

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	
TPI INTERNATIONAL)	Adversary Proceeding
AIRWAYS, INC.)	
(Chapter 11 Case <u>91-20162</u>))	Number <u>91-2022</u>
)	
<i>Debtor</i>)	
)	
)	
)	
TPI INTERNATIONAL)	
AIRWAYS, INC.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
FEDERAL AVIATION)	
ADMINISTRATION, An Agency)	
of the United States;)	
DEPARTMENT OF))	
TRANSPORTATION, a Department)	
of the United States Government)	
)	
<i>Defendants</i>)	

MEMORANDUM AND ORDER

TPI International Airways, Inc., ("TPI") is an air carrier which filed Chapter 11 in February of 1991. In order to be a certified carrier and to conduct flight operations, TPI must have an air carrier operating certificate, the "operations specifications" from the

FAA, which it possesses. *See* 49 U.S.C. App. §§1424, 1430(a)(4). Additionally, TPI must have a certificate of public convenience and necessity, the "economic authority" from DOT. *See* 49 U.S.C. App. §1371(a) and (r); 14 CFR §204.1, et. seq. Currently, TPI is unable to resume its flight operations because it lacks the proper certification and authority from DOT. The DOT refuses to return TPI's certificate of public convenience and necessity, its "economic authority," although TPI's operations specifications were returned by the FAA in May of 1991.

TPI filed this adversary proceeding on May 28, 1991, against the Federal Aviation Administration ("FAA") and the Department of Transportation ("DOT"). According to TPI, the FAA wrongfully demanded surrender of the operations specifications, which led to the DOT's automatic suspension of TPI's economic authority under the DOT's dormancy rules.¹ Once the FAA returned the operations specifications and "certified" TPI, TPI expected the return of its economic authority from the DOT. TPI asserts that only the wrongful demands of the FAA brought about the suspension of its economic authority from

¹ Under the DOT's dormancy rules, 14 CFR §204.8 Revocation for dormancy, an air carrier's certificate can be suspended upon the carrier's ceasing of operations.

The applicable part of the rules provides:

(c) An air carrier found fit by the Department of Transportation after the effective date of this rule and that begins initial operations within one year after being found fit but then ceases operations, shall not resume operations without first filing all the data required by §204.4 or §204.7 as applicable, at least 45 days before it intends to provide any such air transportation A carrier to which this paragraph applies shall not provide any air transportation for which it is required to be found fit, willing, and able until the Department either decides that the carrier continues to meet those requirements, or finds that the carrier is fit, willing, and able to perform such air transportation based on new information the carriers submits.

14 CFR §204.8. In effect the certificate is automatically suspended with the burden upon the carrier to show its "continuing fitness to fly." *See also*, 49 U.S.C. App. 1371(r) for the continuing fitness requirement of air carriers.

DOT and seeks an injunction under 49 U.S.C. App. §1487(a), prohibiting the DOT from withholding the economic authority. Alternatively, TPI urges this court to base its jurisdiction on 28 U.S.C. Section 1334 as a case "arising under" or "related to" a Title 11 proceeding and issue the injunction under Section 1334(b) which confers jurisdiction in bankruptcy cases to the district courts.

I. JURISDICTION

The DOT filed a Motion to Dismiss this adversary proceeding for lack of jurisdiction citing 49 U.S.C. App. Section 1486(a), which provides:

Any order, affirmative or negative, issued by the Board or Administrator [Secretary of Transportation] 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 [49 U.S.C. App. §1461], 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.

(Emphasis Added) 49 U.S.C. App. §1486(a). This Code Section vests review of agency "orders" under the Federal Aviation Act in the exclusive jurisdiction of the Court of Appeals. According to the DOT, this Court is without jurisdiction to hear the merits of TPI's claim.

First, TPI contends that this Court has jurisdiction on the basis of 49 U.S.C.

App. Section 1487(a) which provides:

If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or Administrator [Secretary of Transportation], as the case may be, their duly authorized agents, or, in the case of a violation of section 1114 of this Act [49 U.S.C. App. §1514] the Attorney General, or in the case of a violation of section 401(a) of this Act [49 U.S.C. App. §1371(a), any party in interest, may apply to the district court of the United States

...

