IN THE

Supreme Court of the United States

October Term, 1971

No. 56 Original

COMMONWEALTH OF VIRGINIA, individually and on behalf of all other states similarly situated,

Plaintiff,

—against—

INTERNATIONAL AIR TRANSPORT ASSOCIATION, *et al.*,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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August 18, 1972

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Question Presented

The question presented is whether this Court, in the exercise of its sound discretion, should refuse to assume jurisdiction of an original action against the International Air Transport Association and 37 airlines alleging violations of the antitrust and other laws since

1. The complaint fails to state a claim upon which relief can be granted because the agreements challenged herein were approved by the Civil Aeronautics Board and thus immunized from attack under the antitrust and other laws, and, in any event, the Civil Aeronautics Board has exclusive primary jurisdiction of the issues raised herein and is presently considering certain of those issues;

2. The plaintiff has an adequate alternative forum in the United States District Court; and

3. This Court is not an appropriate forum to determine the complex factual questions presented by this action and to supervise the pre-trial discovery which may be necessary.

Constitutional Provisions and Statutes Involved

(The text of these constitutional provisions and statutes is set forth in Appendix A hereto at the pages indicated.)

Statement of the Case

A. The Complaint Which Plaintiff Seeks to File

The Commonwealth of Virginia ("Virginia") has moved for leave to institute an original class action against the International Air Transport Association ("IATA") and 37 airlines. All but five* of the airline defendants are members of IATA.

The gravamen of Virginia's complaint is that (1) air cargo rates are set jointly by members of IATA and (2) rates between European cities and John F. Kennedy International Airport in New York are unjustifiably lower than rates between European cities and almost all other United States airports including Dulles International Airport in Virginia. The complaint contains two counts. The first alleges that defendants violated the antitrust laws of the United States by agreeing upon the rates in question. The second alleges that such agreements were violative of the common law.

Virginia seeks a mandatory injunction requiring each defendant to adopt a rate structure which does not give an undue preference to Kennedy Airport and also demands damages allegedly suffered, in their proprietary capacities, by Virginia and all other states similarly situated by reason of the present rate structure.

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* Airlift International, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Seaboard World Airlines, Inc. and Southern Airways, Inc.

B. The Statutory Scheme for the Setting of International Air Freight Rates

1. *The Federal Aviation Act*

Commercial aviation is a highly regulated industry subject to the control of the Civil Aeronautics Board ("the Board").* As Mr. Justice Douglas stated in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 301 (1963):

> "Since 1938, the industry has been regulated under a regime designed to change the prior competitive system. As stated in S. Rep. No. 1661, 75th Cong., 3d Sess., p. 2, 'Competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of the air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest, in the interests of the Postal Service, and of the national defense.' "

The Federal Aviation Act ("the Act") specifically contemplates agreements among air carriers designed to eliminate competition in certain spheres including rates. *IATA Traffic Conference Resolution,* 6 C.A.B. 639, 641 (1946). Such agreements were made subject to the direct control of the Board by section 412 of the Act which requires that every air carrier file with the Board a copy of every agreement between such air carrier and other air carriers, whether foreign or domestic, "relating to the establishment of transportation rates" or "for controlling, regulating, preventing, or otherwise eliminating destructive . . . or

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* The industry has been so regulated since the passage of the Civil Aeronautics Act (52 Stat. 973) in 1938. The Civil Aeronautics Act "was superseded in 1958 by the Federal Aviation Act, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, the latter making no changes relevant to our present problem." *Pan American World Airways, Inc.* v. *United States, supra* at 301.

wasteful competition . . ." (49 U.S.C. §1382(a)). That section further provides that the Board "shall by order approve any such contract or agreement . . . that it does not find to be adverse to the public interest" and "shall by order disapprove any such contract or agreement . . . that it finds to be adverse to the public interest, or in violation of this Act . . ." (49 U.S.C. §1382(b)).

In section 414 of the Act Congress provided that:

> "Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." (49 U.S.C. §1384).

2. *The International Air Transport Association*

IATA is an association of the airlines of all nations engaging in scheduled international air service, including virtually all United States air carriers authorized to engage in foreign air transportation. The Articles of Association of IATA were approved by an order of the Board dated June 5, 1945. See *IATA Traffic Conference Resolution, supra* at 639 n. 1.

By resolution adopted in October 1945 IATA established traffic conferences. Each member of IATA is required to be a member of the traffic conference in the region in which it operates and action by any traffic conference must be taken by unanimous vote of all members present. The traffic conferences are empowered to concern themselves

with all international air traffic matters including specifically the setting of cargo tariffs and rates.

The resolution establishing the traffic conferences and giving those conferences power to set rates was approved by the Board for a one-year trial period on February 19, 1946 (C.A.B. Agreement No. 493, *IATA Traffic Conference Resolution, supra* at 640-41).* The trial period approval was extended from time to time until the IATA Traffc Conference Resolution was approved for an indefinite period by the Board in its Order E-9305 of June 15, 1955.

With respect to the rate conference machinery established by the *IATA Traffic Conference Resolution,* the Board stated, *supra* at 641-42:

> "In approving the rate conference machinery established by this resolution, we take cognizance of the fact that the Congress clearly contemplated the establishment of air carrier rates by agreement . . . in section 412(a) of the Civil Aeronautics Act . . .
>
> "The conference method of rate making was well established in the field of surface transportation at the time of the passage of the Civil Aeronautics Act. Congress previously had incorporated in the Shipping Act of 1916 a provision similar to section 412 (a) of the Civil Aeronautics Act, in which rate conferences in the shipping industry were recognized and rate agreements reached in those conferences were made subject to the approval or disapproval of the Shipping Board (now the Maritime Commission). Recent developments in Congress offer no indications of a

* In approving the agreement which gave IATA the power to set rates the Board explicitly noted that to "the extent that the Board approves an agreement, section 414 of the Act relieves the parties from any liability under the antitrust laws of the United States." *IATA Traffic Conference Resolution, supra* at 640.

