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International Aviation Decisions (9 of 10)
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THE WHITE HOUSE
WASHINGTON

March 17, 1986

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOT International Aviation Decision:
Marco Island Airways, Inc., and
Aeron International Airlines, Inc.

Our office has reviewed the above-referenced Department of Transportation International Aviation decision, 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 this order or to the substance of the letter from the President to the Secretary of Transportation.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) / / Name of Correspondent: David Chew☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: DOT International Aviation Decisions re:
Marco Island Airways, Inc. and Aeron
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
<u>CUHOLL</u>	ORIGINATOR	<u>86/03/13</u>			<u> / / </u>
	Referral Note:				
<u>CUAT 18</u>	<u>R</u>	<u>86/03/13</u>		<u>S</u>	<u>86/03/19</u>
	Referral Note:				
		<u> / / </u>			<u> / / </u>
	Referral Note:				
		<u> / / </u>			<u> / / </u>
	Referral Note:				
		<u> / / </u>			<u> / / </u>
	Referral Note:				

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

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.

Send all routing updates to Central Reference (Room 75, OEOB).

Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/12/86 ACTION/CONCURRENCE/COMMENT DUE BY: Wed., 3/19/86

SUBJECT: DOT INTERNATIONAL AVIATION DECISIONS RE: Marco Island Airways, Inc
AND Aeron International Airlines, Inc.

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	☐	☐	LACY	☐	☐
REGAN	☐	☐	POINDEXTER	☐	☐
MILLER	☐	☐	RYAN	☐	☐
BALL	☐	☐	SPEAKES	☐	☐
BUCHANAN	☐	☐	SPRINKEL	☐	☐
CHAVEZ	☐	☐	SVAHN	☒	☐
CHEW	☐ P	☐ SS	THOMAS	☐	☐
DANIELS	☐	☐	TUTTLE	☐	☐
FIELDING	☒	☐	_____	☐	☐
HENKEL	☐	☐	_____	☐	☐
HICKS	☐	☐	_____	☐	☐
KINGON	☐	☐	_____	☐	☐

REMARKS:

Please provide any comments/recommendations by Wednesday, March 19.
 Thank you.

RESPONSE:



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

ACTION

MAR 12 1986

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Department of Transportation
International Aviation Decisions:

Marco Island Airways, Inc.
Docket 43767
Date due: April 24, 1986

Aeron International Airlines, Inc.
Docket 43582
Date due: May 5, 1986

The Department of Transportation (DOT) proposes to take the following actions with regard to the above international aviation cases:

- Revoke the authority of Marco Island Airways, Inc., to engage in foreign scheduled air transportation between the United States and points in the Bahama Islands, for failure to maintain operations. The carrier has not objected to the proposed order.
- Authorize Aeron International Airlines, Inc., to engage in worldwide foreign charter air transportation of property and mail.

The National Security Council and the Departments of State, Defense, and Justice have not identified any foreign policy or national defense reasons for disapproving the orders in whole or in part.

The Office of Management and Budget (OMB) recommends that you approve DOT's decisions by signing the attached letter to the Secretary which indicates that you do not intend to disapprove DOT's orders within the 60 days allowed by statute for your review. Also, OMB recommends that you state in your letter that no national defense or foreign policy reason underlies your actions. This will preserve whatever opportunity is available under the statute for judicial review.

Signed

Carol T. Crawford
Associate Director for
Economics and Government

Attachments:

DOT letters of transmittal
DOT orders
Letter to the Secretary

Options and Implementation Actions:

- () 1) Approve DOT's orders and preserve whatever opportunity is available for judicial review (DOS, DOD, DOJ, NSC, OMB).
-- Sign the attached letter to the Secretary
- () 2) Approve DOT's orders and do nothing to preserve whatever opportunity is available for judicial review.
-- Implementation materials to be prepared.
- () 3) Disapprove DOT orders.
-- Implementation materials to be prepared.
- () 4) See me.

THE WHITE HOUSE
WASHINGTON

Dear Madam Secretary:

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

Marco Island Airways, Inc.
Docket 43767

Aeron International Airlines, Inc.
Docket 43582

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



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Office of Assistant Secretary

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

FEB 24 1986

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

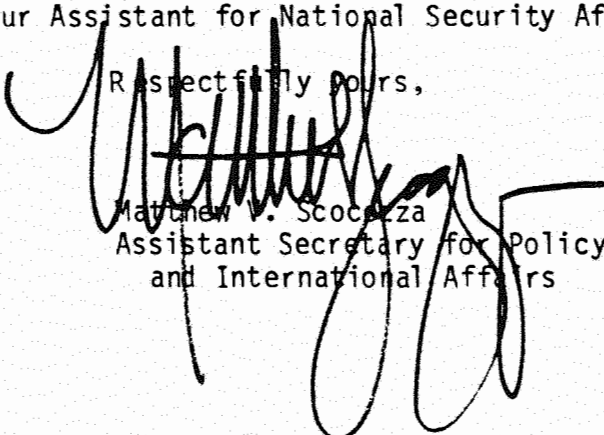
Dear Mr. President:

I transmit the Department's proposed order in the matter of the revocation of the foreign scheduled certificate of Marco Island Airways, Inc., 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 revoke the certificate of public convenience and necessity issued to Marco Island Airways authorizing the operation of foreign scheduled air transportation between the U.S. and the Bahama Islands and adopt the Department's tentative decision in its Order to Show Cause (copy enclosed), unless you disapprove it within 60 days of this transmittal. For your information, I am also enclosing the Department's Order which finalized the tentative findings and conclusions set forth in its Show-Cause Order and revoked the domestic certificates of this and five other carriers.

If you should decide earlier that you will not disapprove, please advise me 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. Scoppa
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 24th day of February, 1986

In the matter of the revocation of :
the air carrier certificates issued to: :

CHISUM FLYING SERVICE OF ALASKA, INC.:
COMBS AIRWAYS, INC. :
GELCO COURIER SERVICES, INC. :
THE HAWAII EXPRESS, INC. :
HAWKINS & POWERS AVIATION, INC. :
AND :
MARCO ISLAND AIRWAYS, INC. :

Docket 43767

under section 401 or section 418 of the :
Federal Aviation Act :

ORDER REVOKING CERTIFICATE

By Order 86-2-42 issued February 24, 1986, the Department finalized the tentative findings and conclusions set forth in Order 86-1-73, and revoked the domestic section 401 and 418 certificates of the carriers listed above, because these carriers had ceased operations or were not operating under their certificates, and apparently had no intentions to commence or recommence certificated service.

By this order, we are revoking the foreign scheduled service certificate of Marco Island Airways, Inc. Instead of repeating our findings and conclusions in Order 86-1-73 we incorporate them here by reference.

ACCORDINGLY,

1. We revoke the certificate of public convenience and necessity issued to Marco Island Airways, Inc., by Order 83-11-28 authorizing the operation of foreign scheduled air transportation between the U.S. and points in the Bahama Islands;
2. This order shall become effective on the 61st day after its submission to the President of the United States, or upon the date of its receipt of advice from the President that he does not intend to disapprove the Department's order under section 801(a) of the Act, whichever occurs earlier, unless he disapproves it under that section; 1/ and

1/ This order was transmitted to the President on February 24, 1986. The 61st day is April 25, 1986.

3. 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)

SERVICE LIST

Chisum Flying Service of Alaska, Inc.

Mr. D. Clark Dechant
Chisum Flying Service of Alaska, Inc.
P.O. Box 1288
Cordova, Alaska 99574

Federal Aviation Administration
Alaska Regional Office
701 C Street
P.O. Box 14
Anchorage, Alaska 99513

Mr. P. R. Steinman
Department of Transportation
701 C Street
P.O. Box 27
Anchorage, Alaska 99513

Judge J. Douglas Williams II
U.S. Bankruptcy Court
Re: Case No. 3X-85-00025
701 C Street
P.O. Box 47
Anchorage, Alaska 99513

Combs Airways, Inc.

The Honorable Ronald J. Brumbaugh
Bankruptcy Court
1825 Sherman Street, Room 400
Denver, Colorado 80203

Combs Airways, Inc.
3980 Quebec Street
Denver, Colorado 80207

Mr. Allan W. Markham
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016

Gelco Courier Services, Inc.

Mr. Mark Katz
Tony Express Courier Corp. of America
P.O. Box 35206
Charlotte, North Carolina 28235

Gelco Courier Services, Inc.
P.O. Box 1975
St. Paul, Minnesota 55111

The Hawaii Express, Inc.

Mr. Grant Murray
President
The Hawaii Express
5757 W. Century Blvd.
Suite 210
Los Angeles, California 90045

Federal Aviation Administration
Flight Standards District
Office #62
5885 W. Imperial Highway
Los Angeles, California 90045

Mr. Daniel H. Slate
Gendel, Raskoff, Shapiro
and Quittner
1801 Century Park East-6th Floor
Los Angeles, California 90067

Hawkins & Powers Aviation, Inc.

Mr. Randy Sullivan
Director
Hawkins & Powers Aviation, Inc.
P.O. Box 391
Greybull, Wyoming 82426

Marco Island Airways, Inc.

Mr. Peter Van Arsdale
President
Provincetown-Boston Airline
3201 Radio Road
Naples, Florida 33942

Mr. V. Michael Straus
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036-5544

Military Airlift Command
Attention: TRCC
Scott Air Force Base, Illinois 62225-5001

Military Traffic Management Command
Attention: PTS
5711 Columbia Pike
Falls Church, VA. 22041-5050

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

Mrs. Patricia T. Szrom
Chief, Special Authorities Division, P-47
Office of Aviation Operations
400 7th Street, S.W.
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 5th day of March, 1986

Application of -----	:	
	:	
AERON INTERNATIONAL AIRLINES, INC.	:	Docket 43582
	:	
for amendment of its certificate of	:	
public convenience and necessity issued	:	
pursuant to section 401(d)(3) of the	:	
Federal Aviation Act of 1958, as amended	:	

ORDER ISSUING CERTIFICATE

On November 13, 1985, Aeron International Airlines, Inc. (Aeron) filed an application, in Docket 43582, for amendment of its certificate of public convenience and necessity to engage in foreign charter air transportation to confer worldwide authority. 1/

In support of its application, Aeron states that: it is a Delaware corporation and a citizen of the United States within the meaning of section 101(16) of the Act; and that it is fit, willing and able to provide the proposed services and to conform to the Act and the Department's rules, regulations and requirements. The applicant states that it will provide the proposed transportation utilizing CL-44-D4 aircraft presently in its fleet, and that it foresees no difficulty in obtaining fuel to operate under the expanded authority requested.

No answers to the application were filed.

We have decided that neither an oral evidentiary hearing nor a show-cause proceeding is necessary for us to make a decision in this case because

1/ Aeron holds a certificate of public convenience and necessity (as reissued by Order 85-8-86) authorizing it to engage in foreign charter air transportation of 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 point in Europe and certain specified areas and countries in the Western Hemisphere. It also holds a domestic all-cargo air service certificate (reissued by Order 85-8-86).

there are no material determinative issues of fact requiring either procedure for their resolution. Therefore, in accordance with our regulations, 14 CFR 302.29(b) and 14 CFR 302.1750(a)(3), we will proceed directly to final approval of Aeron's application. 2/

We find that Aeron is fit, willing and able to provide the foreign charter air transportation covered by its application. 3/ A certificated carrier applying for additional authority that would not substantially change its operations ordinarily is presumed to be fit and need not file any information relating to its fitness to provide the additional services. We construe Aeron's request for an amendment of its certificate as a non-substantial change in its operations. Section 204.3 of our regulations provides that such carrier will be found fit on the basis of officially noticeable materials unless the Department concludes from its own analysis or from information submitted by third parties that such carrier may not be fit to provide the service which it seeks to provide.

We have received no answers to the application and there is nothing that would lead us to conclude that Aeron is not fit to provide the services it proposes. 4/

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 charter air transportation under section 401(d)(3). See Orders 81-12-146, 83-11-5, 84-2-103 and 84-4-90. 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 find 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. These findings remain valid and apply to the authority sought by Aeron.

We are taking this opportunity to reissue Aeron's certificate in a new format which we will use in the issuance of future certificates. The "new" certificates contain provisions which are not included in our current "standard" certificates. These additional provisions impose no

2/ We note that, while we are taking final action here, the certificate cannot become effective until after we have been advised that the President does not intend to disapprove this order under section 801(a) of the Act.

3/ Aeron's fitness was last determined by Order 85-4-28. In the instant application, the carrier states that there have been no changes in its ownership or key personnel, and that its compliance disposition remains unchanged since that last finding. In addition, our review of the applicant's Form 41's indicates the carrier maintains a solid financial posture.

