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## The Pan American World Airways-National Airlines Merger and The Airline Deregulation Act of 1978: A History and Analysis

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## **Abstract**

Fifteen months after Texas International Airlines surprised the commercial aviation community by announcing it had purchased 9.2 percent of the common stock of National Airlines, the Civil Aeronautics Board [C.A.B.] unanimously approved not only Texas International's merger application, but also the subsequently-filed Pan American World Airways-National Airlines merger application

**KEYWORDS:** merger, airways, analysis

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## Introduction

Fifteen months after Texas International Airlines surprised the commercial aviation community by announcing it had purchased 9.2 percent of the common stock of National Airlines,<sup>1</sup> the Civil Aeronautics Board [C.A.B.] unanimously approved not only Texas International's merger application, but also the subsequently-filed Pan American World Airways-National Airlines merger application.<sup>2</sup> Before the C.A.B. decision, Texas International agreed to sell its 2.9 million shares of National Airlines stock to Pan American for a pre-tax profit of \$45,780,000.<sup>3</sup> On January 7, 1980, the merger became effective,<sup>4</sup> giving Pan American the domestic route system it had sought for 34

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1. Wall St. J., July 11, 1978, at 2, col. 2.

2. Texas International-National Acquisition Case/Pan American Acquisition of Control of, and Merger with National, Docket Nos. 33112, 33283, CAB Order Nos. 79-12-163, 79-12-164, 79-12-165 (October 24, 1979).

3. Palm Beach Post Times, July 29, 1979, § A, at 24, col. 1. As of October 19, 1979, Texas International had sold Pan American 38% of its holdings in National for after-tax profits of \$19.3 million. Pan Am had further paid Texas International three million dollars for an option to purchase the remaining 1.3 million shares at \$50 per share. Texas International eventually sold Pan Am all of its National stock and realized the expected profit. See *A Plucky Challenge to Eastern's Shuttle*, Bus. Wk., Sept. 22, 1980, at 71; *A New Air War*, TIME, Sept. 22, 1980, at 72.

4. Application of Pan American World Airways, Inc. for Acquisition of Control of, and Merger with, National Airlines, Inc., Docket No. 33283, CAB Order No. 80-1-125 (Jan. 18, 1980).

years.<sup>5</sup> Eastern Air Lines spent \$3.4 million in its unsuccessful attempt to acquire National,<sup>6</sup> but after unfavorable decisions from both an administrative law judge<sup>7</sup> and the full C.A.B.,<sup>8</sup> dropped out. Tiny Air Florida also was unsuccessful in its limited merger application.<sup>9</sup> Ironically, the new Pan Am has continued to have problems since the merger, losing \$126.9 million from air transport operations in its first year of combined operations<sup>10</sup> and another \$217.6 million during the first six months of 1981.<sup>11</sup>

This article will examine what the Miami Herald termed the "biggest and most complex airline merger case ever," in which National Airlines became the "world's most wanted airline."<sup>12</sup> The multi-faceted National Airlines case is not only significant in itself; but because it came at a time when the United States commercial aviation industry was undergoing great change, primarily due to the drastically altered

5. For a recent history of Pan American, see R. DALEY, AN AMERICAN SAGA - JUAN TRIPPE AND HIS PAN AMERICAN EMPIRE (1980).

6. *Eastern to Halt Pursuit of National*, AV. WK. & SPACE TECH., Oct. 8, 1979, at 29.

7. Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., Docket No. 34226 (June 14, 1979) (initial decision of Administrative Law Judge Richard J. Murphy).

8. Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., Docket No. 34226, CAB Order No. 79-12-74 (Dec. 17, 1979)(dismissing the application).

9. Wall St. J., Feb. 22, 1979, at 29, col. 1. Air Florida, unlike the other applicants, was only seeking permission to acquire National's international routes and four of its wide-bodied DC-10's. *Id.*

10. PAN AMERICAN WORLD AIRWAYS, INC. 1980 ANNUAL REPORT 1 (1981). Actually Pan Am showed a net income of \$80.3 million, but this was from the gain of some \$294 million it showed from the sale of its office building in New York City. *Id.*

11. Merzer, *Pan Am Eyes Shifting Base to S. Florida*, Miami Herald, Aug. 15, 1981, § A, at 1, col. 5. Pan Am international operations were particularly hard hit by the astronomic rise in world-wide fuel prices and competition from foreign government-supported flag carriers as well as American carriers encouraged by the passage of the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (amending 49 U.S.C. § 1301 *et seq.*).

12. Baron, *Now Stockholders Get Their Turn in National Fight*, Miami Herald, May 13, 1979, § F, at 1, col. 5. One reason other airlines were interested in National was that the asset value of its undervalued stock was between \$60-\$75 per share. Therefore, even a purchase price of \$50 a share would be a bargain, particularly in view of National's low debt load. *Id.*

regulatory climate, it illustrates the effects of that change.

The C.A.B. initially signalled the pending deregulation,<sup>13</sup> which was greatly expanded and codified in the Airline Deregulation Act of 1978<sup>14</sup> [A.D.A.]. The A.D.A. changed the public interest test which the C.A.B. used to make decisions under antitrust statutes,<sup>15</sup> delineated the burden of proof for opponents and proponents of a merger,<sup>16</sup> set time limits for C.A.B. approval<sup>17</sup> and limited the reviewing power of the President.<sup>18</sup> It also included labor-protective provisions for workers adversely affected by the A.D.A.,<sup>19</sup> and provided for eventual elimination of the C.A.B.<sup>20</sup>

After a brief overview of general merger and anti-trust law and philosophy, this article reviews pre-A.D.A. airline mergers under the 1938 and 1958 Aviation Acts.<sup>21</sup> Next the 1978 A.D.A. is discussed. The various proposed mergers with National are analyzed, beginning with brief histories of each of the airlines involved and a chronology of merger and post-merger events. Finally the various administrative law

13. *C.A.B. End Set in Air Deregulation*, N.Y. Times, Nov. 7, 1978, § 1, at 79, col. 1.

14. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (amending 49 U.S.C. § § 1301 *et seq.*). A partial legislative history of the Act may be found in 1978 U.S. CODE CONG. & AD. NEWS 3737. For an earlier Senate Report by the Senate Judiciary Subcommittee chaired by Senator Edward M. Kennedy, the Airline Deregulation Act's chief sponsor, *see* SUBCOMM. ON ADMINISTRATIVE PRAC. & PROC., SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1st SESS., CIVIL AERONAUTICS BOARD PRACTICES AND PROCEDURES (Comm. Print 1975) (hereinafter C.A.B. PRACTICES AND PROCEDURES).

15. 49 U.S.C. § 1302(a) (1976 & Supp. 1979).

16. 49 U.S.C. § 1378(b)(1) (1976 & Supp. 1979). Opponents of a merger have the burden of proof as to the anticompetitive effects and proponents have the burden of proof that it meets significant transportation conveniences and needs, which may not be met by less anticompetitive means.

17. 49 U.S.C. § 1490 (Supp. III 1979).

18. 49 U.S.C. § 1461 (1976 & Supp. III 1979). In international cases, the President must base his decision solely upon foreign relations or national defense criteria and not upon economic or carrier selection criteria.

19. 49 U.S.C. § 1552 (Supp. III 1979). *See* text accompanying notes 164-76 *infra*.

20. 49 U.S.C. § 1551 (Supp. III 1979). *See* text accompanying note 70 *infra*.

21. Civil Aeronautics Act of 1938, Act of June 23, 1938, ch. 601, 52 Stat. 973 and Federal Aviation Act of 1958, Pub. L. No. 85-726, Aug. 23, 1958, 72 Stat. 731.

judges' decisions and Board orders related to the National merger attempts are discussed and compared with other post-A.D.A. merger decisions.

## Background

### *Federal Regulation of Big Business*

In response to the huge trusts and corporations established in the last quarter of the nineteenth century by the so-called robber barons,<sup>22</sup> the United States Congress passed the Sherman Antitrust Act<sup>23</sup> in 1890. In 1914 the Clayton Act<sup>24</sup> was passed in an effort to strengthen

22. 54 AM. JUR. 2d *Monopolies, Restraints of Trade and Unfair Trade Practices* (hereinafter *Monopolies*) § 1 (1971), which principally cites *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) and *United States v. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

23. 15 U.S.C. §§ 1-7 (originally enacted as Act of July 2, 1890, ch. 647, 26 Stat. 209). See generally 54 AM. JUR. 2d *Monopolies* §§ 1-108 (1971); 58 C.J.S. *Monopolies* §§ 17-25 (1948). Basically, 15 U.S.C. section 1 deals with means of monopolizing and section 2 deals with the results to be achieved. Section 1 states in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

*Id.* § 2.

24. The Clayton Act can be found at 15 U.S.C. § § 12, 13, 14-19, 20, 21, 22-27, and 44, and at 29 U.S.C. § § 52-53. (originally enacted as Act of Oct. 15, 1914, ch. 323, 38 Stat. 730). See generally 54 AM. JUR. 2d *Monopolies* §§ 109-139 (1971); 58 C.J.S. *Monopolies* § 26 (1948). Rather than being broad and general like the Sherman Act, the Clayton Act concentrates on certain specified practices that Congress believed were anticompetitive and permitted economic concentration, but which the various courts had held to be outside the coverage of the Sherman Act. 54 AM. JUR. 2d, *Monopolies* § 1096 (1971). Among the proscribed practices are: discrimination in price, services or facilities (15 U.S.C. § 13) sale on agreement not to use goods of competitors (§ 14); with various exceptions, acquisition of stock in one corporation by another corporation (§ 18); interlocking directorates in certain situations (§ 19); purchases by

the Sherman Act. While the Antitrust Division of the Justice Department is responsible for federal enforcement of the various federal anti-trust laws,<sup>25</sup> private individuals may also bring suits and seek treble damages.<sup>26</sup> But the current political climate is once again favoring big business; "bigness in business does not necessarily mean badness."<sup>27</sup> Thus, a number of extremely large corporate mergers have taken place in the last several years.<sup>28</sup>

### *Pre-Deregulation Airline Mergers*

The early history of the American commercial aviation industry is inexorably tied to that of the United States Post Office. The latter provided funds for airport and airway development and subsidized airmail contracts. The four big airlines before the Pan Am merger, United, American, T.W.A. and Eastern, can all trace their present prominence to this early period.<sup>29</sup> Under the Black-McKellar Act,<sup>30</sup> during an in-

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common carriers in case of interlocking directorates (§ 20). Private individuals or corporations who are hurt by the above activities may obtain treble damages and reasonable attorney fees (§ 15) or may sue for injunctive relief (§ 26). Also a judgment obtained by the Government under this Act may be used as prima facie evidence of an antitrust violation in a private suit. (§ 16).

25. UNITED STATES GOVERNMENT MANUAL 1978-1979, at 352-53.

26. 15 U.S.C. § 15 states in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust Laws may sue therefore. . . ."

27. Alexander, Beckwith & Ungeheuer, *Reaching for Conoco's Riches*, TIME, July 27, 1981, at 50, quoting Attorney General William French Smith. For a sampling of the Reagan philosophy, compare R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) with MONOPOLY POWER AND ECONOMIC PERFORMANCE (3d ed. E. Mansfield 1974); RALPH NADER'S STUDY GROUP REPORT ON REGULATION AND COMPETITION: THE MONOPOLY MAKERS (M. Green ed. 1973).

28. Strout, *Merger Action Boom Going Full Steam*, Palm Beach Post, Aug. 2, 1981, § FF, at 2, col. 1. The author noted that first quarter 1981 merger bids were a record \$17.5 billion and that 1980 had previously set a record with mergers of \$44.3 billion. The largest, Dupont-Conoco at 7.3 billion dollars, took place in 1981. *Id.*

29. C.A.B. PRACTICES AND PROCEDURES, *supra* note 14, at 29-35 and 195-215. In 1938, when the Civil Aeronautics Act became effective, these four airlines accounted for 82.5% of all revenue passenger miles flown and in 1972 they still accounted for 60% of all revenue passenger miles flown. *Id.* at 6. See also A. LOWENFIELD, AVIATION LAW, § 1 (1972). For a recent and comprehensive history of commercial aviation in the United States, see C. SOLBERG, CONQUEST OF THE SKIES: A HISTORY OF

terim period from 1934 to 1938, the Interstate Commerce Commission worked with the Post Office Department to regulate airmail contracts. The Black-McKellar Act also established a five member Federal Aviation Commission to study commercial aviation and make recommendations to Congress.<sup>31</sup> The eventual result of these recommendations was the passage of the Civil Aeronautics Act of 1938.<sup>32</sup> Twenty years later Congress passed the similar, but expanded, Federal Aviation Act of 1958.<sup>33</sup>

During the forty years the C.A.B. functioned prior to deregulation, mergers reduced the original sixteen domestic trunk lines to ten.<sup>34</sup> Local service carriers, which first came into existence after World War II, were reduced through mergers from nineteen to nine.<sup>35</sup> Between 1938 and 1973, eight domestic trunkline merger applications were denied or disapproved and fifteen applications resulted in eventual mergers. Others were withdrawn or dismissed.<sup>36</sup>

Lucile Sheppard Keyes, an economist who has written much on the subject of economic deregulation of commercial aviation, traced the

#### COMMERCIAL AVIATION IN AMERICA (1979).

30. Act of June 12, 1934, ch. 466, 48 Stat. 933. This Act provided competitive bidding for airmail contracts, curtailed the Postmaster General's discretion in letting contracts, placed a ceiling on total airmail route miles authorized, gave responsibility for contract modifications to the I.C.C., outlawed aviation holding companies and limited the number of contracts each airline could have. C.A.B. PRACTICES AND PROCEDURES, *supra* note 14, at 206-07.