49 U.S.C. App. §1487(a). Presented with an analogous argument under Section 1487(a), the District Court in Matter of Airlantic Transport, Inc., 440 F.Supp. 744 (D. P.R. 1977), dismissed for lack of jurisdiction a petition requesting review of an FAA order. Airlantic argued that the court had jurisdiction under 49 U.S.C. App. Section 1487(a) as TPI does here. The District Court found Section 1487 and its enforcement provisions inapplicable for claims against the FAA and concluded that review before the Court of Appeals was the exclusive and "clear-cut remedy" under 49 U.S.C. App. Section 1486(a). Id at 746. *See Air Line Pilots Assoc. International v. Civil Aeronautics Board*, 750 F.2d 81 (D.C. Cir. 1984) (Section 1006 of the Federal Aviation Act, 49 U.S.C. App. §1486, gives the Court of Appeals exclusive jurisdiction over final agency action that would affect the court's future or prospective jurisdiction).

As Section 1487(a) is an enforcement provision to be employed by the government, Plaintiff's reliance on this section as a basis for this Court's jurisdiction is misplaced. In order for "any party in interest" to apply to the District Court for relief under

this section, an entity or carrier must have violated 49 U.S.C. App. Section 1371(a), which requires a carrier to operate with proper DOT certification or face possible penalties enforceable through Section 1487(a). As the DOT is not a carrier and could not have violated Section 1371(a), TPI, the Plaintiff here, cannot as a "party in interest" apply to the District Court for enforcement of the provisions of the Federal Aviation Act under Section 1487(a). Airlantic Transport, 440 F. Supp. at 746. See Peninsula Airport Commission v. National Airlines, Inc., 436 F.Supp. 850, 852 (E.D.Va. 1977); Diefenthal v. C.A.B., 681 F.2d 1039, 1049-1051 (5th Cir. 1982), cert. denied 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956 (1983) (Since Section 1487(a) provides for parties in interest to seek injunctive relief only for a violation of Section 1371(a), "that is a strong indication that Congress did not intend to provide private litigants with a means of redressing other violations of the Act). It follows that TPI as a private party can not use Section 1487(a) as a basis for jurisdiction for claims against DOT.

Plaintiff's second jurisdictional argument is based upon 28 U.S.C. Section 1334 which provides in pertinent part:

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Section 1334 was amended by Section 101 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 to provide Federal District Courts with original and exclusive jurisdiction over all bankruptcy cases. The amendment was in response to the decision of the United States Supreme Court in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), which held that 28 U.S.C. Section 1471, as enacted by the Bankruptcy Reform Act of 1978, was an unconstitutional grant of power to a non-Article III court. This decision, which struck the independent powers of the bankruptcy court, motivated Congress to enact the 1984 bankruptcy amendments making the bankruptcy courts a unit of the district courts.

There is little legislative history on the current Section 1334(b). Inasmuch as subsections (a) and (b) of 28 U.S.C. Section 1334 are taken virtually verbatim from the original statute, 28 U.S.C. Section 1471(a) and (b), the legislative history and precedent under that statute are relevant. *See In re Atlas Fire Apparatus, Inc.*, 56 B.R. 927 (Bankr. E.D.N.C. 1986). Both the Senate and House proposed bills that were the basis for the former Section 1471(b). The Senate in its report on this section discussed the jurisdictional grant to the bankruptcy court explaining that:

Subsection (b) grants to the U.S. district courts original, but not exclusive, jurisdiction of all civil proceedings arising under title 11 or arising under or related to cases under title 11. This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts of the district court for the purpose of exercising the jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court or in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court. The idea of possession and consent

as bases for jurisdiction is eliminated. The adjunct bankruptcy courts will exercise in personam jurisdiction as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case

The term 'proceeding' is used instead of 'matters and proceedings,' the terminology currently used in the Bankruptcy Act and Rules. As used in this section everything that occurs in a bankruptcy case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law

The . . . [grant of] jurisdiction . . . will leave no doubt as to the scope of the jurisdiction over disputes to be exercised by the bankruptcy court.

