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REGULATION BY THE CIVIL AERONAUTICS BOARD OF THE OWNERSHIP AND CONTROL OF FOREIGN AIR CARRIERS

BY JERROLD SCOUTT, JR., AND COATES LEAR*

THE Civil Aeronautics Board has never declined to issue a Foreign Air Carrier Permit because of dissatisfaction with the ownership and/or control of the applicant. However, in three recent cases this was a hotly contested issue,1 and it promises to remain so. The problem is, of course, not confined to the three small airlines whose applications have most recently raised the issue. It affects any U. S. citizen (but particularly U. S. air carriers) seeking foreign aviation investments; it affects foreign governments and foreign carriers seeking outside capital and technical assistance; it affects foreign air carriers planning consolidated or pooled operations to the United States; and it must somehow be reconciled with our planned assistance for friendly foreign nations. It is the purpose of this Article to trace the development of these rules, to survey the manner in which they have been applied by the Civil Aeronautics Board, and to analyze the considerations which justify their retention.

I. WHAT ARE THE STANDARDS?

Origins of Rule. In January 1941, 25% of all of the local airline operations in Latin-America were owned by German nationals.2 This fact, coupled with the dramatic efforts which eliminated the Axis influence in hemisphere aviation, lead to the following resolution of the Foreign Ministers of the American Republics assembled at Rio de Janeiro, January 28, 1942:3

"CIVIL AND COMMERCIAL AVIATION"

"Whereas:
"1. The American Republics by mutual understanding have agreed to unite in a common effort to resist the attempts of any foreign power through force or subversion to destroy their individual or collective freedom;
"2. The peaceful pursuit of such a course is presently threatened by the non-American countries at war with American Republics whose resort to subversive methods and force is inimical to our common integrity; and
"3. It has been amply demonstrated that the operation or use of aircraft in the American Republics by nationals of non-American countries at war with American Republics and the use of airfields and aviation facilities in these Republics by such nationals constitute a serious threat to hemispheric defense,

* Members of the District of Columbia Bar.
3 Department of State Bulletin, February 7, 1942.
"The Third Meeting of the Ministers of Foreign Affairs of the American Republics

Resolved:

"To recommend to each American Republic that in harmony with its national laws, immediate steps be taken to restrict the operation or use of civil or commercial aircraft, and the use of aviation facilities to bona fide citizens and enterprises of the American Republics or to citizens or enterprises of such other countries as have shown themselves, in the judgment of the respective Governments, to be in full sympathy with the principles of the Declaration of Lima." 4

This same view is attributed to President Franklin Delano Roosevelt in the conferences which preceded the Chicago Convention. 5 Rules as to ownership and control of airlines were thereafter embodied in the documents produced by the Chicago Convention, and this modern day "Monroe Doctrine" has been incorporated in all of the Bilateral Air Services and Air Transport Agreements negotiated since that date by the United States. In its present form, the rule provides as follows:

"Each contracting party reserves the right to withhold or revoke the operation permission provided for in Article 3 of this Agreement from an airline designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party . . . ."

By this reservation, each contracting party may unilaterally satisfy itself as to the facts of ownership and control, but the standards of what constitutes "substantial" and "effective" are matters of interpretation of the Bilateral Agreement. 6 The way this has been handled by the Civil Aeronautics Board is summarized in the following paragraphs.

Substantial Ownership. There is no decision of the Civil Aeronautics Board which specifies what percentage of equity constitutes "substantial ownership," although the Department of State, presumably after consultation with the Board, did so in a note exchanged simultaneously with the execution of the Bilateral Air Transport Agreement with the Republic of Peru. The pertinent provisions of this note are quoted below:

"The experience of recent months leads to the conclusion that the Government of Peru will be able to promote the formation of one or more Peruvian aviation enterprises for the purpose of being designated, as regards the Agreement, only if a reasonable period of time could be available for a company originally formed with a moderate percentage of effectively Peruvian capital, to increase gradually under the control of the Government of Peru, the proportion of Peruvian capital until a minimum proportion of 51% is reached, which will permit securing for it the title of an effectively Peruvian company; . . . ." 7

There is no other example of a similar interpretation. It is interesting to note, however, that when the Civil Aeronautics Board shortly thereafter passed upon the application of Peruvian International Airways for a foreign air carrier permit, these rules were not applied because the Board was apparently not "satisfied" that these requirements had been met. However,

4 The Declaration of Lima, approved December 24, 1938, had reaffirmed the solidarity of the American states and their decision to defend themselves against foreign intervention.

5 Smith, Airways Abroad, The University of Wisconsin Press (1950), p. 151, quoting A. A. Berle, Jr., who was then an Assistant Secretary of State.

6 Such interpretation should follow the general rules of contract construction, beginning with the proposition that the intention of the parties must govern. One important difference should be noted. Where international agreements are executed in counterparts, one in the language of each contracting party (as is case with Bilateral Air Transport Agreements), little use can be made of the local technical definition of words. See: In Re Zalewski's Estate, 292 N. Y. 332, 55 N. E. 2d 184 (1944).

7 Treaties and other International Acts Series, No. 1587, Department of State, p. 17.
since the ownership rules are discretionary rather than mandatory, the Permit was nonetheless issued.\(^8\)

Much of the controversy that later developed could have been avoided had the Board announced either (a) that a 51% equity interest constituted “substantial ownership,” or (b) that a foreign country’s own requirements of local ownership would be accepted as meeting the standard in the Bilateral.