31. Act of June 12, 1934, ch. 466, 48 Stat. 933. The Commission reported back with 102 recommendations, including the establishment of an independent regulatory agency. President Roosevelt, however, favored extending the authority of the I.C.C. to cover aviation. The legislation was stalled for three years in Congress because of the inability to decide whether to use the I.C.C. or establish an independent agency. Finally the concept of an independent agency won and the legislation quickly went forward. C.A.B. PRACTICES AND PROCEDURES, *supra* note 14, at 208.

32. Act of June 23, 1938, ch. 601, 52 Stat. 973. *See generally* C. RHYNE, CIVIL AERONAUTICS ACT ANNOTATED (1939).

33. Act of August 23, 1958, Pub. L. No. 85-726, 72 Stat. 731. The economic regulation provisions were continued practically verbatim; among others, provisions relating to the Federal Aviation Administration were added.

34. C.A.B. PRACTICES AND PROCEDURES, *supra* note 14, at 6.

35. *Id.* at 6 and 222.

36. *Id.* at 252.



history of U.S. airline mergers, dividing it into four periods.<sup>37</sup> During the first period from 1938 through the late forties, the C.A.B. maintained a strongly competitive attitude. This was followed by a period running through the mid-fifties, during which the Board actively encouraged mergers, approving several mergers with considerable anticompetitive effects. The third period, from the mid-fifties through the late sixties, saw the approval of only one airline merger, that under the "failing business" doctrine. This was followed by a four-year period which saw the approval of four merger proposals, each improving the financial stability of at least one of the airlines.<sup>38</sup>

Oren T. Chicamoto analyzed the various factors considered by the C.A.B. in pre-deregulation merger applications.<sup>39</sup> While the Board stated that mergers would be considered on a case by case basis without reference to precedents,<sup>40</sup> it nevertheless considered common factors under §408 of the 1958 Act. In determining whether the proposed merger would be in the public interest, the Board balanced benefits, such as efficiency and economy, route integration and improved services,<sup>41</sup> against disadvantages, such as diversion from competing carri-

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37. Keyes, *Notes on the History of Federal Regulation of Airline Mergers*, 37 J. AIR L. & COM. 357 (1971).

38. *Id.* at 357. During the first period the C.A.B. proclaimed its pro-competitiveness in its decisions denying merger approval: United Air Lines Transport Corp., Acquisition of Western Air Express Corp., 1 C.A.B. 739 (1940) and American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C.A.B. 365 (1946). A significant change in policy was announced by the C.A.B. during the second period: CIVIL AERONAUTICS BOARD, ANNUAL REPORT 2 (1950). The one merger approved under the "failing business doctrine" during the third period was the takeover of Capital by United. United-Capital Merger Case, 33 C.A.B. 307 (1961). Only three of the four mergers approved during the fourth period were consummated. Frontier and Central; Pacific, West Coast and Bonanza; Allegheny and Lake Central were the three local service mergers which were approved. The Northeast and Northwest merger was approved but the transfer of the previously approved Miami to Los Angeles route was not immediately approved and Northwest withdrew. Keyes, *supra* note 37.

39. Chicamoto, *Domestic Mergers in the Airline Industry: C.A.B. Approval and Antitrust*, 11 HAWAII B.J. 3 (1974). See also Travers, *An Examination of the C.A.B.'s Merger Policy*, 15 KAN. L. REV. 227 (1967); Crooker, *Airline Mergers in the 1970's*, 39 J. AIR L. & COM. 143 (1973); Reid & Mohrfeld, *Airline Size, Profitability, Mergers and Regulation*, 39 J. AIR L. & COM. 167 (1973).

40. Chicamoto, *supra* note 39, at 7-8.

41. *Id.* at 8-10.

ers, competitive balance after merger and the intent of the general antitrust laws.<sup>42</sup> Additionally, other factors were examined: the reasonableness of the proposed purchase price, protective labor conditions for employees of both carriers, the applicant's guilt of prior and present antitrust violations, and the overall effect of the proposed merger on local service carriers.<sup>43</sup>

The United States Supreme Court has provided analytical tools for the Board, such as the "failing business" doctrine, to sanction a merger that would otherwise be quite anticompetitive.<sup>44</sup> The doctrine of primary jurisdiction has often been invoked by various courts, including the Supreme Court, to permit C.A.B. examination and judgment on purported antitrust violations within its jurisdiction.<sup>45</sup> This doctrine was expanded considerably by the Court in *Pan American World Airways vs. United States*<sup>46</sup> and in *Hughes Tool Company vs. Trans World Airlines*<sup>47</sup> where the Court held that in addition to any express exemptions, there was an implied exemption from general antitrust statutes, based on the Board's primary jurisdiction under the Federal Aviation Act of 1958.

### Airline Deregulation Act of 1978

Various reasons have been espoused to explain the rapid and unprecedented congressional movement toward deregulation of the commercial aviation industry: Public and political antipathy against government regulation in general; discontent with burdensome regulatory schemes and agencies such as the Occupational Safety and Health

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42. *Id.* at 10-16.

43. *Id.* at 16-18.

44. United Capital Merger Case, 33 C.A.B. 307 (1961). The Board specifically cited *International Shoe Co. v. Federal Trade Comm'n*, 280 U.S. 291 (1929), the initial case in which the Supreme Court adopted the failing business doctrine to uphold such a potentially anticompetitive merger.

45. See generally Coultas, *The Doctrine of Primary Jurisdiction: Determination of Express and Implied Immunity from the Antitrust Laws*, 39 J. AIR L. & COM. 559 (1973); Annot., 38 L. Ed. 2d 796 (1974); 2 AM. JUR. 2d *Administrative Law* § 788-97 (1962).

46. 371 U.S. 296 (1963). See Note, *Civil Aeronautics Board Held to Have Exclusive Jurisdiction to Grant Injunctive Relief Against Acts Allegedly in Violation of Antitrust Laws*, 63 COLUM. L. REV. 923 (1963).

47. 409 U.S. 363 (1973).

Act,<sup>48</sup> and the agency it spawned; economic factors affecting the industry, such as wildly escalating fuel costs, excess capacity afforded by new wide-body jets and the success of intra-state carriers; the nearly unanimous academic and public opinion that regulation could only lead to greater inefficiency and higher fares for the traveling public; and a growing coalition of politicians and academic and governmental economists that started deregulation through C.A.B. regulations and introduced and supported legislation until they were successful.<sup>49</sup>

Certainly one of the most significant and pervasive sections of the A.D.A. is that declaring Congressional policy.<sup>50</sup> With respect to interstate and overseas air transportation, ten factors replaced the original six.<sup>51</sup> These factors, considered to be in the public interest and in accordance with public convenience and necessity, are:

1. maintenance of safety as the highest priority in air commerce;
2. prevention of any deterioration in presently established safety procedures;

48. 29 U.S.C. §§ 651 *et seq.*

49. Thornton, *Deregulation: The C.A.B. and Its Critics*, 43 J. AIR L. & COM. 641 (1977); Callison, *Airline Deregulation-Only Partially a Hoax: The Current Status of the Airline Deregulation Movement*, 45 J. AIR L. & COM. 961 (1980); Kellener, *Deregulation and the Practicing Attorney*, 44 J. AIR L. & COM. 261 (1978). During the three year period that deregulation was being debated in the Congress, it was also being debated in the journals; *see, e.g.*, Brenner, *Need for Continued Economic Regulation of Air Transport*, 41 J. AIR L. & COM. 793 (1975); Callison, *Airline Deregulation-A Hoax?*, 41 J. AIR L. & COM. 747 (1975); Levine, *Alternatives to Regulation: Competition in Air Transportation and the Aviation Act of 1975*, 41 J. AIR L. & COM. 703 (1975); Thayer, *And Now 'The Deregulators': When Will They Learn?* 43 J. AIR L. & COM. 661 (1977). For a legislative history, *see* C.A.B. PRACTICES AND PROCEDURES, *supra* note 14; Styles, *Commuter Airlines and the Airline Deregulation Act of 1978*, 45 J. AIR L. & COM. 685 n.1 (1980) (listing pre-A.D.A. hearings).

50. 49 U.S.C. § 1302(a) (1976 & Supp. 1979).

51. In summary, the six original factors were: 1) Encourage and develop the air transportation system, 2) Regulate air transportation in such a way as to assure the highest degree of safety and foster sound economic conditions, 3) Promote adequate, economical and efficient service without unjust discrimination, preferences or unfair competition, 4) Maintain necessary competition to assure the sound development of the air transportation system, 5) Promote air safety, 6) Promote, encourage and develop civil aeronautics. FEDERAL AVIATION ACT OF 1958, § 102. Congress readopted these factors as the six factors to be considered in the area of foreign air transportation. 49 U.S.C. § 1302(c) (1976 & Supp. 1979).

3. availability of a variety of adequate, efficient and low-priced services without using unfair or deceptive practices, while encouraging fair wages and equitable working conditions;
4. maximum reliance on competition in the market place;
5. development and maintenance of a sound, responsive and prompt regulatory climate, which adapts to the country's needs;
6. development of services in major urban centers through secondary and satellite airports where possible;
7. prevention of unfair, deceptive, predatory or anticompetitive practices and avoidance of unreasonable concentration, excessive market domination and monopoly powers;
8. maintenance of a comprehensive and convenient system of scheduled airline service for small communities;
9. development of the air transportation system by relying on actual and potential competition;
10. encouraging new carriers to enter the system, encouraging established carriers to enter new markets and strengthening small carriers.<sup>52</sup>

The subsequent International Air Transportation Competition Act [I.A.T.C.A.] of 1979<sup>53</sup> deleted the A.D.A.'s six foreign air transportation factors, merging them with those for interstate and overseas air transportation, and added two extra factors for all three types of air transportation:<sup>54</sup>

11. promote, encourage and develop civil aeronautics and a viable, privately owned United States air transport industry;
12. strengthen the competitive position of U.S. commercial aviation to assure at least equality with foreign carriers and to maintain and increase profitability in foreign air transportation.

The procedures for a merger proposal are governed by 49 U.S.C. § 1378. Subpart A, generally unchanged, lists those consolidations, mergers and acquisitions that are unlawful, unless approved by the C.A.B.<sup>55</sup> The Board's decision process has been outlined:

52. *Id.* § 1302(a).

53. Pub. L. No. 96-192, 94 Stat. 35 (amending 49 U.S.C. §§ 1301 *et seq.*). A partial legislative history of this act may be found at 1980 U.S. CODE CONG. & AD. NEWS 54.

54. 49 U.S.C. § 1302(a) (1976 & Supp. 1979).

55. *Id.* § 1378(a). The section providing presumption of control of an air carrier

Unless, after a hearing, the Board finds that the transaction 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 transaction, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe, except the Board shall not approve such transaction—

(A) if it would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of air transportation in any region of the United States; or

(B) the effect of which in any region of the United States may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Board finds that the anticompetitive effects of the proposed transaction are outweighed in the public interest by the probable effect of the transaction in meeting significant transportation conveniences and needs of the public, and unless it finds that such significant transportation conveniences and needs may not be satisfied by a reasonably available alternative having materially less anticompetitive effects.

