

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

JUL 7 2 38 PM '83



BOARD

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 1st day of July, 1983

In the Matter of	:	
	:	
PAGE AVJET CORPORATION	:	Docket 40905
	:	
to determine whether it is a	:	
citizen under section 101(16)	:	
of the Federal Aviation Act,	:	
of 1958, as amended	:	

ORDER

By Order 82-8-41, August 6, 1982, we tentatively found that Page Avjet Corporation (Page), the parent corporation of the Page group of air taxis ^{1/} and a successor corporation to Page Airways, is not a U.S. citizen as defined by section 101(16) of the Act, and that it must cease operations or restructure within 60 days so that it qualifies as a U.S. citizen. ^{2/}

On November 8, 1982, Page filed a response requesting that we not make final the above findings and conclusions because it intends to restructure the ownership and control of its air taxi operations. Page submitted a copy of its reorganization plan for us to determine whether the air taxi, as restructured, qualifies as a U.S. citizen. Under this plan, the corporation will issue 1,100 shares of stock. One hundred of these shares will be "nonvoting common" and one thousand will be "voting preferred." Page will own the "nonvoting" stock; a group of U.S. citizens will own the "voting" stock. The voting stockholders will have the right to elect the officers and directors, all of whom will be U.S. citizens, and will have day-to-day operational control of the air taxi. The nonvoting stockholders will have the right to exercise control in extraordinary circumstances. For example, approval of the nonvoting class is required before any merger, acquisition or consolidation of the company, proposed by the voting stockholders or company management, is effective. Similarly, the nonvoting stockholders have the right to initiate, and their approval is required for, a company dissolution or liquidation.

^{1/} Page Airways, Inc. (Rochester), Page Airways of Albany, Inc. and Page Airways, Inc. (Washington).

^{2/} We also tentatively concluded that Page cannot register as an air taxi under Part 298 and that the registrations under Part 298 of Page Airways, Inc. (Rochester), Page Airways of Albany, Inc., and Page Airways Inc. (Washington) should be cancelled.

By Order 83-1-60, January 17, 1983, we requested Page to submit additional specific information concerning its proposal to clarify the extent of voting power of the nonvoting stockholders. On February 2, 1983, Page responded with the specific powers of the nonvoting stockholders. First, they would have the right to vote on -- but not initiate -- company mergers, acquisitions and consolidations. Approval of the majority of the nonvoting stockholders is required before any of these acts is effective. Accordingly, the vote of the nonvoting stockholders can block a decision by the voting shareholders on any of these matters. The nonvoting shareholders also have the right to vote on -- or initiate -- a company liquidation or dissolution. The voting shareholders cannot block a vote by the nonvoting shareholders on these issues; however, the nonvoting shareholders can prevent such action by the voting class. Page characterizes the nonvoting stockholders as having rights which "are purely negative, purely protective in character."

Page's proposal states that the nonvoting class vote will be checked by the requirement that the Civil Aeronautics Board approve any vote of the nonvoting stockholders to block the decision of the voting stockholders for a merger, consolidation, acquisition, liquidation or dissolution of the company. ^{3/}

We have examined Page's proposal and have determined that it fails to satisfy the citizenship requirements of the Act. Section 101(16) defines "Citizen of the United States" as a "corporation or association created or organized under the laws of the United States or of any state, territory or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 percentum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions." (emphasis supplied)

We have consistently interpreted section 101(16) to mean that (1) at least 75 percent of the outstanding voting stock must be owned by U.S. citizens; and (2) as a factual matter, the carrier must actually be controlled by U.S. citizens. ^{4/} In the plan that Page submitted, the first criterion for U.S. citizenship appears to be met. Specifically, all the officers and directors are U.S. citizens and all of the stock that has been designated as having a voting interest is owned by bonafide U.S. citizens. Second, even considering the nonvoting stockholders to have a voting interest, the amount of that interest is below the 25 percent maximum specified in the Act for noncitizens.

In examining the control aspect for purposes of determining citizenship, we look beyond the bare technical requirements to see if the foreign interest has the power -- either directly or indirectly -- to influence the

^{3/} On April 28, 1983, Page filed an Amended Response, accompanied by a Motion for Leave to File the Response. We will grant the motion. In that Response, Page modified its proposal to require CAB approval in cases where the nonvoting shareholders exercise the right to dissolve or liquidate the air taxi operation. In its prior pleading, only CAB notification was required.