**Table No. 1**

**EXAMPLES OF AIRLINE OWNERSHIP REQUIREMENTS**

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage of Local Ownership Required</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>75%</td>
<td>Section 101 (13) Fed. Av. Act</td>
</tr>
<tr>
<td>Colombia</td>
<td>51%</td>
<td>7 CAB 149 (1946)</td>
</tr>
<tr>
<td>Venezuela</td>
<td>51%</td>
<td>7 CAB 317 (1946)</td>
</tr>
<tr>
<td>Panama</td>
<td>60%</td>
<td>8 CAB 44 (1947)</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>51%</td>
<td>12 CAB 766 (1951)</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>60%</td>
<td>12 CAB 232 (1950)</td>
</tr>
<tr>
<td>Peru</td>
<td>60%</td>
<td>CAB Order No. E-15538 (1960)</td>
</tr>
<tr>
<td>El Salvador</td>
<td>None</td>
<td>CAB Order No. E-15144 (1960)</td>
</tr>
<tr>
<td>Ecuador</td>
<td>51%</td>
<td>CAB Order No. E-15819 (1960)</td>
</tr>
</tbody>
</table>

It is unrealistic to assume that the other party to a Bilateral Agreement “intended” to accept any higher standard of “substantial ownership” than that required by its own laws. This, of course, does not answer the problem for countries such as El Salvador that have no requirements of local ownership of their flag-carriers. In such instances, the best guide as to what is acceptable to the Civil Aeronautics Board is that which has been accepted; examples of this are shown in Table No. 2.

The standard of substantial local ownership of foreign air carriers is often complicated by the Civil Aeronautics Board’s announced determination to eliminate any “substantial interest” held in such carriers by U. S. air carriers.\(^9\) There is, therefore, a potential conflict between the standards of the Bilateral (“substantial ownership”) and rules asserted under Section 408 (“substantial interest”). For example, even though a U. S. air carrier held a 25% stock interest in Transcontinental, an Argentine carrier, the Board was able to make the required findings of substantial local ownership for Section 402 purposes;\(^10\) nevertheless, this investment constituted a “substantial interest” for Section 408 purposes and divestment within 5 years was ordered.\(^11\) Such rules cut foreign air carriers off from equity supplied by U. S. air carriers, although the Board would have no jurisdiction to impose a similar restriction where the U. S. investor was not an air carrier.\(^12\)

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\(^8\) Peruvian International Airways, Foreign Air Carrier Permit, 8 CAB 229, 233 (1947).

\(^9\) The doctrine was originally expressed in the Havana-New York Foreign Air Carrier Permit Case, 14 CAB 399 (1951), and was reaffirmed in the Board’s decision in Aerovias Venezolanas, Foreign Permit, 20 CAB 746 (1955), and later in the proceeding entitled California Eastern Aviation, Inc. et al., Control and Interlocking Relationships, Order No. E-12118, January 16, 1958.


\(^11\) CAB Order No. E-12118, Jan. 16, 1958. It is not clear how much less than a 25% interest would be “substantial” for these purposes, although in certain Section 408 problems the Board has said that a “minute percentage may be a substantial part.” Sec: Pan American-National, Opinion & Order, E-13124, Oct. 31, 1958; Northwest-Eastern Equipment Interchange, 19 CAB 346 (1954); Continental-United Equipment Interchange, 17 CAB 635 (1955).

\(^12\) Compania Dom., Cap-Haitien and Port-Au-Prince Service, 19 CAB 823 (1955).
<table>
<thead>
<tr>
<th>Country of Origin</th>
<th>Name of Carrier</th>
<th>Percentage of Stock Owned by</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Nationals of Applicant</td>
<td>Nationals of U.S.</td>
</tr>
<tr>
<td>Mexico</td>
<td>Aeronaves</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Venezuela</td>
<td>TACA</td>
<td>58%</td>
<td>47%</td>
</tr>
<tr>
<td>Mexico</td>
<td>Mexicana</td>
<td>59%</td>
<td>41%</td>
</tr>
<tr>
<td>Panama</td>
<td>Panamena de Aviacion</td>
<td>67%</td>
<td>33%</td>
</tr>
<tr>
<td>Philippine</td>
<td>Philippine Air Lines</td>
<td>77%</td>
<td>23%</td>
</tr>
<tr>
<td>Bahama</td>
<td>Bahama Airways</td>
<td>55%</td>
<td>45%</td>
</tr>
<tr>
<td>China</td>
<td>China National Aviation Corp.</td>
<td>80%</td>
<td>20%</td>
</tr>
<tr>
<td>Italy</td>
<td>LAI</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>LACSA</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Dominican Rep.</td>
<td>CDA</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Cuba</td>
<td>Cubana</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Panama</td>
<td>AVISPA</td>
<td>75%</td>
<td>25%</td>
</tr>
<tr>
<td>Venezuela</td>
<td>AVENSA</td>
<td>70%</td>
<td>30%</td>
</tr>
<tr>
<td>Argentina</td>
<td>Transcontinental</td>
<td>75%</td>
<td>25%</td>
</tr>
<tr>
<td>Peru</td>
<td>APSA</td>
<td>72%</td>
<td>28%</td>
</tr>
<tr>
<td>Ecuador</td>
<td>LIA</td>
<td>Over 50%</td>
<td>30%</td>
</tr>
</tbody>
</table>
Effective Control. Except for those few instances where a controlling stock interest was held by others than nationals of the applicant's homeland, the test of "effective control" is even more illusive than that of "substantial ownership." Even in those cases where U. S. interests were found to be in control of foreign air carriers the Board has given few clues as to how much control constitutes "effective control."¹⁴

