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Case Notes

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—A Use Tax Levied Against the Storage and Withdrawal of Aviation Fuel Imported from Outside the Taxing State for Use Solely as a Source of Motive Power for Interstate Air Carrier Operations is Not Violative of the Commerce Clause. *United Air Lines, Inc. v. Mahin,* 410 U.S. 623 (1973).

Illinois applied its general revenue use tax to the aviation fuel of appellant airline purchased in Indiana and shipped into Illinois where it was stored temporarily before being loaded onto aircraft for consumption in interstate and foreign flights. United Air Lines claimed that this application of the tax contravened the commerce clause of the United States Constitution. The Illinois Supreme Court rejected the carrier's claim and upheld the tax.[1] *Held, Vacated and Remanded:* The United States Supreme Court ruled that since storage or withdrawal from storage were appropriate taxable events occurring within Illinois, the tax did not place an unconstitutional burden on interstate commerce.[2] *United Air Lines, Inc. v. Mahin,* 410 U.S. 623 (1973).

Use taxes[3] are imposed on the privilege of using items of tangible personal property within the state imposing the tax. This method of taxation is designed to complement state and local sales taxes that can be avoided to an extent by interstate commercial transactions. For example, a higher sales tax rate in one state can be

[1] Two members of the Illinois Supreme Court, however, expressed the view that an alternative taxing method sought by United which would subject only fuel actually consumed over Illinois to taxation would offend the commerce clause. United Air Lines, Inc. v. Mahin, 49 Ill.App.2d 45, 50, 273 N.E.2d 585, 587 (1972). The two justices based their conclusion on the rationale of Helson v. Kentucky, 279 U.S. 245 (1929).

[2] The United States Supreme Court reasoned that the facts in Mahin did not warrant the application of the *Helson* doctrine. Noting that "a method of tax measurement intimately related to interstate commerce is not automatically unconstitutional," 410 U.S. 623, 632, the Court remanded to avoid any risk of affirming a decision that might have been decided differently had not *Helson* been misunderstood. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1952). The Illinois Supreme Court reaffirmed and acknowledged its error in a per curiam opinion, ___ Ill.App.2d ___, ___ N.E.2d ___ (1973).

[3] Use taxes are also referred to as excise or privilege taxes.

avoided by purchasing items elsewhere for delivery and use within the state imposing the higher sales tax.[4] The imposition of a tax on use eliminates the possible tax advantage of making purchases in another state and serves the two-fold purpose of protecting local business from loss of sales and protecting state governments from loss of revenue.[5]

Illinois enacted its use tax in 1953, taxing the "exercise of any right or power incident to the ownership of tangible personal property." A temporary storage provision, however, exempted from the tax tangible personal property acquired outside Illinois and which, subsequent to being brought into the state and stored there temporarily, was used solely outside Illinois. The Illinois Tax Commission, in applying the tax to aviation fuel imported into Illinois for use in interstate flights by air carriers, originally concluded that the temporary storage provision exempted from taxation fuel that was not actually burned over Illinois. In 1963, however, the Tax Commission reinterpreted the application of the tax and determined that temporary storage ended and taxable use began when fuel was taken from storage tanks and loaded into an aircraft. Since it made all fuel loaded aboard its planes taxable, United Air Lines challenged this interpretation of Illinois' use tax.

The Supreme Court in upholding the Tax Commission's revised interpretation of the Illinois tax in *Mahin*, relied primarily on two cases decided some forty years earlier in which use taxes were also challenged: *Nashville, C. and St. L. Ry. v. Wallace*[6] and *Edelman v. Boeing Air Transport, Inc.*[7] In *Nashville*, a railroad imported gasoline into Tennessee to be stored temporarily before being used solely as a source of motive power in interstate commerce. The Court sustained the state tax on the privilege of storing the gasoline or its withdrawal for sale or use. Taxation of a right or power incident to ownership of the gasoline, *e.g.*, storage or withdrawal from storage, the Court reasoned, was taxation of an event separate

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[4] *See* Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COLUM. L. REV. 49, 55 (1938). *See, e.g.*, In re National Cash Register Co. v. Taylor, 276 N.Y. 208, 11 N.E.2d 881 (App. Div. 1937), *cert. denied*, 303 U.S. 656 (1938).

[5] P. HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 137 (1953).

[6] 288 U.S. 249 (1933).

[7] 289 U.S. 249 (1933).

and apart from the flow of interstate commerce[8] which did not impose an unconstitutional burden on that commerce.[9] The *Edelman* case involved a tax like that discussed in *Nashville*, but concerned an air carrier. Wyoming imposed a use tax on gasoline brought in from outside the state for use on interstate flights. The Court in *Edelman* held that since the taxable event was storage or withdrawal from storage, "the burden of the tax was too indirect and remote from the function of interstate commerce to transgress constitutional limitations."[10]

The Supreme Court in *Mahin* distinguished the use taxes upheld in *Edelman* and *Nashville* from a use tax struck down in *Helson v. Kentucky*.[11] In *Helson*, a Kentucky statute which levied a tax on all gasoline used within the state was applied to fuel consumed by a ferry boat engaged in exclusively interstate commerce between Illinois and Kentucky. Although seventy-five per cent of the ferry's gasoline was consumed on waters in Kentucky the tax was struck down. The Court noted that the taxpayer maintained no business facilities in Kentucky and that the gasoline was purchased and loaded aboard in Illinois. The only activity taking place within Kentucky was consumption of fuel. Taxation of the mere consumption of gasoline by a state, the Court felt, was a direct burden on interstate commerce amounting to a price exacted for the privilege of using an instrumentality of interstate commerce.[12] The *Mahin* decision reaffirmed the vitality of *Nashville, Edelman* and *Helson* by noting that the "line drawn between an impermissible tax on mere consumption and a permissible tax on storage of fuel before

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[8] *See* p. 117 and note 37 *infra.*

[9] 288 U.S. at 268.

[10] 289 U.S. at 252. The Court is citing, with approval, language from *Nashville*, 288 U.S. at 268.

[11] 279 U.S. 245 (1929).

[12] "A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected." *Id.* at 252. *See also* Bingaman v. Golden Eagle Western Lines, 297 U.S. 626 (1936).

The privilege of carrying on exclusively interstate commerce is a federal privilege that may not be burdened by state taxation. Spector Motor Service v. O'Connor, 340 U.S. 602 (1951); Crutcher v. Kentucky, 141 U.S. 47 (1891); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

loading continues to serve rational purposes."[13] In *Nashville* and *Edelman*, an ascertainable taxable event occured within the taxing states; in *Helson*, no event, save consumption, occurred within Kentucky.

