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THE WHITE HOUSE

WASHINGTON

August 16, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS, JR.
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOT International Aviation Decisions: Pan Am World Airways, Midway-Air Florida Acquisition, Ports of Call Travel Club, Inc., Trans International Airlines, Inc.

Our office has reviewed the above-referenced Department of Transportation International Aviation decisions, and has no legal objection to the procedure that was followed with respect to Presidential review of such decisions under 49 U.S.C. § 1461(a).

We also have no legal objection to OMB's recommendation that the President not disapprove these orders or to the substance of the letter from the President to the Secretary of Transportation prepared by the Department of Transportation.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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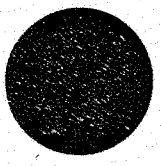
Date Correspondence Received (YY/MM/DD) 1 1



Name of Correspondent: D. Yew

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: DOT International Aviation Services: ① Air One Worldwide ② Midway - Air Florida Operations ③ Pan Am Travel Club, Inc ; ④ Sans International Airlines, Inc

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Central	ORIGINATOR	85/08/14			1 1
	Referral Note:				
Dept of State	R	85/08/14		S	85/08/21
	Referral Note:				
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

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Type of Response = Initials of Signer
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WHITE HOUSE STAFFING MEMORANDUM

DATE: 8/14/85 **ACTION/CONCURRENCE/COMMENT DUE BY:** August 21st

SUBJECT: DOT International Aviation Decisions: 1. Pan American World Airways; 2. Midway-Air Florida Acquisistion; 3. Ports of Call Travel Club, Ir 4. Trans International Airlines, Inc.

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	LACY	☐	☐
REGAN	☐	☐	McFARLANE	☐	☐
WRIGHT	☐	☐	OGLESBY	☐	☐
BUCHANAN	☐	☐	ROLLINS	☐	☐
CHAVEZ	☐	☐	RYAN	☐	☐
CHEW	☐P	☐SS	SPEAKES	☐	☐
DANIELS	☐	☐	SPRINKEL	☐	☐
FIELDING	☑	☐	SVAHN	☑	☐
FRIEDERSDORF	☐	☐	THOMAS	☐	☐
HENKEL	☐	☐	TUTTLE	☐	☐
HICKEY	☐	☐	_____	☐	☐
HICKS	☐	☐	_____	☐	☐
KINGON	☐	☐	_____	☐	☐

REMARKS: Please give your recommendations to my office by Wednesday, August 21st. Thanks.

RESPONSE:

David L. Chew
Staff Secretary
Ext. 2702

U.S. Department of Transportation
Office of the Secretary of Transportation

Office of Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 8 1985

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I transmit the Department's proposed order on the application of Pan American World Airways, Inc., Docket 42843 for your consideration under section 401 of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. The order will, unless you disapprove it within 60 days of this transmittal, amend the carrier's certificate for Route 130 to add Taiwan as a coterminal point.

If you should decide earlier that you will not disapprove, please advise us to that effect; this will allow us to issue the order earlier.

We are submitting the proposed decision to you before publication under the provisions of section 401 of the Federal Aviation Act of 1958. In accordance with Executive Order 11920, however, we plan to release all unclassified portions of the decision on or after the sixth day following this transmittal unless notified by your Assistant for National Security Affairs.

Sincerely,

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

Enclosures

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 13th day of May, 1985

Application of PAN AMERICAN WORLD AIRWAYS, INC. pursuant to Section 401 of the Federal Aviation Act of 1958, as amended, for amendement of its certificate of public convenience and necessity for Route 130 (U.S.-Far East)	Docket 42843

ORDER AMENDING CERTIFICATE

On February 6, 1985, Pan American World Airways, Inc. filed an application requesting amendment of its certificate of public convenience and necessity for Route 130, pursuant to section 401 of the Federal Aviation Act of 1958, as amended, to permit it to engage in foreign air transportation of persons, property and mail between any point or points in the United States and a point or points in Taiwan. 1/ Pan American further requests that it be granted flexibility to integrate the Taiwan service with its other Pacific area operating authority.

1/ Pan American also requested a pendente lite exemption in Docket 42844 to operate combination service four days per week using B-747SP aircraft over a New York/San Francisco-Seoul/Taipei route commencing April 28, 1985. The exemption was granted by Order 85-2-54, February 22, 1985. Pan American has advised the staff informally that it intends to commence service to Taiwan on July 28, 1985. Pan American also holds exemption authority to serve New York, the intermediate point Tokyo, and the coterminal points Seoul and Taipei by Order 83-4-86, April 18, 1983. Pan American holds certificate authority to operate combination service on Route 130 to serve Korea and other Pacific points as coterminal points to/from any point in the United States. Pan American's certificate for Route 130 also authorizes United States-Taiwan authority, but for the carriage of property only.

In support of its application, Pan American states that the proposed service will give it greater flexibility in providing service to and from Taiwan and other points in the Far East. Pan American, in the companion exemption request Docket 42844, stated that its proposed service will provide consumers with the benefit of faster service than is currently available; that this service will increase the U.S.-flag market share in the U.S.-Korea and the U.S.-Taiwan markets, both of which are now dominated by foreign flag carriers; and that this service will result in a significant improvement in the U.S. balance of payments.

We have received no answers to Pan American's application.

We have decided that an oral evidentiary hearing or show-cause procedures are unnecessary since there are no material, determinative issues of fact requiring such procedures for their resolution, and that we should proceed directly to a final discussion. 2/

Upon consideration of the application, we find that Pan American has demonstrated that there is a public need for its proposed service that it is prepared to meet, and that approval of its request is therefore consistent with the public interest. 3/ The grant of this authority will result in new service options for persons interested in traveling or shipping to/from Taiwan. As for Pan American's request to integrate Taiwan with its other Pacific authority, we believe that route integration improves the efficiency of carrier operations and generally results in increased benefits to the traveling and shipping public. Therefore, we will authorize Pan American to integrate its Taiwan service in the manner requested. We further find that Pan American's proposed services are consistent with the Air Transport Agreement between the American Institute in Taiwan and the Coordination Council for North American Affairs and aviation agreements with other nations affected by Pan American's requested authority.

We find, based on officially noticeable data, that Pan American is a citizen of the United States and is fit, willing, and able to provide the foreign air transportation for which authority is requested and to conform to the requirements of the Act and our Regulations.

2/ See Rule 29(b) and Rule 1750(a)(3) of our Procedural Regulation.

3/ On April 22, 1985, Pan American and United Airlines filed a joint application, in Docket 43065, requesting approval, pursuant to sections 401(h) and 408 of the Federal Aviation Act of 1958, as amended, of the sale to United of Pan American's international Pacific division and of the transfer of Pan American's underlying route authority in the Pacific. Notwithstanding that application, we have decided to grant the authority sought in Docket 42843. The Agreement between AIT and CCNAA permits multiple U.S. carrier designations to serve Taiwan, and there is no reason to withhold prompt consideration of this application on the merits.

Finally, we have analyzed the operating data submitted by Pan American and conclude that the proposed service would not exceed the threshold standard of a "major regulatory action" under the Energy Policy and Conservation Act of 1975 (14 C.F.R 313.4). 4/

ACCORDINGLY,

1. We amend the certificate of public convenience and necessity of Pan American World Airways. Inc. for Route 130, in the form attached, to authorize the scheduled foreign air transportation of persons, property and mail between United States and Taiwan and to permit the integration of this authority with other certificate authority on Route 130 to serve Pacific points;

2. The authority granted in ordering paragraph 1 shall become effective under section 801(a) of the Federal Aviation Act of 1958, as amended, on the 61st day after submission of this order to the President of the United States, unless he disapproves the order, or upon the date of receipt of advice from the President that he does not intend to disapprove our order, whichever occurs earlier; 5/

3. We require Pan American World Airways, Inc. to comply with all relevant terms, conditions, and limitations of its certificates of public convenience and necessity;

4. To the extent not granted, we deny the application of Pan American in Docket 42843; and

5. We shall serve a copy of this order on Pan American World Airways, Inc., the Ambassador of Korea in Washington, D.C., the American Institute in Taiwan (AIT), the Coordination Council for North American Affairs (CCNAA), and the United States Department of State.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

4/ Pan American estimates its fuel consumption for its initial operations to be about 2.96 million gallons. This level of fuel useage is well under the 10 million gallon threshold for determining "major regulatory actions".

5/ This order was submitted to the President on July 8, 1985. The 61st day is September 7, 1985.

CERTIFICATE AMENDMENT

Pan American World Airways, Inc. for Route 130

Amend segment to read, as follows:

"Between a point or points in the United States, Puerto Rico; and the Virgin Islands, on the one hand, and coterminal point or points in the Philippines; Sri Lanka; India; Hong Kong; Thailand; Malaysia; Indonesia; Korea; and Taiwan, on the other hand."

"The holder may serve a point or points in Taiwan via other existing route segments on this certificate; provided that such services are conducted in accordance with all treaties and agreements between the United States and other countries."

Certificate Amendment Effective:

U.S. Department of Transportation
Office of the Secretary of Transportation

Office of Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 12 1985

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I transmit the Department's proposed order on the application of Ports of Call Travel Club, Inc., in Docket 42631 for your consideration under section 801(a) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. The order will issue the attached certificate to the applicant unless you disapprove it within 60 days of this transmittal. I am also enclosing a copy of the Administrative Law Judge's Recommended Decision which found Ports of Call Travel Club fit to perform interstate, overseas and foreign air transportation and a copy of the Department's order declining to review the Judge's decision.

If you should decide earlier that you will not disapprove, please advise the Department to that effect; this will allow the earlier issuance of the proposed order and certificate.

We are submitting the proposed decision to you before publication under the provisions of section 801(a) of the Federal Aviation Act of 1958. In accordance with Executive Order 11920, however, we plan to release all unclassified portions of the decision on or after the sixth day following this transmittal unless notified by your Assistant for National Security Affairs.

Sincerely,

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

Enclosures

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 12th day of July, 1985

PORTS OF CALL TRAVEL CLUB, INC. FITNESS INVESTIGATION	:	Docket 42631

ORDER ISSUING CERTIFICATE

By Order 85- 7-31 , we declined review of the Recommended Decision of Administrative Law Judge Ronnie A. Yoder and issued a certificate authorizing Ports of Call Travel Club to engage in interstate and overseas charter air transportation of persons, property and mail, pursuant to section 401(d)(3) of the Federal Aviation Act.

By this order, we are issuing a companion certificate authorizing Ports of Call Travel Club to engage in foreign charter air transportation of persons, property and mail. Instead of repeating our findings and conclusions in Order 85- 7-31 , we incorporate them here by reference.

ACCORDINGLY,

1. We issue a certificate of public convenience and necessity, in the attached form, authorizing Ports of Call Travel Club, Inc. to engage in foreign charter air transportation;

2. The authority granted here shall become effective five days after the Director, Office of Aviation Operations, has received from the FAA a copy of the applicant's Air Carrier Operating Certificate and revised Operations Specifications [1]: Provided, however, that the Department may stay the effectiveness of this authority prior to that date; and

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1/ Generally speaking, an acceptable FAA safety report consists of (a) a letter to the Director from the FAA stating that it has issued an Air Carrier Operating Certificate and Operations Specifications to the carrier and (b) copies of the Carrier's Air Carrier Operating Certificate and Operations Specifications. When the certificate has become effective, a notice to that effect will be issued with a copy of the certificate, including its effective date, attached.

3. This order shall become effective on the 61st day after its submission to the President of the United States, or upon the date of receipt of advice from the President that he does not intend to disapprove this order under section 801(a) of the Act, whichever occurs earlier, unless he disapproves it under that section. 2/

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

2/ This order was transmitted to the President on July 12, 1985
The 61st day is September 11, 1985.

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR CHARTER AIR TRANSPORTATION

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PORTS OF CALL TRAVEL CLUB, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules and regulations issued under it, to engage in the foreign charter air transportation of persons, property and mail:

Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and

a. Any point in Canada;

b. Any point in Mexico;

c. Any point in the Gulf of Mexico or the Caribbean Sea;

d. Any point in Central or South America;

e. Any point in Australia, Indonesia or Asia as far west as longitude 70 degrees east, via a transpacific routing; and

f. Any point in Greenland, Iceland, the Azores, Europe, Africa and Asia as far east as, and including, India.

This authority is subject to the terms, conditions and limitations prescribed by the Department of Transportation's Regulations for charter air transportation and to the following additional conditions:

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.

(2) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign government such operating rights as may be necessary.

(3) The exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall be effective

The Department of Transportation has executed this certificate and affixed its seal on July 12, 1985.

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

SERVICE LIST FOR PORTS OF CALL TRAVEL CLUB, INC.

Harlan G. Balaban
1624 Market St.
Suite 311
Denver, Colorado 80202

Thomas F. Mahoney
Office of Aviation Enforcement
and Proceedings/C-70
Department of Transportation
Washington, D.C. 20590

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 12th day of July, 1985

PORTS OF CALL TRAVEL CLUB, INC. FITNESS INVESTIGATION	Docket 42631

ORDER DECLINING REVIEW

Ports of Call Travel Club, Inc., filed applications with the Civil Aeronautics Board in Dockets 42356 and 42357 for certificates of public convenience and necessity to provide interstate, overseas and foreign charter air transportation of persons, property and mail under section 401(d)(3) of the Act. By Order 84-11-58, both of these applications were consolidated into Docket 42631.