The party challenging the transaction shall bear the burden of proving the anticompetitive effects of such transaction, and the proponents of the transaction shall bear the burden of proving that it meets the significant transportation conveniences and needs of the public and that such convenience and needs may not be satisfied by a less anticompetitive alternative.<sup>56</sup>

Thus, the Board must base its determinations on three distinct tests: (1) the Sherman Act test, (2) the Clayton Act test and (3) the public interest and convenience test.<sup>57</sup>

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where 10% or more of its stock is owned by any person remains unchanged. *Id.* § 1378(f) (1976). If one or more of the parties to the transaction come within the purview of the C.A.B., an application must be filed with the Board with copies sent to the Attorney General and Secretary of Transportation. The Board must notify the applicant(s) and others with a substantial interest in the proceedings of the manner in which the Board will proceed. *Id.* § 1378(b)(1) (1976 & Supp. 1979).

56. *Id.*

57. The relationship or order of these three tests is a significant issue discussed in both the TXI-Pan Am decision and the Eastern decision. *See* text accompanying notes 105-109 and 112-115 *infra*.

Interlocking relationships of officers, directors, or stockholders with controlling interests in air carriers, common carriers or a person "substantially engaged in the business of aeronautics" are still unlawful, unless approved by the C.A.B. as being in the public interest.<sup>58</sup> Pooling and other agreements between domestic and foreign air carriers are subject not only to a public interest test, but also to an anticompetition test.<sup>59</sup> Mutual aid agreements are treated separately.<sup>60</sup> They may only be approved if they are limited to cover sixty percent of an air carrier's direct operating expenses, do not start for thirty days after the beginning of the labor strike, last no longer than eight weeks and the air carrier agrees to binding arbitration under the provisions of the Railway Labor Act, if the union so requests.<sup>61</sup>

The President of the United States still has final authority with respect to foreign air transportation; his approval is necessary whenever the merger is between carriers flying international routes. However, the A.D.A. limits his power to national defense and foreign relations con-

58. 49 U.S.C. § 1379 (1976 & Supp. 1979).

59. *Id.* § 1382. Under the A.D.A. the agreements are simply referred to as "possible cooperative working arrangements," without further defining them. *Id.* § 1382(a)(1) (Supp. 1979). Previously such agreements were delineated:

agreement. . . for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

*Id.*; FEDERAL AVIATION ACT OF 1958, § 412. Procedures for reviewing such agreements are statutorily outlined including prior notification to certain Cabinet officers before approval, so written comments may be filed or hearings requested. 49 U.S.C. § 1382(b) (1976 & Supp. 1979). Delineation of burdens of proof are also included. *Id.* § 1382(c)(2)(B) (Supp. 1979).

60. *Id.* § 1382(e). Mutual aid agreement is defined as any contract or agreement between air carriers which provides that any such air carrier will receive payments from the other air carriers which are parties to such contract or agreement for any period during which such air carrier is not engaging in air transportation, or is providing reduced levels of service in air transportation, due to a labor strike.

*Id.* § 1382(e)(3)(A).

61. *Id.* § 1382(e)(2).

siderations. He may not disapprove upon the basis of economic or carrier selection considerations.<sup>62</sup>

The A.D.A. also changed 49 U.S.C. § 1384, retitled Antitrust Exemptions.<sup>63</sup> The antitrust exemption is no longer automatic with the C.A.B.'s approval of the transaction. Before antitrust exemption may be given, the Board must specifically find exemption is required in the public interest.<sup>64</sup> A 1980 amendment to this section now provides that the Board *shall* by order exempt any person "to the extent necessary to enable such person to proceed with the transaction specifically approved . . . and transactions necessarily contemplated by such order."<sup>65</sup>

To preclude deliberate stalling tactics by the Board, the A.D.A. set specific time limits for Board decisions; for Section 1378 applications, the final order must be rendered within six months.<sup>66</sup>

62. *Id.* § 1461(a) (1976 & Supp. 1979). In his letter of December 22, 1979, approving the Pan American-National merger, President Carter noted his limited review power. Letter from President Carter to C.A.B. Chairman Marvin Cohen dated Dec. 22, 1979, reprinted at Texas International-National Acquisition Case/Pan Am-Acquisition of and Merger with National, Docket Nos. 33112 & 33283, C.A.B. Order Nos. 79-12-163, 79-12-164, and 79-12-165 (Oct. 24, 1979).

63. 49 U.S.C. § 1384 (1976 & Supp. 1979):

In any order made under section 1378, 1379 or 1382 of this title, the Board *may*, as part of such order, exempt any person affected by such order from the operations of the "antitrust laws" set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest.

*Id.* (emphasis added).

64. *Id.* In the Texas International/Pan American-National merger case, the Board was asked to grant antitrust exemption to the proposed mergers, but after analyzing the A.D.A. and the arguments presented specifically declined to do so. Texas International-National Acquisition Case/Pan American Acquisition of Control of, and Merger with National Acquisition Case, Docket Nos. 33112 & 33283, C.A.B. Orders 79-12-163, 79-12-164 and 79-12-165 (October 24, 1979). *See also* Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001 (1980).

65. 49 U.S.C. § 1384 as amended by section 27 International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35, 47-48. It would appear that the amendment goes a long way towards an automatic exemption again.

66. 49 U.S.C. § 1490 (Supp. 1979).

In another significant section, the A.D.A. established an employee protection program for employees who had been employed by a certificated air carrier for four years as of the beginning of the A.D.A. and who were deprived of either employment or compensation as a result of bankruptcy or "major contraction"<sup>67</sup> "the major cause of which is the change in regulatory structure provided by the A.D.A."<sup>68</sup> Monthly assistance payments may be made until the protected employee finds other employment or for 72 months maximum. Relocation assistance may also be provided. After their own furloughed employees have been called back, certificated carriers have a duty to hire protected employees before hiring any non-protected employee similarly qualified.<sup>69</sup>

Most significant are the A.D.A.'s sunset provisions prescribing a three-phase termination of C.A.B. authority, with complete phase-out on January 1, 1985, unless Congress intervenes. Board authority to pass on mergers ceases on January 1, 1983, and is transferred to the Department of Justice.<sup>70</sup>

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67. *Id.* § 1552(h)(4) defines "major contraction" as being "a reduction of at least 7½ percent of the total number of full time employees of an air carrier within a 12 month period." *Id.* However, the C.A.B. may also determine that it is a major contraction if less than 7½ percent. Strikers are not to be included. *Id.*

68. 49 U.S.C. § 1552(h)(2) (Supp. 1979). However, this program is limited to the first 10 calendar years occurring after October 28, 1979, the date that the A.D.A. became effective. *Id.*

69. *Id.* § 1552. For an interesting history and explanation of this provision and similar provisions for railroad employees, see Ris, *Government Protection of Transportation Employees: Sound Policy or Costly Precedent?*, 44 J. AIR L. & COM. 509 (1979). The historical reasons for labor protective provisions in the railroad industry have not necessarily been present in the commercial aviation industry. In fact until the A.D.A., Congress did not mandate such provisions as it had in the railroad industry; the C.A.B. nevertheless administratively applied them starting in 1950 in United-Western Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).

70. 49 U.S.C. § 1551 (Supp. 1979). The Board is also required to make a comprehensive review of its activities and present this review to the Congress no later than January 1, 1984. It is to recommend to Congress whether it should be continued in existence after 1985 and what changes should be made to further the goals of the A.D.A. The A.D.A. lists in great detail the elements and factors to be considered during the comprehensive review. *Id.* It was reported that the Transportation Department would support legislation which would move the sunset date up from 1985 to 1982. *Transportation Department Backs Early C.A.B. Sunset*, AV. WK. & SPACE TECH. Apr. 7, 1980, at 32.



Ironically the A.D.A. preempted to the federal government all authority over rates, routes or services of certificated carriers.<sup>71</sup> Liberalized route application procedures and awards were provided the A.D.A.,<sup>72</sup> including an automatic market entry program<sup>73</sup> and a means to obtain unused authority.<sup>74</sup> Carriers obtained flexibility in rate changes; a “standard industry fare level”<sup>75</sup> was established between city-pairs and carriers could adjust their fare no more than 5% upward or 50% downward from this level without C.A.B. authority.<sup>76</sup> In 1980 I.A.T.C.A. established a similar “standard foreign fare level” and

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71. 49 U.S.C. § 1305 (Supp. 1979). This is ironic because one of the primary reasons advanced in support of deregulation was the economic and regulatory success of intrastate carriers operating under California and Texas state authorities. *See Note, Is Regulation Necessary? California Air Transportation and National Regulatory Policy*, 74 *YALE L.J.* 1416 (1965); Means & Chasnoff, *State Regulation of Air Transportation: The Texas Aeronautics Commission*, 53 *TEXAS L. REV.* 653 (1975).

72. 49 U.S.C. § 1371 (1976 & Supp. 1979). Among other provisions in this lengthy section, the C.A.B. is authorized to establish simplified procedural rules for route applications. *See generally The Line Forms Here for Air Routes*, *BUS. WK.*, Nov. 6, 1978, at 66; *Deregulation Spurs Airport Problems*, *AV. WK. & SPACE TECH.*, Nov. 3, 1980, at 55; Tinnin, Alexander & Hannifin, *Fasten Your Seat Belts*, *TIME*, Aug. 4, 1980, at 47; Marbach, Buckley, *et al. Silver Lining in the Air*, *NEWSWEEK*, Aug. 24, 1981, at 52.

73. 49 U.S.C. § 1371(d)(7) (Supp. 1979). Basically this section provides that each certificated air carrier may apply for (and generally will be automatically given) route authority for one city pair during the first thirty days of 1979, 1980 and 1981. If the Board either determines that the air carrier is not fit, willing and able to provide such non-stop service or that the air carrier is not the *only* air carrier to be given that particular city pair under the automatic market entry program, it may reapply for another city pair within the first one hundred and twenty days of the year. *Id.*

74. *Id.* § 1371 (d)(5)(A) (Supp. 1979). Basically an air carrier must provide a minimum of five round trips per week between two points or city pairs for which it has route authority for at least thirteen weeks during any twenty-six week period or any other air carrier may apply for such unused route authority thirty days after the end of the twenty-six week period. *Id.*

75. 49 U.S.C. § 1482(d)(6)(A) (1976 & Supp. 1979) which is defined as the “fare level in effect on July 1, 1977, for each interstate or overseas pair of points, for each class of service, existing on that date. . . .” Semiannually the Board will make adjustments proportional to the percentage change “in the actual operating cost per available seat mile for interstate and overseas transportation combined.” *Id.* § 1482(d)(6)(B).

76. *Id.* § 1482(d)(4).

range of reasonableness for foreign fare adjustments.<sup>77</sup> Subsidized "guaranteed essential air transportation" for those small communities that have lost all air service as a result of deregulation was also provided.<sup>78</sup> Finally, the A.D.A. amended the 1957 Guaranty of Loans for Purchase of Aircraft and Equipment Act to encompass guaranties for "charter air carriers," "commuter air carriers," and "intrastate air carriers."<sup>79</sup>

## Proposed National Mergers

### *Description of the Airlines*

To more clearly understand this complicated merger, it is necessary to briefly examine and compare each of the five airlines involved. Prior to the merger each of the five airlines was in a different stage of development and was practically, if not theoretically and legally, a different category of air carrier.<sup>80</sup> Each of the four courtiers had a differ-

77. *Id.* § 1482(j)(6). See generally *Is the U.S. Sabotaging Its International Airlines?*, Bus. Wk., Jan. 26, 1981, at 74.

78. 49 U.S.C. § 1389 (Supp. 1979).

79. 49 U.S.C. § 1380.

80.

ITEM (1978)	NAL	PAN AM	EAL	TXI	AF
Employees	8,040	26,964	35,899	2,949	500
Equipment					
Total planes	55	95	257	28	7
Wide-bodied jets	15	43	41	---	---
Passengers enplaned	6,983* (11)**	8,675 (10)	37,819 (2)	3,987 (19)	498 (na)
Revenue	7,892,599*	21,054,983	25,183,415	1,560,554	181,000
Passenger Miles	(10)**	(6)	(4)	(16)	(na)
Passenger Revenue (\$)	587,782* (10)**	1,631,798 (6)	2,150,577 (3)	158,185 (19)	15,350 (na)
Profits (\$)	18,309*	118,801	67,257	12,850	132
Assets (\$)	452,952*	2,048,303	1,908,556	95,200	11,474

ent reason for wanting to merge with National.