There is a temptation in defining this standard to look to the Board's tests for "control" in Section 408 proceedings, which involve mergers and consolidations. Beginning with the case of Railroad Control of Northeast Airlines, 4 CAB 379 (1943), the Board has adhered to a very broad interpretation of the word "control."¹⁵ As interpreted for Section 408 purposes, "control" is now practically indistinguishable from "influence,"¹⁶ and it seems that the Board's jurisdiction under this Section of the Federal Aviation Act is constantly being expanded to reach "public interest" objectives.¹⁷ However, the definition of "effective control" in foreign air carrier permit cases is largely a matter of the interpretation of international agreements, and not regulation as such. The requirement of Section 1102 of the Federal Aviation Act is that the Board administer Section 402 consistently with obligations assumed under the Bilateral Air Transport Agreements.¹⁸

There is no provision in Section 402 that the Board must find the ownership and control of the foreign applicant complies with U. S. standards of "public interest." The requirements for local ownership and control are

³³ TACA International Airlines, S. A., 18 CAB 737 (1954); Cuba-Florida Air Carrier Permit Case, 12 CAB 292 (1950); Canadian Pacific A. L., Air Carrier Permit, 10 CAB 138 (1949); TACA, S. A., Foreign Air Carrier Permit, 10 CAB 130 (1949); Peruvian International Airways, Foreign Air Carrier Permit, 8 CAB 229 (1947); TACA, S. A., Foreign Air Carrier Permit, 7 CAB 715 (1946); Lineas Aereas Mexicanas, S. A., Temporary Foreign Air Carrier Permit, 6 CAB 165 (1944).

Compania Dom., Cap-Haitien and Port-Au-Prince Service, 19 CAB 823 (1955); Havana-New York Air Carrier Permit Case, 14 CAB 399 (1951); 16 CAB 371 (1952).

¹⁵ "Since there is no legal or technical meaning of control apart from that accorded the term in ordinary usage, it is apparent that control may apply to and cover a wide variety of situations. When 'broadly used (control) may embrace every form of control, actual or legal, direct or indirect, negative or affirmative.' As the late Justice Cardozo stated, a 'dominating influence may be exerted in other ways than through a vote.'" (pp. 381-2)

The same view was adopted in the following cases: Pan American Airways, Inc., Acquisition of Aerovias de Guatemala, S. A., 4 CAB 403, 405, 406 (1943); Pan American Airways, Inc., Acquisition of Aeronaves de Mexico, S. A., 4 CAB 494, 496 (1943); National-Caribbean-Atlantic Control Case, 6 CAB 671, 680 (1946); Braniff Airways, Inc., Acquisition of Aerovias Braniff, S. A., 6 CAB 947, 948 (1946); Acquisition of Mid-West by Purdue Research Foundation, 14 CAB 851, 856 (1951).

³⁶ See: Meteor-Metropolitan Aircraft Sale and Lease-Back Proceeding, Docket Nos. 8934 and 8946, Brief of Bureau Counsel, and Initial Decision of Examiner Pfeiffer; Arthur Vining Davis Enforcement Proceeding, Docket No. 8250, Complaint, Answer to Motion to Dismiss, and Order Denying Motion to Dismiss, Order No. E-10944, January 11, 1957; Transocean-Atlas Case, Docket Nos. 8943 and 10337, Initial Decision of Examiner Ruhlen, June 8, 1959. However, in the Pan American-National Agreement Investigation, Order No. E-15541, July 14, 1960, the Board does recognize (p. 11) the difference between the "power to influence" and the "power to control," at least for purposes of Section 408(a) (5) of the Act.


¹⁸ In non-Bilateral cases, the Board is free to apply the broad Section 408 standards in determining how much non-national ownership and control is in the public interest. But in Bilateral cases, the Board is confined to a reasonable interpretation of what constitutes "substantial ownership and effective control." Despite this distinction, the Board has held that the ownership and control rules are "equally applicable to those situations where there is no bilateral in force." TACA International Airlines, S. A., 18 CAB 737, 738 (1954).
found exclusively in the Bilateral Agreements; under Section 402, the Board is restricted to finding “such applicant fit, willing and able.”

One solution would be to equate “effective control” with “voting control,” which would guarantee that the final or ultimate decisions rested with nationals of the applicant’s homeland. Such a standard would be (1) consistent with objectives that originally led to the imposition of the ownership and control condition, (2) consistent with the intention of the parties negotiating the Bilaterals, and (3) easy to administer. A recent alternative solution equated “effective control” with “negative control” in the Reopened Aerolineas Peruanas, S. A., Foreign Permit Case, supra, where the Board reached this conclusion at page 4 of the mimeographed opinion:

“With regard to requiring divestiture of the block of APSA stock owned by Servicios, we see no present need for such a condition. Neither the bilateral agreement nor Board policy demands 100 percent ownership of APSA’s stock by Peruvian nationals, and since under Peruvian law the holders of two-thirds of a corporation’s stock can take any corporate action of any description, it is clear that Servicios will not be in a position to exercise even negative control over APSA’s corporate activities by reason of its stockholding.”

This decision probably rules out any non-national interest in excess of a 33 1/3% stock interest, even though a 40% non-national interest is permissible under the laws of Peru. The problem is that the Civil Aeronautics Board has not been trying to interpret the contract (i.e. the Bilateral Agreement), but for the most part has been trying to determine how much non-national ownership and/or control is consistent with U. S. objectives. Unilateral standards have been applied by the Civil Aeronautics Board to a bilateral problem, whereas it would seem that the question of interpreting what constitutes substantial ownership and effective control should be resolved under the machinery provided in the Bilateral itself:

“ARTICLE 10

“Except as otherwise provided in this agreement, or its Annex, any controversy between the contracting parties relative to the interpretation or application of this agreement, or its Annex, which cannot be settled through consultation shall be submitted for an advisory report to the Interim Council of the Provisional International Civil Aviation Organization, in accordance with the provisions of Article III, Section six (8) of the Provisional Agreement on International Civil Aviation signed at Chicago on December 7, 1944 or to its successor, unless the contracting parties agree to submit the controversy to some other person or body designated by mutual agreement between the same contracting parties. The executive authorities of the contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in such report.”

