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July 25, 1990

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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

Office of the General Counsel
Federal Election Commission
Sixth Floor
999 E Street, N.W.
Washington, D.C. 20463

Supplement TO
AOR 1990-10

Re: AOR 1990-10 -- Request of Texas Air Corporation PAC for an Advisory Opinion

Dear Sirs:

Texas Air Corporation, now Continental Airlines Holdings, Inc. ("CAH"), and its PAC appreciate the opportunity to make this submission to aid the FEC in rendering an advisory opinion pursuant to Advisory Opinion Request 1990-10.

At its July 12 meeting, the Commission was unable, based on the information before it, to reach a determination that CAH does not control Eastern Airlines and that therefore their PACs are unaffiliated. The Commission provided an opportunity for the submission of additional information to clarify the current relationship between the two entities, especially information that would address the issues of CAH's control of Eastern through stock ownership, and through a "Chairman of the Board" position, and if available, a copy of Eastern's reorganization plan. Unfortunately, no reorganization plan is in place for Eastern. As recognized in the trustee hearing in open court, the common stock of Eastern is

essentially worthless and, in accordance with Section 1123 of the Bankruptcy Code, will in all probability be canceled in any reorganization when effected. Upon the conversion to Chapter 7, the stock will most certainly be canceled. This submission addresses in turn the questions of stock ownership and management through a director's position.

A. The Stock Ownership Question

The Federal Election Campaign Act requires that the contribution limitations be applied to two political action committees "established or financed or maintained or controlled by any corporation ... including any parent ... of such corporation" as if they were a single committee. 2 U.S.C. § 441a (a)(5). Stock ownership in most cases would be presumed to establish "control" such that the PACs should be considered affiliated. In this case, stock ownership does not establish control.

As presented in our original request for an advisory opinion, a trustee has been appointed to control Eastern Airlines; Texas Air was ordered to relinquish control. Mr. Shugrue, in the role of the court-appointed trustee, has complete and plenary management and oversight authority over Eastern. He possesses and controls its assets and conducts its affairs. CAH does not have the right to direct or instruct Eastern's officers and employees to take or refrain from taking any action. These rights are the trustee's. In fact, CAH and Eastern, acting in conformity with the legal reality of this "deconsolidation," have each reflected in recent filings with the Securities and Exchange Commission that the two airlines operate separately.[1/] As a result of the appointment of the trustee, Eastern's financial results and balance sheet will be excluded from CAH's financial statements, effective April 19, 1990. CAH has stopped performing management, financial, legal and other services for Eastern, and Eastern has stopped paying CAH a management fee.[2/]

Eastern Airlines' estimated liabilities subject to reorganization as of March 31, 1990 were $2.9 billion, estimated to reach $3

1/Texas Air Corporation, SEC Form 10-Q, Notes to Financial Statements, filed May 14, 1990, attached hereto as Exhibit 1 and Eastern Airlines, SEC form 10-Q, Notes to Financial Statements, filed May 14, 1990, attached hereto as Exhibit 2.

2/Similarly recognizing Eastern's complete independence, the trustee has directed that any attorneys representing Eastern must withdraw from any representation of Continental Airlines Holdings and Continental.

billion by December 31, 1990. [3/] As a stockholder, the CAH deficit relating to Eastern is approximately $1.4 billion as of March 31, 1990. [4/] CAH's stock ownership is not a privilege that carries with it the traditional "control" aspects of ownership. In fact, the very existence of such stock and the fact that it has not been canceled pursuant to a reorganization plan carries certain burdens, including the alleged obligation on the part of CAH and its affiliates to fund Eastern's pension plans.

The financial obligations of CAH and the consequent financial loss in no way establish or maintain a "control" relationship. CAH may not exercise the legal rights normally associated with stock ownership. CAH does not now have the right to vote on matters normally entrusted to the shareholders by Eastern's corporate charter. CAH's theoretical right to elect directors for Eastern is meaningless since the directors have no management or oversight authority.

Under the Railway Labor Act, the National Mediation Board must determine whether two carriers are a "single carrier" for the Act's purposes when common ownership or control exist. 45 U.S.C.A. §§ 151 and 181. When faced with the appointment of a trustee, the National Mediation Board has recognized that a single carrier finding can be precluded. In Atchison, Topeka & Santa Fe Rwy. Co., 12 N.M.B. 95 (1985), Santa Fe Industries, a holding company that owned the Santa Fe Railway, had acquired the Southern Pacific Railway. While ICC approval of the acquisition was being sought, the stock of Southern Pacific was placed in a voting trust, under which the holding company was unable to exercise any control of Southern Pacific's railroad operations. The Board held that Santa Fe and Southern Pacific did not constitute a single carrier, despite common legal ownership of the two carriers' stock, because "the voting trust arrangement was sufficient to ensure independent operation of the two railroads . . ." and the Santa Fe could have "no control over the Southern Pacific's business relationships or its labor relations."[5/]

Although it was contemplated that Santa Fe Industries was going to control the Southern Pacific Railway at some future date, the National Mediation Board did not rely on a hypothetical future circumstance, but instead looked to the facts as they existed at the time, and held that the two carriers should not be considered a single entity. The Board issued this holding even though a

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3/See Exhibit 1.

4/ Id.

5/ Id. at 110.

majority of the stock had been acquired by Santa Fe Industries, and it was, theoretically, a parent corporation.

It is entirely reasonable and certainly consonant with the Commission's precedent to issue an advisory opinion based upon current facts. To issue an opinion based upon hypothetical occurrences in the future is not only discordant with precedent, but unsupported by the Federal Election Campaign Act, which authorizes the issuance of advisory opinions "with respect to a specific transaction or activity." 2 U.S.C.A. §437f. In this case, at this time, there is not control by CAH of either Eastern Airlines or its PAC. To continue to subject the PACs to shared contribution limits would not reflect reality, and would serve only to disenfranchise the employees who contribute to the PACs, by imperiling the legality of each contribution.

B. The Chairman of the Board Question

Questions were raised at the July 12 meeting of the Commission regarding the nominal title of Mr. Lorenzo as "Chairman of the Board" of Eastern Airlines. Although the title is used, it carries no practical meaning. The Board of Directors of Eastern exercises no control over the airline.

As the Supreme Court stated in Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985), "[t]he powers and duties of a bankruptcy trustee are extensive." At the commencement of the case, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§323, 541. The trustee must maximize the value of the estate. 11 U.S.C. §704(1). He is directed to investigate the debtor's financial affairs, 11 U.S.C. §§704(4), 1106 (a)(3), and is empowered to sue officers, directors and other insiders to recover fraudulent or preferential transfers of the debtor's property. 11 U.S.C. §§547 (b)(4)(B), 548.

In the case of Eastern Airlines, the trustee has the power to operate the debtor's business. 11 U.S.C. §1108. In the course of operating the business, the trustee may enter into and affect transactions, including the sale or lease of the property of the estate, in the ordinary course, without court approval. 11 U.S.C. §363 (c)(1).

The Supreme Court has noted that the trustee's "wide-ranging" management authority contrasts with the "severely limited" powers of the debtor company's directors. C.F.T.C. v. Weintraub, 471 U.S. 343, 354, 105 S.Ct. 1986, 1993. In fact, the directors' only role

is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. 11 U.S.C. §§521, 343. According to the Supreme Court,

> Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are "completely ousted." See H.R. Rep. No. 95-595, pp. 220-221 (1977).[6/]

The Court concluded that under the Bankruptcy Code, the trustee plays the role most closely analogous to that of a solvent corporation's management and Board of Directors, and that the debtor's directors retain "virtually no management powers."[7/]

It would elevate form over substance to view the role of chairman of an ousted board of directors as a position of corporate control. Eastern Airlines is managed and controlled by a trustee, and by no other entity. In these circumstances, it would be unfair to continue to view the PACs of CAH and Eastern as affiliated.

Please contact us if you require any further information.

Sincerely,

Carolyn F. Bigda

Attachments: Exhibit 1 - Texas Air Corporation Form 10-Q Notes to Financial Statements. 5/14/90

Exhibit 2 - Eastern Airlines Form 10-Q Notes to Financial Statements. 5/14/90

6/Id.

7/Id.

Exhibit 3 - Selected Provisions from the Bankruptcy Code

Exhibit 4 - Commodity Futures Trading Commission v. Weintraub
471 US 343, 105 S.Ct. 1986 (1985)

Exhibit 5 - Atchison, Topeka & Santa Fe Rwy., Co., 12 N.M.B. 95 (1985)

cc: Chairman Lee Ann Elliot
Vice Chairman John Warren McGarry
Commissioner Joan D. Aikens
Commissioner Thomas J. Josefiak
Commissioner Danny Lee McDonald
Commissioner Scott E. Thomas

Exhibit I
Texas Air Corp.
Form 10-Q
(5/14/90)

Note 1 - Chapter 11 Reorganization of Eastern

On March 9, 1989, Eastern filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking to reorganize under Chapter 11 of the Federal Bankruptcy Code (the "Code"). The filing for protection under the Code was necessary due to Eastern's inability to continue substantial operations as a result of the refusal by most of Eastern's pilots, represented by the Air Line Pilots Association ("ALPA"), to report to work since the commencement on March 4, 1989 of the strike against Eastern by employees of Eastern represented by the International Association of Machinists and Aerospace Workers (the "IAM").

