In re TRANSPACIFIC LINES, INC., Formerly styled: In re DAVID M. SABLAN, Receiver of TRANSPACIFIC LINES, INC., Petitioner.

Civil Action No. 11-74

Trial Division of the High Court

Mariana Islands District

February 25, 1975

Motions attacking receivership. The Trial Division of the High Court, Brown, Associate Justice, held that the government had power to grant corporation exclusive franchise and contract for sea transportation in the territory and could terminate the franchise upon failure of the corporation to follow the contract.

1. **Trust Territory—Administering Authority—Vital Products and Services**

   Where company granted exclusive sea transportation contract and franchise for the Trust Territory by the government had deteriorated to the point where shipping and passenger service were practically nonexistent and its financial position was extremely poor, the High Commissioner had the right and the duty to take action to preserve adequate shipping and passenger service for the territory.

2. **Trust Territory—Administering Authority—Vital Products and Services**

   Where United States, as administering authority for the Trust Territory, through its Secretary of the Interior, reserved for the High Commissioner the power and authority to contract for the maintenance and operation of surface vessels in the territory, and company granted exclusive contract and franchise for sea transportation in the territory had deteriorated to the point where services where almost nonexistent and its financial position was very poor, High Commissioner had the power and authority to place the company in administrative receivership.

3. **Constitutional Law—Due Process—Hearing**

   That court changed administrative receivership into judicial one and appointed a receiver without notice and hearing in open court was not fatal denial of due process, and court would not vacate the order establishing the receivership, where motion to vacate receivership and hearing on the motion were had immediately after establishment of receivership and there was no prejudice.

4. **Constitutional Law—Due Process—Hearing**

   Due process generally requires both notice and an opportunity to be heard whenever any significant property interest may be substantially affected.

5. **Constitutional Law—Due Process**

   "Due process" means the same thing in the Trust Territory as it does in the United States.

6. **Receivership—Power To Appoint Receiver**

   Generally, an equity court may appoint a receiver only when the appointment is ancillary to a pending action, but where a corporation expressly consents to the appointment or admits its insolvency, the receivership need not be ancillary to a main action.

7. **Receivership—Priority of Claims—Receivership Expenses**

   The expenses of an operating receivership constitute a first charge upon current income and under certain circumstances upon the corpus of the property in receivership.

8. **Receivership—Priority of Claims—Receivership Expenses**

   Trust Territory government occupied a position of preference as to funds it advanced to insolvent corporation under receivership so that the corporation could marshall its assets and finish its business.

9. **Trust Territory—Contracts—Termination**

   Trust Territory Government could terminate franchise it had granted for sea transportation in the islands where it had the power to contract for the maintenance and operation of surface vessels in the islands.

10. **Receivership—Bond**

    Receiver for corporation operating under government franchise did not have to post bond where government gave the receiver written authority and supported his actions.

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BROWN, *Associate Justice*

After a lengthy and prolonged series of financial reverses, steady reductions of service vitally important to the

citizens and residents of the far flung islands of the Trust Territory of the Pacific Islands, and, finally, an almost total paralysis of sea transportation within the Trust Territory, TransPacific Lines, Inc. (hereinafter sometimes called TransPac) was placed in receivership under and by virtue of Executive Order 110, dated February 15, 1974, whereby David M. Sablan was named as Administrative Receiver. This Court, on February 16, 1974, by Chief Justice Harold W. Burnett, ratified and approved the administrative receivership in its entirety and thereby established a judicial receivership by its own order. Those proceedings took place in chambers and were without notice. Shortly thereafter, believing that a conflict of interest might arise, Mr. Sablan tendered his resignation as receiver. The resignation was accepted, and under Executive Order No. 111, John F. Meadows, Esq. was appointed Administrative Receiver. This appointment, too, was ratified and confirmed on February 26, 1974 by Chief Justice Burnett, the proceedings again being entirely ex parte.

As receiver appointed and acting under the judicial receivership thus established, and following the provisions of the order issued by the Chief Justice, Mr. Meadows forthwith undertook to marshall the assets of TransPac, to cause payment of claims having priorities, and to take steps towards the ultimate dissolution of the company.