Vested in nationals. The term “vested” as distinguished from “contingent” or “potential” seems to have been involved in only one Section 402 case—TACA International Airlines, S. A., supra. Here the applicant sought to establish both “substantial ownership” and “effective control” for Section 402 purposes by proving that a national of El Salvador held (from the U. S. owners) an irrevocable proxy to vote 31% of the total shares and an irrevocable option to purchase 16% of the shares. Although the requirement of a vested interest was technically not before the Board because there is no Bilateral with El Salvador, the agency’s conclusion is probably a binding precedent:

19 Contrast the arrangement in Transcontinental, S. A. (Argentina), Order No. E-12117, January 3, 1958, where a U. S. air carrier’s stock interest was placed in a voting trust in order to sterilize its “substantial interest” for Section 408 purposes.
And with regard to control, the nature and effect of Kriete's voting rights under the option agreement (as detailed in the Examiner's decision) do not satisfy our requirement of effective control. While, technically speaking, the proxy held by Kriete coupled with the voting rights in his own shares, could be viewed under certain circumstances as giving him the power to control TACA, this kind of arrangement is too artificial and elusive to satisfy the basic purposes of our ownership and control policy. Indeed, we believe TACA's whole reorganization plan tacitly recognizes this fact.

No case has been found where the term "national" as distinguished from "citizen" has been an issue; however, an interesting question is suggested by the fact that some stockholders of foreign airlines are known to hold dual citizenship.

Nationals of the other contracting party. This present language in the Bilateral resulted from the following evolution:

a. Nationals of a contracting state. This was the rule in both the International Air Services Transit Agreement (the so-called "Two Freedoms" Agreement) and the International Air Transport Agreement (the so-called "Five Freedoms" Agreement), both of which were signed at Chicago, December 7, 1944.

The effect of this rule was discussed as follows in an excellent concurring opinion in the case of Venezuelan Airlines, Air Carrier Permit, 7 CAB 317, 327 (1946):

"... this broad provision ... permits the national of any signatory state to organize air transportation enterprises under the flag of any other signatory state."20

And its purpose was described in these terms:

"It was designed to permit a country that might not otherwise be able to finance its own airlines to enjoy the prestige attaching to international operations by an airline carrying its flag, or to permit a smaller country not having its own airlines to designate an existing international carrier for the purpose of developing air services to other countries."

b. Nationals of either party. The Chicago Convention also produced a draft of a Bilateral Air Transport Agreement, which was in fact used by the United States in all Bilaterals negotiated through August, 1946.21 In 16 instances, the United States has agreed that "substantial ownership and effective control" must be "vested in nationals of either party to the agreement." This means, for example, that even though BOAC were owned and controlled by Americans, or Pan American were owned and controlled by British nationals, each would nonetheless be entitled to operating permits.

c. Nationals of the other contracting party. Beginning with the Brazilian Bilateral in September, 1946, and continuing since that date, every one of the agreements contains the present language as to ownership and control, which exchanges the word "either" for "other." The interesting, though still unanswered question, is why should the change have been made?

The fact that the change occurred in connection with the Brazilian agreement may be significant because we now know that the designated Brazilian

20 In the case of TACA, S. A., Foreign Air Carrier Permit, 7 CAB 715 (1946), the denial of the application was urged because TACA, operating under the flag of El Salvador, was controlled by a Panamanian corporation. While El Salvador and the United States were signatory to the Chicago Air Transport Agreement, Panama was not. The fact of the matter was that the Panamanian holding company was owned by citizens of the United States. The Permit was granted as a matter of discretion, not right.

21 These included, in order of their signature date, Bilateral Air Transport Agreements between the United States and Spain, Denmark, Sweden, Iceland, Ireland, Switzerland, Norway, Portugal, Czechoslovakia, United Kingdom, Turkey, France, Greece, Belgium, Egypt and Lebanon.
# Table No. 3
Examples of Foreign Air Carriers Which Were Not Substantially Owned by Nationals of Their “Homeland”

<table>
<thead>
<tr>
<th>Carrier</th>
<th>Homeland</th>
<th>Non-National Ownership</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAMSA</td>
<td>Mexico</td>
<td>80% held by United Air Lines</td>
<td>6 CAB 165, 166 (1944)</td>
</tr>
<tr>
<td>TACA</td>
<td>El Salvador</td>
<td>98% held by U. S. citizens</td>
<td>7 CAB 715, 716 (1946)</td>
</tr>
<tr>
<td>PIA</td>
<td>Peru</td>
<td>68% held by Canadians and Americans</td>
<td>8 CAB 229, 232 (1947)</td>
</tr>
<tr>
<td>SAS</td>
<td>Scandinavia</td>
<td>Jointly owned by citizens of Norway, Sweden, Denmark</td>
<td>8 CAB 676, 680 (1947)</td>
</tr>
<tr>
<td>TACA</td>
<td>El Salvador</td>
<td>93% held by U. S. citizens</td>
<td>10 CAB 130; 133 (1949)</td>
</tr>
<tr>
<td>CPA</td>
<td>Canada</td>
<td>Majority held by citizens of Great Britain and U. S.</td>
<td>10 CAB 138, 142 (1949)</td>
</tr>
<tr>
<td>LAI</td>
<td>Italy</td>
<td>40% held by TWA</td>
<td>11 CAB 454, 457 (1950)</td>
</tr>
<tr>
<td>CUBANA</td>
<td>Cuba</td>
<td>48% held by Pan American</td>
<td>12 CAB 292, 296 (1950)</td>
</tr>
<tr>
<td>CUBANA</td>
<td>Cuba</td>
<td>42% held by Pan American</td>
<td>14 CAB 399, 401 (1951)</td>
</tr>
<tr>
<td>TACA</td>
<td>El Salvador</td>
<td>93% owned by Waterman Airlines</td>
<td>18 CAB 737, 738 (1954)</td>
</tr>
<tr>
<td>TACA$^{22}$</td>
<td>El Salvador</td>
<td>93% held by U. S. citizens</td>
<td>E-15144 (1960)</td>
</tr>
<tr>
<td>TAN</td>
<td>Honduras</td>
<td>Majority held by U. S. citizens</td>
<td>E-15548 (1960)</td>
</tr>
</tbody>
</table>