4/ The FAA has also advised us that it knows of no reason why we should find the applicant unfit for its proposed service.

obligations not imposed previously, but merely emphasize, for purposes of clarity, certain requirements applicable to air carriers which are now present in our regulations. Thus, the certificates now state specifically that they are not transferable without Department approval; that the certificate holder must maintain liability insurance coverage for its operations; and that failure to maintain such insurance or to comply with the Federal Aviation Act or the Department's rules shall be grounds to revoke the certificate.

ACCORDINGLY,

1. We grant the application of Aeron International Airlines, Inc., in Docket 43582, for amendment of its certificate of public convenience and necessity to engage in foreign charter air transportation of property and mail, and issue it a revised certificate in the form attached; 5/

2. The authority to serve the points listed in the foreign charter certificate reissued by Order 85-8-86 became effective on August 29, 1985; the expanded authority granted here shall become effective immediately, with the exception of operations to Australasia, Indonesia, and Asia. The latter authority will become effective 5 days after we receive from the FAA a copy of the carrier's amended Operations Specifications authorizing it to engage in such operations; Provided, however, that we may stay the effectiveness of such authority prior to that date. 6/ 7/

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; 8/ and

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

By:

MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

5/ The certificate issued by Order 85-8-86 shall be superseded by the one issued pursuant to this order.

6/ The FAA documents should be sent to the Department of Transportation, Attention: Director, Office of Aviation Operations, P-40, 400 7th Street, S.W., Washington, D.C. 20590.

7/ When the remainder of the certificate has become effective, the Department will issue a notice to that effect, with a copy of the certificate, including its effective date, attached.

8/ This order was transmitted to the President on March 5, 1986. The 61st day is May 5, 1986.

SERVICE LIST FOR AERON INTERNATIONAL AIRLINES, INC.

Mr. James B. Leonard
President, Aeron International Airlines, Inc.
Steward International Airport
Building 138
P.O. Box 6400
Newburgh, New York 12550

Mr. Benjamin R. Achenbach, Jr.
Dunnington, Bartholow and Miller
1700 K Street, N.W., Suite 1100
Washington, D.C. 20006

Mr. William T. Brennan
Chief, Air Transportation Division, AFO-200
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

Mr. Robert Schwartz
Chief, New York Air Carrier
District Office
Federal Aviation Administration
181 South Franklin Avenue
Fourth Floor
Valley Stream, New York 11582

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

Ms. Donna Kelly
Official Airline Guides
2000 Clearwater Drive
Oak Brook, Illinois 60521



Certificate of Public Convenience and Necessity for Charter Air Transportation

(as reissued)

This certifies that

AERON INTERNATIONAL AIRLINES, INC.

is authorized, subject to the provisions of Title IV of the Federal Aviation Act of 1958, as amended, the orders, rules, and regulations issued thereunder, and the attached terms, conditions, and limitations, to engage in foreign air transportation of persons, property and mail.

This certificate is not transferable without the approval of the Department of Transportation.

Issued by Order _____

On March 5, 1986

Effective on See Attached

By Direction of the Secretary

Matthew V. Scocozza

Assistant Secretary for

Policy and International

Affairs

Terms, Conditions & Limitations

AERON INTERNATIONAL AIRLINES, INC.

is authorized to engage in foreign charter air transportation of 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 point in Canada;

Any point in Mexico;

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

Any point in Central or South America;

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

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

This authority is subject to the following provisions:

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

(2) The holder shall maintain in effect liability insurance coverage in amounts not less than those required under Part 205 of the Department's Regulations (14 CFR 205) for all operations under this certificate.

(3) 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.

(4) 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.

*This certificate is being reissued to reflect the addition of authority to serve the remainder of South America and the transatlantic, and the transpacific.

(5) 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 prescribe in the public interest.

(6) Failure to maintain insurance coverage as required by Part 205 renders a certificate ineffective and this or other failure to comply with the Federal Aviation Act or the Department's regulations shall be sufficient grounds to revoke this certificate.

(7) The authority to engage in charter air transportation between the United States and Canada; Mexico; and any point in the Gulf of Mexico or the Caribbean Sea; Central America; Europe; Colombia; Venezuela; Guyana; Surinam; and French Guiana is effective on August 29, 1985. The authority to engage in charter air transportation between the United States and the remainder of South America, Greenland, Iceland, the Azores, and Africa is effective on . The remainder of Aeron's foreign charter authority will become effective 5 days after the Department has received from the Federal Aviation Administration a copy of the holder's amended Operations Specifications authorizing it to engage in such operations; Provided, however, that we may stay the effectiveness of such authority prior to that date.

THE WHITE HOUSE
WASHINGTON

March 17, 1986

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOT International Aviation Decision:
Dominion Intercontinental

Our office has reviewed the above-referenced Department of Transportation International Aviation decision, 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 this order or to the substance of the letter from the President to the Secretary of Transportation.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Paul Chew☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: DOT International Aviation Decision
re Dominion Intercontinental

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>WALL</u>	ORIGINATOR	<u>8610311</u>			<u>1 / 1</u>
<u>Unit 18</u>	Referral Note: <u>B</u>	<u>8610311</u>		<u>S</u>	<u>8610317</u>
	Referral Note:	<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:	<u>1 / 1</u>			<u>1 / 1</u>

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
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 X - Interim Reply

DISPOSITION CODES:

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 S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
 Code = "A"
 Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
 Send all routing updates to Central Reference (Room 75, OEOP).
 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

WHITE HOUSE STAFFING MEMORANDUMDATE: 3/11/86 ACTION/CONCURRENCE/COMMENT DUE BY: 3/17/86SUBJECT: DOT INTERNATIONAL AVIATION DECISION RE: DOMINION INTERCONTINENTAL

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	☐	☐	LACY	☐	☐
REGAN	☐	☐	POINDEXTER	☐	☐
MILLER	☐	☐	RYAN	☐	☐
BALL	☐	☐	SPEAKES	☐	☐
BUCHANAN	☐	☐	SPRINKEL	☒	☐
CHAVEZ	☐	☐	SVAHN	☒	☐
CHEW	☐ P	☐ SS	THOMAS	☐	☐
DANIELS	☐	☐	TUTTLE	☐	☐
FIELDING	☒	☐	_____	☐	☐
HENKEL	☐	☐	_____	☐	☐
HICKS	☐	☐	_____	☐	☐
KINGON	☐	☐	_____	☐	☐

REMARKS:

Please provide any comments/recommendations by
Monday, March 17th. Thank you.

RESPONSE:



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ACTION

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Department of Transportation International
Aviation Decision:

Dominion Intercontinental Airlines, Inc.
Fitness Investigation
Docket 41035
Date due: April 1, 1986

The Department of Transportation (DOT) proposes to take the following action with regard to the above international aviation case:

- Deny the application of Dominion Intercontinental Airlines, Inc., to engage in scheduled foreign air transportation. DOT has based its decision on a finding that the airline is not fit to provide the requested service.

The National Security Council and the Departments of State, Defense, and Justice have not identified any foreign policy or national defense reason for disapproving the order in whole or in part.

The Office of Management and Budget (OMB) recommends that you approve DOT's decision by signing the attached letter to the Secretary which indicates that you do not intend to disapprove DOT's order within the 60 days allowed by statute for your review. Also, OMB recommends that you state in your letter that no national defense or foreign policy reason underlies your action. This will preserve whatever opportunity is available under the statute for judicial review.

Carol T. Crawford
Associate Director for
Economics and Government

Attachments:

DOT letter of transmittal
DOT order
Letter to the Secretary

Options and Implementation Actions:

- () 1) Approve DOT's order and preserve whatever opportunity is available for judicial review (DOS, DOD, DOJ, NSC, OMB).
-- Sign the attached letter to the Secretary.
- () 2) Approve DOT's order and do nothing to preserve whatever opportunity is available for judicial review.
-- Implementation materials to be prepared.
- () 3) Disapprove DOT's order.
-- Implementation materials to be prepared.
- () 4) See me.

THE WHITE HOUSE
WASHINGTON

Dear Madam Secretary:

I have reviewed the order proposed by the Department of Transportation in the following case:

Dominion Intercontinental Airlines, Inc.
Fitness Investigation
Docket 41035

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

Sincerely,

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



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Office of Assistant Secretary

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

JAN 31 1986

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

Dear Mr President:

I transmit for your consideration under section 801(a) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, a proposed order adopted by the Department of Transportation which would deny an application filed by Dominion Intercontinental Airlines, Inc. in Docket 41035. That application requests authority to conduct scheduled foreign air transportation operations.

The order will become effective unless you disapprove it within 60 days of this transmittal. I am also enclosing an order denying Dominion overseas authority, the Administrative Law Judge's Supplemental Recommended Decision of September 13, 1985, and our earlier Order 85-5-27, all of which discuss Dominion's failure to demonstrate its fitness to engage in foreign air transportation.

If you should decide earlier that you will not disapprove our proposed order, please advise the Department 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

Enclosures

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

Issued by the Department of Transportation
on the 31st day of January, 1986

DOMINION INTERCONTINENTAL AIRLINES, INC.:
FITNESS INVESTIGATION :

Docket 41035

ORDER

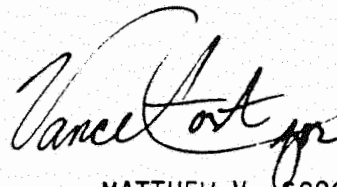
By Order 86-1-75 , we denied Dominion Intercontinental Airline's application to engage in scheduled overseas air transportation of persons, property and mail.

By this order, we are denying Dominion's application to engage in scheduled foreign air transportation of persons, property and mail. Instead of repeating our findings and conclusions in order 86-1-75 , we incorporate them here by reference.

ACCORDINGLY,

1. We deny the application in Docket 41035 of Dominion Intercontinental Airlines to engage in scheduled foreign air transportation.
2. This proceeding is terminated.
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 the Department's order under section 801(a) of the Act, whichever occurs earlier, unless he disapproves it under the section. 1/

By:



MATTHEW V. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

1/ This order was transmitted to the President on January 31, 1986.
The 61st day is April 2, 1986.

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

Issued by the Department of Transportation
on the 3rd day of May, 1985

SERVED MAY 10 1985

DOMINION INTERCONTINENTAL AIRLINES, INC.	:	Docket 41035
FITNESS INVESTIGATION	:	

ORDER

Dominion Intercontinental Airlines petitioned the Civil Aeronautics Board to reconsider its decision in Order 84-11-130, November 30, 1984, to remand this proceeding to the presiding Administrative Law Judge ("ALJ") for further evidentiary hearings. By that order, the CAB directed the ALJ to reopen the record on all three fitness issues (managerial competence, financial/operational plan and compliance disposition) and to issue a supplemental decision in light of Dominion's newly offered evidence of changes in its management team and new evidence by the CAB's Bureau of International Aviation ("BIA") which might adversely affect the ALJ's favorable finding on Dominion's compliance disposition.

Dominion did not agree with the decision to remand and, consequently, filed its petition for reconsideration on December 20, 1984. Dominion presents basically three arguments against further evidentiary hearings: (1) Dominion has submitted new evidence, after the issuance of the ALJ's Recommended Decision ("R.D."), reflecting a change in its senior management team which should cure any defects found by the ALJ in his R.D. and also answering any questions raised by the CAB in its order; (2) the CAB had applied a more stringent standard in evaluating Dominion's senior management team for competence than was applied in another fitness proceeding, The Alfonso Airways Case; 1/ and (3) the record need not be reopened on the compliance issue since the

1/ Alfonso Airways & Export, Inc. Fitness Investigation, Docket 42028, Recommended Decision of Administrative Law Judge William A. Kane, Jr., served September 13, 1984; aff'd Order 84-11-39, October 10, 1984.

CAB's own internal investigation had resolved any concerns regarding the propriety of the preparation of Dominion's exhibits.

In addition, Dominion requested that the CAB grant it a certificate to engage in overseas and foreign air transportation on the existing record, since the CAB had all the necessary information for granting Dominion's application and since further hearings would only impose an unnecessary financial hardship on it.

On January 14, 1985, Dominion filed with the Department a motion requesting expedited action on its application without further evidentiary hearings. That motion essentially reiterates the three arguments presented in its petition for reconsideration to the CAB. Dominion's motion and petition were answered by this Department's Office of Aviation Enforcement and Proceedings and Office of Aviation Operations ("OAEP/OAO"). 2/

After reviewing the record in this proceeding, we are not convinced by Dominion's arguments that a remand is unnecessary. We concur with the CAB's decision in Order 84-11-130 to remand this proceeding for further evidentiary hearings. Furthermore, our independent analysis of the record and of Dominion's arguments requires that we not grant Dominion a certificate at this time and remand this proceeding.