S.Rep. No. 989, 95th Cong., 2d Sess. 153-154 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5939-40. *See also* H.R.Rep. No. 595, 95th Cong., 2d Sess. 445 (1977), reprinted in 1978 U.S.Code Cong. & Admin. News 5963, 6400 (using similar language). The purpose of Section 1334(b) is to provide the "expeditious resolution of bankruptcy claims." Brock v. Morysville Body Works, Inc., 829 F.2d 383, 386 (3rd Cir. 1987). Under this jurisdictional grant, bankruptcy proceedings may be completed without awaiting the outcome of a trial in state or federal court. *See* Matter of Lemco Gypsum, Inc., 910 F.2d 784 (11th Cir. 1990) (In enacting Section 1471(b) Congress intended to grant comprehensive jurisdiction to the bankruptcy courts to allow for efficient disposition of all matters connected with the debtor's estate).

Distinguishing jurisdiction in administrative agencies from jurisdiction in courts, the Fifth Circuit in McCorp Financial, Inc. v. Board of Governors, 900 F.2d 852 (5th Cir. 1990), *affirmed in part and reversed in part* Board of Governors v. McCorp Financial,

Inc., ___ U.S. ___, 112 S.Ct. 459, 116 L.Ed 2d 358 (1991), determined that the Federal Reserve Board could continue its administrative proceedings against a Chapter 11 debtor, a bank holding company, under 12 U.S.C. Section 1818(i), which gives the Board exclusive jurisdiction to prosecute its enforcement actions and examine banks for violations of the Federal Reserve Act and banking laws.

In deciding that the bankruptcy court's jurisdiction under 28 U.S.C. Section 1334 did not supersede the exclusive jurisdiction of the administrative agency, the court examined the legislative history of Section 1334, acknowledging the House of Representatives' concern with the "division of labor between the bankruptcy court and other courts." H.R.Rep. No. 595, 95th Cong., 1st Sess. 43 (1977), 1978 U. S. Code Cong. & Admin. News 5787, 6005. According to the House report, the old laws were undesirable because of "the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding." *Id.* at 45, 1978 U.S. Code Cong. & Admin. News 6007. The Fifth Circuit, persuaded by the legislative history and the distinction between bankruptcy courts and "other courts" concluded that the jurisdictional provisions of section 1334(b) referred to granting jurisdiction previously in "other courts," to the bankruptcy court and did not divest administrative agencies of their exclusive jurisdiction in other matters.

The plain language of §1334(b) does not purport to give the district court exclusive jurisdiction over matters arising under Title 11 to the exclusion of administrative agencies; rather § 1334(b) grants the district court concurrent jurisdiction over matters that otherwise would lie within the exclusive jurisdiction of another court.

McCorp, 900 F.2d at 855. According to the Fifth Circuit, "the legislative history reflects no intent that the bankruptcy court's jurisdiction supersede the exclusive jurisdiction of an administrative agency . . ." Id. at 855. The United States Supreme Court, which affirmed in part and reversed in part the Fifth Circuit's decision in McCorp agreed with this interpretation of Section 1334(b), concluding that the "section authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings that would otherwise be subject to the exclusive jurisdiction of another court." McCorp, 112 S.Ct. at 465.

More important, the court concluded that "[i]f and when the board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. Section 1334(b). Id. at 464 (emphasis added). *See In re Casey*, 46 B.R. 473 (S.D.Ind. 1985) (Construing the "notwithstanding any act of Congress" language of the superseded 28 U.S.C. §1471, the district court concluded that its bankruptcy jurisdiction took precedence over sections granting exclusive jurisdiction to the claims court and refused to transfer a claim against the United States to the claims court); In re Pennsylvania Peer Review Organization, Inc., 50 B.R. 640 (Bankr. M.D. Pa. 1985) (Under 1334(b), the bankruptcy court has concurrent jurisdiction with the claims court to hear due process claims against the Secretary of Health and Human Services); In re Modern Boats, 775 F.2d 619 (5th Cir. 1985) (The admiralty court's previous acquisition of in rem jurisdiction over vessel in proceeding to enforce lien did not defeat bankruptcy court's jurisdiction over owner's reorganization and over his property under 1334(d).)

