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Paul M. Godehn

Frank E. Quindry

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AIR MAIL CONTRACT CANCELLATIONS OF 1934 AND RESULTING LITIGATION*

BY PAUL M. GODEHN AND FRANK E. QUINDRY

Paul M. Godehn, deceased. Formerly a Senior partner, Mayer, Meyer, Austrian & Platt, Chicago, General Counsel for United Air Lines, Inc., and a Director of United Air Lines, Inc.

Frank E. Quindry, attorney, Mayer, Meyer, Austrian & Platt; University of Illinois, LL.B. 1931; member Illinois and Michigan Bars; Chairman, Committee on Aviation Law, Chicago Bar Association; Chairman, Aviation Committee, The Chicago Association of Commerce and Industry; Colonel, U.S.A.F. Res.

INTRODUCTION

ON February 9, 1934, the Postmaster General issued an order which cancelled all domestic air mail contracts. The history set forth below relates to the air mail contracts of the following companies:

Boeing Air Transport, Inc. (BAT), operating Route A.M. 18 Chicago-San Francisco, Route A.M. 5 Salt Lake City-Pendleton-Spokane and Pendleton-Portland-Seattle, and a segment of Route A.M. 30 Omaha-Kansas City.

Pacific Air Transport (PAT), operating Route A.M. 8 Seattle-San Diego.

National Air Transport, Inc. (NAT), operating Route A.M. 17 Chicago-New York, and Route A.M. 3 Chicago-Dallas and Fort Worth.

Varney Air Lines, Inc. (Varney), operating Route A.M. 5 Salt Lake City-Pendleton-Spokane and Pendleton-Portland-Seattle, the route being transferred to BAT in 1933.

They were pioneer air mail carriers and held air mail contracts awarded to them after competitive bidding. In 1930-31 the original contracts were exchanged in accordance with the McNary-Watres Air Mail Act[1] for air mail route certificates, which were contractual documents due to expire April 5, 1936. After the air mail contract cancellations new air mail contracts were awarded after competitive bidding to a former United Air Lines, Inc. (UAL), which theretofore had

* Edited and reprinted with permission from "Corporate and Legal History of United Air Lines and its Predecessors and Subsidiaries 1925-1945" (copyright, 1953, by United Air Lines, Inc.).

[1] 49 Stat. 259 (1930).

served as a management company for the above operating companies. The present United Air Lines, Inc., originally known as United Air Lines Transport Corporation, became the operator of the United system later in 1934 as the result of a merger and consolidation.

CANCELLATION ORDER AND WITHHOLDING OF AIR MAIL PAY

The air mail contracts (route certificates) held by Boeing Air Transport, National Air Transport and Pacific Air Transport (including Varney's route certificate which had been transferred to Boeing under a subcontract) were cancelled by Postmaster General James A. Farley in an order issued on February 9, 1934, effective at midnight February 19, 1934. Purporting to annul all domestic air mail contracts, the order read as follows:

> "Pursuant to the authority vested in me by Section 3950, Revised Statutes of the United States, Act of June 8, 1872 (39 United States Code, Section 432), and by virtue of the general powers of the Postmaster General, it is ordered that the following air mail contracts be, and they are hereby annulled effective midnight February 19, 1934***."

In connection therewith the Post Office Department withheld air mail payments due and unpaid for the months of January and February 1934 and securities deposited to secure performance bonds.

The order was issued during an investigation of air mail contracts by a Special Senate Committee under the chairmanship of Senator Hugo L. Black which held hearings from September 26, 1933, until May 25, 1934.[1a] Reasons for the order were stated by Postmaster General Farley in a letter to Senator Black dated February 14, 1934. In general, it was indicated that the action was based upon a belief that the air mail contractors had obtained contracts and extensions of routes as the result of a combination to prevent the making of bids. This combination, it was claimed, was entered into by representatives of the contractors at a conference called by the previous Postmaster General in May 1930, and was in violation of Section 3950 of the Revised Statutes referred to in the order. This statute read as follows:

> "No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled; and for the first offense the person so offending shall be disqualified to contract for carrying the mail for five years, and for the second offense shall be forever disqualified."

As shown in the above statute, persons who violated it were, for the first offense, disqualified from contracting for carrying the mail for

[1a] Investigation of Air and Ocean Mail Contracts, Hearings Before Special Committee on Investigation of Air Mail and Ocean Mail Contracts, U. S. Senate, 73d Cong., 2d Sess., Pursuant to S. Res. 349 (72d Cong.) and S. Res. 143, Parts I-IX (1933-1934).

five years. In view of this prohibition, the Postmaster General took the position that no bids would be considered or received from any of the companies whose air mail contracts had been cancelled under the above order and so provided, in effect, in advertisements for new temporary air mail contracts, previously discussed, published on March 30, 1934. In addition, the advertisements required that a bidder have no officer or director who had theretofore entered into or proposed to enter into any combination to prevent the making of any bid for carrying the mail.

These disqualifications applied to the United operating companies whose contracts were cancelled and also to individuals who had represented them at the May 1930 conference. Such representatives were named in the above mentioned letter of February 14, 1934, from Postmaster General Farley to Senator Black.

The representatives of the United companies to whom the disqualifications applied were Mr. Philip G. Johnson, Colonel Paul Henderson, Mr. George S. Wheat, Mr. R. W. Ireland, and Mr. J. P. Murray. At the time the above-mentioned advertisements were published, the first three were Directors of the former United Air Lines, Inc. (UAL); Mr. Johnson was its President; and Colonel Henderson was a Vice President. Mr. Johnson also was President of United Aircraft & Transport Corporation, and Colonel Henderson and Mr. Wheat were Vice Presidents thereof. Mr. Johnson had headed the United companies since the formation of Boeing Air Transport (BAT); and Colonel Henderson had been one of the organizers of National Air Transport (NAT).

Because the original operating companies were disqualified from bidding for the new air mail contracts, UAL, which had been serving as a management company, submitted bids therefor. In order for it to qualify, however, it was necessary that Mr. Johnson, Colonel Henderson and Mr. Wheat resign their positions with it, thereby terminating long associations with the United companies. Though not officers or directors, Mr. Ireland and Mr. Murray likewise were barred from holding such positions.

Protests and Suits to Enjoin Enforcement of the Cancellation Order

The cancellation order was issued without prior notice or hearing by the Postmaster General. The first and only official information received by the United companies showing reasons for the order was contained in newspaper publications of the letter of February 14, 1934, from Postmaster General Farley to Senator Black. On February 16, 1934, the United companies sent a joint letter of denial and protest to the Postmaster General in which they requested that the order be suspended until an opportunity was afforded for a hearing. On February 19 they severally sent telegrams to the Postmaster General in which they stated their readiness and willingness to carry the mail

and requested Postmaster General to issue instructions to postmasters to deliver mail to them as theretofore. No reply was received and on March 7 they sent another joint letter again requesting an opportunity to present facts relative to their contracts. Thereafter, in a letter to the President of UAL, dated March 27, 1934, the Postmaster General advised that he would be receptive to a written brief regarding the matter. Such a brief, in printed form, was submitted under date of April 4, 1934, but nothing further was heard from the Post Office Department. Meanwhile air mail was carried by the Army Air Corps, and, on March 30, 1934, the Post Office Department published advertisements for bids pursuant to which temporary air mail contracts were awarded to UAL for substantially all of the air mail routes of the prior operating companies except NAT's Chicago-Dallas route, BAT's former Route A.M. 30 between Omaha and Kansas City and its Omaha-Watertown extension of Route A.M. 18.