The moving parties herein, identifying themselves as creditors, holders of default, shareholders, and plaintiffs in a certain derivative action against TransPacific Lines, Inc. (later determined to be the case of *Porter, et al. v. The United States*, Court of Claims No. 111-73, and dismissed, pursuant to motion, on May 15, 1974) moved this court (1) to vacate its orders of February 16, 1974 and February 26, 1974; (2) to dismiss the currently appointed receiver, Mr. John F. Meadows; (3) to permit TransPac to sue and be sued; (4) to eliminate any priority of claims

the Government of the Trust Territory may have against the assets of TransPacific Lines, Inc.; (5) to require any receiver appointed to take all steps necessary to prevent cancellation of the franchise held by TransPacific Lines, Inc.; (6) to require the receiver to post bond in the amount of Thirty-One Million ($31,000,000.00) Dollars; and (7) for full hearing on all the foregoing requiring the Government to justify all of its actions in the placing of TransPacific Lines, Inc. in receivership.

A lengthy and exhaustive hearing on the motion was held at Saipan, Mariana Islands, and evidence, both oral and documentary, was received. Detailed arguments were heard, and briefs were submitted and carefully reviewed. Additionally, this court invited Micronesian Legal Services, Inc. to file its brief as Amicus Curiae; and, to the gratification of this court, the invitation was accepted, and competent counsel employed by Micronesian Legal Services, Inc. did prepare and file an amicus curiae brief.

Before ruling upon the motion and separate portions thereof that are now before this court, consideration must be given to the undisputed fact that the Government is obligated, among other things, to improve and regulate the means of transportation to, from and within the Trust Territory. (Department of Interior Order No. 2902.) Likewise, it must be recognized that at the hearing upon this motion the uncontradicted testimony of the High Commissioner and of numerous other witnesses established beyond question that sea transportation is of vital importance to the economy of the Trust Territory and to the health, comfort, and well-being of the citizens and residents thereof, and that an emergency situation prevailed. Without question, the total failure of sea transportation to, from and within the Trust Territory would have resulted in catastrophe, and by February, 1974, sea transportation had indeed reached a point of almost total collapse. Never financially

healthy, TransPac finally had become financially moribund and was unable to serve the thousands of residents of the Trust Territory who had been forced to rely upon its unreliable services. Businesses both large and small were adversely affected, and few, if any, of those who resided within the Trust Territory were spared at least a degree of suffering. It was against this background that the Government acted to establish the receivership which now is challenged.

During the hearing on this motion, there was offered and received in evidence without objection "Ocean Transportation in Micronesia" a Joint Report submitted to the Fifth Congress of Micronesia, second regular session, 1974 by the Committees on Resources and Development of the Senate and the House of Representatives. This report, together with other evidence received at the hearing, furnish a recent history of sea transportation in this area, and a familiarity with that history is necessary to an understanding of the matters now before the court.

It would serve no useful purpose at this time to discuss sea transportation in the Trust Territory prior to August 1, 1968; but from that date forward, the history is relevant, albeit disheartening. From "Ocean Transportation in Micronesia," *supra*, pp. 6–10, it is learned:

"In the contract dated August 1, 1968, the Trust Territory Government granted the Micronesian Interocean Lines, (MILI), a ten-year shipping franchise "to operate vessels in the common carriage of goods, merchandise, passengers and mail under the terms of this Agreement . . .". The contract further specified that there be direct linkage with U.S. West Coast ports and direct linkage with Japan and other Far Eastern ports. The Government obligated itself to provide harbor and terminal facilities and to charter to the company for a period of one year the "Gunners Knot," "Pacific Islander," and "Palau Islander." Government sea-borne cargo, except cargo normally carried by tanker-type vessels, were to be carried by MILI. Furthermore, the Government agreed to "use its best

efforts to cause residents of the Trust Territory to ship their cargo on the Carrier's vessels." It agreed also to levy no direct or indirect taxes on the Carrier's transportation activities.