The reasons why the Supreme Court has chosen to draw the line where it has are outgrowths of the attempt by the Court to implement the original purpose of the commerce clause without ignoring the vast economic and technological changes that have taken place in the nation subsequent to the adoption of the Constitution. The commerce clause provides that Congress shall have power to regulate commerce among the several states. The purpose of the clause was to insure the development of an open national economy free from trade barriers and protectionist measures like those various states had seen fit to enact during the period of Confederation.[14] The free flow of commerce, then, was declared to be of paramount national interest and was not to be impeded by the exercise of state authority. State power, even over purely intrastate activities, may be pre-empted under the commerce clause if the exercise of that power has a detrimental effect on interstate commerce.[15]

That the taxing power is among those state powers limited by the commerce clause would seem to be clear, since the power to tax may readily be used to erect barriers restricting interstate economic activity. The precise extent of the clause's limitation on state taxing power, however, is not clear. This is due to the fact that the commerce clause does not go beyond enabling Congress to regulate interstate commerce. The extent to which the clause is a self-executing ban on the exercise of state taxing power can only be implied by the judiciary based upon its notions concerning the requisites of an open economy. Early decisions of the Supreme Court indicated that interstate commerce was immune from most forms of state taxation. "Interstate commerce cannot be taxed at all," declared the Court, "even though the same amount of tax

[13] 410 U.S. at 629.

[14] T. CALVERT, THE REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION 3-5 (1907). The open-market purpose of the commerce clause has been enunciated by the framers of the Constitution and by the Court. *See* THE FEDERALIST NOS. 7, 11, 22 (A. Hamilton), No. 42 (J. Madison); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 395 (1952); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[15] *See* Chicago, M., St. P. & Pac. R.R. v. Illinois, 355 U.S. 300, 306 (1958); The Shreveport Rate Cases, 234 U.S. 342 (1914).

should be laid on domestic commerce, or that which is carried on solely within the state."[16] The Court originally took this position because the power to regulate interstate commerce was considered to rest exclusively within the domain of Congress.[17] State taxation of interstate commerce was often therefore considered an intrusion upon congressional authority.[18]

Two developments, however, have contributed substantially to a relaxation of the original limitations placed on state taxing power when the interstate commerce was involved. First, the economic growth of the nation has been marked by the development of business and industry from primarily local enterprises into multi-state and national entities.[19] Secondly, local government has shown a growing need for funds. State governments have required more and more revenue to provide social services, roads, public assistance, educational facilities and other benefits for which there has been an increasing demand.[20] Interstate commerce has undoubtedly been among the recipients of these benefits and services provided by the states. Consequently, the Supreme Court has determined that the states be allowed to require that interstate commerce share in the tax burden[21] and that the judiciary must therefore "guard against imprisoning the taxing powers of the states within formulas that are not compelled by the Constitution."[22] Pursuant to this rationale, the Supreme Court has allowed state and local governments to utilize many varieties of taxes, including the use tax, to secure revenue from interstate commerce.[23]

[16] Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887). *See also* Leloup v. Port of Mobile, 127 U.S. 640 (1888); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872). Not every sort of state tax that might conceivably affect interstate commerce was banned. For example, the states were allowed to collect property taxes on artciles within their jurisdiction after the goods had become part of the "common mass" of property within the state. Precisely when goods become part of this common mass is not always clear. *Compare* Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922) *with* Bacon v. Illinois, 227 U.S. 504 (1913).

[17] Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

[18] *See* P. HARTMAN, *supra* note 5 at 22-33.

[19] J. HELLERSTEIN, STATE AND LOCAL TAXATION 162 (3d ed. 1969).

[20] *Id.*

[21] Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (1954); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

[22] Wisconsin vs. J. C. Penny Co., 311 U.S. 435, 445 (1940).

[23] *See Developments in the Law—Limitations on State Taxation of Interstate*

Even though the states enjoy extensive taxing authority over interstate air carriers, the commerce clause is still a limiting factor on this power. It is probable that a use tax will be struck down as violative of the commerce clause if it is: (i) discriminatory against interstate commerce, (ii) considered excessive or (iii) imposed on the privilege of using an instrumentality of interstate commerce.[24] A state law providing for the application of a tax to the storage or withdrawal of fuel when interstate use is contemplated while intrastate commerce remains free of the same or a comparable tax is patently discriminatory and invalid.[25] Moreover, even though a taxing statute is fair on its face, if it is discriminatory in operation it will be declared invalid.[26]

In addition to being non-discriminatory, a use tax must not exceed in amount a fair compensation to the state.[27] If the reviewing court considers the amount of the tax to be unreasonable in relation to the benefits conferred by the state on the carrier, then

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Business, 75 HARV. L. REV. 953, 956 (1962). The Court has acknowledged that the rule of Robbins v. Shelby County Taxing Dist. has been "narrowly limited." McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 57 (1940).

[24] It should be noted at this point that the principles governing the validity of state and local taxation of air carriers engaged in interstate commerce are basically the same as the rules applicable to other carriers. *See* Annot., 31 L. Ed.2d 975, 977 (1973).

[25] *Cf.* Best & Co. v. Maxwell, 311 U.S. 454 (1940); People *ex rel.* Schoon v. Carpenter, 2 Ill.2d 468, 118 N.E.2d 315 (1954) (use tax applied when vehicles purchased outside the state where none was applied when purchased within the state declared invalid). *But see* Aero Mayflower Transit Co. v. Georgia Public Serv. Comm'n, 295 U.S. 285 (1935).

A use tax statute that does not allow a credit for sales or other taxes previously paid in another state would seem to be patently discriminatory against interstate commerce. The Supreme Court, however, has indicated that this allowance is not necessarily a constitutional requirement (*see* Henneford v. Silas Mason Co., 300 U.S. 577 (1937)) and has in fact sustained use tax statutes containing no credit provision for taxes paid in other states. *See* S. Pac. Co. v. Gallagher, 306 U.S. 167 (1939) (no credit feature); Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932) and Ry. Express Agency, Inc. v. Virginia, 282 U.S. 440 (1931) (credit allowed only for local sales tax payments). None of the taxpayers in these cases, however, made a showing that the same property had been taxed in two different states. Presently, every state imposing sales and use taxes, except Arkansas and West Virginia, allow credit against the use tax for sales taxes paid on the same property in another state. CCH STATE TAX GUIDE, ALL STATES UNIT 6013 (2d ed. 1967).

[26] *See* Nippert v. City of Richmond, 327 U.S. 416 (1946).

