Exhibit B

quently, in the absence of further evidence justifying the proposed fare, we are unable to approve the resolution as submitted.[5]

It is worth noting that in the field of domestic air transportation, as distinct from overseas and foreign air transportation, the Congress has not given the Board discretion with respect to the granting of free and reduced-rate privileges. Thus, under the terms of section 403(b), the Board has been given authority to authorize free and reduced rates for domestic, overseas, and foreign air transportation for specified categories of persons and, with respect to overseas and foreign air transportation *alone*, "to such other persons and under such other circumstances as the Board may by regulations prescribe." When it was determined that categories of persons not specifically named in section 403(b) should be provided with reduced-rate transportation domestically, it was deemed necessary to obtain statutory modification from the Congress. A similar course may be necessary here. In any event, we cannot find on the record before us that the discriminatory fares to be provided tour conductors have been justified as a matter of law.

The Board, acting pursuant to sections 204(a), 412, and 1001 of the Act, finds that it would be in the public interest to defer final action on agreement CAB 10782 for a period of 30 days with a view toward eventual disapproval. Before taking final action on the agreement, we will consider such comments as are received from interested persons within such 30-day period. Accordingly,

IT IS ORDERED, That action on agreement CAB 10782 be and it hereby is deferred; *Provided*, That any party to the agreement, or any other interested person, may, within 30 days from the date hereof, submit written comments in support or in opposition to approval of the agreement. Such statements should conform to the general requirements of the Board's Rules of Practice in Economic Proceedings.

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[5] In this connection, we invite attention to our holding in *Tour Basing Fares, supra*, where at 259, we stated as follows:

"* * * In formulating a standard of unjust discrimination, the Congress did not intend to limit the Board to passing judgment on the business acumen of air carrier management and to require the Board to rule that a fare discrimination is justified in every case where the carrier may benefit therefrom. Nor did Congress intend that we were merely to guard against improvidence in reducing fares. We cannot lose sight of the fact that the air carriers here involved are public utilities. And as a public utility, in return for the privilege of operating in a more limited competitive atmosphere as well as enjoying other benefits, an air carrier assumes certain obligations, one of which is the duty to provide service to all who request it on equally favorable terms. It is our opinion that this is the duty which Congress intended to underscore when it established the prohibition against unjust discrimination. The expectation of profit to the carriers, without more, will not ordinarily be, and is not in this case, a sufficient justification for a fare discrimination."

DOCKET 9612, DELTA-C&S SENIORITY LIST—order E–14403, adopted August 31, 1959.

On May 28, 1958, there was filed with the Board on behalf of a number of pilots employed by Delta Air Lines, Inc. (Delta), a document entitled "Petition for Revision of and Protest Against Integrated Seniority List of Delta-S&S Air Lines, Inc." The petition requests, among other things, that the seniority list established by an agreement entered into on March 27, 1953, between the pilots employed by Delta and the pilots employed by Chicago and Southern Air Lines, Inc. (C&S), through their respective representatives, which agreement was later incorporated into the collective bargaining agreements entered into between Delta and the Air Line Pilots Association (ALPA), be vacated and set aside and a new seniority list established in accordance with length-of-service concepts. The basis for the request is an allegation that, contrary to the provisions of the Board's opinion and order in *Delta-Chicago and Southern Merger Case*,[1] approving the merger of Delta and C&S, subject to certain conditions, the respective seniority lists of the Delta pilots and the C&S pilots were not integrated "in a fair and equitable manner."

In support of the above allegation the petition makes the following representations: That petitioners are pilots employed by Delta and for the purposes of collective bargaining are represented by ALPA; that prior to December 24, 1952, the petitioners were employed by Delta or by C&S as pilots and copilots; that on December 24, 1952, the Board issued its opinion and order approving the merger of Delta and C&S, subject, among other conditions, to a provision

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[1] 16 C.A.B. 647 (1952).

regarding the integration of seniority lists;[2] that on March 27, 1953, an "Agreement Respecting Merger of Pilot Seniority Lists of Delta Air Lines, Inc., and Chicago and Southern Air Lines, Inc." was executed;[3] that thereafter many pilots filed written protests in accordance with provisions of the agreement;[4] that as provided in the agreement the seniority board was convened and on June 11, 1953, issued its decision;[5] that opportunity to be heard was denied to protesting pilots and that all protests were dismissed notwithstanding the fact that the seniority board in its report expressly acknowledged the fact that "one or more errors were found to exist;" that thereafter ALPA and Delta entered into an agreement, effective August 1, 1953, which agreement adopted the seniority list referred to above; that all subsequent collective bargaining agreements between ALPA and Delta, including the one currently effective, have continued the same seniority list (except that the names of pilots subsequently employed have been added); that petitioners have made every effort through ALPA and Delta to obtain relief and that although they have exhausted the procedures set forth in the agreement between Delta and ALPA and those provided for in ALPA's constitution and bylaws they have failed to secure any relief; that the seniority list complained of "departs from the well-established principle that seniority is based on length of service" and "on the contrary, this Seniority List disregards the pilots' length of service and the Board's requirement that 'provision shall be made for the integration of the Seniority Lists in a fair and equitable manner;'" and that as a result many of the petitioners and other pilots have sustained and will continue to sustain substantial financial losses and other irreparable damages and inconveniences.

