Mutually Exclusive Air Route Application Hearings: Procedural Stringency

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7. Based upon the hearings to date and additional data studies by the committee, it appears that the German route exchange is economically unsound. In the absence of a satisfactory renegotiation, the Government should insist upon performance of the basic principles of the agreement and make full use of the agreed rights to consultation under article 12, or even termination under article 16 if abuses develop.

8. The Department of State should create appropriate and adequate facilities to handle the negotiation of air transport agreements and consultations under them. This undertaking by the Department of State should result in the creation of posts of rank and responsibility commensurate with those of foreign governments, and qualified Foreign Service officers should be selected to fill them. With the development of international aviation, it seems clear that it would be necessary to have several persons, some able to travel abroad and some to remain in Washington, to cope with the many negotiations and consultations which will be required in this field.

The subcommittee should continue to function in order (1) to observe the development by the Government of a procedure for working with the carriers; (2) to insure that such procedure is satisfactory; and (3) to watch the formulation of an effective program for enforcement of the Bermuda principles—all in all, so that we can be certain, at this important transitional stage, of the maintenance of the deserved preeminence of the United States in world air transport.

JUDICIAL AND REGULATORY DECISIONS

MUTUALLY EXCLUSIVE AIR ROUTE APPLICATION HEARINGS: PROCEDURAL STRINGENCY

One of the main functions of the Civil Aeronautics Board1 is the certification of new air routes. All applications for routes are given a hearing before this agency. As our national aviation transportation system expands and progresses, the Board has found itself deluged with a flood of these applications, yet it is capable of hearing only a limited number. As a result, there is an ever increasing backlog of applications waiting to be heard. In order to reduce this accumulation, the development of a more efficient and streamlined system of hearings is required. However, in attempting to develop such a system, care must be taken to avoid the possibility of encroachment on the applicant's right to a fair hearing.

This problem of increasing the number of applications considered while, at the same time, according the applicant a full and fair hearing is particularly vexing when the Board is faced with two or more air route applications which seek to serve a route capable of supporting only one, thus making the applications mutually exclusive.5 A recent case, Delta Air Lines Inc. v. Civil Aeronautics Board,6 presents this problem.

1 Hereafter referred to as CAB.
2 "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the CAB authorizing such carrier to engage in such transportation . . . " 52 Stat. 987 (1938), 49 U.S.C. § 481(a) (1952).
5 An air route is exclusive (and applications with regard to that route are mutually exclusive) when there is not sufficient demand for service at the time the applications are being considered, to support more than one air line. Northwest Airlines v. CAB, 194 F. 2d 339, 334 (D.C. Cir. 1951).
6 228 F. 2d 17 (D.C. Cir. 1955).
In that case, Eastern Air Lines applied to the CAB for modification of its St. Louis-New York Routes. In the same application, additional route segments of a north-south nature were sought between Cincinnati and Memphis. Shortly thereafter, Delta Air Lines, basically a north-south carrier with operations between New Orleans and Detroit, applied for modifications to its certificate. These modified routes would also include service between Cincinnati and Memphis. Delta alleged that the traffic between the two cities would support one carrier only, and that the applications were, therefore, mutually exclusive. Since the applications were of that nature, Delta requested a consolidation of the hearings.

In response to Delta's request for consolidation, the CAB, without holding a hearing on the question of mutual exclusivity, ruled that, because of differences in the scope of the two applications, the broad implications of the two proposals differed so much as to preclude mutual exclusivity. In addition, the Board felt that consolidation of the applications into one hearing would cause unduly expanded issues and delayed decisions. As a result, the application for consolidation was denied. However, it was indicated that Delta would be permitted to intervene in the hearing on Eastern's application for the purpose of trying to prove mutual exclusivity.