National, the smallest of the domestic trunklines, first began flying in 1934, carrying the mail between St. Petersburg, Florida, and Daytona Beach, Florida. By 1970 National's routes generally ran from Florida to Washington and New York City, and from Florida across the southern tier of states to California. It was awarded the Miami-London transatlantic route in 1970, and has since steadily expanded into Europe. Prior to the merger it flew from Florida to London, Paris, Amsterdam and Frankfurt.<sup>81</sup> Its stock was undervalued.<sup>82</sup>

Pan American World Airways was unique among United States airlines because, for all practical purposes, it was strictly an international airline. It too traced its roots to Florida. On October 28, 1927, it first flew from Key West, Florida, to Havana, Cuba. In 1947 the company provided the first scheduled around-the-world service.<sup>83</sup> In 1974, it was thought Pan Am would follow Penn-Central into bankruptcy, but this was avoided by better management procedures and elimination of excess management personnel.<sup>84</sup> More recently the airline faced two problems; increasing international competition from other American airlines and continued competition from foreign airlines, such as Air

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\*Add 000

\*\*Rank among ATA carriers

AIR FLORIDA SYSTEM, INC., 1978 ANNUAL REPORT (n.d.); EASTERN AIR LINES, INC., 1978 ANNUAL REPORT (1979); NATIONAL AIRLINES, INC., 1978 ANNUAL REPORT (n.d.); PAN AMERICAN WORLD AIRWAYS, INC., 1978 ANNUAL REPORT 1978; AIR TRANSPORT ASSOCIATION OF AMERICA, AIR TRANSPORT 1979 (1979); Cook, *Lorenzo the Presumptuous*, FORBES, Oct. 30, 1978, at 115; Baron, *New Aircraft, Increased Traffic Push Air Florida into the Black*, Miami Herald, Nov. 18, 1978, § B, at 4, col. 1; BARRON'S, Oct. 10, 1977, at 39; PAN AMERICAN WORLD AIRWAYS, INC., THE PAN AMERICAN MERGER (n.d.).

81. NATIONAL AIRLINES, INC., NATIONAL AIRLINES HISTORY, (n.d.).

82. See note 12 *supra*; Russell, *They're Just Wild About National*, N.Y. Times, Dec. 24, 1978, § C, at 1, col. 4.

83. For histories of Pan American World Airways, Inc., see R. DALEY, AN AMERICAN SAGA: JUAN TRIPPE AND HIS PAN AM EMPIRE (1980); C. SOLBERG, CONQUEST OF THE SKIES: A HISTORY OF COMMERCIAL AVIATION IN AMERICA (1979); PAN AMERICAN WORLD, INC., THE FIRST 50 YEARS OF PAN AM-THE STORY OF PAN AMERICAN WORLD AIRWAYS, INC. FROM 1927 TO 1977 (n.d.); PAN AMERICAN WORLD AIRWAYS, INC., ANNUAL REPORT 1979 (1980).

84. See generally *Pan Am: In the Black-For-Now*, BUS. WK., Sept. 5, 1977, at 52; Cook, *Pan American: Coming Home*, FORBES, Oct. 16, 1978, at 47; Griffiths, *Pan Am Cutback Geared to Profits*, AV. WK. & SPACE TECH., Sept. 18, 1978, at 34.

France, Alitalia and Lufthansa, which are owned and/or heavily subsidized by their respective governments.<sup>85</sup> Increased American competition reduced Pan Am's domestic feeder traffic. Thus Pan Am was desirous of obtaining its own domestic system more quickly and less expensively than building one from scratch. Pan Am expected that National would best connect Pan Am's transpacific, transatlantic and Latin American operations, and enable better utilization of equipment since Pan Am peaked during the summer tourist season and National peaked during Florida's winter season.<sup>86</sup>

Eastern Air Lines, as its name implies, generally concentrated its route system in the eastern United States, with major hubs at Miami, Atlanta, Washington and New York. It also served Eastern Canada, Mexico and the Caribbean. Eastern was the second largest domestic trunkline in the United States before the Pan Am-National merger.<sup>87</sup> Eastern's present president, Colonel Frank Borman, appears to be bringing the company out of a severe financial crisis, which saw it lose nearly ninety million dollars in 1975.<sup>88</sup> Two major problems appeared to face the proposed Eastern-National merger. One was the fact that the two airlines were major competitors on the important northeast-Florida routes. The other was the resultant size of the combined company.<sup>89</sup>

Texas International (TXI), originally known as Trans-Texas Air-

85. PAN AMERICAN WORLD AIRWAYS, INC., THE PAN AM-NATIONAL MERGER (n.d.); ANNUAL REPORT 1979 20 (1980) and Pan American World Airways, Inc., S.E.C. Form 10-K (1978) (S.E.C. file # 103532) (1979). For a description of state ownership characteristics of various I.A.T.A. airlines, see generally P. HAANAPPEL, RATEMAKING IN INTERNATIONAL AIR TRANSPORT - A LEGAL ANALYSIS OF INTERNATIONAL AIR FARES AND RATES 37-39 (1978).

86. ANNUAL REPORT 1979, *supra* note 68; Hice, *Pan Am-National Merger: Where Will All the People Fit?*, FLORIDA TREND, Apr. 1980, at 150. Union seniority and meshing problems have prevented the cross-utilization of equipment that was expected. *Id.* See also text accompanying notes 165-69 *infra*.

87. Pan Am replaced Eastern in second place, behind United, when the merger became effective. Hobson & Golden, *Merged Pan Am Slashes Fares*, Miami News, Jan. 7, 1980, § A, at 1, col. 1. See generally R. SERLING, FROM THE CAPTAIN TO THE COLONEL - AN INFORMAL HISTORY OF EASTERN AIRLINES (1980); E. RICKENBAKER, RICKENBAKER - AN AUTOBIOGRAPHY (1967).

88. EASTERN AIRLINES, INC., GROWTH, CHALLENGE CHARACTERIZE EASTERN AIRLINES FIRST 50 YEARS (1979).

89. See text accompanying notes 143-47 *infra*.

ways, was a small local service airline. In 1967 it was rescued from a crippling debt load of over twenty million dollars by two Harvard M.B.A.'s, Frank Lorenzo and Robert Carney, who were able to recapitalize the company through innovative and aggressive management, turning it into one of the industry's most exciting companies. Texas International's daring in trying to gain control of National brought the company at least forty-five million dollars in profits on the sale of its National stock.<sup>90</sup> After realizing the profit from the sale of its stock to Pan Am, Texas International sought to acquire T.W.A. and currently has C.A.B. approval to acquire Continental Airlines.<sup>91</sup>

Until the A.D.A. Air Florida was strictly an intrastate carrier. Deregulation and an infusion of new capital permitted the once struggling airline to expand its route system to the Northeast, the Caribbean, Central America and Europe.<sup>92</sup> Like the other so-called National-merger losers, Air Florida has grown and prospered more than the "new" Pan Am.

### *Chronology of Events*

While this article focuses on the airline regulatory process, it is important to realize that concurrent with the C.A.B. hearings there was a massive corporate scramble on other fronts, involving the Securities and Exchange Commission and the shareholders of the involved corporations. These are here summarized.<sup>93</sup>

Texas International Airlines set this incredible chain of events in motion on July 10, 1978 when it announced it had already purchased 9.2% of National's common stock. On August 22, 1978 Pan American World Airways joined in battle against Texas International, also seeking C.A.B. approval for its proposed merger with National Airlines. Shortly thereafter Pan American and National executed a definitive merger agreement. The C.A.B. consolidated these two merger applications, but later refused to consolidate Eastern Airlines' application, when, on December 11, 1978, it likewise indicated an interest in acquiring its chief rival on the East Coast-Florida market. Throughout,

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90. See note 3 *supra* and accompanying text.

91. See text accompanying notes 148-62 *infra*.

92. AIR FLORIDA SYSTEM INC., AIR FLORIDA BACKGROUND (n.d.).

93. For a full chronology, see Appendix A.

Air Florida's only interest was the acquisition of National's international routes and four of its DC-10's.

Meanwhile, on October 28, 1978, President Carter signed into law the A.D.A., which not only deregulated the domestic airline industry, but also significantly changed the rules for airline mergers. Later I.A.T.C.A. was also enacted, much to Pan American's detriment.

Eventually an auction system was proposed and accepted by National's shareholders, which would permit five rounds of bidding between Pan American and Eastern, should each obtain C.A.B. approval. The Texas International, Pan American and Eastern applications were all rejected by the respective administrative law judges. Finally the full Board approved both Texas International's and Pan American's merger applications, despite the fact that Texas International had informed the Board it had already agreed to sell its National stock to Pan American for a handsome profit. Throughout the summer of 1979 Pan American increased its ownership of National.

In September 1979 the full C.A.B. tentatively rejected Eastern's merger application and shortly thereafter Eastern dropped out of contention.

President Carter formally approved the Pan American-National merger in December 1979 and the merger became effective in January 1980. Since the merger, management problems, labor seniority meshing problems, continued and expanded deregulation, high fuel costs and the economy in general have all combined to raise the spectre of possible bankruptcy. First the airline sold its New York City headquarters to raise badly needed cash, then its profitable InterContinental Hotel subsidiary. Only time will tell whether Pan American World Airways will realize the expected benefits from its merger with National Airlines and even whether the "new" Pan Am will survive.

### C.A.B. Decisions

Although not the first merger decision after the adoption of the A.D.A. merger tests,<sup>94</sup> the C.A.B. decision in the Texas International/

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94. The C.A.B.'s first affirmative decision created Republic Airlines from North Central and Southern. Since the two airlines served different regions of the United States, there was little, if any, anticompetitive effect on the airline industry. Thus the Board opinion offered no real analysis or rationale. North Central-Southern Merger

Pan American-National Case<sup>95</sup> gives the greatest expository insight into the Board's interpretation of the A.D.A. merger provisions. Handed down one year after the adoption of the A.D.A., this lengthy opinion approved both the proposed acquisition of National by Texas International and the proposed acquisition and merger of National with Pan American, despite contrary recommendation by the administrative law judge.<sup>96</sup> This Board opinion is analyzed and compared with the earlier decision by Administrative Law Judge William Dapper. The initial decision of Administrative Law Judge Richard Murphy recommending denial of the Eastern-National acquisition application,<sup>97</sup> the decision of Administrative Law Judge John Vittone recommending approval of the second Continental-Western merger,<sup>98</sup> and the C.A.B. decision accepting such recommendation are also discussed below.<sup>99</sup> The latter Continental-Western decisions are examined because they shed some light on the C.A.B.'s earlier decision denying the first Continental-Western merger application<sup>100</sup> and because they show the changes in the domestic airline industry since deregulation and the effect those

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Case, Docket Nos. 33136 & 34430, C.A.B. Order Nos. 79-6-7 & 79-6-8 (May 15, 1979). For discussion and analysis of the first five merger/acquisition cases under the A.D.A., see Keyes, *A Preliminary Appraisal of Merger Control Under the Airline Deregulation Act of 1978*, 46 J. AIR L. & COM. 71 (1980).

95. Texas International-National Acquisition Case/Pan American Acquisition of Control of, and Merger with National Acquisition Case, Docket Nos. 33112 & 33283, C.A.B. Order Nos. 79-2-163, 79-12-164, 79-12-165 (Oct. 24, 1979) (hereinafter TXI/Pan Am-National Order).

96. Texas International-National Acquisition Case/Pan American Acquisition of Control of, and Merger with National Acquisition Case, Docket Nos. 33112 & 33283 (Decision of Administrative Law Judge William H. Dapper, Apr. 5, 1979) (hereinafter TXI/Pan Am-National Judge Decision).

97. Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc. Docket No. 34226 (Decision of Administrative Law Judge Richard J. Murphy, June 14, 1979) (hereinafter Eastern-National Judge Decision).

98. Continental-Western Merger Case, Docket No. 38733 (Decision of Administrative Law Judge John M. Vittone, Feb. 6, 1980) (hereinafter Continental-Western Judge Decision).

99. Continental-Western Merger Case, Docket No. 38733, C.A.B. Order Nos. 81-6-1 & 81-6-2 (Mar. 31, 1981) (hereinafter Second Continental-Western Order).

100. Continental-Western Merger Case, Docket No. 33465, C.A.B. Order No. 79-9-185 (Sept. 27, 1979) (dismissing application) (hereinafter First Continental-Western Order).

changes have had on the C.A.B.'s consideration of merger applications.

### *Preliminary Decisions*

Under the Federal Aviation Act of 1958, the C.A.B. initially determined whether the proposed merger, consolidation or acquisition was consistent with the public interest. The Board was further required to disapprove proposals that would result in a monopoly or monopolies.<sup>101</sup> In the first post-A.D.A. decision, Administrative Law Judge Saunders commented upon the C.A.B.'s view of its antitrust role under the 1958 Act: "Under this interpretation of the prior law, the Board's antitrust resolve was erratic; and with the broad discretion afforded by the 'public interest' test, antitrust policy was often ignored."<sup>102</sup>

With the adoption of the A.D.A. Congress specifically intended to subject proposed airline mergers or acquisitions to the same antitrust standards to which other mergers are subject, with the proviso that if the proposed merger failed the Sherman and Clayton Act tests, it might nevertheless be approved if it passed the public interest test and "no reasonably available less anticompetitive alternative"<sup>103</sup> existed.

101. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973). Federal Aviation Act of 1958, Pub. L. No. 85-726, tit. IV, § 408, 72 Stat. 767 as amended, stated (before the A.D.A.):

Unless after such hearing, the Board 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 Board 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. . . .

102. *North Central-Southern Merger Case*, Docket No. 33136 at 23 (Decision of Administrative Law Judge Saunders, Feb. 9, 1979).

103. A.D.A. Legislative History, *supra* note 14, at 3789.

The intent of the new section 408 of the proposed legislation is to insure that, in light of deregulation, mergers in the air carrier industry will be tested by the antitrust standards traditionally applied by the courts to unregulated industries. However, under the new section 408, even if a merger



The public interest tests under the A.D.A. are similar to those under Section 102(a) of the Bank Merger Act of 1966.<sup>104</sup>

Because of substantial change in Section 408 of the Aviation Act,<sup>105</sup> which effectively altered the entire antitrust philosophy and tests applied to the airline industry, the Board and the two administrative law judges dealing with the various National merger cases had to determine the section's intent and application. The two issues were: first, whether the public interest test was separate from the antitrust analysis or whether the antitrust analysis was only an important part of the overall public interest test;<sup>106</sup> and second, what criteria or factors should be considered for the public interest test.<sup>107</sup> Judge Dapper,

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does not meet the antitrust standards of the Sherman and Clayton Acts it may nonetheless be approved if it meets 'significant transportation needs of the community to be served,' and if there is no 'reasonably available less anticompetitive alternative' to the merger. These latter tests only apply if a merger or similar transaction does not meet the Sherman and Clayton standards. The 'public interest' standard in section 408(b) of the Federal Aviation Act of 1958 is retained in the new section, but the standard must now be interpreted in light of the intent of Congress to move the airline industry rapidly toward deregulation. The foundation of the new airline legislation is that it is in the public interest to allow the airline industry to be governed by the forces of the marketplace. Consistent with the premise, mergers of air carriers should be governed by the same standards that are applied to mergers of other firms.

The Sherman and Clayton Acts are more fully explained at notes 23-24 *supra*.

104. 12 U.S.C. § 1828(c) (1976 & Supp. 1979). See generally 54 AM. JUR 2d *Monopolies* §§ 198-205. Accord, TXI/Pan-Am-National Judge Decision at 40, and Eastern-National Judge Decision at 21.

105. 49 U.S.C. §§ 1301-1504 (1976 & Supp. 1979).

106. TXI/Pan Am-National Judge Decision at 40-45. Pan Am, TXI and the Department of Justice all took the position that if the proposed acquisitions or mergers passed both the Clayton Act Test and the Sherman Act Test, that there was no need to subject them to the public interest tests. The factors listed in section 12(a) of the Bank Merger Act would only come into play if the antitrust tests are not passed. National and others contend that even if the proposed mergers pass the antitrust tests, they could still be disapproved if they fail to pass the public interest test. *Id.* It would appear that the first position is supported by the Legislative History, which states: "These latter tests (public interest tests) *only apply* if a merger or similar transaction *does not meet* the Sherman and Clayton Act Standards." A.D.A. Legislative History, *supra* note 14, at 3789 (emphasis added).

107. TXI/Pan Am-National Judge Decision at 40-45.

whose Texas International/Pan Am-National decision provided the first interpretation of Section 408, concluded that antitrust analysis was only an important part of the overall public interest standard, and that the factors for public interest listed in Section 102(a) of the A.D.A. should be considered, but were not exhaustive.<sup>108</sup> Specifically:

The analysis proceeds as follows: a determination is made concerning whether a proposed merger is anticompetitive or not (The Clayton Act Test). If the conclusion is that the transaction is not anticompetitive then other public interest factors are evaluated. The antitrust and other public interest factors are then weighed and balanced against each other and an ultimate determination is made. Thus, the merger may pass muster under antitrust criteria but offend overriding public interest considerations on the other hand. In that event the merger must be disapproved. Finally, if the merger fails under the antitrust criteria it may still be approved pursuant to section 408(b)(1)(B) if it meets significant transportation needs.<sup>109</sup>

Applying this analysis, Judge Dapper concluded with respect to each airline that the proposed transactions were violative of the Clayton Act test,<sup>110</sup> applying the public interest test as applied under the Bank Merger Act of 1966, he concluded that neither airline had met its burden of proof in establishing that such a merger would meet "significant transportation conveniences and needs of the public."<sup>111</sup>

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108. *Id.* at 43.

109. *Id.*

110. *Id.* at 82-91.

111. *Id.* at 114-127. TXI's principal argument was that it was a more aggressive and better-managed company than National, that subsequent to the merger TXI's low cost fares could be introduced system-wide and overall management would be improved to the benefit of the consumer. Judge Dapper declined to accept this thesis. He also noted several negative factors that he considered: 1) a long period of cross-ownership would have detrimental effects on National; 2) TXI might lose its citizenship because of the foreign debenture device it used to raise money for the acquisition; 3) approval of this acquisition would be a signal that might cause other acquisitions or mergers; 4) it would be better for the consumer if TXI expanded internally rather than acquired another airline externally and 5) TXI violated section 408 when it initially acquired more than 10% of National stock without Board approval. *Id.* at 82-91. Likewise, Judge Dapper disagreed with Pan Am's main contention that it would be in the public interest to permit Pan Am to rapidly acquire a domestic feeder system and thereby

Several months later, Judge Murphy in the Eastern-National case determined that there were three separate tests to be considered under the A.D.A.: 1) the public interest test, 2) the Sherman Act Test and 3) the Clayton Act Test.<sup>112</sup> He concluded that *each* of the three tests must be passed for approval, rather than the alternative propositions Judge Dapper considered. Thus, even though he concluded that the proposed acquisition would “not be inconsistent with the public interest,”<sup>113</sup> and that it would pass the Sherman Act Test,<sup>114</sup> because it failed the Clayton Act Test, he recommended disapproval.<sup>115</sup>

### *C.A.B. Decision in the Texas International/Pan Am-National Merger Application*

In October 1979 the full C.A.B. interpreted for the first time the applicability and interrelationship of the various tests under Section 408 of the A.D.A. First the Board decided that the public interest standard was separate and independent from the antitrust standard. However the Board refused to read subsection 7, condemning monopolies and other anticompetitive acts, out of the public interest factors of section 102(a). Despite including antitrust or anticompetitive factors in the public interest test, the Board noted that the effect would be the same as pre-A.D.A. analysis using the Clayton Act Test and the Bank Merger Act of 1966, since the Clayton Act envisaged a broad inquiry, subsuming this independent public interest inquiry.<sup>116</sup> In making a determination under the Clayton Act, the Board decided that a “functional analysis” of the acquisitions, taking into account the “structure, history and performance of the industry,” was more appropriate than “static statistical analyses of market shares and concentration ra-

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support its position as the primary U.S. flag carrier, rather than require it to slowly build such a domestic feeder system. The Judge also listed three negative public interest factors: 1) the merger would be inconsistent with U.S. international aviation policy which supports more international competition, 2) internal growth is preferable and 3) approval would trigger other mergers. *Id.* at 114-127.

112. Eastern-National Judge Decision at 5-6, 12.

113. *Id.* at 21.

114. *Id.* at 59.

115. *Id.* at 62.

116. TXI/Pan Am-National Order at 58-60.

tios."<sup>117</sup> The Board ultimately disagreed with Judge Dapper, determining that there were no anticompetitive problems with either merger or acquisition, other than on the United States-London market,<sup>118</sup> and further found that both applications were in the public interest, subject to labor protective provisions.<sup>119</sup>

In the Board's functional Clayton Act analysis, it agreed with Judge Dapper that the "product market" was "scheduled air transportation."<sup>120</sup> Actually Judge Dapper had more narrowly defined the applicable product market as "scheduled passenger air transportation between a specific origin point and a specific destination point."<sup>121</sup>

Looking first at the Texas International proposal, Judge Dapper determined the applicable geographic markets were those city-pairs where Texas International and National actually competed, those where one of the two airlines actually operated and the other might be a potential entrant and those where both airlines might be potential entrants.<sup>122</sup> Although the Board agreed that city-pairs deserved analysis, it deemphasized the importance of statistical market share analysis relative to such city-pairs. It based its Clayton Act determination upon a historical, structural and prospective analysis of the industry, particularly in view of deregulation.<sup>123</sup> Specifically, Judge Dapper determined

117. *Id.* at 6 and 59.

118. *Id.* at 3-7. *See* text accompanying note 138 *infra*.

119. TXI/Pan Am-National Order at 3-7.

120. *Id.* at 10.

121. TXI/Pan Am-National Judge Decision at 52-55 citing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), Judge Dapper stated, "In that proceeding, the Court stated that the key factor in identifying the product market was the 'reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it.'" TXI/Pan Am-National Judge Decision at 53. It would appear that the difference in terminology between Judge Dapper and the Board shows the Board's emphasis upon a more functional analysis, partially occasioned by the changed competitive conditions brought about by the A.D.A.

122. *Id.* at 57.

123. TXI/Pan Am-National Order at 12-16, citing *United States v. General Dynamics*, 415 U.S. 486 (1974).

We believe the Judge erred in not accepting TXI's invitation to make a thorough examination of this market. . . . Under this functional approach the likely effect on performance should be examined as well as surface structural changes. . . . We believe that we should apply antitrust law functionally and in the light of the recent and ongoing deregulation of

there would be a substantial and continuing two-firm concentration ratio in the Houston-New Orleans market should the proposed merger be approved, which would violate the Clayton Act.<sup>124</sup> Skeptical about market shares analysis in general, the Board decided Texas International's rapid market growth and Southwest Airlines' ability to enter the market with apparent ease belied the conclusions drawn by Judge Dapper.<sup>125</sup> The Board concluded that the loss of National in this market would not be anticompetitive.<sup>126</sup>

Courts have divided potential competition into "perceived" and "actual" potential competition.<sup>127</sup> Judge Dapper examined sixteen city-pairs radiating from Houston or New Orleans and determined that either National or TXI would be an actual potential competitor, having deconcentrating effects upon the markets they entered.<sup>128</sup> Disagreeing with this conclusion, the Board noted the Judge's underlying assumption, that "concentration gives rise to poor competitive performance," is legally challengeable.<sup>129</sup> Concluding that none of these southern tier markets faced any anticompetitive challenge from the proposed acquisition, the Board decided that no commercial (or special) barriers would prevent other airlines from entering these markets, should the acquisition be approved.<sup>130</sup> It emphasized the changed conditions under the A.D.A.:

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the airline industry. The case law just reviewed reveals a reemphasis of the Supreme Court's belief that a thorough review of competitive circumstances is advisable.

TXI/Pan Am-National Order at 16.

124. TXI/Pan Am-National Judge Decision at 62-70.

125. TXI/Pan Am-National Order at 17-19.

126. *Id.* at 19.

127. TXI/Pan Am-National Judge Decision at 71:

An actual entrant is a company which does not serve the relevant market. However, it has the 'available feasible means' for entering the relevant market other than by acquisition; and those means offer a 'substantial likelihood of producing deconcentration in that market or other significant procompetitive effects.' A perceived potential entrant is a company which does not serve the relevant market. However, it is perceived by the competitors in the relevant market as likely to enter that market if anticompetitive practices develop.

128. *Id.* at 75-80.

129. TXI/Pan Am-National Order at 23.

130. *Id.* at 20-31.

A more general examination of entry conditions must begin with the recognition that the most significant barrier to competitive entry in the domestic system was a regime of restrictive licensing and that has been eliminated by the passage of the A.D.A. In implementing its provisions we have adopted a policy of granting widespread authority to all fit applicants, and of allowing substantial freedom to reduce fares and engage in price competition.<sup>131</sup>

In considering the Pan Am application, the administrative law judge chose five city-pairs where National was actually operating and where Pan Am was an actual potential competitor. He concluded, based upon the high concentration ratios and the competitive effect Pan Am's entry into these markets would have, the proposed merger would violate the Clayton Act in all such markets.<sup>132</sup> Rejecting his recommendation, the Board again decided it was necessary to go beyond market share and concentration ratios, and determined all five markets were substantial markets that would draw other capable competitors should the merger be approved.<sup>133</sup>

Internationally, city-pairs are not as important because consumers are more price sensitive and less time sensitive, willing to substitute destinations and origins when economically advantageous. The airline industry and C.A.B. have recognized this unique situation. Thus both Judge Dapper and the Board concluded, with respect to the Pan American-National merger, that the United States-Western Europe market should be the applicable international market, with United States-London as a sub-market.<sup>134</sup>

With respect to the United States-Western Europe market, Judge Dapper determined that National and Pan Am were actual competitors in a concentrated market, that National had become the third largest United States carrier crossing the Atlantic and moreover, was a vigorous competitor; therefore, its loss under the contemplated merger would be anticompetitive and violative of the Clayton Act.<sup>135</sup> The Board, on the other hand disagreed that National had been a vigorous competitor

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131. *Id.* at 27.