After review of the record and without hearing, Administrative Law Judge Ronnie A. Yoder served on May 10, 1985, a Recommended Decision ("R.D.") in which he found the applicant to be a U.S. citizen and to be fit, willing and able to provide the air transportation for which it seeks authority. He also found that the existing control relationship between Ports of Call and Project 80, Ltd. should be approved under section 408 of the Federal Aviation Act. In addition, he found that no environmental or energy problems exist which preclude the grant of any of the authority applied for.

Neither the applicant nor the Office of Aviation Enforcement and Proceedings and the Office of Aviation Operations have filed exceptions under Rule 1754(a) (14 CFR 302.1754(a)). As we find that the Judge has examined all the issues in this proceeding and we agree with his ultimate conclusions, we will decline review of the R.D., which is attached as an appendix.

In accordance with the CAB's decision in Former Large Irregular Air Service Proceeding, Order 78-7-106, we find that Ports of Call's foreign charter application and proposed service are consistent with the public convenience and necessity. 1/

1/ In Order 78-7-106, the CAB found that there was a continuing demand and need for additional charter air carriers and that noncomparative selection criteria should be utililzed for new applicants, since the charter market is inherently capable of adjusting to new entry.

Finally, we are issuing with this order a certificate of public convenience and necessity which authorizes Ports of Call to engage in interstate and overseas charter air transportation of persons, property and mail under section 401(d)(3) of the Act. 2/

ACCORDINGLY,

1. We decline review of the Recommended Decision in Docket 42631, served May 10, 1985;

2. We find that Ports of Call Travel Club, Inc. is a citizen of the United States and is fit, willing and able to engage in interstate, overseas and foreign charter air transportation of persons, property and mail, and to conform to the provisions of the Act and the Department's rules, regulations and requirements;

3. We issue to Ports of Call Travel Club, Inc. a certificate of public convenience and necessity for interstate and overseas charter air transportation in the form attached;

4. The authority granted here shall become effective five days after the Director of the Office of Aviation Operations has received from the FAA a copy of the applicant's Air Carrier Operating Certificate and Operations Specifications 3/; Provided however, that the Department may stay the effectiveness of this authority prior to that date;

5. We approve the control relationship between Ports of Call Travel Club and Project 80, Ltd. under section 408 of the Act;

6. Except to the extent granted, we deny all other pending motions, petitions, applications and requests in the docket; and

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2/ By this order, we are issuing only an interstate and overseas charter certificate to Ports of Call Travel Club. Issuance of the foreign charter certificate is subject to Presidential approval and will be handled in a forthcoming companion order.

3/ Generally speaking, an acceptable FAA safety report consists of (a) a letter to the Director from the FAA stating that it has issued an Air Carrier Operating Certificate and Operations Specifications to the carrier and (b) copies of the Carrier's Air Carrier Operating Certificate and Operations Specifications. When the certificate has become effective, a notice to that effect will be issued with a copy of the certificate, including its effective date, attached.

7. We will serve a copy of this order on the persons listed in the attached service list.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

Issued by
Order 85-7-31

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR CHARTER AIR TRANSPORTATION

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PORTS OF CALL TRAVEL CLUB, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules and regulations issued under it, to engage in the interstate and overseas charter air transportation of persons, property and mail:

> Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and any other point in any State of the United States or the District of Columbia or any territory or possession of the United States.

This authority is subject to the following provisions:

(1) The holder shall conduct its operations in accordance with the regulations prescribed by the Department of Transportation for charter air transportation.

(2) The holder is not authorized to engage in air transportation between points within the State of Alaska.

The exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall become effective on

The Department of Transportation has executed this certificate and affixed its seal on July 12, 1985.

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

SERVICE LIST FOR PORTS OF CALL TRAVEL CLUB, INC.

Harlan G. Balaban
1624 Market St.
Suite 311
Denver, Colorado 80202

Thomas F. Mahoney
Office of Aviation Enforcement
and Proceedings/C-70
Department of Transportation
Washington, D.C. 20590

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

PORTS OF CALL TRAVEL CLUB, INC.
FITNESS INVESTIGATION
DOCKET 42631

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE RONNIE A. YODER

Served: MAY 10 1985

Upon:

Harlan G. Balaban, 1624 Market St., Suite 311, Denver, Colorado 80202, for Ports of Call Travel Club, Inc.

Thomas F. Mahoney, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590, for the Office of Aviation Enforcement and Proceedings and Office of Aviation Operations.

Found:

Ports of Call Travel Club is a U.S. citizen and is fit, willing, and able to engage in interstate, overseas, and foreign charter air transportation of persons, property and mail as defined in the Federal Aviation Act, and to comply with the Act and the Department's rules, regulations and requirements thereunder, and the applicant's existing control relationship should be approved under section 408 of the Act.

This recommended decision is rendered pursuant to authority delegated to Administrative Law Judges under Rule 27 of the Rules of Practice in Proceedings (14 CFR 302.27) and issues 14 days after service absent further order of the Judge (14 CFR 302.1753(c)). Review of this decision is automatic if timely and adequate exceptions are filed; exceptions may be filed within 7 days and briefs may be filed within 14 days after service of this decision in accordance with Rules 1754 and 1755 of the Rules of Practice in Proceedings (14 CFR 302.1754, 302.1755).

STATEMENT OF THE PROCEEDING

On July 20, 1984, Ports of Call Travel Club, Inc., a travel club certificated under Part 125 of the Federal Aviation Regulations (hereinafter sometimes "POC" or "the Club"), filed applications with the Civil Aeronautics Board in Dockets 42356 and 42357 for certificates of public convenience and necessity to provide interstate, overseas, and foreign charter air transportation of persons, property, and mail. After the applicant filed supplemental information pursuant to Order 84-8-66, the Board, by Order 84-11-58, instituted this proceeding to determine (1) whether Ports of Call is fit, willing and able to perform the service described in its applications and to comply with the Act and the Board's rules, regulations, and requirements; and (2) whether the Board should approve, disapprove, exempt, or disclaim jurisdiction over any control or interlocking relationship under sections 408 and 409 which may exist. 1/

On January 1, 1985, the Civil Aeronautics Board was terminated pursuant to the Airline Deregulation Act of 1978 (P.L. 95-504, October 24, 1978) and the Board's authority and responsibility with respect to this proceeding was transferred to the Department of Transportation by the Deregulation Act and the Sunset Act, under which previous orders of the Board and the Judge in this proceeding were continued in effect until modified, terminated, superseded, set aside or revoked. 2/

A prehearing conference was held on January 17, 1985, which was attended by representatives of the applicant and the Department of

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1/ The Board found the proposed foreign charter service to be consistent with the public convenience and necessity, as Section 401(d)(3) of the Act requires. See Order 84-11-58, p. 3. No such findings need be made with respect to interstate and overseas charter air transportation. Id.

2/ Section 12(a) of the Civil Aeronautics Board Sunset Act of 1984, 98 Stat. 1710, P.L. 98-443, October 4, 1984, 49 USC app. 1556; see also Westates Airlines Fitness Investigation, Order 85-4-25, p. 4. By Order 85-2-24 the Department extended the statutory deadline for the recommended decision in this proceeding by 30 days, i.e. to May 25, 1985.

Transportation's Office of Aviation Enforcement and Proceedings and Office of Aviation Operations. 3/ The parties were directed to submit certain additional exhibits and to furnish fully integrated sets of their exhibits. In addition, the parties were invited to file briefs demonstrating that the record as so supplemented was adequate for decision without an oral evidentiary hearing (PHC Tr. 53; PHC Report, served January 22, 1985). 4/

On January 28 and February 8, 1985, Ports of Call submitted supplemental exhibits, and AEP filed rebuttal exhibits on February 4, 1985. By Order dated February 13, 1985, the Judge noted that the applicant's submission was not a fully integrated set of exhibits, as the prehearing conference report required, and ordered it to prepare and submit an integrated index of all exhibits it planned to offer in evidence. That order also directed that certain additional evidence be supplied and that certain matters be addressed on brief. Thereafter Ports of Call filed a second supplement to its exhibits dated February 14, 1985. Briefs were filed by Ports of Call on February 19 5/ and by AEP on February 22, 1985.

3/ A representative of each of the offices attended the conference; but the attorney appearing for the Office of Aviation Enforcement and Proceedings stated that he would represent both offices in the proceeding. See PHC Tr. 39-40. The offices are referred to herein collectively as "AEP."

4/ The applications of Ports of Call in Dockets 42356 and 42357 were answered and opposed by Key Airlines, Inc. and Ryan International Airlines on August 7 and 21, 1984, respectively. Nonetheless, each declined to intervene or otherwise participate in this case. See letters from Key (dated December 21, 1984) and Ryan (dated January 2, 1985) in the correspondence section of the docket. Copies of the answers of Key and Ryan were subsequently submitted by the parties for the record in this proceeding.

5/ Applicant's brief was due on February 15, and it originally tendered a brief on that date. It also filed a motion on that date for an extension of time to offer additional copies of its brief. On February 19, the first business day after February 15, Ports of Call filed a motion to withdraw that brief and substitute a "corrected" brief, which was filed that day. It also sought leave to file additional copies of the second supplement to its direct exhibits. Neither motion was answered or opposed; and we will dismiss the motion of February 15 as moot, and grant the two motions of February 19.

Both urge that the applicant be found fit without the need for additional evidence or an oral evidentiary hearing.

SUMMARY OF FINDINGS AND CONCLUSIONS

We conclude that the motions of the applicant and AEP to proceed to a decision on the basis of the existing record without an oral hearing should be granted and that (1) Ports of Call is a citizen of the United States; (2) Ports of Call should be found fit, willing, and able to engage in interstate, overseas, and foreign charter air transportation of persons, property, and mail and to comply with the Act and the Department's rules, regulations, and requirements; and (3) the applicant's control relationship with Project 80, Ltd., should be approved under Section 408 of the Act.

ORAL HEARING

Based upon the evidence and briefs submitted, we conclude that the proposed exhibits proffered by Ports of Call and AEP constitute an adequate record for determination of the issues in this proceeding without an oral hearing or other further procedures. All of the exhibits have been submitted with affidavits attesting that they are true and correct. Accordingly, we grant the motions of the applicant and AEP to mark and admit their proffered exhibits without sponsoring witnesses and without an oral hearing. 6/

6/ The applicant's exhibits include duplicate documents as well as overlapping and conflicting exhibit numbers. In order to enable citation of these exhibits the Judge's Order of February 13, 1985 directed that the exhibits accompanying the original application (dated July 20, 1984) be cited by the prefix "A" and that applicant's Direct Exhibits (dated January 25, 1985) and any filed subsequently be denominated with the prefix "B". Applicant's amended application and accompanying exhibits, dated October 8, 1984, were not submitted in the applicant's "integrated" exhibits, but we will mark and admit them with the prefix "C". Consequently, the following exhibits of Ports of Call and AEP are hereby marked and admitted into evidence:

POC-A-1 (i.e., Exhibit 1 of the original application exhibits) through POC-A-15; POC-B-0 (Exhibit 0 of the direct exhibits) through POC-B-19; and POC-C (i.e., the amended application) and

(footnote continued on page 5)

FITNESS STANDARDS

The three-part test for determining fitness formerly used by the Civil Aeronautics Board has been adopted by the Department. 7/ Applicants demonstrate that they meet this test by showing that they have (1) the necessary management skills and technical ability to operate safely; (2) unless internally financed, a plan for financing that, if carried out, will generate sufficient resources to begin the proposed operation without undue risk to the public; and (3) a satisfactory compliance disposition, i.e., a demonstration that the applicant will comply with the Federal Aviation Act and with the regulations imposed by Federal and State agencies. 8/

Managerial Expertise

Ports of Call Travel Club, Inc. was organized as a non-profit corporation under Colorado law in 1966 (POC-A-3, p. 13). It was certificated as a travel club under Part 123 of the Federal Aviation Regulations until 1981, when it became certificated under Part 125 (POC-B-1-3). It has operated for the past 18 years and currently owns and operates eight Boeing 707 aircraft and one Boeing 727 aircraft (POC-A-6, p. 2), serving a club membership of over 70,000 people. 9/

(footnote continued from page 4)

POC-C-A (Exhibit A attached to the amended application) through POC-C-H; POC-Index.

DOT-RT and DOT-R-1 through R-4.

Applicant's "B" exhibits bear hyphenated page numbers (for instance, page 8 of POC-B-6 is marked POC-B-6-8) and are cited in that manner. All other exhibit pages are cited as "p. " (e.g., POC-A-5, p. 11).

7/ Westates Airlines Fitness Investigation, Order 85-4-25, pp. 6-7. See Application of Air Mid-America, Inc., Order 85-4-9, p. 2.

8/ New York Air Fitness Investigation, Order 80-12-57, p. 4; 87 CAB 677, 680 (1980). Accord Sun Pacific Airlines Fitness Investigation, Order 81-6-126, pp. 4-6; 90 CAB 269, 272-74 (1981).

9/ POC-B-12-1. Ports of Call also owns three Convair CV-990 jet aircraft which were removed from service on January 1, 1985, because of noncompliance with federal noise regulations which became effective on that date. Id. These regulations, Part 36 of the FARs, also affect Ports of Call's 707s and have had a significant impact on the applicant's financial and operating plan. See discussion infra, pp. 7-10.