In a final effort to prevent the cancellation order from being carried out the United operating companies, on April 18, 1934, severally filed suits in equity in the Supreme Court of the District of Columbia against Mr. Farley, as an individual, to enjoin enforcement of the order and to compel him to revoke it. The defendant filed motions to dismiss which were sustained by the trial court on June 6, 1934. The decree was affirmed on February 4, 1935, by the Court of Appeals for the District of Columbia, and a petition to the Supreme Court of the United States for a writ of certiorari was denied.[2]

The United companies contended in the injunction suits that the annulment of their contracts without notice and hearing violated the Fifth Amendment. The defendant maintained that a valid order could be entered under Section 3950 of the Revised Statutes without notice and hearing. The Court of Appeals said:[3]

> "Section 3950, *supra*, does not expressly provide for notice and hearing as a condition precedent to the annulment of a mail contract; but we are of the opinion that a provision for notice and hearing may, by implication, be read into the statute, for otherwise it would be clearly unconstitutional. *Southern Ry. Co. v. Virginia*, 290 U.S. 190."

The court decided that the plaintiffs' contracts were property protected by the Fifth Amendment, but held that, though Mr. Farley was the nominal defendant, the suits were actually against the government and could not be maintained without its consent. In connection therewith the court quoted the provision of the Air Mail Act of 1934, giving the holders of cancelled air mail contracts the right to sue the government in the United States Court of Claims. Further, the court said:[4]

> "Technically speaking, there was not an outright breach by direct cancellation of a contract in the present case, but an attempt on the

[2] *Boeing Air Transport, Inc. v. Farley*, 75 Fed. (2d) 765 (1935); cert. den., *Pacific Air Transport v. Farley*, 294 U. S. 728 (1935).
[3] *Boeing Air Transport, Inc. v. Farley*, 75 Fed. (2d) 765, 767 (1935).
[4] *Ibid.* at 768.

part of the Postmaster General to annul the contracts through statutory authority. Assuming the order to be void, there could be no annulment as provided by statute without notice and opportunity to be heard. The effect of the order, therefore, is to breach the contract, and, if the breach of the contract operated to deprive plaintiffs of their property rights, they have an adequate and complete remedy at law. What has occurred in these cases amounts to a breach of the contracts by the Postmaster General. Whether properly or improperly breached cannot be determined in this action, but remains to be established in the appropriate action at law."

INSTITUTION OF SUITS IN UNITED STATES COURT OF CLAIMS

Later in 1935 steps were taken to prosecute claims in the United States Court of Claims for amounts of the withheld air mail pay earned in January and February 1934 and damages resulting from the contract cancellations. Five petitions were filed on June 4, 1935, the jurisdiction of the court being invoked under Section 145 of the Judicial Code of the United States[5] and also under Section 8 of the Air Mail Act of 1934[6] especially authorizing such suits against the United States. One petition was filed by Pacific Air Transport with respect to Route A.M. 8; one by Boeing Air Transport with respect to Route A.M. 18; one by Boeing Air Transport as subcontractor of Varney with respect to Route A.M. 5; one by United as successor of National Air Transport with respect to Route A.M. 17; and one by United as successor of National Air Transport with respect to Route A.M. 3.[7] A petition was not filed with respect to BAT's subcontract for the portion of Route A.M. 30 between Omaha and Kansas City. The reason was that any damages recoverable for the cancellation of that subcontract would have been nominal in amount and that, therefore, a suit would not have been worthwhile. The withheld air mail pay involved amounted to $4,101.30; but it was concluded that this could be claimed later since a claim therefor was not barred by the statute of limitations until a lapse of six years.[8]

The amounts claimed with respect to withheld air mail pay were as follows:[9]

Route A. M. 18	$143,441.68
Route A. M. 17	66,748.80
Route A. M. 3	51,782.01
Route A. M. 5	42,931.62
Route A. M. 8	59,519.32
Total	$364,423.43

Except with respect to Route A. M. 3, damages claimed for the

[5] 28 U.S.C. §250 (1946).

[6] 48 STAT. 933 (1934).

[7] They were assigned Docket Nos. 43029, 43030, 43031, 43032 and 43033, respectively.

[8] Letter from Mayer, Meyer, Austrian & Platt, Chicago, to United, June 3, 1935.

[9] See Plaintiffs' brief of Nov. 15, 1941, in *Pacific Air Transport, et al. v. U. S.*, 98 C. Cls. 649 (1943).

contract cancellations with respect to each route were determined as follows:

(1) the amount of compensation that would have been payable to the contractor, if its air mail contract had not been cancelled, for the transportation of mail loads carried and to be carried from February 19, 1934, to April 5, 1936 (the date of expiration of the route certificates) computed in accordance with schedules of flight and rates of pay therefor in effect on February 19, 1934;

(2) less the amount of additional expense which the contractor and UAL (successor operator) would have incurred by transporting mail in addition to passengers and express during the period February 19-May 8, 1934, during which air mail was carried by the Army Air Corps; and

(3) less the amount of compensation paid and to be paid to UAL and United for the transportation of air mail over the route under the applicable new air mail contract awarded to UAL in 1934 (as extended) from May 8, 1934, to April 5, 1936.

An anology lay in a rule of damages applied in water transportation charter party cases expressed as follows in illustration No. 4 in Section 336 of the Restatement of the Law of Contracts:[10]

> "4. A charters space in his ship to B at a specified freight charge. B repudiates and notifies A in time for him to fill the space with other goods. A uses reasonable effort to obtain a full cargo and fills much space after B's breach; but the ship sails with more space empty than that chartered to B. A can get judgment for the entire freight charge promised by B, less only the cost saved to A by not having to handle B's goods."

Of further analogy was the application of the rule in *LeBlond* v. *McNear,* (D.C. N.D. Cal.) 104 Fed. 826 (1900); 9 Cir., 123 Fed. 384 (1903), wherein a shipper, after breaching a charter, rechartered from the same person for the same voyage at a lower rate. Damages were measured by the difference between the freight that would have been received under the first charter and the amount actually earned under the second up to the time the voyage under the first would have been completed.[11]

The measure of damages claimed with respect to the Chicago-Dallas Route A. M. 3 was somewhat different. UAL did not obtain a new air mail contract for that route and discontinued operations south of Kansas City on May 12, 1934. The same measure of damages was claimed for the period between February 19 and May 12, 1934, however, as was claimed with respect to the other routes for the period between February 19 and May 8, 1934. Otherwise, recovery was sought for expenditures and outlays made in hanger properties at Kansas City and Dallas subsequent to May 3, 1930 (the date of the route certificate for Route A. M. 3), less accrued depreciation on such properties to

[10] Restatement of the Law of Contracts as Adopted and Promulgated by the American Law Institute at Washington, D. C., May 6, 1932 (St. Paul, Minn., American Law Institute Publications, 1932), Vol. I, p. 538.

[11] Plaintiffs' brief of Nov. 15, 1941, in *Pacific Air Transport, et al. v. U. S.,* 98 C. Cls. 649 (1943).

