to use its own aircraft.

Initially, since the equipment was owned and operated by Alitalia, the flights would be operated by Italian crews. At such times as TAP inaugurated services with its own aircraft, it would supply crews to operate the equipment. As to cabin personnel, stewards and stewardesses would be employed by TAP to handle its passengers from the outset. Ground-handling of passengers would be performed by TAP at Lisbon and, in New York, Alitalia would provide facilities and personnel.

The record in the case developed that there was no intention either to promote jointly the TAP-Alitalia operation or to hold out, in any way, the services to the public as being operated as part of a unified system. Alitalia was obligated to affix identification marks of TAP to all aircraft used on the route and to permit TAP to place promotional material aboard the aircraft.

The Board issued foreign air carrier permits to TAP and to Alitalia to engage in the proposed operation with the usual conditions, such as:

- (a) Prohibiting the passing off of services of one as services of the other;
- (b) limiting general agency agreements;
- (c) maintaining separate identities through appropriate markings, etc.

This case is significant because it involves an agreement between two foreign air carriers, both of which were "developed" carriers. The record showed that TAP was fit, willing and able to perform the services on its own, but it could do so only "at a prohibitive cost," and that the only way TAP could gain a market identity in the highly competitive North Atlantic market was through the arrangement proposed. The Examiner also concluded that this case was analogous to the Air Afrique case inasmuch as Portugal's economic development had not kept pace with the rest of the Western World.

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<sup>15</sup> Transportes Aereos Portugueses, S.A.R.L., CAB Doc. No. 16692 (OSN E-23820) June 1, 1966, approved by the President, June 14, 1966.

## 2. *Air Jamaica—BOAC—BWIA.*<sup>16</sup>

In August 1963, Air Jamaica Ltd. was incorporated as the national carrier of Jamaica, with the government holding 51%; BOAC, 33%; and BWIA, 16% of the airline's stock. Air Jamaica entered into a wet lease agreement with BOAC and BWIA for operations between Jamaica and New York, and Jamaica and Miami. In March 1965, Air Jamaica applied to the CAB for a foreign air carrier permit for its operations. Inasmuch as it owned no aircraft, Air Jamaica's application stated that the operations would be conducted under the wet lease arrangements with BOAC and BWIA.

The Board issued a permit to Air Jamaica but required BOAC and BWIA to obtain additional authority from the Board to conduct the operations as wet lessors to Air Jamaica. Both BOAC and BWIA claimed that neither carrier required additional authority from the CAB to operate their respective sectors under the wet lease agreement. BOAC's rationale was that the wet lease agreements did not constitute foreign air transportation as defined in the Act. BWIA adopted BOAC's position and, in addition, argued that it required no further authority from the CAB inasmuch as BWIA at that time held a permit for the Miami/Jamaica sector. (BOAC did not have New York City/Jamaica authority.) Regarding the contention of BOAC, the Board ruled that wet leases performed under the direction and control, and pursuant to the safety authority, of a lessor constitute air transportation by the lessor. Regarding BWIA's contention, the Board ruled that nothing in BWIA's permit granted authority to conduct operations other than in its own right.

The CAB's ruling clearly established that a foreign air carrier permit, absent a provision to the contrary, authorizes operations only in the holder's behalf and, further, that wet lease agreements constitute air transportation, as defined in the Act, when performed under the direction, control and safety authority of the lessor. Therefore, the question as to which party has direction and control under a wet lease agreement is a vital factor in the CAB's consideration as to whether or not authorization will be granted.

## 3. *VIASA—CDA.*<sup>17</sup>

In 1967, CDA, for competitive reasons, found it necessary to inaugurate jet service to Miami and San Juan, Puerto Rico. Representatives of CDA and VIASA met to study the feasibility of a plan of cooperation wherein VIASA would provide scheduling, equipment, management, sales, publicity, training, operations and related services for CDA over CDA's routes. At that time, CDA's financial condition was unsatisfactory; the company lacked suitable and modern equipment and was in need of a complete reorganization. Both airlines agreed to obtain from their respective aeronautical governmental authorities, to the greatest extent pos-

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<sup>16</sup> Air Jamaica Limited, CAB Doc. Nos. 15919 *et al* (OSN E-23280) Jan. 19, 1966, approved by the President, Feb. 19, 1966.

<sup>17</sup> VIASA Enforcement Proceeding, CAB Doc. No. 18791 (OSN E-26975) June 25, 1968.

sible, a limitation of competition from third parties and other such safeguards and advantages for their mutual interests. In May 1967, the airlines entered into a charter agreement under which VIASA agreed to furnish a Venezuelan-registered DC-9 aircraft (leased from AVENSA), with pilot and co-pilot, for three weekly round trips between Caracas and Miami via San Juan, and between Santo Domingo and San Juan.