From March 9, 1989 until April 18, 1990, Eastern was operated as a debtor-in-possession under the Code. On April 19, 1990, the Bankruptcy Court appointed a trustee to replace the debtor-in-possession and to operate Eastern as a going concern and to explore a viable business plan. The trustee has all the powers of the management and Board of Directors of Eastern to operate and manage Eastern's business but may not engage in transactions outside of the ordinary course of business without approval, after notice and hearing, of the Bankruptcy Court. While Texas Air does not feel a trustee was warranted, Texas Air presently intends to continue to work with and support Eastern in all reasonable ways.

Texas Air's first quarter results include revenues of $557.2 million and a net loss (including dividends on certain preferred stock) of $144.2 million, related to Eastern. As a result of the appointment of a trustee to manage Eastern's reorganization efforts, under generally accepted accounting principles, Eastern's operating results and separate company assets and liabilities will be excluded from Texas Air's future financial statements beginning April 19, 1990. As of March 31, 1990, the accompanying consolidated financial statements reflect the assets and liabilities of Eastern. At such date, Eastern's recorded liabilities exceeded its assets, resulting in a stockholder's deficit of Eastern of approximately $1.4 billion. Texas Air management is currently evaluating the impact of the trustee's appointment on Texas Air's financial condition and future operations. Although such impact has not been quantified at this time, Management believes that Texas Air's negative investment in Eastern of approximately $1.4 billion (representing losses of Eastern recorded by Texas Air from acquisition of Eastern in 1986 through April 18, 1990) exceeds the amount of Texas Air's guaranties or contingent obligations relating to Eastern, including, among others, interest on certain Eastern indebtedness, obligations related to Eastern's 11.36% Cumulative Junior Preferred Stock (the "11.36% Preferred"), and certain Eastern pension obligations, and therefore is of the opinion that Texas Air in the future will realize a gain once such guaranties and contingencies can be quantified.

The trustee and Eastern management are reviewing certain transactions between Eastern and Texas Air and its subsidiaries, including those evaluated by the examiner appointed by the Bankruptcy Court in April 1989 (the "Examiner") and the settlement reached in February 1990 among the Examiner, Texas Air and Eastern, which agreement is no longer applicable due to the appointment of the trustee. Texas Air has had discussions with the Examiner and the trustee with respect to a possible settlement but cannot predict whether such a settlement will be reached. If a settlement cannot be reached, Texas Air expects that the trustee may pursue certain claims related to the transactions but cannot predict the outcome of such claims. Texas Air and its subsidiaries believe that they have substantial and valid defenses to such claims and intend to contest them vigorously if pursued.

The trustee and Eastern management currently are reviewing Eastern's business plan with a view to proposing a revised plan of reorganization acceptable to Eastern, its creditors and security holders and the Bankruptcy Court. Currently, any creditor or security holder is free to file its own plan of reorganization and to solicit acceptances

Note 1 - Chapter 11 Reorganization of Eastern (continued)

with respect thereto. The committee of preferred stockholders appointed by the Bankruptcy Court has filed such a plan. Eastern does not believe this plan will be accepted by the creditors. There is no assurance that a plan of reorganization will be confirmed or that sufficient cash will be generated to sustain successful future operations.

The filing by Eastern of its voluntary petition for reorganization operated as an automatic stay against the commencement or continuation of any judicial, administrative or other proceedings against Eastern, any act to obtain possession of property of or from Eastern, or any act to create, perfect or enforce any lien against property of Eastern, with certain exceptions under the Code. Consequently, Eastern's creditors are prohibited from attempting to collect prepetition debts without the consent of the Bankruptcy Court. Any creditor may seek relief from the automatic stay and, if applicable, enforce a lien against any security if authorized to do so by the Bankruptcy Court. Notwithstanding the automatic stay, Eastern has paid certain prepetition liabilities, with approval from the Bankruptcy Court, including certain payments to foreign vendors and governmental agencies, wages and salaries for active employees, insurance benefits, pension payments, interest payments, insurance claims, travel agency commissions and certain ticket refunds. In addition, payments are being made on certain debt relating directly to aircraft financing under the provisions of Section 1110 of the Code (which provides special treatment for certain aircraft lenders and lessors permitting them otherwise to obtain possession of such aircraft) and lease rentals for airport properties and certain items of ground equipment.

The following table summarizes estimated liabilities subject to Chapter 11 reorganization proceedings (in thousands):

	March 31, 1990	December 31, 1990
Long-term debt	$1,564,324	$1,592,991
Capital leases	653,178	673,765
Accounts payable	203,773	218,685
Air traffic liability	57,042	110,024
Accrued payroll and pension	202,626	203,946
Accrued taxes	13,799	13,799
Accrued interest	213,829	194,950
Accrued other liabilities	16,382	16,264
	$2,924,953	$3,024,424

In addition, other substantial claims have been submitted and may require significant litigation to resolve. Under the Code, Eastern is required to pay substantial expenses associated with the Chapter 11 proceedings. Since the commencement of the Chapter 11 proceedings, Eastern has expensed $45.1 million, of which amount, $8.2 million was expensed during the first quarter of 1990.

Eastern expects that a portion of its receivables may be subject to set off against an equal amount of estimated unsecured payables. The issue of set off will ultimately be resolved by the Bankruptcy Court.

Effective January 1990, Eastern ceased accruing interest on unsecured debt and the recording of undeclared dividends on its redeemable preferred stock (except its 11.36% Preferred).

Note 1 - Chapter 11 Reorganization of Eastern (continued)

At March 31, 1990, $836.2 million of restricted investments were held by Eastern in segregated accounts for the benefit of secured and unsecured creditors. Application of these funds for use by Eastern for working capital purposes, to pay down debt related to asset dispositions and to satisfy unsecured creditors' claims is subject to approval of the Bankruptcy Court. These funds include cash generated from asset sales, rental income from aircraft leased out to third parties and accrued interest income on such restricted investments. Of the total $836.2 million in restricted accounts, $663.1 million is held for the benefit of secured creditors and is comprised of the aggregate proceeds from the sale or leasing of assets that collateralized specific loans. Eastern anticipates that a substantial portion of the $663.1 million will be paid to the secured creditors. The remaining amounts in the restricted accounts and proceeds from future sales of unencumbered assets, less any amounts subsequently released for working capital purposes will, at time of confirmation of a plan of reorganization, become available to satisfy unsecured creditors.

Since the commencement of the Chapter 11 proceedings, Eastern has obtained the release of $400 million from its restricted accounts for working capital purposes, of which $50 million, $60 million and $80 million were obtained in January, March and April of 1990, respectively. Eastern believes that release of additional restricted funds will be required in future periods although there can be no assurance that such funds will be released.

During the quarter ended March 31, 1990, Eastern sold nine aircraft for net proceeds of $185.8 million, five of which were sold to Continental for net proceeds of $122.0 million; sold and leased back six aircraft for net proceeds of $168.0 million; sold its Boston Reservations Center for $9.2 million (including $3.6 million in debt forgiveness) and sold various spare engines and equipment for net proceeds of $12.4 million. In connection with these sales, Eastern recognized gains of $34.2 million and recorded deferred gains of $121.5 million.

Note 2 - Loss per Share

Loss per common and common equivalent share for the quarters ended March 31, 1990 and 1989 were computed using 40.3 million and 39.9 million weighted average common shares outstanding during the period, respectively. Although certain preferred stock, warrants and stock options are considered common equivalent shares, they were not included in the computation since their inclusion would be antidilutive. Similarly, loss per share assuming full dilution is the same as primary loss per share since the assumed conversion of certain preferred stock and convertible debentures would be antidilutive. Preferred stock dividend requirements and amortization of discount on preferred stock of $5.8 million and $5.9 million for 1990 and 1989, respectively, were added to loss before extraordinary credit for the computations.

Exhibit II
Eastern Airlines, Inc.
Form 10-Q
(5/14/90)
NOTES TO FINANCIAL STATEMENTS
(Unaudited)

[redacted] - Chapter 11 Reorganization

On March 9, 1989, Eastern Air Lines, Inc. ("Eastern") filed a voluntary petition in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") seeking to reorganize under Chapter 11 of the Federal Bankruptcy Code (the "Code"). The filing for protection under the Code was necessary due to Eastern's inability to continue substantial operations as a result of the refusal by most of Eastern's pilots, represented by the Air Line Pilots Association ("ALPA"), to report to work since the commencement on March 4, 1989 of the strike against Eastern by employees represented by the International Association of Machinists and Aerospace Workers (the "IAM").

From March 9, 1989 until April 18, 1990, Eastern was operated as a debtor-in-possession under the Code. On April 19, 1990, the Bankruptcy Court appointed a Trustee to replace the debtor-in-possession and to operate Eastern as a going concern and to explore a viable business plan. The Trustee has all the povers of the Management and Board of Directors of Eastern to operate and manage Eastern's business, but may not engage in transactions outside of the ordinary course of business without approval, after notice and hearing, of the Bankruptcy Court.