Ports of Call will continue to be operated by its current executive and managerial personnel. Its President and Chief Executive Officer since 1966, Robert L. Turrill, supervises and manages Ports of Call on a day-to-day basis. Before his current position he served for twenty years as President and Chief Executive Officer of ALSCO, a Colorado home improvement company. Mr. Turrill is also a Director of Ports of Call and holds a private pilot certificate (POC-A-5, p. 11; POC-B-7, p. 1).

Douglas E. Underwood is Vice President of Operations for Ports of Call. He has been employed by the applicant since 1970 and obtained his current position in 1983. Mr. Underwood previously served as Director of Technical Services for Ports of Call; and for ten years prior to joining the applicant he held corporate pilot positions with several companies. Mr. Underwood is qualified to operate B-707 and B-727 aircraft and is type-rated on several other models of transport category aircraft (POC-A-5, p. 13).

The applicant's Vice President of Finance, Florence M. Keating, joined Ports of Call in 1972 and has been responsible for the company's financial management since that time. She is also a Director and the Secretary-Treasurer of the Board of Directors (POC-A-5, p. 5; POC-B-7-1).

Ports of Call's Vice President of Marketing is Fredda O. Turrill. Ms. Turrill has been employed by the applicant since 1966, and during her tenure has acted in a number of capacities, including Director of Office Administration, Director of Passenger Services, and Director of the Flight Attendant Department. Since 1983 she has been responsible for the company's marketing and the day-to-day operations of its flight attendants (POC-A-5, p. 12).

Robert A. Resling will be the Director of Flight Operations for Ports of Call. Mr. Resling, a pilot, served in the Air Force and later (1976-82)

held various positions in the FAA. In 1982 he joined a management consulting firm, resigning prior to assuming his current position at Ports of Call in 1983. Mr. Resling holds several airman certificates (POC-B-1-4, revising POC-A-5, p. 14).

Cal N. Sefton, the applicant's Chief Pilot, joined the company in 1972. Mr. Sefton is presently qualified as pilot in command and check airman on the B-707 and CV-990 aircraft, and holds several airman certificates. Mr. Sefton served in the Army and Air Force for 22 years and was employed by United Air Lines as a flight operations instructor for five years prior to joining Ports of Call (POC-A-5, p. 21).

Based upon the recited experience, the current successful operations of the applicant, and our findings and conclusions concerning compliance disposition, we conclude that the Ports of Call management team possesses sufficient business and aviation experience to enable it to operate an airline safely and competently and to satisfy the Department's managerial fitness requirements.

Operating Proposal and Financial Plan

Ports of Call seeks by these applications to free itself of Part 125 restrictions which prohibit it from holding out its transportation services to the general public, and thereby enhance its flexibility and efficiency as a charter operator. Section 401 authority would also expand the opportunities and economies of its other aircraft (POC-A-2, p. 1), if its B-707 aircraft are grounded for noncompliance with federal noise regulations. 10/ Ports of Call envisions little change in its operations

10/ As noted above, Ports of Call has already been forced to ground the three CV-990 aircraft it owns for these reasons. See n. 9, supra. POC has obtained an FAA exemption for the 707s through October 31, 1985, for eleven listed airports. Under certain contingencies the exemption may extend until December 31, 1985. See POC-B-18.

after certification; despite common carrier status, POC's club activities would continue to account for the bulk of its operations (POC-C, p. 3, ¶10a). Operations would be centered in cities in the western United States and Canada, emanating from applicant's headquarters in Denver, but would also include other foreign points such as Cancun, London, and Madrid (POC-A-8, p. 11).

Ports of Call's cost and revenue projections for the forecast year beginning January 1, 1985 (POC-A-8, p. 3; POC-B-1-5, revising POC-A-8, p. 4) are based on calendar year 1983 operating results (POC-A-8, p. 5), with adjustments to reflect changed fleet assumptions, i.e. only one modified B-707, one B-727, increased utilization of complying aircraft, and higher operating costs due to increased aircraft repositioning. After a negative cash flow in the early months, the applicant expects to achieve a positive cash flow as its fleet comes into compliance with noise regulations and predicts positive operating revenues for the year (POC-A-8, p. 2). Assuming a cost per seat mile of 5.77¢ and a load factor of 93.44%, POC projects operating revenue of $11.5 million and operating costs of $9.2 million for a profit of $2.3 million in 1985 (POC-B-1-15). 11/ Total revenues for the first normalized year are expected to be $34 million and expenses $31.3 million, for an operating income of $674,351 (POC-A-8, p. 3).

We conclude that Ports of Call's forecast operating costs are reasonable based upon costs reported by certificated air carriers operating the same aircraft types (DOT-RT), and find that Ports of Call's operating plan appears feasible and credible. Ports of Call appears to have the

11/ The applicant assumes the availability of only one B-707 due to FAA noise-related restrictions. See discussion p. 7, supra. Although its projected load factor appears high, POC states that its experience shows that these figures are conservative, citing its aggregate load factor for the first five months of 1985 (95.9%), which dipped below its projection for the forecast year in only one month. POC-A-8, pp. 2, 55.

financial resources to carry out its plan. An unaudited balance sheet for the year ended December 31, 1984, shows total assets for the club of $21.1 million, including $11.4 million in current assets, and a surplus of more than $6.7 million (POC-B-19-3). The applicant has enjoyed robust financial health in recent years (see, e.g., POC-A-12, pp. 16 and 26). While it faces the possibility of substantial financial reverses in attempting to comply with the federal noise regulations, its long-term fiscal health should not be materially impaired.

The applicant recently entered a limited partnership agreement known as Project 80, Ltd., with the president of Aviation Technical Support, Inc. (ATS) for the development and production of an FAA-approved noise reduction nacelle suitable for installation on B-707 aircraft (POC-B-16; POC-A-4). Ports of Call has contributed $11 million under Project 80 to date, and anticipates an infusion of an additional $9 million (POC-B-11-1). While the initial investment was funded in large part by a $7 million loan from the Central Bank of Denver, 12/ the source for the remainder of the infusion is unclear. 13/ If funding dries up, Project 80 could be scrapped as a total loss. Furthermore, the partnership may not be successfully concluded in any event. The nacelle could fail to receive FAA certification, 14/ and in such a case Ports of Call would lose its investment and be forced to look elsewhere for hush kits or ground its

12/ POC-C, pp. 4-5, ¶ 11b. The loan terms required the principal to be paid on January 10, 1985. Applicant did not tender payment at that time, but the record indicates that the parties are actively working toward restructuring the loan. See POC-B-13.

13/ Ports of Call states that four funding entities are considering financing the remainder of the project, but none has made a commitment to date. POC-B-11-1.

14/ The FAA exemption granted to applicant was issued on the condition that approved nacelles would be installed in applicant's aircraft by October 31, 1985. POC-B-18-4. FAA approval for the hush kits would be effectuated through the grant of a Supplemental Type Certificate. See PHC Tr. 32.

707s. The applicant is making arrangements to obtain retrofits of its 707s with another nacelle developer, Comtran, which expects a Supplemental Type Certificate shortly (POC-B-11-1).

Ports of Call has submitted "worst case" financial statements for the next five years, i.e., assuming Project 80 proves to be a total loss. These figures show a negative cash flow through 1987, but a rebound into the positive column afterwards. Moreover, the club's income would continue to be positive throughout that period; for each of the five years the applicant projects a net after-tax income of at least $500,000 (POC-B-19-4). Thus, while Ports of Call would incur significant monetary reverses from the failure of Project 80, its long-term financial health would not appear to be jeopardized. Consequently, we conclude that Ports of Call's operating proposal appears to be sound, and its financial plans, if carried out, should enable it to commence charter air tranportation operations without undue risk to consumers, and that Ports of Call meets the Act's financial fitness requirements.

Compliance Disposition

Ports of Call's exhibits show that no charges of unfair, deceptive or anticompetitive business practices, or fraud, felony, or antitrust actions have been brought against the applicant or its key personnel (POC-A-1, p. 4). In addition, a check conducted by the Civil Aeronautics Board's Bureau of Carrier Accounts and Audits indicates that no consumer complaints or actions have been brought against the carrier or its key personnel. 15/

On two occasions prior to 1984 the FAA charged Ports of Call with civil violations of the Federal Aviation Act. In 1978 the Club was cited for failing to replace a gearbox in accordance with published standards. It paid a fine of $750 in full settlement of the matter (DOT-R-1, pp. 8-10). In 1976 the FAA alleged that Ports of Call had on several occasions

15/ DOT-R-2, p. 2; see also POC-A-11; POC-C-B, pp. 1, 2; POC-B-4-1.

operated aircraft without proper inspection of the co-pilot's altimeter. The Club tendered $500 in full settlement (DOT-R-1, pp. 11-13). 16/

The applicant further states that it has not been involved in any accidents or incidents during the past seven years (POC-C, p. 1, ¶ 4), which was confirmed by an oral NTSB report to AEP staff (DOT-RT). Securities and Exchange Commission records do not reveal any investigations or actions involving the applicant (DOT-R-2, p. 2), and the FAA states that it knows no reason why the Department should act unfavorably on the application (DOT-R-3). 17/

During 1984 Ports of Call was separately cited by the Federal Aviation Administration and the Enforcement Division of the Civil Aeronautics Board for operating in air transportation without appropriate authority. The FAA and the Enforcement Division each were concerned that the Club was "holding out" its services to the public in violation of laws and regulations within each agency's jurisdiction. On June 29, 1984, as amended on August 17, 1984, the FAA reached an agreement with Ports of Call in which the applicant promised not to operate certain charter flights. 18/ Ports of Call also paid $10,000 in full settlement of the charges brought. The Consent Order signed by the parties stipulated that it constituted neither an admission nor an adjudication of the FAA's allegations. Ports of Call failed to reach an agreement with the Enforcement Division, but obtained a temporary restraining order (TRO) and later a preliminary injunction in the Federal District Court for the District of Colorado (Case No. 84-A-1687),

16/ Ports of Call asserted in its application that "[t]he Federal Aviation Administration has never taken any action . . . against Ports of Call" (POC-A-1, p. 4), but that assertion was obviously incorrect.

17/ We also note that a May 4, 1983, letter written by an FAA official in Colorado states that the Club's "operations and maintenance programs are equivalent to those of Part 121 operators . . . . Their maintenance and operations departments are well staffed with qualified personnel and their aircraft are maintained in an airworthy condition. Ports of Call has an excellent safety record." POC-B-6-462.

18/ POC-B-6-9 through 12 (Consent Order); POC-B-6-16 through 17 (amended Consent Order).

which prohibited the Board from further action regarding the charters cited therein pending further order of the Court (POC-B-6-463 (TRO); POC-B-6-133 through 134 (preliminary injunction)). While we are concerned about the implications of these events, for reasons set forth below we conclude that they do not warrant a finding that POC fails to meet the compliance disposition element of the Department's fitness standards.

Unauthorized Operations. Shortly after receiving its Part 125 certificate from the FAA in 1981, Ports of Call began supplementing its air travel activities for club members with charter flights carrying members of other organizations or groups. The Club was authorized to engage in private operations, but it did not have a certificate issued by the Civil Aeronautics Board permitting it to engage in common carriage, i.e., charter air transportation, under section 401 of the Federal Aviation Act (49 U.S.C. 1371) and under Part 125 it was not permitted to "hold out" its services to the public:

> "No certificate holder may conduct any operation which results directly or indirectly from any person's holding out to the public to furnish transportation." 14 CFR 125.11(b).

Nevertheless, between 1981 and mid-1984, Ports of Call conducted about 150 flights for organizations other than its membership group (POC-B-6-154 through 155).

On May 29, 1984, Ports of Call received a telephone call from an attorney in the CAB's Enforcement Division, advising that its non-Club charter operations might be in violation of section 401 of the Act (POC-C, pp. 1-2, ¶ 5). Mr. Turrill testified at the hearing on the motion for preliminary injunction that the Division attorney told him that "as far as the CAB was concerned any and all charters that we ran were in common carriage and that we should cease and desist immediately" (POC-B-6-156).

On June 11, 1984, Ports of Call wrote the FAA that it was taking steps to obtain an operating certificate as a Part 121 supplemental air carrier and as a section 401 air carrier in order to offer public carriage and sent a copy of that letter to the Enforcement Division. 19/

On June 26, 1984, the FAA issued an Order of Investigation to POC, stating:

> "Information has been received by the Federal Aviation Administration indicating that Ports of Call Travel Club, Inc. may have conducted flights in air transportation when it did not hold an air carrier operating certificate and appropriate operations specifications authorizing it to do so, in violation of Sections 604 and 610 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§1424 and 1430, and Parts 121 and 125 of the Federal Aviation Regulations, 14 CFR 121 and 125.11(b)." (POC-B-6-13.)