> reversal of the national policy thus revealed in the provisions of the Shipping Act and the Civil Aeronautics Act with respect to the rate conference method."

The IATA rate conference machinery is not only wholly consistent with the Congressional intent embodied in the Act, but is also necessitated by the realities of international air transportation.

The operations of United States flag air carriers to foreign countries and those of foreign flag air carriers to the United States are governed by bilateral agreements between the United States and foreign governments.* In *IATA Traffic Conference Resolution, supra* at 642, the Board noted that at least certain foreign governments

> "insist that American-flag carriers operating on routes to and from territory controlled by them either shall charge rates that have been approved by an appropriate international governmental agency or rates that have been fixed by agreement among all the carriers operating throughout a given region."

"[T]he alternative to rate agreement in the traffic conferences, subject in the case of American air carriers to the approval of the Civil Aeronautics Board, would be to provoke unilateral control by other governments of the rates charged by our carriers." (*Id.* at 643).

The rate conference machinery of IATA, initially approved by the Board twenty-six years ago, remains the basic method of establishing rates in international air transportation.

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* The bilateral agreements have been negotiated pursuant to the executive authority of the President and the State Department. In the absence of bilateral agreements between the United States and a foreign government, operations can be, and are, authorized on the basis of principles of international comity and reciprocity.

Not only has this method received the continuing approval of the Board, but it has also continued to be approved by both the executive and legislative branches of the government. Thus the recent Statement of International Air Transportation Policy of the United States, approved by the President, stated:

> "The U.S. should continue to accept IATA as the machinery for pricing scheduled services, subject to continuing safeguards, but supplemented by increased direct informal exchanges between governments." (Statement of International Air Transportation Policy of the United States, June 22, 1970, at 10).

Similarly, the Congress, in recently granting the Board authority to suspend rates and fares in international air transportation, made it clear that such legislation was not intended to supplant or conflict with the IATA rate conference method of establishing rates. The House Report accompanying that legislation stated:

> "The bill would allow the continuation of the present mechanisms for establishing international air transportation fares through the International Air Transportation [sic] Association (IATA)." (H.R. REP. No. 92-854, 92d Cong., 2d Sess. 4 (1972)).

As recently noted by the U.S. Court of Appeals for the Second Circuit, the determination of the legality of international airline rates involves consideration of foreign policy.

> "The operation of foreign-owned airlines to points in this country, and of American-owned airlines to points in foreign countries, is permitted by virtue of, and governed by, bilateral agreements between the United States Government and foreign governments. Section

1108(b) of the Act requires the CAB to exercise its powers with respect to foreign-owned civil aircraft in a manner consistent 'with any treaty, convention, or agreement which may be in force between the United States and any foreign country or countries.' These bilateral agreements characteristically provide that in the event that either party is dissatisfied with a rate proposed by an airline of either government (a 'rate proposed' includes rates filed with the CAB), and if the two governments are unable to agree on an appropriate rate, then upon the request of either government the issue must be submitted to the International Civil Aviation Organization for an advisory report. Each government agrees to use its best efforts to implement the recommendation made in the report." (*Danna* v. *Air France,* 12 CCH Av. Cas. 17449, 17452-53 (2d Cir. July 3, 1972)).

C. All IATA Rates Put Into Effect by the Air Carriers Were Approved by the Board

Board approval of the IATA rate conference machinery did not and does not extend to any agreements establishing rates under that machinery. Each agreement on rates that has been reached under the IATA machinery must be and has been submitted to the Board for its approval under Section 412 of the Act. The procedure has been well described by the U.S. Court of Appeals for the District of Columbia in *National Air Carrier Ass'n* v. *CAB,* 436 F.2d 185, 186 (1970) as follows:

"The International Air Transport Association (IATA) is a trade organization of domestic and foreign air carriers which are engaged in scheduled international air transportation. The member carriers periodically meet in 'traffic conferences' to take joint action on matters of mutual concern, including types

> of fares offered to the public. These agreements, which take the form of resolutions, are subject to approval by the parent nations of the member carriers; in this country, the Civil Aeronautics Board has long asserted jurisdiction over IATA resolutions under section 412 of the Aviation Act, 49 U.S.C. § 1382 (1964). *See generally* IATA Traffic Conference Resolutions, 6 C.A.B. 639 (1946). The Board's approval of an IATA resolution confers antitrust immunity by virtue of section 414 of the Act, 49 U.S.C. § 1384 (1964); the rates contemplated by the agreements are then embodied in tariffs which are filed with the Board pursuant to 49 U.S.C. § 1373 (1964)."

The IATA agreed upon rates, which are the subject of Virginia's complaint, have been established according to that procedure and the IATA resolutions establishing such rates have been approved by the Board.

The basic transatlantic air cargo rate structure has been in existence for twenty-five years. IATA resolutions and agreements with respect to that structure have been approved by the Board on a periodic basis over the years.

The rate structure in question first establishes a rate level for the transatlantic portion of the carriage. Until 1969 rates for United States cities, other than New York and Boston, were constructed by combining the lowest transatlantic rate via designated gateways* and the lowest existing local rate from the gateway to the United States destination.