In Brock v. Morysville Bodyworks, Inc., 829 F.2d 383 (3rd Cir. 1987), the Third Circuit Court of Appeals construing 28 U.S.C. Section 1334(b) in conjunction with 29 U.S.C. Section 660 determined that 1334(b), which gives jurisdiction to the bankruptcy court, altered the jurisdictional grant of 660, which provides that the Court of Appeals has original and exclusive jurisdiction for review of OSHA orders. According to the Court, Section 1334(b) rendered the Section 660(b) provisions non-exclusive, but did not divest the Court of Appeals of its jurisdiction. Instead, the "effect of 28 U.S.C. Section 1334(b) is to grant the district court overseeing the bankruptcy concurrent original jurisdiction." Id. at 385-386. In Brock, the debtor, while reorganizing in bankruptcy, was cited for several OSHA violations. The Secretary of Labor sought to enforce its order of abatement to stop the safety violations and to recover \$21,000.00 in penalties for the violations. The Court of Appeals without deferring to the District Court granted the petition for abatement and lifted the stay for the Secretary to enforce the order but denied the request for penalties.²

Following the reasoning of the Third Circuit in Brock, supra, the bankruptcy court in In re Apex Oil Co., 122 B.R. 559 (Bankr. E.D.Mo. 1990), held that it could exercise jurisdiction over a claim filed by the United States Customs Service despite 28 U.S.C. Section 1581(a), which confers exclusive jurisdiction on the Court of International Trade in such matters. There, Apex, the debtor, objected to claims filed by the United States Customs Service. In concluding that jurisdiction was present, the Court looked to the plain and express language of Section 1334(b), which gives the bankruptcy court jurisdiction

² The dissent favored remand to bankruptcy court, concluding that the OSHA statute was vague and did not clearly grant "exclusive jurisdiction" to the Court of Appeals. The wording in 29 U.S.C. Section 660 is similar to 49 U.S.C. Section 1486 in that both statutes provide for "review" of an order by the Court of Appeals and do not use the words "exclusive jurisdiction."

despite the applicability of another statute conferring exclusive jurisdiction. Apex at 565. Although finding jurisdiction, the bankruptcy court abstained in favor of the expertise of the Court of International Trade.

To fashion any remedy in this case, this Court must first find the existence of subject-matter jurisdiction. Determining the existence of jurisdiction in this case is not easy considering the two apparently conflicting jurisdictional statutes, 49 U.S.C. Section 1486(a) and 28 U.S.C. Section 1334(b). Where two statutes are capable of co-existence, the court must regard each as effective, unless there is a clear congressional intent to the contrary. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018, 104 S.Ct. 2862, 2881, 81 L.Ed.2d 815 (1984). Reading the plain and express language of Section 1334(b), the District Court has original jurisdiction over all civil proceedings which arise under Title 11 "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts" This "notwithstanding" language grants the District Court concurrent jurisdiction after the commencement of a case under Title 11 of actions which otherwise had been granted within the exclusive jurisdiction of another court. Having established that the District Court has, in this limited circumstance, concurrent jurisdiction with the Court of Appeals, that jurisdiction is likewise vested in the Bankruptcy Court.³

Moreover, neither the statutory language nor the legislative history creates any exception under Section 1334(b) for cases that are exclusively in the jurisdiction of the Court of Appeals. *See* S.Rep.No. 989, 95th Cong., 2d Sess. 153-154 (1978) reprinted in

³ Section 1334 is applicable to the bankruptcy courts through 28 U.S.C. §§157(b) which gives the bankruptcy courts jurisdiction over "core proceedings" and non-core matters arising in or related to a case under Title 11.

1978 U.S. Code Cong. & Admin. News 5787, 5939-45; H.R.Rep.No. 595, 95th Cong. 2d Sess. 445 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6400. The legislative history reflects concerns with delay in administering the Debtor's estate and with judicial economy. The legislature addressed these concerns by allowing the bankruptcy courts to hear cases which previously would have been tried exclusively in another court such as state court, the federal district court, or the claims court while the bankruptcy court without jurisdiction patiently awaited the outcome. My finding of jurisdiction is in accord with the legislative policies disfavoring delay in administering the debtor's estate.

The decision in Brock v. Morysville Bodyworks, Inc., 829 F.2d 383 (3rd Cir. 1987) holding that the Bankruptcy Court has concurrent jurisdiction with the Court of Appeals to review an OSHA order is both persuasive and the only Circuit Court decision on point. Following the lead of the Third Circuit in Brock, I conclude that this Bankruptcy Court has concurrent jurisdiction with the Court of Appeals to review an order entered by the Department of Transportation.

