PAN AMERICAN WORLD AIRWAYS, INC., *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 23. Argued November 8, 1962.—Decided January 14, 1963.*

Charging violations of §§ 1, 2, and 3 of the Sherman Act, the United States brought this civil suit against Pan American World Airways, W. R. Grace & Co. and their jointly owned subsidiary, Pan American-Grace Airways (Panagra). The complaint alleged that, when Pan American and Grace organized Panagra in 1928, they agreed that Pan American and Panagra would not parallel each other's air routes, that this was a combination and conspiracy in restraint of trade and monopolization and attempted monopolization of air transportation between the United States and South America and also that Pan American had used its control over Panagra to prevent it from obtaining authority from the Civil Aeronautics Board to extend its route from the Canal Zone to the United States. The District Court found that Pan American had violated § 2 of the Sherman Act by suppressing Panagra's efforts to extend its route from the Canal Zone to this country, and it ordered Pan American to divest itself of its stock in Panagra; but it dismissed the complaint against Grace and Panagra, holding that none of their practices violated the Sherman Act. *Held:* The narrow questions presented by this complaint had been entrusted by Congress to the Civil Aeronautics Board, and the entire complaint should have been dismissed. Pp. 298–313.

(a) Since enactment of the Civil Aeronautics Act in 1938, the airline industry has been regulated under a regime designed to change the prior competitive system, and the Federal Aviation Act of 1958 made no changes relevant to the problem presented by this case. Pp. 300–301.

(b) Under § 411 of the Federal Aviation Act of 1958, the Civil Aeronautics Board has jurisdiction over "unfair practices" and "unfair methods of competition," even though they originated prior to 1938. Pp. 302–303.

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*Together with No. 47, *United States* v. *Pan American World Airways, Inc., et al.*, also on appeal from the same Court.

(c) In regulating air carriers, the Board is to deal with at least some antitrust problems. In addition to its power under § 411, it is given authority by §§ 408, 409, and 412 over consolidations, mergers, purchases, leases, operating contracts, acquisition of control of an air carrier, interlocking relations, pooling arrangements, etc.; and the Clayton Act is enforced by the Board, insofar as it is applicable to air carriers. P. 304.

(d) The legislative history indicates that the Civil Aeronautics Board was intended to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned. P. 304.

(e) This Court does not hold, however, that there are no antitrust violations left to the Department of Justice to enforce. Pp. 304–305.

(f) The Acts charged in this suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers. Pp. 305–306.

(g) Whatever the unfair practice or unfair method employed, § 411 of the Act was designed to bolster and strengthen antitrust enforcement. Section 411 is patterned after § 5 of the Federal Trade Commission Act, and cases interpreting § 5 are relevant in determining the meaning of § 411; but the application of § 411 in any given situation must be determined in light of the standards set by the Civil Aeronautics Act. Pp. 306–308.

(h) The Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers. Pp. 308–310.

(i) The Board's power to issue a "cease and desist" order is broad enough to include the power to compel divestiture where the problem lies within the purview of the Board. Pp. 311–313.

193 F. Supp. 18, reversed and cause remanded.

David W. Peck argued the cause and filed briefs for Pan American World Airways, Inc., appellant in No. 23 and appellee in No. 47.

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Assistant Attor-*

ney General Loevinger, Bruce J. Terris and *Robert B. Hummel.*

Lawrence J. McKay argued the cause for W. R. Grace & Co., appellee in No. 47. With him on the briefs were *William E. Hegarty* and *Raymond L. Falls, Jr.*

Mr. Justice Douglas delivered the opinion of the Court.

This is a civil suit brought by the United States charging violations by Pan American, W. R. Grace & Co., and Panagra of §§ 1, 2, and 3 of the Sherman Act, 15 U. S. C. §§ 1, 2, and 3. This suit, which the Civil Aeronautics Board requested the Attorney General to institute, charged two major restraints of trade. First, it is charged that Pan American and Grace, each of whom owns 50% of the stock of Panagra, formed the latter under an agreement that Panagra would have the exclusive right to traffic along the west coast of South America free from Pan American competition and that Pan American was to be free from competition of Panagra in other areas in South America and between the Canal Zone and the United States. Second, it is charged that Pan American and Grace conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires. Pan American was also charged with using its 50% control over Panagra to prevent it from securing authority from the C. A. B. to extend its route from the Canal Zone to the United States.[1]

[1] Another charge relates to alleged restraints on Panagra by its two stockholders which the District Court summarized as follows:

"To a large extent the evidence of restraints on Panagra in the categories of joint offices, communications, equipment, publicity and sales are matters of agreement that must be initially approved by the C. A. B. and to a large degree have been approved and others are awaiting approval or extension of approval previously granted." 193 F. Supp. 18, 22.

In 1928, when Pan American and Grace entered into an agreement to form Panagra,[2] air transportation was in its infancy; and this was the first entry of an American air carrier on South America's west coast. Pan American in 1930 acquired the assets of an airline competing with it for air traffic from this country to the north and east coasts of South America and received a Post Office air mail subsidy contract.[3]

The District Court found that there was no violation by Pan American and Grace of § 1 of the Sherman Act through the division of South American territory between Pan American and Panagra.[4] It held, however, that Pan

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[2] Panagra was organized January 25, 1929, and received on March 2, 1929, an air mail contract from the Postmaster General (see 45 Stat. 248, 1449) even though it was not the lowest bidder. See 36 Op. Atty. Gen. 33.

[3] The District Court said:

"The award of a Post Office contract for each sector of South America, in effect, assured the American contractor of a monopoly in that sector insofar as American flag operations were concerned, and the invaluable assistance of the State Department and Post Office Department in the carrier's relations with the countries along its route." 193 F. Supp. 18, 31.

[4] The District Court said:

"The State Department actively assisted defendants in defeating the foreign company designs for monopoly concessions and in securing American operating rights along their routes. The contracts awarded by the Post Office Department defined the international route of the contractor, and so to a large extent defined the area of development and expansion of any such contractor. The Post Office policy during the years 1928 to 1938 was to award but one contract for each route, in effect to subsidize one American carrier in a particular sector. The ideal route pattern as envisaged by the C. A. B. today is to have two carriers, Pan American and a merged 'Panagra-Braniff,' and the only difference from that existing prior to Braniff's entry would be the extension of 'Panagra-Braniff' to the United States. Competition among American carriers under the policy of the Post Office Department under the foreign mail contracts, was economically impossible, and most likely detrimental to the sound

American violated § 2 of the Sherman Act by suppressing Panagra's efforts to extend its route from the Canal Zone to this country—in particular, by blocking Panagra's application to the Civil Aeronautics Board for a certificate for operation north of the Canal Zone.[5] It indicated that Pan American should divest itself of Panagra stock. But it directed dismissal of the complaint against Grace and against Panagra, holding that none of their respective practices violated the Sherman Act. 193 F. Supp. 18. Both Pan American and the United States come here on direct appeals (15 U. S. C. § 29); and we postponed the question of jurisdiction to the merits. 368 U. S. 964, 966.