"In turn, MILI assumed the contractual obligations to train and employ Micronesians, locate its principal office in Saipan, provide shoreside operations necessary for efficient service, i.e., stevedoring, cargo handling, wharfage, dockage and other port activities. MILI agreed to publish its schedule of service for the upcoming year, keep records, books and other documents and allow a yearly audit by certified public accountants as to its operations; the audit would then be submitted to the Government. It agreed to replace Government-leased vessels with its own vessels within a one-year period from the date of execution of contract, and to carry insurance and furnish a $500,000 performance bond which should be kept in force until otherwise agreed upon by the Government.

"MILI's contract with the Trust Territory was just two years old when, on August 13, 1970, the Joint Committee on Shipping of the Congress of Micronesia issued its report and its recommendations in compliance with the mandates to the Committee to study the shipping system in Micronesia. The Committee's report thoroughly evaluated the operation and practices of MILI and carefully documented the shortcomings and failures of this company in meeting its contractual obligations. It set forth specific recommendations whereby the company could begin to recover from its insolvent status. These recommendations, however, were ignored and the company continued to be plagued with the same problems.

"By mid-1971 the financial position of MILI was so shaky that it was on the verge of being forced into involuntary receivership or even bankruptcy. The U.S. West Coast dock strike contributed partially to this inordinate financial hardship for the company, but in the main the cumulative effects of mismanagement and maladministration of the company accounted for many of the company's woes. Finally, when the company failed to obtain the necessary collateral to maintain a performance bond in favor of the Trust Territory Government, the Administration hurriedly notified the company on September 30, 1971 as to its intention to cancel the Water Transportation Contract dated August 1, 1968, unless specific steps were taken to rectify the latter's defaults.

"Eight major reasons were advanced by the Administration as justifiable grounds to seek the termination of the shipping contract with MILI. These were: (1) failure to submit in advance an an-

nual shipping schedule; (2) failure to adhere to the 30-day transpacific service schedule between the U.S. West Coast and the Far East through the Trust Territory, and the general inability of MILI to maintain any semblance of regularity; (3) nonadherence to the 18-day service between Saipan, Guam, Yap, Koror and return; (4) deterioration of the financial position of MILI whose consolidated cash forecast indicated a deficit position of about $900,000; (5) loss of confidence in MILI by the general public in Micronesia, and those associated with MILI (as evidenced by key operation personnel resigning from the company and expressing doubts in the viability of MILI as a shipping concern); (6) failure to locate the main office of the company as required by the shipping contract and continuing to control MILI operations from San Francisco; (7) mismanagement of the company as indicated by lack of cargo security within terminals under the company's control and improper handling of cargo aboard ships; and (8) failure to submit a fully documented financial report and submission of incomplete consolidated cash forecast, which included disclaimers by the firm retained to undertake the 1971 annual review of the operations of the company.

"Subsequent to the notice of intent to terminate the shipping contract with MILI, the Administration arranged a meeting with representatives of the company for the purpose of working out possible solutions to the cited problems and determining how to insure the maintenance of a viable sea transportation system. The results of this meeting produced the "October 19, 1971, Agreement" which provided, among other things, the following: (1) suspension of the contract requirement that MILI maintain a continuing performance bond (to be conditioned upon the true and faithful performance of all and singular the covenants and agreements of the Carrier contained in the August 1, 1968 Agreement); (2) withdrawal of the Administration's Notice of Default dated September 28, 1971; (3) sale by Marine Chartering Micronesia, Inc., (MCMI) of all its Class A shares through the United Micronesian Development Association (UMDA) to qualified Micronesian citizens at par value of $1 per share and waiver of rights by MCMI to exercise any right to vote said shares; proceeds of sale of stocks and dividends to be paid by MCMI to Marine Chartering Company, Inc., (MCC); (4) Trust Territory Attorney General to hold in trust and to offer for sale all Class B shares of MILI owned by MCC to Micronesian citizens at the current market price but no