In April and May of 1969 IATA traffic conferences held in Athens, Greece, adopted resolutions that continued the basic rate construction methodology, but provided charges for the leg of the trip beyond the gateway that were below

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* The designated gateways are New York, Boston, Montreal, Halifax and Gander.

existing local domestic rates between Philadelphia, Baltimore or Washington (including Dulles Airport), on the one hand, and New York on the other.*

The Board approval of the agreements adopting this rate structure for the two-year period beginning October 1, 1969** was granted without prejudice to the rights of the parties in an investigation that was instituted by the Board into the lawfulness of the rate structure in *Agreements Adopted by IATA Relating to North Atlantic Cargo Rates,* Docket 20522 (see pp. 11-13 *infra*).

Beginning on October 1, 1971 an open-rate situation*** developed due to the inability of the carriers to reach an agreement on transatlantic cargo rates and continued for an eight month period.

Agreement on rates was finally reached and approved by the Board for the period July, 1972 through September, 1973 (C.A.B. Order 72-6-137 (June 29, 1972)). Again the Board took note of its investigation in Docket 20522 and observed that its approval was granted *"pendente lite* and is subject to such modifications as may be warranted." (*Id.* at 9).

D. The Board's Pending Investigation Into the Alleged Discrimination With Respect to Dulles Airport

The question of whether air cargo rates from Europe to Dulles Airport and U.S. points other than New York are

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* Philadelphia, Baltimore and Washington (including Dulles Airport), thus benefited from these reduced charges.

** C.A.B. Orders 69-7-76 (July 16, 1969), 69-8-174 (Aug. 29, 1969), 69-9-90 (Sept. 15, 1969), 69-10-30 (Oct. 7, 1969).

*** An open rate situation occurs when any IATA carrier's government disapproves an IATA agreement, or if the agreement otherwise expires. When this happens each carrier is free to set its own rates, subject to any limitations imposed by the governments involved.

unjustly discriminatory, the rate structure here challenged by Virginia, is presently under investigation by the Board.

On March 13, 1969, the Board acting on a complaint of the City of Baltimore instituted an investigation into the transatlantic cargo rate structure in order to determine whether such rates unduly discriminate against Baltimore/Washington and are unduly preferential to New York (C.A.B. Order 69-3-47 (March 13, 1969), Docket 20522). Virginia's Airport Authority acting on behalf of the Commonwealth of Virginia filed an answer in support of Baltimore's complaint and actively participated in the investigation. Rates to Dulles Airport in Virginia were included within the scope of the proceeding.

The Board named as parties to the investigation "all IATA air carriers and foreign air carriers who provide cargo service on the North Atlantic between European points on the one hand and both New York and Baltimore and/or Washington, D.C. on the other, whether by direct single carrier service, or through transportation in through service pursuant to joint rates. United States carriers participating in such through service on the domestic segments are also made parties hereto." * (C.A.B. Order 69-3-47, *supra* at 4).

A hearing was held before an Examiner of the Board who rendered an Initial Decision on February 8, 1972. The Examiner found that the transatlantic cargo rate structure was unduly preferential and unjustly discriminatory. He recommended that the Board reconsider its approval of the existing rate structure and condition any IATA agreements in certain respects so as to eliminate the discrimination.

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* All of the defendants herein, except IATA, are parties to that proceeding.

Exceptions were filed to the Initial Decision, briefs submitted to the Board and oral argument held before the Board on May 3, 1972. The matter is now before the Board for final decision.

ARGUMENT

THIS COURT SHOULD DECLINE TO ASSUME JURISDICTION

This Court has original, but not exclusive, jurisdiction over suits by a state against the citizens of another state. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(b)(3). However, the "breadth of the constitutional grant of this Court's original jurisdiction dictates that [it] . . . exercise discretion over the cases" it hears, lest its "ability to administer [its] . . . appellate docket be impaired." *Washington* v. *General Motors Corp.*, 40 U.S.L.W. 4437, 4438 (U.S. April 24, 1972). See also *Illinois* v. *Milwaukee*, 40 U.S.L.W. 4439, 4440 (U.S. April 24, 1972).

As the Court stated in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 (1971):

> "What gives rise to the necessity for recognizing such discretion is pre-eminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court."

"[I]n order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction", *Ohio* v. *Wyandotte Chemicals Corp., supra* at 498, the Court will "inquire whether recourse to that jurisdiction . . . is necessary for the State's protection." *Massachusetts* v. *Missouri,* 308 U.S. 1, 18 (1939). A state's burden is a heavy one. "Such a serious intrusion [can] . . . be justified only

by the *strictest necessity . . .*" *Ohio* v. *Wyandotte Chemicals Corp., supra* at 505 (emphasis added).

This Court has repeatedly declined to entertain complaints brought by a state against the citizens of another state where, as here, there is an alternate tribunal which is competent to exercise jurisdiction over the acts of nonresidents of the allegedly aggrieved state and where "reasons of practical wisdom" suggest that this Court is an inappropriate forum.

This Court's extreme reluctance to exert its original jurisdiction was emphasized by two recent decisions. In *Ohio* v. *Wyandotte Chemicals Corp., supra,* this Court denied Ohio's motion for leave to file a complaint against chemical companies which allegedly were dumping mercury into streams whose courses ultimately reached Lake Erie. In *Washington* v. *General Motors Corp., supra,* this Court denied a motion by 18 states for leave to file a complaint against the nation's four major automobile manufacturers and their trade association alleging that the defendants conspired to restrain the development of motor vehicle air pollution control equipment. In both cases the Court noted that the complaint came within its original jurisdiction. In *Wyandotte,* the Court described the underlying problem as one of "fundamental import and utmost urgency." (401 U.S. at 505). In *Washington* v. *General Motors Corp.,* the Court characterized the issues presented as "important questions of vital national importance." (40 U.S.L.W. at 4438). Nevertheless, the availability of another forum and the inappropriateness of the Supreme Court as the initial forum, resulted in a denial of the States' motions for leave to file complaints.