[27] A state may require revenue from interstate commerce only "in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred. . . ." Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

the tax must fail even though the same or similar tax is imposed on intrastate commerce.[28] Air carriers operating in several states may not be taxed in excess of a reasonably apportioned share reflecting the use occuring within the state.[29] The cost of state-provided services and facilities and the extent of their actual use by the carrier may therefore be important factors in determining the fairness of a tax. The Supreme Court has invalidated taxing schemes wholly unrelated to use[30] but has generally seen fit to sustain taxing measures, even fees or percentage rates[31] unrelated to actual use, as long as these measures are not proven by the carrier to be excessive.[32] Proof of excessiveness involves more than a showing that the tax lacks absolute fairness. The carrier must prove that the amount of the tax does not even approach a "rough approximation" of the value of benefits provided by the state.[33]

Finally, a use tax offends the commerce clause if it is imposed on the privilege of using an instrumentality of interstate commerce, *e.g.*, the consumption of fuel. This is the principle of the *Helson* case which was reaffirmed in *Mahin*. This prohibition, when coupled with the long-established rule that articles actually moving in interstate commerce may not be taxed,[34] may create the im-

[28] Freeman v. Hewit, 329 U.S. 249 (1946).

[29] *See* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590 (1954).

[30] *See* McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940) (tax based on amount of gasoline over twenty gallons carried in tanks when entering state); Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931) (tax based on seating capacity).

[31] *See* Evansville-Vanderburg Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) (one dollar charge on emplaning passengers); Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) (highway toll based on two per cent of the fair market value of the vehicle).

[32] The burden of proof is on the carrier to show that the tax is excessive. *See* Evansville-Vanderburg Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 719-20 (1972); Clark v. Paul Gray, Inc., 306 U.S. 583, 598-600 (1939); Ingles v. Morf, 300 U.S. 290 (1937).

[33] International Harvestor Co. v. Evatt, 329 U.S. 416, 422-23 (1947). In other words, "the use taxpayer has the burden of showing that he is subjected to a *substantially greater* tax burden than the taxpayer who buys locally." P. HARTMAN, *supra* note 5 at 170 (emphasis added). This proof is difficult. (*Id.* at 170-71) especially since the Court has not made clear what kind of evidence must be presented to show that a tax is excessive. *See* Annot., 17 A.L.R.2d 421, 432 (1951).

[34] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Hughes Brothers Timber Co. v. Minnesota, 272 U.S. 469 (1926); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872).

pression that use taxes involving the fuel of interstate carriers are difficult to justify since the fuel is either moving or being consumed in interstate commerce almost continuously. That this is not the case is evidenced by the Supreme Court decisions in *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*,[35] *Nashville, Edelman*, and several other cases[36] that followed *Helson* and validated use taxes when the fuel of interstate carriers was involved. The relative ease with which the constitutional prohibitions noted above can be avoided is due to the narrow view that the Supreme Court has taken regarding what constitutes movement or consumption in interstate commerce. Taxation of some "local event" severable from actual interstate movement or consumption, the Court feels, is a tax only indirectly burdening interstate commerce and is permissible.[37] The Court has been willing to go to great lengths to find a local event or "taxable moment" after interstate movement has ended and before an article has begun to be used or consumed in interstate commerce on which to sustain use taxes.[38] This policy

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[35] 285 U.S. 147 (1932).

[36] *See* American Airways, Inc. v. Wallace, 57 F.2d 887 (6th Cir. 1932), *aff'd per curiam*, 287 U.S. 565 (1932) and American Airways, Inc. v. Grosjean, 3 F. Supp. 995 (D.C. La. 1933), *aff'd per curiam*, 290 U.S. 596 (1933).

[37] The direct-indirect burdens distinction is a test that has been frequently used by the Court to distinguish between permissible and impermissible state taxes affecting interstate commerce. *See* P. HARTMAN, *supra* note 5 at 28-33. This test necessarily places a great deal of emphasis upon the incidence of a tax, *i.e.* when and where tax liability arises. Severability of the taxed event from movement or consumption in interstate commerce will generally lead the Court to characterize the event as "local" and the tax burden as "indirect." Some events or activities that might be considered local in nature, however, may not be taxed if they are deemed to be integral parts of interstate commerce. *See* Puget Sound Stevedoring v. Tax Comm., 302 U.S. 90 (1937) (tax on unloading or discharge of cargoes of vessels); Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 442 (1946) (tax on loading and unloading). The Court in *Mahin* was careful to note that the Illinois use tax fell upon storage or withdrawal from storage of fuel *before* it was loaded into the tanks of an aircraft. 410 U.S. at 629, 631.

[38] *See* S. Pac. Co. v. Gallagher, 306 U.S. 167 (1939); where a California tax on use and storage was applied to railroad equipment purchased and imported from outside the state and used in maintaining interstate railway lines. Some of the equipment was installed immediately upon arrival within California, the movement being "as nearly continuous as managerial efficiency can contrive." *Id.* at 177. Nevertheless, the tax was sustained. *See also* the companion case of Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939). *Cf.* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (tax on production of electricity sustained when production and transmission in interstate commerce were virtually instantaneous).

More modern cases sustaining use taxes as applied to air carriers are: Flying Tiger Line, Inc. v. State Bd. of Equalization, 157 Cal.App.2d 85, 320 P.2d 552 (1958) (aircraft); American Airlines, Inc. v. State Bd. of Equalization, 216

provides a fair result, the Court believes, since the state taxing the local event is likely to provide benefits related to the event taxed. In *Mahin*, for example, the Court suggested that benefits provided by the state included police protection and access roads to storage facilities.[39] Moreover, taxation of an ascertainable local event apart from consumption is felt to minimize the danger of cumulative tax burdens on interstate commerce, *i.e.* the danger that the same activity will be taxed in another state.[40]

The result in *Mahin* is not surprising since it is consistent with the earlier rationale of *Edelman* and *Nashville*. Nor is the result disturbing in the sense that anyone can point to a clear inequity having befallen the taxpayer in this particular case. What is disturbing, from the carrier's viewpoint, is that the *Mahin* decision evidences a continuing reluctance on the part of the Supreme Court to interfere with state taxing measures.[41] In light of this reluctance and the continuing revenue needs of state and local government, carriers can expect to be subjected to more and higher state taxes as new taxing measures are enacted and exemptions are narrowed or eliminated.[42]

Any relief that may be afforded must come from Congress. There are indications that Congress is not entirely satisfied with the

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Cal.App.2d 180, 30 Cal. Rptr. 590 (1963) (aircraft parts). Cases involving state taxation of air carriers are collected in Annot., 31 L. Ed.2d 975 (1973).

[39] 410 U.S. at 630.

[40] The multiple burdens doctrine was originally applied in Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). This doctrine emphasized apportionment of the tax in relation to the taxpayer's nexus with the taxing state. The incidence of a tax was considered to be of little importance. Conceivably, the tax invalidated in *Helson* might have been sustained under the multiple burdens test had it provided for proper apportionment. *Compare* Justice Rutledge's opinion in McLead v. J. C. Dilworth Co., 322 U.S. 327, 358 (1944) (dissenting) *with* his opinion in Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 96-98 (1948) (concurring). While the multiple burdens doctrine was rejected by a majority of the Court in favor of the old "direct-indirect burdens test" in Freeman v. Hewit, 329 U.S. 249 (1946), the language of "multiple burdens" has appeared in a number of decisions since *Freeman*, including *Mahin*. For an examination of the Court's commerce clause tests, *see* P. HARTMAN, *supra* note 5 at 21-48; J. HELLERSTEIN, *supra* note 19 at 163-70.

