CONSOLIDATION AND MERGER OF AIRLINES UNDER SECTION 408 (b) OF THE C. A. A.

Petitioner, United Air Lines Transport Corporation, filed an application with the Civil Aeronautics Board pursuant to § 408 (b) of the Civil Aeronautics Act of 1938, requesting a certificate of convenience and necessity for merger or purchase of all the assets of Western Air Express Corporation. After proper hearing, Special Trial Examiner, Roscoe Pound, recommended approval of the petition. Exception was thereafter filed by the interveners, T. W. A., and the minority shareholders committee of Western. After reviewing the Examiner's report, the Civil Aeronautics Board refused issuance of the certificate on the ground that the proposed merger would be inconsistent with "public interest." Alternatively, an application for interchange of flying equipment on the airlines' connecting transcontinental route was approved, thus eliminating passenger transfer at Salt Lake City.

The instant case raises two issues: (1) construction of the statute, (2) application of the statute to the particular fact situation.

Section 408 (b) of the Act provides that the Board shall approve mergers unless they find that such acquisition of control "will not be consistent with the public interest." It would seem that this represents an express mandate for the Board to grant all petitions unless found contrary to public interest. Hence, in every case the burden of proof would rest on the Board. The present case represents no express ruling on this point, for petitioner undertook to establish public benefit; the Board and the Examiner differed as to what was proved.

Assuming that the burden of proof rests with the Board, the statute is not clear as to the degree required; must the Board prove simply that no additional benefit to public interest will accrue, or must they establish that the proposed merger will be detrimental to public interest? Again, the ruling of the instant

1. In the Matter of the Application of United Air Lines Transport Corporation, Docket No. 270; Board Order, Serial No. 558, June 19, 1940.
3. 49 U.S.C.A. § 488 (b), 52 Stat. 1001 (1938) "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control specified in subsection (a) of this section, shall present an application to the Authority, and thereupon the Authority shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Authority shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control ..."
4. Supra Note 1, at 5: "United seeks to establish that the approval of the application would advance the public interest by contending (1) that the transcontinental service between Los Angeles and points east of Salt Lake City on United's route ... would be materially improved, (2) that the unification of properties and operations would result in greater efficiency and economy, and (3) that local service would be better ... than it is at present."
However, the words, "will not be consistent with public interest" seem to support the latter construction. Further, should the first construction be adopted, this would in effect shift the burden of proof to the petitioner as in every instance no other party could be relied on to allege hypothetical benefits to the "public interest."

What the Board must prove in establishing detriment to public interest is not left to speculation. The framers established in their "Declaration of Policy," § 2, that "among other things" the "public interest" should be determined by consideration of adequate development, economy and safety, fair trade practices and the protection of such competition as necessary for the benefit of all interests concerned. In the instant case, the Board was of the opinion that sufficient detriment to the public interest existed to deny the application.

As the Board found such detriment existent, they concluded no necessity existed to consider the first proviso of § 408 (b) which says that no merger or lease shall be approved which would "result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier . . . ." However, as such exclusion is questionable and as the proviso was both considered and interpreted by the Board in the Interchange Opinion, it is worthy of note. Apparently the position of both the Board and the Examiner was that this monopoly proviso is a condition supplemental to the public interest criterion (which in itself involves consideration of restraint of competition). Thus,

5. Supra note 1, at 4: "The application of United is to be approved, providing the other conditions in section 408 are fulfilled, unless it is found that the proposed acquisition of control and the subsequent merger or purchase of assets will not be consistent with the public interest."

6. Supra note 1, at 26: We find that the factors opposed to the public interest . . . . outweigh the considerations urged in support thereof . . . . therefore that approval of United's application in this case would not be consistent with the public interest."

7. Supra note 2, at 11. "Under the terms of section 408 (b) and 412 (b) of the Act, two distinct issues are presented for decision: (1) whether or not the agreement is adverse to or inconsistent with the public interest . . . . In so far as the 'public interest' is concerned, the expressions 'adverse to' and 'not consistent with' have essentially the same meaning . . . ."

8. See supra, note 3.

9. 49 U.S.C.A. § 402, 52 Stat. 980 (1938): "In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity. (a) the encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense; (b) The regulation of air-transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster the development and economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers; (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense. (e) The regulation of air commerce in such manner as to best promote its development and safety; and (f) The encouragement and development of civil aeronautics."