Delta's petition for a stay of the proceedings on Eastern's application, pending review of the Board's denial of consolidation, was granted by the United States Court of Appeals for the District of Columbia Circuit, with respect to those segments of the application alleged to be mutually exclusive. The court said that if a claim of mutual exclusivity is not frivolous or insubstantial, a decision on that issue without a hearing is not satisfactory. Setting forth the types of procedure required when mutual exclusivity is involved, the court held that where mutual exclusivity exists as an established economic fact, all conflicting applicants must be heard in one consolidated, comparative hearing. However, where mutual exclusivity is merely alleged and not clearly evident, the court felt that a comparative hearing need not be held initially. The exact procedure in such cases of alleged mutual exclusivity is left to the discretion of the CAB; thus, the

7 The CAB felt that the extent of identical route segments requested in both applications was so small as to present no considerable conflict of economic interests. 1 A CCH Aviation Law Rep. 21,931 (1956).
8 The Board undoubtedly feels that in a case such as this, with only a small segment of each of the two applications overlapping, a consolidated hearing embracing the entire area of both applications would most likely result in quibbling and bickering over many points on which there are no real conflicts. Hearing the two applications separately would eliminate the greater part of this, and thus result in speedier hearings for both parties.
9 As one whose interests are liable to be offered by the proceedings on Eastern's application, Delta is entitled to intervene in that proceeding, subject to certain restrictions. 14 C.F.R. §§ 302.15, 302.14 (1952).
10 Under the impression that the Board was going to dispose of the mutual exclusivity issue before hearing the merits of Eastern's application, the court initially refused Delta's request for a stay. Subsequently, upon being apprised of the Board's true intent, the stay was granted by the court. Delta Air Lines, Inc. v. CAB, 228 F. 2d 17, 22 (D.C. Cir. 1955).
11 The CAB had rejected the claim of mutual exclusivity without holding a hearing.
12 The term "comparative hearing" refers to a procedure in which the parties are heard concurrently, with each accorded the rights to cross examination, oral argument, and rebuttal.
13 "The agency has a choice of procedure when two applications are alleged to be mutually exclusive. It may, for example, (1) set for hearing and thereupon decide the issue of exclusivity as a separate preliminary issue; (2) proceed to a comparative hearing . . . without further ado; or (3) set for hearing and thereafter decide the merits of the two applications and also the issue of exclusivity." Delta Air Lines, Inc. v. CAB, 228 F. 2d 17, (D.C. Cir. 1955).
Board may, at its discretion, hold a preliminary hearing to determine the mutual exclusivity issue. However, regardless of the procedure chosen to resolve this question, no separate hearings on the merits of the respective applications may be held until the issue is settled. For if the issue is resolved affirmatively and mutual exclusivity is established, a consolidated, comparative hearing would be required. Only if mutual exclusivity is found not to exist may separate hearings be held.

In arriving at the conclusion that mutually exclusive applications, definitely established as such, must be given a comparative hearing, the court relied on the case of *Ashbacker Radio Co. v. FCC,* in which it was held

> "... that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

Subsequently, the CAB disposed of the two applications in accordance with the holding of the court, even though it disagreed with the D. C. Circuit's interpretation of the *Ashbacker* decision. The CAB attributed a strict construction to the exact language of the holding. The Board's interpretation would require only a concurrent consideration of all mutually exclusive applications before a grant is made. The hearing itself would not have to be of a comparative nature. Thus, there are two conflicting interpretations of the *Ashbacker* doctrine, each with its own advocates.

The variously interpreted holding of the United States Supreme Court in the *Ashbacker* case was based on the Court's desire to assure the applicant a full and fair hearing. In *Ashbacker* the aggrieved party had received a hearing, but it was not held until after the other mutually exclusive application had been granted. The Court felt that such a procedure deprived the losing applicant of an effective opportunity to be heard, which Congress had accorded him. The applicant was entitled to a genuine hearing.

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14 326 U.S. 327 (1945). In this case, two parties applied to the FCC for the same broadcasting frequency. Since two radio stations operating on the same frequency would have interfered with each other's broadcasts, their applications were mutually exclusive as an established fact. The FCC granted one application, and then, for the first time, set the other for hearing, as it was required to do by statute before the application could be finally denied.

15 Id. at 333.

16 Due to severance of the non-conflicting east-west portions of Eastern's application and because of a voluntary withdrawal by Eastern of a large portion of its previously conflicting segment, the overlapping of the two applications was so slight, in the eyes of the CAB, as to constitute no substantial conflict of economic interests. Since the claim of mutual exclusivity was now insubstantial, a consolidated hearing on that issue was no longer required, and the Board moved the court to vacate the previously imposed stay. 1A CCH Aviation Law Rep. 21,931 (1956).