less than $1 per share the proceeds of such sales to be paid to MCC; all Class B shares upon sale shall be converted to Class A shares; (5) Trust Territory Government to render assistance and advice in obtaining financing or accommodations from MILI's creditors; (6) TT Government to 'give due consideration to the reccomendation of a recovery surcharge on all West Coast freight movements to the Trust Territory'; (7) MILI to honor its financial commitments and to make every effort to retain all Micronesian employees; (8) MILI to use terminal operators and stevedoring companies who had contracts with the Trust Territory Government; (9) Government to supervise and control MILI's operations until the appointment of a new general manager of the company through a reconstituted Board of Directors. The defacto name of the company was changed from MILI to 'TransPacific Lines, Inc.' The change in the name of the corporation was formally approved by the Board of Directors and, subsequently, by the High Commissioner on March 12, 1973.

"Thus, it was by the October 19th Agreement that the Administration acquired a greater voice in the routine day-to-day management responsibility of TransPacific Lines, Inc. This was accomplished through a Management Committee consisting of the Chief, Transportation Division, the Attorney General, Deputy Director of Transportation and Communication, representing the Government and three other members representing the Shipping Company. The administration in assuming a more direct control and operation of TransPacific Lines, Inc., hoped to 'save the idea of a Micronesian Company . . .', to restore confidence in the financial integrity of the TransPac among its creditors, to manage the shipping line 'differently than it had been, . . .', 'as soon as possible, let the Government get out of the operation,' and to protect the interest of the Micronesian citizens who owned stock in the company.

"The Administration's involvement in the actual daily operations and management of the company continued for a period of approximately one year, and by October-November of 1972 the government members of the Management Committee individually resigned on a staggered basis, allowing the company's Board of Directors to fill such vacancies with people of its own choice. The decision to phase out the Government's participation in the management of the company 'was made with the opinion that the Company was doing all right that one year and that, if any unknown things came along there were enough provisions in the contract for

rate changes and other arrangements where the Company could continue all right.' 'Therefore, the idea was to let the Government back out, which they did, about a year ago, and the private owners through their directors reestablish control of their Company.' Thus, it could be said that TransPacific Lines, Inc., assumed full control and management of its own internal affairs in November, 1972."

None of the certificates representing the Class B stock was delivered to the Attorney General.

During the latter part of 1972 and in early 1973, devaluations of the United States dollar added to the operating costs of TRANSPAC. Some relief was obtained through the Rate Review Board, but even with rate increases, changes in schedules, and the development of containerization, by November, 1973, the total liabilities of TRANSPAC had soared to $3,117,215 in excess of its total assets. The world wide oil shortage with its attendant skyrocketing of fuel prices served to increase drastically the company's indebtedness. No loan could be obtained by it from any source, and the situation continued to deteriorate with ever increasing speed.

Individuals called upon the Government to act to protect the economy of the Trust Territory and the interests of all who resided therein. Apparently in full agreement, the Committees on Resources and Development concluded and recommended:

"The Government has gone to lengths to avoid forcing TransPac into bankruptcy. This is understandable. The Government is reluctant to take any course of action that would disrupt shipping service to Micronesia or jeopardize the investments of Micronesia stockholders.

In an effort to keep TransPac solvent, the Government has allowed TransPac to operate since September 1971 without posting the $500,000 performance bond specified in the 1968 contract. The Government has also allowed TransPac's continued use of the 'Gunners Knot' (until just recently) under the charter agreements without insisting on collection of the charger rental fees from

TransPac. In addition, the Government has extended credit to TransPac by not attempting to collect port charges and claims receivable. The fact that as of June 30, 1973, TransPac owed the Government over $350,000 on port charges, claims receivable, and payments owing from charter of the 'Gunners Knot,' and whatever the past reasons for the Government's reluctance to force TransPac to live up to its obligations, the Committees think that the situation has reached the point where the Government must recognize the futility of attempting to save the company from bankruptcy. It is the futher opinion of the Committees that it is time for the Government to take into account the public interest of the people of Micronesia which is being adversely affected. There can be no justification for subsidizing an operation that in all probability will not be solvent at the end of the contract period.