[41] Cellar, *The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce*, 36 FORDHAM L. REV. 385, 386 (1968).

[42] *See* Brabson, *Determining Whether Exemptions Apply is Still Difficult; Courts Unsure*, 7 J. TAX. 204 (1957). The author predicts determined efforts to eliminate tax exemptions in states where sales and use taxes are an important source of revenue.

Court's handling of commerce clause issues.[43] In the area of air commerce specifically, Congress has recently enacted a law banning head taxes on emplaning passengers[44] even though the Supreme Court found that this type of tax did not offend the commerce clause.[45] While not referring specifically to the use tax area, several members of the Supreme Court itself have indicated that Congress may be more capable of balancing the national interest in an open economy with the revenue needs of the states.[46] In a dissenting opinion involving a state income tax on revenues derived from interstate commerce, Justice Frankfurter observed:

> At best this court can only act negatively; it can determine whether a specific tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economics of Nation and State.[47]

The concerns expressed by Justice Frankfurter are also applicable to state use taxes on interstate carriers. Since the cost factor primarily determines whether a tax is or is not unduly burdensome,

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[43] Cellar, *supra* note 41.

[44] Act of June 18, 1973, Pub. L. No. 93-44 § 7, 87 Stat. 96, *amending* Title XI, Federal Aviation Act of 1958, adding § 1113 (codified at 49 U.S.C. § 1113(c) (Supp. 1974)). Congress has also compiled an exhaustive study concerning state taxation of interstate commerce, including constitutional questions. *See* SPECIAL SUBCOMM. ON STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 1480, 88th Cong., 2d Sess., vols., 1 and 2 (1964); H.R. REP. No. 565, 89th Cong., 1st Sess., vol. 3 (1965) (sales and use taxes); H.R. REP. No. 952, 89th Cong., 1st Sess., vol. 4 (1965).

[45] Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972).

[46] Mr. Justice Douglas dissenting in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940); Mr. Justice Black in *McCarroll* (dissenting opinion); Gwin, White and Prince v. Henneford, 305 U.S. 434, 448-55 (1939) (dissenting opinion); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 327 (1938) (dissenting opinion); Mr. Justice Clark in Northwestern States Portland Cement Co. v. Minnesota, 358 Northwestern Airlines v. Minnesota, 322 U.S. 292, 300 (1944) dissenting in *Northwestern States* and *McCarroll*; Mr. Justice Jackson concurring in *Northwest Airlines*; Mr. Justice Rutledge in McLeod v. J. E. Dilworth Co., 322 U.S. 327, 360 (1944) (dissenting opinion).

[47] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959).

a meaningful dollars and cents consideration of the costs incurred by both the state and the carrier in relation to the tax is important. A court, however, may not be capable of this measurement nor may it be inclined to devote more time and effort than is absolutely necessary to the consideration of issues that are primarily economic in nature. While the Supreme Court certainly has not ignored the economic consequences of questioned use taxes, it has been willing to approve taxes amounting to a rough approximation of the value of state-provided benefits.[48] Even if this overly simplistic analysis is acceptable in an individual case, it fails to appreciate the fact that interstate air carriers are subjected to numerous state use taxes, each of which may "overcharge" the carrier, but which may not, in the eyes of the Court be considered excessive. Additionally, other factors like the cost of complying with the numerous and varied state taxing requirements are given little, if any consideration. These objections, of course, do not affect the carrier's ability to contend that a use tax is either patently discriminatory or that it falls too directly on the privilege of using an instrumentality of interstate commerce. It is unlikely, however, that a legislature would enact a law that could be considered patently discriminatory against interstate commerce, and, as the *Mahin* decision indicates, the ban against taxation of the privilege of using an instrumentality in interstate commerce may be avoided without difficulty. The carrier therefore should recognize the limitations of the courts as a forum for challenging the constitutionality of questioned state taxes under the commerce clause.

The formulation of a congressional policy regarding state taxation of air carriers is in order. This policy should insure a degree of uniformity in the state taxation of air carriers or perhaps establish an administrative board competent to determine the full economic impact of a tax. As matters now stand, it is largely up to the states to determine how much an air carrrier can be required to contribute through various taxing schemes. Unless Congress chooses to act, it is unlikely that the comence clause will be a substantial factor in limiting the exercise of state taxing powers.[49]

Stephen N. Wakefield

[48] *See* note 33 *supra.*

[49] In Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), it was suggested to Congress by the Court that it might be desirable to develop uniform

PRIMARY JURISDICTION—ANTITRUST EXEMPTION—The CAB Has Primary Jurisdiction for Alleged Violations of Antitrust Laws by Air Carriers Even Though the Board Has Not Approved the Conduct at Issue and Can Not Grant Damages in the Action. *Laveson v. Trans World Airlines*, 471 F.2d 76 (3d Cir. 1972).

In 1967, Defendants, twelve airlines, sought the approval of the Civil Aeronautics Board of an agreement providing for a two dollar fee to be charged coach passengers for visual, inflight entertainment.[1] The Board indicated that the charge was reasonable, but gave no affirmative ruling on the application.[2] Defendants subsequently implemented the agreement. Plaintiffs, as class representatives of all coach passengers who had paid the two dollar fee, brought an antitrust action for treble damages in federal court alleging that defendants had conspired in violation of the Sherman Antitrust Act in agreeing to and implementing the charge. Approval by the Board, under section 414 of the Federal Aviation Act,[3] of an agreement like that of defendant-air carriers relieves the parties from the operation of the antitrust laws to the extent of the approval given. The plaintiffs alleged that the lack of Board approval prior to implementation of the agreement left the conduct of defendants exposed to the operation of the antitrust laws without recourse to subsequent action by the Board; the statutory inability of the Board to grant damages, the only remedy sought by plaintiffs, vitiated the requirement of prior resort to the federal agency. The district court, however, granted defendant's motion to dismiss on the grounds that the action was subject to the primary

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standards for state taxation of air commerce. Shortly thereafter, the Civil Aeronautics Board was directed by Congress to study and report on the problems of state taxation of air carriers. *See* H.R. Doc. No. 141, 79th Cong., 1st Sess. (1945). The resulting CAB report prompted the introduction of several bills in Congress providing for uniform apportionment formulas for use by the states in taxing airlines. *See* H.R. 1241, 80th Cong., 1st Sess. (1947); S. 2453, 80th Cong., 2d Sess. (1948); S. 420, 81st Cong., 1st Sess. (1949). None were ever enacted.