$^{22}$ This was the sixth time the Board issued a Section 402 Permit to TACA; its U. S. ownership and control has been at issue for 12 years.
carrier (Aerovias Brazil) was at the time of the Bilateral a part of the TACA System, which was owned and controlled by a British subject. See: Aerovias Brasil, S. A., Air Carrier Permit, 8 CAB 348 (1947). However, it is obvious that a British-owned and controlled Brazilian-designated air carrier could not meet the requirements of a U. S.-Brazil Bilateral referring to "nationals of either party." The change in language was not necessary if the U. S. objective were to exclude Aerovias Brasil as then constituted. It may be, however, that this situation simply led to a reappraisal and tightening of the ownership and control provisions, although the motive for doing so remains obscure.

II. WHEN SHOULD A PERMIT BE WITHHELD?

In a number of Section 402 cases, the Civil Aeronautics Board has actually found the applicant to be substantially owned and/or effectively controlled by nationals of another country. Examples of this are shown in Table No. 3.

Under these circumstances, the United States could have withheld the Foreign Air Carrier Permit. The considerations governing the decision whether or not to do so have been these:

A. Subsidy. Beginning with the Havana-New York Air Carrier Permit Case, 14 CAB 399, 401 (1951), the Board expressed this fear of U. S. carrier investments in foreign airlines:

"Where the American carrier receives mail pay support from the Government, there is always present the danger that portions of such mail pay may find their way indirectly into the support of the foreign carrier."

The seriousness of this problem was first apparent when the Board reopened Pan American's Transatlantic Final Mail Rate Case, Order No. E-11146, March 20, 1957, where on the basis of preliminary audits it was found that Pan American had under-charged its foreign affiliates and overcharged Uncle Sam. The Board reached this conclusion:

"...in the light of the specific items of information outlined herein, which indicate that for the 1946-1953 period alone Pan American's properly recognizable expense, which was underwritten with subsidy, may have been overstated by as much as $6,500,000, we think it clearly our duty and responsibility to re-examine, in the public interest, the mail pay awarded in this proceeding. Moreover, our duty in this respect is plainly evident

23 In the Reopened Aerolineas Peruanas, S. A. Foreign Air Carrier Permit Case, supra, it was argued the U. S. did not have this right. The English version of Article VI of the Bilateral Agreement between the U. S. and Peru reserves to each Contracting Party the right "to withhold" or revoke a permit if the substantial ownership and effective control standard is not met. In the equally authentic Spanish version, "suspender" appears as the purported equivalent of "to withhold." It was argued that "suspender" meant "to suspend," and not "to withhold"; consequently, the Permit first had to be issued. This argument was supported by the fact that the Spanish versions of the U. S. Bilaterals with other Spanish-speaking countries do not use the word "suspender"; for example, Chile and Venezuela—"reten" (to withhold); Cuba and Spain—"rehusar" (to refuse or decline); Dominican Republic and Paraguay—"negar" (to deny or refuse); Ecuador and Panama—"no otorgar" (not to grant); and Mexico—"no conceder" (not to grant). However, in Articles 62 and 88 of the Convention on International Civil Aviation (Chicago Convention) "suspender" and "to suspend" are equated. Perhaps the U. S. version, which retains more control for the permit-issuing state, would nevertheless govern. The World Court discussed a similar situation as follows: "The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, it is doubtless in accordance with the common intention of the parties." (Mavrommatis Palestine Concessions (Jurisdiction), Permanent Court of International Justice Publications, Series A, No. 2, pp. 10-21 at p. 19 (1924).)
when it is considered that transactions between Pan American and its affiliates aggregate some $50,000,000 annually."

Although the initiation of this case was applauded in Congress in 1957, the matter was not even set for hearing until three years later.