When the transactions, now challenged as restraints of trade and monopoly, were first consummated, air carriers were not subject to pervasive regulation. In 1938 the Civil Aeronautics Act (52 Stat. 973) was passed which

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development of American flag service, which would have complicated or embarrassed the effective rendition of diplomatic assistance from the State Department, and actually cause a waste of public monies. Competition between Panagra and Pan American certainly was not encouraged by this government. On the contrary, there appears to emerge from the evidence presented a definite policy of the government approving a sort of 'zoning' for the operations of the American international carriers in the nature of east and west coast spheres as was ultimately arranged between Pan American and Panagra. Agreement not to parallel each other's service in South America seems perfectly consistent with the air transportation policy of this country in those formative years." 193 F. Supp. 18, 34.

[5] See *Panagra Terminal Investigation*, 4 C. A. B. 670, remanded, *W. R. Grace & Co.* v. *C. A. B.*, 154 F. 2d 271. We granted certiorari, 328 U. S. 832, and later dismissed the case as moot, 332 U. S. 827, because Pan American and Panagra had settled their dispute through an agreement approved by the C. A. B. (see note 15, *infra*), after the C. A. B. had said that joint control of Panagra by Pan American and Grace was "unhealthy" (4 C. A. B. 670, .678) and that "the joint owners cooperatively should enable Panagra to apply for access to the east coast of the United States." *Additional Service to Latin America*, 6 C. A. B. 857, 914.

was superseded in 1958 by the Federal Aviation Act, 72 Stat. 731, 49 U. S. C. § 1301 *et seq.*, the latter making no changes relevant to our present problem. Since 1938, the industry has been regulated under a regime designed to change the prior competitive system. As stated in S. Rep. No. 1661, 75th Cong., 3d Sess., p. 2, "Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense."

Some provisions of the 1938 Act deal only with the future, not the past. Such, for example, are the provisions dealing with abandonment of routes (§ 401 (k)), with loans or financial aid from the United States (§ 410), and with criminal penalties. § 902. The Act, however, did not freeze the *status quo* nor attempt to legalize all existing practices. Thus § 401 requires every "air carrier" to acquire a certificate from the Board, a procedure being provided whereby some could obtain "grandfather" rights. By § 401 (h) the Board has authority to alter, amend, modify, or suspend certificates whenever it finds such action to be in the public interest.

Section 409, in regulating interlocking relations between air carriers and other common carriers or between air carriers and those "engaged in any phase of aeronautics," looks not only to the future but to the past as well. For the prohibition is that no air carrier may "have and retain" officers or directors of the described classes. Section 408, which is directed at consolidations, mergers, and acquisition of control over an "air carrier," makes it unlawful, unless approved by the Board, for any "common carrier" to "purchase, lease, or contract to operate the properties" of an "air carrier" or to "acquire control of any air carrier in any manner whatsoever" or to "continue

to maintain any relationship established in violation of any of the foregoing" provisions of § 408 (a). By § 408 (b) a common carrier is taken to be an "air carrier" for the purposes of § 408; and transactions that link "common carriers" to "air carriers" shall not be approved unless the Board finds that "the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

We do not suggest that Grace, a common carrier, need get the Board's approval to continue the relationship it had with Panagra when the 1938 Act became effective.[6] It is clear, however, that the Board under § 411 of the 1958 Act has jurisdiction over "unfair practices" and "unfair methods of competition" even though they originated prior to 1938.

That section provides:

> "The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent *has been or is engaged in unfair* or deceptive *practices* or *unfair methods of competition in air transportation* or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such *unfair* or deceptive *practices* or *unfair methods of competition,* it shall order *such air carrier,* foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition." (Italics added.) 49 U. S. C. § 1381.

[6] The Board has held that § 408 (a) is not retroactive. *Railroad Control of Northeast Airlines,* 4 C. A. B. 379, 386. And see *National Air Freight Forward. Corp.* v. *C. A. B.,* 90 U. S. App. D. C. 330, 335, 197 F. 2d 384, 389.

The words "has been or is engaged in unfair . . . practices or unfair methods of competition" plainly include practices started before the 1938 Act and continued thereafter [7] as well as practices instituted after the effective date of the Act.

The parentage of § 411 is established. As the Court stated in *American Airlines* v. *North American Airlines,* 351 U. S. 79, 82, this section was patterned after § 5 of the Federal Trade Commission Act,[8] and "[w]e may profitably look to judicial interpretation of § 5 as an aid in the resolution of . . . questions raised . . . under § 411." As respects the "public interest" under § 411, the Court said:

> ". . . the air carriers here conduct their business under a regulated system of limited competition. The business so conducted is of especial and essential concern to the public, as is true of all common carriers and public utilities. Finally, Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry." *Id.,* 84.

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[7] The Sherman Act was applied to pre-1890 combinations: *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 342; *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107–108 (Texas version of the Sherman Act); see also *Cox* v. *Hart,* 260 U. S. 427, 435; *American P. & L. Co.* v. *Securities & Exchange Comm'n,* 141 F. 2d 606, 625 (C. A. 1st Cir.), affirmed, 329 U. S. 90.

Moreover, as we recently stated in *United States* v. *duPont & Co.,* 353 U. S. 586, 607, ". . . the test of a violation of § 7 is whether, *at the time of suit,* there is a reasonable probability that the acquisition is likely to result in the condemned restraints." (Italics added.)

[8] The original Act took out from under the jurisdiction of the Federal Trade Commission, "air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938." 52 Stat. 973, 1028, § 1107 (f).

The Board in regulating air carriers is to deal with at least some antitrust problems. Apart from its power under § 411, it is given authority by §§ 408 and 409, as already noted, over consolidations, mergers, purchases, leases, operating contracts, acquisition of control of an air carrier, and interlocking relations. Pooling and other like arrangements are under the Board's jurisdiction by reason of § 412. Any person affected by an order under §§ 408, 409 and 412 is "relieved from the operations of the 'antitrust laws,' " including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board. 52 Stat. 973, 1028, § 1107 (g); 15 U. S. C. § 21.