[1] The Federal Aviation Act requires that air carriers file with the CAB for approval every agreement between carriers relating to the establishment of transportation rates. 49 U.S.C. § 1382 (1970).

[2] In CAB Order No. E-24839 (March 9, 1967), 32 Fed. Reg. 4086, 4087, the Board deferred action on the agreement, stating that though a charge of two dollars would be reasonable, the implementation of the charge could be better accomplished through the rule making powers.

[3] 49 U.S.C. § 1384 (1970).

jurisdiction of the Civil Aeronautics Board. *Held, affirmed*:[4] Neither the failure of defendants to obtain approval of the agreement prior to its implementation, nor the statutory inability of the CAB to grant damages in reparation for past conduct wrested primary jurisdiction from the CAB. *Laveson v. Trans World Airlines*, 471 F.2d 76 (3d Cir. 1972).

The doctrine of primary jurisdiction provides that in cases originally brought in a court, in which both the court and the agency have subject matter jurisdiction, the court should not exercise its jurisdiction until certain issues have been passed upon by the appropriate administrative agency.[5] At its inception, the rationale for applying primary jurisdiction was dependent on the concept of the agency as a fact finder.[6] The idea was that the court should stay its action until issues of fact requiring the expertise of administrative specialists have been determined by the agency.[7] Though expertise and the concept of the agency as a fact finder persist in current notions of the doctrine,[8] another consideration, uniformity,

[4] The court vacated and remanded on the ground that the district court should not have dismissed but rather should have stayed pending approval or disapproval of the agreement by the CAB. Only in this way could problems with the statute of limitations be averted in the event of CAB disapproval and a subsequent reinstitution by plaintiff of proceedings under the damage provisions of the antitrust laws.

[5] *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT 344; Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

[6] The early cases involved the conflict between common law jurisdiction of courts and the statutory jurisdiction of the newly created Interstate Commerce Commission. Texas & Pac. Ry. Co. v. Abiline Cotton Oil Co., 204 U.S. 426 (1907); Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922). The reasoning which emerged was that the determining factor would be "the character of the controverted question and the nature of inquiry necessary for its solution." Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922). Questions primarily of fact or involving matters with which the agency has expertise, such as reasonableness of rates, were to be considered by the agency. *See, e.g.*, Armour and Co. v. Alton R.R., 312 U.S. 195 (1941); St. Louis, Brownsville & Mexico Ry. v. Brownsville Navigation Dist., 304 U.S. 295 (1938); Board of R.R. Commrs. v. Great Northern Ry., 281 U.S. 412 (1930). "Pure" questions of law were to be decided by the court. *See, e.g.*, Brown & Sons Lumber Co. v. Louisville & Nashville R.R., 299 U.S. 393 (1937); Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922).

[7] For a severe criticism of the concept of "expertise" as grounds for agency jurisdiction *see* Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). *See also* Jones, *The Anomaly of the Civil Aeronautics Board in American Government*, 20 J. AIR L. & COM. 140 (1953).

[8] *See* Far East Conference v. United States, 342 U.S. 570, 574 (1951); Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767, 774 (1972), *cert. denied*, 411

has become increasingly important as the scope of agency regulation has been enlarged.[9] The function of uniformity in the application of primary jurisdiction is not merely to insure that issues of fact are determined consistently, by one body, but also to solidify the legal standards made applicable to particular kinds of conduct when agency standards under an administrative statute differ from those ordinarily applied by the courts.[10]

In recent years the most prominent and controversial application of primary jurisdiction has occurred in cases like *Laveson v. Trans World Airlines* which involve the enforcement of the federal antitrust laws against members of the so-called regulated industries.[11] The courts have accepted the premise that the Sherman and Clayton Antitrust Acts represent a fundamental national economic policy in favor of competition.[12] This policy is not, however, clearly defined in relation to several industries that Congress has singled out for special regulation.[13] With respect to the air transportation industry, Congress has indicated through legislation that the public interest is best served by substantial limitations on competition. As in other industries, Congress has delineated in an administrative statute standards of competition for the industry differing from

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U.S. 932 (1973). In *Far East* the Court stated "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. 570, 574 (1951).

[9] The Court in *Far East* also stated "[U]niformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort." 342 U.S. 570, 574-75 (1952). One writer concluded that the "formulation" of the rationale for primary jurisdiction stated in *Far East* was "preferable to some others because it subordinates administrative specializations to uniformity and consistency." K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE 54 (1958).

[10] *See, e.g.*, American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 82 (1956) where the Court pointed out that "unfair practices and methods of competition" as defined by the Federal Aviation Act contain a broader concept than the common law idea of unfair competition. *See generally* Petrucelli and Long, *Antitrust and the Regulated Industries: The Role of the Doctrine of Primary Jurisdiction*, 1 TOLEDO L. REV. 303 (1969). The writers refer to the issue of divergent legal standards as "statutory duality."

[11] Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1060 (1964).

[12] *Compare* Carnation v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966), *with* F.C.C. v. R.C.A. Communications, 346 U.S. 86 (1953).

[13] *See, e.g.*, the Interstate Commerce Act, 49 U.S.C. § 301 (1970); the Shipping Act of 1916, regionally enacted as Act of Sept. 7, 1916 ch. 451, § 1, 39 Stat. 728 (1916), *as amended*, 46 U.S.C. § 801 (1970); Civil Aeronautics Act of 1938, 52 Stat. 1018, *as amended*, 49 U.S.C. § 642 (Supp. 1952).

those of the Sherman and Clayton Acts,[14] and has created an agency with pervasive regulatory powers to enforce these standards of competition in accordance with the public interest.[15] One of the most common regulatory powers granted for this purpose is the ability to exempt industry conduct from the operation of the national antitrust laws. Section 414 of the Federal Aviation Act establishes the power of the CAB in this respect.[16] An air carrier, which has sought and received the approval of its conduct from the CAB, is immunized from the operation of the antitrust laws by the administrative statute to the extent of the approval given.[17] Problems arise, however, when a carrier engages in unapproved conduct that is violative of the federal antitrust laws, as did defendants in *Laveson*, and is correspondingly sued in federal court. Both court and agency have technical statutory jurisdiction in this situation; the question is whether the court may retain jurisdiction and grant the remedy warranted under the antitrust laws or whether it must yield to the primary jurisdiction of the agency and allow the administrative standards of competition to control the conduct at issue. The situation is further complicated in cases like *Laveson* in which the plaintiff seeks only damages, a remedy the CAB is powerless to give.[18]

The decision of the Third Circuit in *Laveson* to uphold the primary jurisdiction of the CAB was founded upon the rationale of

[14] The Federal Aviation Act, 49 U.S.C. § 1302 (1970) states:

> In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest. . . . (c) the promotion of adequate . . . service without . . . destructive competitive practices.