May 12, 1934, and less the market value of such improvements after the alleged breach of contract on February 19, 1934.[12]

Applying the foregoing, the amount of damages claimed were computed as follows:[13]

Routes	Net Losses Feb. 20, 1934-May 7, 1934*	Net Losses May 8, 1934-Apr. 5, 1936	Totals
A. M. 18.........	$332,374.99†	$ 547,090.70	$ 879,465.69
A. M. 17.........	148,063.60	352,544.54	500,608.14
A. M. 3.........	132,260.43	—	132,260.43
A. M. 3.........	—	—	39,380.71‡
A. M. 3.........	—	—	31,612.79§
A. M. 5.........	93,689.44	147,027.42	240,716.86
A. M. 8.........	146,182.97	507,546.88	653,729.85
	$852,571.43	$1,554,209.54	$2,477,774.47

Notes: * Net losses Feb. 20-May 12, 1934, for Route A. M. 3.
† The above amount did not cover the Omaha-Watertown-extension of Route A. M. 18 after its discontinuance on March 4, 1934.
‡ Losses on Kansas City property.
§ Losses on Dallas property.

Adding to the above amounts the claims for withheld air mail pay totalling $364,423.43, the total of the amounts claimed was $2,842,-197.90.

The Attorney General on July 13, 1935, filed general denials. Thereafter, a hearing was postponed pending the filing of special answers and counter claims by the government.

Meanwhile, in April 1936, officials of the Post Office Department proposed a settlement and dismissal of the suits by returning securities deposited to secure performance bonds and by paying the withheld air mail compensation due for January and February 1934. United's Board of Directors decided not to accept the proposal.[14]

The special answers and counterclaims still not having been filed and informal efforts to obtain a hearing having failed, the plaintiffs, on October 27, 1937, filed a motion to have the cases set for hearing. The court, by an order issued on November 6, 1937, allowed the government a reasonable time within which to file its special pleadings. Thereafter, on January 14, 1938, the government's special answers and counterclaims were filed. The plaintiffs filed replications thereto on February 21, 1938, and the hearing was commenced on April 26, 1938.[15]

The cases were heard together before Commissioner Richard H. Akers over a period of more than three years, extending from April 26, 1938, to June 11, 1940. During this time a large number of witnesses testified during a total of sixty-three days at Washington and also at Sanford, North Carolina, and at Los Angeles. The record included 769 exhibits, 100 of which were offered by the plaintiffs, and

[12] *Ibid.*
[13] *Ibid.*
[14] United Minutes of Directors, May 25, 1936.
[15] See brief of Pacific Air Transport, et al., in Opposition to the Defendant's Motions Filed October 30, 1939, For an Order Relating to Procedure, etc., Nov. 9, 1939, in *Pacific Air Transport, et al. v. U. S.*, 98 C. Cls. 649 (1943).

7,164 pages of testimony, 609 of which were devoted to direct examination of witnesses called by the plaintiffs in chief and in rebuttal and to cross examination of witnesses called by the government.[16]

The government's position was based chiefly on the contention that the plaintiffs, through their representatives, and other air mail contractors had entered into a combination to prevent the making of bids for air mail contracts. This had to do mainly with the conference of May 1930 and subsequent awards of contracts for two transcontinental routes and a large number of route extensions made by the former Postmaster General Walter F. Brown during the period June 1, 1930, and March 4, 1933. The government also claimed that the route certificates were invalid and that the mail compensation paid thereunder was excessive. In its counterclaims, it asked recovery of all amounts paid under the route certificates, or, if the court should so determine, such amounts less amounts which the court might find that the plaintiffs were reasonably entitled to receive as a quantum meruit. The quantum meruit amounts were not stated in the pleadings.

In addition, early in the hearing, the government requested certification to the court of the proposition that the plaintiffs could recover only one month's extra pay under Section 1846 of the 1932 Revision of the Postal Laws and Regulations, under which the Post Office Department could curtail or discontinue mail service and allow the contractor one month's extra pay as full indemnity. This the commissioner denied without prejudice to the right of the government to present its motion to the court.[17]

Such a motion was not so presented at that time; but near the end of the hearing, the government presented the issue again in a motion for an order relative to procedure filed on October 30, 1939. In this motion it also contended that recovery, if any, was limited, in any case, to damages accrued within forty-five or sixty days. The forty-five days period had reference to a provision of the McNary-Watres Air Mail Act authorizing the Postmaster General to cancel a route certificate for wilful failure or neglect by the holder to carry out Post Office Department rules, regulations or orders. It provided for "notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be cancelled." The sixty days period had reference to a provision in the route certificates whereby upon sixty days notice, the Postmaster General could increase, diminish or modify the service called for and make adjustments in rates of compensation. The motion was submitted to the court on briefs and oral argument and was denied.[18]

The hearing thereafter was concluded and proposed findings of fact were submitted to the Commissioner.

[16] See Plaintiffs' Reply to Findings Suggested by the Defendant, Feb. 6, 1941, in *Pacific Air Transport, et al. v. U. S.*, 98 C. Cls. 649 (1943).

[17] Brief of Pacific Air Transport, et al., op. cit. supra note 15.

[18] Brief of Pacific Air Transport, et al., op. cit. supra note 15.

REPORT AND FINDINGS OF COMMISSIONER

The Commissioner filed a report on July 14, 1941. In it he set forth extensive findings of fact in 140 numbered paragraphs. Among other things, he described at length the above-mentioned conference of May 1930, the subsequent awards of contracts for two transcontinental routes and route extensions, and matters pertaining to the United companies. Except for his ultimate conclusions, the facts as stated by the Commissioner were less subject to dispute by the parties than were subsequent findings of the court.[19] For this reason, and because a detailed analysis of the evidence, much of which was controversial, is not feasible here, principal facts concerning the above matters are explained below substantially as found by the Commissioner in his report.

As previously indicated, the matters referred to above involved occurrences during the administration of Postmaster General Walter F. Brown, who held that office between March 4, 1929, and March 4, 1933. The Post Office Department proposed legislation to revise the air mail law after which Congress enacted the McNary-Watres Air Mail Act of April 29, 1930. This proposed legislation was reported by the Commissioner to have been prepared by the Postmaster General with the cooperation of representatives of air mail and passenger air-line operators. It was contained in a bill designated as H.R. 9500 introduced in the House of Representatives on February 4, 1930.

According to the Commissioner's report, the Postmaster General considered that the air mail service had grown illogically, and that the air mail map should be revised by eliminating some short lines or consolidating them with longer lines, by making extensions of other lines, and by providing a coordinated system, with preference given generally to establishing longer lines than then existed. In general, he felt that competitive bidding was not the most desirable method for awarding air mail contracts and that a more desirable method would be to leave

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[19] Based on following statement in brief of United companies in support of motion for new trial filed Feb. 4, 1943, p. 842:

> "This long record was summarized by Mr. Akers in a manner which is generally acceptable to both sides. Opposing counsel disagree sharply as to the conclusions to be drawn from the Commissioner's report. They differ as to the admissibility of certain evidence. But the two sides to this controversy do not disagree substantially as to the Commissioner's report of the facts. Counsel for the Government state at page 364 of their brief:
>
> > 'The basic facts are well stated in the report of the Commissioner and need not be repeated. While in certain respects the defendant excepts to the Commissioner's report and presses those exceptions, the Commissioner's report in the main presents an accurate statement of the facts of the case.'
>
> "The Court does not agree with Government counsel and has revised the report made by its Commissioner. This revision includes (1) the insertion of findings not requested by either plaintiffs or defendant; (2) the deletion of findings made by the Commissioner at the request of both plaintiffs and defendant; and (3) the modification of language which was acceptable to both sides. The Court also inserted in its opinion various statements of fact which are not included in its findings and relied upon such facts in reaching a conclusion that plaintiffs violated Section 3950 of the Revised Statutes."