There are various indications in the legislative history that the Civil Aeronautics Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned.

The House Report stated:

> "It is the purpose of this legislation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air-transportation industry in the United States." H. R. Rep. No. 2254, 75th Cong., 3d Sess., p. 1.

No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here, as in comparable situations,[9] to hold that

[9] Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, holding that the Interstate Commerce Act is no bar to an antitrust suit against a carrier; *United States* v. *R. C. A.*, 358 U. S. 334, holding that the Federal Communications Act is no bar to an antitrust suit against TV and radio licensees; *United States* v. *Borden Co.*, 308 U. S. 188, 195–199, holding that neither the Agricultural Adjustment Act nor

the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose so to do. While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87, 105. Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce.

That does not, however, end our inquiry. Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers.[10] The case is therefore quite unlike *Georgia* v. *Pennsylvania R. Co., supra,* where a conspiracy among carriers for the fixing of through and joint rates was held to constitute a cause of action under

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the Capper-Volstead Act displaced the Sherman Act; and *California* v. *Federal Power Comm'n,* 369 U. S. 482, holding that the Clayton Act was not displaced by the Natural Gas Act. And see *Milk Producers Assn.* v. *United States,* 362 U. S. 458.

[10] In *Pan American-Matson-Inter-Island Contract,* 3 C. A. B. 540, the Board rejected a proposal for the creation of a joint company similar to Panagra for service to Hawaii. Such joint ventures, as we note in the opinion, may be combinations in violation of the antitrust laws. See *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598.

the antitrust laws, in view of the fact that the Interstate Commerce Commission had no power to grant relief against such combinations.[11] And see *United States* v. *R. C. A.*, 358 U. S. 334, 346. And the present Act does not have anything comparable to the history of the Capper-Volstead Act, which we reviewed in *Milk Producers Assn.* v. *United States*, 362 U. S. 458, and which showed that farmer-producers were not made immune from the class of predatory practices charged in that civil suit as antitrust violations. *Id.*, pp. 464–467.

The words "unfair . . . practices" and "unfair methods of competition" as used in § 411 contain a "broader" concept than "the common-law idea of unfair competition." *American Airlines* v. *North American Airlines, supra*, 85. They derive, as already noted, from the Federal Trade Commission Act; and their meaning in the setting of that Act has been much discussed. They do not embrace a remedy for private wrongs but only a means of vindicating the public interest. *Federal Trade Comm'n* v. *Klesner*, 280 U. S. 19, 25–30. The scope of "unfair practices" and "unfair methods of competition" was left for case-by-case definition. The Senate Report stated:

> "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of

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[11] It should be noted that the result in *Georgia* v. *Pennsylvania R. Co.*, *supra*, might today be different as a result of the Act of June 17, 1948, 62 Stat. 472, which gives the Interstate Commerce Commission authority to approve combinations of the character involved in that case and give them immunity from the antitrust laws. See S. Rep. No. 1511, 79th Cong., 2d Sess.; H. R. Rep. No. 1212, 79th Cong., 1st Sess.; H. R. Rep. No. 1100, 80th Cong., 1st Sess. This Act was passed over a presidential veto. See 94 Cong. Rec. 8435, 8633.

> the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." S. Rep. No. 597, 63d Cong., 2d Sess., p. 13.

The legislative history was reviewed in *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 649–650, the Court concluding that "unfair competition was that practice which destroys competition and establishes monopoly." *Id.*, 650. The provision was designed to supplement the Sherman Act by stopping "in their incipiency those methods of competition which fall within the meaning of the word 'unfair.' . . . All three statutes [the Sherman and Clayton Acts and § 5] seek to protect the public from abuses arising in the course of competitive interstate and foreign trade." [12] *Id.*, 647. See *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U. S. 441, 453–454; *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 310–312; 2 Toulmin's Anti-Trust Laws (1949) § 43.6. Joint ventures may be combinations in violation of the antitrust laws. *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598. Whatever the unfair practice or unfair method employed, § 411 of this Act, like § 5 of the Federal Trade Commission Act (*Federal Trade Comm'n* v. *Motion Picture Adv. Co.*, 344 U. S. 392, 394–395), was designed to bolster and strengthen antitrust enforcement.

We have said enough to indicate that the words "unfair practices" and "unfair methods of competition" are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and

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[12] And see the debates in 51 Cong. Rec. 11874–11876; 12022–12025; 12026–12032

the impact of particular practices on competition and monopoly.

These words, transferred to the Civil Aeronautics Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes. Cf. *American Power Co.* v. *Securities & Exchange Comm'n,* 329 U. S. 90, 104–105. That regime has its special standard of the "public interest" as defined by Congress. The standards to be applied by the Board in enforcing the Act are broadly stated in § 2:

> "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—
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> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
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> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics." 52 Stat. 980. And see 49 U. S. C. § 1302.

The "present and future needs" of our foreign and domestic commerce, regulations that foster "sound economic conditions," the promotion of service free of "unfair or destructive competitive practices," regulations that produce the proper degree of "competition"—each of these is pertinent to the problems arising under § 411.

It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U. S. C. § 1486. Cf. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U. S. 481; *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83.

In case of a prospective application of the Act, the Board's order, as noted, would give the carrier immunity from antitrust violations "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." § 414. Alternatively, the Board under § 411 can investigate and bring to a halt all "unfair . . . practices" and all "unfair methods of competition," including those which started prior to the Act.[13]

[13] We note, in addition, that the Board itself has assumed jurisdiction under changed circumstances in those areas covered by § 408, in which it has found only prospective authority. *Railroad Control of Northeast Airlines, supra,* note 6.

If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide. Furthermore, many of the problems presented by this case, which involves air routes to and in foreign countries, may involve military and foreign policy considerations that the Act, as construed by a majority of the Court in *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, subjects to presidential rather than judicial review. It seems to us, therefore, that the Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers.[14] See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156.