132. TXI/Pan Am-National Judge Decision at 110-114.

133. TXI/Pan Am-National Order at 55-57.

134. *Id.* at 32-34, 44-46, and TXI/Pan Am-National Judge Decision at 94-101.

135. TXI/Pan Am-National Judge Decision at 104-109.

and disagreed that the merger would have any effect on a healthy and increasingly competitive transatlantic market.<sup>136</sup> Further the Board noted:

Competitive conditions in the United States-Western Europe market have changed markedly in recent months, and we believe that as a result the reduction by one of the number of United States scheduled carriers will have little impact on competition. Over the past few years the United States government has promoted and encouraged liberalized entry in international aviation. The results of this effort are now being seen in the form of bilateral agreements with some European nations which permit United States carriers, unrestricted in number, to fly to virtually any major point (city) in those nations.<sup>137</sup>

The Board agreed with Judge Dapper's analysis of the United States-London submarket. Transferring National's Miami-London certificate would increase the Pan American market share and would be anticompetitive. Rather than veto the merger as the Judge recommended, the Board conditioned approval on the loss of the Miami-London route, making that route subject to separate route proceedings.<sup>138</sup>

Since the Board disagreed with the Judge on the public interest test, it approved both the Texas International and the Pan American applications.<sup>139</sup> Before the A.D.A. such approval would automatically clothe the acquisition or merger with antitrust immunity. But the Board noted congressional policy had changed under the A.D.A. Immunity must now be specifically conferred by the Board, if the Board determines under section 414 of the A.D.A. that immunity is required

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136. TXI/Pan Am-National Order at 35-43.

137. *Id.* at 37. This decision was written before I.A.T.C.A. became law; this has further increased competition on the Transatlantic routes.

138. *Id.* at 44-54 and TXI/Pan Am-National Judge Decision at 109-110. Eventually the Board was forced to return the route permanently to the new Pan Am, because it was the only U.S. carrier that could continue to fly into Heathrow under the terms of amendments to the Bermuda II Treaty, imposed by the British. Russell, *London Run Is Pan Am's: CAB Cities Heathrow Flap*, Miami Herald, Apr. 8, 1980, § A, at 1, col. 3.

139. TXI/Pan Am-National Order at 3-7.

in the public interest. Additionally, the Board required the applicants to show the merger would not go forward without such immunity. Neither applicant made the showing; therefore, the Board declined to grant antitrust immunity.<sup>140</sup> Without such immunity it is conceivable that the merger may be subject to collateral attacks by the Government or other airlines, which could subject the resulting airline to treble damages and other penalties.<sup>141</sup>

Despite arguments that labor protective provisions were not justified under the philosophy of the A.D.A., the Board nevertheless conditioned its approval on acceptance of the standard labor protective provisions first enunciated in the Allegheny-Mohawk Merger Case.<sup>142</sup>

### *Other Post-A.D.A. Decisions*

No formal C.A.B. opinion was prepared in the Eastern-National merger case, because Eastern dropped out of competition after receiving the initial unfavorable Board opinion.<sup>143</sup> It is useful nevertheless to compare briefly the administrative law judge's initial decision in Eastern with the Board decision in the TXI/Pan Am-National Merger. Noting the vigorous actual competition between Eastern and National on the East Coast and Sun Belt Routes, Judge Murphy concluded the applicable geographical markets for the Clayton Act test were groups of routes (rather than city-pairs).<sup>144</sup> He placed much emphasis on market share and firm concentration ratios; and, despite misgivings engendered by *General Dynamics*, concluded those statistics, though generated prior to the A.D.A., proved the merger would be anticompe-

140. *Id.* at 73-77.

141. See generally Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001 (1980).

142. TXI/Pan Am-National Order at 65-69. See text accompanying notes 168-69 *infra*.

143. Application of Eastern Air Lines, Inc. for Approval of Acquisition of Control of National Airlines, Inc., Docket No. 34226, CAB Order No. 79-12-74 (Dec. 17, 1979) (dismissing the application).

144. Eastern-National Judge Decision at 22-32. The routes were: 1) New York-Florida Routes, 2) Washington-Florida Routes, 3) Intra-Florida Routes, 4) New York-Washington Routes and 5) Sun Belt Routes. With very little discussion, the Judge accepted the relevant product market as "scheduled passenger air transportation." *Id.* at 22.



titive.<sup>145</sup> After examining the effects of various barriers on potential competitors, it was his opinion that such barriers precluded entry by other airlines in four of the five markets; therefore, Eastern had failed to rebut the merger opponents' prima facie case.<sup>146</sup> Thus the proposed merger failed the Clayton Act test. Therefore even though it passed the Sherman Act test and the Public Interest test, Judge Murphy recommended disapproval.<sup>147</sup>

Both administrative law judges premised their decisions on traditional, historically-slanted market share analysis. They were less inclined to include the effects of the A.D.A.'s deregulatory philosophy. The Texas International/Pan Am-National Board decision, which came several months later, more willingly predicted the market and competitive effects of the year-old A.D.A.

Continental Airlines and Western Airlines have twice submitted joint applications for approval of proposed mergers. Even though the administrative law judge in the first application recommended approval, the full Board voted to disapprove.<sup>148</sup> It filed no formal opinion because the Continental Board of Directors withdrew from the merger agreement. In the Order Dismissing Application, the Board indicated the proposed merger would fail the Clayton Act test, since both airlines were aggressive actual competitors in at least twelve city-pairs and potential competitors in many other western cities.<sup>149</sup> Further, the Board expressed concern about barriers caused by crowded conditions at some Western United States airports which would bar potential competitors even in a deregulated situation.<sup>150</sup> Another factor was the possibility of

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145. *Id.* at 33-36 citing *United States v. General Dynamics*, 415 U.S. 486 (1974).

146. *Id.* at 37-51. While there were no regulatory barriers, and temporary but not insurmountable capital barriers, there were landing slot restrictions at some Eastern U.S. airports that might constitute barriers, and similar but less serious gate problems in Florida. Fuel sources were not a problem. But route efficiency and the marketability of the alternatives might constitute barriers in certain markets. Cumulatively there would be problems of entry in all but perhaps the Sun Belt market and therefore Eastern had not rebutted the prima facie case against it. *Id.*

147. *Id.* at 62.

148. *See* First Continental-Western Order.

149. *Id.* at 1.

150. *Id.* at 2.

duopolistic control by the new airline and United Airlines.<sup>151</sup> The Board did not accept some of the asserted public benefits,<sup>152</sup> and thus disapproved the application.

In instituting proceedings on the second case, the Board asked the parties and the administrative law judge to specifically address those concerns it voiced over the first application and to relate them to the foreseeable effects of the A.D.A.<sup>153</sup> Judge Vittone addressed five issues. First, evidence clearly showed competition in the airline industry nationwide was increasing.<sup>154</sup> Second, since the implementation of new routes under the A.D.A., competition between the two airlines had substantially declined.<sup>155</sup> But third, in those two city-pairs where the merger would cause decline in competition, there were sufficient potential competitors.<sup>156</sup> With respect to concentration Judge Vittone wrote:

Similarly I have concluded that the loss of one of the applicants upon the merger will not adversely affect the balance of perceived potential competition in the west. The structure of the air transportation industry has changed significantly since deregulation and the Western United States has been the scene of many such changes. Carriers traditionally confined to the east have entered western routes since deregulation. Mergers have strengthened the networks of formerly limited western carriers. . . . Concentration in the west is declining.<sup>157</sup>

Fourth, significant improvements had taken place to remove those barriers previously a problem.<sup>158</sup> Finally he determined that the resultant carrier and United would not be able to exert duopolistic control in light of deregulation.<sup>159</sup> Judge Vittone also extensively examined the

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151. *Id.*

152. *Id.* at 3.

153. Continental-Western Judge Decision at 1.

154. *Id.* at 9.

155. *Id.* at 9-11. Of the twelve original city-pairs where the two airlines were actual competitors, only four remained that were still served by both. One new city-pair had been added.

156. *Id.* at 12-19, 25.

157. *Id.* at 25.

158. *Id.* at 27-36.

159. *Id.* at 37-43.

relevant product markets.<sup>160</sup> He finally concluded the proposed merger would pass all three A.D.A. merger tests.<sup>161</sup> The Board adopted his decisions as its own.<sup>162</sup>

The Board's three decisions are best viewed and explained in light of geographic markets served by the various airlines involved in the mergers at the time the A.D.A. was passed. On the east coast there was National, Eastern and Delta; an Eastern-National merger would result in a duopoly between the resultant airline and Delta. In the vast western United States there was Continental, Western and United; a Continental-Western merger would result in a duopoly between the resultant airline and United.

But Texas International was largely a Texas-Mexico-southwestern United States local service carrier and Pan American was strictly an international carrier, while National was a small trunk line with some east coast, sun belt and transatlantic traffic. Its merger with either of the latter applicants would not result in the same potentially duopolistic market that the first Continental-Western merger or the Eastern-National merger would have caused. In the few years since the A.D.A., this potential for duopolistic control in a regional market has generally disappeared because of the liberalized route application proceedings.<sup>163</sup>

### *Labor Issues*

As previously mentioned, the A.D.A. established a ten year protection program to assist employees adversely affected by deregulation. Monthly payments for up to 72 months, relocation assistance and priority in hiring at any certificated airline, after that airline's furloughed employees have been called back, are the three major provisions.<sup>164</sup>

Nonetheless the Board prescribed labor protective provisions in the TXI/Pan National merger as a condition for merger approval.<sup>165</sup> The Board put all interested parties on notice that while special provisions would not be automatic in future mergers, until unions and labor con-

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160. *Id.* at 44-75.

161. *Id.* at 87.

162. Second Continental-Western Order.

163. 49 U.S.C. § 1371 (1976 & Supp. III 1979).

164. 49 U.S.C. § 1552 (Supp. III 1979).

165. TXI/Pan Am-National Order at 65-69 and Appendix III-Labor Protective Provisions.

tracts had an opportunity to adjust to the A.D.A., provisions would be applied as they had since 1950.<sup>166</sup> These provisions provide for the integration of seniority lists in a fair and equitable manner; the payment of displacement allowances or differential pay for a three year period, if an employee is adversely affected by the merger; a dismissal allowance equal to 60% of the average monthly compensation of the employee for anywhere from six to sixty months, depending on total length of service and relocation assistance for employees forced to move because of the merger.<sup>167</sup>

The Pan American-National merger caused many labor problems based on the different nature of the two airlines and on the different types of airplanes being used. Labor problems prevented management from using and mixing equipment in the most advantageous manner.<sup>168</sup> Eventually an arbitrator had to decide the integration method for pilots and flight engineers using a complex formula.<sup>169</sup>

In the second Continental-Western case, the administrative law judge found that even two years after the adoption of the A.D.A. most of the eleven labor agreements binding the applicants had been concluded or substantially delineated prior to the Board's National-Pan Am decision.<sup>170</sup> Thus the "notice" given in that decision did not prepare the parties for a merger free of labor protective provisions. The judge recommended provisions similar to those in the National-Pan Am

166. *Id.*

167. TXI/Pan Am-National Order at Appendix III-Labor Protective Provisions.

168. See, e.g., Feazel, *Labor Problems in Merger May Lead to Arbitration*, AV. WEEK & SPACE TECH., Apr. 21, 1980, at 26; *Meshing Problems for Pan Am and National*, BUS. WK., Jan. 21, 1980, at 56; *Union Issues Big Problem Facing Pan Am in National Merger*, Aviation Daily, Apr. 15, 1980, at 249 and *Teamsters Outline Problems in Pan Am-National Merger*, Aviation Daily, Apr. 16, 1980, at 261.

169. In Re: Merger of Pan Am and National Airlines Flight Deck Crew Member Seniority Lists, (Arbitrator Lewis M. Gill, Mar. 12, 1981) and In Re: Merger of Flight Deck Crew Member Seniority Lists. Pan Am and National Airlines, (Arbitrator Lewis M. Gill, May 5, 1981). Possibly inspired by a similar attempt by Continental employees to purchase a controlling interest of their airline's stock and thereby preclude a takeover attempt by Texas International, a group of Pan American employees unsuccessfully tried a similar approach with Pan American in an effort to install their own management. See *Continental's Crusade to Stop Frank Lorenzo*, BUS. WK., May 11, 1981, at 110; Merzer, *Group Seeks a Takeover of Pan Am*, Miami Herald, May 21, 1981, § A, at 1, col. 6.