The United companies, however, did file a limited number of exceptions to the Commissioner's report under date of Aug. 13, 1941.

the matter to the Postmaster General's discretion in much the same manner as he was permitted to contract with railroads for mail transportation without advertising for bids. At the same time, he considered it important to aid passenger airlines which did not have mail contracts and which were in need of financial assistance by contracting with them for the carriage of mail without competitive bidding. Also, as found by the Commissioner, the Postmaster General felt that anyone who had spent money in developing a given territory, had created good will, and had persuaded people to fly and support commercial aviation, should be given preferred consideration in awarding air mail contracts.

The legislation proposed by the Postmaster General, in addition to providing for the issuance of route certificates and other things, provided for awards of contracts by competitive bidding, with a proviso that when in the opinion of the Postmaster General the public interest so required, he might award contracts by negotiation and without competitive bidding, and that in awarding contracts he would give consideration to the equities of air mail and other aircraft operators with respect to routes which they had been operating and territories which they had been serving. One of the principal purposes of the provision for negotiated contracts was to enable the Postmaster General to give aid to passenger airlines. On the other hand, it was also provided that he could make extensions and consolidations of routes when in his judgment the public interest would be promoted thereby. In general, the McNary-Watres Act contained most of the proposed legislation, but the above-mentioned proviso with reference to awarding contracts by negotiation was omitted because of objections by certain congressmen.

Conference of May 1930

With the passage of the Act discussion began among those affected by its provisions as to its meaning and effect. Passenger airlines were dissatisfied because of the omission of the provision for awarding contracts by negotiation; and, as explained in the report, suggestions were made to the Postmaster General that at least some of the relief contemplated for passenger airlines might be accomplished by granting extension of existing air mail routes and by arranging for the extensions to be sublet to passenger lines.

In view of this situation, the Postmaster General called a conference of representatives of air mail contractors and passenger airlines at his office on May 19, 1930. At this conference he was reported to have discussed the possibility of extending routes and having extensions sublet to passenger airlines as had been suggested. Also, as shown in the report, he exhibited a map showing existing air mail routes and routes which might be established to form a desired national air mail route network. In connection therewith, as found by the Commissioner, the Postmaster General indicated that he favored additional

transcontinental air mail routes and that such routes should be independent and competing.

Referring to the prospective routes, the Postmaster General requested certain recommendations, this being described and explained by the Commissioner in his report as follows:

"The Postmaster General asked the operators to consider the routes which he had outlined to be established for additional airmail service and see whether they could agree among themselves as to who should receive recognition for the performance of the service on those routes through the method of extension and subletting heretofore mentioned in the event it was finally determined that he had the right to create the network by the process of geographical extensions and sublettings. In determining who should receive recognition to perform the service on a given route or in a given territory, the operators were asked to see if they could agree among themselves what particular operator ought in fairness to perform the service in that area because of the pioneering work which he had done in building up goodwill for aviation in that area and investments which in fairness entitled him to recognition. In seeking to have the operators agree on a given operator who was to perform the service for a particular extension it was expected by the Postmaster General that in the event of such an agreement it would be a simple matter to have the extension given to the operator agreed upon without objection from other operators who might have some claim for consideration on that route.

"As part of the same plan of creating the network by extensions and sublettings, the Postmaster General stated that he was hopeful the operators would work out among themselves mergers and consolidations which would give recognition to the rights of all parties on a given route and at the same time would reduce the number of operators on a given route to one and thereby make it possible to have only one operator with whom he would have to deal in making the extension or providing for service in a given area.

"While the record is not clear as to whether the Postmaster General specifically mentioned that he desired to create the network without advertising for contracts and having competitive bidding, the method outlined by the Postmaster General and considered by the parties at the conference contemplated its substantial accomplishment without competitive bidding through the extension of existing contracts, or contracts thereafter to be established, and then having that extension operated by either the operator whose line had been extended or the subletting of the extension to another contractor as might be determined upon and through mergers or consolidations. In that conference the establishing of new routes through competitive bidding was not being considered but rather the possibility of creating the entire network through extensions, even in the case of a transcontinental route from Atlanta to Los Angeles, where the proposal was being made that an extension could be made from Atlanta westward and by other extensions for that route.

"The Postmaster General gave no definite assurance to the operators at the conference that he would follow the recommendations made by them or consider himself bound in any way thereby but did state that he desired suggestions and recommendations as to whether they could agree on the operator who should perform the

service in a given area and that he would give most careful consideration to their suggestions and recommendations."

In conclusion, the Postmaster General was further reported to have suggested that the airline representatives form a committee or committees to consider his plan and to undertake to agree upon recommendations as to the operator or operators who should perform the air mail service on a given line or in a given area. Mr. William P. MacCracken, representing Transcontinental Air Transport, Inc.,[20] and other operators, was made chairman of the meeting.

Subsequent meetings were held by airline representatives, most of which took place outside the Postmaster General's office, until June 4, 1930, when a final meeting was held at his office. At that meeting the above-mentioned chairman submitted a report to the Postmaster General which embraced twelve prospective routes, these being routes designated by the Postmaster General on the map referred to above. Various operators were recommended with respect to seven routes, including a route between Seattle and Vancouver on which it was recommended that "United" operate one schedule and Varney another.[21] The other five routes, including transcontinental routes between Los Angeles and Atlanta and between Los Angeles and New York, were noted as still subject to negotiation. The names of various possible operators, however, were shown with respect to certain routes and route segments.

The United companies were not otherwise referred to in connection with the twelve routes, but the report noted that "United" had suggested abandonment of NAT's Chicago-Dallas route south of Kansas City and that it take over some other line of equal value, indicating that this was because NAT's route south of Kansas City seemed to stand in the way of a solution to some of the problems. As explained by the Commissioner, this involved a meeting on May 19 or 20, 1930, between representatives of the United companies and of Aviation Corporation at which the latter proposed that the United companies might be interested in exchanging the part of NAT's route south of Kansas City for a route controlled by Aviation Corporation from Cleveland to Albany. As further explained by the Commissioner, however, the proposal was rejected by Aviation Corporation and was never carried out.

When the report of the airline representatives' chairman was submitted on June 4, 1930, the Postmaster General was reported to have indicated disappointment in that recommendations had been made only with respect to shorter routes about which little or no disagreement could arise and that no agreement had been reached as to the longer and more controversial routes, but that the airline representatives were advised that the report would be carefully studied and that any decisions reached would be indicated to them. Thereupon, the

[20] Transcontinental Air Transport, Inc. was a transcontinental passenger airline.

[21] Varney had not yet become a United company.