17 The firmness of the CAB's conviction is evidenced by their statement that before they accept the view of the D. C. Circuit as the final word, they will pursue the issue until all avenues for the review of its validity have been exhausted. 1A CCH Aviation Law Rep. 21,931 (1956).

18 Under the interpretation of the D. C. Court of Appeals, the proceeding would have to be of a comparative nature.

19 The D. C. Circuit has espoused its interpretation previously with regard to radio applications. Radio Cincinnati v. FCC, 177 F. 2d 92 (D.C. Cir. 1949); see Kentucky Broadcasting Corp. v. FCC, 174 F. 2d 38 (D.C. Cir. 1949). The CAB's interpretation is also followed by the 9th Circuit. Western Air Lines v. CAB, 184 F. 2d 545 (9th Cir. 1950).

20 Justice Frankfurter, in his dissent in the *Ashbacker* case, was under the impression that the majority ruling required all mutually exclusive applications to be heard concurrently. See *Ashbacker Radio Co. v. FCC,* 326 U.S. 327, 335 (1945).

21 *Ashbacker Radio Co.* was entitled to a hearing by virtue of 48 Stat. 1085 (1934), 47 U.S.C. § 309(b) (1952), which provides a hearing for any applicant on whom the Commission has not reached a favorable decision.

22 In such a case the applicant finds himself, for all practical purposes, in the unenviable position of trying to displace an established licensee.
ing, full and fair. What he received had the outward appearance of a hearing, but it was substantially defective in both form and substance.

Once the fairness aspect is recognized as the motivating factor behind the Ashbacker decision and the flexibility with which such a criterion can be implemented is perceived, it is no wonder that the holding has been subject to a variety of interpretations. The Court did not explicitly spell out what would constitute a fair hearing, probably because what would constitute a fair hearing in one case might, under another set of circumstances, be a violation of the statutory rights of the parties. As a result, the procedure appropriate for each case must be individually determined.

Generally, if Congress itself has not set up the precise form to be followed in quasi-judicial hearings before an administrative tribunal, the procedure is left to the discretion of the administrative agency. So long as no interest, private or public, is violated by the procedure promulgated by the agency, the parties are not aggrieved and have no cause for appeal to a court of review. A fair hearing before an administrative tribunal requires that each party have the reasonable opportunity to know the claims of the other party and to contest them. Moreover, when the hearing concerns parties with opposing interests, this doctrine has been interpreted as requiring the presence of all parties at all hearings, with the opportunity to introduce evidence and cross examine witnesses, that is, a trial-type or adversary proceeding. More specifically, utilization of the trial-type hearing would seem to be required when a dispute arises with respect to facts which peculiarly relate to particular parties, their past conduct, or their circumstances, business, or property.

When several carriers apply for a route, the economic aspects of which are such that profitable operation is possible only if use of the route is limited to one party, the applicant desiring certification must prove that granting his certificate will best serve the public interest. In so doing he must vie with the other applicants, all of whom will try to show that they, themselves, can best serve the public interest. Data will be presented regarding the particular parties, their past conduct, their circumstances, business and property. Each applicant for the exclusive route will also be opposing the application of all other carriers. This undoubtedly will

26 Brotherhood of Railroad Trainmen v. Swan, 214 F. 2d 56 (7th Cir. 1954).
27 Davis, The Requirement of Opportunity To Be Heard in the Administrative Process, 51 Yale L. J. 1093 (1942). In this article, Professor Davis discusses a variety of procedural devices which can be used in administrative hearings. He concludes that all are practicable and appropriate under the proper circumstances. He would reserve the trial-type procedure for those instances where a dispute arises concerning facts which peculiarly relate to particular parties, their past conduct, or their circumstances, business or property. Under such circumstances, a trial-type proceeding would seem necessary in order to preserve the right of the parties to a fair hearing.
28 The public interest requires that the route be served by the carrier who, among other things, is most fit, willing and able. CAB v. State Airlines, 338 U.S. 572 (1950). See also 52 Stat. 987 (1938), 49 U.S.C. § 481(d) (1952).
29 In order to prove fitness, willingness, and ability the carrier-applicant must show (1) a proper organizational basis for the conduct of air transportation; (2) a plan for the conduct of the service, made by competent personnel; and (3) adequate financial resources. Braniff Airways, Inc. v. CAB, 47 F. 2d 152 (D.C. Cir. 1945).
30 Competing applicants for mutually exclusive air routes are allowed to show that the others are not fit and able to serve as a carrier on that route. The purpose of this is to give the hearing tribunal the advantage of all available information, both good and bad, as a basis for its selection of the applicant best qualified to serve the public interest. CAB v. State Airlines, 338 U.S. 572 (1950).
lead to disputes with regard to facts pertinent to the business property, etc. of the particular parties. When this type of situation exists, a trial-type or adversary proceeding is necessary in order to provide a full and fair hearing for parties whose applications are mutually exclusive. The comparative hearing, which is advocated by the D. C. Circuit, satisfies the adversary proceeding requirement and assures the applicant of a fair hearing.