The Civil Aeronautics Act of 1938, the forerunner of the Federal Aviation Act and unchanged by it with respect to the "competition" provisions recited above, was designed to eliminate the "public menace" of "unbridled and unregulated competition." 83 CONG. REC. 6507 (1938). *See also* S.S.W., Inc. v. Air Transp. Ass'n of Am., 191 F.2d 658, 661 (D.C. Cir. 1951) where the court stated:

> [T]he aircraft industry, . . . is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'

[15] 49 U.S.C. § 1381 (1970) gives the Board the power on its own initiative to investigate and determine whether any air carrier has engaged in unfair methods of competition, and to order any carrier to cease and desist from such practices.

[16] 49 U.S.C. § 1384 (1970).

[17] *See* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973).

[18] The Federal Aviation Act contains no provisions for the award of damages by the CAB.

uniformity.[19] In holding that lack of prior Board approval of the conduct complained of was not proper grounds for avoiding primary jurisdiction, the circuit court reasoned that the uniform application of the Board's regulatory policy could be undercut if the doctrine were not applied.[20] The Board is unilaterally empowered to investigate conduct within its jurisdiction and to immunize or enjoin that conduct when appropriate under administrative standards.[21] The retention of jurisdiction by a court and an award of relief pursuant to the antitrust laws creates the possibility of conflicting rulings by the court and the agency on the legality of the same prospective conduct.[22]

For support of its reasoning, the court in *Laveson* relied principally on three decisions: *United States Navigation Co. v. Cunard S.S. Lines*,[23] *S.S.W. v. Air Transport Ltd.*,[24] and *Pan American World Airways v. United States*.[25] Each of these cases involved an antitrust suit for injunctive relief in which the court ruled in favor of agency jurisdiction notwithstanding the failure of defendants to gain the approval of the agency prior to implementation of the conduct complained of. The Supreme Court grounded its opinion in *Cunard* upon a broad reading of the "comprehensive" administrative statute involved in that case, the Shipping Act.[26] Not only does the Shipping Act establish industry wide standards of competition, but section 15 of the Act, like section 414 of the Federal Aviation Act, provides for the immunization of agency approved conduct from the operation of the national antitrust laws.[27] The Court reasoned that it could not have been the intent of Congress to carve out an area of law for a specific agency to interpret uni-

[19] Although the court did allude to the traditional concept of expertise in agency discretion. 471 F.2d 76 (3d Cir. 1972).

[20] The court stated:

> [b]ecause of the possibility that in exercizing the power over the subject matter of this controversy, the Board may approve the agreement here alleged to violate the antitrust laws we hold that prior resort by plaintiffs to the CAB is required. 471 F.2d 76, 81 (3d Cir. 1972).

[21] 49 U.S.C. § 1381 (1970).

[22] 471 F.2d 76 (3d Cir. 1972).

[23] 284 U.S. 474 (1932).

[24] 191 F.2d 658, 661 (D.C. Cir. 1951).

[25] 371 U.S. 296 (1963).

[26] 284 U.S. 474, 480, 485 (1932).

[27] 46 U.S.C. § 814 (1970).

formly only to "strip it of primary original jurisdiction . . . because of a failure of [defendants] to file."[28]

The decisions in *Pan American* and *S.S.W.* applied the same concept of uniformity to cases involving the jurisdiction of the CAB. The Court in *Pan American* reasoned that if the courts were to "intrude" on the jurisdiction of the Board with their construction of the antitrust laws, "the two regimes might collide."[29] Similarly, the decision in *S.S.W.* expressed concern over the possibility of courts enjoining conduct as violative of the antitrust laws even though the agency specifically authorized to deal with the conduct has determined or may decide that "such practices serve the national air transportation policy."[30]

The application of this concept by the court in *Laveson* to an action for damages only goes to the heart of the doctrine of primary jurisdiction. Because the CAB is without the statutory power to assess damages in reparation for past conduct, the question arises whether a determination of the legality of past conduct by the court could conflict with subsequent action by the Board.[31] Indeed, the court in *Laveson* referred to several cases in which the inability of the Board to award damages was the cornerstone of a decision upholding the retention of jurisdiction by the court when the antirust laws were involved.[32] An example of this reasoning is the decision of the Second Circuit in *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*[33] In that case, since plaintiffs were bankrupt, there was no possibility of injunctive relief in the actions. Because adjudication of past conduct by the court in the action for damages would have no effect on the future conduct of the parties, the Second Circuit reasoned that court determination without prior resort to the CAB would not impinge on the "agency's ability to promote a uniform scheme" of regulation by approval or

[28] 284 U.S. at 485.

[29] 371 U.S. at 310.

[30] 191 F.2d at 663.

[31] Because the award of damages by the court would operate as an adjudication of past conduct only, it is arguable that such award could not conflict with any decision of the Board with regard to the prospective behavior of defendants.

[32] 471 F.2d at 82. The court referred to Allied Air Freight v. Pan American World Airways, 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968), and Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Hawaii 1972).

[33] 471 F.2d at 82.

disapproval of prospective behavior.[34] The court in *Laveson* distinguished *Allied* and cases following it on the ground that they involved conduct that was no longer continuing or otherwise "not a problem" at the time the antitrust suit was filed.[35] The Third Circuit concluded in cases like *Laveson*, in which the conduct of defendant is still in effect and has a continuing effect upon the plaintiff, a judicial determination of issues would undercut the Board's ability to regulate.

In defending this conclusion, however, the court in *Laveson* was still faced with the decision of the Supreme Court in *Carnation Co. v. Pacific Westbound Conference*,[36] another case involving the primary jurisdiction of the Federal Maritime Commission under the Shipping Act. In *Carnation*, the Court concluded that the principles established in *Cunard*[37] preclude courts from awarding treble damages without prior resort to the agency only when the defendants' conduct has already been arguably approved by the Maritime Commission.[38] No exception was made in *Carnation* for cases in which defendants' conduct, though not arguably approved, is continuing at the time the antitrust suit is filed. The heart of the reasoning in *Carnation* was that the agency has "no power to validate pre-approval implementation of agreements."[39] Thus, even if the conduct of the defendant was continuing and still a problem, a deferral to the agency and a subsequent approval could not serve to immunize that conduct occuring prior to approval. This result, the Court concluded, avoided the possibility of direct conflict between court and agency.

The court in *Laveson* distinguished the decision of the Supreme

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[34] 393 F.2d 441 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968).

[35] 471 F.2d at 82, quoting Allied Air Freight, Inc. v. Pan American World Airways, Inc., 393 F.2d 441, 445 (2d Cir. 1968).

[36] 383 U.S. 213 (1966).