10. See supra, note 5.
even if an application of X and Y lines for merger shows adequate consonance with public interest, the Board still would be powerless to grant a certificate of convenience and necessity, should such action create a monopoly. The anomalous situation thus created is, that if X and Y lines are non-competing monopolies at the time of the application, the proviso of § 408 (b) would seem not to apply. Examiner Pound, who construed the monopoly proviso to apply in the instant case, perceived this as one method of circumvention; said he: "... it is pretty clear that there is no actual competition between United and Western."

Whether the Board correctly regarded the monopoly proviso of § 408 (b) as a supplemental limitation depends largely upon the interpretation accorded. Read literally, it would seem to prohibit all monopolies, for any monopoly is in degree a restraint of competition. However the Board refused to accept this definition of monopoly; they defined it instead "as a condition embodying a particular degree of control." Claimed advantage of this definition is that the words immediately following "monopoly," "and thereby restrain competition," are thereby given meaning whereas they are otherwise repetitious. The difficulty here lies in the fact that by redefining "monopoly," restraint of competition likewise alters meaning and again becomes repetitious, though in a different sense than priorly. Hence, not only are definitions foreign to the statute invoked, but the canons of statutory interpretation are not aided.

An established canon of statutory construction makes mandatory an interpretation giving all parts of a statute consonance and purpose. If we refer to the policy section of the Act, § 2, we find that § 2 (d) declares that "competition to the extent necessary to assure the sound development of an air transportation system..." shall be maintained. This is elastic; it does not say that competition is to be maintained—rather, the board is to "consider" its necessity. If effect be given this policy section, the proviso of § 408 (b) cannot exclude monopolies absolutely. Further support for this position may be found in the fact that § 414 of the Act relieves all parties under § 408 from the operation of the antitrust laws. If no monopolies were to be allowed, it would be senseless to lift the ban. Hence, to give the whole Act accordance, the proviso of § 408 (b) must be regarded as a particularization of § 2; therefore the clause, "and thereby restrain competition or jeopardize another air carrier," becomes explanatory rather than repetitious of its modifier, "monopoly."
Is the proviso of § 408 (b) then, anything more than a mandate that the Board give extraordinary consideration to the issue of monopoly and competition when considering the elements of public interest under § 408 (b)? If not, then the proviso of § 408 (b) is in no sense a supplemental condition to the granting of a certificate of convenience and necessity.

It is doubtful if Congress ever intended the monopoly proviso to be absolute. Section 408 (b) was taken in principle from the Interstate Commerce Act, § 5, and was originally drafted by Commissioner Eastman of that body. In fact, it has been asserted that the Commerce act was in reality silently enacted into the C. A. A. As found both in the Commerce Act and the original draft of the McCarran and Lea bills, the proviso prohibited only those monopolies that would "unduly restrain competition or unreasonably jeopardize another air carrier ... " Senator Borah demanded the striking of the italicized words on the ground that he did "not wish to connive at a still more liberal construction" of the Standard Oil case. However, there is no indication that Congress intended the Board to have any less power than the Commerce Commission.

The latter, then, jeopardy to another air carrier is a condition in addition to monopoly. There seems little doubt that the jeopardy clause was intended to be the second predicate of the second subordinate clause—all of which together modified. Thus construed the proviso means that those monopolies shall be prohibited which restrain competition or jeopardize another air carrier.

17. 49 U.S.C.A. § 5 (1) (1933) "... whenever the commission is of opinion, after hearing upon application of any carrier ... that the division of their traffic or earnings, to the extent indicated by the commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the commission shall have authority by order to approve and authorize ... such division of traffic or earnings ... as shall be found by the commission to be just and reasonable in the premises." 18. 49 U.S.C.A. § 5 (4) (b) (1933) "Whenever a consolidation, merger, purchase, lease, operating contract or acquisition of control is proposed ... if after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

...
That public interest may demand the creation of a monopoly in some instances scarcely admits of a doubt. Conceptually, monopolies are closely allied with public utilities; "the notion of a public utility is made up of two ideas: (a) the idea of monopoly and (b) the idea of common necessity." It is the necessity of monopoly in a public utility which distinguishes it from other forms of competitive enterprise and leads the State to confer upon such industries legal monopolies. As distinguished from other forms of enterprise where competition is maintained through equality of bargaining power, the State then undertakes to control the utility's economic relations. That this is done in the "public interest" has been established doctrine since Munn v. Illinois.