The purpose in granting an exclusive franchise has not been met. TransPac has not developed into a viable Micronesian shipping company. After five years of operation, TransPac owns no vessels and has discontinued direct service from Trust Territory ports to and from the United States' West Coast. TransPac's present operation whereby it leases space and containers from PFEL for cargo from the West Coast to Guam, and where the cargo must then be transshipped to Trust Territory ports, has shown and will continue to show increased costs to the Micronesian consumers. To permit TransPac to continue this interchange operation is not tantamount to developing the type of Micronesian shipping company envisioned in the original agreement.

In retrospect, TransPac is becoming more of a brokerage company than an ocean transportation company. It is securing ships from ship owners and allowing other shipping companies to run the shipping system for it. This has resulted in a shipping system in Micronesia that is expensive, inefficient, and unwieldy. A drastic change is self-evident and the time to improve the whole shipping concept in Micronesia is clearly indicated by Micronesia's circumstances and the needs of its people.

RECOMMENDATIONS

It is the recommendation of the Senate and House Committees on Resources and Development of the Congress of Micronesia to the High Commissioner that the present contract with TRANS-PACIFIC LINES, INC., for an exclusive franchise to provide shipping service to the Trust Territory be terminated immediately.

It is the recommendation of the Committees that the High Commissioner present to the Congress of Micronesia as soon as possible an alternative plan to replace the present water transportation service arrangement.

It is the recommendation of the Committees that TRANSPACIFIC LINES, INC., should be allowed to continue carrying Government cargo for a period of one year. Exclusive rights to carrying non-Government cargo should be withdrawn immediately. Upon submission, adoption, and institution of a new shipping system in the Trust Territory, the exclusive right of TRANSPACIFIC LINES, INC., to carry Government cargo should be withdrawn.

It is the recommendation of the Committees that the High Commissioner assist all creditors and shareholders of TRANSPACIFIC LINES, INC., whereby debts and claims owing them from TRANSPACIFIC LINES, INC., could be liquidated and settled as soon as practicable.

It is the recommendation of the Committees that the High Commissioner should find ways of reducing the prevailing freight rates of cargo moving into the Trust Territory. The High Commissioner should encourage competition among private carriers of all nations to submit bids for direct services and direct calls from foreign ports to Micronesian ports.

It is the recommendation of the Committees that the High Commissioner take positive steps to protect and find employment for all present Micronesian employees who might be terminated from TRANSPACIFIC LINES, INC., as a result of the cancellation of the 1968 contract, and the consequent reduction in force for this company.

It is the recommendation of the Committees that the High Commissioner deploy the vessels owned by the Government to supplement shipping services to the various districts of the Trust Territory pending the establishment of a more stable and viable sea transportation system."

(See "Ocean Transportation in Micronesia, etc." (supra) p. 46–49.)

It cannot seriously be argued that no emergency existed. One definition of the word "emergency" is:

"A relatively permanent condition of insufficiency of service or of facilities resulting in social disturbance or distress." (See:

"Black's Law Dictionary," Fourth Revised Edition, "Emergency," p. 615, and cases cited therein.)

The committees of the Congress of Micronesia recognized the existence of an emergency as did the Executive Branch of the government. Both saw with clarity that services and facilities were not merely insufficient; they were essentially non-existent. Great social distress throughout the Trust Territory was the result of the substantial collapse of sea transportation. In facing this emergency, the Government acted by establishing the receivership which now is attacked.

The contention of the moving parties that the High Commissioner acted beyond his powers in establishing an administrative receivership which later was confirmed and changed by order of this court into a judicial receivership is interesting only in the abstract, for it ignores the realities which prevailed and overlooks the specific authority under which the High Commissioner acted. The realities were that sea transportation had come to a virtual halt. To all intents and purposes, TransPac enjoyed a monopoly position. With its franchise, it, and it alone, had the right (except in insignificant instances) to serve the population of the Trust Territory with sea transportation; yet it was unable to do so. Consequently, the TransPac system was clogged with supplies that had been ordered months before but remained undelivered; the economic impact throughout the Trust Territory was severe; the situation worsened steadily; and in order to avoid an economic catastrophe and social chaos, prompt remedial action was mandatory.