Since the appointment of a Trustee, the Board of Directors of Eastern (which was elected by Texas Air Corporation ("Texas Air"), the holder of all of the common stock of Eastern), no longer controls the business and operations of Eastern. Accordingly, Texas Air for financial statement purposes has deconsolidated Eastern, effective April 19, 1990. The Trustee and Eastern management are revieving certain transactions between Eastern and Texas Air and its subsidiaries, including those evaluated by the examiner appointed by the Bankruptcy Court in April 1989 ("Examiner"), and the settlement reached in February 1990 among the Examiner, Texas Air, and Eastern. The Trustee and Eastern management also are evaluating the effect, if any, of the change in the relationship between Eastern and Texas Air and its subsidiaries on Eastern's financial statements. Accordingly, the financial statements as of March 31, 1990 do not include any adjustments relating to these matters.

The Trustee and Eastern management currently are revieving Eastern's business plan with a viev to proposing a revised plan of reorganization acceptable to Eastern, its creditors and security holders and the Bankruptcy Court. Currently, any creditor or security holder is free to file its ovn plan of reorganization and to solicit acceptances with respect thereto. The committee of preferred stockholders appointed by the Bankruptcy Court has filed such a plan. Eastern does not believe this plan will be accepted by the creditors. There is no assurance that a plan of reorganization will be confirmed or that sufficient cash will be generated to sustain successful future operations.

The filing by Eastern of its voluntary petition for reorganization operated as an automatic stay against the commencement or continuation of any judicial, administrative or other proceedings against Eastern, any act to

Note 1 - Chapter 11 Reorganization - (Continued)

obtain possession of property of or from Eastern, or any act to create, perfect or enforce any lien against property of Eastern, with certain exceptions under the Code. Consequently, Eastern's creditors are prohibited from attempting to collect pre-petition debts without the consent of the Bankruptcy Court. Any creditor may seek relief from the automatic stay and, if applicable, enforce a lien against any security, if authorized to do so by the Bankruptcy Court.

The accompanying financial statements have been prepared on a going concern basis which contemplates continuity of operations, including realization of assets and liquidation of liabilities, in the ordinary course of business. The appropriateness of using the going concern basis is dependent upon, among other things, confirmation of a plan of reorganization, successful future operations and the ability to generate sufficient cash from operations, financing sources or sale of assets to meet obligations as they become due.

As a result of the reorganization proceedings, Eastern may sell or otherwise realize assets and liquidate or settle liabilities for amounts other than those reflected in the financial statements. The financial statements do not include any adjustments relating to the recoverability and classification of recorded asset amounts, or the amounts and classification of liabilities that might be necessary as a consequence of the various contingencies discussed herein.

Pursuant to provisions of the Code, liabilities arising prior to the filing of the petition under Chapter 11 of the Code may not be paid without prior approval of the Bankruptcy Court. Certain pre-petition liabilities have subsequently been paid upon approval from the Bankruptcy Court. These liabilities include certain payments to foreign vendors and governmental agencies, wages and salaries for active employees, insurance benefits, pension payments, interest payments, insurance claims, travel agency commissions and certain ticket refunds. In addition, payments are being made on certain debt relating directly to aircraft financing under the provisions of Section 1110 of the Code and lease rentals for airport properties and certain items of ground equipment.

Certain parties to executory contracts, including leases, with Eastern may file a motion with the Bankruptcy Court seeking to require Eastern to affirm or reject those contracts. Affirmation of a contract requires Eastern, among other things, to cure defaults under such contract. Rejection of a contract, which may be done if the contract is found to be onerous and burdensome, constitutes a breach of that contract as of the moment immediately preceding the bankruptcy filing, giving the other party the right to assert a general unsecured claim against the bankruptcy estate for damages arising out of the breach. Eastern has been revieving its executory contracts and has from time to time affirmed or rejected specific contracts.

Exhibit 3
Selected Provisions from the Bankruptcy Code

SECTION 323 (11 U.S.C. § 323)

§ 323. Role and capacity of trustee.

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

SECTION 343 (11 U.S.C. § 343)

§ 343. Examination of the debtor. The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

SECTION 363 (11 U.S.C. § 363)

§ 363. Use, sale, or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweights the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

SECTION 521 (11 U.S.C. § 521)

§ 521. Debtor's duties. The debtor shall—

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title; and

(5) appear at the hearing required under section 524(d) of this title.

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

§ 547. Preferences.

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt se-

cured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title. ; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interst that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

§ 548. Fraudulent transfers and obligations.

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such prop-

erty of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment; and

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment.

SECTION 704 (11 U.S.C. § 704)

§ 704. Duties of trustee. The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

§ 1106. Duties of trustee and examiner.

(a) A trustee shall—

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

(b) An examiner appointed under section 1104(c) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

SECTION 1108 (11 U.S.C. § 1108)

§ 1108. Authorization to operate business. Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

Pub.L. 95–598, Nov. 6, 1978, 92 Stat. 2631; Pub.L. 98–353, Title III, § 507, July 10, 1984, 98 Stat. 385.

Exhibit 4

471 U.S. 343, 85 L.Ed.2d 372

[343]COMMODITY FUTURES TRADING COMMISSION, Petitioner

v.

Gary WEINTRAUB et al.

No. 84-261.

Argued March 19, 1985.

Decided April 29, 1985.

Officer and director of corporate debtor appealed from an order of the United States District Court for the Northern District of Illinois, Nicholas J. Bua, J., which affirmed a United States Magistrate's order that debtor's trustee in bankruptcy had authority to waive corporation's attorney-client privilege. The Court of Appeals, 7th Cir., 722 F.2d 338, reversed, and certiorari was granted. The Supreme Court, Justice Marshall, held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications.

Reversed.

1. Witnesses ⇐199(2)

Attorney-client privilege attaches to corporations as well as to individuals.

2. Witnesses ⇐198(1)

Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients; it thereby encourages observance of the law and aids in the administration of justice.

3. Corporations ⇐307
Witnesses ⇐219(3)

As an inanimate entity, a corporation must act through agents; it cannot speak directly to its lawyers and, similarly, it cannot directly waive the attorney-client privilege when disclosure is in its best interest.

4. Witnesses ⇐199(2)

Attorney-client privilege for a corporation does not only cover communications between counsel and top management; under certain circumstances, communications between counsel and lower-level employees are also covered.

5. Witnesses ⇐219(3)

For solvent corporations, power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors; the managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

6. Corporations ⇐397

Authority of corporate officers derives legally from that of the board of directors.

7. Witnesses ⇐199(2), 217, 219(3)

When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.

8. Witnesses ⇐219(3)

New managers installed as the result of a corporate takeover, merger, loss of confidence by shareholders, or simply normal succession may waive the attorney-client privilege with respect to communications made by former officers and directors.

9. Witnesses ⇐199(2), 217

Displaced corporate managers may not assert the corporate attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

10. Bankruptcy ⇐242(3)

Legislative history of Bankruptcy Code provision, stating that "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney * * * that holds recorded information * * * relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee", makes clear that Congress did not intend to give a corporate debtor's directors the right to assert the corporation's attorney-client privilege

against the bankruptcy trustee; indeed, statements made by members of Congress regarding the effect of said provision specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee. Bankr. Code, 11 U.S.C.A. § 542(e).

11. Bankruptcy ⇐242(3)

In regard to Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant, or other person, the provision's "subject to any applicable privilege" language is merely an invitation for judicial determination of privilege questions. Bankr.Code, 11 U.S.C.A. § 542(e).

12. Bankruptcy ⇐242(3)

Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant or other person was not intended to limit the trustee's ability to obtain corporate information; the provision was intended to restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. Bankr.Code, 11 U.S.C.A. § 542(e).

13. Bankruptcy ⇐242(3)

Because the attorney-client privilege is controlled outside of bankruptcy, by corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

14. Bankruptcy ⇐242(3)

Bankruptcy Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited; thus, the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's attorney-client privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. Bankr.Code, 11 U.S.C.A. §§ 323, 343, 363(b), (c)(1), 521, 541, 547, 547(b)(4)(B), 548, 704(1, 2, 4).

15. Bankruptcy ⇐242(3)

No federal interest would be impaired by the trustee in bankruptcy's control of a debtor corporation's attorney-client privilege with respect to prebankruptcy communications; on the other hand, vesting such power in the corporate directors would frustrate the Bankruptcy Code's goal of empowering the trustee to uncover insider fraud and recover misappropriated corporate assets. Bankr.Code, 11 U.S.C.A. §§ 547, 548, 704(4).

16. Bankruptcy ⇐118

Fiduciary duty of a corporation's trustee in bankruptcy runs to shareholders as well as to creditors.

17. Bankruptcy ⇐345

In bankruptcy, interests of the corporate debtor's shareholders become subordinated to the interests of creditors.

18. Bankruptcy ⇐242(3)

In cases in which it is clear that the corporate debtor's estate is not large enough to cover any shareholder claims, the trustee in bankruptcy's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. Bankr.Code, 11 U.S.C.A. § 726(a).

19. Bankruptcy ⇐664

If a corporate debtor remains in possession, that is, if a trustee is not appointed, the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession; indeed, the willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.

20. Witnesses ⇐217

Giving the trustee in bankruptcy of a corporate debtor control over the corporate attorney-client privilege will not have an undesirable chilling effect on attorney-client communications and does not dis-

criminate against insolvent corporations; the chilling effect is no greater than in the case of a solvent corporation and, by definition, corporations in bankruptcy are treated differently from solvent corporations.

21. Bankruptcy ⇐242(3)

Trustee of a corporation in bankruptcy has the power to waive corporation's attorney-client privilege with respect to prebankruptcy communications. Bankr.Code, 11 U.S.C.A. § 542(e).