DISCUSSION

In processing an application for certificated authority to engage in overseas and foreign air transportation, the CAB has applied a three-part test for determining an applicant airline's fitness: (1) the airline must demonstrate that it possesses the necessary management skills and technical ability to operate safely (i.e., have "managerial competence"); (2) if not internally financed, the airline must have a plan for financing which, if carried out, will generate sufficient resources to begin the proposed operation without undue risk to the public (i.e., have a satisfactory "financial/operational plan"); and (3) the airline must demonstrate that it is disposed to comply with the Federal Aviation Act and regulations imposed by federal and state regulatory agencies (i.e., have a satisfactory "compliance

2/ The Office of Aviation Enforcement and Proceedings and the Office of Aviation Operations, as joint successors to the CAB's BIA, filed a Motion for Leave to File out of Time with their consolidated answer. We hereby grant their motion to file late since Dominion's petition was filed less than two weeks before the CAB's demise and since the two offices had to contend with administrative and logistical problems occasioned by their own creation. Moreover, Dominion will not be prejudiced by our accepting their late filing.

disposition"). 3/

After Dominion's second hearing to determine its fitness in February 1984, the ALJ found Dominion unfit on the issue of its managerial competence and on the issue of its financial/operational plan. In his R.D., the ALJ noted that Dominion's three founders (Mr. Wendell W. Levister, the President and Chairman of the Board; Mr. D. Wendell Keene, Executive Vice-President and Vice-Chairman of the Board; and Mr. John S. Wisniewski, Senior Vice-President of Personnel and Administration) all lacked experience in managing an airline. Furthermore, only Mr. Wisniewski had any significant successful business experience comparable to his position at Dominion. (R.D. at 9.)

Moreover, the ALJ found that Mr. Levister as chief executive officer showed little ability to attract and select competent senior managers for his airline. (R.D. at 8.) Also the ALJ found, after observing many members of the senior management team unsuccessfully attempting to sponsor exhibits at the hearing, that no one at Dominion seemed to understand what the airline's start-up plan was:

Inasmuch as none of the individuals who attempted to sponsor the operating and financial exhibits were able to explain them, no one in [Dominion's] executive management appears to understand the company's current financial status or the carrier's start-up proposal, from either a financial or an operational standpoint. This flawed presentation of [Dominion's] case at the hearing calls into serious question whether Mr. Levister, [Dominion's] President, can be relied upon to select and retain competent managerial personnel. R.D. at 15 (footnote omitted).

Although the ALJ and BIA understood the financial/operational plans as presented in Dominion's exhibits and they considered those plans to be basically sound, the ALJ concluded that Dominion did not meet the sound financial/operational plan test because apparently Dominion's senior management did not understand those plans:

... [W]e do not find that [Dominion's] operating and financial plans can be assessed or approved apart from competent witnesses and employees of the applicant to sponsor those plans, demonstrate their adequacy and accuracy, and assure some possibility of their implementation. Where, as here, the

3/ See, e.g., Denham Aircraft Services Corp. II, Fitness Investigation, Order 84-5-116, April 18, 1984, at 2; and New York Air Fitness Investigation, Order 80-12-57, December 11, 1980, at 4.

applicant has failed to effectively sponsor or explain financial and operating plans and has failed to show the managerial competence to implement them, we conclude that fitness could not be demonstrated by the substitution or addition of assertedly competent management personnel without some further demonstration that such management understands, supports, and would attempt to implement the same or other adequate operating and financing plans. R.D. at 22.

The ALJ found Dominion fit on the issue of compliance disposition in light of the record before him.

A. Dominion's First Argument on Reconsideration.

Dominion's first argument in its petition for reconsideration challenged the CAB's failure to find Dominion fit under the managerial competence test. However, Dominion did not directly dispute the ALJ's findings in his R.D., as based on the hearing and the exhibits there introduced. Rather, Dominion argued that whatever managerial defects were found by the ALJ and described in his R.D. were cured by Dominion's having obtained a new president and vice-president of finance. 4/

1. CAB's Response to Dominion's First Argument.

This proposed change in Dominion's senior management team was apparently first announced in Dominion's August 14, 1984 Brief to the CAB which appealed the ALJ's adverse findings in the R.D. The CAB considered this very argument by Dominion when Dominion attempted to introduce new evidence, attached as exhibits to its brief, in the form of resumes and form-letter affidavits of commitment from the newly proposed president and vice-president of finance.

Although the CAB considered the resumes impressive in terms of the listed experience, it concluded that the resumes alone were an insufficient basis for finding Dominion to be managerially fit.

4/ Dominion has requested that the name and identity of its newly proposed president and vice-president of finance be given confidential treatment to prevent jeopardizing their current employment. The CAB ordered a temporary grant of confidentiality pending further developments in the proceeding. Order 84-11-130 at 4. We will continue that grant of confidentiality until we have reason to act otherwise.

Although Dominion refers to these individuals as its new president and vice-president, we will refer to them as the newly proposed president and vice-president since their affidavits indicate that they have not accepted the positions and will not do so until Dominion is certificated.

This was especially so in light of the other senior managers' apparent failure to comprehend the airline's start-up plan:

...[I]t is insufficient for an applicant [airline] to indicate that it has hired talented personnel. Its managerial team must demonstrate that it is at least conversant with the terms of the financial and operational proposals. If they are not, the credibility of the proposals and the competence of the management team are undermined. Because Dominion has yet to show that anyone in its management team understands the company's financial and operational proposals, we cannot find it fit on this record. Order 84-11-130 at 3.

Furthermore, the CAB noted that the attached resumes with form-letter affidavits raised a number of questions without a developed record to answer them:

... While their resumes are impressive, a closer examination of their experience would be useful in determining the adequacy of the reformulated management team. More important, the applicant has provided little detail on the duties of the new executives in the company, or the limits of their authority to make decisions on behalf of the company. In this regard, it is unclear to what extent Mr. Levister, the company's founder, will have a voice in the company's decisionmaking process. In short, the [CAB] has little information on how Dominion will be run.

Moreover, further information is required on the extent to which the new executives are committed to employment with Dominion. Dominion's recent filings do not disclose whether there are circumstances in which the new executives may choose not to join the company or the circumstances in which they may terminate their employment. Order 84-11-130 at 3.

In summary, the CAB recognized that the new evidence of Dominion's proposed new management needed to be developed on the record. It would be a question of fact, requiring findings of fact, as to whether the proposed additions to the management team could cure the managerial competence defects described in the R.D. 5/ The CAB remanded the proceeding to the ALJ with directions to

5/ Furthermore, the CAB believed that the issue of the financial/operational plan would have to be reopened since the ALJ found Dominion unfit on that issue (because the senior managers were not conversant with the plans) and there was no existing record on whether the proposed new management understood those start-up plans. We have concluded, however, that since the ALJ's problems with Dominion's plans flowed solely from his findings on the lack of understanding by the senior management team, the
(footnote continued on next page)

develop the record on these issues. 6/

2. Dominion's Response to the CAB's Rejection of its First Argument.

In response to the CAB's decision to remand in Order 84-11-130, Dominion attempted to use its petition for reconsideration to introduce more evidence with which to answer the questions raised by the CAB and thereby eliminate the need for a remand. The petition contained further allegations of new facts and was accompanied by another affidavit from the newly proposed president of Dominion.

Dominion's petition also argued that there was no longer a need for remand because: (1) The basis of the ALJ's finding of managerial incompetence was Mr. Levister's lack of managerial experience as president of Dominion and the lack of a full-time director of finance, two problems now resolved through Dominion's having obtained a new president and a new senior vice president - finance; (2) the scope of the newly proposed president's managerial authority was fully dealt with in Dominion's August 14, 1984 Brief; and (3) his commitment to Dominion was unambiguously stated in his new affidavit.

soundness of those plans (assuming that they are basically unchanged) need not, as such, be an issue on remand.

6/ Examples of other cases, where the CAB remanded for developing and evaluating new evidence, include: Regent Air Corporation Fitness Investigation, Order 84-8-130, August 31, 1984, and Order 83-7-22, July 8, 1983, (proceeding remanded and record reopened on issues of compliance disposition and ownership); Key Airlines Inc. Fitness Investigation, 84-4-83, April 23, 1984 (reopening of the record to resolve issues of ownership and control); Skystar Fitness Investigation, Remand, Order 83-12-84, December 15, 1983 (proceeding remanded and record reopened to accept new evidence of changes in management and ownership after the issuance of the R.D.); Aero West Airlines Fitness Procedure, Order 83-12-61, December 12, 1983; Lone Star Airways Fitness Proceeding, Order 82-9-9, September 2, 1982, at 5; Worldwide Airlines Fitness Investigation, Order 83-4-127, April 25, 1983.

3. Analysis of Dominion's First Argument.

We do not believe Dominion's argument accurately or completely portrays the relevant facts or law. First, the ALJ based his finding of lack of managerial competence on numerous factors, including but not limited to the absence of managerial experience by Mr. Levister and the other two founders, as described briefly supra at p.3. The record in this proceeding shows Dominion's managerial competence problems extending beyond Mr. Levister's lack of a successful business history to the collective inability of its entire management team to demonstrate that someone understood the airline's start-up plans. 7/ Whether the newly proposed president can overcome these problems is an issue of fact to be determined on a complete record.

Second, Dominion has not adequately dealt with the issue of the scope of the newly proposed president's authority in its August 14, 1984 brief. The only reference in its brief to the scope of his authority is a single sentence: "As President and Chief Operating Officer, [the newly proposed president] will have overall managerial responsibility for [Dominion's] operations." (Dominion's August 14 Brief at 11, para. 2.)

In view of the ALJ's findings concerning Mr. Levister, fundamental questions on the scope of authority are still unanswered on this present record. For example, (a) Can the newly proposed president discharge any or all of the current management team? If so, is cause needed for doing so? (b) Can he hire his own senior managers? If so, does he first need the approval of someone else? (c) When there is a disagreement between himself and the chairman of the board (Mr. Levister) on the operation of the airline, how will that disagreement be resolved? By the full board of directors? By his deferring to the chairman? By a committee of directors? and (d) Does there exist a description of the president's duties and responsibilities? If such a description does exist, has the newly proposed president seen it and agreed to it?

Third, the newly proposed president's affidavit does not answer all questions related to his commitment to Dominion. In fact, the new affidavit does not direct itself to the two specific questions raised by the CAB in its order to remand: "whether there are any circumstances in which the new executives may choose not to join the company or the circumstances in which they may terminate their employment." Order 84-11-130 at 3.

Furthermore, Dominion only supplied an affidavit from the newly proposed president; no new affidavit was offered from the

7/ See pp. 11-13 and n. 17, infra, for a more complete discussion of the deficiencies noted by the ALJ in Dominion's senior management team.

newly proposed senior vice president - finance. This continuing lack of definitive answers further reinforces the need for a remand with evidentiary hearings, where questions can be asked and answers returned for a complete record.

B. Dominion's Second Argument on Reconsideration.

1. Synopsis of Dominion's Second Argument.

Dominion's second argument against the CAB's decision to remand alleges the use of a double standard against Dominion. According to Dominion, the CAB used a more lenient standard for evaluating the managerial competence of Alfonso Airways 8/ than it used in evaluating Dominion's managerial competence.

In support of this argument, Dominion provides three instances of apparently different treatment: (1) the founder and president of Alfonso Airways, Mr. Alfonso Diaz del Castillo, allegedly had "absolutely no business managerial experience whatsoever" 9/ and yet his airline was certificated; whereas the proposed new president of Dominion has a wealth of experience and success in managing complex air transportation enterprises; (2) Alfonso Airways' Director of Finance, the same Mr. Diaz del Castillo, allegedly lacks any financial experience; whereas Dominion's Director of the Finance Committee, Mr. Thomas McMahon, was formerly the executive vice-president of a major bank; and (3) Alfonso Airways had only one witness testify at its hearing, Mr. Diaz del Castillo; whereas many of Dominion's senior managers were required to respond to close questioning at Dominion's hearing.

Although Dominion's second argument claims that the CAB erred in failing to find Dominion's executive management fit, Dominion fails to state how the CAB erred by either violating or disregarding any applicable law, procedures or legal principles. Dominion presents a few selected facts from Dominion's case, finds similarities between them and a few facts in The Alfonso Case, implies that the similarities in facts mandate a similar result (i.e., the granting of a certificate), and then concludes that, because dissimilar results were reached from similar facts, such different results could only be caused by the application of a different standard. Yet nowhere in Dominion's argument does Dominion state how or where the CAB erred. Rather Dominion at most implies that the CAB erred because it reached, in Dominion's view, the wrong result.

8/ Alfonso Airways & Export, Inc. Fitness Investigation, Docket 42028, Recommended Decision of Administrative Law Judge William A. Kane, Jr., served September 13, 1984; aff'd Order 84-11-39, October 10, 1984.

9/ Dominion's Petition for Reconsideration at 3.