Two days later, on June 28, the Associate General Counsel in charge of the Enforcement Division wrote to Mr. Turrill by express mail, setting down the position taken by the Division in the May 29 telephone call. The letter charged that "Ports of Call does not have requisite authority from the CAB to operate such [non-Club member] charters as an air carrier under section 401(a) of the Federal Aviation Act" (POC-B-6-80). In support of this conclusion, the Division alleged that the Club arranged charters for the Gary Hart and Jesse Jackson Presidential campaigns and for various named professional and college football teams. The Division also charged that POC arranged certain charters for nonmembers (naming the Air Force Academy) through an entity known as Charter Services--which described itself as "specializing in the handling of Single Entity Charter arrangements for customers nationwide" (POC-B-6-81). The Division stated that it would ordinarily institute an enforcement proceeding immediately, but the

19/ POC-B-2-1. Ports of Call had previously applied for a section 401 certificate in 1982 (Docket 40935) but that application was abandoned (PHC Tr. 5-6), because POC believed that certification could jeopardize its non-profit status and "the benefit of obtaining such certification was unclear." POC-C, p. 2, ¶ 5.

circumstances of the case--including the applicant's "apparent mistaken belief" that it could engage in the questioned activities without CAB authority--warranted a settlement offer first (POC-B-6-81). Consequently, the letter offered to forego a formal enforcement proceeding, seeking a cease-and-desist order and full civil penalties, if the Club would agree in writing by July 9 that it would immediately abstain from operating as a section 401 air carrier "charter flights of the kind described above or any other flights held out to the public" (POC-B-6-81). A copy of this letter was sent to the FAA's Enforcement Division in Washington.

On the following day, June 29, Ports of Call signed an initial Consent Order with the FAA (POC-B-6-9 through 12). The Club agreed to cancel all flights contracted through travel agencies, including four named nonmember charters already arranged. It also agreed to contact all athletic team charters brokered by Charter Services, and to state in writing to these teams that Ports of Call was "not authorized to engage in common carriage under Part 121 of the FAR and is certificated only under Part 125, which restricts operations to those in noncommon/private carriage." The Consent Order further directed that each of these organizations be given the opportunity to re-ratify or rescind its contract with Ports of Call (POC-B-6-11). As noted above, the applicant also paid $10,000 in full settlement of the charges, which by the terms of the order were neither admitted nor adjudicated.

That same day, Mr. Turrill spoke by telephone with the writer of the previous day's Enforcement Division letter and informed him that Ports of Call planned to operate two nonmember charters the following day--one for the Arizona Wranglers professional football team, the other for the Colorado Future Business Leaders of America. These disclosures prompted an Enforcement Division telegram to the Club, alleging that the contemplated

flights were in common carriage and directing the applicant to bring itself into compliance with the Federal Aviation Act "by not engaging in air transportation as an air carrier . . . by operating these charter flights or any other flights held out to the general public" (POC-B-6-85 through 86). In response to the urgings of the Division, the applicant subserviced both charters (POC-B-6-159).

Over the next several weeks, the Enforcement Division and Ports of Call participated in further attempts at settlement (POC-B-6-160). Informal negotiations were apparently unsuccessful, since Ports of Call on July 19 rejected in writing the settlement offer proposed by the Division on June 28 (POC-B-6-88). The Club maintained that it had "at no time conducted any operation which has resulted directly or indirectly in holding out to the public to furnish transportation." The following day, July 20, 1984, it filed applications with the Civil Aeronautics Board for the authority to conduct charter air transportation under section 401 of the Act (Dockets 42356 and 42357).

On August 6, 1984, the Enforcement Division wrote to Mr. Turrill in another attempt at settlement. It stated its understanding that the applicant had scheduled approximately 35 charter flights for 14 football teams through the end of 1984 and charged that these charters "are flights in common carriage . . . [and] do not qualify as private carriage." It further warned that operation of these flights could affect consideration of the applicant's compliance disposition in its forthcoming fitness case before the CAB. Ports of Call was given 10 days from the date of the letter to furnish a reply stating its intentions; if the charters were operated, the Division would initiate enforcement action against the Club and against Mr. Turrill personally (POC-B-6-19 through 21).

On August 17, 1984, eleven days after the Division's letter was written, Ports of Call entered into an amended Consent Order with the FAA, which now contained a provision cancelling all flights arranged through Charter Services, i.e. charters for thirteen groups, all universities. 20/

On August 22 Ports of Call filed a motion for a temporary restraining order against the CAB in the Federal District Court in Colorado (POC-B-6-25 through 27). The motion recited that the Board threatened legal action against the Club if it operated charters which the FAA had "permitted" it to conduct — stating that the FAA was "the regulating body which clearly has authority over it." Contending it was thereby placed in an "impossible" position and likely to suffer irreparable harm, Ports of Call asked for a TRO enjoining the CAB "from taking any action against the plaintiffs with respect to the charter flights permissible pursuant to the FAA Consent Order." 21/ A pleading and exhibits contemporaneously submitted enumerated the charters which had ostensibly received FAA sanction, and repeated that "the FAA is the sole and only regulatory agency

20/ POC-B-6-16. The requirement of the initial Consent Order that charterers obtained through Charter Services be given the option of ratifying or rescinding their Club contracts was considered to constitute "resolicitation" and consequently was withdrawn. POC-B-6-243. In addition, paragraph 5.b., which read: "No other contracts will be made to carry persons or property on Ports of Call aircraft, except for the transportation of persons known as the Ports of Call Travel Club membership, unless and until Ports of Call obtains appropriate authority from the FAA and the Civil Aeronautics Board, if necessary, to engage in common carriage" (POC-B-6-10) was revised to specify that the restrictions on the Club's authority were in "air" transportation, that the FAA authority required was Part 121 authority, and that CAB licensing would be obtained "as necessary" rather than "if necessary." As revised paragraph 5.b read: "No other contracts will be made to carry persons or property in air transportation, without appropriate certification under Part 121 of the Federal Aviation Regulations and authorization, as necessary, from the Civil Aeronautics Board." POC-B-6-16.

21/ At the subsequent hearing on the motion the Club contended that it was being "whipsawed" between the FAA and the Board. POC-B-6-413.

having control over the operations" of Ports of Call. 22/ Ports of Call also submitted a Memorandum Brief in support of the motion in which it asserted, inter alia, that "Part 125.11 and 49 U.S.C. section 1371 are mutually exclusive" (POC-B-6-42).

Following a hearing on the same day (POC-B-408 through 449), the District Judge issued an order granting the motion for a TRO, which restrained the Board from "instituting any Cease and Desist or any other order, penalty, procedure or sanction" against Ports of Call until a hearing on the Club's verified complaint (POC-B-6-463). On September 21, 1984, following a hearing (POC-B-6-145 through 255), the District Judge granted the Club's motion for a preliminary injunction (POC-B-6-250 through 252). By written order dated October 25, 1984, the District Judge

> "restrained and enjoined [the Civil Aeronautics Board] from instituting any Cease and Desist or any other order, penalty, procedure or sanction against the plaintiffs [i.e., Ports of Call and Robert L. Turrill] until this Court enters a final judgment upon the merits of this case; provided, however, that the plaintiffs shall not perform or contract for the performance of any charters other than those already scheduled with the Denver Broncos, Brigham Young University, Colorado State University and the Seattle Seahawks, in accordance with Exhibit C attached to the Complaint originally filed by the plaintiff in this action [i.e., POC-B-6-18]." POC-B-6-133.

As amended by the Court's order of December 6, 1984, 23/ the preliminary injunction remained in effect until the proceeding was dismissed by the Court on March 7, 1985, at POC's request. 24/

22/ POC-B-6-5. Ports of Call also alleged that the language of 14 CFR 125.11 and 49 U.S.C. 1371 was unconstitutionally vague and that it had exhausted its administrative remedies. The pleading, styled a "Verified Complaint for Injunctive Relief and for Declaratory Judgment" (POC-B-6-3 through 22) attached a list of "approved" charters (POC-B-6-4) as Exhibit C of the verified complaint (POC-B-6-18).

23/ The amendment, granted pursuant to a "Motion for Modification of Preliminary Injunction" (POC-B-6-140), permitted Ports of Call to transport the Brigham Young University football team to the post-season Holiday Bowl. POC-B-6-143. See also the transcript of the hearing on the motion, POC-B-6-450 through 458. An earlier Club motion to permit certain post-season athletic team flights (POC-B-6-130 through 131) was denied as premature (POC-B-6-504) following a hearing on November 9, 1984 (POC-B-6-394 through 407).

24/ DOT-R-4. The Department of Transportation was substituted for the Board as a party by order of February 6, 1985. POC-B-6-461.

Holding Out. Although the terms "common carrier" and "common carriage" are not defined in the Federal Aviation Act, the law is well-settled that a common carrier is "one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place, and so invites the patronage of the public." 25/ A carrier which makes its services available indiscriminately to the public or to a segment of the public is engaged in holding out. 26/ The FAA has stated that "a person is considered to be engaged in 'common carriage' when 'holding out' to the general public or to a segment of the public as willing to furnish transportation within the limits of its facilities to any person who wants it." 27/ Holding out may be effectuated through advertising or solicitation 28/ or simply by performing large numbers of contracts. 29/

All parties acknowledge that holding out to the public is prohibited by both FAA and CAB regulations and that only private carriage is allowed (POC-B-6-175; AEP Br., p. 8). Ports of Call contends that its charter operations were legitimate private carriage and did not amount to an illegal "holding out" to the general public and that, in any event, the circumstances of its operations and its dealings with the FAA and CAB do not demonstrate a lack of disposition to comply with appropriate laws and regulations. AEP does not think it necessary to determine whether POC engaged in common carriage, but in any case believes that the Club's

25/ Voyager 1000 v. CAB, 489 F.2d 792, 799 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974).
26/ Intercontinental U.S., Inc., Enforcement Proceeding, 41 CAB 583, 601 (1965).
27/ FAA Advisory Circular No. AC 125-1, dated January 22, 1981. POC-B-6-110.
28/ Voyager 1000, Enforcement Proceeding, 61 CAB 252 (1973), aff'd, Voyager 1000 v. CAB, 489 F.2d 792 (7th Cir. 1973), cert. denied, 416 U.S. 982 (1974).
29/ East Coast Flying Service, Inc., Enforcement Proceeding, 46 CAB 640 (1967).

actions in going to Federal District Court "comprise a good-faith effort to resolve what it mistakenly considered to be conflicting regulatory requirements." 30/

Having carefully considered these contentions and the entire record, we conclude that evaluating POC's actions during the events described is essential to a determination of its disposition to comply with applicable laws and regulations; and dismissal of the injunctive proceeding has removed any arguable impediment to such a determination. 31/ We also conclude that Ports of Call did violate the Act, but that the circumstances surrounding its conduct do not prevent a finding of adequate compliance disposition.

Firstly, it seems clear that Ports of Call did hold out its services to the public in violation of Section 401 of the Act. It operated three football team charters for Global International Airlines (POC-B-6-200 through 201); and a carrier operating planeload charters for a common carrier such as Global engages in common carriage itself. 32/ Furthermore, the evidence shows that several charters were arranged through travel agencies, an indirect holding out proscribed by Part 125.11(b) and the Act. 33/ The initial FAA Consent Order cancels four charters which

30/ AEP Br., pp. 8, 10. AEP has not indicated whether the Enforcement Division's successor at the Department intends to continue proceedings against the applicant in view of the District Court's dismissal of the injunction action on March 7, 1985. See PHC Tr. 10, 18, 19.

31/ AEP's position that this evaluation need not be made preceded dismissal of the injunction proceeding by the District Court.

32/ Automotive Cargo Investigation, Order 76-6-182, 70 CAB 1541, 1553, n. 61 (1976). See also FAA Advisory Circular AC 120-12 effective June 24, 1964. POC-B-14-21 [¶ f].

33/ The FAA has stated in an advisory to carriers that if a travel agency "advertises [its] services to the public and then contracts with you to transport [its] payload by air, you will be considered to have "indirectly" received that business as a result of holding out to the public . . . this is clearly a violation of §125.11(b) . . ." See POC-B-6-111. Mr. Turrill acknowledged at the preliminary injunction hearing that "125.11 specifically sets forth that we cannot hold out directly or indirectly to the public." POC-B-6-175.

were arranged through four different named travel agencies (POC-B-6-90; see also POC-B-6-187). Similarly, the various charters the Club conducted through Charter Services, Inc. also appear to constitute a holding out. A Charter Services brochure (POC-B-6-75) and letter of solicitation sent to a regional competitor of Ports of Call 34/ indicate that Charter Services has attempted to function as a charter broker between carriers and the general public. Moreover, travel agencies themselves may be members of the Ports of Call Travel Club, thereby creating the potential for an indirect holding out. 35/

The applicant argues that the middleman-arranged "single-entity" charters discussed above are not holding out because, as Mr. Turrill stated at the hearing on the motion for preliminary injunction, "it was the unit itself, the group that we were taking that was the primary consideration; that if they were a private group, then they were all right." 36/ This

34/ DOT-R-2, p. 36. A regional competitor, Key Airlines, Inc., produced the letter in its answer to the applications of Ports of Call in Dockets 42356 and 42357. Key did not formally intervene in the proceeding, but its answer and supporting documents (including the letter) were submitted for the record by AEP (DOT-R-2, pp. 36-41) and Ports of Call (POC-B-6-115 through 120). See n. 4.

35/ PHC Tr. 50. The Club did not furnish any evidence to show that agents are prohibited from membership or that they are not in fact Club members. Questions also arise concerning holding out in the area of direct advertising and solicitation. Ports of Call has stated on numerous occasions that it refrains from advertising (POC-B-15-1; POC-B-6-169), other than in the telephone directory (POC-B-6-209) and through its membership application (PHC Tr. 51; POC-C-A). Indeed, the Club, in informing its members in its May 1981 newsletter of its newly-won Part 125 authority, cautioned that "participants for [affinity charters] may not be solicited from the general public. . . ." POC-B-6-367. However, testimony at the hearing on the motion for a preliminary injunction revealed that the Club distributed bumper stickers reading "I Fly Ports-of-Call" in the 1970s. After Mr. Peterson of the FAA objected to such advertising, distribution was apparently "diminished" but not terminated. POC-B-6-180 through 181.