The questions presented by the complaint herein are not substantial and certainly this case is a less appropriate one for the assertion of this Court's original jurisdiction

than were *Wyandotte* and *Washington*. Plaintiff's motion for leave to file its complaint should be denied for three reasons.

First, the complaint fails to state a cause of action. The Board approved the IATA rate conference machinery challenged herein and further approved all rates set by that method. The agreements setting such rates are, therefore, immune from attack under the antitrust laws or other laws (pp. 15-18 *infra*). Moreover, even if the setting of such rates by IATA was not immune from the operation of the antitrust and other laws, plaintiff's charges would be within the primary jurisdiction of the Board (pp. 19-23 *infra*).

Second, jurisdiction over defendants can be obtained in a United States District Court and, therefore, there is no necessity for plaintiff to sue in this Court (pp. 23-25 *infra*).

Third, this Court would not be an appropriate forum to determine the complex factual questions presented by this action and to supervise pre-trial discovery (pp. 25-27 *infra*).

1. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

A. *The Board's Approval of the IATA Agreements Challenged Herein Immunized Those Agreements and Actions Taken Pursuant Thereto From Attack Under Antitrust and Other Laws*

As more fully set forth above (pp. 5-11), the agreements establishing IATA's rate making machinery and the agreements setting the rates challenged herein were submitted to and approved by the Board pursuant to Section 412 of the Act.

The Board's approval of those agreements relieved defendants from the operation of the antitrust laws and other

laws pursuant to the Congressional direction contained in section 414 of the Act which provides that

> "Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." (49 U.S.C. § 1384).

Thus the allegations of the complaint, including plaintiff's charge that "the air carriers who belong to IATA have agreed among themselves to submit in their tariffs only those rates which have been approved by an IATA conference" and to "establish rates . . . to and from . . . Kennedy Airport . . . which are substantially lower than the transatlantic air cargo rates established for shipments to and from other American airports", and the demand that defendants be enjoined "from agreeing on transatlantic cargo rates among themselves" and be directed "to provide independent tariffs" (Pl. Br. p. 9, Compl. ¶¶ 11-13), fail to state a cause of action on which relief can be granted under either the antitrust laws or the common law.

In *Pan American World Airways, Inc.* v. *United States, supra,* 371 U.S. 296, this Court explicitly recognized that a person is relieved from the operations of the antitrust laws and all other laws insofar as may be necessary to enable that person to do anything authorized, approved, or required by order of the Board. The Court analyzed the relationship between the Federal Antitrust Laws and the Federal Aviation Act and concluded that

> "The Board in regulating air carriers is to deal with at least some antitrust problems . . . [I]t is given authority by §§ 408 and 409, as already noted, over consolidations, mergers, purchases, leases, operating contracts, acquisition of control of an air carrier, and interlocking relations. Pooling and other like arrangements are under the Board's jurisdiction by reason of § 412. *Any person affected by an order under §§ 408, 409 and 412 is 'relieved from the operations of the "antitrust laws,"'* including the Sherman Act. § 414. The Clayton Act, insofar as it is applicable to air carriers, is enforceable by the Board." (*Id.* at 304) (emphasis added).

This Court's earlier decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), on which plaintiff relies (Pl. Br. p. 4) does not suggest a contrary result and lends no support to plaintiff's effort to institute this action in this Court. In *Georgia* v. *Pennsylvania R. Co.*, this Court granted leave to the State of Georgia to file a bill of complaint against 20 railroad companies in which plaintiff alleged that defendants fixed arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from Georgia. However, the Court's decision therein was predicated in large part on the conclusion that a rate-fixing combination among railroads was not immunized from the antitrust laws by the Interstate Commerce Act. The Court pointed out that "Congress has not given the Commission . . . authority to remove rate-fixing combinations from the prohibitions contained in the antitrust laws" and that it "has not placed these combinations under the control and supervision of the Commission." (324 U.S. at 456). The Court further noted that on two occasions "Congress has been tendered proposals to legalize rate-fixing combinations" and "has not adopted them." (*Id.*

at 457). In sharp contrast, in the Federal Aviation Act Congress has explicitly legalized rate setting combinations among airlines provided that they are approved by the Board, and that difference is determinative here.

The distinction between the setting of rates by airlines and the railroad rate-fixing situation involved in *Georgia* v. *Pennsylvania R. Co., supra,* was recognized by this Court in *Pan American World Airways, Inc.* v. *United States, supra.* The Court there stated in language which is particularly applicable here:

> "The case is therefore quite unlike *Georgia* v. *Pennsylvania R. Co., supra,* where a conspiracy among carriers for the fixing of through and joint rates was held to constitute a cause of action under the antitrust laws, in view of the fact that the Interstate Commerce Commission had no power to grant relief against such combinations." (371 U.S. at 305-06).

The Court further noted in a footnote that:

> "[T]he result in *Georgia* v. *Pennsylvania R. Co., supra,* might today be different as a result of the Act . . . which gives the Interstate Commerce Commission authority to approve combinations of the character involved in that case and give them immunity from the antitrust laws." (*Id.* at 306 n. 11).*

The Board has authority under sections 412 and 414 of the Federal Aviation Act to approve joint action in the setting of rates. The conduct here challenged was approved by the Board—and its "orders . . . give immunity from the antitrust laws by reason of § 414" (*id.* at 305).

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* Georgia's complaint was eventually dismissed on the basis of a Special Master's 900 page report concluding, *inter alia,* that Georgia failed to show any damage. 340 U.S. 889 (1950).