Theoretically, we could dispose of Dominion's argument by merely stating that it fails to specify an error, committed by either the ALJ in his R.D. or the CAB in its Order 84-11-130, in making findings of fact or in applying the relevant law and procedure to those facts. However, we will meet Dominion's argument fully and in its best possible light. We will: (a) state the principal indicators used by the CAB as criteria for determining managerial fitness, (b) review the application of those indicators to Dominion and to Alfonso for the purpose of determining whether the CAB treated Dominion unfairly either by incorrectly applying those indicators to Dominion or by disregarding those indicators in The Alfonso Case, and (c) review the three instances cited by Dominion which allegedly prove the application of a double standard. 10/

2. Review of The Dominion Case and The Alfonso Case.

a. CAB Criteria for Determining Managerial Fitness.

The CAB traditionally used four principal indicators of managerial competence in its fitness proceedings: (1) a history of business success by its founders and senior executive officers as managers in aviation or nonaviation related enterprises; 11/ (2) in the absence of such a history, the manager's demonstration -- during the course of the proceeding -- of good business judgment, management skills and a desire to succeed; 12/ (3) the ability of

10/ It is important to note that we do not consider ourselves bound by the CAB's cases as precedent or mandatory authority in our independent review of Dominion's application. However, we do consider CAB cases as precedent in determining whether the CAB acted evenhandedly in its decisionmaking in this proceeding, within the context of a petition for reconsideration.

11/ See, e.g., Sea Coast Airways Fitness Investigation, Order 83-6-27, June 9, 1983, at 4; Air Atlanta Fitness Investigation, Recommended Decision of Administrative Law Judge John M. Vittone, served May 27, 1982, at 3 and 6-9; aff'd, Order 82-6-90, June 15, 1982; Northeast Sunrise Airlines, Inc. Fitness Investigation, Order 83-5-90, May 19, 1983, at 2 and 4; Spanish Main International Airlines Fitness Investigation, Order 81-11-86, October 1, 1981, at 4; Universal Airlines Inc. Fitness Investigation, Recommended Decision of Administrative Law Judge William A. Pope, II, served March 12, 1981, at 14; aff'd, Order 81-10-28, October 2, 1981; and Eugene Horbach Acquisition of Modern Air Transport, Inc., 73 CAB 147 (1977).

12/ See e.g., Northeast Sunrise Airlines, Inc. Fitness Investigation, Order 83-5-90, May 19, 1983 ("Of course, in the absence of a history of business success, [the airline founder's] conduct in establishing [the airline] is the best evidence of his
 (footnote continued on next page)

the president or chairman of the board (i.e., the primary moving force of the senior management team) to attract, select and retain competent senior managers in general, but especially when many senior management slots are not yet filled; 13/ and (4) the presentation of the applicant airline's case at hearing. 14/

managerial competence." Id. at 5). See also, Spanish Main International Airlines Fitness Investigation, Order 81-11-86, October 1, 1981 ("[the airline founder's] conduct in this proceeding demonstrates a lack of business acumen and skill." Id. at 5.).

13/ See Sea Coast Airways Fitness Investigation, Order 83-6-27, June 9, 1983 ("[The CAB] has found carriers fit with an incomplete management roster where we could rely on existing management to select and attract qualified personnel." Id. at 5. "Appointment of personnel to responsible positions on the basis of a family relationship does not reflect the type of business judgment we require of individuals with overall managerial responsibilities." Id. at 4.); Northeast Sunrise Airlines, Inc. Fitness Investigation, Order 83-5-90, May 19, 1984 ("... [T]he ALJ acted properly in examining the method by which [the airline's founder] selected key personnel." Id. at 5.); Worldwide Airlines Fitness Investigation, Recommended Decision of Administrative Law Judge John M. Vittone, served August 9, 1982; aff'd Order 83-4-127, April 25, 1983; Air Atlanta Fitness Investigation, Recommended Decision of Administrative Law Judge John M. Vittone, served May 27, 1982; aff'd, Order 82-6-90, June 15, 1982; Muse Air Fitness Investigation, Initial Decision of Administrative Law Judge William A. Kane, Jr., served January 8, 1981; aff'd, Order 81-1-99, January 21, 1981.

14/ See, Silvas Air Lines Fitness Investigation, Order 84-11-126, November 30, 1984 at 3-5 (airline found unfit where Chief Executive Officer's testimony displayed inattention to detail and uncertainty about airline's assets and preoperating costs, an unwillingness to respond to questions about expenses and potential lenders, and a general failure to demonstrate that he comprehended the various complexities associated with the proposed airline); Aero West Fitness Investigation, Order 84-10-105, October 24, 1984 (where the Chief Executive Officer's managerial competence was evaluated on his inaccurate and incomplete representations in his evidentiary submissions and testimony); Northeast Imperial Airlines Fitness Investigation, Recommended Decision of Administrative Law Judge Ronnie A. Yoder, served January 19, 1984; aff'd, Order 84-2-84, February 17, 1984 (where senior management was unwilling to answer relevant and material questions); Sea Coast Airways Fitness Investigation, Order 83-6-27, June 9, 1983 (where the airline's founder and president admitted his own lack of financial expertise but did not search for another senior manager to fill that gap); Worldwide Airlines Fitness Investigation, Recommended Decision of Administrative Law Judge

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b. Application of the CAB Managerial Fitness Criteria to Dominion.

These indicators were properly applied to Dominion by the ALJ during the course of the proceeding. First, when this case was before the ALJ, Dominion's chairman of the board, president and primary moving force at that time, Mr. Levister, did not have a history of significant business success as a manager. Neither did the other two founders, Messrs. Keene and Wisniewski. Consequently, the other three indicators became of greater importance.

As to the second principal indicator of managerial competence, Mr. Levister's demonstration of managerial qualities and skills during the course of the proceeding up to the close of the record after hearing was very poor: (a) Dominion responded to requests for evidence from BIA in a tardy manner, sometimes months after the first due date; (b) Dominion failed to assemble its exhibits properly and had to submit revised exhibits on at least two occasions; (c) Dominion admitted to not meeting the fitness requirements at its first hearing in August 1983; and (d) Dominion called to the witness stand several of its chief officers as sponsors of its exhibits at the February 1984 hearing, yet these senior managers could not demonstrate that they understood those exhibits and, inferentially, Dominion's start-up plan.

As to the third and fourth principal indicators of managerial competence, Dominion's founder, chairman of the board and, up to the close of the hearing, president --Mr. Levister-- had attracted and selected several senior managers of questionable abilities for their positions. ^{15/} Mr. Levister selected Mr. D. Wendell Keene to be Dominion's executive vice-president and vice-chairman. Mr. Keene has had some success in real estate, but no aviation experience. He also had little role in forming the company, and thus gained little experience in aviation matters in the time between the formation of the company and the hearing. At the hearing, he apparently still did not know much about aviation

John M. Vittone, served August 9, 1982, at 11-13; aff'd Order 83-4-127, April 25, 1983 (where airline's president and founder refused to supply information about persons being considered for employment); and Spanish Main International Airlines Fitness Investigation, Order 81-11-86, October 1, 1981 (where airline founder and president's testimony demonstrated a "lack of business acumen and skill").

15/ Their abilities are of greater importance to the airline in light of Mr. Levister's not having experience in managing an airline.

matters. 16/ Mr. Levister also selected Mr. John S. Wisniewski to be Dominion's senior vice-president of personnel and administration. Mr. Wisniewski apparently had no significant responsibility for personnel supervision (R.D. at 9). Although Mr. Wisniewski has had some experience in supervising, the ALJ questioned whether he would be a suitable choice for that position. (R.D. at 9.)

The selection of Messrs. Keene and Wisniewski called into question Mr. Levister's ability to select competent senior executive managers. Mr. Levister's selection of other senior managers confirmed that doubt. At the time of the first hearing in August 1983, Mr. Levister had selected Mr. George A. Vadasan as Dominion's vice-president for finance and financial planning. Mr. Vadasan sponsored Dominion's exhibits at that first hearing and his presentation led the ALJ to conclude: "[H]e was obviously deficient in his understanding of those exhibits, financial matters generally, and the aviation industry." (R.D. at 10.) Furthermore, at the second hearing in February 1984, the ALJ found that Mr. Levister's selections for vice-president of marketing and route development (Mr. Tackling), senior vice-president and chief operating officer (Mr. Sykes), and vice-president for finance (Mr. Carter) could not adequately explain, justify or demonstrate they understood the exhibits they were sponsoring. 17/ Consequently,

16/ "... it is unclear what [Mr. Keene's] future management responsibilities would be." R.D. at 8. "Keene admitted that he is 'not well versed in airline management.'" Id.

17/ At the hearing Mr. Lloyd J. Tackling, Dominion's Vice President of Marketing and Route Development, did not understand the exhibits which he was sponsoring or how they were calculated. The ALJ noted the following problems with Mr. Tackling's testimony at hearing: a) he did not understand the Quality Service Index (QSI) methodology used; b) he admitted the exhibits were wrong; c) he twice pleaded a mental block in response to questions concerning exhibits; d) he failed to demonstrate an understanding of Dominion's marketing strategy and operating forecasts; e) he could not explain the reason why Dominion had a common fare in the Chicago-Port-au-Prince market and the Chicago-Santo Domingo market, but had different fares from Boston to the same two destinations; f) he could not explain why his comparison of existing discount fares with Dominion's proposed fares showed some discount fares to be higher than regular coach fares, although he claimed to have checked the Official Airline Guide in all markets; g) he could not explain the source of his fare elasticity estimate of 1.3; h) he could not explain his generalization that 25% of the traffic in Caribbean markets was carried on discount fares; i) he was confused by the term "OLC" which appeared on Exhibit DIA-502 under the heading "Equipment," and did not realize that it signified "on-line connections." (R.D. at 10-11.)

Although we acknowledge his statement after hearing that he
(footnote continued on next page)

the ALJ found that Mr. Levister, as the primary moving force of Dominion's senior management team, could not be relied upon to select and retain competent senior managers (R.D. at 15) nor effectively present Dominion's case at hearing (R.D. at 16).

c. Application of CAB Managerial Fitness Criteria to Alfonso.

Alfonso Airways was scrutinized under the same four principal indicators of managerial competence. The difference between the

was under great stress from other matters before and during the hearing (See Letter of Mr. Lloyd J. Tackling, undated, Exhibit C attached to Dominion's August 14, 1984 Brief), nonetheless he failed to demonstrate his managerial abilities at a critical point in the proceeding. Furthermore, no CAB regulation or procedural guideline required Mr. Tackling specifically to appear to sponsor those exhibits on which he testified. Dominion could have used another witness to sponsor those exhibits.

Mr. Don C. Sykes, Dominion's Senior-Vice President and Chief Operating Officer, also had problems sponsoring exhibits at hearing. The ALJ noted the following problems with Mr. Sykes testimony in sponsoring Dominion's costing exhibits, the average fare calculation, the computation of units for Subpart K Methodology and the 500 and 600 series exhibits: a) he could not explain the derivation of the QSI factors applied in each market; b) he acknowledged that he had checked only two of the QSI figures; c) he could not explain Dominion's average fare calculation, and in particular could not, after repeated questions from the ALJ and BIA counsel, state why excursion fares are mentioned in Dominion's revenue projections when Dominion only proposed to use coach and first class fares; and d) he was unable to explain the traffic forecasts developed by Mr. Vadasan. (R.D. at 12.)

Mr. Albert G. Carter, Dominion's Vice-President of Finance, also had problems during his testimony. Even though he had been associated with Dominion for only three weeks prior to hearing, Dominion called him to the witness stand to sponsor exhibits. The ALJ noted the following problems with his testimony: a) he had not audited Dominion's current balance sheet, even though he is a CPA licensed in Illinois; b) he attempted to sponsor the private placement memorandum, which involves obtaining sufficient financing for start-up operations, but he could not demonstrate a competent understanding of that document; c) he could not verify the intentions or capability of the founders to produce the additional capital to which they had committed themselves; d) he could give only a partial explanation of Dominion's financial condition or its future plans; and e) he could not explain the \$20,000 debt under current liabilities on the balance sheet which had been the subject of inquiry at the August 8, 1983 hearing. (R.D. at 12-13.) On the basis of the above problems, the ALJ concluded that he did not have the financial expertise to qualify as the financial manager of Dominion. (R.D. at 13.)

respective ALJs' findings on managerial competence was based on differences of fact. The first indicator of managerial competence, a history of business success as a manager, was not strictly applied to Alfonso's president and founder, Mr. Diaz del Castillo, just as it had not been applied strictly to Mr. Levister of Dominion. He, like Mr. Levister, had no history of previous business success. Nonetheless, the ALJ in The Alfonso Case noted that "[Mr. Diaz del Castillo] has obtained a good deal of experience since [forming the airline]." (R.D. at 6-7.)