II. DOT'S REVIEW OF TPI'S FITNESS TO FLY

Having concluded that this Court has subject matter jurisdiction I must now decide what relief if any is to be granted. Currently, the DOT is making a review of TPI's fitness to fly as TPI's certificate was "suspended" for dormancy until a new fitness determination can be made. *See* 49 U.S.C. App. §1371(r); 14 CFR 204.8. Under Regulation 204.8(c), a carrier must submit the data required by Section 204.4 or 204.7, as applicable, 45 days before it intends to resume air transportation. The air carrier must contact the

Department to determine what information need not be filed. After the information is received, if any is needed, the Department will decide if the carrier meets the continuing fitness requirements or if the carrier is fit based on the new information submitted. CFR 204.8(c).

Regulation 204.4, "Certified Carriers Proposing a Substantial Change in Operations," requires, among other things, a description of formal complaints against the company, a list of orders finding an employee to have violated the Federal Aviation Act, and a description of all FAA action taken against the carrier. Additionally, the Board may request a forecast income statement, including estimated revenue. The air carrier is also required to file information on its fleet of aircraft and compliance with safety standards. Regulation 204.7, is not applicable to TPI as it has previously applied for a certificate and is seeking the return of that certificate, but would require similar information about complaints, orders, FAA actions, balance sheets, income statements, and the fleet of aircraft.

According to DOT, in making a fitness determination it must consider the following three factors: (1) the competence and experience of management; (2) the existence of sufficient funds to operate without risk to consumers; and (3) the carrier's compliance with statutory and regulatory requirements. From the record it is clear that no decision has yet been rendered by the DOT. Since 49 U.S.C. Section 1486 and 11 U.S.C. Section 1334 grant to this Court only the right to review "any order" and the DOT has not entered any such order, I find this case lacks ripeness for adjudication. As established by McCorp, supra, Section 1334 does not give this Court authority to supplant the administrative process, it simply grants concurrent jurisdiction with other courts. *See*

McCorp, 112 S.Ct. at 464-465. Hooker Chemical Co., Ruco Div., v. U.S.E.P.A., Region II, 642 F.2d 48, (3rd Cir. 1981); *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). While in some circumstances unreasonable agency delay may itself be reviewable, Airline Pilots Assn. v. C.A.B., 750 F.2d 81 (D.C. Cir. 1984), the complaint does not state such a claim. Instead, Plaintiff sought a determination that DOT was not entitled to perform a fitness review under the dormancy rules but should be required to release TPI's certificate of public convenience and necessity. Because I find that the withholding of TPI's certificate is valid under the dormancy rules,⁴ DOT is correct in requiring a fitness review. The review has not been completed and the agency has not entered any order which could be reviewed under the authority of 49 U.S.C. Section 1486 and 11 U.S.C. Section 1334. For that reason the relief sought in the complaint is premature and the Motion to Dismiss is granted.

Lamar W. Davis, Jr.

⁴ In Oceanair of Florida, Inc. v. United States Department of Transportation, 876 F.2d 1560 (11th Cir. 1989), the Eleventh Circuit interpreted the dormancy rules, 14 C.F.R. §204.8, used by DOT to revoke or suspend certificates. The Court held that: (1) Sections (c) and (d) under which a dormant carrier is presumed to be unfit is valid because it merely places the burden on the carrier to provide the DOT with information concerning fitness, and (2) Sections (a) and (b) providing for automatic revocation of an air carrier's certificate without an oral evidentiary hearing to the carrier is invalid. Under 49 U.S.C. App. Section 1371(r) notice and a hearing are required to alter, amend, modify, suspend, or revoke a certificate.

In this case TPI's certificate is being held pending a fitness review due to a period in which it ceased operations. TPI's certificate has not been "revoked" as was the case in Oceanair. The Oceanair case mandates a hearing only where the certificate is revoked but does not require a hearing pending a fitness review under subsection (c).

In a decision filed July 2, 1991, the Ninth Circuit rejected the Oceanair decision in Air North v. DOT, 937 F.2d 1427 (9th Cir. 1991). According to the Court, DOT rule 14 CFR §204.8, which allows for revocation of certificates for dormancy, is a reasonable regulation, and neither notice nor a hearing is required. In Air North the carrier had been dormant for a year when its certificate was revoked. The Court stated that since the provision provided for "automatic" revocation, there were no factual questions to be decided in a hearing. Although the Court rejected the Oceanair decision, it concluded that the agency must provide affected persons an opportunity to show any special reasons that the agency's rule should not be applied to their individual case.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1992.