B. *The Board Has Exclusive Primary Jurisdiction Over the Setting of International Rates*

" 'Congress has committed the regulation of this industry to an administrative agency of special competence' " and " 'air carriers . . . conduct their business under a regulated system of limited competition.' " *Pan American World Airways, Inc.* v. *United States, supra* at 303.

The questions presented by this complaint, *i.e.*, (1) whether defendants violated the antitrust laws by jointly setting rates for the shipment of transatlantic air cargo and (2) whether the rates thus set are unjustly discriminatory, were expressly entrusted by Congress to the Board and call for the exercise of its expertise and technical judgment.*

Section 403(a) of the Act requires that every air carrier and foreign air carrier file with the Board tariffs showing all rates. Section 404 provides that no air carrier shall give any undue preference or advantage to any locality. Section 412 requires all air carriers and foreign air carriers to file with the Board copies of all agreements relating to rates and fares (which includes the agreements in question herein) and requires the Board to approve or disapprove those agreements. Section 1002(f) empowers the Board to determine whether rates are "unjustly discriminatory or unduly preferential or unduly prejudicial" and to take corrective action if they are.

Similarly, the Board in regulating air carriers is empowered to deal with the subject matter of the dispute presented herein, *i.e.*, agreements among carriers to set rates. As this Court stated in *Pan American World Airways, Inc.* v. *United States, supra* at 304, "Pooling and other

* Only the second question is before the Board in Docket 20522 (Pl. Br. pp. 8-9). Virginia has not requested that the Board reexamine its decision in *IATA Traffic Conference Resolution, supra*, 6 C.A.B. 639.

like arrangements are under the Board's jurisdiction by reason of § 412."

Thus, the Act "covers the dominant facts alleged in the present case as constituting a violation of the Antitrust Act. . ." *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 483 (1932).

Where, as here, the questions presented by a complaint have been entrusted by Congress to an administrative body, this Court has repeatedly held that exclusive primary jurisdiction is in that administrative body.* *Pan American World Airways, Inc.* v. *United States, supra* at 305-09; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439-442 (1907); *Robinson* v. *Baltimore & O. R. R.*, 222 U.S. 506, 508-11 (1912); *United States Navigation Co.* v. *Cunard S.S. Co., supra* at 485; *Far East Conference* v. *United States*, 342 U.S. 570, 573-75 (1952); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 220-22 (1966).

The reasons which give rise to such "exclusive primary jurisdiction" were articulated by this Court in *United States Navigation Co.* v. *Cunard S.S. Co., supra*, which was an action under the antitrust laws.

> "Such resort . . . [to the Commission] must be had where a rate, rule or practice is attacked as unreasonable or unjustly discriminatory . . . In all such cases the uniformity which it is the purpose of the Com-

* A demand for damages in a complaint does not deprive the Board of its exclusive primary jurisdiction. *E.g., Pan American World Airways, Inc.* v. *United States, supra* at 313 n. 19; *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 221-24 (1966). Furthermore, Virginia would not be entitled to damages "even if the conspiracy alleged were shown to exist." *Georgia* v. *Pennsylvania R. Co., supra* at 453; *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162-63 (1922); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 469-74 (1959).

merce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission 'is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts . . .' " (284 U.S. at 482).

* * *

"So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the commission, *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426; . . . and where an action was brought under § 7 of the Antitrust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U.S. 156." (*Id.* at 483).

* * *

"Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal." (*Id.* at 485).

More recently in *Pan American World Airways, Inc.* v. *United States, supra,* this Court stated:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486." (371 U.S. at 309).
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> * * *
>
> "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." (*Id.* at 310).

The supervision and control over the defendants' acts which have been challenged herein, *i.e.,* the joint setting of rates for the shipment of transatlantic air cargo, has been entrusted by Congress to the Board and it is that administrative body and not the Courts which has exclusive primary jurisdiction herein.

What Virginia seeks is a "judicial order . . . enjoining the defendant air carriers from agreeing on transatlantic cargo rates among themselves and directing them to provide independent tariffs for such service." (Pl. Br. p. 9).

If Virginia wishes to have the Board re-examine its determination in *IATA Traffic Conference Resolution, supra,* 6 C.A.B. 639, it should seek such relief directly before the Board. The Board's determination would then be sub-

ject to judicial review as provided in § 1006(a) of the Act (49 U.S.C. § 1486(a)).

2. There Are Alternative Forums in Which Virginia May Maintain This Action

This Court may decline to adjudicate a controversy within its original jurisdiction when there is a suitable alternative forum, *i.e.*, a tribunal—other than the state courts of another jurisdiction—"competent to exercise jurisdiction over the acts of nonresidents of the aggrieved State." *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 500; see also *Washington* v. *General Motors Corp., supra,* 40 U.S.L.W. at 4439. It is abundantly clear that the United States district courts are not only a suitable alternative forum but indeed are better suited to the trial of an antitrust action than is this Court (see pp. 25-27 *infra*).

Any person injured in his business or property by reason of a violation of the antitrust laws may "sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent." (15 U.S.C. § 15). Injunctive relief may similarly be sought in such courts.* (15 U.S.C. § 26). "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (28 U.S.C. § 1391 (c)). In addition a suit under the antitrust laws against a corporation "may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in

* A state "qualifies as a person" under both 15 U.S.C. §15 and 15 U.S.C. §26. *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 261 (1972); *Georgia* v. *Pennsylvania R. Co., supra,* 324 U.S. at 447.

such cases may be served in the district of which it is an inhabitant, or wherever it may be found." (15 U.S.C. § 22). Where defendants reside "in different districts in the same State", the action may be brought "in any of such districts." (28 U.S.C. § 1392(a)).