Alfonso's president amply demonstrated he had the managerial qualities and skills and the firm desire to succeed necessary to satisfy the second indicator of managerial competence as president of a new airline. After starting a career in aviation, he went back to school to study aviation management and transportation management at Barry University in Miami. To expand his knowledge of aircraft availability, he directly contacted various aircraft manufacturers on the availability of various types of aircraft. (R.D. at 5-6.)

When confronted with the problem of finding and selecting qualified senior management for his new airline, he arranged a meeting and sent letters with invitations to approximately 500 people with various aviation-related backgrounds, inviting them to meet with him to discuss the establishment of an airline. The majority of the people now with Alfonso were among those who attended that formative meeting. (R.D. at 6.)

When he discovered that Alfonso's director of finance did not have the qualifications shown on his resume and was unfit for the position, Mr. Diaz del Castillo took it upon himself to testify on Alfonso's financial plan at the fitness hearing and then discharged the director of finance. Although he successfully presented his airline's financial plan at hearing, he recognized his limited experience in financial matters and was planning to find a replacement director of finance. 18/

Furthermore, Mr. Diaz del Castillo's desire to succeed and managerial skills were shown by his aggressive prosecution of Alfonso's application through the certification process to a favorable R.D. He accomplished this despite encountering obstacles such as attempts to delay his application by prospective competitors on one of Alfonso's proposed routes, requests for further evidence from the CAB, denial of his motion for processing his application without hearing, and a reopening of the record after hearing when Alfonso's former director of finance made allegations reflecting on Mr. Diaz del Castillo's and Alfonso's integrity and the truthfulness of Alfonso's exhibits.

18/ R.D. at 2; and Order Deferring Briefs and Reopening the Record, July 6, 1984.

As to the third and fourth indicators of managerial competence, Alfonso's management team was satisfactory. Mr. Diaz del Castillo demonstrated his ability as president and chairman of the board to attract competent senior managers through his creative and effective method of mass mailing. The ALJ found no problems with Mr. Diaz del Castillo's selection of Alfonso's senior managers. Nor does the record of Alfonso Airways indicate any problem in the retention of competent managers.

In addition, Alfonso's management successfully presented its case before the ALJ at hearing. The exhibits were prepared almost solely by Alfonso's president. He was the sole witness for the presentation of Alfonso's case. He sponsored all the exhibits and responded to close questioning by Alfonso's attorney, the ALJ and BIA counsel. Although the ALJ noted in his R.D. that the exhibits were poorly organized, they were understandable to the ALJ and opposing counsel and did not require further revisions at hearing as did Dominion's during the August 1983 hearing. Finally, the ALJ was so impressed with Mr. Diaz del Castillo's presentation of Alfonso's case at hearing that he stated: "His solo efforts manifest a persistence and strong determination to make Alfonso Airways succeed and a general knowledge and understanding of what is needed to start an airline." (R.D. at 7.)

3. Review of Dominion's Three Instances of Allegedly Unfair Treatment.

In light of the above discussion of the principal CAB indicators of managerial competence and their application to Dominion and to Alfonso, we now have a context of material facts and relevant cases within which to review Dominion's three alleged instances of the CAB's applying a more stringent standard to Dominion.

a. Dominion's First Alleged Instance.

Dominion claims, as its first instance of allegedly unfair treatment, that its management team must have been unfairly evaluated by the CAB because Dominion's "president and chief officer possesses extensive managerial experience in the managing of complex air transportation enterprises" 19/ whereas Alfonso's "president and chief operating officer had absolutely no business managerial experience whatsoever." 20/

In responding to Dominion's allegation, we first note that Dominion's characterization of Mr. Diaz del Castillo is not the same as that of the ALJ who decided The Alfonso Case: "Although he

19/ Dominion Petition for Reconsideration at 4.

20/ Dominion Petition for Reconsideration at 3 (emphasis in the original).

had no prior business management experience before forming Alfonso Airways he has obtained a good deal of experience since that time." (R.D. at 6-7.) Second, we have already discussed above that the president or chief executive officer need not have a prior history of business success, provided that he could assemble a staff of senior managers who demonstrate proficiency in those areas where he was deficient. This standard was applied to Dominion by the ALJ in his R.D. and resulted in Dominion's being found unfit on the basis of managerial competence. 21/

Third, Dominion's comparison-of-presidents argument tacitly assumes that the fundamental issue of managerial fitness centers upon the qualifications of an airline's president. That assumption is not always true. Rather, the managerial fitness test revolves around the central issue of whether the collective abilities of the senior management team are sufficient to successfully operate an airline. While Dominion's newly proposed president's qualifications are relevant to this central issue, they are by no means dispositive or conclusive.

In some cases, the CAB gave great weight to the president's qualifications when he was well qualified and deemed to be the primary moving force of the senior management team. 22/ However, in a case like this where the other senior managers have shown deficiencies, the Board could not mechanically evaluate only the president, disregarding the abilities of the other managers, and then reach a sound conclusion on the collective abilities of the management team.

We cannot find on this record that the newly proposed president here will be the primary moving force within the airline. His ability to select and attract other senior managers has been basically preempted by Mr. Levister's already having filled most of the more important senior management positions. 23/

Moreover, we cannot assume that the newly proposed president will be the ultimate authority within the airline's management structure. Factors indicating that he will not be the ultimate authority include: (1) Mr. Levister's dominant position in forming the airline; (2) Mr. Levister's retaining his current position of Chairman of the Board, the position to which the newly proposed

21/ See our discussion at pp. 11-13 and n. 17, supra, for a more detailed enumeration of the defects found by the ALJ in Dominion's senior management team.

22/ See cases cited at p. 10, n. 13, supra.

23/ See pp. 11-13 and n. 17, supra, for the positions already filled and the problems noted by the ALJ regarding the managers in those positions.

president will report; and (3) the absence in the record of a realistic delineation of the responsibilities and duties between the president and chairman. 24/

Thus, we do not perceive that the CAB erred in remanding this proceeding to the ALJ despite the submission of the newly proposed president's resume and affidavit. The proper weight to be given the resume and the affidavit in evaluating the collective ability of the reconstituted senior management team is simply unclear. The CAB properly denied Dominion a certificate because Dominion had not met its burden of proof in demonstrating that its reconstituted senior management team was collectively fit, even with its newly proposed president.

Finally, we cannot find under our own review that the mere submission of the newly proposed president's resume and affidavit merits finding by us of managerial competence in light of this factually unusual situation. Too many uncertainties prevent us from finding that Dominion has met its burden of proof in demonstrating managerial competence.

Accordingly, we believe that the record should be developed through evidentiary hearings so that findings of fact can be made by the ALJ on remand. We, like the CAB earlier, cannot make such findings of fact on the current record.

b. Dominion's Second Alleged Instance.

Dominion alleges, as its second instance, that its Director of the Finance Committee, Thomas McMahon, was eminently more qualified for that position in Dominion than Mr. Diaz del Castillo was for the position of Director of Finance in Alfonso. Mr. McMahon was formerly the executive vice-president of a major bank. Mr. Diaz del Castillo, on the other hand, had no previous experience in financial matters; yet Dominion's management team was found unfit whereas Alfonso's was found fit. Supposedly this demonstrates that whatever standard was applied to Dominion was not applied to Alfonso during its application process.

We can see two potential arguments arising from Dominion's contrast: (1) that the CAB found Mr. McMahon unfit for his position, despite the fact that Mr. McMahon's qualifications were better than those of Mr. Diaz del Castillo for the position of Director of Finance, and that such a finding shows Dominion must have been subjected to a more stringent test of managerial competence than Alfonso; or (2) that the CAB found Mr. McMahon fit for his position and such finding should be sufficient for finding Dominion's management team fit.

24/ See also the questions on the newly proposed president's scope of authority posed on p. 7, supra.

Turning to the first potential argument, we can discover no finding by the ALJ in his R.D. or by the CAB in Order 84-11-130 indicating that Mr. McMahon was found unfit for his position. To the contrary, the ALJ seems to be laudatory of Mr. McMahon as to his professional experience and abilities, and as to his sharing of those abilities in helping numerous minority-owned enterprises initiate operations. (R.D. at 14.) However, any problem which the ALJ found regarding Mr. McMahon did not involve any lack of ability on his part; rather the problems arose from his role at Dominion being essentially part-time and advisory, and his inability to rectify the deficiencies of other senior managers in areas of expertise and day-to-day responsibilities beyond Mr. McMahon's position. (R.D. at 14.)

Furthermore, as to Mr. Diaz del Castillo's holding the position of Director of Finance at Alfonso, Dominion's argument gives the impression that Mr. Diaz del Castillo considered himself adequately qualified for that position and that the ALJ in that proceeding agreed. That is a false impression. The record in the Alfonso proceeding shows that Alfonso originally had a Director of Finance who appeared to be qualified for his position on the basis of his resume, who apparently was not truthful on his resume and who was subsequently discharged about the time of the hearing. Mr. Diaz del Castillo stepped into the breach caused by the removal of the former Director of Finance and presented all the financial testimony at Alfonso's hearing as the most knowledgeable person, given the emergency circumstances. 25/

Mr. Diaz del Castillo recognized his limitations in the area of finance and intended to find another Director of Finance. 26/ Under CAB case law, an applicant airline need not have filled the position of Director of Finance as a prerequisite for certification provided that the primary moving force of the senior management team (i.e., chairman of the board, president or chief executive officer) demonstrates that he has the ability to attract, select and retain competent senior managers for the unfilled positions on the senior management team. 27/ Mr. Diaz del Castillo demonstrated that ability and it was so found by the ALJ in that proceeding. (R.D. at 7.)

25/ See Alfonso Airways & Export, Inc. Fitness Investigation, Docket 42028, Order Deferring Briefs and Reopening the Record, July 6, 1984, at 2; and R.D. at 2.

26/ Id.

27/ See Air Atlanta Fitness Investigation, Recommended Decision of Administrative Law Judge John M. Vittone, served May 27, 1982; aff'd, Order 82-6-90, June 15, 1982; Muse Air Fitness Investigation, Initial Decision of Administrative Law Judge William A. Kane, Jr., served January 8, 1981; aff'd, Order 81-1-99, January 21, 1981.

c. Dominion's Third Alleged Instance.

For its third instance of allegedly unfair treatment, Dominion argues that numerous members of its senior management team were subjected to close questioning by the ALJ and BIA counsel at hearing; whereas in the Alfonso proceeding, only one witness testified for Alfonso, Mr. Diaz del Castillo. At Dominion's second hearing, many of the senior managers who sponsored various exhibits were unable to explain, to justify, or even to agree with their respective exhibits. Consequently, the ALJ found such poor sponsorship of exhibits to be a major basis for finding Dominion's senior management unfit:

... The revised exhibits submitted at the reconvened hearing were again incompetently sponsored. Such persistent deficiencies reflect serious shortcomings in Mr. Levister's ability to conduct the affairs of the company in compliance with the Act and applicable rules and regulations and without undue risk to the public. R.D. at 16.

Dominion apparently believes that, since its management team was subjected to such close questioning and since the result of the close questioning was an adverse finding by the ALJ on its managerial competence, Alfonso must have been subjected to a less strict standard of not being required to call its senior management team to sponsor exhibits.

Dominion's argument rests upon the false premise that Dominion was required to call numerous members of its senior management team to sponsor exhibits during the hearing. There is no such requirement in the CAB's regulations, in the Act, in the case law or in the rules of evidence. Rather, an airline is required to have someone sponsor its exhibits so that they can be entered into the record as the testimony of a person under oath and in accordance with the rules of evidence.

Dominion's argument fails to perceive the nature of exhibits and their relation to the burden of proof in the application process. First, there is no presumption that every applicant airline is fit for certification. Thus, each applicant must prove that it is fit to operate. To successfully carry that burden of proof, the airline prepares exhibits as a way of summarizing a great deal of oral testimony for the purpose of showing that it meets all requirements under applicable law and regulations. Those exhibits are not self-authenticating; that is, an exhibit's truth and accuracy is not immediately accepted by the ALJ on the basis of the exhibit's mere existence. Rather, the statements in an exhibit are adopted by the person sponsoring the exhibit as his own statements. 28/ And as such, the sponsoring witness must be

28/ See Silvas Air Lines Fitness Investigation, Order 84-11-126,
(footnote continued on next page)

prepared to explain, justify and agree with those statements in the exhibit which he is sponsoring, just as he would have to do with any statement he himself uttered on the witness stand.

At its hearing, Dominion had the burden of proof to show that it was fit to operate. Dominion chose various senior managers to sponsor Dominion's exhibits in order to enter the exhibits into the record as the statements of a person who was testifying under oath. The choice of who sponsored a particular exhibit, or all the exhibits, was solely Dominion's. Dominion could have entered its exhibits through one witness if it so desired because no applicable rule or law prevents it from doing so. Since it chose to use its various managers to sponsor exhibits, it cannot now claim that it was forced to do so by the CAB. And since many of its senior managers could not explain, justify or even agree with those exhibits, Dominion cannot fault the ALJ for inferring that those senior managers have not demonstrated their ability to meet the requirements of their positions nor fault the ALJ for concluding that Dominion's senior management as a whole was unfit at the time of the hearing to operate an airline. We therefore find Dominion's third instance of allegedly unfair treatment to be without merit.