About this same time, the Board instituted an investigation into the financial relationship among Pan American World Airways, Inc. and Various Affiliates, Order No. E-11103, March 8, 1957, as shown in Appendix A of said order:

### TABLE No. 4
FINANCIAL INTEREST HELD BY PAN AMERICAN WORLD AIRWAYS IN OTHER CARRIERS

<table>
<thead>
<tr>
<th>Company</th>
<th>Incorporated Under Laws of</th>
<th>Percentage of Stock Owned by PAA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aeronaves de Mexico, S. A.</td>
<td>Mexico</td>
<td>21.13</td>
</tr>
<tr>
<td>Aerovias Nacionales de Colombia, S. A.</td>
<td>Colombia</td>
<td>38.13</td>
</tr>
<tr>
<td>Compania Cubana de Aviacion, S. A.</td>
<td>Cuba</td>
<td>0a</td>
</tr>
<tr>
<td>Compania Dominicana de Aviacion C por A</td>
<td>Dominican Rep.</td>
<td>40.</td>
</tr>
<tr>
<td>Compania Mexicana de Aviacion, S. A.</td>
<td>Mexico</td>
<td>41.88</td>
</tr>
<tr>
<td>Compania Panamena de Aviacion, S. A.</td>
<td>Panama</td>
<td>33.</td>
</tr>
<tr>
<td>Lineas Aereas Costarricenses, S. A.</td>
<td>Costa Rica</td>
<td>33.33</td>
</tr>
<tr>
<td>Lineas Aereas de Nicaragua, S. A.</td>
<td>Nicaragua</td>
<td>20.</td>
</tr>
<tr>
<td>Panair do Brasil, S. A.</td>
<td>Brazil</td>
<td>48.</td>
</tr>
<tr>
<td>Pan American-Grace Airways, Inc.</td>
<td>Delaware</td>
<td>50.</td>
</tr>
<tr>
<td>Servicio Aereo de Honduras, S. A.</td>
<td>Honduras</td>
<td>40.</td>
</tr>
<tr>
<td>Urba, Medellin and Central Airways, Inc.</td>
<td>Delaware</td>
<td>100.</td>
</tr>
</tbody>
</table>

a Included because of past affiliation.

Source: Order No. E-11103, March 8, 1957, Appendix A.

No further action of any sort has been taken in this Docket.

Subsequently, in the case of Pan American World Airways, Inc.—Acquisition of LACSA (Reopened), Docket No. 6594, an Examiner of the Board concluded that Pan American's control of the Costa Rican carrier should be disapproved for a number of reasons, including the possibility that U. S. mail pay would find its way into the support of the foreign carrier. Although this Initial Decision was issued on November 15, 1957, there has been no Board action yet. This inaction in each of these cases suggests that the financial aspects of this problem are not now matters of serious concern to the Board, which may in part be excused by the fact that Pan American is no longer a subsidized carrier and that the Board may at its leisure correct past accounting errors.

B. Reciprocity. The second reason originally advanced in the Havana-New York Air Carrier Permit Case, supra, for disapproving U. S. control of foreign air carriers was expressed in these terms:

"... an even greater danger lies in the fact that such American ownership or control may prove embarrassing in negotiating for the exchange...

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of operating rights with the country of nationality of the foreign carrier. When our Government seeks operating rights in a foreign country on behalf of one American carrier, and a second American carrier owns an interest in the foreign carrier operating from that country into the United States, a conflict of interests may ensue as between the American carriers, and may seriously interfere with prompt and satisfactory exchange of operating rights with the country concerned."

This fear, unlike the first, proved groundless. As a matter of fact, those cases where ownership and control were most seriously questioned by the Civil Aeronautics Board were the very ones where the foreign governments most enthusiastically urged the issuance of a permit.

C. Defense. The fear of third country ownership and/or control of applicants for Section 402 Permits gave rise, as we have noted, to the present ownership and control provisions in the Bilateral Air Transport agreements. However, with two possible exceptions, this has never been a factor in Section 402 proceedings. Nevertheless, the apprehension continues and has been urged as a reason for continuing U.S. ownership and/or control of foreign flag carriers. For example, on the basis of somewhat less than satisfactory presentations by the Departments of State and Defense in

25 In the Reopened LACSA Case, supra, one of the reasons urged by the Examiner in disapproving Pan American's control of the Costa Rican carrier was the protest of a third country (El Salvador), which was supporting a rival airline (TACA).

26 See: TACA International Airlines, S. A., Docket No. 8711, Initial Decision, p. 3; Reopened Aerolineas Peruanas, S. A., Docket No. 8955, Initial Decision, p. 12, quoting an official representative of the President of Peru:

"We have permitted all American carriers who have requested permits to go into Peru and we have not been going into much technicalities of the process of issuing permits to American companies, as we could have, and we have done that because of the reciprocal treatment that we will hope to have when we, the Government of Peru, issues or signs the bi-lateral agreement."

A similar point was noted by the Board in the case of Transportes Aereos Nacionales, S. A., Order No. E-15548, approved July 18, 1960:

"Of great weight in deciding upon a renewal of TAN's permit is the desire of the Board to give recognition, insofar as practicable, to the wishes of the Honduran Government as reflected in its endorsement of TAN's application."

27 In Peruvian International Airways, Foreign Air Carrier Permit, 8 CAB 229 (1947), the Board found the applicant owned and controlled by citizens of the United States and Canada; in Canadian Pacific Airlines, Air Carrier Permit, 10 CAB 138 (1949), the Board found the applicant owned and controlled by citizens of the United States and Great Britain.

28 These presentations are summarized as follows at page 4 of the Initial Decision:

"Although the reopening order looked to the possibility that other Government agencies would submit their views as to the consistency of the control relationship with the public interest, no Government agency, other than the Board through its Bureau of Air Operations, submitted evidence in the reopened phase of this proceeding. The Bureau's witness did, however, disclose the view of the State Department to the extent it is reflected in the following paragraph contained in a classified letter dated February 18, 1956, from the State Department to the Chairman of the Board:

'It appears to the Department (of State) that the evidence used by the examiner in arriving at his initial decision that the Pan American relationship with LACSA is not in the public interest may not be fully compelling, and that there may be a balance of advantage to be gained by permitting continuance of the relationship."