A district court which has jurisdiction over the claim for a violation of the antitrust laws (Count One of the Complaint) would have pendent jurisdiction over the common law conspiracy count (Count Two of the Complaint). *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 721-729 (1966).

Virginia has a choice of district courts in which to commence this action. All of the defendants herein are either "residents" of the Southern or Eastern Districts of New York, as that term is used in 28 U.S.C. § 1391(c), or are "transacting business" in the Eastern District of New York within the meaning of 15 U.S.C. § 22. (See affidavit of H. Don Reynolds, which is annexed hereto as Appendix B). Thus, all defendants can be sued in the Eastern District of New York.

Moreover, many of the United States carriers, including the principal transatlantic carriers, could be sued in the United States District Court in the Eastern District of Virginia and in the United States District Court in the District of Columbia.* Thus, Virginia certainly cannot

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* "In a suit to enjoin a conspiracy not all conspirators are necessary parties defendant." *Georgia* v. *Pennsylvania R. Co., supra* at 463. Nor are all alleged co-conspirators indispensable parties in an action for damages. See *e.g., Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 25-26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906); *Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802, 804-05 (S.D. Cal. 1968). Thus, even if it were not possible to obtain jurisdiction over all of the defendants either in Virginia or in the District of Columbia, plaintiff could obtain complete relief in those courts.

establish that a suit in this Court is necessary for it to obtain the relief sought in the complaint.

3. This Court Is Not an Appropriate Forum for the Adjudication of the Issues Presented Herein

It is self evident that this Court is not an appropriate forum for the trial of an antitrust action. Nor is it the forum best suited to supervise the pre-trial discovery which would be necessary and to resolve the numerous legal issues which will arise prior to trial.

The trial of such an action would involve a fact finding process at least as formidable as the one which the Court refused to undertake in *Ohio* v. *Wyandotte Chemicals Corp., supra.** For example, the question of whether the present transatlantic air freight rates unduly discriminate against Virginia and others similarly situated can be resolved only by an analysis of such complex subjects as the traffic flow of air freight and the nature of the commodities being moved, the air cargo potential of numerous individual transatlantic markets, the shipper demand in such markets, cost differentials in the various markets and their relationship to the rate differentials, the availability of transatlantic cargo schedules and service at various airports, division of rates between carriers participating in the carriage, freight distribution and consolidation locations, competitive relationships between foreign and U.S. carriers and foreign policy considerations underlying the existing rate structure. The words of Mr. Justice Harlan in *Wyandotte* are particularly appropriate here:

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* At the hearing before the Board's Examiner discussed above (pp. 12-13), the parties introduced in evidence 1200 pages of information responses and exhibits. There were 28 witnesses and the transcript of the hearings covers 700 pages. The briefs of the parties exceed 600 pages.

> "The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic." (401 U.S. at 504).

There is no doubt that here, as in *Wyandotte,* "the complexity of the task of preparing responsibly to exercise our judgment" would cause a "serious drain on the resources of this Court" (*id.*).*

The burden on this Court of trying this action would be greatly increased by the fact that defendants have the right to trial by jury, a right which some defendants might assert. U.S. CONST. amend. VII; 28 U.S.C. § 1872; see *Georgia* v. *Brailsford,* 3 Dall. 1 (1794); *United States* v. *Louisiana,* 339 U.S. 699, 706 (1950); *Ohio* v. *Wyandotte Chemicals Corp., supra* at 511 (dissenting opinion); *Fleitmann* v. *Welsbach St. Lighting Co.,* 240 U.S. 27 (1916); *Beacon Theaters, Inc.* v. *Westover,* 359 U.S. 500 (1959); *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, 470-73 (1962); 1 CARSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 169 n. 1 (1902).

In addition to the great burden to the Court of trying this action, the Court will be required to devote a substantial amount of time to pre-trial matters.

For example, should the Court grant plaintiff's motion to file its complaint, it will be necessary to resolve the

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* In his dissenting opinion in *Georgia* v. *Pennsylvania R. Co., supra,* Chief Justice Stone stated: "the remedy asked is one normally pursued in district courts whose facilities and prescribed judicial duties are better adapted to the trial of issues of fact than are those of this Court. In an original suit, even when the case is first referred to a master, this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties." (324 U.S. at 469-70).

question of whether this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure and it will be necessary to supervise pre-trial discovery involving 39 parties.

In addition to the substantial and unnecessary burden which would be imposed on this Court by assertion of its original jurisdiction herein, there is yet another "reason of practical wisdom" why jurisdiction should be declined. In *Ohio* v. *Wyandotte Chemicals Corp., supra,* this Court pointed out that it is most reluctant to become involved as an original matter in a situation in which "a number of official bodies are already actively involved in regulating the conduct complained of" (401 U.S. at 502). Here, even more so than in *Wyandotte,* the conduct complained of is within the scrutiny and control of a federal agency, *i.e.,* the Board. Indeed, as we have indicated (pp. 19-23 *supra*), the Board has primary jurisdiction over this dispute. However, even if the Board did not, certainly its deep involvement with respect to international air freight rates and the direct involvement of the Executive Branch of government are strong reasons for this Court not to become involved in "trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." (*Id.* at 503).

CONCLUSION

This case is wholly inappropriate for the assertion of this Court's original jurisdiction and plaintiff's motion should, therefore, be denied.

August 18, 1972

Respectfully submitted,

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Northeast Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Southern Airways, Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Air Canada
Air France
Air-India
Austrian Airlines
British Overseas Airways Corp.
El Al Israel Airlines
Finnair
Iberia, Lineas Aereas de Espana, S.A.
Irish International Airlines
Japan Air Lines Co., Ltd.
KLM Royal Dutch Airlines
Lufthansa German Airlines
Qantas Airways, Ltd.
Sabena Belgian World Airlines
Scandinavian Airlines System, Inc.
Swiss Air Transport Co., Ltd. and
Transportes Aereos Portugueses, S.A.R.L.