In summary, our analysis of the Dominion record indicates no error by the CAB, either in the R.D. or in Order 84-11-130, in applying the relevant regulations, case law and rules of evidence and procedure to the material facts in the record. Furthermore, our comparison of the CAB's processing of Dominion's application with Alfonso's application likewise revealed no errors through the use of any stricter standards applied to Dominion. Finally, our review of the three specific instances cited by Dominion failed to show any application of a double standard to Dominion; rather, the divergent outcomes on managerial fitness resulted from differing factual, legal and procedural circumstances.

C. Dominion's Third Argument on Reconsideration.

Dominion's third argument challenges the CAB's decision to remand the compliance disposition issue in light of BIA's new evidence and allegations regarding the circumstances under which Dominion's exhibits were prepared.

The remand on the compliance disposition issue arose from BIA's motion, filed the day after the R.D. was issued, to reopen the record and to stay the effectiveness of the R.D. According to the motion, BIA had recently discovered new evidence (embodied in a memorandum concerning the internal investigation of a CAB employee) which could affect the ALJ's finding of a satisfactory

November 30, 1984, at 5 ("We expect [an applicant airline] to provide a sponsor for all information ... contained in its exhibits." Id. at 5.).

compliance disposition. 29/

BIA's motion raised the question whether Dominion may have violated relevant law or guidelines, or alternatively, may have demonstrated a predisposition for not complying with applicable law if granted a certificate. However, BIA did not develop an argument going to the merits of the compliance issue; rather, it merely moved for an opportunity to present such an argument in its rebuttal case. In support of its motion and to show that its motion was not frivolous, BIA proffered the memorandum on the internal investigation. The CAB granted BIA's motion to reopen the record on the compliance issue and noted that the new evidence also involved the preparation of Dominion's exhibits. Order 84-11-130 at 3-4. 30/

In support of its argument against the remand, Dominion basically alleges three points: (a) that the members of Dominion's senior management team are all honorable men, some of whom hold advanced academic degrees; and therefore to subject them and Dominion to further proceedings on the compliance issue would be unnecessary and a drain on Dominion's limited finances; (b) that the ALJ has already made a favorable finding of compliance disposition and there is no need to disturb it; and (c) that the CAB has already completed its own internal investigation under Part 370 of the CAB's regulations and the investigation has resulted in no findings adverse to Dominion; therefore such investigation cannot be the basis for additional inquiry into Dominion's compliance disposition within the context of its fitness proceeding.

As to Dominion's first point, it is immaterial to the compliance issue being remanded. The purpose of the remand is not for a determination of who is or who is not an honorable man. Whether or not all of Dominion's senior management team are honorable men is not a material issue in this proceeding. Rather, the basic issues on remand, as to compliance disposition, are:

29/ BIA stated in its motion that it was informed of an internal CAB investigation which convinced BIA that "inextricably interwoven with the questions on [Dominion's] compliance disposition are questions on a serious and sensitive matter of Board employee conduct." BIA Motion to Reopen the Record and Stay the Effectiveness of the Recommended Decision, April 24, 1984, at 2.

30/ In ruling on BIA's motion, the CAB further revealed that "the concern about the applicant's compliance disposition arises from the circumstances under which the applicant's exhibits were prepared." Order 84-11-130 at 4.

Because of the sensitive nature of the investigation, the CAB granted temporary confidentiality on the more sensitive issues involved until the ALJ could make further rulings on confidentiality during the course of the remanded proceeding.

whether BIA's newly discovered evidence should be admitted into the record, and whether OAEF/OAO will be permitted to develop that evidence through discovery and at hearing. The purpose of the remand is to develop the record on the issue of compliance disposition under the applicable law and the rules of evidence. The issue must be remanded because we do not have a fully developed record, with findings of fact based on evidence properly introduced into the record.

As to Dominion's second point, that the ALJ has already made a favorable finding on Dominion's compliance disposition, Dominion's argument begs the very question that it is supposed to answer. The issue is not whether the ALJ found Dominion fit under the compliance disposition test in his R.D. after hearing. No one is contesting that he did so; but the ALJ did not have before him, did not rule on and did not reopen the record to accept BIA's newly discovered evidence. Thus, and more specifically, the issue is whether the ALJ would still have found Dominion fit under the compliance disposition test if the ALJ had reopened the record, had ruled on and had accepted BIA's proffered evidence, and had permitted BIA to develop the record on the subsidiary issues raised by the new evidence.

As to Dominion's third point, that the CAB's internal investigation has resolved the questions raised by the new evidence on compliance disposition, we find Dominion's argument unconvincing. The internal investigation, according to Dominion, was conducted under Part 370 of the CAB's regulations. Those regulations govern employee conduct and not airline fitness under the compliance disposition test. Although Dominion argues that the Part 370 internal investigation failed to make any findings adverse to Dominion and that Dominion's managers and directors were not called to testify there, we fail to perceive how such alleged facts can be deemed conclusive or dispositive of the compliance disposition issue in this fitness proceeding. The parties, the issues, the substantive law and the procedures in the Part 370 investigation are different from those in this fitness proceeding.

Furthermore, Dominion's argument implies that BIA and OAEF have already presented their arguments based on the new evidence for their rebuttal case on the compliance issue. They have not. Rather, BIA merely moved to reopen the record without presenting full arguments or complete evidence of its rebuttal case. 31/

31/ The record of this proceeding does not contain the full Part 370 investigation to which Dominion refers. BIA moved to reopen the record and to have the memorandum -- related to the investigation -- entered into the record on the day after the ALJ's R.D. was issued, when the record was already closed. The ALJ declined to rule on BIA's motion since he had already issued his R.D. and, consequently, jurisdiction passed from the ALJ to the (footnote continued on next page)

Although Dominion's argument speculates that OAEP/OAO are limited in this proceeding to evidence introduced in the Part 370 employee investigation, we do not preclude the possibility of their going beyond that to evidence which may have been developed but not introduced in that investigation or which may yet be uncovered in this proceeding by discovery. In any event, we will not decide the merits of BIA's or OAEP/OAO's rebuttal arguments and evidence before they are presented to us.

Thus, we are not convinced by Dominion's third point that the CAB's internal investigation under Part 370 either disposes of the compliance disposition issue in this fitness proceeding or determines the sufficiency of BIA's or OAEP/OAO's rebuttal case. The proper forum to determine the issue of Dominion's compliance disposition is this fitness proceeding, where we have the proper parties, issues, procedures and substantive law.

We concur with the CAB's decision to reopen the record and remand the compliance disposition issue on the basis of BIA's motion with supporting evidence. We find that the motion raises important questions involving compliance disposition which should be answered but cannot be resolved until OAEP/OAO make their arguments and present their supporting evidence. 32/ We therefore direct the ALJ to make findings of fact and to issue a supplemental decision on the compliance disposition issue also.

CAB. The CAB, in turn, could not decide the compliance issue on the record before it and ordered the record reopened on the compliance issue. See Administrative Law Judge's Order, April 27, 1984; Order 84-7-11, July 3, 1984; and Order 84-11-130, November 30, 1984.

32/ The CAB, like this Department, felt constricted in making any findings without a developed record upon which to base them:

Dominion's counsel has reviewed the allegations and responds that he does not believe the allegations [contained in BIA's proffered evidence] reflect adversely on Dominion's compliance disposition. While certainly not dispositive, the allegations, at a minimum, call into question the applicant's willingness to be candid with regulatory authorities. The applicant avoided disclosure of the circumstances in which its exhibits were prepared, even after the presiding judge raised questions about them. The facts might also disclose actual misrepresentation or violations of laws or regulations. Order 84-11-130 at 4.

ACCORDINGLY,

1. We remand this proceeding to the Chief Administrative Law Judge for assignment. We direct the Designated Administrative Law Judge to reopen the record, to make findings of fact and to issue a Supplementary Decision, in accordance with this order:

a. on the issue of whether Dominion's newly reconstituted senior management team meets the managerial fitness requirements;

b. on the issue of whether Dominion's current financial and operational plans have changed from the plans presented in its exhibits at hearing; if those plans have materially changed, then the ALJ should reopen the record and make findings of fact on the new plans; if those plans have not so changed, then this issue need not be reopened; and

c. on the issue of whether Dominion's compliance disposition meets the fitness requirements in light of evidence discovered by BIA and to be developed by OAEF/OAO.

2. We grant the motion of the Office of Aviation Enforcement and Proceedings and the Office of Aviation Operations for Leave to File Out of Time.

3. We grant Dominion's motion to withdraw a document from the public docket of this proceeding, and direct the Chief of the Docket Section to return Mr. Levister's affidavit dated February 7, 1985, to Dominion's attorney. 33/

4. We deny, to the extent not otherwise granted or denied, all other pending motions, petitions and other requests in this docket.

By:

Matthew V. Scocozza
Assistant Secretary for Policy
and International Affairs

(SEAL)

33/ Mr. Levister filed with the Department an affidavit regarding his qualifications. A week later, Dominion filed a motion to withdraw that document because it was untimely filed. OAEF/OAO have not contested Dominion's motion. We therefore grant Dominion's motion for the return of the affidavit.

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

Issued by the Department of Transportation
on the 31th day of January 1986

DOMINION INTERCONTINENTAL AIRLINES, INC.:
FITNESS INVESTIGATION :

Docket 41035

ORDER DENYING APPLICATION

This proceeding was transferred to the Department from the Civil Aeronautics Board. At the CAB, Administrative Law Judge Ronnie A. Yoder issued a Recommended Decision ("R.D.") on April 24, 1984, in which he found that Dominion satisfied the operational/financial plan and the compliance disposition elements of the fitness test, but not the managerial competence element. On the day after the R.D. was served, the CAB's Bureau of International Aviation moved to reopen the record for the admission of newly discovered evidence relating to Dominion's compliance disposition. Dominion appealed the Judge's decision and offered evidence of a reconstituted management team which would allegedly cure the defects found by the Judge. The CAB remanded the proceeding on all three elements of the fitness test by its Order 84-11-130; and Dominion petitioned the CAB to reconsider its decision to remand. The proceeding was transferred to this Department without a decision on Dominion's petition for reconsideration.

By our Order 85-5-27, we remanded this proceeding for further development of the record. The proceeding on remand was reassigned to Judge Yoder and a prehearing conference was held on June 25, 1985. Shortly thereafter, Dominion's board of directors unanimously voted to dissolve the corporation. Dominion filed a Notice of Withdrawal of Application on July 10, 1985, and its attorney filed a Notice of Withdrawal of Counsel on the same day.

Judge Yoder issued a supplemental recommended decision (S.R.D.) on September 13, 1985 (copy attached as appendix). He denied Dominion's motion to withdraw and proceeded instead to make findings on the merits. He concluded that Dominion had not met the fitness standards and that its application should be denied. Although no petition for discretionary review has been filed, we have decided to take review on our own initiative and to affirm his decision in part.

As to procedure, we affirm Judge Yoder's decision to deny Dominion's request to withdraw. He rightly characterized the disposition of withdrawal requests as discretionary with the Department. He accurately described how such requests were typically disfavored by the C.A.B. when received only after a case had been extensively litigated.^{1/} That is clearly the situation here and we will continue the C.A.B.'s approach. Furthermore, we endorse the Judge's emphasis on the importance of finalizing this particular proceeding. (S.R.D. at 9).

As to the merits, our remand Order 85-5-27 requested the Judge to reopen the record for the admission of new evidence and arguments on two issues: (a) the managerial competence of Dominion's new management team and (b) Dominion's compliance disposition in light of OAEP's newly discovered evidence. However, the withdrawal of Dominion and its counsel before hearing precluded the proper admission of Dominion's and OAEP's evidence into the record and the necessary opportunity for rebuttal evidence and arguments.