36/ POC-B-6-176. Ports of Call introduced evidence at the preliminary injunction hearing that the four charters for which it claimed FAA operating permission were not solicited in any manner, and thus, in its view, constituted private carriage. See POC-B-6-173 through 175; POC-B-6-211 through 212.

understanding misconstrues the nature of the rule. The question of holding out turns not so much on the character of the chartering group as on the manner in which the carrier's services become known and secured. 37/ Mr. Turrill may have confused the holding-out concept under Part 125 with CAB and Department rules prohibiting the formation of pro-rata and single-entity charters through solicitation of the general public prior to the signing of a charter contract. 38/ Indeed, Mr. Turrill seems to have recognized this distinction earlier in the same hearing, when he testified that he thought Part 125.11 "meant that we could not accept any charter that was advertised either directly or indirectly by anyone that was advertising to the public" (POC-B-6-154)--clearly a different and more accurate formulation of the rule.

Ports of Call also argues that the FAA knew about and approved its charter practices (Br., pp. 19-21). Both Mr. Turrill and Robert Resling, applicant's Director of Flight Operations and an FAA official in Denver between 1979 and 1982, testified in the District Court that the agency was aware of and approved its "affinity" operations. 39/ While the FAA undoubtedly endeavored to keep itself informed of the Club's activities, there is no documentary evidence that it affirmatively sanctioned the operations in question. 40/ The applicant also contends that the FAA

37/ See Las Vegas Hacienda v. CAB, 298 F.2d 430 (9th Cir. 1962), cert. denied, 369 U.S. 885 (1962).

38/ POC-B-14-3. See 14 CFR Parts 207 and 208, reissued by the Department effective January 1, 1985 (50 Fed. Reg. 452, January 4, 1985).

39/ POC-B-6-154 through 155; POC-B-6-200 through 201; POC-B-6-213 through 214; POC-B-6-218 through 219. Mr. Turrill testified at the hearing on the motion for preliminary injunction that "as a matter of policy, Ports of Call has sent our local [FAA] office our flight schedule for every month for the last three years, and the charters show up on that flight schedule very clearly." POC-B-6-155.

40/ POC contends that an FAA memo dated July 17, 1981, commenting on the Club's disclosure of its new Part 125 authority in its May 1981 newsletter constituted such approval (POC-B-6-218). That memo stated in pertinent part, "we do not consider this [newsletter] article to be in noncompliance

(footnote continued on page 22)

Consent Orders approved four of the nonmember charters to which the CAB's Enforcement Division registered objection, since four charters embraced by the initial Consent Order were not prohibited by the terms of the amended Order. 41/ But the FAA never "approved" those charters. Rather, for purposes of settlement the agency agreed to forego further enforcement against Club operations. Indeed, the U.S. Attorney's Trial Brief stated that during FAA settlement negotiations

> "the FAA's Regional Counsel, Northwest Mountain Region, Daniel J. Peterson, in a telephone conversation with the CAB's Associate General Counsel, Enforcement Division, Kenneth G. Caplan, stated that he did not disagree with the CAB's position that all of the flights in issue were in common carriage. However, for the FAA's purposes of settlement only, he was willing not to object to Ports of Call's conducting a very limited number of charter flights not arranged through an intermediary." POC-B-6-57.

Although the applicant alleged that the FAA was the only or the primary agency with jurisdiction over it, in fact the FAA and the CAB were each charged with the regulation of aspects of air transportation; and that jurisdictional duality continues in the post-CAB sunset environment. The responsibilities of the FAA and CAB (now DOT) in air travel are generally separate and discrete, but they sometimes overlap. In the context of this proceeding, some overlapping occurred. FAA-issued Part 125 certificates, as noted above, prohibit holding out to the public (14 CFR 125.11(b)) --

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(footnote continued from page 21)
with FAR 125.11(b) in that there has been no advertisement to the general public" and that "the article is also worded in a manner which meets the general indicators of private carriage" (POC-B-14-38). While that memo indicates that the newsletter itself was not a violation, the memo clearly does not constitute an approval or endorsement of the Club's operations. Testimony at the hearing on the motion for preliminary injunction that the FAA's Peterson approved one or both of the Club's June 30, 1984 charter flights (POC-B-6-159 through 160) was contradicted by the U.S. Attorney's Trial Brief submitted in the case (POC-B-6-58) and was not supported by documentary proof.

41/ These four involved the Denver Broncos and Seattle Seahawks professional football teams and the football teams of Brigham Young University and Colorado State University. See POC-B-6-412; POC-B-6-415; and POC-B-6-18.

and section 401 of the Federal Aviation Act, enforced formerly by CAB and now by DOT, bars carriers not licensed under that section from engaging in common carriage. 42/ Moreover, Ports of Call was aware that the regulation of air transportation fell under the rubric of both agencies. Thus Mr. Turrill admitted at the preliminary injunction hearing:

> "Q. Now Mr. Peterson at all times indicated to you that in his action in allowing you to transport first the initial 19 charters and then the four that he could not and would not be able to control the actions of the CAB; isn't that correct?
>
> "A. That is correct." (POC-B-6-158 through 159.)

Mr. Turrill further acknowledged:

> "A. . . . I have been aware of the CAB all along."
>
> "Q. Were you aware of their licensing function?
>
> "A. That is correct." (POC-B-6-202.)

Indeed, an FAA Memorandum dated September 1, 1982, submitted by the applicant, states that "the two types of authority are independent of each other. . . . CAB economic authority . . . is entirely the responsibility of the air carrier and not a function of the FAA safety certification and compliance program 43/

Finally, Ports of Call argues that it was caught between inconsistent positions taken by two government agencies, contending that the CAB threatened legal proceedings against the club if it ran charters which the FAA had allowed. The Club's contention that it was "caught" between the rules of two government agencies is, regardless of the rules' consistency, a mischaracterization of its position. Applicant's need to pass scrutiny

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42/ Section 401 of the Federal Aviation Act (49 U.S.C. 1371) confers jurisdiction on the Department to issue certificates to "air carriers" to engage in "air transportation" (as defined by section 101 of the Act, 49 U.S.C. 1301) and to investigate and enforce compliance with the Act (section 1102, 49 U.S.C. 1482).

43/ POC-B-6-96. Ports of Call was supplied a copy of this Memorandum by the Enforcement Division's letter of August 6, 1984. See POC-B-6-20.

by the FAA and the CAB was not a "whipsaw", but simply a prerequisite for operating legally. Ports of Call, as a nonprofit corporation subject to IRS review (POC-C, p. 3, ¶ 10b), is undoubtedly aware of the possibility of multi-agency scrutiny of its activities. 44/ When confronted with the demands of the FAA and the CAB, it may well have chosen to settle with the FAA only, as the less demanding of the two regulatory authorities, in order to claim conflict and harassment. POC's characterization of the Board as a 'lame duck' agency in its "death throes," with the implication that the Board's concerns carried less weight as a result (POC-B-6-41; POC-B-6-441) provides no justification for its conduct, since those same regulatory concerns continue after the CAB's sunset.

The policies of the two agencies concerning common carriage have indeed at times lacked consistency. In this case the FAA chose not to charge Ports of Call with a rules violation concerning charters which the CAB enforcement unit believed merited prosecution; and the CAB and FAA have previously disagreed in their interpretation of what constitutes common carriage. 45/ But even if the agencies' posture regarding enforcement against POC was inconsistent, its duty to comply with the Act remained unchanged. The fact that one agency with discretionary enforcement authority chooses to pursue enforcement measures and another does not offers no immunity to enforcement by the former. Thus, even if the agency postures were not consistent, Ports of Call was required to satisfy the

44/ Government regulation of particular business activity is commonly the responsibility of two or more agencies. For example, an individual Federal taxpayer may be charged with wrongdoing by the IRS in a civil proceeding (26 U.S.C. 7801) and/or by the Department of Justice in a criminal proceeding (28 U.S.C. 547) for the same act or omission. See United States v. LaSalle National Bank, 437 U.S. 298, 308, 312, 315 (1978).

45/ The FAA Regional Counsel, in response to a request for a legal opinion from Ports of Call regarding an advertising matter, expressly disagreed with a previously issued opinion of the CAB General Counsel that certain advertising did not constitute "holding out." POC-B-14-28.

concerns of each. 46/ Moreover, it is clear that the TRO and preliminary injunction did not affect the legality of the proposed flights. Those orders did not determine or alter the legality of the operations themselves but merely prevented the CAB from ruling on the allegations made and remedies sought by the Enforcement Division, a determination which would itself have been subject to judicial review. 47/

Conclusion. While Ports of Call's operating history has not been free from regulatory concerns, we conclude that the Club has demonstrated the requisite disposition to comply with applicable laws and regulations. Despite FAA and CAB guidance it may have been sincerely confused concerning its Part 125 obligations. The FAA regional office, at least partially through the Club's own efforts, was kept abreast of its activities -- and when, after three years of Part 125 operations, the FAA cited the Club for alleged violations, the applicant promptly negotiated a settlement, cancelling numerous charters in the process. Similarly, the Club's posture regarding the 1976 and 1978 FAA citations was marked by cooperation and dispatch. Concerning the CAB, Ports of Call contended that the agency lacked power over it, but the record shows that shortly after the Enforcement Division made contact the Club began preparing section 401 applications and made efforts to reach an accommodation with the Division. On one occasion it cancelled two charters on one day's notice at the Division's request. When the applicant apparently believed itself caught between the directives of two government agencies, it sought relief in court. In winning its motions for a temporary restraining order and then a

46/ Even though both agencies are now under the Department of Transportation umbrella, enforcement authority over the two statutes is lodged within different authorities (FAA and the DOT Office of Aviation Enforcement and Proceedings); and differing enforcement approaches under those statutes may persist absent interdepartmental coordination through the Secretary, who has the ultimate responsibility for enforcement determinations by either the FAA or AEP. 49 CFR 1.41, 1.45, 1.47; 14 CFR 302.1753, 302.1757.

47/ Section 1006 of the Federal Aviation Act (49 U.S.C. 1486).

preliminary injunction, Ports of Call showed that its position had some plausibility. Finally, Ports of Call apparently has observed the conditions of those decrees, has subsequently operated no further non-membership charters, 48/ and has acknowledged that as a section 401 air carrier all of its flights (including those carrying only Club members) will be subject to regulation under that section. 49/ While Ports of Call's actions when confronted with FAA and CAB intercession may have been combative, they cannot fairly be characterized as contumacious or otherwise in disregard of applicable authority. In addition, the Club appears to be diligently pursuing noise-reduction technology at substantial expense in attempting to meet FAA requirements. Under all these circumstances, we conclude that Ports of Call satisfies the compliance element of the Act's fitness requirements. 50/

ENVIRONMENTAL AND ENERGY ISSUES

Under section 312.10 of the Civil Aeronautics Board's Regulations 51/ an environmental assessment or impact statement was required when there is (1) first time service to an airport; (2) first time service to an airport

48/ The applicant represents on brief that it has fully complied with the conditions of the TRO and preliminary injunction. POC Br., pp. 28, 31.
49/ PHC Tr. 21-22. See Independent Air, Inc. Fitness Investigation, 103 CAB 1, n. 2 (1983), Order 83-8-42, p. 2, n. 2.
50/ See, e.g., Independent Air, Inc. Fitness Investigation, 103 CAB 1 (1983), Order 83-8-42; Aeromar, Foreign Permit, 57 CAB 492, 500-501 (1971); Transportes Aereos Nacionales, Foreign Permit, 31 CAB 246, 248 (1960); Foreign Charter Carriers, Permit Renewals, 72 CAB 97, 198-99 (1976). Compare Air America, Inc. Fitness Investigation, Docket 42034 Recommended Decision of Administrative Law Judge Ronnie A. Yoder served October 1, 1984, where a finding of negative compliance disposition was based, inter alia, on the applicant's continuing to engage in conduct despite Enforcement Division warnings to desist and its misrepresentation of facts and failure to adhere to promises made in affidavits filed with the Enforcement Division and the State of Michigan Attorney General's office. See Recommended Decision, pp. 12-13, 16-20.
51/ Part 312 of the Board's regulations was rescinded by the Department effective January 1, 1985 (50 Fed. Reg. 2374, January 16, 1985); but this investigation was processed under those regulations prior to January 1, 1985, they have become the law of this case, and their applicability to this proceeding is continued by the CAB Sunset Act, which provides that "all orders, determinations, rules [and] regulations. . . . (1) which have been issued, made, granted, or allowed to become effective by . . . any agency or official thereof . . . in the performance of any function which
(footnote continued on page 27)

by jet, SST, helicopter or V/STOL aircraft; or (3) service that would substantially increase the scope of operations at an airport. Section 312.11(b) of the regulations provided that an environmental impact statement (EIS) or an environmental assessment shall be prepared when the responsible Board official determines that any of the actions which normally do not require preparation of an EIS or an environmental assessment have the potential to affect the environment significantly. The grant of authority in this proceeding will not result in any of the actions listed in section 312.10, and we conclude that this proceeding will not have a significant environmental impact.