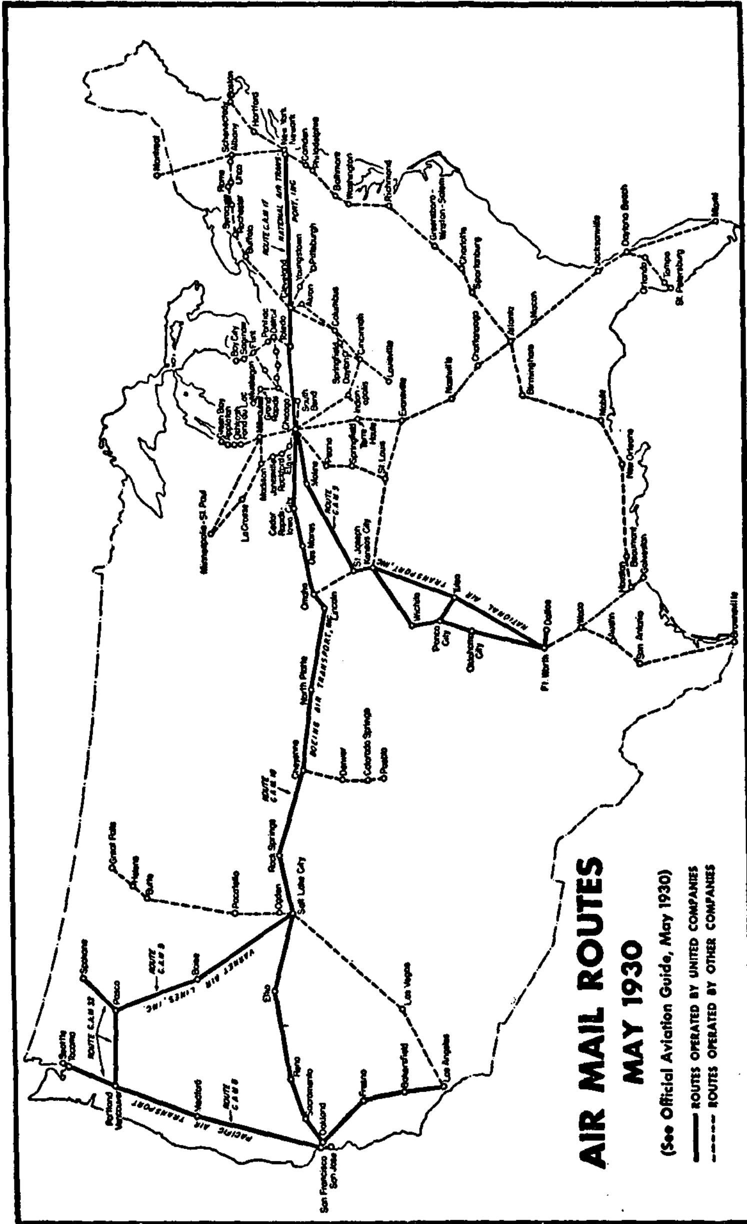
above-mentioned chairman submitted a short supplemental report advising that the representatives of parties involved in the controversies desired to submit the controversies to the Postmaster General as arbiter and that they agreed to be bound by his decision.

Awards of Contracts for Two Transcontinental Routes and Route Extensions

During the ensuing period ending March 4, 1933, the Postmaster General established additional air mail routes by making some thirty-four route extensions, and by awarding contracts for two new transcontinental routes under the advertising and bidding provisions of the McNary-Watres Act. One of the transcontinental routes, referred to as the southern route, extended from Los Angeles to Atlanta; the other, referred to as the middle route, extended from Los Angeles to New York. Advertisements for bids for both routes were published on August 2, 1930. Bids were called for by August 25, 1930, and service was to commence not later than thirty days after the awards of the respective contracts. Passenger type equipment with two-way radio was required, and, in order to qualify, a bidder had to show that he had at least six months actual experience in operating aircraft on regular night schedules over a route 250 miles or more in length.

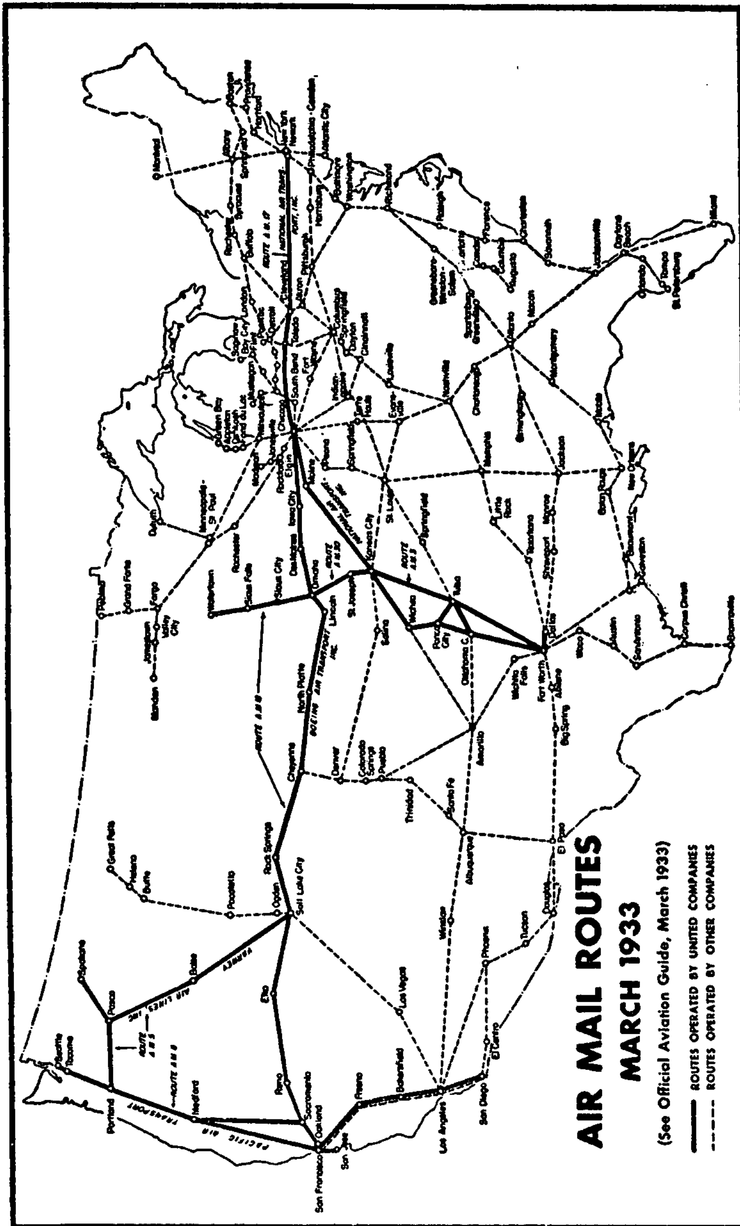
According to the Commissioner's findings, negotiations took place in June and July 1930 among operators who were interested in the above routes, and early in the discussions, the Postmaster General indicated to Aviation Corporation his desire to have it operate the southern route. Also, it was reported that the Postmaster General indicated his desire that Transcontinental Air Transport, Inc., and Western Air Express, Inc., (which were the two principal operators interested in the middle route) bring their resources together in some way that would enable them to operate that route as a continuous operation. Eventually arrangements were made among several parties involved as a result of which companies associated with Aviation Corporation submitted a joint bid for the southern transcontinental route and Transcontinental Air Transport, Inc., and Western Air Express, Inc., submitted a joint bid for the middle transcontinental route. There were no other bidders for the southern route and the bid submitted was at 100% of the maximum mail rate. The above bid for the middle route was at 97% of the maximum mail rate, but one other bid was submitted on that route at a lower rate — 64% of the maximum — by a company known as United Avigation Company which had been formed for the purpose of bidding.

The Postmaster General reached the conclusion that the bid of the United Avigation Company should be rejected for the reason, among others, that it did not show that the bidder had the required night flying experience and that it did not have other experience which was reasonably necessary for it to be accepted as a qualified bidder, and awarded the two contracts to the other bidders referred to above. American Airways, Inc. (a subsidiary of Aviation Corporation) be-



AIR MAIL ROUTE MAP I

came the operator of the southern route, and Transcontinental & Western Air, Inc., was formed to operate the middle route. A controversy, however, developed with respect to the award of the contract for the middle route, its validity being questioned by the Comptroller General.