170. Continental Western Judge Decision at 81.

decision.<sup>171</sup> The Board agreed with this analysis, and adopted the labor protective provisions in its order.<sup>172</sup>

A clearer picture of the future of these provisions was to have been supplied by the Texas International-Continental Acquisition Case,<sup>173</sup> where Texas International voiced opposition to the provisions. The C.A.B. instituted a proceeding to consider the costs and benefits of the provisions.<sup>174</sup> On the fourth day of the hearing, however, Texas International withdrew its opposition, citing conditions similar to those in the Continental-Western case.<sup>175</sup> Thus, since no evidence against the provisions would be presented, the judge recommended ending the hearings as useless.<sup>176</sup> He noted that the Board wished to stop using the provisions, but concluded that this was not the proper case for such a decision.<sup>177</sup>

### Conclusion

The Texas International/Pan Am-National Merger Case first interpreted the parameters of airline merger under the A.D.A. While the administrative law judges tended to use traditional analytical tools in their decisions, the C.A.B. took a broader view. Recognizing that the A.D.A. was meant to change the traditional patterns of growth in commercial aviation, the Board rejected only those mergers that would produce a duopoly of control in an area. As deregulation proceeds, competition should increase in all areas of the country, with the possibility of duopolistic control lessening everywhere. Perhaps the last years of C.A.B. control will approach the "decontrol" the A.D.A. aspires to. The limits to merger will be the pressures of economy, often difficult to predict. As in the Pan Am-National merger, an unsuccessful merger attempt may be more financially rewarding than a completed one. Only time will tell if Pan Am was the winner in its endeavors.

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171. *Id.* at 82.

172. Second Continental-Western Order at 16 and Appendix B.

173. C.A.B. Docket No. 39285 (1981).

174. Texas International-Continental Acquisition Case, Docket No. 39285, C.A.B. Order 81-3-100 (Jan. 3, 1981).

175. Texas International-Continental Acquisition Case, Docket No. 39285, at 2 (Partial Decision of Judge Kane, Jr., May 22, 1981).

176. *Id.* at 3.

177. *Id.* at 4-5.

## Appendix A

The following abbreviated citation form is used: A.W. = Aviation Week & Space Technology; B.W. = Business Week; M.H. = Miami Herald; N.Y.T. = New York Times; W.S.J. = Wall Street Journal.

- 7/10/78 TXI announces it bought 790,700 shares of NAL's 8.6 million shares of common stock between June 12, 1978, and July 7, 1978, for \$14,355,780.45 including brokers' commissions. It is considering the possibility of seeking control. N.Y.T., July 11, 1978, § D, at 1, col. 1, W.S.J., July 11, 1978, at 2, col. 2; A.W., July 17, 1978, at 28.
- 7/28/78 TXI files with C.A.B. to seek control of NAL. Also notifies S.E.C. of intent to buy not more than 25% of NAL common stock. Stock to go in voting trust. C.A.B. Bureau of Consumer Protection notifies TXI that such purchases would be a "knowing and willful" violation of Federal Aviation Act. TXI has no definite plans for the acquisition. N.Y.T., July 29, 1978, § A, at 23, col. 3; W.S.J., July 31, 1978, at 3, col. 4.
- 8/8/78 NAL asks C.A.B. to delay approving TXI request to purchase more NAL stock and also asks that TXI be forced to detail its takeover plan. N.Y.T., Aug. 9, 1978, § D, at 1, col. 6; W.S.J., Aug. 9, 1978, at 11, col. 3.
- 8/16/78 TXI's Netherlands Antilles financing subsidiary announces offering of \$25 million convertible subordinated debentures paying 7½% convertible into TXI common stock at the rate of one share per \$14.50 of debentures. Proceeds will be used to buy additional NAL stock. W.S.J., Aug. 8, 1978, at 35, col. 2; W.S.J., Aug. 17, 1978, at 29, col. 1.
- 8/22/78 Pan Am files application with C.A.B. for permission to merge with NAL. Announces that it has acquired 411,600 shares or 4.8% of NAL's stock. Offers \$35/share or approximately \$286 million for acquisition. Pan Am also asks that it be allowed to purchase up to 25% of NAL stock. A.W., Aug. 28, 1978, at 30; W.S.J., Aug. 24, 1978, at 3, col. 1; W.S.J., Aug. 25, 1978, at 2, col. 3.
- 8/25/78 C.A.B. enters order tentatively allowing TXI to purchase up to 25% of NAL common stock. Requires that all stock in excess of 10% be placed in a voting trust device, with stock

- to be voted in same proportion as all non-TXI held NAL stock. Recommends that all such stock be placed in voting trust. Thirty days for comments before order is confirmed. TXI-NAL Acquisition Case & Enforcement Investigation, Docket No. 33112, Order 78-8-150 (Aug. 25, 1978); *see also* W.S.J., Aug. 18, 1978, at 6, col. 4.
- 8/28/78 C.A.B. permits Pan Am to purchase up to 25% of NAL common stock on same conditions as TXI. TXI case assigned to administrative law judge. N.Y.T. Supp. Mat., Aug. 29, 1978, at 12; W.S.J., Aug. 29, 1978, at 4, 1.
- 8/29/78 TXI has purchased 1,553,300 shares or approximately 18.2% of NAL stock for a total acquisition cost of \$42,193,501. TXI also announces foreign debenture sale completed. A.W., Sept. 4, 1978, at 36; W.S.J., Aug. 31, 1978, at 27, col. 4.
- 9/5/78 U.S. Justice Department announces its intent to intervene and files Petition for Intervention with the C.A.B. W.S.J., Sept. 5, 1978, at 2, col. 3.
- 9/6/78 Directors of Pan Am and NAL hold merger discussions in Miami, Florida. W.S.J., Sept. 6, 1978, at 2, col. 2; W.S.J., Sept. 7, 1978, at 5, col. 5.
- 9/7/78 C.A.B. consolidates TXI and Pan Am merger cases. Pan Am announces that it has a definitive merger agreement with NAL whereby Pan Am would purchase NAL for \$41/share or about \$350 million and would rename NAL Pan American U.S.A. W.S.J., Sept. 8, 1978, at 6, col. 4; TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 and 32283, Order Consolidating Cases 78-9-24 (Sept. 7, 1978).
- 9/11/78 TXI announces it has bought an additional 165,000 shares at a price per share of \$34.08. TXI has 1,718,300 shares at a total cost of \$48,816,076.45 or \$28.41 per share. W.S.J., Sept. 11, 1978, at 12, col. 3.
- 9/14/78 TXI petitions C.A.B. to permit it to acquire control of NAL. Eventually TXI expects a complete amalgamation of the two carriers, but has no specific plans at present. W.S.J., Sept. 15, 1978, at 38, col. 5.
- 9/15/78 U.S. Justice Department urges C.A.B. to prohibit further purchases of NAL stock by either Pan Am or TXI. Pan

- Am discloses details of the Pan Am-NAL merger agreement and that it has lined up \$300 million of the \$350 million credit needed for the purchase. Pan Am also has acquired 1,614,000 shares of NAL stock or 18.9% for a total purchase price of \$55,406,297. A.W., Sept. 25, 1978, at 21-22; W.S.J., Sept. 18, 1978, at 10, col. 2; W.S.J., Sept. 19, 1978, at 34, col. 2.
- 9/25/78 TXI asked by NAL if it expects to make an offer better than Pan Am's. W.S.J., Sept. 26, 1978, at 1, col. 2.
- 9/29/78 Frank Borman, EAL President, states that EAL would have to seek merger if either Pan Am or TXI are permitted to merge with NAL. EAL urges C.A.B. to disapprove both mergers. A.W., Oct. 2, 1978, at 33.
- 10/16/78 Pan Am files documentation with C.A.B. B.W., Nov. 6, 1978, at 67.
- 10/20/78 C.A.B. approves continued use of voting trusts by TXI and Pan Am. TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 & 33283, Order 78-10-100 (Oct. 20, 1978).
- 10/24/78 President Carter signs the Airline Deregulation Act of 1978, PUB. L. NO. 95-504, 92 STAT. 1705 (amending 49 U.S.C. § 1301 *et seq.*); W.S.J., Oct. 25, 1978, at 2, col. 3.
- 10/31/78 Hearing before Judge Dapper begins and lasts until January 12, 1979. Exhibits and transcripts total over 12,000 pages. Opening briefs filed by 25 organizations. TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 & 33283, Decision at 5 & 7 (Apr. 5, 1978).
- 11/3/78 TXI purchases 76,500 more shares of stock at \$22.34/share for a total holding of 1,969,000 shares, or \$54.5 million. TXI has acquired 23% of NAL at a per share average of \$27.45. A.W., Nov. 6, 1978, at 34.
- 12/11/78 EAL announces that it too will seek approval to merge with NAL. EAL offers \$50/share or \$425 million for NAL. Criticized as a defensive move. Financing may be difficult because of a high debt-equity ratio. A.W., Dec. 18, 1978, at 29; B.W., Dec. 25, 1978, at 35; N.Y.T., Dec. 12, 1978, § D at 1, col. 6; W.S.J., Dec. 12, 1978, at 3, col. 1.
- 12/13/78 EAL files application for merger approval with C.A.B. and requests that case be consolidated with the other two NAL



- merger cases. EAL Acquisition Case, Docket No. 34226, Decision at 1 (June 14, 1979).
- 12/15/78 NAL management unsure what it will recommend to its stockholders relative to the EAL merger attempt. Before EAL offer, NAL planned to recommend the lower Pan Am offer. W.S.J., Dec. 18, 1978, at 17, col. 1.
- 12/21/78 Despite contrary recommendation by Judge Dapper, C.A.B. denies EAL Petition to Consolidate all NAL merger cases. W.S.J., Dec. 22, 1978, at 8, col. 1.
- 12/22/78 S.E.C. investigation into adequacy of TXI's and Pan Am's public disclosures reported. EAL not affected. N.Y.T., Dec. 23, 1978, § 1, at 29, col. 5; W.S.J., Dec. 26, 1978, at 7, col. 1.
- 12/29/78 EAL announces that Chase Manhattan Bank has agreed to provide \$100 million of \$425 million purchase price. W.S.J., Jan. 1, 1979, at 19, col. 4.
- 1/22/79 U.S. Department of Justice files brief with C.A.B. opposing both TXI and Pan Am merger proposal on antitrust grounds. D.O.J. argues such mergers would have anticompetitive effects and would violate standards set by the Airline Deregulation Act of 1978. U.S. Department of Transportation, on the other hand, files briefs supporting both airlines. W.S.J., Jan. 23, 1979, at 48, col. 1.
- 1/25/79 Pan Am proposes amendment to its offer which would allow bidding between EAL and Pan Am if they receive final approval to merge with NAL. N.Y.T., Jan. 27, 1979, § 1, at 29, col. 4; W.S.J., Jan. 29, 1979, at 18, col. 2.
- 2/8/79 NAL announces auction plan whereby Pan Am and EAL would have five rounds of bids in a 48 hour period with Pan Am always getting the final bid. EAL states that it is willing to forego C.A.B. antitrust immunity to expedite its merger effort with NAL. N.Y.T., Feb. 9, 1979, § D, at 5, col. 1; W.S.J., Feb. 9, 1979, at 2, col. 3.
- 2/20/79 TXI makes formal bid to NAL of consideration that would be worth at least \$50/share composed of cash, debt securities, equity securities or a combination. W.S.J., Feb. 20, 1979, at 4, col. 2.
- 2/21/79 Air Florida asks C.A.B. approval to purchase NAL international routes and four of its DC-10 series 30 airplanes at