In addition, the Department of Defense submitted a statement of position, for which it requested and obtained confidential treatment pursuant to rule 39 of the Rules of Practice. Although the contents of this statement cannot be summarized in this decision, the Department goes no further than to cite, in support of a policy encouraging United States airlines to assist smaller nations in estab-
the still pending *Reopened LACSA Case*, supra. The Examiner made the following findings:

"Among the considerations urged as warranting approval, the strongest is probably the possibility that Pan American's withdrawal would leave a vacuum to be filled by a large airline of European nationality. This risk was discussed in the prior initial decision and the conclusion was reached that, in LACSA's present state of development, a new affiliation did not appear probable. The record developed since the reopening order does not serve to heighten the likelihood of a substitute affiliation."

Nevertheless, the Defense Department thereafter (March 6, 1958) presented this strong argument to the Board in support of Pan American's continued control of the Costa Rican flag carrier:

"Soviet Russia has recognized the value of civil aviation as an element of national power and prestige, and is developing a formidable capability to challenge United States leadership in this field. Under the circumstances, it is unlikely that any vacuum in the air transport system of small nations will remain long unfilled. If our national objectives of maintaining United States leadership in international civil aviation is to be realized, there must be no diminution of United States influence in foreign aviation activities, especially in the Western Hemisphere."

As it becomes apparent that Latin American nations, for example, are not inextricably tied to the United States, defense considerations may once again take precedence over the commercial factors in appraising the propriety of U.S. ownership and control of foreign air carriers.

**D. Anti-Trust.** There are no Civil Aeronautics Board decisions which relate the policies of the anti-trust laws to the control of foreign carriers by U.S. airlines. However, in the yet undecided *Reopened LACSA Case*, supra, the Examiner discussed at length Pan American's control of the Costa

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*a* The State Department's letter of February 15, 1956, to the Chairman was stamped 'For Official Use Only,' was classified as confidential, and was not deemed available for the record. The Department consented, however, to disclosure of the quoted paragraph.

*b* By order No. E-10991, dated January 31, 1957, the Board directed that the Defense Department's statement of position be withheld from public disclosure.

*A similar argument was submitted by the Defense Department in the case of TACA International Airlines, S. A., Docket No. 8711:*

"Any action which might lead to foreign, and especially unfriendly, control of the air transportation systems of Costa Rica or other small nations in contitive (sic) areas would be contrary to the national security. It is the view of the Department of Defense that American private enterprise should be encouraged to maintain and enter into arrangements to assist Latin American and other technically backward nations in the development of their air transportation systems where such assistance is welcomed by the countries concerned."

The Board did not comment on this problem in its Opinion in Order No. E-15144, 5 April 1960.

This has been done, however, by the Celler Committee in its 1957 Report on Airlines. The Report found (p. 255) that the acquisition or formation of foreign carriers by Pan American either eliminated competition or made its competitive position more secure. The Report concluded (p. 277) that this created important issues with respect to the enforcement of the anti-trust laws. Report of Anti-trust Subcommittee of the Committee on the Judiciary, House of Rep., 85th Cong. 1st Sess., 1957. The Civil Aeronautics Board has often deferred to "established anti-trust principles" in other situations. See, for example, Order Nos. E-15693, E-15692 and E-15691, all dated August 25, 1960, relating to credit or credit card systems for purchase of air transportation; Order No. E-15651, August 12, 1960, relating to Prepaid Ticket Resolution of the Air Traffic Conference; VOLUMAIR, Order No. E-15077, April 6, 1960; Local Cartage Agreement Case, 15 CAB 850, 852 (1952); Air Freight Tariff Agreement Case, 14 CAB 424, 425 (1951).
Rican flag carrier in terms of Sections 7 and 10 of the Clayton Act (15 U.S.C.A. Sections 18, 20). He concluded that Section 7 had been violated because the Pan American-LACSA affiliation tended to create a monopoly in the Panama-Miami market, and to lessen competition in the Havana-Panama market. He also found that the spirit, though not the letter, of Section 10 (which prohibits certain transactions between affiliated common carriers) had been violated. This was one of several reasons why he recommended disapproval of the control relationship.

This problem is, incidentally, involved in a pending District Court case which promises to be one of major significance: United States v. Pan American World Airways, W. R. Grace and Company, Pan American-Grace Airways, Inc., (D.C. S.D. N.Y. Civil Action No. 90-259, 1959). The following illustration is from pages 112-113 of the Government’s Trial Brief:

"An agreement was signed on April 20, 1938 between Faucett, Panagra and Aerovias which provided: (1) that in consideration of the withdrawal of Aerovias from local service Faucett would turn over to Aerovias 20% of its stock. Aerovias would have two directors on the Faucett Board; (2) that Panagra would not participate directly in any enterprise dedicated to local service in Peru other than Faucett but that it could continue its local services inside of its international itinerary; (3) that Panagra would maintain the existing difference between Faucett and Panagra tariffs for the local transport of passengers in Peru. Both companies agreed to modify local tariffs in the case of competition from other companies; and (4) that Faucett would give up all international connections in Peru. Further, that Faucett would not enter into interline agreements with any international airline without Panagra's consent."

E. Assistance to under-developed countries. The Civil Aeronautics Board has never interfered with the temporary use of American capital and technical assistance for the airline operations of friendly foreign countries, particularly under-developed countries. Such aid is “in the public interest,” and numerous “technical assistance” agreements which left little to the foreign carrier except the sale of tickets have been approved. The resulting loss of “effective control” was generally overlooked because of the temporary nature of the assistance. For example, in the case of Trans Caribbean Airways, Inc., and Aerovias Interamericanas de Panama, S. A., Order No. E-8910, January 24, 1955, the Board stated the policy in these terms:

"Furthermore, an arrangement of this type is consistent with this government's over-all policy of assisting friendly foreign countries for temporary periods in developing their own resources and in enabling them on the basis of that assistance to continue their activities without further aid thereafter."