APPENDIX A

APPENDIX A

Constitutional Provisions and Statutes Involved

United States Constitution:

Article III, § 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> * * *

Seventh Amendment

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Clayton Act:

§ 4. Suits by Persons Injured; Amount of Recovery

> That any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (38 Stat. 731 (1914), 15 U.S.C. § 15).

§ 12. District in Which to Sue Corporation

That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (38 Stat. 736 (1914), 15 U.S.C. § 22).

§ 16. Injunctive Relief for Private Parties; Exception

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person,

firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (38 Stat. 737, 15 U.S.C. § 26).

Federal Aviation Act of 1958:

§ 403. Tariffs of Air Carriers—
Filing of Tariffs Required

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air

transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate. (72 Stat. 758, 49 U.S.C. § 1373(a)).

* * *

§ 404. Rates for Carriage of Persons and Property—Carrier's Duty to Provide Services, Rates and Divisions

(a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or un-

reasonable prejudice or disadvantage in any respect whatsoever. (72 Stat. 760, 49 U.S.C. § 1374).

§ 412. Pooling and Other Agreements— Filing of Agreements Required

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly

engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. (72 Stat. 770, 49 U.S.C. § 1382).

§ 414. Legal Restraints

Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. (72 Stat. 770, 49 U.S.C. § 1384).

§ 1002. Complaints to and Investigations by the Administrator and the Board

* * *

(f) Removal of Discrimination in Foreign Air Transportation

Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or

unduly prejudicial, the Board may alter the same to the extent necessary to correct such discrimination, preference, or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare, or charge or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation, or practice. (72 Stat. 788, 49 U.S.C. § 1482(f)).

§ 1006. Judicial Review of Orders—Orders of Board and Administrator Subject to Review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. (72 Stat. 795, 49 U.S.C. § 1486(a)).

* * *

Other Statutes:

28 U.S.C. § 1251. Original Jurisdiction

* * *

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

* * *

(3) All actions or proceedings by a State against the citizens of another State or against aliens. (62 Stat. 927 (1948)).

28 U.S.C. § 1391. Venue Generally

* * *

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes. (62 Stat. 935 (1948)).

* * *

28 U.S.C. § 1392. Defendants or Property in Different Districts in Same State

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts. (62 Stat. 935 (1948)).

* * *

28 U.S.C. § 1872. Issues of Fact in Supreme Court

In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury. (62 Stat. 953 (1948)).

APPENDIX B

APPENDIX B

Affidavit of H. Don Reynolds

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1971

No. 56 ORIGINAL

AFFIDAVIT

COMMONWEALTH OF VIRGINIA, individually and on behalf of all other states similarly situated,

Plaintiff,

—against—

INTERNATIONAL AIR TRANSPORT ASSOCIATION, *et al.*,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

H. DON REYNOLDS, being duly sworn deposes and says:

1. I am Assistant Director-General and Chairman of the Traffic Conferences of International Air Transport Association ("IATA") with offices at 500 Fifth Avenue, New York, New York. I have been intimately connected with the air transport industry in various governmental, executive and professional capacities for more than three decades.

2. IATA is an international association of scheduled airlines. A list of IATA's members is annexed hereto.

3. I have examined the proposed complaint of the Commonwealth of Virginia in this proceeding and note that of the thirty-seven airline defendants all but five are members of IATA. The five which are not members, are Airlift International, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Seaboard World Airlines, Inc., Southern Airways, Inc.

4. Thirty-six of the thirty-seven airline defendants, viz. Airlift International, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Mohawk Airlines, Inc.,* National Airlines, Incorporated, Northeast Airlines, Inc.,* Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Seaboard World Airlines, Inc., Southern Airways, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Air Canada, Air France, Air-India, Alitalia Airlines, British Overseas Airways Corporation, British West Indian Airways, Ltd., El Al Israel Airlines, Ltd., Finnair, Iberia, Lineas Aereas de Espana, S.A., Irish International Airlines, Japan Air Lines Co., Ltd., KLM Royal Dutch Airlines, Lufthansa German Airlines, Olympic Airways, S.A., Qantas Airways, Ltd., Sabena Belgian World Airlines, Scandinavian Airlines Systems, Inc., Swiss Air Transport Co., Ltd., Transportes Aereos Portugueses, S.A.R.L., fly into John F. Kennedy International Airport and/or LaGuardia Airport on a regular commercial basis, both located in the Eastern District of New York.

5. The only airline defendant not flying to John F. Kennedy International Airport or LaGuardia Airport on a

* On April 12, 1972 Mohawk Airlines, Inc. merged with Allegheny Airlines, Inc. and on August 1, 1972 Northeast Airlines, Inc. merged with Delta Air Lines, Inc.

regular commercial basis is Austrian Airlines. Austrian Airlines maintains a traffic, sales, and executive office at 545 Fifth Avenue, New York, New York, which is within the Southern District of New York.

6. I have corroborated my personal knowledge with respect to the foregoing by causing a check to be made under my direction of the schedules of and information provided by the respective airlines published in the Official Airline Guide, International and North American Editions, July, 1972.

/s/ H. Don Reynolds
H. Don Reynolds

Sworn to before me this
11th day of August, 1972.