Section 313.4 of the Department's regulations defines a major regulatory action requiring an energy statement as any action which "may cause a near-term net annual change in aircraft fuel consumption of 10 million . . . gallons or more". Ports of Call forecasts consumption of 4.4 million gallons in the first normalized year (POC-A-1, p. 4). Thus, it would not exceed the 10 million gallon threshold established in section

(footnote continued from page 26)
is transferred by section 1601(b) of the Federal Aviation Act of 1958 or section 4 of this Act from the Civil Aeronautics Board to another agency, and (2) which are in effect on December 31, 1984, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the head of the agency to which such function is transferred, or other authorized officials, a court of competent jurisdiction, or by operation of law" and that "the transfers of functions made by section 1601(b) of the Federal Aviation Act of 1958 and section 4 of this Act shall not affect any proceedings or any application for any license, permit, certificate, or financial assistance pending at the time such transfer take effect before the Civil Aeronautics Board; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings . . . as if such sections 1601(b) and 4 had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law." P. L. 98-443, Section 12(a), (b); 49 US (app.) 1556(a), (b). See Tampa-Yucatan Service Case, Recommended Decision served February 6, 1985, p. 17, n. 20, adopted by Order 84-5-58. See also Westates Airlines Fitness Investigation, Order 85-4-25, p. 16, n. 27. Accordingly, regulations implementing the National Environmental Policy Act (40 CFR 1500-1508) and the Department's procedures for considering environmental impacts (DOT Order 5610.1C) have not been applied in this proceeding.

313.4(a)(1). Moreover, the Board previously indicated that irrespective of additional fuel consumption, it would not restrict awards based on energy considerations in the absence of an industry-wide determination of appropriate fuel use, and no argument has been advanced to alter that approach. 52/ Accordingly, we conclude that the awards in this proceeding are consistent with the Energy Policy and Conservation Act and that no energy statement is required.

SECTION 408 AND 409 QUESTIONS

Section 408(a)(3) of the Act makes it unlawful without approval for any air carrier to purchase, lease, or contract to operate all or a substantial portion of the properties of any person substantially engaged in the business of aeronautics. Section 408(a)(6) makes it unlawful without approval for an air carrier to acquire control of any person substantially engaged in the business of aeronautics.

As noted above, Ports of Call has entered into a limited partnership agreement, known as Project 80, Ltd., with A.B. Stewart, president of Aviation Technical Support, Inc., to develop, produce, and sell a B-707 aircraft nacelle which would conform to the noise restrictions of FAR Part 36 (POC-A-4, p. 1; see discussion pp. 9-10, supra). The applicant acknowledges and AEP agrees that Project 80 is substantially engaged in the business of aeronautics (PHC Tr. 29-30; AEP Br., p. 14). Both the applicant and AEP argue that the relationship between Ports of Call and ATS falls outside the reach of section 408, because under the terms of the agreement (POC-B-16) Ports of Call, as a limited partner, supposedly exercises no control over the project (POC Br., pp. 9-10; AEP Br., pp. 13-14). 53/ Nevertheless, since the applicant has supplied virtually all

52/ See Miami-Los Angeles Competitive Nonstop Case, Order 76-3-93, pp. 36-37.

53/ See Section 5.1 of the agreement, POC-B-16-7. Mr. Stewart is the general partner of Project 80. POC-A-4, p. 5; POC-B-16-16.

of the funding for the Project, we cannot accept the suggestion that POC does not or cannot control the partnership within the meaning of the Act. Financial backing is a significant indicator of control. 54/ Hence, we find that POC's acquisition of the partnership constituted control within the meaning of Section 408 without CAB approval or exemption in violation of the Act. 55/ However, it appears that the applicant did not file for approval or exemption because it was unaware of the Act's requirement, and we see little potential for harm to competition or to the public interest in Project 80. There is no evidence in the record that ATS will be restricted in its sales of noise-reduction nacelles to other air-transportation entities or that competitors of the applicant will encounter difficulties in securing nacelles from other sources. Under these circumstances, we conclude that the transaction should be approved under Section 408 of the Act. 56/ The record discloses no interlocking relationships requiring approval under section 409 of the Act.

CITIZENSHIP

The Federal Aviation Act provides that certificates to perform air transportation may only be issued to a "U.S. citizen," which is defined in section 101(16)(c) of the Act as:

> "a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions."

Ports of Call is organized and incorporated under the laws of the State of Colorado. Its President, Robert L. Turrill, is a U.S. citizen, as are the members of the Board of Directors and the managing officers of the

54/ Premiere Airlines Fitness Investigation, Order 82-5-11.
55/ See Bergt-AIA-Western Section 408 Violations, Order 82-5-10.
56/ See Flight International Airlines Fitness Investigation, Order 84-11-66; National Airlines Acquisition, Order 79-12-163; Order 84-6-98.

company (POC-A-10). The applicant further states that over 99% of its membership, by which it is owned and controlled, is comprised of citizens of the United States (POC-A-1, pp. 1-2). Therefore, Ports of Call is a U.S. citizen within the meaning of Section 101(16) of the Act.

CONCLUSIONS

After consideration of the entire record and the contentions of the parties, we find and conclude that Ports of Call Travel Club, Inc. is a citizen of the United States within the meaning of the Federal Aviation Act of 1958, as amended, and is fit, willing, and able to engage in charter interstate, overseas, and foreign air transportation of persons, property, and mail, and to comply with the provisions of the Act and the rules, regulations, and requirements of the Department of Transportation thereunder, and that the applicant's existing control relationship with Project 80, Ltd., should be approved under section 408 of the Act. Accordingly, the Department should issue orders and certificates in the usual form granting the requested authority and approving the control relationship.

Ronnie A. Yoder
Administrative Law Judge

Dated: May 10, 1985

FOR OFFICIAL USE ONLY

U.S. Department of Transportation
Office of the Secretary of Transportation

Office of Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 9 1985

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On June 13, 1985, I transmitted a letter to you with an enclosed proposed order on the application of Midway Airlines, Inc. in Docket 42790 for your consideration under section 801(a) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. The proposed order, if not disapproved, would have transferred Air Florida's certificate authority for several international routes to Midway and cancelled Air Florida's domestic and international charter certificate authority and its domestic scheduled service certificate authority.

We would like to withdraw that item and submit, for your consideration, the substitute proposed order enclosed herein. This proposed order is identical to the earlier one, except that it clarifies that the cancellation of Air Florida's authority will not become effective until Midway has acquired Air Florida's assets. The clarification became necessary when the parties were unable to close the acquisition as soon as expected. The substitute order also corrects a typographical error in the second ordering paragraph.

We deeply regret any inconvenience this may have caused you and your office.

The enclosed proposed order will adopt the Department's decision to transfer Air Florida's certificate authority for foreign routes to Midway Airlines, Inc., unless you disapprove it within 60 days of its transmittal.

If you should decide earlier that you will not disapprove, please advise us to that effect; this will allow the earlier issuance of the order.

We are submitting the proposed decision to you before publication under the provisions of section 801(a) of the Federal Aviation Act of 1958. In accordance with Executive Order 11920, however, we plan to release all unclassified portions of the decision on or after the sixth day following this transmittal unless notified by your Assistant for National Security Affairs.

Sincerely,

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 9th day of July, 1985

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MIDWAY-AIR FLORIDA ACQUISITION :
SHOW CAUSE PROCEEDING : Docket 42790
- - - - - - - - - - - - - - - - - -

ORDER

By Order 85-6-33 (June 11, 1985) the Department approved the application of Midway Airlines, Inc. under section 408 of the Federal Aviation Act, 49 U.S.C. 1378, to acquire virtually all of the assets of Air Florida, Inc. and to acquire control of Midway Airlines (1984), Inc. Midway (1984) is a wholly-owned subsidiary of Midway which will operate the services operated earlier by Air Florida, Inc. under the name "Midway Express." In Order 85-6-33, the Department indicated that it would consider the transfer of Air Florida's certificate authority in a separate order so that Midway could close its acquisition more expeditiously.

In Order 85-4-3 (April 1, 1985) the Department tentatively found that Air Florida's operating authority should be transferred to Midway (subject to the Department's final decision in the Miami-London Competitive Service Case, Docket 42758). That authority includes Air Florida's certificates for Routes 197, 197-F, 253, 261 and 396, as well as its

interstate, overseas and foreign charter air transportation certificates. 1/ The Department directed interested persons to show cause why this tentative finding should not be made final. Since no objections to the Department's show cause order were received, we will transfer to Midway all of Air Florida's certificate authority, except as noted below. Instead of repeating our findings and conclusions in Order 85-6-33, we incorporate them here by reference.

In the order to show cause the Department stated that it would not transfer Air Florida's Miami-London authority (Route 261) if the Department determined to revoke Air Florida's authority for that route in Docket 42758. By Order 85-5-87 (May 20, 1985), the Department did revoke that authority, so it will not be transferred to Midway. Midway, like Air Florida, holds interstate and overseas scheduled authority, as well as worldwide charter authority. 2/ Accordingly, we need not reissue either Air Florida's

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1 Air Florida holds the following certificate authority:

Route No.	Type of Authority	Issued by Order Number
197	Scheduled Interstate and Overseas	81-12-131
197-F	Scheduled Foreign (South and Central America, Caribbean and Europe)	83-8-6
253	Miami-Costa Rica	80-12-16
261	Miami-London	81-1-15
396	Miami-Madrid-Tel Aviv	83-8-116
	Interstate and overseas charter	79-9-116
	Foreign charter	79-10-138

2 Midway holds worldwide charter authority as an incident of its domestic scheduled authority. See Order 83-2-30.

certificate for Route 197, or its charter certificates, and will instead cancel them on the closing of Midway's acquisition of Air Florida's assets. Until then, Air Florida will retain that certificate authority.

Since the Department is proposing to transfer Air Florida's foreign certificate authority, this order must be referred to the President for review under section 801.

ACCORDINGLY:

1. The Department cancels the certificates of Air Florida for Route 197 and for charter air transportation, issued by Orders 81-12-131, 79-9-116 and 79-10-138, effective on the date that Midway Airlines, Inc. has completed its acquisition of Air Florida's assets.

2. The Department transfers to Midway Airlines, Inc. certificates for Routes 197-F, 253 and 396, in the form attached.

3. Unless disapproved by the President of the United States under section 801 of the Act, 49 U.S.C. 1461, this order shall become effective on the 61st day after submission to the President or upon the date of receipt of advice from the President that he does not intend to disapprove the Department's order under that section, whichever occurs earlier. 3/

4. The attached certificates shall be effective 30 days after the service date of this order, subject to the extension of that effective date in accordance with the provisions of those certificates.

MATTHEW V. SCOCOZZA
Assistant Secretary for Policy
and International Affairs

(SEAL)

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3 This order was transmitted to the President on July 9, 1985. The 61st day is September 8, 1985.

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended and reissued)

for Route 197-F

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MIDWAY AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules and regulations issued under it, to engage in foreign air transportation of persons, property and mail, as follows:

1. Between a point or points in the United States and a point or points in the Bahama Islands.

2. Between the terminal point Miami/Ft. Lauderdale, FL; the intermediate points Freeport, George Town, Great Harbor Cay, Marsh Harbor, Nassau, Rock Sound, Treasure Cay and West End, Bahama Islands; and the coterminal points South Caicos, Turks and Caicos, B.W.I., and Kingston and Montego Bay, Jamaica.

3. Between a point or points in the United States and a point or points in Belize, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

4. Between the terminal point Miami, FL; the intermediate points Freeport, George Town, Great Harbor Cay, Marsh Harbor, Nassau, Rock Sound, Treasure Cay and West End, Bahama Islands; Grand Turk, Providenciales, Turks and Caicos, B.W.I.; and the terminal point Puerto Plata, Dominican Republic.

5. Between the terminal point Miami, FL; the intermediate point Port-au-Prince, Haiti; and the terminal point Santo Domingo, Dominican Republic.

6. Between the terminal point New York, NY-Newark, NJ, and the coterminal points Puerto Plata and Santo Domingo, Dominican Republic, and Port-au-Prince, Haiti.

7. Between the coterminal points New York, NY-Newark, NJ, Houston, TX, Washington, D.C.-Baltimore, MD, and Miami-Ft. Lauderdale, FL; the intermediate points Ponce and Mayaguez, P.R.; Providenciales, Grand Turk, South Caicos, Turks and Caicos, B.W.I.; Barbados, Barranquilla and San Andres, Colombia; Port-au-

Prince and Cape Haitien, Haiti, Pointe-a-Pitre, Guadeloupe; St. Maarten; and St. Kitts; and the terminal point Fort-de-France, Martinique.

8. Between a point or points in the United States and Shannon, Ireland; Copenhagen, Denmark; Oslo, Stavanger, and Bergen, Norway; Stockholm and Gothenburg, Sweden; Helsinki, Finland; Frankfurt, the Federal Republic of Germany; or a point or points in the Netherlands, Belgium and Switzerland.

9. Between the coterminal point Miami, FL; the intermediate point Bermuda; and the coterminal points Brussels, Belgium and Dusseldorf, Germany.

10. Between Miami, FL and Prestwick, Scotland.

11. Between the coterminal points Chicago, IL; New York,NY-Newark, NJ-White Plains, NY and the terminal point Bermuda.

12. Between a point or points in the United States and a point or points in Chile.

This authority is subject to the following terms, conditions and limitations:

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department issued under, or for the purpose of requiring compliance with, such treaties and agreements.