Classification of the air transport industry as a public utility is not difficult. If not completely a utility, at least it possesses many of the characteristics thereof. Much significance may be ascribed to the fact that Congress not only indicated the degree of public interest involved, but created the Board to grant monopolies in any event; compare with the Board's statement, his concluding remarks. Note also Senator McCarran's remark that the denial in any consolidation or merger 'would be denied'.

Mr. Borah, Mr. President, the suggestion of my colleague that a merger necessarily destroys competition, in my judgment is not well sustained. There may be a merger or there may be a combination, and it may not have any effect on the question of competition whatever. It all depends upon the facts in each case. What I desire to see accomplished is the preservation of the opportunity of competition. When we say to the commission that these lines shall not do a thing "unduly" or "unreasonably" it is very different from saying that they shall not do it. It gives too much room for unlimited construction....

Cf. Rhyne, supra note 19 at 144: "The provision regulating consolidation, merger and acquisition of control is taken in principle from the Interstate Commerce Act, but the Authority is much more limited in its discretion...." Rhyne, supra note 19 at 147: "The antitrust exemption provision invoked much debate by Congress, but the same provisions are included in the Interstate Commerce Act. Under the Air Mail Act of 1934, Solicitor General Crowley was severely criticized for allowing merger of competing lines, and Senators McCarran and Pope in the debate on the Bill declared that in the ordinary case any consolidation or merger 'would be denied'.

Apparantly Mr. Rhyne overlooked part of the record printed above. Senators McCarran and Pope were merely seeking clarification of the issue and Senator Borah is quite clearly correcting their impression as to denial in his concluding remarks. Note also Senator McCarran's remark that the Board will grant monopolies in any event; compare with the Board's statement, supra note 12.

23. 18 Encyclopaedia Britannica 744; 12 Encyclopaedia of Social Sciences 674.

24. Supra, note 23: "The power of the State will be used either to regulate industries so as to restore equality of bargaining power by maintaining competition and controlling competitive practices, or used to promote the inherent trend toward monopolistic consolidation by conferring upon such industries legal monopolies and then controlling their economic relations...."

25. 94 U. S. 113, 126 (1876): "When private property is 'affected with a public interest, it ceases to be juris prietii only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise De Portibus Mortis et Harg. Law Tracts 18... Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, be, in effect, grants the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control...."

26. Supra note 24: A "tendency toward monopoly, whether the result of a competitive struggle or brought about by legislation is a fundamental characteristic of public utility business." It is the duty of a public utility "To render reasonably adequate service to all who apply... up to the limit of its capacity with capacity being defined as the limit of profitableness...."

It may be said that the legal notion of public utility is that of a fixed concept with a changing content. "The industries at any time recognized as 'clothed with a public interest' are not necessarily the industries which may legally be classified as public utilities at another time."
over the industry a body endowed with greater power than accorded any prior independent regulatory agency. The simple explanation for this lies in the fact that prior experience had demonstrated that without uniform and equitable regulation, investment of private capital was discouraged, the business of air commerce lagged and lack of synchronized cooperation between employer and employee left labor in this highly skilled service unprotected and improperly compensated.\(^{27}\)

As “not only is commercial aerial transport to play a vital part in our national development but likewise it is to become a forceful agency for national defense,”\(^{28}\) it would indeed be regrettable if a restricted interpretation of power or lack of foresight should again retard the aviation industry.

Whether the certificate should have been granted in the instant case is a fact upon which capable minds have already differed. As indicated before, the Board in its order at least, gave disjointed consideration to the issue of monopoly, their conclusion being that the west coast predominance requested would not be best suited to encourage and develop air transportation “properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense” nor “be in accordance with the best interests of local business in that territory and would not serve to maintain and encourage competition to the extent necessary to assure the development of a properly balanced system of air transportation in that section of the country.”\(^{29}\) Obviously the Board stressed local needs; the Examiner emphasized broader national needs and was quick to point out that the power of the Board is sufficient to prevent local abuses.\(^{30}\) This would seem more consonant with the theory of public utility regulation.