The fact that transactions occurring before 1938 are involved in this case does not change our conclusion. The past is prologue and the impact of pre-1938 transactions on present problems of air carriers is eloquently demonstrated in a recent order of the Board concerning the United States flag carrier route pattern between this country and South America which is set forth in part in the Appendix to this opinion. The status of Panagra—

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[14] An "air carrier" is defined in § 1 (2) as "any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest." Whether there might be "a reasonable basis in law" (*Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131) for a Board conclusion that Grace is an "air carrier" by reason of its negative control over Panagra is a matter on which we intimate no view. We mention the matter so as not to foreclose the question by any implication drawn from our separate treatment of common carriers and air carriers.

jointly owned by Pan American and Grace—is central to that problem,[15] as that order makes clear. What was done in the pre-1938 days may be so disruptive of the regime visualized by the Act or so out of harmony with the statutory standards for competition set by the Act[16] that it should be undone in proceedings under § 411. The transactions in question are reached by the terms of § 411. But more important, the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide whether these particular transactions should be undone in whole or in part, or whether they should be allowed to continue.

It is suggested that the power of the Board to issue a "cease and desist" order is not broad enough to include the power to compel divestiture and that in any event its power to do so under § 411 runs solely to air carriers, not to common carriers or other stockholders. We do not read the Act so restrictively. The Board has no power to award damages or to bring criminal prosecutions. Nor does it,

[15] Phases of issues related to those in the present litigation have indeed been before the Board. Note 5, *supra*. It held in an investigation that it had no authority to accomplish the compulsory extension of Panagra's route to the United States (*Panagra Terminal Investigation*, 4 C. A. B. 670), a ruling reviewed by the Court of Appeals which remanded the matter to the Board for further consideration. *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. 2d 271. Before that controversy had been resolved, Pan American and Panagra entered a "through flight agreement" which in essence provided that Pan American would charter any aircraft operated by Panagra from the south to the Canal Zone and operate it on its schedules to the United States. This agreement, with exceptions not material here, was approved by the Board. *Pan American-Panagra Agreement*, 8 C. A. B. 50.

[16] For a discussion of the Board's policy in issuing certificates to competing air carriers, see Hale and Hale, Competition or Control IV: Air Carriers, 109 U. of Pa. L. Rev. 311, 314–318.

as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand.

We need not now determine the ultimate scope of the Board's power to order divestiture under § 411. It seems clear that such power exists [17] at least with respect to the particular problems involved in this case. Of principal importance here, we think, is the fact that the Board could have retained such power over these transactions, if they had occurred after 1938, by so conditioning its grant of approval. The terms of § 411 do not distinguish between conduct before or after that date. If the Act is to be administered as a coherent whole, we think § 411 must include an equivalent power over pre-enactment events of the kind involved in this case [18]—although, of course,

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[17] We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act decrees. *Federal Trade Comm'n* v. *Mandel Bros.*, 359 U. S. 385, 392–393. Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees (*Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 433, 436; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385) subject of course to judicial review. Dissolution of unlawful combinations, when based on appropriate findings (*Schine Theatres* v. *United States*, 334 U. S. 110, 129–130), is an historic remedy in the antitrust field, even though not expressly authorized. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. Likewise, the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority, as we held only the other day in *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115. Cf. *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619.

[18] There is no express authority for divestiture in either the Sherman or Clayton Act. See 15 U. S. C. §§ 4, 25. The reasoning that supports such a remedy under those Acts is as applicable to the

the Board might find that the historic background of these pre-1938 transactions introduces different considerations in formulating a suitable resolution of the problem involved.

We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed.[19] Accordingly we reverse the judgment and remand the case for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post*, p. 319.]

Board as it is to the courts, and it is as valid today as it was when originally stated by the first Justice Harlan:

"All will agree that if the . . . Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 344.

[19] If it were clear that there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C. A. B., we would have the kind of problem presented in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc., ante,* p. 84, where litigation is held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted. Nor is this a case where a proceeding before a second tribunal is desirable (*Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478) or necessary (*General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134, 150–151) for an authoritative determination of a legal question controlling in the first tribunal.

Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474; *Far East Conference* v. *United States,* 342 U. S. 570, 577.

APPENDIX TO OPINION OF THE COURT.

Order No. E–17289

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on the
8th day of August, 1961.

In the matter of the
United States-South America Route Case } Docket 12895

ORDER INSTITUTING INVESTIGATION

The Board has decided that it is appropriate at this time to institute a comprehensive review of the U. S. flag carrier route pattern between the United States and South America. The most recent extensive study of that route structure was undertaken in 1946, some 15 years ago. Since then considerable developments, hereinafter referred to, have taken place which affect these services and require the review here contemplated.

Three U. S. carriers are presently certificated to provide the major services to points in South America. Pan American World Airways, Inc. (Pan American), is authorized to provide service between San Francisco, Los Angeles, Houston, New Orleans, Washington, Philadelphia and New York-Newark, on the one hand, and points on the north and east coasts of South America including Rio de Janeiro and Buenos Aires, on the other hand, via points in Central America and the Caribbean, on route 136. Pan American-Grace Airways, Inc. (Panagra) is authorized to provide service between Balboa, Guayaquil, Lima, Santiago and Buenos Aires, via intermediate points,

primarily along the west coast of South America, on route 146. Braniff Airways, Inc. (Braniff) is authorized to provide service between Houston and Miami, on the one hand, and Havana, Balboa, Bogota, Guayaquil, Lima, Rio de Janeiro and Buenos Aires, on the other hand, via intermediate points, on route FAM–34.[1]

As previously indicated, the basic U. S. flag carrier route patterns between the United States and South America presently in effect were established some years ago in the *Additional Service to Latin America Case,* 6 C. A. B. 857 (1946). Matters involving service between the United States and South America were, however, further considered in the *New York-Balboa Through Service Proceeding, Reopened,* 18 C. A. B. 501 (1954), 20 C. A. B. 493 (1954), and certain through-service aircraft interchange agreements were approved as a result of the *New York-Balboa* case by Order E–9481, 21 C. A. B. 1005 (1955). Also, the certification of a Los Angeles/San Francisco-Guatemala City route, last considered in Order E–9514, August 3, 1955, permitted Pan American to operate between the west coast of the United States and points in South America.