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2 The pertinent provision of the Board's order (*id.* at 661) is as follows:
"2. That the approval granted herein is subject to the following conditions:
* * * * * * *
"Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provision shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

3 A copy of the agreement is attached to the petition as schedule C. The agreement is signed on behalf of the pilots employed by Delta and on behalf of the pilots employed by C&S by two seniority representatives, respectively, and the agreement states that these seniority representatives were duly selected to act in that capacity. The document also contains the signatures of seven members of the Delta master executive council and six members of the C&S executive council and it is stated that their signatures indicate that a majority of each council approved the attached integrated seniority list. Par. 2 of the agreement provides that the appended integrated list shall be final and binding on all the pilots, except that any pilot shall have the right to protest his seniority position by filing a written protest by May 15, 1953, in accordance with pars. 4 and 5. Pars. 4 and 5 provide for a seniority board, consisting of the two seniority representatives for each pilot group, or designated successors, plus a fifth and neutral member appointed by the National Mediation Board, to be convened to hear, consider, and decide the protests and to make any changes in the integrated list required by decision on such protests. Par. 6 provides that after the Board has acted upon all protests, the integrated list shall be final, conclusive, and binding. Pars. 6 and 7 further provide that ALPA shall negotiate the integrated list into a single employment agreement with the surviving merged carrier in accordance with the Railway Labor Act and that the seniority list shall thereupon become effective.

4 141 protests were filed, representing about 28 percent of the 501 pilots on the list. Of the total protests, 94 were from C&S pilots and 47 from Delta pilots.

5 A copy of the seniority board's report is attached to the petition as schedule D. This report discloses that the board was first met with an attempt by four members of the C&S master executive council to withdraw their signatures and the contention of the C&S seniority representatives that a "corrected" list was necessary because of misunderstandings, misinformation, and mistakes." Later the Delta seniority representatives took a similar position. However, the board decided to consider individual protests rather than to abrogate the previous agreement. The report further discloses that for practical reasons it was decided that the agreement did not require the board to grant requests for hearing. After deadlocking on most protests, the board was recessed so that the seniority representatives could meet by themselves without the chairman. After several meetings the board was reconvened, and at this time the seniority representatives stated that although they were agreed that errors existed they had decided to dismiss all the protests. The report states, "They were in agreement also that any attempt to correct or revise the list would affect most of the names on the list; and further, that in making the extensive changes that would be necessary because of the large number of pilots involved, more errors of greater importance would probably be made than were found in the merged list that was agreed upon and approved."

On July 2, 1958, a motion was filed on behalf of Delta requesting dismissal of the above petition. On December 29, 1958, the petitioners filed an answer, and on January 15, 1959, Delta filed a reply.

The Board has given full and careful consideration to this matter and has decided to dismiss the petition for the reasons hereafter stated.[6]

We believe that the Board's policy with respect to the integration of seniority lists is clearly discernible from its opinions and orders in the several cases in which the Board has imposed protective labor provisions.[7] Simply stated, the policy of the Board in approving a merger or similar transaction involving the transfer of employees from one company to another has been to charge the receiving company with the duty and responsibility of making provision for the integration of the seniority lists in a fair and equitable manner, utilizing when applicable the collective bargaining procedures contemplated by the Railway Labor Act. Although the Board has legal power itself to direct the precise manner in which the individual seniority lists for the various categories of employees should be merged,[8] we have consistently taken the position that it is more desirable that this task be accomplished by those directly concerned, the company and the employee groups, either by agreement or arbitration.[9] Where the members of a craft or class are represented by a labor organization the Board expects that labor organization to perform its statutory function of representing such craft or class and to enter into prompt negotiations with the company looking toward the establishment of an integrated seniority list by voluntary agreement.[10] Where this has been done, it would be with the greatest reluctance that the Board would inject itself into the area of the contractual relationships between the carrier and the employee group, and only on a showing of bad faith, or deliberate attempt to subvert the Board's order, or other compelling circumstances.

The reasons for this policy are readily apparent. As we stated in the *North Atlantic Route Transfer Case, supra,* "It is clear to us that we should not undertake to determine the precise manner in which the individual seniority

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[6] In view of the action being taken herein, we find it unnecessary to consider in detail the pleadings of the parties on the motion to dismiss. Further, under the particular circumstances present here, although petitioners' reply was not timely filed, we have decided to consider it in connection with our disposition of the petition.