AIR MAIL ROUTE MAP II

There was no indication in the Commissioner's findings that the United companies had anything to do with the above negotiations, bids and contract awards. The Commissioner noted, however, that during the time of the controversy between the Comptroller General and the Postmaster General regarding the award for the middle trans-

continental route, Colonel Paul Henderson (who had been a representative of the United companies at the May 1930 conference), "at the request of the Postmaster General and as a favor to his former employer, Transcontinental Air Transport, conferred with the Comptroller General in support of the award as made," and that "The Comptroller General finally withdrew his objection after further explanation by the Postmaster General." Also, the Commissioner made a finding that, "Prior to the making of the award but after the opening of the bids, Col. Paul Henderson, in a conference with the President of the United States Airways and a representative of Aviation Corporation, urged upon the president of the United States Airways that the Avigation Corporation could not profitably operate the central transcontinental at the price which it had bid for the contract."[22] United States Airways, it should be noted, was an active party in connection with the United Avigation Company bid.

The thirty-four route extensions made by the Postmaster General were authorized at various times between June 1, 1930 and March 4, 1933. The extent to which the air mail route system was expanded by these extensions and the establishment of the above transcontinental routes is indicated by the accompanying Air Mail Route Maps I and II showing the air mail route system in May 1930 and March 1933, respectively, with the routes of the United companies being indicated by heavy lines.[23]

Except for three instances noted by the Commissioner, one of which involved the above-mentioned United States Airways on a route between Kansas City and Denver, the extensions were not sublet to other operators, but were granted to and thereafter operated by operators who held the contracts for the routes which were extended. Only to a limited extent were the extensions shown to have corresponded with routes and recommendations contained in the report of June 4, 1930, submitted at the conclusion of the May 1930 conference. The route between Seattle and Vancouver, for which "United" and Varney were recommended as the operators in the above-mentioned report of June 4, 1930, was shown not to have been established by extension or otherwise during the period in question.

On the other hand, there was nothing in the Commissioner's findings to indicate that the United companies had anything to do with the thirty-four route extensions that were made, except for the extension of PAT's Route A.M. 8 from Los Angeles to San Diego on July 1, 1930 and the extension of BAT's Route A.M. 18 between Omaha and Watertown, South Dakota, on which operations were commenced on January 16, 1932. Regarding these extensions, the Commissioner said in his report:

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[22] Colonel Henderson, however, denied having had any negotiations with the President of United States Airways. (See brief cited in note 19, p. 894.)

[23] Similar maps appear in the Commissioner's report and in the report of the case in *Pacific Air Transport, et al. v. U. S.*, 98 C. Cls. 649, 728 (1943).

"The route mileage of route No. 8, which was in operation between Seattle and Los Angeles at the time of the extension, was 1,141 miles and the extension which was granted to the Pacific Air Transport at its request was for 120 miles from Los Angeles to San Diego. The route mileage of route No. 18, which was in operation between Chicago and San Francisco at the time of the extension, was 1,931 miles and the extension was for 259 miles from Omaha, an intermediate point on the route to Watertown, South Dakota. This extension was not solicited or desired by Boeing Air Transport, Inc. to whom the extension was granted, but the operation was undertaken by that company at the request of the Postmaster General. At that time South Dakota was without air mail service and influential residents of that state were urging that such service be provided. Three or four small passenger operators in that area desired to operate the route but the Postmaster General did not look with favor on them because of their promotional character or lack of experience or doubtful financial responsibility. The Postmaster General urged the Boeing Air Transport to undertake the operation through an extension from route A.M. 18, but Boeing Air Transport was reluctant to do so because, in its opinion, such a route would not prove profitable. The Postmaster General suggested that the extension be granted to Boeing Air Transport and then sublet by the latter to one of the small operators who desired to operate the route, and Boeing Air Transport agreed to proceed in that way provided the Postmaster General would designate the operator to whom the extension was to be sublet. June 30, 1931, the Postmaster General issued an order for the extension effective August 1, 1931. The Postmaster General, however, did not designate the party to whom the extension was to be sublet and some months elapsed during which Boeing Air Transport unsuccessfully urged that the Postmaster General designate an operator for the extension. Under a revised order of the Post Office Department, Boeing Air Transport finally began the operation on January 16, 1932, and continued its operation until February 19, 1934, the date when all air-mail contracts and/or route certificates were cancelled as hereinafter shown. Plaintiffs' suits for damages do not include a claim for damage on account of a cancellation of the Omaha-Watertown extension."[24]

Participation by Representatives of United Companies at May 1930 *Conference and Situation of the United Companies*

As previously indicated, the United companies were represented at the May 1930 conference by Mr. Philip G. Johnson, Colonel Paul Henderson, Mr. George S. Wheat, Mr. R. W. Ireland and Mr. J. P. Murray. At that time Mr. Johnson was President of BAT and PAT and Vice President of United Aircraft & Transport Corporation; Colonel Henderson was Vice President and General Manager of NAT. Mr. Wheat was a Vice President of United Aircraft & Transport Corporation; Mr. Ireland was Traffic Department representative of NAT; and Mr. Murray was eastern representative of Boeing Airplane Company, a subsidiary of United Aircraft & Transport Corporation.

[24] The last sentence quoted above is erroneous in that damages were claimed with respect to the Omaha-Watertown extension up to March 4, 1934, when operations thereon were discontinued. (See plaintiff's exceptions to report dated Aug. 13, 1941.)

Though not shown in the Commissioner's report, Mr. Wheat, who had charge of advertising and public relations of United Aircraft & Transport Corporation, was invited to attend the conference through an error in the Post Office Department. Mr. Johnson was not invited, but attended the conference. Mr. Ireland and Mr. Murray also were not invited. Mr. Johnson explained that the way in which they happened to attend was that on the morning of May 19, 1930, he happened to have breakfast with them and invited them to go to the meeting with him.[25] It should be noted that the conference was not secret and was publicized in a press release issued by the Post Office Department on May 19, 1930.

The Commissioner found that representatives of the United companies attended all meetings of the May 1930 conference held in the Postmaster General's office, but that they did not attend most of the meetings held outside the Post Office Department. In a memorandum quoted in the report, however, it was mentioned that Colonel Henderson had expressed a belief that it was possible for the group to work out a plan. It also appeared that initially Colonel Henderson had presented claims on seven of the twelve routes being considered. The Commissioner noted, however, that after the first two or three meetings these claims were withdrawn, except for the Seattle-Vancouver route, upon instruction from Mr. Johnson. On the other hand, the Commissioner reported that, prior to presenting the above claims, Colonel Henderson had questioned the legality of proceeding in the manner suggested by the Postmaster General as being contrary to the intent of Congress in enacting the McNary-Watres Act and that some of the claims were not seriously made.[26]

The United companies, at the time of the May 19, 1930 conference, had the only transcontinental air mail system (see preceding Air Mail Route Map I), and were opposed to the establishment of additional transcontinental routes. This situation and the attitude of the representatives of the United companies at the time of the conference and afterwards, were described by the Commissioner in his report as follows:

> "Prior to the beginning of the conference of May 19, 1930, the United group had actively opposed the establishing of additional transcontinental systems for the carrying of mail on the ground that their creation was not then justified and particularly because these additional lines would take business from their existing line. However, by the time of the conference, the representatives of United recognized that the Postmaster General had determined to establish additional transcontinental lines as a part of a national network for the Air Mail Service and that these lines should be sep-

[25] See plaintiffs' reply to findings suggested by the defendant, Feb. 6, 1941, p. 46, and plaintiffs' brief of Nov. 15, 1941, p. 317.