Since the original establishment of the basic South America route structure, there have been basic changes in technology and patterns of service. Thus, in 1944, the range of aircraft was relatively limited and operational requirements, as well as economic considerations, required multiple stops on the long-haul service. Today, available aircraft can, and do, serve the most distant points on a

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[1] Delta Air Lines, Inc. (Delta) is authorized to serve Caracas and certain Caribbean points on its Caribbean route 114 from Houston and New Orleans; and Aerovias Sud Americana, Inc. (ASA) is authorized to provide cargo and mail service (on a nonsubsidy basis) between Florida points and points in Central and South America. The only South American points presently served by ASA are Quito and Guayaquil, Ecuador.

nonstop basis. Of the relative attractiveness of nonstop to multi-stop service in comparable equipment there can be no question; consequently, the changed technology which has made nonstop services operationally feasible warrants a careful review of the economics of such service in relation to the existing and future route structure. Similarly, changes have taken place in the competitive picture. Prior to the decision in the *Latin America Case, supra,* Pan American and Panagra operated in competition with three foreign air carriers. Today, 19 South American foreign air carriers are authorized to serve the United States-South America market. There has also been an increase in service within South America by local carriers. Not only do these services rendered by non-U. S. flag carriers dilute the potential economic support for the services of the U. S. carriers, but also they bring into question the need for point-to-point duplication of such services. In this connection, we cannot be unmindful of the fact that the U. S. flag carriers' operations are marginal economically.

Our concern with the current South America route pattern is not a recent one. As long ago as 1954, the Board publicly suggested that the available traffic in South America did not warrant continuation of three United States flag services.[2] In the Interim Opinion in the *New York-Balboa* case, *supra,* it was noted that Braniff was not an effective competitor for South American traffic and that the public interest of the United States would be served by the establishment of a single independent carrier operation between Houston and Miami, on the one hand, and the points served on the combined routes of Panagra and Braniff, on the other hand. The Board then also voiced its interest in making

[2] *Reopened New York-Balboa Through Service Case,* 18 C. A. B. 501.

such a route available to northeastern United States traffic. The hope then was that the carriers concerned would voluntarily seek to resolve the problem along the lines suggested.[3] In this connection, we were fully cognizant of the recent institution of a suit by the Attorney General against Pan American, Panagra, and W. R. Grace and Company, which, on antitrust grounds, sought divestiture by Pan American and Grace of their interest in Panagra. However, the principals did not come forward with a proposal. Instead, the suit was permitted to proceed to trial and judgment, and it is currently pending possible review by the United States Supreme Court.[4]

Assuming that the District Court's judgment, at least insofar as it ordered divestiture by Pan American of its interest in Panagra, is sustained,[5] it is clear that the Board will, in the near future, be called upon to consider further the consequences of divestiture with respect to U. S. flag services in South America. And in order for the Board to be able promptly and effectively to take such further steps as might be required in the circumstances, it would be well for it to have considered carefully the overall need for U. S. flag services in South America in the light of a litigated record.

Since the selection of carrier issues will remain somewhat clouded until final resolution of the pending anti-

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[3] The powers granted the Board in the Federal Aviation Act of 1958 and its predecessor, the Civil Aeronautics Act of 1938, do not include authority to compel merger, or to terminate the entire route of a carrier.

[4] The District Court for the Southern District of New York handed down a decision on May 8, 1961, *U. S.* v. *Pan American World Airways, Inc., W. R. Grace and Company, and Pan American-Grace Airways, Inc.*, Civ. 90–259. Pan American filed a notice of appeal in the Supreme Court on May 11, 1961.

[5] The Attorney General had sought divestiture by both Grace and Pan American.

trust suit, it appears appropriate and in the interest of a sound and orderly disposition of this proceeding to consider separately the appropriate route structure prior to consideration of selection of carrier matters. We recognize that factual matters relative to public convenience and necessity issues may also have their carrier selection aspects; similarly, we are not unmindful of the fact that, while the prescribed route pattern can be established in substantial part without regard to carrier selection, some adjustment in route pattern may be found necessary at the time we decide the carrier selection issues. We anticipate, however, the full cooperation of all concerned to facilitate an appropriate separation of these issues.

The Board intends that the scope of the proceeding instituted herein include issues with respect to authorization of services to new points, the deletion of presently certificated points, and the consolidation of separate route into single routes.[6] Caribbean points will be considered only to the extent that they are in issue as possible intermediate points on United States-South America routes and the proceeding will not examine services wholly within the Caribbean area, or between points in the United States and the Caribbean.

In its study of the South American route pattern, the Board has tentatively concluded that an east coast route and a west coast route are required. The details of the routes are set forth in the attached analysis. In addition and because we have found that considerable route modifications are necessary to meet present needs and problems, we have compiled and attached hereto data which

[6] Pending certificate applications involving service between the United States and South America will be considered for consolidation upon appropriate request submitted within 20 days of the date of service of this order. Applications not moved for consolidation will be subject to dismissal for lack of prosecution.

we believe will facilitate hearing and decision. The attached materials should serve as the focal point for the trial of this case, and we direct that the presentation of participants in the proceeding, unless otherwise ordered by the Board upon good cause shown therefor, be pointed to showing why and in what manner the conclusions derived from the study should be modified. Such an approach can restrict the hearing to relevant and material facts and otherwise minimize procedural delay.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE concurs, dissenting.

The Court holds that the "narrow questions presented by this complaint have been entrusted to the [Civil Aeronautics] Board and that the complaint should have been dismissed." The ground of the decision is that the provisions for economic regulation in the Civil Aeronautics Act of 1938, which were reenacted without change in the Federal Aviation Act of 1958, displaced the Sherman Act insofar as "all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers" is concerned. With all respect, I think this conclusion is contrary to reason and precedent.

I.

The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other. As a result of today's decision, certain questions under the antitrust laws are placed in the exclusive competence of the Board and will not be the subject of original court actions to enforce the antitrust laws. In effect, a

pro tanto repeal of the antitrust laws is contemplated, since the law to be applied in Board proceedings under § 411 is based not upon the antitrust laws but upon the "public interest" and "competition to the extent necessary" standards of the Board's overall mandate. See 49 U. S. C. § 1302. And though the Board's decisions under § 411 are subject to judicial review, presumably such review will be limited to ensuring that the Board adheres to the criteria set out in its mandate. See *American Airlines, Inc.*, v. *North American Airlines, Inc.*, 351 U. S. 79, 85.