[7] *United-Western, Acquisition Air Carrier Property,* 11 C.A.B. 701 (1950); *North Atlantic Route Transfer Case,* 11 C.A.B. 676 (1950), 12 C.A.B. 124 (1950), 12 C.A.B. 140 (1950), 12 C.A.B. 422 (1951), 14 C.A.B. 910 (1951); *North Atlantic Route Transfer Case, Employees,* 16 C.A.B. 1 (1952); *Braniff–Mid-Continent Merger Case,* 15 C.A.B. 708 (1952); *West Coast-Empire Merger Case,* 15 C.A.B. 971 (1952); *Delta-Chicago and Southern Merger Case,* 16 C.A.B. 647 (1952); *Flying Tiger-Slick Merger Case,* 18 C.A.B. 326 (1954); *Continental-Pioneer Acquisition Case,* 20 C.A.B. 323 (1954); and *Colonial-Eastern Acquisition Case,* 23 C.A.B. 500 (1956).

[8] The Board's power to impose conditions relating to integration of seniority lists was upheld in *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (C.A. 2, 1953), cert. den. 346 U.S. 826.

[9] In the *Monarch-Challenger Merger Case,* 11 C.A.B. 33 (1949), the Board refused to withhold approval of the merger pending reconciliation of differences respecting seniority, stating that the settlement of seniority questions should be accomplished by the parties involved. The question of imposing a specific condition relating to the integration of seniority lists was first considered by the Board in the *North Atlantic Route Transfer Case,* 12 C.A.B. 124, 132–133 (1950). In this case the Board stated as follows:

"It is clear to us that we should not undertake to determine the precise manner in which the individual seniority lists for various categories of employees should be merged, or other provision made for the determination of seniority. Such a determination is dependent upon so many factors, and is of such a detailed nature that it would not be practical for an administrative agency such as the Board to undertake the task. It would therefore be more desirable that the task be accomplished by those most directly concerned, the company and the employee groups. It is a matter which lends itself directly to voluntary agreement by negotiation and, failing that, to arbitration. We are therefore providing for such a method of determination herein."

In all subsequent cases the Board has directed that the matter of seniority be settled among the parties directly concerned by agreement or arbitration. In the Delta-C&S Case, the language of the provision governing seniority was changed from "provision shall be made for the integration of seniority lists on the basis of an agreement between the carriers and the representatives of the employees affected" to "provision shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected." But this change was made only to take into account the fact that some of the Delta employees were not organized and therefore might not have representatives for arriving at agreement through collective bargaining.

[10] *Id.* at 132–134.

lists for the various categories of employees should be merged * * *. Such a determination is dependent upon so many factors and is of such a detailed nature that it would not be practical for an administrative agency such as the Board to undertake the task." It is obvious that this statement is as much applicable to a detailed review of the manner in which the integration of two seniority lists was accomplished as it is to undertaking the task in the first place. Unquestionably, the integration of seniority lists is at best a difficult matter, especially if factors other than each employee's length of service with his company are to be taken into account. No doubt it would be difficult if not impossible for the Board to accomplish the integration of seniority lists in such manner that all employees would be satisfied that they had been fairly and equitably treated. Thus it is likely that a large volume of complaints would be received by the Board were it to review agreements for integration of seniority lists entered into by the parties directly concerned, and the Board is not equipped for any such undertaking. Another consideration, and one which is equally important, is that a review of the manner in which the integration of seniority lists is accomplished would inject the Board further into the field of labor-management relations and in some cases, such as the present case, into the internal affairs and functioning of labor organizations. With full regard for the principles of the Lowden case,[11] the Board does not believe that it would be a wise use of its discretion to follow such a course in the absence of the most compelling circumstances. In short, the Board's policy in seniority integration matters contemplates that there be voluntary agreement between the carriers and the labor groups involved or, failing agreement, that such problems be settled by arbitration.

In the present case, even assuming that the integration of the two pilots seniority lists was accomplished and made effective in the manner described, it is not alleged that Delta failed to make provision for the integration of the pilots seniority lists in a fair and equitable manner by refusing to enter into collective bargaining negotiations on the subject with ALPA, the exclusive bargaining representative of the pilots. Likewise, it is not alleged that ALPA, the duly designated representative of the pilots, failed to perform its statutory function of representing the pilots or to enter into prompt negotiations with Delta looking toward the establishing of an integrated seniority list by voluntary agreement. On the contrary it is recited in the petition, paragraph 8, that ALPA and Delta entered into an agreement, effective August 1, 1953, which incorporated the integrated seniority list now complained of and that all subsequent collective bargaining agreements between ALPA and Delta have continued the same list. No charge is made in the petition that Delta or ALPA acted in bad faith or with deliberate intent to subvert the Board's order. Under the circumstances we fail to perceive a sufficient basis for our taking action which would have the effect of disturbing the contractual relationships now existing between the carrier and its pilot group. Accordingly, we shall dismiss the petition.