[37] The Court in *Carnation* defined the principles established in *Cunard* in terms of conflict avoidance. "The . . . Cunard principles [require] the courts [to] refrain from taking action which might interfere with the Commissions exercise of its lawful powers." 383 U.S. at 221.

[38] *Id.* at 222.

[39] *Id.* at 222. The Court looked to the specific language of the Shipping Act, 49 U.S.C. § 814 (1970). It determined that because only those activities which were lawful under the Shipping Act were exempt from the antitrust laws and because an activity was lawful under the Act only "when and as long as approved by the Shipping Board," all agreements not yet approved by the Board were not lawful and thus not exempt.

Court in *Carnation* on the ground that there is a vital difference between the Shipping Act involved in *Carnation* and the Federal Aviation Act:

> Unlike the Federal Aviation Act, . . . the Shipping Act provided antitrust immunity for approved agreements but *expressly* withheld immunity from agreements not yet approved.[40] (emphasis added)

The Third Circuit refused to rule expressly on the power of the CAB to retroactively immunize unapproved conduct; however, its opinion expressly invites that determination by the Board and implicitly grants the power pending future action.[41] The decision establishes the rule that so long as the conduct complained of is still in effect and still is a current problem, the court must defer to the primary jurisdiction of the CAB.[42]

A recent decision of The Second Circuit Court of Appeals, *Breen Air Freight Ltd. v. Air Cargo Inc.*, failed to recognize the validity of the distinction between section 15 of the Shipping Act and section 414 of the Federal Aviation Act.[43] In *Breen* the court refused to require primary resort to the CAB in an antitrust action for damages only involving an agreement that was still in effect when the action was brought. Rather, the Second Circuit adopted the reasoning of the Supreme Court in *Carnation* and determined that unless the conduct complained of has been arguably approved by the CAB prior to implementation, the district court need not defer to the Board "irrespective of whether the activities are continuing activities or completed activities."[44]

A proper application of the concept of uniformity would undermine the decision of the Second Circuit in *Breen* and extend the holding of the Third Circuit in *Laveson*. That the concept was in-

[40] 471 F.2d at 83. *See* note 36 *supra.*

[41] *Id.* at 83 n.7. The court points out that judicial determination of the Board's power would more appropriately be made after it has acted but concludes that until the Board has ruled on the matter the defendants' conduct will be presumed to be of "debatable legality" and thus subject to the primary jurisdiction of the CAB.

[42] If the Board approves the conduct complained of, the defendant is exempt from the operation of the antitrust laws. The determinations of the Board are of course subject to substantial evidence review on appeal in the courts. *See* 49 U.S.C. § 1486 (1970).

[43] 470 F.2d 767 (2d Cir. 1972). The resolution of the primary jurisdiction issue was the alternative holding in the case.

[44] *Id.* at 773.

tended by Congress not merely to embody a policy of avoiding conflict between court and agency with respect to the same prospective conduct of a defendant, but more broadly to require the application of administrative competitive standards as the primary measure of conduct in the industry was strongly indicated by the Supreme Court in *Pan American World Airways v. United States.*[45] The majority in *Pan American* pointed out that "the type of competitive regime which . . . [the Act] visualizes . . . has its special standards of the public interest as defined by Congress."[46] Whether or not transactions involving "questions basic to the regulatory scheme . . . meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board."[47]

The extent to which the Board may assert the standards of the Federal Aviation Act as the primary competitive standard in the air transportation industry is defined by its ability to sanction the behavior of the industry in conformity with the Act's provisions.[48] Though the CAB is unable to impose negative sanctions for past conduct in that it is unable to award damages directly, the power to retroactively immunize past conduct would allow the Board the equivalent power. If primary jurisdiction is applied to all antitrust actions, including those for damages only, in which the dominant facts alleged are encompassed by the Act, the approval or disapproval of the Board determines whether or not the conduct of the defendant is protected from or exposed to the treble damage provisions of the general antitrust laws on the reinstitution of the action in federal court.[49] The conduct of the industry will be conformed to the standards by which post-implementation exemptions may be obtained, i.e. those of the Federal Aviation Act, notwithstanding that the conduct is violative of the antitrust laws.

If, on the other hand, as in *Breen*, the district courts are allowed to retain jurisdiction over antitrust actions for damages merely because the defendant has not received the approval of his conduct

[45] 371 U.S. 296 (1962).

[46] *Id.* at 308.

[47] *Id.* at 309.

[48] As was pointed out by the Court in *Pan American* "where the problem lies within the preview of the Board, Congress must have intended to give it authority that was ample to deal with the evil at hand." *Id.* at 312.

[49] *See* note 4 *supra.*

by the CAB, the primary measure of conduct within the industry will be the antitrust laws and not the Federal Aviation Act. An air carrier in contemplation of future activities can not know whether a prospective plaintiff will bring his action for damages only or for injunctive relief. The carrier does know, however, that if the antitrust laws are to be applied in an action for damages only, the sanction of treble damages is available. The carrier will not therefore risk conduct that conforms with the Federal Aviation Act and the public interest, as defined therein, but that is violative of antitrust standards.

Just as a proper application of uniformity invalidates the distinction between suits for damages only and those involving injunctive relief, it also requires the extention of the decision expressed in *Laveson* to cases involving conduct that is no longer continuing or affecting the plaintiff.[50] While a judicial determination in these cases would not involve a conflict between the injunctive powers of the courts and the agency, it would impinge on the ability of the agency to positively sanction conduct within the industry. Just as a carrier can not know whether a prospective plaintiff will bring his action for damages only or for injunctive relief, it can not know when a plaintiff will bring his action. To allow the legal standard applied to a defendant-air carrier's conduct to be determined by the time the plaintiff's suit is brought is arbitrary and contrary to congressional intent.

Whether the doctrine of primary jurisdiction will continue to evolve in accordance with an expanded concept of uniformity is not clear. The decision of the Third Circuit in *Laveson* has laid the groundwork for a substantive determination that in all cases in which the CAB has jurisdiction of the subject matter, a reviewing court must defer to the Board.[51] Unfortunately, decisions like that expressed in *Breen* have placed the law in a condition of mixed authority.[52] Because of the national character of the air transportation

[50] *See* note 32 *supra.*

[51] This determination is synonymous with the recognition of the Board's power to immunize preapproval conduct.

[52] While *Breen* is supported by an earlier decision in the Second Circuit, Allied Air Freight, Inc. v. Pan American World Airways, 393 F.2d 441 (2d Cir. 1968), and several district level opinions, Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F. Supp. 1064 (D. Hawaii 1972); Slick Airways, Inc. v. American Airlines, 107 F. Supp. 199 (D. N.J. 1951), the Ninth Circuit has recently followed the *Laveson* decision in Price v. Trans World Airways, 481 F.2d 844 (9th Cir. 1973).

industry, there is a chronic need for clarification by the Civil Aeronautics Board or the Supreme Court on the issue. If congressional intent rather than independent judicial policy is to be given effect, the reasoning in *Laveson* will be emphasized and extended. The decision in *Laveson* proceeds from a sound construction of the Federal Aviation Act, and weaves a web of consistency in application of competitive standards to the air transportation industry.