But of the instruments of accommodation that are available, *pro tanto* repeal of the antitrust laws by implication from a regulatory statute such as the Aeronautics Act is surely the very last that ought to be resorted to. It cannot be justified as a matter of statutory construction. Section 414 of the Act immunizes from the operation of the antitrust laws transactions as to which the Board has issued orders of approval under §§ 408, 409, and 412 (consolidations and mergers, interlocking directorates, and cooperative working arrangements). The existence of this express and specific provision for exemption would seem to presuppose the general applicability of the antitrust laws to the airline industry, and to limit the Board's exempting power to the enumerated orders, which do not include orders issued under § 411; the Court concedes that the Board has no power under §§ 408, 409, or 412 to approve the transactions upon which the instant suit is predicated. Furthermore, it is odd indeed that the Board should have express statutory authorization to enforce §§ 2, 3, 7, and 8 of the Clayton Act (see 15 U. S. C. § 21) while the Sherman Act is not enforceable by any procedure with respect to the wide range of transactions comprised in the rule laid down by the Court today. It is odd because the Clayton Act was intended to supplement and reinforce the basic antitrust prohibitions of the Sher-

man Act, rather than to form an independent and self-sufficient scheme of regulation. By its action today, the Court subjects the airline industry to a crazy quilt of antitrust controls that Congress can hardly have contemplated.

Two further aspects of the Aeronautics Act cut against the Court's interpretation. The first is the presence of a saving clause: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U. S. C. § 1506. The second is the total absence from the Act of any provision for damages or reparations. This *lacuna* leads the Court, somewhat unusually in light of certain prior decisions,[1] to intimate that the damages remedy under the antitrust laws survives where the injunctive remedy is barred—an impractical solution, as I shall try to demonstrate, see *infra*, pp. 326–327. The more reasonable interpretation of the absence of a provision for damages is that the Act was not intended to be an absolutely all-inclusive scheme of regulation which would oust every remedy afforded by a different statute or by the common law. The antitrust laws were to be allowed to function, save as regards the specific exemptions provided for in § 414, and these laws would support actions for damages and for equitable relief.

I am satisfied that the scheme of the Aeronautics Act refutes any inference that *pro tanto* repeal of the antitrust laws was intended. Nor does the legislative history furnish any support for the Court's position. The Court cites but a single sentence: "It is the purpose of this legis-

[1] See *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464, and cases cited therein. At least one Federal Court of Appeals has held that the CAB's lack of power to award money reparations leaves open a court action for damages sounding in tort. *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F. 2d 499 (C. A. 2d Cir. 1956).

lation to coordinate in a single independent agency all of the existing functions of the Federal Government with respect to civil aeronautics . . . ." H. R. Rep. No. 2254, 75th Cong., 3d Sess., p. 1. Prior to the enactment of the Aeronautics Act of 1938, the regulation of civil aviation had been divided between the Interstate Commerce Commission, the Department of Commerce, and the Post Office Department; and the plain meaning of the quoted sentence, especially in light of the debates that preceded passage of the Act, is that as a result of the Act regulation of civil aviation would be centralized in one agency, the CAB. See Hearings on H. R. 9738 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., p. 37.

But a still more conclusive refutation of the Court's reading of the Act is provided by an unbroken chain of decisions by this Court rejecting, in comparable situations, claimed *pro tanto* repeals by implication of the antitrust laws. Perhaps the leading case is *United States* v. *Borden Co.*, 308 U. S. 188, 197–206, where the Court held emphatically that the enactment of a regulatory statute would not be deemed to work a *pro tanto* repeal of the antitrust laws, save only if there was a plain repugnancy between the two regimes (which the Court does not suggest, except in the vaguest conclusional terms, is the case here), in which case repeal would be implied only to the extent of the repugnancy. But the holding of the *Borden* case had been anticipated in much earlier decisions of the Court. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 314–315; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U. S. 469, 474–475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515. See also *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 107–108. And the

canon of construction that repeals by implication are not favored has even a longer history in this Court's jurisprudence. See, *e. g., United States* v. *Tynen,* 11 Wall. 88, 92; *Henderson's Tobacco,* 11 Wall. 652.

Georgia v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457, strongly reaffirmed the *Borden* principle in the context of a regulatory scheme, the Interstate Commerce Act, no less pervasive than that which governs the airline industry. I believe it is accurate to say that the Court had never until today deviated from this position. See *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 205–206; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797; *United States* v. *Radio Corp. of America,* 358 U. S. 334; *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–466; *California* v. *Federal Power Comm'n,* 369 U. S. 482. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226–227; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U. S. 481. Only last Term, in *California* v. *Federal Power Comm'n, supra,* we wrote: "Immunity from the antitrust laws is not lightly implied. . . . We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. See *United States* v. *Borden Co.,* 308 U. S. 188, 198–202." 369 U. S., at 485.

Furthermore, although this Court had not until today passed on the question whether the Aeronautics Act repealed by implication any part of the antitrust laws, the lower federal courts have uniformly held that it did not. See *S. S. W., Inc.,* v. *Air Transport Assn.,* 89 U. S. App. D. C. 273, 191 F. 2d 658 (1951), cert. denied, 343 U. S. 955; *Apgar Travel Agency, Inc.,* v. *International Air Transport Assn.,* 107 F. Supp. 706 (D. C. S. D. N. Y. 1952); *Slick Airways, Inc.,* v. *American Airlines, Inc.,* 107 F. Supp. 199 (D. C. D. N. J. 1951), petition for prohibition dismissed *sub nom. American Airlines* v. *Forman,* 204 F. 2d 230

(C. A. 3d Cir. 1953), cert. denied *sub nom. American Airlines, Inc.*, v. *Slick Airways, Inc.*, 346 U. S. 806.

Finally, it has been held that § 411 of the Aeronautics Act was modeled on § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, and that decisions under § 5 are precedents for the construction of § 411. *American Airlines, Inc.*, v. *North American Airlines, Inc.*, 351 U. S. 79, 82. And § 5 has uniformly been construed to provide for dual enforcement by courts and agency of the antitrust laws, not exclusive enforcement by the agency. *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 205–211; *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 692–695; *United States* v. *Charles Pfizer & Co.*, 205 F. Supp. 94 (D. C. S. D. N. Y. 1962); *United States* v. *Cement Institute*, 85 F. Supp. 344 (D. C. D. Colo. 1949).

In light of this decisional history, it cannot be supposed that Congress, when it first enacted a scheme of comprehensive economic regulation of the airline industry in 1938 and when it reenacted these economic provisions without change in 1958, intended any displacement of the antitrust laws beyond that specifically provided for in § 414. Nor did the decisions I have cited rest upon the mechanical application of one of the common law's canons of statutory construction. However questionable the principle that repeals by implication are not favored may be in other contexts, it is entirely sound when dealing with the antitrust laws, and especially the Sherman Act. For this Act embodies perhaps the most basic economic policy of our society, basic and continuing: abhorrence of monopoly. The kind of conduct proscribed by the Sherman Act is simply not such that congressional silence may be interpreted as congressional approval. Where, as here, neither the scheme of the regulatory statute nor anything in the legislative history supports a *pro tanto* repeal by implication of the Sherman Act, it

seems to me inescapable that we must reject such a solution. Nor can it be seriously contended that on the facts of the instant case judicial enforcement of the antitrust laws would disrupt, even slightly, the Board's regulation of civil aviation. See Part III, p. 327, *infra.* And since no question of certification for foreign air carriage is involved, there is no danger of court interference in matters committed to the President's discretion by 49 U. S. C. § 1461.