/s/ William P. DeWitt
Notary Public
William P. DeWitt
Notary Public, State of New York
No. 43-0943010 Qualified in Richmond County
Cert. filed in New York County
Commission Expires March 30, 1973

IATA MEMBERSHIP AS AT 9TH JUNE 1972
ACTIVE MEMBERS (90)

Aer Lingus Teoranta (Dublin)
Aerlinte Eireann (Dublin)
Aerolineas Argentinas (Buenos Aires)
Aeromexico (Mexico City)
Aerovias Nacionales de Colombia SA (AVIANCA) (Bogota)
Air Afrique (Abidjan)
Air Algerie (Algiers)
Air Canada (Montreal)
Air Ceylon (Colombo)
Air France (Paris)
Air Guinee (Conakry)
Air-India (Bombay)
Air Malawi Limited (Blantyre)
Air Mali (Bamako)
Air New Zealand (Auckland)
Air Siam Air Company Limited (Bangkok)
Air Vietnam (Saigon)
Air Zaire (Kinshasa)
ALIA-The Royal Jordanian Airlines (Amman)
ALITALIA-Linee Aeree Italiane (Rome)
Allegheny Airlines Inc. (Washington)
American Airlines Inc. (New York)
Ariana Afghan Airlines Co. Ltd. (Kabul)
Austrian Airlines (Vienna)
Braniff International (Dallas)
British Caledonian Airways Limited (London)
British European Airways (London)
British Overseas Airways Corp. (London)
British West Indian Airways (Trinidad)
CP Air (Vancouver)
Ceskoslovenske Aerolinie (Prague)
China Airlines Ltd. (Taipei)
Compania Mexicana de Aviacion SA (Mexico)
Compania Ecuatoriana de Aviacion SA (Quito)
Servicos Aereos Cruzeiro do Sul SA (Rio de Janeiro)
Cyprus Airways Limited (Nicosia)
Delta Air Lines Inc. (Atlanta)

Deutsche Lufthansa (Cologne)
Direccao de Exploracao dos Transportes Aereos "DETA" (Lourenco Marques)
DTA-Linhas Aereas de Angola (Angola Airlines) (Luanda)
East African Airways Corp. (Nairobi)
Eastern Air Lines Inc. (New York)
Egyptair (Cairo)
El Al Israel Airlines (Tel Aviv)
Empresa Consolidada Cubana Aviacion (Havana)
Ethiopian Air lines SC (Addis Ababa)
FINNAIR Oy (Helsinki)
Flugfelag Islands HF (Reykjavik)
Flying Tiger Line Inc. (Los Angeles)
P.N. Garuda Indonesian Airways (Djakarta)
Ghana Airways Corporation (Accra)
IBERIA, Lineas Aereas de Espana (Madrid)
Indian Airlines (New Delhi)
Iran National Airlines Corp. (Teheran)
Iraqi Airways (Baghdad)
Japan Air Lines Co. Ltd. (Tokyo)
Jugoslovenski Aerotransport (JAT) (Belgrade)
KLM Royal Dutch Airlines (Amsterdam)
Kuwait Airways Corporation (Kuwait)
Libyan Arab Airlines (Benghazi)
Linea Aerea del Cobre Ltda. (Santiago) (Ladeco)
Linea Aerea Nacional (LAN-CHILE) (Santiago)
The Malta Airlines (Sllema)
Middle East Airlines Airliban (Beirut)
National Airlines Inc. (Miami)
Nigeria Airways Limited (Lagos)
Northwest Airlines Inc. (St. Paul)
Olympic Airways SA (Athens)
Pakistan International Airlines Corp. (Karachi)
Pan American World Airways Inc. (New York)
Phillippine Air Lines Inc. (Manila)
Polish Airlines "LOT" (Warsaw)
Qantas Airways Limited (Sydney)
SABENA, Societe Anonyme Belge d'Exploitation de la Navigation Aerienne (Brussels)
Saudi Arabian Airlines Corp. (Jeddah)
Scandinavian Airlines System (Stockholm)

South African Airways (Johannesburg)
Sudan Airways (Khartoum)
Swiss Air Transport Co. Ltd. (Zurich)
Syrian Arab Airlines (Damascus)
Trans-Mediterranean Airways SAL (Beirut)
Transportes Aereos Portugueses (TAP) (Lisbon)
Trans World Airlines Inc. (New York)
Tunis Air (Tunis)
Turk Hava Yollari (Istanbul)
Union de Transports Aeriens (UTA) (Paris)
United Air Lines (Chicago)
VARIG SA (Viacao Aerea Rio-Grandense) (Porto Alegre)
Venezolana Internacional de Aviacion SA (VIASA) (Caracas)
Zambia Airways Corporation (Lusaka)

ASSOCIATE MEMBERS (18)

Aerial Tours Pty. Ltd. (Boroko)
Ansett Airlines of Australia (Melbourne)
Ansett Airlines of Papua New Guinea (Lea)
AVNA (Aviation Natal) (Pty.) Ltd. (Dundee, Natal)
Chicago Helicopter Airways Inc. (Chicago)
Commercial Airways (Pty.) Ltd. (Johannesburg)
Continental Air Lines Inc. (Los Angeles)
East-West Airlines Ltd. (Tamworth, NSW)
Eastern Provincial Airways (1963) Ltd. (Gander)
Mount Cook Airlines (Christchurch)
New York Airways Inc. (New York)
New Zealand National Airways Corp. (Wellington)
Quebecair Inc. (Dorval)
Suidwes Lugdiens (Eindoms) Beperk (Windhoek, SW Africa)
Territory Airlines Pty. Ltd. (Goroka)
Trans Australia Airlines (Melbourne)
United Air Services (Pty.) Ltd. (Pretoria)
Viacao Aerea Sao Paulo SA (VASP) (Sao Paulo)