Movants argue that the High Commissioner was without power to establish the receivership with which we are concerned. In opposition, both the Government and the receiver seemingly take the position that the High Commissioner is clothed with powers so great and so all encompassing that all legislative power in the area of corporate

affairs has continually resided, and now resides in the Executive Branch. Neither argument is correct.

[1] There is no need to discuss the powers of the High Commissioner except as they are relevant to the matter now before the court; and in this case it is clear that the High Commissioner not only had a right to act, he had a duty to do so.

Prior to 1962, responsibility for the administration of these islands was divided between the Department of the Interior and the Department of the Navy. Effective July 1, 1962, the President of the United States, by Executive Order 11021, 27 Fed. Reg. 4409, redelegated his authority for civil administration of the Trust Territory to the Secretary of the Interior to

"take such actions as may be necessary and appropriate to carry out the obligations assumed by the United States as the administering authority of the Trust Territory under the terms of the trusteeship agreement and under the Charter of the United Nations."

Pursuant to these obligations, the Secretary established in 1967 a Trust Territory Government which included legislative, judicial, and executive branches, with the High Commissioner as chief executive of the Trust Territory. Secretarial Order No. 2918, December 27, 1968, 34 Fed. Reg. 16058. The Secretary also reserved for himself or his delegate (here, the High Commissioner) the power and authority to contract, "on behalf of the Trust Territory," for the purchase, charter, maintenance and operation of aircraft and surface vessels in the islands. Secretarial Order No. 2902, November 15, 1967, 32 Fed. Reg. 16058.

[2] Since at all times pertinent here the power to contract for the operation of surface vessels within the Trust Territory clearly had been reserved to and lay with the High Commissioner as the delegate of the Secretary of the Interior, the former had the right to incorporate in the

agreement of October 19, 1971 a provision pertaining to the establishment of a receivership. To argue that this provision is invalid in that authority to establish such receivership had not been delegated to the High Commissioner by the Congress of Micronesia cannot be accepted. The Congress of Micronesia had no such authority to delegate. Since the United States, as the administering authority was, and still is charged with the duty of maintaining and improving sea transportation to, from and within the Trust Territory, it is only reasonable that certain powers concerning sea transportation were reserved.

It must be concluded that the High Commissioner did have the power and authority to act as he did in causing the receivership to be established. He had a duty to act; and had he not acted in accordance with that duty, there can be no question but that even greater hardships would have been visited upon the inhabitants of these islands.

The next contention of movants relates to the judicial receivership. They assert that the order establishing the judicial receivership must be vacated because the proceedings were without notice and hearing in open court, that they were entirely ex parte, and that the receivership was not ancillary to a main action.

[3-5] Admittedly, it would have been better had all proceedings been held in open court and upon notice, so far as it would have been practicable to have given notice; but this is not fatal here. Due process generally requires both notice and an opportunity to be heard whenever any significant property interest may be substantially affected. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, and due process means the same thing in the Trust Territory as it does in the United States. *Trust Territory v. Tarkong*, 5 T.T.R. 252; *Ichiro v. Bismark*, 1 T.T.R. 1953. The question, of course, is whether there was a denial of due process;

and if so, was it of such seriousness as to require the application of the remedy sought by movants. Equity would not be served by doing so, and common sense dictates against such action by this court; for were such extreme action taken, those who could afford it least would be hurt the most. The chaos it would cause throughout the Trust Territory would be unimaginable, and this court will not knowingly issue any order which would serve only to militate against the general welfare of the inhabitants of the Trust Territory. As has been said by amicus curiae, TransPac's office and staff have disbanded, its remaining ship has been released from service, almost all of its assets have been converted to cash, and settlement of claims is well under way.

Movants likewise urge the removal of the receiver. They claim again that his appointment was invalid, and that a grave conflict of interest existed.

Ordinarily, notice should be given before a receiver is appointed, but it cannot be said that in this case there was not the necessity for the appointment without notice. A rapidly worsening emergency faced the government, and it was forced to act with great speed. Time truly was of the essence, and it is abundantly clear that the court, in establishing the judicial receivership and in confirming the administrative receiver by appointing him as the receiver herein was well aware of the circumstances then prevailing.