(2) The holder may continue to serve regularly any named point through the airport it last used regularly to serve that point before the effective date of this certificate. Upon compliance with procedures prescribed by the Department, the holder may, in addition, regularly serve a named point through any convenient airport.

(3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

(4) The holder's authority to engage in the transportation of mail is limited to carriage on a nonsubsidy basis, i.e., on a service mail rate to be paid entirely by the Postmaster General.

(5) The holder is authorized to carry local traffic between and among U.S. points named within each segment of this certificate on flights in foreign air transportation.

(6) The holder may serve a point or points in Chile via other existing route segments in this certificate; Provided, that such service is

conducted in accordance with all treaties and agreements between the United States and other countries.

(7) The holder may combine service authorized by segments 8, 9, 10 and 11 of this certificate; Provided, that such service is conducted in accordance with all treaties and agreements between the United states and other countries.

Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department may prescribe in the public interest.

This certificate shall be effective [30 days from service date]; Provided, however, that prior to the date on which the certificate would otherwise become effective, the Department, either on its own initiative or upon the timely filing of a petition for reconsideration of the order issuing this certificate, may by order or orders extend such effective date from time to time.

The Department of Transportation has executed its certificate and affixed its seal on July 9, 1985.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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EXPERIMENTAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as reissued)

for Route 253

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MIDWAY AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules and regulations issued under it, to engage in foreign air transportation of persons, property and mail, as follows:

Between the terminal point, Miami, Florida, and the terminal point San Jose, Costa Rica.

This authority is subject to the following terms, conditions and limitations:

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries. The exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department issued under them or for the purpose of requiring compliance with them.

(2) The holder may continue to serve any named point through the airport it last used regularly to serve that point before the effective date of this certificate. Upon compliance with procedures prescribed by the Department, the holder may, in addition, regularly serve a named point through any convenient airport.

(3) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will in fact materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative and low-priced air transportation it proposed in its application for this authority.

(4) The holder's authority to engage in the transportation of mail is limited to carriage on a nonsubsidy basis, i.e., on a service mail rate to be paid entirely by the Postmaster General.

(5) The exercise of the authority granted here is subject to the holder's first obtaining from the government of Costa Rica such operating rights as may be necessary.

Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department may prescribe in the public interest.

This certificate shall be effective [30 days from service date]; Provided, however, that prior to the date on which the certificate would otherwise become effective, the Department, either on its own initiative or upon the timely filing of a petition for reconsideration of the order issuing this certificate, may by order or orders extend such effective date from time to time. In any event, this certificate shall expire December 5, 1985.

The Department of Transportation has executed its certificate and affixed its seal on July 9, 1985.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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EXPERIMENTAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as reissued)

for Route 396

- - - - - - - - - - -

MIDWAY AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules and regulations issued under it, to engage in foreign air transportation of persons, property and mail, as follows:

Between the terminal point, Miami, Florida, the intermediate point Madrid, Spain and the coterminal point Tel Aviv, Israel.

This authority is subject to the following terms, conditions and limitations:

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries. The exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department issued under them or for the purpose of requiring compliance with them.

(2) The holder may continue to serve any named point through the airport it last used regularly to serve that point before the effective date of this certificate. Upon compliance with procedures prescribed by the Department, the holder may, in addition, regularly serve a named point through any convenient airport.

(3) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will in fact materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative and low-priced air transportation it proposed in its application for this authority.

(4) The holder's authority to engage in the transportation of mail is limited to carriage on a nonsubsidy basis, i.e., on a service mail rate to be paid entirely by the Postmaster General.

(5) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

(6) In conjunction with the service authorized here, the holder may provide service beyond Madrid to any European point named on its certificate for Route 197-F.

Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department may prescribe in the public interest.

This certificate shall be effective [30 days from service date]; Provided, however, that prior to the date on which the certificate would otherwise become effective, the Department, either on its own initiative or upon the timely filing of a petition for reconsideration of the order issuing this certificate, may by order or orders extend such effective date from time to time. In any event, this certificate shall expire August 29, 1988.

The Department of Transportation has executed its certificate and affixed its seal on July 9, 1985.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

U.S. Department of Transportation
Office of the Secretary of Transportation

Office of Assistant Secretary

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 17 PAID

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I transmit the Department's proposed order on the application of Trans International Airlines, Inc., in Dockets 42591 and 42592, for your consideration under section 801(a) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978. The order will issue a certificate to the applicant and adopt the Department's tentative decision in its Order to Show Cause 85-1-31 (enclosed) unless you disapprove it within 60 days of this transmittal.

If you should decide earlier that you will not disapprove, please advise us to that effect; this will allow the earlier issuance of the order.

We are submitting the proposed decision to you before publication under the provisions of section 801(a) of the Federal Aviation Act of 1958. In accordance with Executive Order 11920, however, we plan to release all unclassified portions of the decision on or after the sixth day following this transmittal unless notified by your Assistant for National Security Affairs.

Respectfully yours,

Matthew V. Scocozza
Assistant Secretary, for Policy
and International Affairs

Enclosures

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 17th day of July, 1985

Applications of TRANS INTERNATIONAL AIRLINES, INC. for certificates of public convenience and necessity under section 401(d)(3) of the Federal Aviation Act to engage in interstate, overseas and foreign air transportation of persons	Dockets 42591 42592

ORDER REISSUING CERTIFICATE

By Order 85-7-49, issued July 17, 1985, we made final our tentative findings and conclusions stated in it and amended and reissued the certificate of public convenience and necessity issued to Trans International Airlines, Inc., by Order 84-10-50 authorizing it to engage in interstate and overseas charter air transportation of property and mail to include the transportation of passengers.

By this order, we are amending and reissuing the companion certificate, issued by Order 84-12-30, authorizing Trans International to engage in foreign air transportation of property and mail to also include passengers. Instead of repeating our findings and conclusions in Order 85-7-49, we incorporate them here by reference.

ACCORDINGLY,

1. We amend and reissue the certificate of public convenience and necessity issued to Trans International Airlines, Inc. by Order 84-12-30 in the form attached;

2. The authority granted here shall become effective five days after the Department has received from the FAA a copy of the applicant's Air Carrier Operating Certificate and revised Operations Specifications; Provided, however, that the Department may stay the effectiveness of this authority prior to that date; 1/

1/ Since TIA already holds a Part 121 certificate from the FAA to conduct cargo operations, our action here delaying the effectiveness of its amended and reissued authority pertains only to the passenger portion of that authority.

3. This order shall become effective on the 61st day after its submission to the President of the United States, or upon the date of receipt of advice from the President that he does not intend to disapprove this order under section 801(a) of the Act, whichever occurs earlier, unless he disapproves it under that section; 2/ and

4. We will serve a copy of this order on the persons listed in Attachment A.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

2/ This order was transmitted to the President on July 17, 1985. The 61st day is September 16, 1985.

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR CHARTER AIR TRANSPORTATION
(as reissued)*

TRANS INTERNATIONAL AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations issued under it, to engage in the foreign charter air transportation of persons, property and mail:

Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and

a. Any point in Canada;

b. Any point in Mexico;

c. Any point in Jamaica, the Bahama Islands, Bermuda, Haiti, the Dominican Republic, Trinidad, Aruba, the Leeward and Windward Islands and any other foreign place in the Gulf of Mexico or the Caribbean Sea;

d. Any point in Central or South America;

e. Any point in Australasia, Indonesia or Asia as far west as longitude 70 degrees east via a transpacific routing; and

f. Any point in Greenland, Iceland, the Azores, Europe, Africa and Asia as far east as, and including, India.

This authority is subject to the terms, conditions and limitations prescribed by the Department of Transportation's Regulations for charter air transportation and to the following additional conditions:

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*This certificate is being reissued to (1) add passenger authority; and (2) remove obsolete references to the Civil Aeronautics Board.

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.

(2) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign government such operating rights as may be necessary.

(3) The exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall be effective

The Department of Transportation has executed this certificate and affixed its seal on July 17, 1985.

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

Attachment A

SERVICE LIST

Mr. William A. Hardenstine
President
Trans International Airlines, Inc.
Box 18
Standiford Field
Louisville, Kentucky 40209

Mr. Jeffrey A. Manley
Burwell, Hansen, Manley & Peters
1706 New Hampshire Avenue, N.W.
Washington, D.C. 20009

Mr. William T. Brennan
Chief, Air Transportation Division
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Mr. Gary Green
Air Line Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Ms. Sarah Perry Fleischer
Air Line Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mr. Ben C. Elliott
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 17th day of July, 1985

Applications of	
TRANS INTERNATIONAL AIRLINES, INC.	Dockets 42591 42592
for certificates of public convenience and necessity under section 401(d)(3) of the Federal Aviation Act to engage in interstate, overseas and foreign charter air transportation of persons	

FINAL ORDER

By Order 85-1-31, issued January 28, 1985, we directed all interested persons to show cause why we should not make final the tentative findings and conclusions stated in it and amend and reissue the certificates of public convenience and necessity issued to Trans International Airlines, Inc. (TIA) to authorize it to engage in interstate, overseas, and foreign charter air transportation of passengers in addition to property and mail.

The Association of Flight Attendants (AFA) filed an answer objecting to the show-cause order on February 15, 1985. 1/ AFA represents the flight attendants employed by Transamerica Airlines (TV), which, like TIA, is a wholly-owned subsidiary of Transamerica Corporation (TAC). The Civil Aeronautics Board tentatively found TIA fit and approved TAC's common control of it and TV by Order 84-7-60 (July 19, 1984); by Order 84-10-50 (October 12, 1984), these findings were made final. 2/

1/ On March 13, the Air Line Pilots Association (ALPA) filed an answer to Order 85-1-31 together with a motion for leave to file late. We will grant ALPA's motion. We note, however, that ALPA's answer and AFA's are nearly identical.

2/ The Board found TIA fit, willing, and able to engage in domestic all-cargo air transportation and in interstate, overseas, and foreign charter cargo air transportation. It also approved TAC's and Midcontinent Air Investors, Inc.'s acquisition of Central American International, whose certificates for interstate and overseas charter air transportation and all-cargo air transportation were reissued to TIA. The Board rejected arguments that these transactions were inconsistent with the public interest as articulated in section 102(a)(3) of the Act; moreover, in approving the acquisition, the Board refused to impose Labor Protective Provisions.

AFA makes two arguments. First, it urges the Department to deny TIA's application as contrary to the public interest. According to AFA, TAC intends to use the new authority to expand its air transportation operations without having to meet its current labor obligations. In particular, AFA maintains that TAC plans to divert TV's existing traffic to TIA. This will displace employees of TV, some of whom have already been placed on furlough. TIA, in turn, will hire "unemployed workers who are desperate for work and willing to take a job at substandard wages." 3/ AFA contends that allowing TAC to escape the obligations of TV's collective bargaining agreements in this manner would violate the policy directive in section 102(a)(3) of the Act to "encourage fair wages and equitable working conditions."

AFA argues that the Civil Aeronautics Board erred in consistently construing section 102(a)(3) as being satisfied by a showing of compliance with section 401(k)(4), which only requires certificated carriers to "comply with Title II of the Railway Labor Act." 4/ In AFA's view, section 102(a)(3) requires the Department actively to encourage fair wages and equitable working conditions as an element of the public interest. AFA claims that allowing TAC to establish a non-union alter-ego to TV will discourage fair wages and working conditions -- by allowing experienced employees to be displaced by inexperienced and less skilled employees -- in violation of section 102(a)(3). Also, allowing substandard wages and benefits at one carrier will have a ripple effect, depressing labor standards throughout the industry and engendering labor strife.

In the alternative, AFA argues that if the Department decides to grant TIA's application, it should impose labor protective provisions (LPPs) in order to mitigate the economic harm to employees of TV. Without LPPs, TV's employees will inevitably see their career prospects deteriorate as they lose their jobs to the lower-paid, non-union employees of TIA. The Board's consistent refusal to provide LPPs whenever the holding company of an established carrier created a non-union subsidiary, AFA asserts, was in error, and the Department should not follow suit.

TIA filed a response to AFA's objections on February 25. 5/ TIA points out that public convenience and necessity is technically at issue in an application for foreign charter authority, but that the Board found that awarding such authority is generically consistent with the public convenience and necessity. Therefore, TIA argues, the public convenience and necessity is not subject to further review here. Citing ALPA v. CAB, 643 F.2d 935 (2d Cir. 1981), TIA also argues that labor protection is not

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3/ Answer at 3.

4/ See, New York Air Fitness Investigation, Order 80-12-57 (December 11, 1980), at 15-20.

5/ On March 19, TIA filed an answer to ALPA's objections, asking us to accept its response to AFA's answer as its response to ALPA's nearly identical objections, if we grant ALPA's motion for leave to file late. We assent.

relevant to fitness issues. 6/ Finally, TIA argues that the points AFA raises here have all been considered and rejected by the Board several times over.

We have decided to make final our tentative findings and conclusions in Order 85-1-31. Thus, we will amend and reissue TIA's certificate of public convenience and necessity to authorize it to engage in interstate, overseas, and foreign charter air transportation of passengers in addition to property and mail. In so doing, we reject AFA's and ALPA's arguments that granting this additional authority is not consistent with the public interest or the public convenience and necessity. We also decline to impose labor protective provisions.