The charter agreement provided:

- (a) That the pilot and co-pilot would not be employed by, nor wear the uniform of, CDA nor be subject to CDA discipline;
- (b) that the charters would operate designated flights in accordance with designated schedules and not at the discretion of CDA;
- (c) that VIASA would operate charters for other carriers with the aircraft and crews at times not designated for operations of CDA;
- (d) that VIASA would maintain the aircraft;
- (e) that the aircraft would bear CDA markings on only one side; and
- (f) that VIASA would bear the major risks of loss to the aircraft.

The air transport agreement with the Dominican Republic authorized the Santo Domingo/Miami and Santo Domingo/San Juan operations; however, the Venezuelan air transport agreement did not authorize an operation between Caracas and Miami via Santo Domingo nor a Caracas/San Juan sector.

This is a particularly significant case in inter-American aviation. VIASA took the position before the Board that the agreement constituted a true lease rather than a series of charters, that the entire operation was under the direction and control of CDA, and that the aircraft would be operated pursuant to the safety authority of CDA. The General Counsel of the CAB did not concur and was of the opinion that the arrangement did constitute an agreement for a series of charters involving routes to the United States which could not lawfully be performed by VIASA unless it was issued a foreign air carrier permit under section 402 of the Act. In July 1967, an enforcement proceeding was initiated at the CAB, in which proceeding the enforcement attorney requested that the Board order VIASA to cease and desist from violations of the Act:

- (a) By engaging in foreign air transport under the agreement with CDA between Santo Domingo and San Juan and Santo Domingo and Miami; and
- (b) from engaging in unfair or deceptive practices or unfair methods of competition by passing off the services of one of the carriers involved as those of the other carrier involved, or passing off the services of either as part of a unified system.

On 27 May 1968, the Examiner, under authority delegated to him by the Board, issued a cease and desist order to VIASA. Neither VIASA nor CDA filed petitions for discretionary review, nor did the Board take action to review the order on its own initiative. The Examiner's decision, then, became the final order of the Board, and the operations ceased after some temporary extensions of the effective date.

This case makes a clear distinction between leases and charter flights and

restates the policy of the CAB that where charter flights constitute foreign air transportation, appropriate authority must be obtained from the CAB. In addition, it emphasizes that a wet lease will not be approved if the lessor retains control so that the agreement in effect becomes a series of charters or a pooling of revenues.

#### 4. LANICA—TAN.<sup>18</sup>

In 1967, LANICA and TAN entered into a joint operating agreement designed to assist LANICA with a better utilization of its BAC-111 jet aircraft and to afford TAN an opportunity to commence jet service from Honduras to Miami. The carriers initiated service by operating the aircraft from Miami via San Pedro Sula, Honduras; San Salvador, El Salvador; and Managua, Nicaragua. Inasmuch as the operation was deemed to be outside the authority granted the carriers by the CAB, LANICA filed for an amendment to its permit, and TAN was made a party to the proceeding in view of the wet lease and blocked space features of the joint operating agreement.

The agreement between LANICA and TAN provided:

- (a) That the carriers would jointly share the use of flight equipment for the sector between San Salvador, San Pedro Sula and Miami;
- (b) that the flights would be operated with BAC-111 equipment owned by LANICA;
- (c) that on the flights between San Salvador and Miami via San Pedro Sula, each carrier would be allocated 37 seats;
- (d) that the aircraft would be under the full control of LANICA during the periods when the aircraft was jointly used; and
- (e) that each carrier would have full control over the use of the space assigned to it.

There were no bilateral agreements between the United States and Honduras and Nicaragua. LANICA was authorized, under its operating permit, to fly Managua/San Salvador/Miami, and TAN was authorized to fly San Pedro Sula/Belize/Miami.

On 12 September 1968, the Examiner rendered his recommended decision in this case. He observed that the Governments of Honduras and Nicaragua were interested in furthering a general program of economic integration, and, perhaps, this cooperative agreement would be a first step toward an ultimate formation of a consortium of Central American air carriers or the establishing of a new Central American airline. He noted that the operations under the agreement began without prior approval of the Board and that the Board would ordinarily take a dim view of such action. However, he found no corporate interlocking relationships between the two air carriers, that they maintained separate offices and identities, that there was no pooling of revenues or of equipment other than the BAC-111 and that, indeed, the airlines competed on the San Salvador/Miami sector. It was further noted that TAN contemplated purchasing its own equipment when traffic and its economic situation justified it.

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<sup>18</sup> *Lineas Aereas de Nicaragua, S. A. (LANICA)*, CAB Amendment, Doc. No. 19601 (OSN 69-2-7) Dec. 4, 1968, approved by the President, Feb. 1, 1969.