A final comment is in order. The gravamen of petitioners' complaint, as we understand it, is that ALPA, in resorting to alleged arbitrary methods in accomplishing a proposed integration of the seniority lists, and Delta, in failing to assume its share of the responsibility for integration of the seniority lists, engaged in unlawful discrimination. We take no position on whether petitioners have a cause of action cognizable by the courts. We note that Delta in its motion to dismiss takes the position that petitioners' "right of action—if any did ever exist—was in court, and not before the CAB. This has been made clear by the Federal courts, acting in dissimilar but related matters." [Footnote citing *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944).] We further note that petitioners in their answer do not disagree that they may have a right of action in the courts but that they state, "However, here we believe that it is patently clear that the Board has primary jurisdiction, and

[11] *United States* v. *Lowden*, 308 U.S. 225 (1939). The Supreme Court held that affording protection to railway employees adversely affected by a consolidation of railway facilities is an element of the public interest to be considered and appropriately dealt with by the Interstate Commerce Commission. The principles established by that case are equally applicable to air transportation. *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (C.A. 9, 1952).

that petitioners are obligated to pursue their administrative remedies, before resort to court action." To the extent that petitioners may have been obligated to pursue their administrative remedies before this Board before resorting to any court action they may have in mind, it would appear that any such obligation was fulfilled by the filing of the present petition. Accordingly,

IT IS ORDERED, That the petition filed in docket 9612 be and it is hereby dismissed. To the extent not granted herein, the motion filed by Delta on July 2, 1958, is denied.

DOCKETS 10371 AND 10597, EMERY AIR FREIGHT, INTERLOCKING RELATIONSHIP—order E–14454, adopted September 15, 1959.

By application (docket 10371) dated April 1, 1959, as amended April 28, request is made by Emery Air Freight Corporation (Emery), a domestic and international airfreight forwarder, for a disclaimer of jurisdiction, or an exemption from the provisions of section 408 so as to permit it to acquire control of Emery Air Freight International, S.p.A. (Emery International), a corporation, to be newly created and incorporated under the laws of Italy. By separate application dated June 11, 1959 (docket 10597), Emery and Romano L. M. Giulini request approval under section 409 for Mr. Giulini, a nominee of Emery, to hold the position of sole administrator and manager of Emery International.

The application states that since the start of its international service, the volume of Emery's international traffic has been increasing steadily. In view thereof, Emery recently decided to undertake a program of expansion of its international operations. Under this program, Emery branch offices have been opened in Paris, Frankfurt, Rotterdam, and Copenhagen. When Emery made known its desire to open a branch office in Italy, it was advised by legal counsel that the formation of a subsidiary Italian corporation in lieu of a branch office would eliminate many administrative and legal problems. As a result, Emery Corporation has decided to form an Italian subsidiary, Emery International. The bylaws of the Italian subsidiary state: "The object of the company is to solicit air freight shipments for forwarding by others by air transport." In other words, Emery International will act as sales agent for Emery and will not operate as a forwarder on its own behalf. The application further states that Emery International will sell the services of its American parent under the latter's tariffs.

Emery will own 499 shares of the 500 total shares outstanding of its Italian subsidiary, and Leonard G. Hunt, an officer of Emery, will own one share.[1] Under the Italian law, there are no corporate boards of directors. Instead, the company is managed by a sole administrator and manager elected annually at a meeting of the stockholders.

In view of the foregoing circumstances, the arguments are advanced by applicants that section 408 of the Act should not apply to Emery's creation and acquisition of control of the Italian subsidiary on the grounds that (a) the subsidiary falls within the exception described in section 408(c), or (b) the subsidiary is not an air carrier nor a person engaged in any phase of aeronautics otherwise than an air carrier. Should the Board, nevertheless, find that section 408 applies, it is contended that the facts herein support an application for exemption from section 408 for Emery's control of the subsidiary on the ground that the enforcement of section 408 in this instance would be an undue burden on Emery by reason of the unusual circumstances affecting Emery's operations. In addition, the air carrier and the individual applicant aver that there is nothing adverse to the public interest in the interlocking relationships for which approval is sought, and they request approval thereof pursuant to section 409 of the Act.

Inasmuch as Emery's subsidiary will not engage in consolidation or break-bulk activities and will not hold out itself to the public as an indirect air carrier, it is not deemed to be an air carrier within the meaning of section 401 of the Act. However, the Board finds that, by virtue of its proposed solicitation of airfreight shipments for forwarding by others and proposed activities as sales and management consultants in the airfreight forwarding field, Emery

[1] Mr. Hunt's subscription is for the purpose of complying with the letter of Italian law which requires at least two stockholders.