^{4/} Order 82-5-11, May 5, 1982.

directors, officers or stockholders. ^{5/} We have found control to embrace every form of control and to include negative as well as positive influence; we have recognized that a dominating influence may be exercised in ways other than through a vote. ^{6/} In the Daetwyler case, ^{7/} we found that actual control or the potential for control existed because of the close personal and business relationships that existed between Mr. Daetwyler, a Swiss citizen who owned 25 percent of the applicant's stock and represented one-third of the corporation's board of directors, and the applicant's U.S. stockholders, officers and directors. ^{8/}

^{6i.} In the Premiere Airlines, Inc. Fitness Investigation, Order 82-5-11, May 5, 1982, the carrier's citizenship was at issue even though there was never any question that 75 percent of the stock was owned by U.S. citizens. In that case, we granted the application for a certificate only after the applicant restructured its stock plan to remove all foreign influence over the voting interests through the establishment of a voting trust. We approved the voting trust as a means of meeting the actual control test and, therefore, concluded that the carrier had met the burden of establishing that it was a U.S. citizen under section 101(16). ^{9/}

Page's proposal brings into question the second aspect of the test, the issue of actual control, by virtue of the degree of voting power held by the minority "nonvoting" stockholders. Unlike Premiere, Page's proposal is to meet the citizenship definition because the nonvoting stockholders, who are not U.S. citizens, do in fact have the power to control the company.

^{5/} Uraba, Medellin, Cent. Airways-Canal Zone-Colombia Op., 2 C.A.B. 334, 337 (1940).

^{6/} Eastern-Colonial Control Case, 20 C.A.B. 629, 634-35 (1955).

^{7/} Willie Peter Daetwyler, d/b/a Interamerica Airfreight Co., Foreign Permit, 58 C.A.B. 118 (1971).

^{8/} In that case we concluded that since those stockholders, officers and directors were employees of other corporations controlled by Daetwyler and that the applicant would continue to do business as part of the system of Daetwyler controlled companies, he would be in a position to sufficiently influence decisions of the officers and board of directors so as to constitute control.

^{9/} In Premiere's initial application, one of the co-founders, who was a U.S. citizen, had borrowed the start-up capital from his non U.S. citizen employer. The terms of the loan agreement highly favored the borrower. On August 27, 1981, Administrative Law Judge John M. Vittone issued an Initial Decision which found that the non U.S. citizen was in a position to influence the U.S. citizen and through him the carrier. He concluded that the applicant had failed to establish that it was a U.S. citizen within the meaning of section 101(16) of the Act. Before we ruled on the case, the applicant requested a stay to reorganize and resolve its citizenship status. By Order 82-1-97, January 20, 1982, at the applicant's request, we remanded the case to the Judge. The carrier submitted its revised plan in which it removed the U.S. citizen from the carrier's management, placed his voting interest in a voting trust to be administered by an independent U.S. citizen and resolved not to accept any further funds from the U.S. citizen or his employer. On April 6, 1982, Judge Vittone issued a second Initial Decision, finding the carrier a citizen. By Order 82-5-11, May 5, 1982, we adopted his decision.

In Page's proposal, the nonvoting stockholders do not have day-to-day operational control; however, they have the right to influence many of the crucial decisions of the company. They have the power to block any proposal by the voting stockholders for a company consolidation, merger or acquisition. ^{10/} Similarly, they have the power to dissolve the company and liquidate its assets. If the nonvoting stockholders disapprove of the way that the officers and directors conduct the company's affairs, they can vote for dissolution of the company. Given the nonvoting shareholders' power, it could be expected that the officers, directors and voting stockholders would follow their wishes.

Page characterizes the role of the nonvoting stockholders as "passive", "protective" and "minor"; we cannot agree. We find that the nonvoting stockholders have substantial direct control that exceeds the percentage of stock that they hold and indirect control over the company's voting stockholders, officers and directors. The fact that their power may be negative in no way diminishes the fact of that control. ^{11/} Under no circumstances can the power that the nonvoting stockholders hold over this company be considered anything less than substantial since those powers concern whether the company can continue to exist.

The provision requiring Board approval in cases where the nonvoting stockholders act against the decisions of the voting stockholders on issues of company mergers, consolidations, acquisitions, dissolutions and liquidations does not change the extent of noncitizen control. The concept of control includes the power to dominate and that power need not be exercised for control to exist. ^{12/} Likewise the fact that there are restrictions on the exercise of such power does not vitiate the existence of a control relationship. ^{13/} In any event, we are not inclined to approve any agreement of this sort that thrusts us into the middle of an air carrier's business decisions.