II.

The decision today is, to me, not only unsound in law, but impractical. The Court purports to lay down a general rule governing the division of responsibilities between the courts and the CAB; and while certain antitrust questions, including those at bar, are to be withdrawn from the courts, others are to remain subject to judicial enforcement. I consider the Court's proposed line of demarcation between the judicial and administrative regimes unsupportable. I see no basis upon which to withdraw questions of route allocation, territorial division, and combinations between common carriers and air carriers from judicial cognizance, yet leave unaffected (as the Court appears to intend to do) questions of rate fixing, combinations between air carriers *simpliciter,* and other serious anticompetitive practices. By what arcane logic does a conspiracy to fix routes go more to the heart of the regulatory scheme than a conspiracy to fix rates? True, the Board, while it has authority to fix routes in foreign air transportation, has no authority to fix rates therein; but the Act broadly prohibits all forms of unjust discrimination, which of course would embrace many rate-fixing practices. See 49 U. S. C. § 1374 (b); *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 478, 480 (dissenting opinion). And what justification can there be for the Board's having exclusive jurisdiction of a combination one party to which is probably outside the Board's jurisdic-

tion, see *infra,* pp. 330–331, but not of a combination both parties to which are clearly within the Board's jurisdiction? The only explanation I can conceive for these dubious distinctions is that the Court does not want to go so far as flatly to overrule some well-established decisions of this Court.[2]

I find it equally difficult to understand the Court's apparently limiting its *pro tanto* repeal of the antitrust laws to questions of injunctive relief. It is true that an order of divestiture or some other equitable remedy may be more effective to deter certain antitrust violations than either criminal or damages sanctions. But the difference in effectiveness is one only of degree. An air carrier is not likely to persist in a course of conduct if heavy criminal penalties and awards of treble damages may be visited upon it. But just this possibility the Court seems to allow. I find it hard to follow the Court's attempted justification for mutilating the antitrust laws in terms of avoiding

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[2] See *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 107–108; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.*, 288 U. S. 469, 475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515. The Court's handling of *Georgia* v. *Pennsylvania R. Co., supra,* seems to me particularly disingenuous. The Court concedes that a conspiracy to secure CAB approval of illicit agreements might form the predicate of an antitrust suit, yet nowhere explains why the use of negative control to further a scheme of monopolization by preventing CAB approval of a route extension for Panagra cannot form such a predicate. Furthermore, it is not the case that the ICC was helpless to grant the relief sought in *Georgia* v. *Pennsylvania R. Co.* The Court conceded that the Commission had "authority to remove discriminatory rates of the character alleged to exist here." 324 U. S., at 459. To be sure, the Commission did not have authority to regulate rate-fixing combinations as such. But neither has the CAB authority to prohibit violations of the antitrust laws as such; it is limited by its mandate, so the Court holds, to facilitating "competition to the extent necessary."

clashes between two regimes of law, the administrative and the judicial, when, the mutilation achieved, the clashes remain acutely present. In part, I must conclude that the Court's artificial distinction again was prompted by a desire to skirt, however disingenuously, prior holdings.[3] In addition, the Court had to conjure with the fact that the CAB's statute nowhere provides a remedy, damages or reparations, for past misconduct.

III.

I should also like to suggest the unreality of the Court's decision in the light of the particular circumstances of the instant case. By its decision today the Court brings to naught nine years of litigation. Yet these nine years actually represent only the most recent phase of a continuing problem first placed before the Civil Aeronautics Board 22 years ago.[4] For 22 years Pan American World Airways has staved off the day of reckoning in respect to the tactics which, Judge Murphy found below, violated § 2 of the Sherman Act. Today's decision vindicates these tactics beyond Pan American's fondest expectations, for the problem is now back with the CAB which has from the outset protested its inability to deal with it.

This suit was instituted by the Government at the urging of the CAB, which in addition filed an *amicus curiae* brief in the District Court in support of the Government's

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[3] See *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87, 105; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 515.

[4] On December 16, 1941, Grace filed a petition with the CAB requesting modification of Panagra's certificate so as to provide for a terminal in the continental United States; on April 29, 1942, Grace requested the Board to proceed under § 411 to order Pan American to divest itself of its holdings in Panagra. See *W. R. Grace & Co.* v. *CAB*, 154 F. 2d 271, 274 (C. A. 2d Cir. 1946), cert. dismissed for mootness *sub nom. Pan American Airways Corp.* v. *W. R. Grace & Co.*, 332 U. S. 827.

position. And repeatedly over a period of many years, the Board has adverted to its felt helplessness in the face of the divided control of Panagra by two powerful corporations, one the dominant United States company in the field of foreign transportation.[5] To be sure, we are not obliged to honor the Board's disinclination to assume jurisdiction. *Trans-Pacific Airlines, Ltd.*, v. *Hawaiian Airlines, Ltd.*, 174 F. 2d 63 (C. A. 9th Cir. 1949). But it is entitled to some weight, see 3 Davis, Administrative Law (1958), 14, and indeed, since the Board's position has been long and consistently adhered to, to great weight. *United States* v. *Radio Corp. of America*, 358 U. S. 334, 350, n. 18. The search for a practical accommodation of court and agency, which is the problem of this case, is not advanced by our ignoring the agency's considered sense of self-limitation.