Syllabus *

Petitioner filed a complaint in Federal District Court alleging violations of the Commodity Exchange Act by Chicago Discount Commodity Brokers (CDCB), and respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree that resulted in the appointment of a receiver who was ultimately appointed trustee in bankruptcy after he filed a voluntary petition in bankruptcy on behalf of CDCB. Respondent Weintraub, CDCB's former counsel, appeared for a deposition pursuant to a subpoena *duces tecum* served by petitioner as part of its investigation of CDCB, but refused to answer certain questions, asserting CDCB's attorney-client privilege. Petitioner then obtained a waiver of the privilege from the trustee as to any communications occurring on or before the date of his initial appointment as a receiver. The District Court upheld a Magistrate's order directing Weintraub to testify, but the Court of Appeals reversed, holding that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition.

Held: The trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. Pp. 1990–1996.

(a) The attorney-client privilege attaches to corporations as well as to individuals, and with regard to solvent corporations the power to waive the privilege rests with the corporation's management and is normally exercised by its officers and directors. When control of the corporation passes to new management, the authority to assert and waive the privilege also passes, and the new managers may waive the privilege with respect to corporate communications made by former officers and directors. Pp. 1990–1991.

(b) The Bankruptcy Code does not explicitly address the question whether control of the privilege of a corporation in bankruptcy with respect to prebankruptcy communications passes to the bankruptcy trustee or, as respondents assert, remains with the debtor's directors. Respondents' contention that the issue is controlled by § 542(e) of the Code—which provides that "[s]ubject to any applicable privilege," the court may order an attorney who holds recorded information relating to the debtor's property or financial affairs to disclose such information to the trustee—is not supported by the statutory language or the legislative history. Instead, the history makes clear that Congress intended the courts to deal with privilege questions. Pp. 1991–1992.

(c) The Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited. Thus the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. Pp. 1992–1993.

(d) No federal interests would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, vesting such power in the directors would frustrate the Code's goal of empowering the trustee to uncover

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

insider fraud and recover misappropriated corporate assets. Pp. 1993–1994.

(e) There is no merit to respondents' contention that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors. When a trustee is appointed, the privilege must be exercised in accordance with the trustee's fiduciary duty to all interested parties. Even though in some cases the trustee's exercise of the privilege will benefit only creditors, such a result is in keeping with the hierarchy of interests created by the bankruptcy laws. Pp. 1994–1995.

(f) Nor is there any merit to other arguments of respondents, including the contentions that giving the trustee control over the privilege would have an undesirable chilling effect on attorney-client communications and would discriminate against insolvent corporations. The chilling effect is no greater here than in the case of a solvent corporation, and, by definition, corporations in bankruptcy are treated differently from solvent corporations. Pp. 1995–1996.

722 F.2d 338 (CA7 1984), reversed.

Bruce N. Kuhlik, Washington, D.C., for petitioner, pro hac vice, by special leave of Court.

1345David A. Epstein, Chicago, Ill., for respondents.

Justice MARSHALL delivered the opinion of the Court.

The question here is whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation's attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy.

I

The case arises out of a formal investigation by petitioner Commodity Futures Trading Commission to determine whether Chicago Discount Commodity Brokers (CDCB), or persons associated with that firm, violated the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* CDCB was a discount commodity brokerage house registered with the Commission, pursuant to 7 U.S.C. § 6d(1), as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Act. That same day, respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree with the Commission, which provided for the appointment of a receiver and for the receiver to file a petition for liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The District Court appointed John K. Notz, Jr., as receiver.

Notz then filed a voluntary petition in bankruptcy on behalf of CDCB. He sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, which provides for the 1346liquidation of bankrupt commodity brokers. 11 U.S.C. §§ 761–766. The Bankruptcy Court appointed Notz as interim trustee and, later, as permanent trustee.

As part of its investigation of CDCB, the Commission served a subpoena *duces tecum* upon CDCB's former counsel, respondent Gary Weintraub. The Commission sought Weintraub's testimony about various CDCB matters, including suspected misappropriation of customer funds by CDCB's officers and employees, and other fraudulent activities. Weintraub appeared for his deposition and responded to numerous inquiries but refused to answer 23 questions, asserting CDCB's attorney-client privilege. The Commission then moved to compel answers to those questions. It argued that Weintraub's assertion of the attorney-client privilege was inappropriate because the privilege could not be used to "thwart legitimate access to information sought in an administrative investigation." App. 44.

Even though the Commission argued in its motion that the matters on which Weintraub refused to testify were not protected by CDCB's attorney-client privilege, it also asked Notz to waive that privilege. In a letter to Notz, the Commission maintained that CDCB's former officers, directors, and employees no longer had the authority to assert the privilege. According to the Commission, that power was vested in Notz as the then-interim trustee. *Id.*, at 47–48. In response to the Commission's request, Notz waived "any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980"—the date of Notz' appointment as receiver. *Id.*, at 49.

On April 26, 1982, a United States Magistrate ordered Weintraub to testify. The Magistrate found that Weintraub had the power to assert CDCB's privilege. He added, however, that Notz was "successor in interest of all assets, rights and privileges of CDCB, including the attorney/client privilege at issue herein," and that Notz' waiver was therefore valid. App. to Pet. for Cert. 19a–20a. The District Court [347] upheld the Magistrate's order on June 9. *Id.*, at 18a. Thereafter, Frank McGhee and his brother, respondent Andrew McGhee, intervened and argued that Notz could not validly waive the privilege over their objection. Record, Doc. No. 49, p. 7.[1] The District Court rejected this argument and, on July 27, entered a new order requiring Weintraub to testify without asserting an attorney-client privilege on behalf of CDCB. App. to Pet. for Cert. 17a.[2]

The McGhees appealed from the District Court's order of July 27 and the Court of Appeals for the Seventh Circuit reversed. 722 F.2d 338 (1984). It held that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition. The court recognized that two other Circuits had addressed the question and had come to the opposite conclusion. See *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (CA2 1982); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (CA8 1981).[3] We granted certiorari to resolve the conflict. 469 U.S. 929, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). We now reverse the Court of Appeals.

[348] II

[1, 2] It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice. See, *e.g.*, *Upjohn Co. v. United States*, *supra*, at 389, 101 S.Ct., at 682; *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980); *Fisher v.*

1. The Court of Appeals found that Andrew McGhee resigned his position as officer and director of CDCB on October 21, 1980. 722 F.2d 338, 339 (CA7 1984). Frank McGhee, however, remained as an officer and director. See n. 5, *infra*.

2. The June 9 order had not made clear that Weintraub was barred only from invoking the *corporation's* attorney-client privilege.

3. The Court of Appeals distinguished *O.P.M. Leasing*, where waiver of the privilege was opposed by the corporation's sole voting stockholder, on the ground that the corporation in *O.P.M. Leasing* had no board of directors in existence during the tenure of the trustee. Here, instead, Frank McGhee remained an officer and director of CDCB during Notz' trusteeship. 722 F.2d, at 341. The court acknowledged, however, a square conflict with *Citibank v. Andros*.

After the Court of Appeals' decision in this case, the Court of Appeals for the Ninth Circuit held that a bankruptcy examiner has the power to waive the corporation's attorney-client privilege over the objections of the debtor-in-possession. *In re Boileau*, 736 F.2d 503 (CA9 1984). That holding also conflicts with the holding of the Seventh Circuit in this case.

United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976).

[3, 4] The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation. In *Upjohn Co.*, we considered whether the privilege covers only communications between counsel and top management, and decided that, under certain circumstances, communications between counsel and lower-level employees are also covered. Here, we face the related question of which corporate actors are empowered to waive the corporation's privilege.

[5, 6] The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.[4] The managers, of
1349course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. See, *e.g.*, *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

[7–9] The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties. See Brief for Petitioner 11; Tr. of Oral Arg. 26. See generally *In re O.P.M. Leasing Services, Inc.*, *supra*, at 386; *Citibank v. Andros*, *supra*, at 1195; *In re Grand Jury Investigation*, 599 F.2d 1224, 1236 (CA3 1979); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611, n. 5 (CA8 1978) (en banc).[5]

The dispute in this case centers on the control of the attorney-client privilege of a corporation in bankruptcy. The Government maintains that the power to exercise that privilege with respect to prebankruptcy communications passes to the bankruptcy trustee. In contrast, respondents maintain that this power remains with the debtor's directors.

III

As might be expected given the conflict among the Courts of Appeals, the Bankruptcy Code does not explicitly address
1350the question before us. Respondents assert that 11 U.S.C. § 542(e) is dispositive, but we find reliance on that provision misplaced. Section 542(e) states:

> "*Subject to any applicable privilege*, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such re-

4. State corporation laws generally vest management authority in a corporation's board of directors. See, *e.g.*, Del.Code Ann. Tit. 8, § 141 (1983); N.Y.Bus.Corp.Law § 701 (McKinney Supp.1983–1984); Model Bus.Corp.Act § 35 (1979). The authority of officers derives legally from that of the board of directors. See generally Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants, 63 Calif.L.Rev. 375 (1975). The distinctions between the powers of officers and directors are not relevant to this case.

5. It follows that Andrew McGhee, who is now neither an officer nor a director, see n. 1, *supra*, retains no control over the corporation's privilege. The remainder of this opinion therefore focuses on whether Frank McGhee has such power.

corded information to the trustee." (emphasis added).