[26] In their exceptions to the report of the Commissioner under date of Aug. 13, 1941, the United companies excepted to the statement that Colonel Henderson questioned the legality of the proceeding as noted above, pointing out that the evidence showed that Colonel Henderson had questioned the propriety of the meeting. It was also pointed out that the United companies did not have a representative at any of the meetings held outside of the Post Office Department.

arately owned and competitively operated. They did not then or thereafter actively oppose the creation of the additional transcontinental lines; their attitude became more that of an acceptance of the fact that the lines would be created and of an endeavor not to antagonize the Postmaster General through actions contrary to his expressed desire, while at the same time protecting their own interests, including protection as far as possible from competition, and cooperating with the Postmaster General and the operators insofar as not unduly inconsistent with their own interests. A good statement of the attitude assumed by the United group and the results of such attitude was summarized by Mr. Philip G. Johnson, a vice president of the United Aircraft & Transport Corporation, to the president of that corporation when the former made a report to the latter on August 3, 1931, of a conference which he had had with a representative of another aviation company, such report reading in part as follows: '* * * Also we pointed out that United Air Lines at no time during the past two years of negotiations had ever by any act on their part, political or otherwise, sought to embarrass the other air lines who were being bailed out by the Post Office Department in order that they might survive — that this attitude on our part had helped them get mail contracts entirely across the country and the letting of such air-mail contracts had resulted in our paying the bill by decreased mail pay, and that after all of the negotiations were over, the only additional thing that United actually had was the 120-mile extension from Los Angeles to San Diego — that nearly all the other companies were flying many more airway miles per day and getting paid for it than they had in their entire existence up to the time of the negotiations.' "

Conclusions of Commissioner

After setting forth the foregoing and other matters in his report, the Commissioner made the following ultimate findings of fact:

> "The contracts which were surrendered by plaintiffs or their predecessors in interest in exchange for the route certificates involved in these proceedings were secured through open competitive bidding and the route certificates were issued under the governing statute (McNary-Watres Act) in effect at the time of their issuance. The record is insufficient to substantiate the claims of the defendant that these contracts and route certificates were secured through fraud, collusion, or a conspiracy on the part of plaintiffs or their predecessors in interest, or that plaintiffs or their predecessors in interest were parties to fraud, collusion, or a conspiracy with respect to the awarding of any contract or the issuance of any route certificate for the carrying of air mail."

On the other hand, he also found that Postmaster General Farley had acted in good faith in issuing the air mail contract cancellation order.

DECISION OF COURT OF CLAIMS

After the Commissioner's report was filed the cases were submitted to the court on exceptions to the report, briefs and oral argument. On December 7, 1942, the court issued its opinion, together with special findings of fact and conclusions of law.[27]

[27] *Pacific Air Transport, et al. v. U. S.*, 98 Cl. Cls. 649 (1943).

The court's special findings of fact followed in large part those in the Commissioner's report; but the court changed the Commissioner's findings in various respects and set forth the following ultimate findings with respect to the matters discussed above:[28]

> "141. Plaintiffs, at the May 19-June 30 conference hereinbefore referred to, made an agreement and combination with the other conferees and with Postmaster General Brown that they would, if called upon to do so, accept extensions to their routes and sublet those extensions to persons to be nominated by Postmaster General Brown. Such persons were to be those named by the conferees, as to the seven routes upon which the conferees agreed upon persons to operate the routes, and were to be any persons nominated by Postmaster General Brown as to the five routes as to which the conferees did not agree upon persons.
>
> "Plaintiffs also at the conference and by their conduct thereafter entered into a combination and agreement with other air mail operators, including the Aviation Group, Transcontinental Air Transport, and Western Air Express, Inc., and with Postmaster General Brown, that they would not bid upon or seek to obtain contracts for air mail by competitive bidding even though advertisements inviting such bids should be published unless they should be designated by Postmaster General Brown as the operators selected to bid on such routes. They further agreed that they would use their efforts and influence to persuade others not so selected to refrain from bidding or to withdraw bids already made.
>
> "The above agreements and combinations were entered into by plaintiffs for the purpose of preventing competitive bidding for air mail contracts and thereby excluding from the industry persons who desired to enter or continue in the industry, and maintaining the high rates which Postmaster General Brown was paying plaintiffs for the carriage of air mail, and keeping in favor with the Postmaster General who had large discretionary powers over their rates and services and who, as plaintiffs well knew, desired to prevent competitive bidding in the industry.
>
> "Plaintiff Boeing Air Transport, Inc. also agreed with Postmaster General Brown that it would accept, as an extension to its Chicago-San Francisco route, an air mail route from Omaha to Watertown, South Dakota, and would sublet this route to a person to be designated by Postmaster General Brown. The purpose of this agreement was to assist Postmaster General Brown in avoiding putting this route up for competitive bidding."

On the basis of these findings, as discussed further in the opinion, the court held "that the plaintiffs engaged in three respects in the conduct described in R.S. 3950 as a ground for annulment of a contract to carry mail."[29] The court decided, however, that they were entitled to recover the amounts claimed for withheld air mail pay and denied the government's counterclaims.

Three opinions were handed down. One opinion was written by Judge J. Warren Madden and was concurred in by Chief Justice Richard S. Whaley. Separate opinions, however, were written by Judges Marvin Jones and Benjamin H. Littleton. One Judge did not

[28] *Ibid.* at 764-765.
[29] *Ibid.* at 789.

take part in the decision and another was silent. Judge Jones concurred in the result and in "the reasoning by which that conclusion is reached." Judge Littleton also agreed with the result but disagreed with the reason. He said, in part:[80]

> "I cannot concur in the ultimate findings and in the opinion that there was a combination or agreement entered into with or by these plaintiffs in the conferences called by the Postmaster General in May 1930, or at any other time, 'to prevent the making of any bid for carrying the mail,' within the meaning of Section 3950 of the Revised Statutes (U.S.C., Tit. 39, Sec. 432).
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> "Whatever plan may have been in the mind of the Postmaster General at the time of the May 1930 conference, which the prevailing opinion finds was agreed to by the parties at the conference, was not only opposed by plaintiffs at that time but also in subsequent years. All of plaintiffs' contracts which ever came into existence had been legally issued long prior to this time and came about through open competitive bidding. No fraud, conspiracy, or illegal acts were involved and their route certificates were issued under the governing statute in effect at the time of their issuance. There is no contention to the contrary, and the prevailing opinion so finds. These contracts and route certificates were in no way affected by the events which occurred at the May 1930 conference. The May 1930 conference discussed the establishing of new routes and had nothing to do with contracts already in existence. At that time plaintiffs had the only transcontinental route and obviously it was detrimental to their interests to have additional transcontinental routes established. Up to the time of the conference they vigorously opposed the additional routes because of the adverse effect in would have on their income from existing routes. Over their objection the Postmaster General proceeded with his determination to establish not only the transcontinental routes but various routes throughout the country. None of the recommendations at the conference for which extensions were granted by the Postmaster General was in favor of plaintiffs nor were any of the routes on which the parties failed to reach an agreement for a recommendation routes for which plaintiffs were making any claim. The suggestion that plaintiffs entered into a combination or agreement and observed it in order to protect their rates is not, in my opinion, supported by the record. It is difficult to see how plaintiffs would be parties to an agreement which was so directly opposed to their interests in the event the agreement was carried out and wherein they would and did obtain nothing. Not only do I think there was no agreement arrived at at the May conference of the character referred to in the prevailing opinion but, in any event, I cannot see plaintiffs as party to any such combination or arrangement.
>
> "The meeting was open to the public. The publicity representative for the Post Office Department was present and issued a press release at the time. During the period of the conference, the Second Assistant Postmaster General reported to Congress that the conference was being held and minutes were kept of what occurred. Intelligent men of the type here involved would hardly follow such a course in connection with an unlawful combination or conspiracy.
>
> "Plaintiffs were not only opposed to the transcontinental routes

[80] *Ibid.* at 794-795.

which the Postmaster General wanted to and did establish but they were opposed to the lengths to which the Postmaster General went in making extensions. The prevailing opinion treats all these extensions as a part of the general plan formulated at the May conference. Plaintiffs' representatives vigorously opposed these extensions and went to the extent of initiating one or perhaps two investigations by Congress of these acts of the Postmaster General. It hardly seems reasonable to say that these parties entered into a combination or agreement and scrupulously observed it when at the same time they were in active opposition to what the Postmaster General indicated he was going to do, and also having these acts of the Postmaster General investigated by Congress.