We cannot find that Page's reorganization comports with the Act's citizenship requirements; the plan does not insulate the U.S. citizen officers and directors from the actual or potential control or influence of the non U.S. citizens. We do not dispute that Page has a legitimate interest in protecting its investment in the air taxi so long as it retains some ownership of stock; however, this interest cannot take precedence over the requirements of the Act.

^{10/} In the context of section 408 we have repeatedly held that the ability to veto a merger or acquisition or other significant corporate action constitutes control, e.g. West Coast Airlines, Inc. Enforcement Case, 42 CAB 561, 587-590 (1965) and Jetwest International Airways Fitness Investigation, Order 82-1-88, January 19, 1982.

^{11/} National Maytag Interlocking Relationships 40 CAB 161, 165 (1964).

^{12/} Railway Express Agency et al., Enforcement Proceeding, 47 CAB 916, 918 (1967).

^{13/} American Airlines Lease Accounting Procedures, 47 CAB 1078, 1079 (1967)

In a limited number of cases, including *Pemiere*, we have approved a voting trust arrangement as a method of insulating the carrier from the prohibited influence. In *Premiere*, we approved an agreement whereby the carrier removed the U.S. Citizen who was tainted by foreign control and transferred his voting interest to an independent voting trustee who would vote the stock in concert with the remaining U.S. stockholder. In the merger area, we have allowed one air carrier to acquire stock in another air carrier prior to Board approval of the acquisition by placing that stock in a voting trust, provided that (1) the acquired stock be voted on a proportional basis with the remaining stock; (2) the acquisition of stock be limited; and (3) there exists an interest adverse to that of the acquiring company with whom the trustee could cast his votes.^{14/} In the instant case, Page could conceivably restructure in a manner that addresses the concerns that we have expressed in these and other voting trust cases.

Page has itself suggested an alternative solution which would appear to satisfy its desire to protect its investment without raising the control questions presented by its current plan. In its information response of February 2, Page argued that its residual voting rights were the equivalent of a buyout provision under which a class of shareholders reserves the right to be bought out according to a predetermined formula in the event of specified occurrences, such as acquisition or mergers. If Page were to substitute such a provision for its current proposal to retain rights to vote on mergers and acquisitions and liquidations and to block decisions of new U.S. citizen shareholders in this area, its power to influence decisions concerning the air carrier would be greatly reduced. Page has proposed to purchase nonvoting common stock while selling to outsiders cumulative preferred voting stock. Assuming a buyout formula which would not be excessively burdensome to new shareholders, the combination of the limited rights accruing to Page as a nonvoting common shareholder vis-a-vis the preferred stockholders, and the buyout provision, would appear to protect Page's investment adequately without giving Page a substantial ability to influence the air taxis activities. We would entertain a reorganization plan for Page that follows this plan to restructure.

For the reasons stated above, we find that Page has failed to meet its burden of establishing that it meets the citizenship requirements under its proposal. Since we find that Page's proposal to restructure fails to comport with the citizenship requirements, we will make final our tentative findings and conclusions set forth in Order 82-8-41 that Page Avjet is not a U.S. citizen. Further, we will direct Page Avjet to cease operations within 60 days of the service date of this order. We will cancel the registrations under Part 298 of Page Airways, Inc. (Rochester), Page Airways of Albany, Inc., and Page Airways, Inc., (Washington) at that time.

We will, however, give the carrier 30 days from the service date of this order to submit a plan of reorganization that comports with the statute and the policy considerations discussed above. If such a plan is forthcoming, we will stay this order pending a determination of the merits of this plan.

^{14/} Order 81-3-30, March 3, 1981 (Acquisition of Control of Continental Air Lines, Inc. by Texas International Airlines, Inc.); Order 78-12-173, December 26, 1978 (Tiger International-Seaboard Acquisition Case); and Order 78-10-100, October 20, 1978 (Texas International-National Acquisition and Enforcement Case).

ACCORDINGLY,

1. We make final our tentative conclusions in Order 82-8-41 that Page Avjet (1) is not a citizen of the U.S. as defined by section 101(16) of the Act; (2) is not eligible to register as an air taxi under Part 298; and (3) must cease operations no later than August 8, 1983;

2. We grant the request of Page for Leave to File an Amended Response; and

3. We will serve a copy of this order on Page Avjet, Inc. and the Federal Aviation Administration.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.