It is worthy to note in passing that the interchange agreement approved in lieu of the merger by the Board grants to petitioner much the same rights and privileges as requested by them three years ago of the Post Office Department. The petition was then denied on the ground that it would make Western a “mere shell” and that through plane service was not necessary.\(^{31}\)

**DIGESTS**

**INSURANCE—Interpretation of Participation in Aviation Clause with Relation to Free Passenger in Glider.—[Pennsylvania]**

Insured met his death as the result of a crash while operating a pleasure glider. The device was cable-operated, usually rising to less than two hundred feet and then being automatically released, was propelled by air currents for a short distance with the guidance of the occupant. On this particular day, the glider was caught in a strong wind, having ascended higher than usual, and

27. See Senator McCarran’s foreword to Rhyne, Civil Aeronautics Act Annotated (1939); Gorrel, the Civil Aeronautics Act of 1938 and Democratic Government (1938) 9 JOURNAL OF AIR LAW 703, 708: “... the need for legislation springs not at all from a need to protect the public from exploitation but rather a need to assure to the industry itself opportunity for vigorous growth. The familiar reasons for regulation of other industries in the past, notably the need to assure that the public be protected from exorbitant rates and discriminatory practices would not in this case have prompted a solitary vote in Congress.”
28. McCarran, supra note 27.
29. Supra note 1, at 26.
30. Trial Examiner’s Report, at 20. “The argument about ‘dominance’ of a region has lost much of its force under the present day regime of administrative regulation of public utilities... the broad powers of the Authority under § 205 (a) are equal to preventing such things.”
31. (1937) 8 JOURNAL OF AIR LAW 635, 681.
insured lost control of the craft while trying to avoid collision with a grove of
trees; the craft crashed. Action by the wife-beneficiary of two accident policies
to recover death benefits.

The defense of the insurance company was that deceased at the time of
death was participating in aviation or aeronautics within the meaning of the
excepting clause of the policies, which provide: "This insurance shall not
cover... injuries, fatal or non-fatal, sustained while participating in aviation
or aeronautics except as a fare paying passenger." The lower court decided
in favor of defendant's contention that operation of the glider under the
circumstances of the case was within the excepting clause of the policies. The
Pennsylvania Supreme Court affirmed the decision.

The court places the determination upon the definition of the words "aviation
or aeronautics" as used in the policy. They define aviation as "the art or
practice of operating heavier than air aircraft," and "aeronautics" as "the
science that treats of the operation of aircraft; or the art or science of operating
aircraft." From these definitions the court concludes that a glider is "a type
of airplane not equipped with a motor" and that the term "aeronautics is a
broad one and embraces the whole art of navigating the air."

The contention of plaintiff that the provision was not intended to refer
to short flights taken as a form of sport where the person ascends less than
two hundred feet and remains aloft but a few minutes is answered thusly by
the court: 1) there is no reasonable basis for such distinction, as, unfortunately
- two hundred feet was sufficient to cause insured's death, 2) the policies regarded
aviation and aeronautics in general term without any qualification as to the
commercial or non-commercial character of the participation. *Spychala v.
Metropolitan Life Insurance Co.* 87 P.L.J. 543, aff. 13 A. (2d) 32 (1940)

WORKMEN'S COMPENSATION.—Temporary Employment Outside
of State.—[New Hampshire]

Plaintiff’s intestate was employed by X Company as an automobile mechanic
in New Hampshire. By agreement between X Company and Y Air Service
of the same state, deceased occasionally worked for the latter as an airplane
mechanic, for which he was licensed. While in their employ he was struck by
a plane propeller and killed in the state of Maine.

X Air Service denied liability under the workmen's compensation act because,
1) deceased was not in their employ, 2) the accident happened outside of New
Hampshire. The indemnitior of X Air Service denied liability on the ground
that deceased had not been considered in computation of the premium as the
sums for his services were paid to X Company rather than to deceased directly.
The lower court dismissed the petition as to X Air Service and entered a decree
against the indemnitior. On appeal, plaintiff's exceptions to dismissal of X
Air Service was sustained; the remainder of the decree was affirmed.

As to the question of agency, the court said:

"The servant of a general employer who is hired out to another for a
particular service becomes ordinarily the servant of the latter during
the performance of that service. *Gagnon v. Dana*, 69 N. H. 264. And
this principle has full application to the master and servant relation
under compensation laws *Parsons v. Company*, 115 Conn. 143, 150 . . .
In determining the relation between the workman and the person to
whom he is hired out, the decisive inquiry is whether that person has the
right to control the servant and direct the details of his work. If the
servant is subject to such direction and control, he is for the time being .
the servant of the temporary employer. Manock v. Company, 86 N. H.
104, 106 . . ."