"I think the record not only fails to show the existence of a combination or agreement within Section 3950 of the Revised Statutes but also shows facts directly opposed thereto. I do not think that anything Postmaster General Brown did after the May conference was in any way controlled or governed by any agreement at that conference. Certainly not so far as these plaintiffs were concerned."

On the other hand referring to Postmaster General Farley's annulment order, he concluded as follows:[31]

> "Having proceeded in that way on the basis of what was substantial evidence and having in mind the peculiar nature of these route certificates which, in my opinion, were subject to cancellation, his action of annulment and cancellation should be approved and sustained. In the circumstances, the propriety or legality of the Postmaster General's action in 1934 was not affected by the fact that plaintiffs were not parties to any fraud or conspiracy nor had entered into any combination or agreement to prevent the making of any bid for carrying the mail within the meaning of Section 3950."

On February 4, 1943, the United companies filed a motion for a new trial and a supporting brief. In these they called attention, based on record references, to a substantial number of errors and omissions in the court's special findings of fact and opinion.[32] The court, however, on March 1, 1943, issued an order denying the motion without modifying its findings and without further expression of opinion. United decided not to file petitions for writs of certiorari in the United States Supreme Court. This is explained below after first summarizing principal aspects of the trial of the cases.

SUMMARY OF TRIAL OF AIR MAIL CONTRACT CANCELLATION CASES IN COURT OF CLAIMS AND DECISION NOT TO PETITION FOR WRITS OF CERTIORARI IN SUPREME COURT

As previously explained, the air mail cancellation actions were started on June 4, 1935, and the litigation did not terminate until March 1, 1943, when the motion for a new trial was denied. A period of nearly eight years was required to complete the litigation because of delaying tactics by the government. United encountered great diffi-

[31] *Ibid.* at 796-797.
[32] See note 19 supra.

culty in having the cases set for hearing. The government filed a formal general denial in each case within the time required by the court's rules but then advised the Commissioner, to whom the cases had been referred, that the government intended to file special pleadings and counterclaims. The court therefore did not regard the cases as being at issue. Innumerable inquiries and many trips to Washington by United's attorneys were of no avail. On October 27, 1937, more than two years after the government had filed its general denials, the plaintiffs filed a motion requesting the court to enter a rule declaring each case at issue upon petition and general denial and providing that the cases be set for hearing at a fixed date. The court deferred a ruling on this motion, stating that a reasonable time would be allowed for the filing of special pleadings by the government. On January 14, 1938, the government filed special answers and counterclaims in each of the five cases. Various untenable theories were ultimately advanced to sustain the counterclaims which the plaintiffs had to force the government to file in order to obtain a hearing.

Hearings began at Washington before Commissioner Richard H. Akers on April 26, 1938, and the plaintiffs completed the presentation of their cases in five days except for the cross-examination of Mr. Walter F. Brown, former Postmaster General, which was adjourned to May 17 at the request of government counsel. Thereafter numerous hearings were held at Washington, D. C., Sanford, North Carolina, and Los Angeles, California. Many adjournments were obtained by government counsel. None were requested by plaintiffs' counsel. Government counsel grossly abused the right of cross-examination, one witness being cross-examined for a period of eight days and two night sessions and another witness being cross-examined for eleven days. Further delays were encountered in connection with various procedural steps relating to findings, exceptions, briefs and oral arguments. Thus, United used up nearly eight years to try cases which could have been disposed of by using only reasonable expedition within a period of less than two years.

During this long continued litigation, the personnel of the Court of Claims changed. One vacancy on the court was filled by the appointment of Judge Sam E. Whitaker. He was a lawyer of real ability, but at the time of his appointment he was the Assistant Attorney General in charge of Court of Claims litigation and therefore was disqualified as a judge not only in the United cases, but also in substantially all other cases pending in the Court of Claims. Judge Whitaker sat during oral arguments with the consent of plaintiffs' attorneys, but he took no part in the decision. Judge William R. Green, who also sat during oral arguments, took no part in the decision so far as is shown by the opinions handed down on December 7, 1942. Therefore, the cases were decided by three judges. There were three separate opinions disclosing a divergence of views, but the three judges concurred in the ultimate judgment.

After the court denied the plaintiffs' motion for a new trial on March 1, 1943, United was confronted with the question of whether petitions for writs of certiorari should be filed in the Supreme Court of the United States.

Mr. Charles Evans Hughes, Jr., of New York, a former Solicitor General of the United States, was employed to aid United in reaching a conclusion on that question. He thoroughly reviewed the pleadings, briefs, findings, opinions and other pertinent documents and attended a meeting of the Board of Directors of United on May 20, 1943. At this meeting there was a general discussion of the three general parts of the decision of the Court of Claims, namely: (1) the award of damages for $364,423.43, representing compensation for air mail carried in January and February 1934; (2) the refusal to allow damages for breach of the contracts; and (3) the denial of recovery on the counterclaims filed by the government.

Mr. Hughes advised the Directors that a review of the decision of the Court of Claims could not be obtained as a matter of right as the writ of certiorari would be granted or withheld in the discretion of the Court. He pointed out that the mere fact that a decision was erroneous was not sufficient to induce the Supreme Court to review it. Mr. Hughes expressed an opinion that petitions for certiorari in the Court of Claims cases probably would be denied by the Supreme Court. He also advised the Directors that if certiorari were granted in these cases, the Supreme Court, according to well-established precedent, would not review the findings of the Court of Claims on questions of fact so that the result might be an affirmance notwithstanding error by the trial court in deciding factual issues. Consideration also was given to the fact that, if petitions for certiorari were granted, the Supreme Court probably would also grant cross-petitions by the government so as to bring up all three branches of the cases with resulting delay in the collection of the compensation for mail carried in January and February 1934.

Mr. Hughes also expressed the opinion that the United companies had not violated Section 3950 of the Revised Statutes of the United States relating to competitive bidding and that the contrary decision by the three judges of the Court of Claims was wrong. He reiterated, however, that the Supreme Court would not, in his opinion, grant certiorari for that reason.

In view of the probability that the Supreme Court would refuse to review the cases, the limited nature of review if obtained, and the expense and delay involved in seeking certiorari, the decision of the Board of Directors of United was that petitions for certiorari should not be filed. Accordingly, the judgments of the Court of Claims became final and in due course the government paid $364,423.43 to the plaintiffs.[33]

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[33] Congress appropriated the above amount in the Second Deficiency Appropriation Act, 1943, approved July 12, 1943. (57 STAT. 547 (1943).)