Under the circumstances, neither the establishment of the receivership nor the appointment of the receiver without notice can be said to have been prejudicial; for almost immediately thereafter, movants moved the court to vacate the receivership and to remove the receiver. They were heard on the motion, permitted to call and examine witnesses, to offer documentary evidence, and to argue both facts and law. Thus movants not only had an opportunity

to question the action of the court and the propriety of such action but actually did so. This is sufficient to negate any error that might earlier have been committed. *Harris v. Capehart-Farnsworth Corp.*, 207 F.2d 512.

[6] There is authority holding that there is no such thing as a pure receivership case, and that an equity court may appoint a receiver only when such appointment is ancillary to a pending action. *Milgram v. Jiffy Equipment Co.*, 247 S.W.2d 668 (Mo.) 30 A.L.R.2d 925, 933; *Kelleam v. Maryland Casualty Company*, 312 U.S. 377; 85 L.Ed. 899. This is the general rule, but there are exceptions to it. Where a corporation expressly consents to the appointment of a receiver or where the corporation admits its insolvency, the receivership need not be ancillary to a main action. *Re Metropolitan R. Receivership*, 208 U.S. 90, 109; 52 L.Ed. 403, 412; 28 S.Ct. 219. In the matter before this court, TransPac not only expressly consented to the appointment of a receiver, it actively sought such an appointment; and it admitted its insolvency.

In likening the actions of the Government to some sort of totalitarianism, movants go far beyond the limits of propriety and have no basis in fact to even hint at such wrongdoing, much less to declare it as truth. An argument of that sort is totally without merit and deserves no further comment.

Movants seek the removal of the currently appointed receiver and base this portion of their motion upon the grounds that the appointment was void ab initio and that a conflict of interest of such gravity existed as to require the dismissal of the receiver. Movants' first claim appears to be founded upon the failure to prove at the hearing the necessity and the propriety of the appointment. It need only be said that the hearing was lengthy and comprehensive; and while questions asked on behalf of movants sought to disparage the receiver and to cast doubt upon the

circumstances of his appointment, not one answer did so. Questions are not evidence except insofar as they may shed light upon the answers thereto. There was no denial of due process; for, almost immediately after the appointment of the receiver, an exhaustive hearing was held in which movants were given the widest latitude in the calling of witnesses, the length and scope of questioning, and in the offering of documentary evidence. See: *Harris v. Capehart-Farnsworth Corp.* (supra).

Movants correctly state that the appointment of a receiver is within the discretion of the court. *Wax v. Monk*, 96 N.E.2d 74 (Mass.) After reviewing all testimony that came before it, as well as reviewing all pertinent documentary evidence, noting that movants made no specific request for the substitution of the present receiver for any particularly named qualified individual, and after considering the services performed by the currently appointed receiver, this court has no hesitancy in stating that there was no deprivation of due process in the appointment of the present receiver and no abuse of discretion on the part of the court in appointing him.

In connection with movants' urging that TransPac be permitted to sue and be sued, the orderly administration of the receivership makes mandatory that litigation in process be stayed and contemplated litigation barred without specific order of court in each case or contemplated case. This court has so limited litigation. To have done otherwise would have resulted in giving improper preference to certain creditors, would have destroyed the orderly procedures of the receivership, and would ultimately have placed additional and wholly unjustified burdens upon those who reside in the Trust Territory. The order of court pertaining to litigation involving TransPac is in harmony with current receivership practice and should not be altered.

Before being judicially appointed, the receiver borrowed funds from the Trust Territory Government to pay off certain debts for operating expenses of TransPac and agreed to give those loans priority status over other claims. Movants argue that this constituted a "blatant taking without due process." A careful examination of all of the facts and of the law applicable thereto reveals the fallacy of that contention.