According to respondents, the "subject to any applicable privilege" language means that the attorney cannot be compelled to turn over to the trustee materials within the corporation's attorney-client privilege. In addition, they claim, this language would be superfluous if the trustee had the power to waive the corporation's privilege.

The statutory language does not support respondents' contentions. First, the statute says nothing about a trustee's authority to waive the corporation's attorney-client privilege. To the extent that a trustee has that power, the statute poses no bar on his ability to obtain materials within that privilege. Indeed, a privilege that has been properly waived is not an "applicable" privilege for the purposes of § 542(e).

Moreover, rejecting respondents' reading does not render the statute a nullity, as privileges of parties other than the corporation would still be "applicable" as against the trustee. For example, consistent with the statute, an attorney could invoke the personal attorney-client privilege of an individual manager.

[10, 11] The legislative history also makes clear that Congress did not intend to give the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Indeed, statements made by Members of Congress regarding the effect of § 542(e) "specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee." *In re O.P.M. Leasing Services, Inc.*, 13 B.R. 54, 70 (Bkrtcy. SDNY 1981) (Weinfeld, J.), aff'd, 670 F.2d 383 (CA2 1982); see also 4 Collier on Bankruptcy ¶ 542.06 (15th ed. 1985). Rather, Congress intended that the courts deal with this problem:

"The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis." 124 Cong.Rec. 32400 (1978) (remarks of Rep. Edwards); *id.*, at 33999 (remarks of Sen. DeConcini).

The "subject to any applicable privilege" language is thus merely an invitation for judicial determination of privilege questions.

[12] In addition, the legislative history establishes that § 542(e) was intended to restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. Both the House and the Senate Report state that § 542(e) "is a new provision that deprives accountants and attorneys of the leverage that they ha[d], ... under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate." S.Rep. No. 95-989, p. 84 (1978); H.R.Rep. No. 95-595, pp. 369-370 (1977), U.S.Code Cong. & Admin.News, 1978, pp. 5787, 5870, 6325-6326. It is therefore clear that § 542(e) was not intended to limit the trustee's ability to obtain corporate information.

IV

[13] In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. See *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

A

The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1),

and has the duty to maximize the value of the estate, see § 704(1); *In re Washington Group, Inc.*, 476 F.Supp. 246, 250 (MDNC 1979), aff'd *sub nom. Johnston v. Gilbert*, 636 F.2d 1213 (CA4 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3084, 69 L.Ed.2d 954 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Moreover, in reorganization, the trustee has the power to "operate the debtor's business" unless the court orders otherwise. § 1108. Even in liquidation, the court "may authorize the trustee to operate the business" for a limited period of time. § 721. In the course of operating the debtor's business, the trustee "may enter into transactions, including the sale or lease of property of the estate" without court approval. § 363(c)(1).

[14] As even this brief and incomplete list should indicate, the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. See 2 Collier on Bankruptcy ¶ 323.01 (15th ed. 1985). In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. §§ 521, 343. Congress contemplated that when a trustee is appointed, he assumes control of the business, and [1353] the debtor's directors are "completely ousted." See H.R.Rep. No. 95-595, pp. 220-221 (1977).[6]

In light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management. Given that the debtor's directors retain virtually no management powers, they should not exercise the traditional management function of controlling the corporation's attorney-client privilege, see *supra*, at 1991, unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws.

B

[15] We find no federal interests that would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, the rule suggested by respondents—that the debtor's directors have this power—would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. See generally 11 U.S.C. §§ 704(4), 547, 548. It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own [1354] conduct. See generally *In re Browy*, 527 F.2d 799, 802 (CA7 1976) (*per curiam*).

Respondents contend that the trustee can adequately investigate fraud without controlling the corporation's attorney-client privilege. They point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary

6. While this reference is to the role of a trustee in reorganization, nothing in the Code or its legislative history suggests that the debtor's directors enjoy substantially greater powers in liquidation.

torts, see, *e.g.*, *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102–1103 (CA5 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). Brief for Respondents 11. The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. See *Clark v. United States*, *supra*, 289 U.S., at 15, 53 S.Ct., at 469. Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing.

In summary, we conclude that vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code.

V

Respondents do not seriously contest that the bankruptcy trustee exercises functions analogous to those exercised by management outside of bankruptcy, whereas the debtor's directors exercise virtually no management functions at all. Neither do respondents seriously dispute that vesting control over the attorney-client privilege in the trustee will facilitate the recovery of misappropriated corporate assets.

Respondents argue, however, that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors, who elect him and who often will be the only beneficiaries of his efforts. See 11 U.S.C. §§ 702 (creditors elect trustee), 726(a) (shareholders 1356 are last to recover in bankruptcy). Thus, they contend, as a practical matter bankruptcy trustees represent only the creditors. Brief for Respondents 22.

[16–18] We are unpersuaded by this argument. First, the fiduciary duty of the trustee runs to shareholders as well as to creditors. See, *e.g.*, *In re Washington Group, Inc.*, 476 F.Supp., at 250; *In re Ducker*, 134 F. 43, 47 (CA6 1905).[7] Second, respondents do not explain why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders. Perhaps most importantly, respondents' position ignores the fact that bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors. In cases in which it is clear that the estate is not large enough to cover any shareholder claims, the trustee's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. See generally 11 U.S.C. § 726(a).

[19] Respondents also ignore that if a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. *Wolf v. Weinstein*, 372 U.S. 633, 649–652, 83 S.Ct. 969, 979–981, 10 L.Ed.2d 33 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." *Id.*, at 651, 83 S.Ct., at 980. Surely, then, the management of a debtor-in-possession 1356 would have to exercise control of the corporation's attorney-client privilege consistently with this obligation to treat all parties, not merely the shareholders, fairly. By the same token, when a trustee is appointed, the privilege must be

7. The propriety of the trustee's waiver of the attorney-client privilege in a particular case can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee's fiduciary duties. Respondents, however, did not challenge the waiver on those grounds; rather, they asserted that the trustee never has the power to waive the privilege.

exercised in accordance with the trustee's fiduciary duty to all interested parties.

To accept respondents' position would lead to one of two outcomes: (1) a rule under which the management of a debtor-in-possession exercises control of the attorney-client privilege for the benefit only of shareholders but exercises all of its other functions for the benefit of both shareholders and creditors, or (2) a rule under which the attorney-client privilege is exercised for the benefit of both creditors and shareholders when the debtor remains in possession, but is exercised for the benefit only of shareholders when a trustee is appointed. We find nothing in the bankruptcy laws that would suggest, much less compel, either of these implausible results.

VI

Respondents' other arguments are similarly unpersuasive. First, respondents maintain that the result we reach today would also apply to *individuals* in bankruptcy, a result that respondents find "unpalatable." Brief for Respondents 27. But our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. As we have stated, a corporation, as an inanimate entity, must act through agents. See *supra*, at 1991. When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be [357] under some theory different from the one that we embrace in this case.

[20] Second, respondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. See Brief for Respondents 37–42; see also 722 F.2d, at 343. But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel. See *supra*, at 1991.

Respondents also maintain that the result we reach discriminates against insolvent corporations. According to respondents, to prevent the debtor's directors from controlling the privilege amounts to "economic discrimination" given that directors, as representatives of the shareholders, control the privilege for solvent corporations. Brief for Respondents 42; see also 722 F.2d, at 342–343. Respondents' argument misses the point that, by definition, corporations in bankruptcy are treated differently from solvent corporations. "Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations." *McDonald v. Williams*, 174 U.S. 397, 404, 19 S.Ct. 743, 745, 43 L.Ed. 1022 (1899). Respondents do not explain why we should be particularly concerned about differential treatment in this context.

Finally, respondents maintain that upholding trustee waivers would create a disincentive for debtors to invoke the protections of bankruptcy and provide an incentive for creditors to file for involuntary bankruptcy. According to respondents, "[i]njection of such considerations into bankruptcy [358] would skew the application of the bankruptcy laws in a manner not contemplated by Congress." Brief for Respondents 43. The law creates numerous incentives, both for and against the filing

of bankruptcy petitions. Respondents do not explain why our holding creates incentives that are inconsistent with congressional intent, and we do not believe that it does.

VII

[21] For the foregoing reasons, we hold that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. We therefore conclude that Notz, in his capacity as trustee, properly waived CDCB's privilege in this case. The judgment of the Court of Appeals for the Seventh Circuit is accordingly reversed.

It is so ordered.

Justice POWELL took no part in the consideration or decision of this case.

471 U.S. 359, 85 L.Ed.2d 385

[359]**SCHOOL COMMITTEE OF the TOWN OF BURLINGTON, MASSACHUSETTS, et al., Petitioners**

v.

DEPARTMENT OF EDUCATION OF the Commonwealth of MASSACHUSETTS et al.

No. 84-433.

Argued March 26, 1985.

Decided April 29, 1985.

Town brought suit against state and parents of learning disabled child seeking to reverse order of Massachusetts Bureau of Special Education Appeals in favor of private school placement and holding town's individualized education plan to be inadequate and inappropriate. The United States District Court for the District of Massachusetts found in favor of defendants on motion for summary judgment. On appeal, the Court of Appeals, 655 F.2d 428, vacated and remanded. On remand, the District Court, Rya W. Zobel, J., reversed finding of Massachusetts Bureau and held that town plan was inappropriate and transferred case and consolidated it with two others. The District Court, Bailey Aldrich, Senior Circuit Judge, sitting by designation, 561 F.Supp. 121, determined that reimbursement was available to town as prevailing party, and state and parents appealed, and town cross-appealed. The Court of Appeals, Bownes, Circuit Judge, 736 F.2d 773 affirmed in part, reversed in part, and remanded. Town filed petition for writ of certiorari. The Supreme Court, Justice Rehnquist, held that: (1) authority granted to court reviewing plan includes power to order school authorities to reimburse parents for their expenditures for private special education for child if court ultimately determines that private placement is proper, and (2) parental violation of the Act by changing the "then current educational placement" of child during pendency of proceedings to review challenged plan does not constitute waiver of parents' right to reimbursement.

Court of Appeals affirmed.

1. Schools ⇐159

Under Education of the Handicapped Act, grant of authority to court reviewing contested individualized education plan includes power to order school authorities to reimburse parents for their expenditures for private special education for child if court ultimately determines that private placement, rather than proposed individualized education plan, is proper under the Act. Education of the Handicapped Act, §§ 602 et seq., 615(e), as amended, 20 U.S.C.A. §§ 1401 et seq., 1415(e).

2. Schools ⇐148

Under provision of Education for the Handicapped Act directing that "[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party,

Exhibit 5

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

In the Matter of the Application of	:	12 NMB No. 29
	:	CASE NO. R-5198
LAURENCE G. RUSSELL, an individual	:	FINDINGS UPON INVESTIGATION
alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act	:	January 31, 1985
involving employees of	:	
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY	:	

On February 10, 1984, this case was reopened for resumption of investigation pursuant to the Order of the United States District Court for the Northern District of Texas in Laurence G. Russell, et al v. National Mediation Board, et al, Civil Action No. 2-81-138. Laurence G. Russell, an individual, filed an application pursuant to Section 2, Ninth, alleging the existence of a representation dispute involving "special agents and security guards" employed by the Atchison, Topeka & Santa Fe Railway Company (Santa Fe). The designated craft or class covering employees of this nature is Police Officers below the Rank of Captain.

At the time the application was filed, these employees were represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) pursuant to the Board's certification in Case No. R-1091 (1943).

The Order was received at the Board's Offices on February 10, 1984. In its Order, the Court said:

> Pursuant to the Mandate of the United States Court of Appeals for the Fifth Circuit, this cause is REMANDED to the National Mediation Board. The Board is directed to proceed with its investi-

gation into the application filed by Russell as it would any other application for investigation of a representational dispute, and not inconsistent with the opinion rendered in this case by the Court of Appeals.

In accordance with standard administrative procedure, the Santa Fe was requested to furnish the total number of employees covered by this application, as well as to advise the Board if the employees are represented by any organization or individual, together with any other statement concerning this application no later than February 27, 1984. BRAC was also allowed the opportunity to submit a statement.

On February 27, 1984, this office received the information requested of the Santa Fe. Late that same day, BRAC informed the Board that it had filed a Petition for Writ of Certiorari. BRAC requested that the Board delay its investigation until the Supreme Court ruled on the petition. The next day the National Mediation Board, by letter, informed Russell and the Santa Fe, and allowed them until the end of business on March 7, 1984, to submit comments upon the request.

On March 7, 1984, the Board informed the Santa Fe, BRAC and Russell that the field investigation will commence on March 20, 1984, at the Carrier's office in Chicago, Illinois. A Board Representative was assigned to conduct the investigation. On March 20, 1984, the Board Representative commenced the investigation at the Carrier's office.

During the course of the field investigation, issues arose concerning the eligibility of certain individuals and the composition of the craft or class. In addition, BRAC alleged that the Carrier engaged in

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a pattern of conduct which threatened to, or may presently deprive certain employees of their rights under the Railway Labor Act. BRAC also asserted that management officials improperly provided assistance to the applicant. BRAC requested a hearing on their allegations.

The Board Representative requested that the representatives submit formal position statements regarding the issues raised by the close of business on March 30, 1984. Each representative was requested to furnish a copy of his statement to the other representatives. The deadline was later extended to April 6, 1984.

On April 9, 1984, the Board Representative acknowledged receipt of position statements submitted by BRAC and the Santa Fe. Russell, BRAC and the Santa Fe were allowed the opportunity to respond to these statements by the close of business on April 17, 1984.

On April 18, 1984, the Board Representative issued several eligibility determinations. He ruled that any decision regarding Carrier interference or BRAC's request for a hearing was not within the scope of the Board Representative's authority. The allegations and the request were placed before this Board for consideration. The applicant, incumbent and Carrier were allowed the opportunity to supplement previous statements. No additional statements were submitted.

On June 1, 1984, the Board ordered that a hearing be held on the issues raised 11 NMB No. 85. In its Notice of Hearing, the Board discussed these issues and the necessity for a hearing. The Board found that the field investigation raised factual issues regarding the Carrier's pattern of conduct and the actions of individuals classified as Assistant Division Superintendent of Police (ADSP). The Board also found that the field investigation revealed that the holding companies, Santa Fe Industries and Southern Pacific Company which control the Santa Fe Railroad and the

Southern Pacific Railroad, respectively, had merged. Based on industry practice, the Board noted that it is not unlikely that the controlled railroads would themselves be merged organizationally. Consequently, the Board concluded that the potential merger had raised a question as to the scope of the appropriate craft or class. The Board found that a hearing was necessary in order to obtain a sufficiently complete investigation. Because of the potential merger, the Southern Pacific Railroad was allowed the opportunity to participate in this proceeding.

Hearing Officer Roland Watkins held a prehearing conference on June 19, 1984. After carefully considering the previous commitments of the representatives and arguments presented regarding the hearing site, the Hearing Officer selected the Everett McKinley Dirksen Federal Building in Chicago, Illinois. The dates of July 31 - August 2, 1984 were selected. The representatives were informed of this by letter on June 20, 1984. In that letter, the Hearing Officer detailed the format for the hearing and order of presentation.

On July 31, 1984, the hearing commenced. Oral and written testimony was submitted regarding the issues enunciated in the Board's Notice of Hearing. As the record shows, neither Russell nor his attorney were present for the hearing. The Hearing Officer was not notified that they would not attend. The Southern Pacific Railroad chose not to participate in the proceeding.

At the commencement of the hearing, Joseph Hahn of the National Right to Work Legal Defense Foundation presented the Hearing Officer with two documents alleged to be signed by Russell and his attorney. In light of the absence of these individuals for cross-examination regarding their statements, the Hearing Officer allowed all of the representatives the opportunity to state their positions regarding the acceptance of the affidavits into the evidentiary record in writing no later than August 17, 1984.

At the hearing, the Santa Fe also requested the opportunity to submit rebuttal at a later date. The Santa Fe was given until August 17, 1984, to inform the Hearing Officer as to whether the Carrier would submit rebuttal. These rulings were confirmed in writing on August 3, 1984.

On August 17, 1984, the attorney for Russell submitted a statement. On that date, the Santa Fe informed the Hearing Officer that the Carrier would not submit any rebuttal. Copies of the two statements were furnished, on August 20, 1984, to all of the representatives for comments no later than August 30, 1984.

In a letter dated September 4, 1984, the Hearing Officer issued several rulings. The affidavits, submitted at the hearing, were received into the evidentiary record along with a statement by the Southern Pacific. In that letter, the Santa Fe, Russell, the Southern Pacific and BRAC were allowed the opportunity to submit any proposed corrections to the record. The participants were also afforded the opportunity to appeal any of the Hearing Officer's rulings to the National Mediation Board in accordance with standard agency practice. The deadline for the receipt of proposed corrections or appeals was September 19, 1984. None of the Officer's rulings was appealed to the Board. The Santa Fe, Russell and BRAC submitted principal briefs on October 15, 1984, and reply briefs on October 29, 1984.

ISSUES

On the basis of the Board's investigation and the hearing the issues are:

> 1) What is the scope, in light of the proposed merger, of the appropriate craft or class; Should it include employees of the Southern Pacific Railroad.

2) Whether the classification of Assistant Division Superintendent of Police should be included in the craft or class of Police Officers below the Rank of Captain; and

3) Whether the Carrier engaged in a pattern of conduct which threatened to, or may presently, deprive certain employees of their rights under the Railway Labor Act and whether management officials improperly provided assistance to the applicant.

CONTENTIONS

BRAC, Russell and the Santa Fe contend that the proposed merger is too speculative as to effect the present craft or class of employees on the Santa Fe. The Santa Fe further contends that the two operate as separate and independent railroads. The Southern Pacific chose not to comment on this matter.

BRAC and the Santa Fe contend that the ADSPs are not employees or subordinate officials within the meaning of the Act and as such, should not be included in the craft or class. Russell stated no objection to the inclusion or exclusion of the ADSPs. The Southern Pacific did not state a position regarding this matter.

BRAC contends that officials of the Santa Fe provided financial support to Russell's organizational effort. In addition, BRAC contends that ADSPs felt pressured into signing authorization cards. BRAC argues that Russell and other employees used the Carrier's communications equipment in their efforts. In its brief, BRAC submits "that perception is everything on the property, and that such perception and contributions by officials of the company are suffi-

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cient to warrant a finding of interference, even without adoption by the corporation, sufficient to warrant some relief." BRAC has requested that the Board utilize a "Laker-type" ballot should the Board find a dispute to exist. This request is based upon BRAC's allegation of Carrier interference.

Russell denies any support from the Carrier. He contends that he solicited authorization cards from ADSPs under a belief that such classification is equivalent to a lieutenant classification and as such would be included in a craft or class of Police Officers below the Rank of Captain.

The Santa Fe denies that it engaged in any conduct which threatened to, or deprived employees of their rights under the Railway Labor Act. Furthermore, the Santa Fe contends that it did not provide any support, financial or otherwise, to the applicant.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 1, Title I, of the Railway Labor Act, as amended 45 U.S.C. §151 et seq. Accordingly, the Board finds as follows:

I.

The Santa Fe and Southern Pacific Railroads are common carriers as defined by Section 1, First of the Railway Labor Act, as amended, 45 U.S.C. §152, First.

II.

Section 2, Fourth, of the Act, 45 U.S.C. §152, Fourth, gives employees subject to its provisions "...the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act."

III.

Section 2, Ninth, of the Act, 45 U.S.C. §152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representation, and to certify the duly authorized representatives of such employees. In determining the choice of the majority of employees under this section, the Board is "authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the Carrier."

IV.

Section 2, General Purposes, 45 U.S.C. §151a states that one of the purposes of the Railway Labor Act is "to provide the complete independence of carriers and of employees in the matter of self organization."

FINDINGS OF FACT

The Board has considered the entire record in this case, including the transcript of the hearing, all exhibits, the posthearing briefs and all correspondence and records of the Board relating to this matter. Upon this record, the Board finds as follows:

I.

Proposed Merger

Santa Fe Industries, Inc., and Southern Pacific Company are the holding companies for the Santa Fe and the Southern Pacific respectively. Santa Fe Industries, Inc., Southern Pacific Company and Santa Fe Southern Pacific Corporation entered into a combination agreement and plan of reorganization on October 4, 1983, whereby Santa Fe Industries, Inc., and South-

ern Pacific Company became wholly-owned subsidiaries of the Santa Fe Southern Pacific Corporation. As part of the agreement, the stock of the Southern Pacific was placed in an irrevocable voting trust pending approval by the Interstate Commerce Commission (ICC) of the merger of the Santa Fe and the Southern Pacific. The voting trust arrangement permits Santa Fe Southern Pacific Corporation control over all non-rail operations of Santa Fe Industries, Inc., and Southern Pacific Company pending ICC approval of the merger of the railroads.

On March 23, 1984, Santa Fe Southern Pacific Corporation, Southern Pacific Company and the Santa Fe Railroad filed an application with the ICC to approve the merger of the railroad companies. This application was formally accepted by the ICC on April 20, 1984. The ICC must rule on the application by October 20, 1986.

The record shows that the operations of the Southern Pacific currently are independent of the Santa Fe. In a sworn affidavit, the General Counsel of the Santa Fe states that the "Santa Fe has no control over the Southern Pacific Transportation Company, its operations, its business relationships, or its labor relations."

II.

Assistant Division Superintendent of Police

The Santa Fe Police Department is headed by the Chief of Police. Immediately subordinate to him are three Assistants to the Chief of Police and three Assistant Chiefs of Police. The former individuals are staff officers and perform administrative functions. The latter individuals each command a geographical region consisting of three or more divisions. The geographical structure of the department is as follows:

Region 1

Northeastern Division
Central Division
Western Division

Region 2

Plains Division
Northern Division
Southern Division
New Mexico Division

Region 3

Arizona Division
Los Angeles Division
Los Angeles Terminal Division
Valley Division

The Assistant Chiefs of Police are stationed in Topeka, Kansas; Amarillo, Texas; and Los Angeles, California. Immediately subordinate to each Assistant Chief of Police is a Deputy Chief of Police who supervises the Division Superintendent of Police. Each division is commanded by a Division Superintendent of Police.

Each division has at least one Assistant Division Superintendent of Police (ADSP) and as many as three. The ADSPs are headquartered in areas where a significant number of Carrier personnel are located. In most instances, the ADSP is located in an area physically separated from the Division Superintendent of Police. ADSPs supervise the Special Agents. The Carrier currently has 21 ADSPs and 168 Special Agents. The specific duties and responsibilities of the ADSPs are described by the Carrier as follows:

> 1. Supervise the activities of Special Agents by assuring that adequate measures are taken to protect personnel and property on the Santa Fe Railroad by assuring an effective police presence is maintained through adequate scheduling and training, and that timely action is taken in the investigation of criminal violations.

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2. Review written investigation reports for accuracy and completeness; takes corrective action as necessary.

3. Maintains contact with Division Superintendent of Police, Operating Superintendents, Trainmasters, Agents, Yardmasters and other departments; also police officers, Santa Fe customers school groups, various civic and governmental agencies to coordinate law enforcement and crime prevention functions.

4. Provides counsel and training for subordinates to assure an adequate knowledge to perform their duties in accordance with State and Federal law and Company policy.

5. Supervises, coordinates and controls major task force criminal investigations and special emergency investigations for derailment and strike occurrences.

6. Provides miscellaneous non-police services such as accident, freight claim and employee irregularity investigations.

The ADSP does not perform any field work but coordinates and supervises the work of the Special Agent. This individual participates in the hiring process by supervising the background investigation of candidates for the Special Agent position. The ADSP has authority to determine the completeness of an investigation. Whenever the ADSP concludes that the background investigation has developed derogatory information about a candidate, he has the authority to

terminate the investigation resulting in the disqualification of an individual. All of the newly hired Special Agents go through a probationary period of one year. During this period the Special Agent is evaluated every 90 days by the ADSP. The evaluations are used in determining whether to permanently retain that individual.

The ADSP has authority to impose discipline. He can suspend an employee for committing a major offense. He also conducts the investigation of any charge of malpractice or misconduct alleged against a Special Agent. The ADSP has authority to resolve grievances.

The ADSP does all of the scheduling of work. He can approve time off. When the ADSP has determined that a Special Agent needs training, he works with the Division Training Officer, who is a Special Agent, by setting up training dates, times, scheduling, and assisting in locating training resources. He has the authority to order overtime and to compensate a Special Agent bypassed for overtime.

During the month of January, the Special Agent may apply for promotion. Following that period, the applications are considered by a board consisting of the Division Superintendents of Police. In reviewing these applicants, this board relies upon evaluations provided by the ADSP.

The ADSP represents the Carrier in dealings with other law enforcement agencies. He has the authority to file reports on behalf of the Carrier with those agencies and to sign complaints. Several public relations functions such as talks before civic groups are frequently performed by the ADSP.

In the absence of the Division Superintendent of Police, the ADSP serves as the Acting Division Superintendent of Police. In this capacity, he reports directly to the Deputy Chief of Police at the regional headquarters.

The ADSP is salaried and enjoys the same retirement plan and hospitalization benefits as the Carrier's management. He also has his own office and participates in the budget process.

III.

Carrier Conduct

David McCoy, District Chairman for District 1956 which represents the Santa Fe Special Agents testified that he was informed by Ben Huntley, a Special Agent, that Russell told him that Bob Pounds contributed $250.00 to Russell's campaign. Pounds at that time was a Division Special Agent, a title later changed to Division Superintendent of Police. Huntley reportedly refused to furnish a statement supporting the allegation. McCoy claimed that other individuals could support this allegation but he would not reveal their names on the grounds that they were staff people he had to protect. The record reveals that Pounds is stationed in the Southern Division. It was McCoy's understanding that Pounds contributed his own personal money. Huntley also told McCoy that "all the supervisors on the Plains Division" contributed money. Huntley did not mention any specific individuals or amounts.

McCoy also testified that he was informed by Special Agent Jim Plagens that several ADSPs signed authorization cards and that they felt "some pressure on them to go ahead and sign the cards and turn them in because if they didn't, their jobs would be in jeopardy." At the time that he signed an authorization card, Plagens was an ADSP but is now a Special Agent. McCoy did not name any specific individuals other than Plagens. McCoy did not have any personal knowledge of any coercion or threat to the ADSP's to sign authorization cards.

In his sworn affidavit, Russell stated that he did submit authorization cards to the NMB from ADSPs when he was informed that the appropriate craft or class was Police Officers below the Rank of Captain.

Mark Leininger, an ADSP, testified that he did receive an authorization card from Russell. He was contacted by other ADSPs concerning their receipt of authorization cards. Of his own volition, Leininger decided not to sign the card. He testified that he did not feel obligated or threatened to sign the card. When Special Agents asked Leininger about the Russell organizing drive, he refused to comment upon the matter.

Carl Ball, Chief of Police, testified that when he became aware of Russell's campaign, he contacted each Assistant Chief of Police and instructed him "that under no circumstances would any supervisor in this department make any comment or become involved in any way at all in Larry Russell's and Bill Hannah's campaign." He further issued "instructions that that order would be verbally transmitted to every division superintendent, every supervisor within the Department." Ball reissued these instructions several times. Ball denied that the Carrier contributed any money or supported Russell. Special Agents frequently asked Ball his opinion on Russell's campaign but Ball declined to comment upon the matter.

McCoy testified that Russell and several other Special Agents used the Carrier's communication equipment for organizational purposes. The record does not show any involvement by the ADSPs or higher officials in this matter. Ball testified that he instructed one of his Assistant Chiefs of Police on several occasions to make sure that no Carrier equipment or property was used in the organizing campaign.

DISCUSSION

I.

Proposed Merger

The Board has faced the issues dealing with railroad mergers on numerous occasions over the past fifty years.

In the First Annual Report of the National Mediation Board (1935), the Board set forth the following standards:

> Although the term "carrier" is clearly defined in the Act, questions have arisen in connection with representation disputes which made it necessary for the Board to interpret its meaning.
>
> Where a railroad system is composed of a number of subsidiary corporations, employees have been in dispute as to whether one vote should be taken of a craft on the whole system or whether the subsidiary corporations are carriers within the meaning of the act whose employees are entitled to separate representation. The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own payroll and seniority rosters, it is a carrier as defined in the act, and its employees are entitled to representation separate from other carriers who may be connected with the same railroad system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies. (p. 22)

In Cincinnati, New Orleans, and Texas Pacific Railroad, 4 NMB 280 (1966), the Board made the following comments with regard to the resolution of the problem raised in the First Annual Report:

> It will be noted that the Board established several criteria for determining "carrier" status and among them were:

1. separate reporting to the Interstate Commerce Commission;

2. keeping a separate carrier payroll; and,

3. keeping separate carrier seniority rosters.

See also Houston Belt & Terminal Railway Co. 2 NMB 226 (1956). In these cases the Board placed greater emphasis on the first of the above listed criteria and lesser weight on the succeeding criteria, with the least being placed on the keeping of separate seniority rosters.

The Board has consistently maintained its commitment to the system-wide nature of collective bargaining in the railroad industry. See, e.g. Seaboard Coast Line Railroad, 6 NMB No. 818 (1976).

This policy was reaffirmed in Seaboard System Railroad-Clinchfield Line, 11 NMB No. 81 (1984). In Seaboard System, the Board found the traditional standards still sound. While holding on the facts in that case that a merger had changed the scope of the system, the Board emphasized the need for practical judgments based on contemporary conditions.

It is in this context that the Board considers the facts of this case. In the present case, the Southern Pacific and the Santa Fe report separately to the ICC. Indeed, there is no assurance whatever that the proposed merger will ultimately be approved. The ICC noted that the voting trust arrangement was sufficient to ensure independent operation of the two railroads pending approval of the merger application. See Santa Fe Exhibit No. 6C. The Santa Fe has no control over the Southern Pacific's business relationships or its labor relations. The evidence reveals that at this time the Santa Fe and Southern Pacific are separate carriers for purposes of the Act.

II.

Eligibility of the ADSP

The Board stated in Pan American World Airways, Inc., 5 NMB 112 (1973), that the following elements and factors must be considered in determining whether individuals are employees or subordinate officials within the meaning of the Act:

> Specifically, the Board must consider various individual elements and factors which might not be decisive if considered separately but considered cumulatively would remove a particular position from the status of an employee or subordinate official. These elements include the authority or responsibility as to the employment or discharge of employees; the authority to definitively resolve grievances; and the authority and method used to direct the manner of work done by subordinates. Other factors that should be considered involve the employment relationship of the individual with the carrier; his method of payment; his participation in benefits available to subordinate officials and employees; his voice in the inner council of management; the extent to which he participates in the formulation of general policy; and the extent of his authority to bind his principal in dealings with outside parties. These are the basic criteria that must be considered in determining the relative rank of the position in the echelon of official management.

These factors were again considered by the Board in numerous cases since that decision. Pan American World Airways, Inc., 7 NMB No. 95 (1980); British Airways, Inc., 7 NMB No. 189 (1980); Frontier Airlines, Inc., 8 NMB No. 99 (1981); Pan American World Airways, Inc., 9 NMB No. 73 (1982); Air Oregon Air-

lines, Inc., 9 NMB No. 84 (1982); and Alia Royal Jordanian Airlines, 10 NMB No. 65 (1983).

In the present case, the Board notes that the ADSP meets many of the criteria. The ADSP has the authority to resolve grievances. He schedules the work of the Special Agent and has broad discretion in determining the need for and the manner of training. An ADSP can authorize overtime and compensate an individual bypassed for overtime work. He has the authority to impose discipline. He plays an important role in the hiring process and promotion procedures. The ADSP provides valuable input in the decision to retain probationary employees. He has the authority to bind the carrier in dealings with outside parties. He represents the Carrier at outside civic functions. In the absence of the Division Superintendent of Police, he serves as the Acting Division Superintendent of Police. He even provides input in the budget process. Therefore, the Board finds that the ADSP is not an employee or subordinate official within the meaning of the Act.

III.

Carrier Conduct

The Railway Labor Act gives employees of carriers the right to organize and select a representative without interference, influence, or coercion by the carrier.

The terms "interference, influence, and coercion" were defined by the Supreme Court shortly after the Act became law. In Texas and New Orleans R. Co. v. Bro. of Railway and Steamship Clerks, 281 U.S. 548 (1930), the Court stated:

> It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question

before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the act providing that "Representatives, for the purposes of this Act, shall be designated by the respective parties...without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect. While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. The intent of Congress is clear with respect to the sort of conduct that is prohibited. "Interference" with freedom of action and "coercion" in this clause may be gathered from the context. Noscitur a sociis. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit be-

> tween employer and employee. "Influence" in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls "self-organization". The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection with the selection of representatives for the purpose of this Act than in relation to well-known applications of the law with respect to fraud, duress and undue influence. [Emphasis supplied].

The test in any case of alleged interference is whether the laboratory conditions which the Board seeks to promote have been contaminated. Zantop International Airlines, 6 NMB No. 1247 (1979).

In the instant case, the evidentiary record does not support a finding that the Carrier interfered with, influenced, or coerced its employees in their choice of a representative pursuant to Section 2, Ninth, of the Act. The investigation did not reveal that any ADSP or higher official influenced or coerced any Special Agent to sign or not to sign an authorization card. Furthermore, the record does not show that any management official influenced or coerced any ADSP to sign or not to sign an authorization card. It must be noted here that the only ADSP to testify stated that he was not influenced or coerced.

The record does not establish any pattern of Carrier support for Russell. The Carrier did not furnish any company funds to Russell. The Carrier forbade the use of any Carrier equipment or property for other than official functions. The record does not reveal that any official was aware of or approved the use of the communications equipment.

IV.

Request for a Laker-type ballot

BRAC has requested that the Board utilize a "Laker-type" ballot should the Board find a dispute to exist. This request is based upon BRAC's allegation of Carrier interference.

In Laker Airways, Ltd. 8 NMB No. 79 (1981), the Board found that the Carrier engaged in "the most egregious violations of employee rights in memory." Due to the nature of the Carrier's actions, extraordinary remedies were required to restore the laboratory conditions necessary for free elections. The Board concluded that a ballot box election was necessary using a "yes" and "no" ballot. A majority of valid ballots actually cast determined the outcome of the elections. The Board stated that its action "should not be considered a precedent for the usual election situation, but is limited to situations where there is gross interference." [Emphasis supplied].

The Board has consistently ordered the use of a "Laker-type" ballot only where the Board has found Carrier interference. Transkentucky Transportation Railroad, Inc., 8 NMB No. 146 (1981); Mercury Services, Inc., 9 NMB No. 85 (1982); Rio Airways, 11 NMB No. 28 (1983); and Sea Airmotive, Inc. d/b/a Seair Alaska Airlines, 11 NMB No. 33 (1983).

It must be noted that on the record here, the Board finds no carrier interference in this case. Therefore, the Board must find that BRAC's request for a "Laker-type" ballot is unwarranted.

CONCLUSION

For reasons stated above, the Board finds that the appropriate craft or class is Police Officers below the Rank of Captain of the Atchison, Topeka and

Santa Fe Railway Company. Employees of the Southern Pacific Railroad are not part of the appropriate craft or class on the Atchison, Topeka and Santa Fe Railway Company. The Board further finds that the classification of Assistant Division Superintendent of Police is not that of an employee or subordinate official within the meaning of the Railway Labor Act, as amended.

Based upon the record submitted, the Board finds that the Atchison, Topeka and Santa Fe Railway Company has not violated the right of its employees to self-organization free of interference, influence or coercion.

Based upon the investigation, the Board finds a dispute in R-5198 among the Police Officers below the Rank of Captain, employees of the Atchison, Topeka and Santa Fe Railway Company. An all mail ballot election is authorized using a cut-off date of March 16, 1984. Applicant Laurence G. Russell and Incumbent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes will appear on the ballot with the count to be conducted in Washington, DC.

The Atchison, Topeka and Santa Fe Railway Company is requested within five business days of the date of this decision to provide this office with alphabetized peel-off gummed labels bearing the names and home addresses of those employees on the list of eligible voters.

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Copies to:

Mr. Laurenc
John Cosmic
Mr. R.I. Ki
Clinton J.
Mr. John F.
Ronald A. L
Mr. John A.

RKQ/rwa

A Board Representative will be promptly assigned to conduct the election in the investigation of this case.

By direction of the NATIONAL MEDIATION BOARD.

Rowland K. Quinn, Jr
Executive Secretary

Copies to:

Mr. Laurence G. Russell
John Cosmic, Esq.
Mr. R.I. Kilroy
Clinton J. Miller, III, Esq.
Mr. John F. Frestel
Ronald A. Lane, Esq.
Mr. John A. Sage

RKQ/rwa