- same price that the purchaser of domestic route pays. Air Florida urges that Pan Am be given domestic route and Air Florida be given the international route. W.S.J., Feb. 22, 1979, at 29, col. 1.
- 3/9/79 NAL rejects TXI offer and says that after merger NAL shares would not be worth \$50 each because of TXI financing arrangements. W.S.J., Mar. 12, 1979, at 2, col. 2.
- 4/5/79 Administrative Law Judge Dapper files opinion in which he finds that the application of TXI to merge with NAL should be denied, further finds that TXI has violated 49 U.S.C. § 1378 by acquiring control of NAL without prior C.A.B. approval and finally recommends that Pan Am's application also be denied. TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 & 33283, Decision (Apr. 5, 1978); *see also* W.S.J., Apr. 6, 1979, at 7, col. 3.
- 4/25/79 NAL tells shareholders in supplementary proxy material that they, in effect, would be loaning TXI the money with which to buy NAL. Both the U.S. Departments of Justice and Transportation tell the C.A.B. they oppose the acquisition bid of EAL because it would reduce competition. W.S.J., Apr. 26, 1979, at 2, col. 2.
- 5/2/79 Pan Am formally raises its merger offer to \$50/share. M.H., May 3, 1979, § C, at 7, col. 3.
- 5/16/79 NAL shareholders approve Pan Am's revised merger offer at annual meeting. They also approve the management recommended auction plan which would give Pan Am the final bid should the C.A.B. approve Pan Am and EAL merger. TXI merger offer is rejected. Palm Beach Post, May 17, 1979, § C, at 5, col. 3.
- 6/14/79 Administrative Law Judge Murphy finds that the EAL application for merger with NAL should be denied because it would substantially lessen competition. EAL Acquisition Case, Docket No. 34226, Decision (June 14, 1979). *See also* M.H., June 15, 1979, § A, at 1, col. 5.
- 7/10/79 C.A.B. unanimously enters a preliminary order instructing its staff to prepare a final order permitting both TXI's application to acquire and Pan Am's application to merge. Preliminarily the Board finds that neither application is in-

- consistent with the public interest or anticompetitive under the standards prescribed by 49 U.S.C. § 1378. Further the C.A.B. lifts its 25% limits on the purchase of stock by both carriers because it does not want to preclude either carrier from purchasing the NAL stock at its present, possibly lower price. TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 & 33283, Order (July 10, 1979); M.H., July 11, 1979, § A, at 1, col. 5.
- 7/21/79 C.A.B. turns down Continental-Western merger proposal despite recommendation of administrative law judge. Many on Wall Street see this as signal that the Eastern proposal will also be rejected because of similar anticompetitive factors. M.H., July 24, 1979, § C, at 4, col. 1; M.H., July 25, 1979, § A, at 12, col. 2; A.W., July 30, 1979, at 22.
- 7/23/79 Pan Am announces that it has bought 95,000 shares of National the preceding week and 900,000 shares today for total holdings of 3.1 million shares or 36% of NAL stock. M.H., July 24, 1979, § C, at 4, col. 5.
- 7/24/79 NAL's stock topped the N.Y.S.E. active list with 1,191,400 shares traded. Pan Am confirmed it was buying, but refused to reveal numbers. Nine large blocks of stock totaling 911,400 shares were sold today and assumption is Pan Am was the buyer. If true then Pan Am had at least 4 million shares of National or roughly 47% of the total stock. M.H., July 25, 1979, § A, at 12, col. 2.
- 7/26/79 Pan Am publicly acknowledges that it is the majority shareholder in NAL, having purchased 4,398,500 shares in all for a total purchase price of about \$186 million or a per share average price of \$42.25. Eastern owns only about 100 token shares. Speculation is that TXI would make about \$45 million for its shares. M.H., July 27, 1979, § A, at 1, col. 6.
- 7/29/79 Pan Am and TXI announce Pan Am will buy NAL stock owned by TXI for 3 million dollars plus \$50 per share. TXI will realize pre-tax profit of \$45,780,000 on the sale of 2.9 million shares and Pan Am will own 75.9% of NAL. Palm Beach Post Times, July 29, 1979, § A, at 24, col. 1.
- 7/30/79 TXI President Lorenzo informs C.A.B. by letter that TXI will sell stock to Pan Am. TXI-NAL Acquisition Case/Pan

- Am Acquisition Case, Docket Nos. 33112 & 33283, Decision 79-12-163; 79-12-164; 79-12-165 at 61 (Oct. 24, 1979).
- 8/10/79 NAL announces fiscal year profit of \$24.22 million or \$2.83 per share. Palm Beach Post Times, Aug. 11, 1979, § A, at 19, col. 5.
- 9/13/79 N.Y.S.E. halts trading in T.W. Corporation (T.W.A. parent company) stock. Trading rapid because of TXI attempt to acquire T.W.A. through purchase of 1.6 million shares. TXI attempt rebuffed by T.W. Corporation. A.W., Sept. 19, 1979, at 26; N.Y.T., Oct. 29, 1979, § D, at 1, col. 3.
- 9/27/79 Informal C.A.B. decision disapproves Eastern merger bid with National. Anticompetitive effects cited. A.W., Oct. 1, 1979, at 23.
- 10/5/79 Eastern announces it will halt its pursuit of NAL in view of the C.A.B. decision. A.W., Oct. 8, 1979, at 29.
- 10/24/79 Formal 77 page C.A.B. decision issued approving both Texas International and Pan Am merger applications and setting out the detailed rationale of the Board. TXI-NAL Acquisition Case/Pan Am Acquisition Case, Docket Nos. 33112 & 33283, Decision 79-12-163; 79-12-164; 79-12-165 (Oct. 24, 1979); A.W., Nov. 5, 1979, at 32; M.H., Oct. 30, 1979, § A, at 1, col. 1; N.Y.T., Oct. 30, 1979, § A, at 1, col. 4.
- 12/7/79 Hearings to begin on London-Miami service proposals. Eleven airlines, including Pan Am, Eastern and Air Florida had filed proposals. A.W., Dec. 3, 1979, at 31.
- 12/22/79 President Carter approves TXI and Pan Am merger proposals. Letter from President Jimmy Carter to C.A.B. Chairman Marvin Cohen dated December 22, 1979. M.H., Dec. 23, 1979, § A, at 1, col. 1; N.Y.T., Dec. 23, 1979, § 1, at 12, col. 2.
- 12/26/79 C.A.B. grants Pan Am exemption for Miami-London route until permanent route decision made. Pan Am Acquisition Case, Docket No. 33283, Order 79-12-166 (Dec. 26, 1979).
- 12/31/79 Pan Am net income for the last full year of operation before acquiring National was reported as \$76.128 million, which was down from the \$118.801 million net income

- from the year before. PAN AMERICAN WORLD AIRWAYS, INC., ANNUAL REPORT 1979 at 2 (1980).
- 1/7/80 Formal acquisition of National by Pan Am. B.W., Jan. 21, 1980, at 56.
- 1/18/80 National certificates of public convenience and necessity formally transferred to Pan Am. Pan Am Acquisition Case, Docket No. 33283, Order 80-1-125 (Jan. 18, 1980).
- 1/29/80 U.S.-Great Britain bilateral talks begin. Gatwick over Heathrow is seen as a major issue. A.W., Jan. 21, 1980, at 31.
- 2/15/80 International Air Transportation Competition Act of 1979 signed into law by President Carter. Deregulates international aviation to extent possible. PUB. L. NO. 96-192, 94 Stat. 35 (Feb. 15, 1980).
- 2/22/80 Administrative Law Judge Elias Rodriguez recommends Eastern get Miami-London route. M.H., Feb. 23, 1980, § A, at 1, col. 8.
- 3/5/80 U.S.-British bilateral agreement initiated. All new London service, whether British or American, to be through Gatwick. A.W., Mar. 17, 1980, at 26.
- 4/3/80 D.O.T. announces it would support legislation for C.A.B. sunset in 1982 rather than 1985. A.W., Apr. 7, 1980, at 32.
- 4/7/80 Full C.A.B. gives Pan Am the Miami-London route because Pan Am was the only route applicant that could continue to serve Heathrow Airport under bilateral agreement. A.W., Apr. 14, 1980, at 24; M.H., Apr. 8, 1980, § A, at 1, col. 8; Palm Beach Post, Apr. 8, 1980, § B, at 9, col. 5.
- 7/1/80 Pan Am will be unable to meet the deadline for a fully completed merger because of labor problems caused by merger. A.W., Apr. 21, 1980, at 26.
- 7/28/80 Pan Am announces that it had agreed to sell its 59 story headquarters building in New York City to Metropolitan Life Insurance Company for a total sales price of \$400 million. Airline will continue to occupy the 15% of the building it was using. B.W., Aug. 11, 1980, at 25; TIME, Aug. 11, 1980, at 50.
- 10/6/80 Pan Am announces that Teamsters unions have reached agreement as to the integration of seniority lists for certain

- ground personnel. A.W., Oct. 6, 1980, at 36.
- 10/26/80 Pan Am and National officially become one completely merged airline operating solely under the Pan Am name. A.W., Oct. 6, 1980, at 36; PAN AMERICAN WORLD AIRWAYS, INC., 1980 ANNUAL REPORT 5 (1981).
- 12/31/80 Sale of Pan Am building officially recorded, which resulted in a gain of \$294.4 million. The company also showed an operating *loss* of \$87.819 million, compared to an operating *income* of \$112.703 million for the previous year. Because of the gain on the sale of the building, the net income for the year was \$80.266 million versus \$76.128 million for the previous year. *Id.* at 27.
- 3/12/81 Arbitrator Lewis M. Gill issues Award in In Re: Merger of Pan Am and National Airlines Flight Deck Crew Member Seniority Lists and thereby resolves the seniority integration problems. *See also* A.W., Mar. 2, 1981, at 38.
- 4/7/81 Pan Am founder and former C.E.O., Juan Trippe dies. TIME, Apr. 13, 1981, at 81.
- 5/11/81 Arbitrator Lewis M. Gill issues 59 page Opinion in In Re: Merger of Flight Deck Crew Member Seniority Lists, Pan Am and National Airlines, to explain and support his earlier Award.
- 5/20/81 Former National pilots group announces intent to organize all Pan Am employees in an effort to buy the controlling interest in the company. M.H., May 21, 1981, § A, at 1, col. 1.
- 6/30/81 Revenue passenger miles for first half of 1981 down 9.1% over same period in 1980 and Pan Am has a \$217.6 million operating loss for the first six months of 1981 versus a total 1980 operating loss of \$126.9 million. A.W., July 20, 1981, at 27; M.H., Aug. 15, 1981, § A, at 5, col. 1.
- 7/7/81 William Waltrip appointed President of Pan Am to succeed William Seawell. Pan Am changes to a holding company, with three divisions, one of which is the airline. A.W., July 13, 1981, at 30; M.H., July 8, 1981, § A, at 1, col. 1; M.H., July 19, 1981, § F, at 1, col. 1.
- 7/14/81 Pan Am announces 10% reduction in operations and the reduction of the payroll by 3,000 jobs. Operations in New York City will only be at J.F.K., rather than there and at

- Newark and LaGuardia. M.H., July 15, 1981, § A, at 1, col. 1; M.H., July 19, 1981, § F, at 1, col. 1.
- 8/3/81 P.A.T.C.O. strikes and causes disruptions in flight schedules and causes further losses. TIME, August 17, 1981, at 14; NEWSWEEK, Aug. 24, 1981, at 52.
- 8/15/81 Miami Herald reports that well placed sources indicated Pan Am might move its headquarters back to the former National headquarters at the Miami International Airport to take advantage of all the unused space that is available and to further reduce operating expenses. M.H., Aug. 15, 1981, § A, at 1, col. 5.
- 8/20/81 Earlier this week Pan Am announced that its profitable Inter Continental Hotel subsidiary or division is for sale. Directors are assembled today to allegedly consider approximately \$500 million offer for the 83 hotel chain in 48 countries from Grand Metropolitan Ltd., a giant British liquor and hotel company. PALM BEACH POST, Aug. 21, 1981, § D, at 9, col. 4.
- 8/21/81 Pan Am agrees to sell Inter Continental Hotel Corp., subsidiary to Grand Metropolitan Ltd. of London for \$500 million. Sale to be consummated on September 30, 1981. A.W., Aug. 31, 1981, at 29.
- 9/1/81 C. Edward Acker, chief executive officer of Air Florida, becomes chairman and chief executive officer of Pan Am. Eli Timoner to replace Acker at Air Florida. A.W., Aug. 31, 1981, at 29.
- 9/7/81 Pan Am announces 67% unrestricted fare cuts on many domestic routes to increase traffic. A.W., Sept. 14, 1981, at 34.
- 9/11/81 Pan Am signs formal agreement with syndicate of banks led by Citibank for a \$200 million line of credit. Unions required to take 10% pay cut as condition of loan. A.W., Aug. 24, 1981, at 31.
- 10/5/81 Senate Commerce Committee drafts further C.A.B. sunset legislation, which would require the C.A.B. to cease to exist by April 1, 1983. Thereafter mergers to be handled by Department of Justice as with any other industry. A.W., Oct. 5, 1981, at 49.

10/12/81 President Reagan gives final approval to TXI takeover of control of Continental Airlines, Inc. TXI owns 50.3% of stock for which it paid \$96.6 million. B.W., Oct. 26, 1981, at 182.