Notwithstanding the undeveloped state of the evidence on remand, we affirm the Judge's finding on remand that Dominion failed to demonstrate that its new management team could remedy the managerial deficiencies enumerated in the Judge's April 24, 1984 recommended decision, which was based on a complete and litigated record. (S.R.D. at 9.) We further affirm on review that this finding is legally sufficient to support his conclusion that Dominion remains managerially unfit and therefore should be denied a certificate to engage in foreign and overseas air transportation. In light of our affirming the Judge on managerial competence as discussed, we need not and do not reach the Judge's other findings on the fitness test elements.^{2/}

ACCORDINGLY,

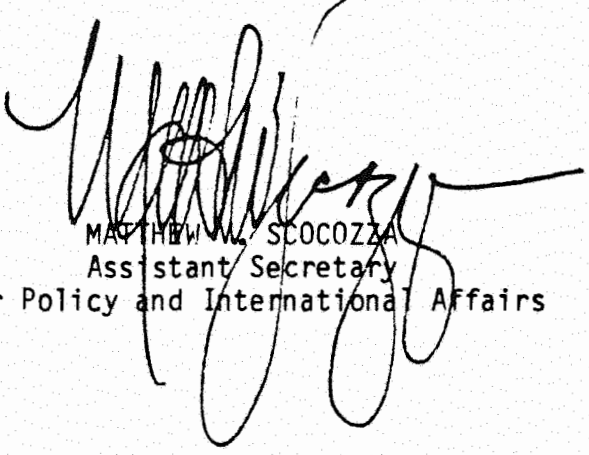
1. To the extent set forth in this order, we affirm the Supplemental Recommended Decision in Docket 41035, served September 13, 1985;

^{1/} When the parties have developed the record and fully argued the issues, an applicant cannot avoid the res judicata effect of an adverse decision by attempting to withdraw. See, e.g., Southern Transcontinental Service Case, 33 CAB 701, 739 (1961); Tourist Enterprises Corporation "ORBIS," d/b/a Orbis Polish Travel Bureau, Inc., and d/b/a Pargiello Services, Inc., Foreign Indirect Air Carrier Permit, 76 CAB 594, 617 (1978); and Unicorn Air, Ltd., Fitness Investigation (On Remand), Docket 41306, Supplemental Recommended Decision of Chief Administrative Law Judge Elias C. Rodriguez, served May 24, 1985; aff'd Order 85-9-24, July 31, 1985.

^{2/} Notwithstanding our decision not to review the Judge's discussion and findings on Dominion's compliance disposition, the Office of Aviation Enforcement and Proceedings has full discretion to determine whether any enforcement action is warranted concerning the events described by the Judge.

2. We find on review that Dominion Intercontinental Airlines has failed to demonstrate that it is fit, willing and able to engage in overseas and foreign air transportation;
3. We deny the application in Docket 41035 of Dominion Intercontinental Airlines to engage in overseas air transportation; 3/
4. The Docket Section shall preserve and maintain the confidential section of this docket until further order of the Department; and
5. Except to the extent granted, we deny all other pending motions, petitions, applications and requests in this docket.

By:


MATTHEW W. SCOCOZZA
Assistant Secretary
for Policy and International Affairs

(SEAL)

3/ By this order, we deny Dominion's application for authority to conduct overseas air transportation. Denial of Dominion's request for foreign authority is subject to Presidential review under section 801 of the Act and will be handled in a forthcoming companion order.

SERVICE LIST FOR DOMINION INTERCONTINENTAL AIRLINES

John S. Wisniewski
325 Box Elder Drive
West Chester, PA 19380

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

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

DOMINION INTERCONTINENTAL AIRLINES, INC.
FITNESS INVESTIGATION

DOCKET 41035

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE RONNIE A. YODER

Served: April 24, 1984

Upon:

Edwin O. Bailey, Wiley, Johnson & Rein, 1776 K Street, NW.,
Washington, D.C. 20006, for Dominion Intercontinental Airlines, Inc.
Nicholas R. Lowry, Civil Aeronautics Board, 1825 Connecticut
Avenue, N.W., Washington, D.C. 20428 for the Bureau of International
Aviation.

Found:

Dominion Intercontinental Airlines, Inc., has failed to demonstrate that it is fit, willing and able to engage in overseas and foreign scheduled air transportation of persons, property and mail as defined in the Federal Aviation Act, and to comply with the Act and the Board's rules, regulations and requirements thereunder.

This recommended decision is rendered pursuant to authority delegated to Administrative Law Judges under Rule 27 of the Rules of Practice in Economic Proceedings (14 CFR 302.27). Review by the Board of this decision is automatic if exceptions are filed within 14 days after service of this decision in accordance with Rules 1754 and 1755 of the Rules of Practice in Economic Proceedings (14 CFR 302.1754, 302.1755).

On May 12, 1983, DIA filed an amendment to its application for overseas and foreign scheduled authority to strike all foreign points in its application except the Dominican Republic and Haiti. Accordingly, DIA's application is limited to transportation 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 point or points in the Dominican Republic and Haiti.

A hearing was held on August 2 and 8, 1983, and at its conclusion the applicant admitted that it had not demonstrated compliance with the Board's fitness requirements (2 Tr. 31-35). It, therefore, requested an opportunity to submit revised exhibit, and to reconvene the hearing at a later date. The only other party, the Bureau of International Aviation, agreed to that request, and the hearing was reconvened on February 2, 1984. Both parties have submitted posthearing exhibits 3/ and briefs. 4/ While DIA supports a finding of fitness, the Bureau opposes such a finding because of DIA managerial deficiencies.

SUMMARY OF FINDINGS AND CONCLUSIONS

We conclude that Dominion Intercontinental Airlines, Inc., has failed to demonstrate that it is fit, willing and able to provide

3/ The following posthearing exhibits were submitted pursuant to rulings at the hearing and are hereby marked and admitted in evidence: DIA Post Hearing IR-1 through 4; BIA PH-1 through 3.

4/ The Bureau's brief was filed on March 1, 1984, with a contingent motion to late file. The Bureau's time was extended to February 29, 1984, by order dated February 28, 1984. On February 29, 1984, the Bureau moved for a further one-day extension because of a breakdown in its word processing equipment. The applicant consented to that motion, which we will grant, thereby mooted the Bureau's motion to late file.

The founder of both companies, Wendell W. Levister, has been attempting to start an airline for over twenty years. While working in Honduras in 1960 he attempted to start an Honduran airline, La Cosa Airlines, but was unable to finance it (1 Tr. 22-24). After returning to the United States Mr. Levister was commissioned in 1974 by the President of Haiti, Jean Claude Duvalier, to start a Haitian airline, Haiti International Airlines, S.A., but after seven years of effort Levister was again unable to finance it (DIA 201, p. 12; 1 Tr. 25). Mr. Levister was then invited by Dominican Ministry of Tourism officials to start a Dominican airline (DIA 201, pp. 12-13; 1 Tr. 26). Dominion Internacional de Aviacion, S.A., was incorporated in Santo Domingo for that purpose in May 1981 (DIA 201, p. 14), with the understanding that it would be 51% owned by Dominican nationals, would not compete with the national flag carrier, and would serve Puerto Plata (DIA 201, p. 13). 6/

The applicant's positions concerning plans for activation of the Dominican "subsidiary" have not been uniformly consistent or clear.7/

6/ Under Dominican law 51% of the stock of S.A. must be owned by Dominican nationals. DIA 1001.24 Rev., p. 7; 1 Tr. 71. Stock was initially issued to three Dominicans -- DIA's attorney Aquiles O. Farias Monge (2%) and Juan Rafael Pacheco and Dr. Angel Enrique Pacheco (49%). 1 Tr. 48-50. Levister testified that the Pacheco's have turned in their stock to the company (S.A.) and that Monge had assigned his proxy to the officers of S.A. (Messrs. Levister and Keene). 1 Tr. 49-50, 69, 73-74. Levister also testified that Monge held 2% and each of the other Dominicans held only 1% (1 Tr. 69) and that the applicant owns 39% of S.A.'s stock, Mr. Keene 5% and Mr. Levister 5%. (1 Tr. 51). Compare DIA 201, p. 17, which states that four percent of S.A. stock is owned by Dominican nationals; that 47% is set aside for purchase by them; and that Keene and Levister each own 4.5% and Wisniewski 1%.

7/ Although DIA holds less than 50% of S.A.'s stock, the applicant has repeatedly referred to S.A. as a subsidiary of DIA, and Mr. Levister stated that he expected to be able to control S.A. DIA 1001.24 Rev., pp. 20-22; PHC Tr. 10-11.

for a number of Honduran-based airlines. 10/ His most recent aviation-related employment was from 1965 to 1967 with George B. Adler & Company in Honduras where he flew crop-spraying and air freight assignments; from April to September 1971 as chief pilot and director of the charter department for Midwest Aircraft Sales Corporation, a fixed-base operation where he supervised 20 employees; and from 1971 to 1973 with Muhammed Speaks, flying a Super Connie L-104-H and developing a program (which was not implemented) for the purchase of a Boeing 720(B) and the creation of an aviation department (DIA 1001.4, 1 Tr. 19-21). Mr. Levister has also held a variety of other jobs, none of which involved managerial or supervisory responsibility in running a business enterprise. He has not had stable, salaried employment since 1973, when he began work on Haiti Intercontinental.

Mr. Levister's business experience has been limited to his attempt to start this airline, Haiti Intercontinental Airlines, and La Cosa Airlines; and his managerial experience is limited to six months with Midwest Aircraft Sales Corporation. Mr. Levister has candidly acknowledged that he lacks experience as a chief executive or operating officer or in running an airline and plans to operate DIA by relying on other personnel (DIA-100, pp. 4-9). He cites President Truman and Henry Ford as precedential examples of inexperienced but

10/ Mr. Levister has been a pilot for 39 years and has accumulated over 8,000 hours of flight time. After the Second World War, Mr. Levister served as a captain for ANHSA Airlines, as a captain for a private freight carriers, and as pilot to the Vice President of the Republic of Honduras and various cabinet members. He also served as a pilot for the Honduran Departments of Geodetics and Civil Aeronautics and for the Honduran Security Police. He has completed high school and two years at the University of Washington and holds licenses as a U.S. airlines transport pilot (SEL) with commercial privileges (SMEL) and as a Honduran airline transport pilot with C-82, C-45 and C-47 ratings. DIA 1001.4.

and loss and supervises 80 employees and product manufacture (1 Tr. 122). Between 1976 and 1981, Mr. Wisniewski worked as a supervisor in the processing and die shop at the Franklin Mint. Prior to 1976 he worked with a number of manufacturing firms in positions including production engineer, assistant manager, manager and vice president, but apparently without significant responsibility for personnel supervision (DIA 1001.6, p. 2). The Bureau asserts that given the scope of DIA's proposed operations, and the need for a considerable workforce, the V.P. Personnel will be a position of considerable importance, and questions whether Mr. Wisniewski is an appropriate choice for that position in view of his limited experience with administrative responsibility for personnel matters. While we conclude that Mr. Wisniewski might be qualified for his proposed position, it is clear that neither Levister nor Keene possesses the kind of successful business experience which has been relied upon by the Board in finding that prospective airline management need not have aviation-related experience, if it has demonstrated successful business experience and may be relied upon to select competent staff to handle technical responsibilities. 12/ Moreover, Mr. Levister's other selections of management personnel and sponsoring witnesses do not reflect an ability to select competent personnel.

The exhibits relating to the applicant's proposed operations were largely prepared by George A. Vadasan, who was initially designated as DIA's Vice-President for Finance and Financial Planning, then later as

12/ See Eugene Horbach and Aeroamerica, Acquisition of Modern Air Transport, Inc., 73 C.A.B. 147, 154-55 (1977).

(QSI) methodology used, admitted the exhibits were wrong, and twice pleaded a mental block in response to questions concerning exhibits (3 Tr. 88, 98, 103, 109-110). Despite Mr. Tackling's allegedly extensive experience in marketing, 16/ he also failed to demonstrate an understanding of DIA's marketing strategy and operating forecasts. Thus he could not explain the reason for DIA's common fare in the Chicago-Port-au-Prince and Chicago-Santo Domingo markets, while fares from Boston to the two destinations were different (3 Tr. 78-79); he could not explain why his comparison of existing discount fares with DIA's proposed fares showed some discount fares to be higher than regular coach fares, although he claimed to have checked the Official Airline Guide in all markets (3 Tr. 85-86); he could not explain the source of his fare elasticity estimate of 1.3 (3 Tr. 88); nor could he explain his generalization that 25 percent of the traffic in Caribbean markets was carried on discount fares (3 Tr. 94). Mr Tackling was confused by the term "OLC" which appeared on DIA-502 under the heading "Equipment," and did not realize that it signified "on-line connections." 17/

The applicant also sought to rehabilitate certain of its exhibits through Don C. Sykes, Senior Vice President and Chief Operating Officer. Mr. Sykes held a number of positions with United Airlines

16/ Mr. Tackling worked as regional sales and marketing director for Capitol Air, Inc. from March 1980 to October 1982, as Director of Route Development for Evergreen International Airlines from February 1978 to November 1980, and as North American Corporate Marketing and Sales Manager for Iran Air, Inc. from March 1969 to November 1978. He holds a B.S. in Business Administration from Ecole Militaire Saint Cyr, Paris. DIA 1001.16.C.

17/ 3 Tr. 95-96, 99, 103. Compare 3 Tr. 105-106.