It is not as if the Board's hesitancy to move against the abuses disclosed by the record in this case were not based upon substantial considerations. We may concede the breadth of the Board's power under § 411 to remedy unfair methods of competition, which may sometimes be violations of the Sherman Act, yet still recognize the unsuitableness of such a remedy in the particular circumstances of this case. For one thing, I should think a proceeding respecting control of Panagra would be rather lopsided unless the Board had jurisdiction of Grace; but I am not sure that could be done. Section 411 only proscribes unfair methods of competition by air carriers and ticket agents. Grace is neither, unless it fits the broad

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[5] See *Panagra Terminal Investigation*, 4 C. A. B. 670, 678 (1944); *Additional Service to Latin America*, 6 C. A. B. 857, 913–914 (1946); *Pan American-Panagra Agreement*, 8 C. A. B. 50, 61 (1947); *New York-Balboa Through Service Proceeding, Reopened*, 18 C. A. B. 501, 504–506 (1954); *Reopened New York-Balboa Through Service Proceeding*, 20 C. A. B. 493, 516–517 (1954). Cf. *New York-Mexico City Nonstop Service Case*, 25 C. A. B. 323 (1957).

language in which the Act defines an "air carrier" as anyone "who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." 49 U. S. C. § 1301 (3). It is not entirely clear that "air carrier" may be read as including a 50% owner of an air carrier, for the Act in general does not purport to regulate stockholders of its subject carriers, and where it does, notably in § 408, it does so explicitly.[6] The opinion of the Court sees fit not to resolve this jurisdictional difficulty. I fear the Board has solid justification for not proceeding against Pan American unless it can proceed against Grace as well. But at all events the Court's silence is sure to result in an added step in this already intolerably prolonged litigation.

A further basis for the Board's hesitancy is that the Board has no experience in the enforcement of the antitrust laws, because § 411 has only been used against common-law unfair competition, never against practices deemed unfairly competitive by virtue of the antitrust laws. Hale and Hale, Competition or Control IV: Air Carriers, 109 U. of Pa. L. Rev. 311, 346–347 (1961).[7] Most of the legal issues which have arisen in the instant litigation—the right of a joint owner to exercise his negative control in an anticompetitive fashion, the substantiality of the commerce restrained as a result of the

[6] For example:

"It shall be unlawful unless approved by order of the Board as provided in this section—

. . . . . .

"(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties . . . of any air carrier . . . ." 49 U. S. C. § 1378 (a)(2).

[7] Also, although the CAB has express authority to enforce the Clayton Act, see 15 U. S. C. § 21, I have found no instance of its ever having attempted to do so.

defendants' conduct, the relevant geographical and services markets, the appropriateness of divestiture as a remedy, and so forth—are typical antitrust problems and not at all typical airline law problems. The expertness required is that of the judge skilled in antitrust adjudication—not that of the Board, which, so far as I can tell, has never dealt with an antitrust problem.

Nor is remission of the instant case to the CAB necessary to protect the integrity of the Board's regulatory scheme for the airline industry. Pan American argues that if its holdings in Panagra are divested, Panagra will apply for and be granted terminal points in the continental United States, with the result that Pan American will be driven out of business on many routes, to the serious detriment of the airline industry. But there is more to acquiring a route certificate than applying for it. If Panagra, freed of Pan American's negative control, applies for a northward extension of its routes, it will be open to Pan American to argue before the Board the unwisdom of its granting the application. A judicial order in the instant case would not affect a single route, but would simply free the process whereby routes are established and territories are divided from the obstructive effects of monopolistic tactics. Judicial enforcement of the Sherman Act here would thus remove the clog of monopolization from the administrative process—not disrupt that process. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. The Court's reliance on *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, and *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, is misplaced. The plaintiff in *Keogh* sought damages under the antitrust laws, complaining that but for the conspiracy the rates he had paid, though lawful because approved by the ICC, would have been lower. The Court held that the exclusive remedy for excessive rates had been vested by Con-

gress in the ICC. It did not matter on what theory the shipper sought to recover; the courts had no power to undo a lawful rate by granting damages, whether on common-law grounds (as in *Abilene*) or under the antitrust laws. The Court in *Keogh* made very plain, however, that injunctive relief in respect of a conspiracy to raise rates might lie, at least if such relief was sought by the Government, as here. 260 U. S., at 161–162. For (as *Georgia* shows) an injunction may be granted with no disturbance to the existing rate structure.

It should also be noted that the Court's decision today vindicates Pan American's hardly creditable "tactic . . . characteristic of its litigious nature" of first raising the jurisdictional issue in a post-trial brief filed six years after the complaint. 193 F. Supp., at 46. Of course, we are obliged to consider such issues *sua sponte*. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63; Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col. L. Rev. 673, 690 and n. 114 (1958). But I find it a wry commentary on the Court's result that every factor of fairness and practicality argues against our abdicating jurisdiction of the present case.

IV.

In seeking to accommodate the regulatory and antitrust regimes by means of *pro tanto* repeal of the antitrust laws, the Court does not tell us why it has departed from the usual pattern of preferring a more flexible technique of accommodation: that afforded by the doctrine of primary jurisdiction. See generally 3 Davis, Administrative Law (1958), 1–55. That doctrine requires that the courts abstain from proceeding in a case of which they have original jurisdiction, remitting the parties in the first instance to their rights and remedies before the agency, where neces-

sary to protect the integrity of the regulatory scheme administered by the agency. Such a requirement of prior resort does not preclude a later judicial antitrust proceeding, but simply ensures that the later proceeding will fully recognize the agency's interest in the premises. The antitrust laws are in no wise repealed. Cf. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U. S. 481, 498–499. This mode of resolving conflicts between court and agency avoids the practical and conceptual difficulties of *pro tanto* repeals by implication. Until today, the Court had never failed to invoke primary jurisdiction in preference to repeal by implication as a means of accommodating the antitrust and regulatory laws; I see no basis for deviation in the instant case from that salutary approach. Certainly the Court suggests none.

I must in candor add that to apply the doctrine of primary jurisdiction to the case at bar would be somewhat of an extension of our decisions in the area, so jealously have we guarded the obligation of judicial enforcement of the antitrust laws. The tendency of the cases has been to invoke the doctrine not when there are simply overlapping judicial and administrative remedies for the same conduct, as is the case here, but only when "there is a possibility that a subsequent administrative decision would approve the questioned activities," as is not true here, since the approval power vested in the CAB by § 414 does not include orders under § 411. Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954). Compare *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, and *Far East Conference* v. *United States*, 342 U. S. 570, with *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *United States* v. *Radio Corp. of America*, 358 U. S. 334; and *California* v.

Federal Power Comm'n, 369 U. S. 482. See generally Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954). But even if it would take some straining to fit the instant case within the established framework of the law of primary jurisdiction, what the Court has done today is a far graver departure from heretofore settled guideposts of the law.[8]

[8] Since the Court disposed of the case at bar on jurisdictional grounds and did not reach the merits of the antitrust issues, I deem it inappropriate for me to intimate any view of those merits.