We will deal with the request that we impose LPP's first. The CAB previously considered the LPP issue with respect to TIA in connection with its parent company's acquisition of Central American International (renamed TIA) and decided not to impose LPP's. The LPP issues here are similar to the issues raised there, except that this proceeding presents the question of whether to impose LPP's when a carrier seeks to expand the scope of its certificate authority.

The CAB did not impose LPP's in such circumstances. Rather, LPP's were imposed on certain control transactions arising under section 408 of the Act and, before 1978, a few transactions involving route transfers under sections 401(h) and 408. They were never imposed as a condition solely to the grant of a certificate of public convenience and necessity or to a finding that a carrier is fit to engage in air transportation. In large measure this policy was the result of the Board's belief that the only issues in certification cases are whether the carrier is fit, willing, and able to provide the air transportation proposed and whether the grant of the authority it requests is consistent with the public convenience and necessity. So long as the CAB was reasonably convinced that the proposed services would fulfill a service need, it did not interfere with management prerogatives on how the airline would be operated.

Nonetheless, AFA and ALPA argue that we must consider the LPP issue as a part of our finding of public convenience and necessity for TIA's

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6/ We note that the Board did hold in the Frontier Horizon, Inc., Fitness Investigation that section 102(a)(3) is to be applied in a certification case "only in the context of the issue of consistency with the public convenience and necessity." Order 83-10-90 (October 24, 1983) at 3 (footnote omitted). It found that, in domestic fitness cases, where its authority to make public convenience and necessity findings had expired, the need for fair wages and equitable working conditions would not be at issue. Id. Subsequently, however, the Board did consider the applicants' conduct toward employees in fitness cases to the extent it might bear on their compliance disposition. Frontier Horizon, Inc. Fitness Investigation, Order 84-1-17 (January 6, 1984) (Order on Review); Application of Transamerica Corporation, Trans International Enterprises, Inc., and Midcontinent Air Investors, Inc., Order 84-7-60 (July 17, 1984) (Order to Show Cause and Denying Exemption).

foreign authority. 7/ We will not grant their request. To impose LPP's here would significantly expand our fitness and public convenience and necessity review. We would, for the first time, be looking beyond the needs of the traveling public and the market to dictate decisions to corporate management. Such an expansion would not be in the public interest. This perception of the limitations of our role in air carrier management decisions is also reflected in our LPP standards for merger cases. There too, the focus has been on the impact of a transition on the general public. As the CAB has stated, LPP's should be imposed only when there is a serious threat of disruption to the national air transportation system. Even if we were willing to employ this test in a public convenience and necessity context, and we are not, AFA and ALPA have presented no evidence of a threat to the national transportation system as a whole if LPP's are not imposed. Therefore, we find no basis for imposing LPP's on public convenience and necessity grounds.

AFA and ALPA also raise a fitness argument. They contend that TIA's application for additional authority should be also denied because TIA lacks the necessary compliance disposition. However, they have not supported their argument with specific facts that would rebut any of the tentative findings set forth in Order 85-1-31. 8/ Instead, they again argue that allowing TAC to establish TIA, a non-union carrier, will discourage fair wages and equitable working conditions in violation of section 102(a)(3), and that the CAB erred in holding that probable compliance with section 401(k)(4) satisfies section 102(a)(3) in the context of fitness applications and public convenience and necessity findings. We disagree. The CAB's interpretation has been upheld by the Court of Appeals, 9/ and AFA and ALPA have provided no sound reason for disturbing the Board's judicially endorsed interpretation. Nor have they alleged, much less shown, any violation of section 401(k)(4) by TIA, TV or TAC. We therefore have no reason to find that TIA lacks the necessary compliance disposition to support a fitness finding.

ACCORDINGLY:

1. We find that Trans International Airlines, Inc., is fit, willing, and able to engage in interstate, overseas, and foreign charter air charter transportation of passengers.

2. We amend and reissue the certificate of public convenience and necessity issued to Trans International Airlines, Inc. by Order 84-10-50 in the form attached in the Appendix to this order; 10/

7/ We, of course, make no finding of that type for domestic authority.

8/ TIA has, of course, already been found fit to provide cargo transportation. AFA and ALPA have failed to show any changes since that time to indicate a lack of TIA's fitness for passenger authority or a lack of willingness to comply with the Railway Labor Act.

9/ ALPA v. CAB, supra, 643 F.2d, at 941.

10/ By this order, we will reissue only the domestic certificate to Trans International. Reissuance of the foreign certificate to the carrier is subject to Presidential approval and will be handled in a forthcoming order.

3. The authority granted here shall become effective 5 days after we have received from the FAA a copy of the applicant's Air Carrier Operating Certificate and amended Operations Specifications; Provided, however, that the Department may stay the effectiveness of this authority prior to that date; 11/

4. We grant the request of the Air Line Pilots Association to file its answer late;

5. We grant the request of Trans International Airlines to use its response to the answer of the Association of Flight Attendants as its response to the answer of the Air Line Pilots Association; and

6. We will serve a copy of this order on the persons listed in Attachment A.

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

SEAL)

11/ Since TIA holds a Part 121 certificate from the FAA to conduct cargo operations, our action here delaying the effectiveness of its amended and reissued authority pertains only to the passenger portion of that authority.

Issued by
Order 85-7-49

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR CHARTER AIR TRANSPORTATION (as reissued)*

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TRANS INTERNATIONAL AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations issued under it, to engage in the interstate and overseas charter air transportation of persons, property, and mail:

> Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and any other point in any State of the United States or the District of Columbia or any territory or possession of the United States.

This authority is subject to the following terms, conditions and limitations:

(1) The holder shall conduct its operations in accordance with the regulations prescribed by the Department of Transportation for charter air transportation.

(2) The holder is not authorized to engage in air transportation between points within the State of Alaska.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall become effective on

The Department of Transportation has executed this certificate and affixed its seal on July 17, 1985.

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

*This certificate is being reissued to (1) add passenger authority; (2) remove references to the Civil Aeronautics Board; and (3) remove an obsolete restriction against the operation of all-cargo service.

Attachment A

SERVICE LIST

Mr. William A. Hardenstine
President
Trans International Airlines, Inc.
Box 18
Standiford Field
Louisville, Kentucky 40209

Mr. Jeffrey A. Manley
Burwell, Hansen, Manley & Peters
1706 New Hampshire Avenue, N.W.
Washington, D.C. 20009

Mr. William T. Brennan
Chief, Air Transportation Division
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Mr. Gary Green
Air Line Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Ms. Sarah Perry Fleischer
Air Line Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Mr. Ben C. Elliott
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 28th day of January, 1985

SERVED JAN 31 1985

Applications of TRANS INTERNATIONAL AIRLINES, INC. for certificates of public convenience and necessity under section 401(d)(3) of the Federal Aviation Act to engage in interstate, overseas and foreign charter air transportation of persons	Dockets 42591 42592

ORDER TO SHOW CAUSE

On October 29, 1984, Trans International Airlines (TIA) filed applications in Dockets 42591 and 42592 requesting authority to provide charter air transportation of passengers in interstate, overseas, and foreign markets. 1/ It requests that its applications be processed by non-hearing procedures.

In support of its applications, TIA states that, by Orders 84-7-60,84-10-50, and 84-12-30, it was found fit, willing, and able and authorized to engage in domestic all-cargo air transportation and in interstate, overseas and foreign charter cargo air transportation. TIA states that it intends to offer charter services to passengers in 1985, serving the transatlantic market during the summer peak period (June-September) and the Transpacific, Transcontinental, Caribbean and South American markets during the remainder of the year. TIA proposes to operate two B-747 aircraft in this service.

No answers to TIA's applications in these Dockets have been filed. 2/

1/ TIA's applications were filed with the Civil Aeronautics Board prior to that agency's "sunset" on December 31, 1984. Responsibility for processing certificate applications transferred to the Department of Transportation on January 1, 1985, pursuant to Pub. L. 98-443, October 4, 1984.

2/ On November 7, 1984, in Docket 42035, the Air Line Pilots Association petitioned for reconsideration of Order 84-10-50 which granted TIA domestic all-cargo authority, and requested that we deny approval of the common control of TIA and Transamerica Airlines (TV) if the employees of TV are not subject to labor protection provisions. The Board denied that petition in Order 84-12-126.

company, Transamerica Corporation, has sufficient financial resources to provide assistance for the services proposed if that should become necessary. 5/ Finally, the carrier appears to have a satisfactory compliance disposition. In these circumstances, we tentatively conclude that it has the managerial experience, financial capability, and compliance disposition to operate the certificated air service proposed in its applications without undue risk to the public.

Public Convenience and Necessity

No finding of consistency with the public convenience and necessity is required for the award of authority for interstate and overseas air transportation except for intra-Alaska charter air service, for which TIA has not requested authority. See Orders 81-12-146, 83-11-5, 84-2-103, and 84-4-90, issued by the Board.

With regard to foreign charter air transportation, section 401(d)(3) of the Act authorizes us to issue a certificate if such transportation is consistent with the public convenience and necessity. We tentatively find and conclude that the proposed foreign charter air transportation is consistent with the public convenience and necessity. By Order 78-7-106, which instituted the Former Large Irregular Air Service Investigation, the Civil Aeronautics Board found that there was a continuing demand and need for additional charter air carriers and that noncomparative selection criteria should be utilized for new applicants, since the charter market is inherently capable of adjusting to new entry. We agree with these findings and conclude that they remain valid and apply to the authority sought by TIA.

Procedures

We will give interested persons 15 days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers will be due within 10 days after that. We expect such persons to direct their objections, if any, to the applications and points at issue and to support such objections with a detailed economic analysis. If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such hearing or discovery is considered necessary and what material issues of decisional fact the objector would expect to establish through a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would suffice to resolve material issues of decisional fact; if so, the type of procedures should be specified (see Part 302, Rules 19 and 20); if not, the reasons why not should be explained. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to certification and fitness and will issue the certificates with a delayed effective date contingent upon appropriate FAA certification.

5/ During 1983, Transamerica Corporation had a net income of nearly $200 million on revenues of slightly over $4.5 billion. Moreover, TIA's sister company, Transamerica Airlines, realized operating profits of $26.7 million in 1983 and $23.6 million in 1982.

Attachment A

SERVICE LIST

Mr. William A. Hardenstine
President
Trans International Airlines, Inc.
Box 18
Standiford Field
Louisville, Kentucky 40209

Jeffrey A. Manley, Esq.
Burwell, Hansen, Manley & Peters
1706 New Hampshire Avenue, N.W.
Washington, D.C. 20009

Mr. William T. Brennan
Chief, Air Transportation Division
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

American Association of Airport
Executives
2029 K Street, N.W.
Washington, D.C. 20006

Air Line Pilots Association
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Appendix
SPECIMEN CERTIFICATE

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR CHARTER AIR TRANSPORTATION
(as reissued)

TRANS INTERNATIONAL AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations issued under it, to engage in the interstate and overseas air transportation of persons, property and mail:

> Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and any other point in any State of the United States or the District of Columbia or any territory or possession of the United States.

This authority is subject to the following terms, conditions and limitations prescribed by the Department of Transportation's Regulations for charter air transportation and to the following additional conditions:

(1) The holder is not authorized to engage in air transportation between points within the State of Alaska.

(2) The exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions, and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall become effective on

The Department of Transportation has executed this certificate and affixed its seal on

(SEAL)

SPECIMEN CERTIFICATE

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR CHARTER AIR TRANSPORTATION
(as reissued)

TRANS INTERNATIONAL AIRLINES, INC.

is authorized, subject to the following provisions, the provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the orders, rules, and regulations issued under it, to engage in the foreign air transportation of persons, property and mail:

Between any point in any State of the United States or the District of Columbia or any territory or possession of the United States, and

a. Any point in Canada;

b. Any point in Mexico;

c. Any point in Jamaica, the Bahama Islands, Bermuda, Haiti, the Dominican Republic, Trinidad, Aruba, the Leeward and Windward Islands and any other foreign place in the Gulf of Mexico or the Caribbean Sea;

d. Any point in Central or South America;

e. Any point in Australasia, Indonesia or Asia as far west as longitude 70 degrees east via a transpacific routing; and

f. Any point in Greenland, Ireland, the Azores, Europe, Africa and Asia as far east as, and including, India.

This authority is subject to the terms, conditions and limitations prescribed by the Department of Transportation's Regulations for charter air transportation and to the following additional conditions:

(1) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.

(2) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign government such operating rights as may be necessary.

(3) The exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions and limitations that the Department of Transportation may from time to time prescribe in the public interest.

This certificate shall be effective

The Department of Transportation has executed this certificate and affixed its seal on

(SEAL)

THE WHITE HOUSE

WASHINGTON

Dear Madam Secretary:

I have reviewed the orders proposed by the Department of Transportation in the following cases:

Pan American World Airways, Inc.
Docket 42843

Midway-Air Florida Acquisition
Show Cause Proceeding
Docket 42790

Ports of Call Travel Club, Inc.
Fitness Investigation
Docket 42631

Trans International Airlines, Inc.
Dockets 42591 and 42592

I have decided not to disapprove the proposed orders. No foreign relations or national defense reason underlies my actions.

Sincerely,

The Honorable Elizabeth Dole
Secretary of Transportation
Washington, D.C. 20590