However, in addition to fairness considerations, there is another factor to be taken into account when formulating procedures for mutually exclusive air route application hearings. This factor, which is vigorously advocated by the CAB, is expedition. Since savings of time, money and effort further the public interest, the Board feels that they are of paramount importance in any disposition made with respect to air route applications.31

The CAB advocates a procedure which, it feels, combines a method for expeditious handling of applications with one which provides the greatest fairness which can be achieved.32 Such a procedure consists of separate hearings for the two applicants, coupled with intervention rights for interested parties,33 followed by a concurrent consideration of the findings of the respective hearing examiners by the Board. In following this procedure,34 an applicant for a mutually exclusive route would intervene in the hearing on the merits of the other application for the purpose of cross-examination, introduction of pertinent evidence, and rebuttal, and then present affirmative arguments with regard to his own application in a separate hearing.

Such a procedure satisfies the adversary proceeding criterion, and, the CAB contends, provides a more expeditious hearing than the comparative proceeding. In a comparative hearing, embracing the entire area of both applications, quibbling and bickering will most likely occur with respect to many points concerning which there are no real conflicts. But in the intervention proceeding, the intervenor is restricted to matters in which he has an interest. The scope and length of his intervention are limited in order to avoid delay and complexity.35 The result is a hearing which accomplishes a saving of much time, money, and effort when compared with that expended in the comparative proceeding.

However, in utilizing the intervention proceeding, there is the possibility that when there is a large area of conflict—which would require a correspondingly large scope of intervention—the restrictions and limitations imposed for the sake of convenience and speed may be exercised to such an extent that the fullness and fairness of the hearing are curtailed. In such a case, although the applicant is accorded what appears to be an adversary

32 "The (CAB) is . . . cognizant of its duty to accord adequate protection to private rights in the process of vindicating the public interest, and we have . . . attempted to strike an appropriate balance between the two." 1 A CCH Aviation Law Rep. 21,931 (1956).
33 Under the CAB regulations any person with a property or financial interest that is to be affected by a proceeding of the Board may intervene in the proceeding and become a party therein, so long as intervention does not unduly broaden the issues or delay the proceedings. Furthermore, he may not intervene if the affected interest has been otherwise represented in the proceeding or is capable of adequate protection elsewhere. 14 C.F.R. § 302.15 (1962). In those cases where intervention may cause undue delay or complexity, the scope of intervention is subject to the discretion of the hearing examiner. 14 C.F.R. § 302.14 (1952).
34 Advocated in 64 Harv. L. Rev. 1189 (1951).
proceeding, he receives a hearing which, so far as fullness and fairness are concerned, is inferior to the comparative proceeding.\textsuperscript{36} Fairness, however, may not be sacrificed to expediency,\textsuperscript{37} although some sacrifice of convenience may be necessary in order to achieve fairness. In hearing applications with varying degrees of mutual exclusivity,\textsuperscript{38} the hearing procedure utilized may depend on the area of conflict between the parties.