Robert C. Heidrick

WARSAW CONVENTION—SUPPLEMENTAL REGULATION—Promulgation of a Regulation Controlling the Form and Content of the Notice of Limited Liability Provision on Passenger Tickets by the Civil Aeronautics Board Neither Conflicts with Article 3 of the Warsaw Convention Nor Exceeds the Board's Statutory Authority. *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

Lufthansa Airlines challenged a CAB economic regulation[1] that required air carriers to include a notice containing specified language in a specialized size type on passenger tickets of the applicable limitations on liability for loss of, damage to or delay in delivery of baggage. This action was brought pursuant to the Warsaw Convention.[2] Lufthansa, as a German citizen affected by the regulation, contended that the requirement was contrary to the terms of the

[1] CAB Economic Regulations, 14 C.F.R. § 221.176(b) (1973) provides in pertinent part:

> (b) Effective March 1, 1972, each air carrier and foreign air carrier which, to any extent, avails itself of limitations of liability for loss of, damage to, or delay in delivery of baggage shall include on each ticket . . . the following notice printed in at least 10-point type:
>
> NOTICE OF BAGGAGE LIABILITY LIMITATIONS
>
> Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: (1) for most international travel (including domestic portions of international journeys) to approximately $7.50 per pound for checked baggage and $330 per passenger for unchecked baggage.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter cited as Warsaw Convention].

Warsaw Convention and that the CAB did not have the statutory authority to enact it. Subsequent to an adverse ruling by the Board, direct review of the regulation's legality was afforded Lufthansa in the Court of Appeals for the District of Columbia as provided by the Federal Aviation Act of 1958.[3] *Held, affirmed*: The promulgation of a regulation controlling the form and content of a liability limitation notice on passenger tickets neither conflicts with the Warsaw Convention nor exceeds the Board's statutory authority. *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board,* 479 F.2d 912 (D.C. Cir. 1973).

In reaching its decision the Court of Appeals for the District of Columbia recognized the CAB's regulation as an attempt to provide United States travellers in international aviation with sufficient notice that the carrier's liability is limited to a specific amount by the Warsaw Convention. Lufthansa's challenge to the CAB's statutory authority to enact the regulation was dismissed by the court of appeals. The court found that section 204(a)[4] of the Federal Aviation Act of 1958, granting the CAB broad regulatory authority over civil aviation, and section 403(a)[5] of the Act, requiring the filing with the CAB of tariffs that contain all conditions of carriage, provided the CAB with ample authority to regulate notice to the public of all those conditions of carriage of

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[3] Federal Aviation Act of 1958, 49 U.S.C. § 1006(a) (1972) provides: Any order . . . issued by the Board . . . under this Act . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition . . . by any person disclosing a substantial interest in such order. . . .

[4] Federal Aviation Act of 1958, 49 U.S.C. § 1342(a) (1972) provides: The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

[5] Federal Aviation Act of 1958, 49 U.S.C. § 1373(a) (1972) provides: Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe. . . .

which air carriers avail themselves.[6] The court of appeals also rejected Lufthansa's contention that the requirements of the regulation were contrary to the terms of the Warsaw Convention. Article 3(1)(e) of Warsaw[7] requires that a statement concerning the Convention's liability rules appear on each passenger ticket. American courts have consistently interpreted this provision as a notice requirement.[8] The court of appeals found precedent for the CAB regulation in the supplemental regulations to article 3 of the Warsaw Convention which have been promulgated by the International Air Transport Association and approved by the CAB.[9] The circuit court therefore concluded that the terms of article 3 are not exclusive, but are subject to the Board's amplification.[10] Accordingly, the CAB regulation was reasoned to give substantive effect to the notice requirement of article 3 rather than to contradict the terms of that article.[11] The court of appeals further noted that if the carriers did comply with the regulation, there would be no question of the sufficiency, adequacy or legibility of the notice,[12] and the carriers would thus be able to invoke the limitations established by Warsaw without fear of judicial contradiction.

Prior to the enactment of this regulation, article 3(1)(e) had

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[6] 479 F.2d 912, 918 (D.C. Cir. 1973).

[7] Warsaw Convention, article 3(1)(e) provides:

> For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
> A statement that the transportation is subject to the rules relating to liability established by this convention.

[8] *Compare* the early case of Ross v. Pan American World Airways, Inc., 190 Misc. 974, 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd*, 80 N.Y.S.2d 735 (App.Div. 1948), 85 N.E.2d 880 (Ct.App. 1949), *cert. denied*, 349 U.S. 947 (1955), *with* the later cases of Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965); Boryk v. Aerolineas Argentinas, 332 F. Supp. 405 (S.D.N.Y. 1971); Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam by an equally divided court*, 390 U.S. 455 (1968), *rehearing denied*, 391 U.S. 929 (1968); Stolk v. Compagnie Nationale Air France, 58 Misc.2d 1008, 299 N.Y.S.2d 58, *aff'd*, 64 Misc.2d 859, 316 N.Y.S.2d 455 (App.T. 1970); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

[9] *See, e.g.*, the following CAB orders which were IATA resolutions submitted to the CAB for approval: CAB Order No. E-3230 (1949); CAB Order No. E-11701 (1957); CAB Order No. E-20146 (1963); CAB Order No. 69-2-65 (1969).

[10] 479 F.2d 912, 916 (D.C. Cir. 1973).

[11] *Id.* at 918.

[12] *Id.*

provided American courts with a useful avenue for circumventing the Warsaw Convention's limits on liability.[13] These monetary limits have been the subject of criticism by many American writers and courts who have described the limitations variously as inadequate, incredible, arbitrary, irresponsible, capricious, indefensible and unconstitutional.[14] These critics frequently point out that the Warsaw Convention was formulated in 1929 and that the protective function of the low limits on liability ceased to serve its purpose when the aviation industry outgrew its infancy.[15] The protection concept has been abandoned by the courts in the United States in cases involving purely domestic aviation, a development which paralleled the elimination in most states of limitations on wrongful death recoveries.[16] The resulting dramatic discrepancy between recoveries for the death or injury of passengers on domestic flights and on international flights[17] provided the impetus for American courts to seek to evade those articles of the Warsaw Convention that limit recoveries. This evasion is most evident in a line of cases that have circumvented the Warsaw limits through strict interpretation of the notice requirement in both the delivery

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[13] *See* cases cited note 8 *supra.*

[14] