



OFFICE OF THE CHAIRMAN

FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

**DISSENTING OPINION OF
COMMISSIONER LEE ANN ELLIOTT
TO ADVISORY OPINION 1990-10**

I disagree with the Commission's conclusion in Advisory Opinion 1990-10 that the separate segregated funds of Continental Air Holdings and Eastern Airlines are affiliated under the Act. The Commission's conclusion, in my opinion, misapplies the law of affiliation and ignores the compelling facts of this case.

The majority's opinion states that under our rules "committees established by a single corporation and its subsidiaries are affiliated per se." AO 1990-10, p. 3. This presumably follows our regulations which state that all committees "established, financed, maintained and controlled by ... a single corporation and/or its subsidiaries" are affiliated. 11 CFR 110.3(a)(2)(i).

In my opinion, the majority opinion and our regulations miss the mark by analyzing committees for being "established, financed, maintained and controlled" by a corporation. I cannot imagine a separate segregated fund that isn't established, financed, maintained or controlled by its connected organization! Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 414-415 (1972) (separate segregated funds need not be free and independent from connected organization's influence or control). By only reviewing the connection between the corporation and its PAC, we miss the more important connection between the corporations, themselves.

What we should be doing here is examining the relationship between the two corporations for common establishment, financing, maintenance or control between them. This is exactly what the regulations do at 11 CFR 110.3(a)(3)(ii) and is how the Commission resolved the complex Montgomery Wards Advisory Opinion request. AO 1988-37 (facts presented indicate connected organization has power and authority to influence decisions of another corporation causing affiliation).

By following this course we would be more precise and only affiliate those committees that are truly under common control and prevent the anti-proliferation Congress was truly concerned with in drafting the Act.

Unfortunately, the majority's opinion does not do that. It simply says these committees are per se affiliated and will be "until the parent/subsidiary relationship is legally severed." AO 1990-10 at p. 3. I do not know what this means.

A subsidiary is not a legal or definitional term like the word "corporation", so I do not know how they can be "legally severed". The word subsidiary is used to describe (not define) a corporation that "another corporation [i.e. parent] owns at least a majority of the shares and thus has control." Blacks Law Dictionary 1280 (5th ed. 1979). In this case, we do not have ownership of shares "thus giving control" - we have a company that was taken away from the management of Continental by operation of bankruptcy law and has been handed over to a completely independent trustee.

So, I am not sure the majority's opinion gives guidance with its stark legal rule and its emphasis on some hypothetical future circumstance. But whether one subscribes to the majority's per se rule or uses the broader factual analysis of "establish, finance, maintain or control", and whether one considers Eastern a "legal" subsidiary or not; it is hard to look at the facts of this case and believe these committees should still be affiliated.

Continental Air Holdings no longer is the debtor-in-possession of Eastern Airlines. Eastern is now under the control of a court-appointed independent trustee which has "wide ranging" management authority. In re Ionosphere Clubs, Inc. and Eastern Air Lines, Inc., 89 B 10448, 9 Bankr. S.D. NY (April 19, 1990); CFTC v. Weintraub, 471 U.S. 343, 354 (1985). This trustee is "empowered, and indeed mandated, to operate and manage the Airline as a going concern." Eastern at 14. Further, Continental "no longer has any equity interest in Eastern, consequently, the airline, in a sense, is now owned by its creditors." Eastern at 11.

Under the court's opinion, Chairman Lorenzo and Eastern's Board of Directors cannot exercise any control over the airline. All corporate property has passed to the trustee who has complete control over the operations of the business. Continental has stopped performing management, financial, legal and other services for Eastern. Eastern has stopped paying Continental a management fee and each entity now has separate SEC Form 10 filings. Continental's board has no authority to participate in the governance of Eastern or its PAC and has no authority to hire, fire or otherwise appoint any Eastern personnel. See, 11 CFR 100.5(g)(4)(ii)(B),(C); 110.3(a)(3)(ii)(A)-(J).

Continental Air Holding's stock ownership of Eastern does not establish control over Eastern. This stock has no equity value and will, in all likelihood, be canceled in reorganization. The stock ownership does not carry with it any meaningful voting rights or other benefits associated with stock ownership, since CAH does not have any oversight or management authority over Eastern. See Atchinson, Topeka & Santa Fe Rwy. Co., 12 N.M.B. 95 (1985).

Although this stock ownership means the two airlines will remain members of the same "control group" (which means Continental still has technical pension obligations on behalf of Eastern), that fact in and of itself does not establish a "significant" financial relationship between the two "sponsoring organizations" indicating affiliation. 11 CFR § 110.3(a)(3)(ii)(G). See Pension Benefit Guaranty Corporation v. Dickens, 535 F. Supp. 922 (W.D. Mich. 1982) (in determining pension obligations, company under control of bankruptcy court and appointed receiver not considered under control of other company that purchased debtor's stock).

Accordingly, I conclude that Eastern and Continental Air Holdings are not commonly "established, financed, maintained or controlled." Their PACs, therefore, should not be considered affiliated under the Act or the Commission's contribution limitation regulations.

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Lee Ann Elliott