At the time with which we are concerned, TransPac was insolvent. Of that there can be no doubt. There were no funds with which to operate, yet it was imperative that the company operate so as to provide at least limited sea transportation until other arrangements could be made to serve the inhabitants of the islands, and likewise it was imperative that operating funds be made available for TransPac to marshall its scattered assets and empty its system of cargo that remained in it. To this extent, the receivership was an operating receivership.

[7, 8] Where an operating receivership is authorized, the expenses thereof constitute a first charge upon current income and, under certain circumstances, upon the corpus of the property in receivership. *National Surety Corp. v. Sharpe*, 72 S.E.2d 109 (N.C.); *Beale v. Moore*, 32 S.E.2d 696 (Va.). It is generally agreed that this rule applies in the case of railroads and other corporations of a quasi-public character charged with public duties. *Lackawanna Iron & Coal Co. v. Farmers Loan & T. Co.*, 176 U.S. 298, 44 L.Ed. 475, 20 S.Ct. 363; *International Trust Co. v. United Coal Co.*, 60 P. 621 (Colo.). A fortiori, the rule applies to TransPac which is likened to a railroad. Any such preference of claims flows from an equitable situation and arises from the order of court so to be preferred and paid. *St. Louis Union Trust Co. v. Texas Southern R. Co.*, 126 S.W. 296 (Tex. Civ. App.). In appointing a receiver,

the court may order that operating expenses have priority. Such order has the effect of a judgment in rem. *McCullough v. Walker Livestock, Inc.*, 220 F.Supp. 790 (D.C. Ark.). Thus, as to those funds advanced by the Government for interim operating expenses of TransPac, the Government does occupy a position of preference.

[9] In considering whether or not the Government may terminate the franchise held by TransPac, it is necessary only to consider the powers reserved in connection with sea transportation to, from and within the Trust Territory, already discussed herein, and to determine the nature of the franchise with which we are concerned. The franchise, of course, is an asset of TransPac and was carried upon the books as such. It has been kept in existence only because it is an asset. Not a scintilla of credible evidence has come before the court which would tend to show that this asset had at any time pertinent hereto, or now has a value in excess of its book value of One ($1.00) Dollar. While movants may have argued that the franchise was an asset of great value, such arguments are of no persuasiveness; they are buttressed by nothing and so must be regarded as mere claims and nothing more. They cannot be regarded as evidence. Undisputed testimony adduced at the hearing on this motion was to the effect that the terms of the franchise cannot be carried out.

Without further order of court, the Government is entitled to, and it is hereby ordered that it may cancel the said franchise; and any and all earlier orders of court to the contrary are hereby vacated and set aside.

[10] With reference to movants' motion to require the receiver to post bond in the amount of Thirty One Million ($31,000,000.00) Dollars, they need only be reminded that any claim in that amount, or thereabouts, has never been substantiated in any manner. Further, and of greater sig-

nificance, is the fact that the Government, through the High Commissioner, gave written authority to the receiver and gave support to his actions. This assurance provides as much, if not more protection than would be afforded by a bond.

Movants finally urge that a full hearing be afforded them, and it was.

Although it is not necessary to the ruling on this motion, the case of *Jurgenson v. National Oil & Supply Co.*, 63 F.2d 727, 728-729 (C.A. 3) may have a distinct bearing upon like motions which may well arise on other days and in other cases.

Jurgenson was an appeal from orders of the District Court for the District of New Jersey denying an application to dismiss an involuntary petition in bankruptcy and an application to vacate the appointment of a receiver, the court said:

"Turning to the alleged error in refusing to vacate the appointment of a receiver, the application was made to Judge Fake to vacate an appointment made by Judge Clark. It is well settled that a judge may not overrule a prior decision of another judge of the same court in the same case, and, under the authorities, the court is justified in refusing such an application." (Citing cases.)

The reasoning of the Third Circuit Court of Appeals is sound. Scarcely ever is it justifiable to seek relief from a decision of a judge of one court by turning to another judge of the same court and placing the very same case before the latter.

Whether or not the motion now before the court does or does not fall within this rule is unnecessary to decide, for more than sufficient other authority exists upon which to base the ruling herein.

Accordingly, said motion, and each and every part thereof, is denied.