F. Competition. The concurred opinion in the case of Venezuelan Airlines, Air Carrier Permit, 7 CAB 317, 329 (1946), expressed the fear that U. S. ownership and/or control of foreign air carriers would be both (1) a

31 See: Aero Nacionales de Colombia, S. A., Foreign Air Carrier Permits, 7 CAB 149 (1946); Lineas Aereas Mexicanos, S. A., Temporary Foreign Air Carrier Permit, 6 CAB 299 (1945); Aero Transportes, S. A., Temporary Foreign Air Carrier Permit, 6 CAB 159 (1944).

device to evade the Civil Aeronautics Board certification procedure, and (2) the cause of excessive competition—particularly in the Caribbean area.

In some circumstances, however, competition became a reason for approving, rather than disapproving, U. S. ownership and/or control, as illustrated by the case **TACA International Airlines, S. A., 18 CAB 737, 738 (1964)**:

"It appears that the applicant herein is the only carrier available to El Salvador for a reciprocal route to the United States. The Salvadoran Government does not have before it any other applicant that it could endorse for the route sought herein. Nor is there any indication that there is sufficient capital available in El Salvador to promote a new carrier at this time. If we award a permit to the applicant, the interest of El Salvador will be preserved. At the same time, steps can be taken toward increasing the proportion of Salvadoran capital in the ownership of the applicant. It is our hope that steps will be taken to reduce gradually the percentage of stock owned by United States nationals, in order that the nationals of El Salvador may ultimately achieve substantial ownership and effective control of the carrier."

But the Board has generally been firm in prohibiting the use of foreign affiliates to enhance the competitive position of a U. S. air carrier. One of the best examples of this policy is found in the **Havana-New York Air Carrier Permit Case, 14 CAB 399, 402 (1951)**:

"So long as Pan American holds a substantial interest in Cubana, it may be expected that Pan American's activities in relation to Cubana will be so conducted as to inure to Pan American's benefit. It will, accordingly, be to Pan American's interest to route passengers between New York and Havana via Cubana, rather than National, or Eastern and Pan American connecting at Miami. This will enable Pan American to compete indirectly with Eastern and National by diverting traffic from these two American certificated airlines. We cannot ignore the fact that we have recently refused to grant Pan American a route between Miami and New York. It would be strange indeed to follow such action with the award of an unrestricted permit for substantially the same service to a carrier such as Cubana, in the light of its relationship to Pan American. We feel it is our duty, under the circumstances, to so condition the award as to reduce to a minimum the diversion and consequent injury to National and Eastern."

This policy was specifically reaffirmed in the recent **Pan American-National Agreement Investigation, Order No. E-15541, July 14, 1960**.

In the case of **California Eastern Aviation, Inc., et al., Control and Interlocking Relationships (Transcontinental, S. A.), Order No. E-12118, January 16, 1958**, it was suggested that the Cubana doctrine might not be applicable where the U. S. investor was not an air carrier:

"There are several pertinent factors which clearly distinguish the situation we are faced with herein from the factual circumstances involved in such cases as the Havana-New York Permit Case. In the first place, the record makes plain the fact that Transcontinental will control its own sales efforts and compete for traffic on its own identity and reputation; there will be no 'palming off' of Transcontinental's operations to the public as that of a United States carrier. Furthermore, it is significant that heretofore California Eastern has not been an established air carrier, and will become an 'air carrier' under the Act only through its arrangements with Transcontinental. Thus, we are not faced with the situation of an established United States air carrier attempting to extend its route in the guise of lending assistance to a foreign air carrier. Furthermore, it is clear that the present arrangements are designed as a practical means for allowing a foreign carrier to inaugurate service over a new route."

The limits of this qualification were clarified in the case of **TACA International Airlines, S. A., Order No. E-15144, approved April 22, 1960**:

"It is TACA's further contention that the Board's established ownership and control requirement is operative only where the United States
investor is an air carrier, and that there is no question here of an American air carrier owning or controlling TACA. In support of its position, TACA cites California Eastern Aviation, Inc., et al. We cannot accept the distinction suggested by TACA, and there is nothing in the California Eastern Aviation case inconsistent with our policy. On the contrary, in that case we approved California Eastern's acquisition of a stock interest in Transcontinental, S. A., for a number of reasons, including the practical necessity for allowing a foreign air carrier to inaugurate service over a new route, but we also stressed that California Eastern was expected to dispose of its stock interest in the foreign air carrier within a specified period."

This competitive factor is largely, though not exclusively, a private interest, which must be balanced against public considerations, previously discussed. To date it has been properly subordinated.

III. CONCLUSION

Whenever "substantial ownership and/or effective control" has been at issue in Section 402 proceedings, the Civil Aeronautics Board has generally reached the right answer for the wrong reason. The Board has consistently, and erroneously, overlooked the fact that the ownership and control requirements are (in 55 instances) imposed by agreements between sovereign states and must be interpreted by ascertaining the intention of the contracting parties—not by looking to the policies of the Federal Aviation Act. This error, however, has been counter-balanced to date by the Board's decisions not to withhold the issuance of foreign air carrier permits in any event.

Of all the factors leading to such decisions, one in particular appears to have been underplayed: That is the recognition that international civil aviation has a Jekyll and Hyde personality—it is both a commercial enterprise and an instrument of foreign policy. This latter aspect may in the long run prove to be the most significant consideration of all.