Miller, 19/ Carter and Levister; but none of those individuals demonstrated a competent understanding of that document or DIA's financial plans; and none had the financial expertise necessary to qualify as a financial manager of DIA. Mr. Albert G. Carter, DIA's Vice President, Finance, could only give a partial explanation of DIA's financial condition or its future plans. Although Mr. Levister deferred certain financial questions to Mr. Carter (3 Tr. 30, 33-35), he could only confirm the appropriateness of the general accounting procedures used in the private placement memorandum (DIA 1001.24 and 1001.24 Rev.). Mr. Carter, a CPA licensed in Illinois, 20/ had only been associated with DIA for three weeks and had not audited the current balance sheet; nor could he verify the intentions or capability of the founders to produce the additional capital for which they have committed themselves. 21/ No one could explain the \$20,000 debt under current liabilities on the balance sheet, which had been the subject of inquiry at the August 8 hearing. There, Mr. Vadasan had been unable to explain the debt (2 Tr. 115-121); at the February 2 hearing neither Mr. Keene (3 Tr. 152) nor Mr. Carter (3 Tr. 169) could explain the item.

19/ Peter J. Miller is outside counsel to DIA, not a permanent member of DIA's executive staff, and could only express a legal opinion as to the adequacy of the memorandum from his prospective as a corporate attorney. 3 Tr. 173-78.

20/ Mr. Carter holds a B.S. in Business Administration from Northwestern University and served as Assistant Controller for Maremount Corporation from 1965-1972 and as Corporate Controller of TV Time Foods, Inc. from 1972 to 1980. Thereafter he operated a small CPA practice until 1982 when he became a senior consultant for FPC Associates; but neither of these activities appears to have been successful. DIA 1000.16E.

21/ 3 Tr. 170; DIA 1001.24 Rev., pp. 17-18.

when qualified personnel have been found to fill technical positions, the carrier must have qualified managers in positions with overall responsibility for the airline." 24/ Inasmuch as none of the individuals who attempted to sponsor the operating and financial exhibits were able to explain them, no one in DIA's executive management appears to understand the company's current financial status or the carrier's start-up proposal, from either a financial or an operational standpoint. 25/ This flawed presentation of DIA's case at the hearing calls into serious question whether Mr. Levister, DIA's President, can be relied upon to select and retain competent managerial personnel.

The initial exhibits presented by the applicant were in such a state of disarray that the judge reviewed the entire submission at the prehearing conference and directed the submission of a revised set of

(footnote 23 continued from page 14)

first as a maintenance representative in the Pacific, and later as Maintenance Controller where he had responsibility for monitoring the maintenance of the carrier's fleet. DIA 1001.15. Robert P. Bell, Assistant Vice President, Flight Operations and Flight Control Manager, is also a former Braniff employee, where he was a flight dispatcher between 1963 and 1980 and Systems Operations Manager with supervisory responsibility over managers of customer service, maintenance, routing, and crew control. DIA 1001.16. Finally, William W. Hefton, DIA's chief pilot, flew for Braniff from 1951 until 1982, and has accumulated some 15,000 flight hours including service across the Pacific and Atlantic and into South America, and is a rated captain on B-747, B-727, and DC-8 equipment. DIA 1001.24, p. 40; 1001.36.

24/ Northeast Sunrise Airlines, Inc. Fitness Investigation, Order 83-5-90, p. 7.

25/ Mr. John B. Wimbicus, Assistant Vice President Finance, has no in-depth experience in financial matters. He is currently an account executive at Namisco, Inc., a rare coin and precious metals brokerage firm located in Chicago. He graduated from Northern Illinois Graduate School of Business with an MBA in 1981. DIA 1001.10.

for service from eight mainland U.S. points (Baltimore, Boston, Chicago, Cleveland, Houston, Los Angeles, Minneapolis and San Francisco) to San Juan, Port-au-Prince and Santo Domingo, to be phased in over the first seven months of operations. 28/ Two L-1011 aircraft would be purchased initially, one of which would be held in reserve for three months as a back-up aircraft until additional routes were inaugurated. The first routes served would be Boston and Baltimore (BWI) to San Juan and Santo Domingo six days a week, including a stop at Port-au-Prince once a week (DIA 300, p. 2). In its seventh month of operation, DIA would purchase a DC-10 to provide non-stop service in the long-haul markets of Los Angeles and San Francisco to San Juan and Santo Domingo (DIA-300, p. 2).

DIA's exhibits give a detailed breakdown of revenues, traffic, costs and load factors by route segment. 29/ DIA proposes to operate largely coach service with some first-class seats, but no discount service apart from bulk sales to hotel or casino operators. 30/ Exhibit DIA-501 attempts to compare DIA's proposed coach fares in its markets with existing coach fares, showing that DIA will offer low fares in all markets.

The Bureau does not dispute DIA's cost projections, stating that they appear reasonable in view of industry experience with regard to DC-10 and L-1011 aircraft. 31/ The Bureau does dispute, however, the applicant's traffic and revenue estimates, asserting that DIA

28/ DIA 300, p. 2; DIA 502.

29/ See DIA 500, 600 and 700 series exhibits.

30/ Mr. Tackling, DIA's proposed Vice President, Marketing and Route Development, testified that as much as 50% of DIA's seats would be blocked for casino traffic. 3 Tr. 94-95.

31/ See CAB, Local Service Air Carrier's Unit Costs, Vol. 1., year ending September 30, 1981, pp. 5, 7.

service. DIA argues that its use of a .15 factor for connecting flights is more conservative than the basic QSI methodology which has no value for connecting flights; but the Bureau witness testified that QSI must be applied with discretion, that it would be inappropriate to give no weight to connecting service, that .15 was too small a factor, that .4 had been used by the Bureau in British American Air, Inc. Fitness Investigation, Docket 41231, BIA-R-304, p. 1, n. 2, and that its use would be appropriate here. 33/ Although no definite value has been established for such service in Board precedent, an arbitrary value does not take into account the varying quality of such service, and DIA's exhibits offer no explanation of why it selected its particular value. None of DIA's witnesses could explain its selection except to point to its use by AVMARK in its report (3 Tr. 129). That report was, however, not sponsored or explained by any of DIA's witnesses and consequently is entitled to little weight. After making all the Bureau's adjustments -- i.e., no fare stimulation, a 15% participation factor for markets now experiencing no single-plane service, and a .4 factor for on-line connecting traffic -- DIA would still have a small profit (\$204,400) after return and taxes in the first normalized year of operations, if the historical growth rate is applied to the full year 1985 traffic, instead of only 1/4 of that year as was done by DIA in its exhibits. 34/ Accordingly, we find no basis for concluding that DIA's operating proposal is ipso facto unreasonable.

33/ 3 Tr. 192-94, 202-204. See BIA-PH-2.

34/ DIA 500, col. 7. See DIA Br., Appendix B.

DIA projects that the bulk of the funds from all three stages would be applied to aircraft purchases. Over the first six months DIA would spend approximately \$20,000,000 of these funds on two L-1011 and one DC-10 aircraft. 37/ Ground equipment, initial advertising expenses, preinauguration payroll and operating expenses (such as crew training, terminal rental and contract services) would require approximately \$2.4 million. 38/

While the financial plan meets this projected need for funds, it lacks firm commitments from proposed sources of equity, other than the incorporators, who have signed notes affirming their commitment to purchase additional stock. Discussions concerning the two subsequent stock offerings have been preliminary and inconclusive. However, the Board does not require firm commitments from potential investors but merely a plan which if implemented will produce sufficient funds to allow the carrier to begin operations without undue risk to consumers; 39/ and DIA's exhibits contain a plan which if successfully implemented would appear to meet its start-up needs for capital.

The Bureau contends that DIA's managerial and sponsorship deficiencies do not infect DIA's operating and financial plans and concludes that they meet the Board's fitness test (Br., p. 14, n. 10). Nevertheless, the Bureau notes that problems of DIA's management and

37/ DIA 1001.24 Rev., pp. 14-18. DIA 704, pp. 1-2, shows that DIA would spend \$20.6 million from stock receipts and borrow approximately \$9.3 million to meet the total estimated cost of \$30 million for the aircraft. At the hearing Mr. Levister acknowledged that the aircraft might each cost up to \$3 million more than estimated in its exhibits. 3 Tr. 48. While that additional \$9 million cost might be funded by the stock offering, the additional depreciation expense is not included in DIA's profit forecasts. DIA 701; DIA 704, p. 1.

38/ DIA 1001.24 Rev., pp. 14, 15.

39/ See Transcontinental Low-Fare Route Proceeding, 80 C.A.B. 11, 29-30 (1979), Order 79-1-75, p. 26; Sea Coast Airway Fitness Investigation, 102 C.A.B. 1, 5 (1983), Order 83-6-27, p. 5.

Compliance Disposition

The record indicates that neither the applicant nor any of the applicant's key personnel has been the subject of consumer complaints; 42/ compliance actions on the part of the FAA or CAB; charges of unfair, deceptive, or anticompetitive business practices; or charges of fraud, felony or antitrust violations. 43/ In response to the Bureau's inquiry, the FAA stated it had no objection to grant of DIA's application (BIA-R-102). Moreover, a review of Board files conducted by the Bureau of Carrier Accounts and Audits revealed no compliance actions taken against any of the key personnel or relevant corporations (BIA-R-100). Mr. Levister was cited by the FAA in 1971 and 1973 for operating an aircraft within 500 feet of people and/or structures, and those complaints were settled upon payment of \$100 and \$200, respectively (BIA-R-101). Those violations were both over ten years ago and do not by themselves warrant a finding of unsatisfactory compliance disposition. DIA has also demonstrated substantial and persistent deficiencies in complying with evidentiary requirements in this proceeding; but those deficiencies do not show a lack of disposition to comply with the Act or the Board's rules and regulations. Accordingly, we conclude that DIA satisfies the Board's requirements with respect to compliance disposition. 44/

42/ See, e.g., statements from the Pennsylvania State Real Estate Commission (DIA-1001.18) and the Indiana State Consumer Complaint Commission (DIA-1001.19).

43/ DIA 201, pp. 1-2; DIA 1001.16(b).

44/ See, e.g., 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); Silvas Airlines, Charter Authority Denial, 87 CAB 160, 167 (1980), Order 80-10-103, p. 8; IASCO Fitness Investigation, 99 CAB 447, 463 (1983), Order 83-1-31, Initial Decision, p. 12; Key Airlines, Inc. Fitness Investigation, Initial Decision, pp. 11-13, review declined except as to citizenship issues, Order 84-2-60.

citizens. 46/ Although the applicant intends to add new members to its Board of Directors, it has certified that they will all be U.S. citizens and that further issuance of its stock will be monitored by its transfer agent to ensure continued compliance with the citizenship requirements of the Act (3 Tr. 53). Accordingly, we conclude that the applicant is a U.S. citizen within the meaning of Section 101(16) of the Act.

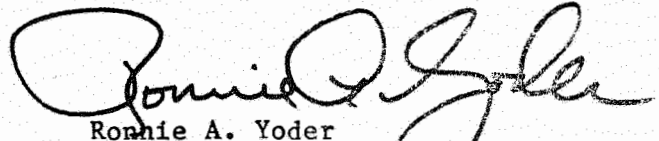
Section 408 and 409 Questions

Order 82-10-34 instituting this investigation placed at issue whether the Board should "approve, exempt, or disclaim jurisdiction over any control or interlocking relationships under Section 408 and 409 which may exist."

Section 408(a)(6) of the Act makes it unlawful, without Board approval, "for any air carrier or person controlling a certificated air carrier to acquire control, in any manner whatsoever, of any person substantially engaged in the business of aeronautics other than as an air carrier." Section 409 prohibits relationships, without Board approval, in which an officer or director of an air carrier concurrently serves as an officer or director of a person substantially engaged in the business of aeronautics.

46/ The company has 12 million shares of authorized common stock, 11,000,000 voting and 1 million to be offered privately as non-voting stock at \$1.50 each. At present there are 1.5 million shares of stock outstanding, all of which is held by Levister (700,000 shares); Keene (600,000); and Wisniewski (200,000) under restrictions imposed by governmental authorities. DIA 1001.24, pp. 42-43. In order to repay loans in connection with the attempted start-up of DIA and Haiti Intercontinental Airlines the shareholders have agreed to issue 21,104 shares of their own or company-owned stock to relatives and friends of Levister and Keene, all but one of whom are U.S. citizens. DIA-H-8; DIA-H-9, p. 2; 2 Tr. 145. See, supra, p. 20.

demonstrated that it is fit, willing, and able to engage in interstate and overseas charter air transportation of persons, property and mail, as proposed in its application; and to comply with the provisions of the Act and rules, regulations and requirements of the Board thereunder. We also conclude that there are no control or interlocking relationships which require approval, exemption or disclaimer of jurisdiction under sections 408 and 409 of the Act.


Ronnie A. Yoder
Administrative Law Judge

Dated: April 19, 1984