The Examiner found that LANICA, in order to carry out the terms of the agreement, did require authority under section 402 of the Act and that it was in the public interest to grant such authority with appropriate restrictions. On 4 December 1968, the Board adopted in the main the recommended decision but toned down some of the suggested restrictions. Interestingly, the Board found it unnecessary to pass on, and did not adopt, the Examiner's observations about the possible formation of a Central American airline consortium. The order and corresponding permit contain the following provisions:

- (a) Requiring the carriers to file all agreements, amendments and modifications regarding their services;
- (b) prohibiting joint public relation activities tending to pass off the services of one as the services of the other or as part of a unified system;
- (c) specifically identifying all flights of each airline without reference to the relation of the carrier performing general agency service;
- (d) requiring maintenance of separate telephone facilities;
- (e) requiring maintenance of separate identities of displays, advertising, desk space, personnel uniforms, time payment application forms, and in all public dealings; and
- (f) requiring the interior of the aircraft to identify the crew in operational control and the exterior to show that the capacity of the aircraft is shared by both airlines.

On 1 February 1969, President Nixon approved issuance of the permit to LANICA, which permit terminates on 18 September 1970, upon termination of the joint operating agreement between TAN and LANICA, or upon termination of the air carrier permit of TAN.

## V. EVALUATION OF COOPERATIVE AGREEMENTS

### A. CAB View On The Various Types Of Cooperative Agreements.

The CAB has taken a position on most of the common forms of cooperative agreements between airlines. Some conclusions can be derived from the decisions and policy statements.

#### 1. Leases.

When a United States air carrier is involved in a lease with a foreign air carrier, sections 408 and 412 of the Act are applicable, and CAB approval is required.<sup>19</sup>

Normally, the CAB is not involved in a simple dry lease between foreign air carriers; however, the Board does become concerned when a lease arrangement involves control by the lessor over the operations of the aircraft. Such an arrangement may be considered as a series of charters, and the lessor of the aircraft is then required to obtain a permit because the lessor is deemed to be engaged in foreign air transportation.

In determining whether a particular arrangement amounts to a wet

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<sup>19</sup> In some cases, it is possible for a U. S. air carrier to obtain an exemption granted under § 416(b) under a relatively quick procedure. Since § 416(b) clearly refers to "air carriers" and makes no reference to "foreign air carriers", this procedure is not available to foreign air carriers. The Board has specifically held that this wording excludes foreign carriers. American Export Airlines, Inc. Acquisition of TACA, S. A., 13 C.A.B. 216, 221 (1941).

lease and would require permit authority, the Board apparently will seek to determine whether the lessor conducts the operation as a part of its ordinary air carrier operations—using its flight crew and personnel, manuals, operating specifications and safety authority—or whether the lessor has surrendered responsibility and control over the operation to the lessee.

## 2. *Blocked Space.*

In the usual blocked space agreement, the lessor retains “control of the operation,” and authority must, therefore, be obtained from the CAB.

## 3. *Pooling.*

Pooling arrangements involving a United States air carrier and a foreign air carrier have been considered not to be in the national interest of the United States. The same holds true for pooling between foreign air carriers on the basic ground that such agreements permit a combination of carriers to render services which they could not undertake singly. Foreign pools which substantially reduce competition to the detriment of the free competition system sought by the United States have not been encouraged.

## 4. *Interchanges.*

Assuming that the proper route authorities exist and that the interchange is based on a true dry lease agreement with each carrier maintaining its own identity, no serious problem should result.

### B. *Cooperative Agreements Between United States And Foreign Air Carriers.*

Before granting authorization for cooperative agreements between a United States carrier and a foreign air carrier, the CAB has required that the foreign air carrier establish that it is not relying upon the United States carrier for the performance of its services under its foreign air carrier permit. The foreign air carrier must demonstrate that it meets the section 402 requirements of the Federal Aviation Act and is “fit, willing and able to perform such services” on its own in order to obtain and maintain its permit. However, there are exceptions where the CAB will conditionally approve such cooperative agreements on certain grounds:

#### 1. *Economic Necessity.*

The *Seaboard—Lufthansa*<sup>20</sup> case offers an example of a cooperative agreement which was approved for a limited period of time because there were sufficient grounds proved of “economic necessity.” However, the provision for the pooling of revenues was struck from the agreement.

#### 2. *National Interest.*

The *Air Afrique*<sup>21</sup> case demonstrated that an approval of a cooperative working arrangement may be granted on the basis of “national interest” where such approval would not have been warranted on aviation policy grounds alone.

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<sup>20</sup> Agreement between Seaboard World Airlines, Inc., and Deutsch Lufthansa Aktiengesellschaft, *supra* note 12.

<sup>21</sup> *Air Afrique*, *supra* note 13.