Air route applications whose conflicting portions are merely minute segments of the overall routes may be handled in intervention proceedings. Of course, when severance is feasible, the mutually exclusive portions can be severed for a consolidated hearing and the remaining portions heard in separate hearings, without intervention. However, if the mutually exclusive portion is so intertwined with the non-conflicting portions of the application that severance is impossible, intervention would satisfy the fairness criterion. When the conflicting segments are but minute portions of the applications, any possible loss in fullness and fairness which might result from holding an intervention proceeding rather than a comparative hearing is more than offset by the speed with which the applications can be processed and the routes granted. In such a case it would be more unfair to the applicant to subject his whole application to the quibbling and bickering of a comparative hearing, with its resultant delay, than to subject a minute portion of that application to the restrictions and limitations of intervention. Therefore, when the mutually exclusive portions of the application are so small that it would clearly be a disadvantage to subject the whole application to a comparative hearing, the intervention proceeding is the required procedure.

As the area of mutual exclusivity increases, the conflicting interests of the applicants likewise grow. As the scope of intervention widens, the possibility of a curtailment of fullness and fairness increases. At the same time, the speed with which the applications can be processed decreases. Ultimately, in cases where the two applications are mutually exclusive in their entirety, the intervenor will be intervening on virtually every issue, and the intervention proceeding will no longer be useful. In addition, due to the restrictions and limitations which might be imposed upon the intervenor, the hearing he would receive may be neither as full nor as fair as that received by a participant in the comparative proceeding. Therefore, in cases of full mutual exclusivity, the comparative hearing is the required procedure.

Somewhere in between complete mutual exclusivity and minute mutual exclusivity there are applications whose areas of conflict are of such size that the minor possibility of loss of fullness and fairness, occasioned by foregoing the comparative hearing, is still not clearly offset by the diminished advantages of an intervention proceeding at this stage. An area of conflict of this size represents the procedural transition point. Therefore, the procedure evolved for an application in which the conflicting area is neither minute nor complete should depend upon which side of the transition point it falls. Thus, in order to ascertain the procedure for

\textsuperscript{36} Since the regulations will not allow unrestricted intervention, in order to assure himself the opportunity to offer evidence and to render cross examination as a matter of right, the intervenor, himself, may limit and restrict the issues—issues which would be fully discussed and heard in a comparative hearing.

\textsuperscript{37} "... the right to such a [fair] hearing is one of the rudiments of fair play assured to every litigant ... as a minimal requirement. There can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay ...." Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292, 304, (1937).

\textsuperscript{38} Mutually exclusive air route applications may be identical in their entirety, but such a situation seldom exists. More frequently, only segments of each overlap and are mutually exclusive.
each individual transition case, an initial determination of the transition point is required.

This transition point, however, appears to be virtually incapable of exact determination. Its locus depends upon the comparative weight given to the factors of fairness and convenience. The weight accorded each factor must of necessity, be an estimate. As such, each estimate would tend to be arbitrary, and, for the same case, it is doubtful whether any two estimates would be identical. Consequently, there is such a possibility of inaccuracy in this determination, that it is submitted that a more definite rule should be established.

Since it is impracticable to ascertain the optimum procedure for each individual transition case, all cases of mutual exclusivity which qualify as transition cases should be heard in a proceeding which would provide the optimum in fairness on an overall basis. The procedure which provides the optimum in fairness on an overall basis is the comparative hearing. The possible undue delay in processing which may result from using the comparative proceeding, rather than the intervention proceeding, can be minimized by some judicious hatchet-work at the outset of the proceeding. On the other hand, the possible undue loss of fullness and fairness which may occur from utilization of the intervention proceeding cannot be compensated.

Therefore, except in cases where mutual exclusivity involves what is clearly only a minute segment of the application, all applications which are of a mutually exclusive nature should be heard in a comparative proceeding. In so doing, a workable system achieving the ultimate that is practicable in expedition and fairness will be provided.

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80 The differentials in fairness and convenience which actually prevail could only be determined by conducting a hearing of each type on the same conflicting applications and then comparing the results.

40 “Undue delay” is delay in processing which is not compensated by the increase in fullness and fairness which the comparative hearing provides.

41 Certain route segments in the conflicting applications have no substantial bearing on the exclusivity issue since these segments are not of a conflicting nature. These segments are oftentimes severable from those which are of an exclusive nature and can be considered separately. Furthermore, amendment of applications by carriers in order to eliminate conflict is possible once the applicants are apprised by the Board of the exclusivity issue.

42 “Undue loss” is a loss of fullness and fairness which is not compensated by the increased speed with which the application is processed in an intervention proceeding.