The court found such control to exist.

Secondly the court found that the clause, "outside the state" in the Act,
referred not to the place of the accident but was intended as designating a class
of workmen regularly employed in another state. Hence temporary employment
outside of the state would not preclude recovery. Such a determination also
automatically disposed of indemnitor's non-liability plea for the policy pro-
vided payment "to any person entitled thereto under the Workmen's Compensa-
tion Law." The fact that deceased had not been included in computation of
premiums constituted no defense, for his true status could have been ascertained.
Bisson v. Winnipesaukee Air Service Inc. et al., 13 A. (2d) 821 (1940).

WORKMEN'S COMPENSATION.—Employees Engaged in Actual Fly-
ing Not Within State Act.—[Washington]

Petition by the state of Washington on the relation of Northwest Airlines
for writ of mandamus to compel the director of the department of labor and
industries to recognize those of relator's employees actually engaged in flying as
within the scope of the state workmen's compensation act. All of these
employees are to some extent engaged in interstate commerce. The writ was
denied.

The court reasoned that as the Act was originally passed in 1911, a time
when air transportation was a novelty, persons engaged aviation could not
have been included. Though the legislature had amended the Act at various
times since then, the legislature had never seen fit to include air transport
employees. The court denied that such employees could be included under
"Airplane (manufacturing)." or "motor delivery." State ex rel. Northwest

CONTRACTS—Liquidated Damages Computed From Date of Delivery.
[Federal]

Plaintiff submitted a bid to the Soil Conservation Service, United States
Department of Agriculture, for the making of certain aerial photographs.
The invitation under which he bid provided that the successful bidder was to
have his plane at the airport ten days after official notification to proceed;
that the flying was to be computed fourteen days after the date of award and
that the prints were to be delivered within fourteen days after completion of the
flying. Liquidated damages for failure of performance was set at twenty
dollars per day.

Plaintiff was notified of acceptance on Sept. 21, by a telegram giving him
authority to go ahead with the work. The formal written contract was not
completed until Nov. 26 and the last materials required under the contract were
delivered to the defendant on Dec. 9. The defendant deducted from the contract
price, $1,020 as liquidated damages, claiming that Sept. 21 was the date of the
contract. Held, that the date of delivery of the formal contract fixes the time
when the contract went into effect. Verdict for the plaintiff, $1,160.

The court quoted 17 C.J.S. 88, sec. 359 that:
"In the case of a written contract, the time of its delivery unless a different intent appears is ordinarily deemed to be the time when the contract becomes binding. A date on the written instrument is generally not conclusive, and if delivery is shown to have been at a different time, that time is deemed to be the date of inception of the contract unless an intention to other effect is otherwise shown."

The court expressly refused to place its decision on the fact that an agent of the defendant had stated in a letter of Oct. 18 that no contract existed as of that date. Also the court distinguished American Smelting and Refining Co. v. United States, 259 U. S. 75 (1921) from the instant case on the ground that as all prior negotiations are merged in the final contract, the first agreement of the instant case was superseded by the formal valid contract now sued upon, whereas in the Smelting case, plaintiff sought to have both contracts held invalid and to recover on quantum meruit. John B. Holmberg v. The United States, U. S. Court of Claims, June 3, 1940. C. C. H. Aviation Law Service, 4015.

PROCEDURE—Negligence Suit Involving Scientific Evidence. [Manitoba]

The suit in this instance grows out of the same accident as that considered in Gater v. Wings, 47 M. R. 281; (1939) 10 JOURNAL OF AIR LAW 414. Defendant’s plane crashed near Lac du Bonnet, April 10, 1936, caused by the breaking of a propeller shortly after the plane took off. Plaintiff of the prior case was denied recovery.

Suit is brought in this case by another injured passenger on the basis of negligence in failing to properly inspect and test the propeller. The Referee ordered the case to be tried by jury. On appeal the court held that as the case involved introduction of scientific evidence, it came within the scope of decisions declaring such cases are better tried by a judge alone than with a jury; K. B. Act, sec. 65 (4). Nystedt v. Wings Limited, Kings Bench, Manitoba, Feb. 26, 1940, C. C. H. Aviation Law Service 1231.