### 3. *Special Circumstances.*

In the *Airlift—Alitalia*<sup>22</sup> case, the CAB considered the "special circumstances" surrounding the case, *i.e.*, that a dispute under the bilateral agreement between the United States and Italy was in the process of arbitration. The Board felt that these circumstances warranted an exception to the policy against long-period chartering of aircraft by a United States air carrier to a foreign air carrier. However, once again, the Board refused to permit a revenue-sharing clause to remain in the agreement.

Therefore, in general, cooperative agreements of this nature will be approved only if reasonable grounds for an exception to the general rule can be shown, such as economic necessity, national interest or special circumstances.

#### C. *Cooperative Agreements Between Foreign Air Carriers.*

In general, the Board has not been favorably disposed toward cooperative agreements between foreign air carriers for similar considerations to those in cases where a United States air carrier is involved. Once again, however, some exceptions have been made, as the cases reflect. In the *Air Jamaica*<sup>23</sup> application, a favorable determination was made on the ground that it was in the "national interest" to assist a developing nation establish its flag carrier. Nevertheless, the Board required both of the foreign air carrier-lessors, BOAC and BWIA, to obtain additional authority to carry out the wet lease agreements.

Even in the case of an established air carrier, the CAB has approved a cooperative agreement on the ground of "national interest." In the *TAP—Alitalia*<sup>24</sup> authorization, the Board recognized that Portugal's economic development had not kept pace with other countries of the Western World. In addition, it was demonstrated that TAP had definite intentions to acquire and operate its own facilities in the future.

#### D. *Significant Factors In Cooperative Agreements.*

A number of factors may be significant in the approval or disapproval of cooperative agreements. A review of the cases decided by the CAB and its policy statements indicate that the following factors have been considered in the past and should be included in a "check list" for evaluation purposes.

1. Stage of economic development of the countries involved.
2. Stage of development of the airlines involved.
3. Bilateral air transport agreements.
4. Route authorities.
5. Potential impact on existing markets and competition.
6. Duration of agreement.
7. Ability of one airline to obtain a greater utilization of expensive equipment, pending development of its own market.

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<sup>22</sup> Application of Airlift International, Inc., *supra* note 14.

<sup>23</sup> Air Jamaica, Ltd., *supra* note 16.

<sup>24</sup> Transportes Aereos Portugueses, S.A.R.L., *supra* note 15.

8. Ability of one airline to upgrade service, gain experience with equipment, and develop markets pending eventual acquisition of equipment on its own.
9. Extent of control of one airline on the operations of another, *i.e.*, use of a true lease rather than a series of charters, *e.g.*, whether the operations are conducted under the flight manuals, operating specifications and safety authority of another airline.
10. Ability of an airline to penetrate a highly competitive market on an economically sound basis.
11. Probabilities that one airline will pass off its services as those of the other or as part of one unified system, *i.e.*, through the use of joint promotions, public relations and advertising, inadequate identification of personnel, desk space, tickets and exterior and interior of aircraft.
12. Terms of general agency agreements.
13. Pooling of revenues.
14. Pooling of personnel, equipment and facilities in addition to the specific flight operations.
15. Arbitrary division and/or restrictions of markets.
16. Whether operations commence prior to application for CAB approval.
17. National interest considerations.
18. "Special circumstances."

#### *E. Conditions Imposed On Cooperative Agreements.*

Even when cooperative agreements have been approved, the CAB has customarily imposed conditions such as:

1. Limiting duration of the agreements.
2. Filing of agreements and amendments thereto.
3. Filing of statistical information.
4. Limiting general agency activities.
5. Appropriately identifying the aircraft, outside and inside.
6. Prohibiting joint promotions.
7. Prohibiting joint public relations activities.
8. Prohibiting sharing of revenues.

#### VI. CONCLUSION

This article has reviewed the policy of the United States Civil Aeronautics Board in the area of cooperative agreements involving foreign air carriers during the current decade by highlighting some of the more significant cases on the subject. Although each case must be considered on its own merits, the CAB has provided certain guidelines which can serve to guide those foreign airlines entering into cooperative agreements affecting transportation to and from the United States.

Past experience would indicate that foreign air carriers contemplating the use of wet lease, blocked space, or revenue-sharing arrangements on



routes to the United States should consider obtaining prior CAB approval. Obtaining such approvals ordinarily involves a considerable amount of time and expense, and the carrier must be prepared to follow the procedures indicated and anticipate interventions by interested airlines. To initiate operations under such cooperative agreements without prior CAB approval, however, involves the risk of a subsequent cease and desist order with the related consequences.

It should be emphasized that the position of the CAB in deciding whether or not to grant authorization for cooperative agreements has been fairly flexible in the past. In the light of the *TAN—LANICA* decision<sup>25</sup> and the demands of the forthcoming decade, it can be anticipated that there will be an even more flexible attitude on the part of the CAB in the future.

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<sup>25</sup> *Lineas Aereas de Nicaragua, S. A. (LANICA)*, *supra* note 18.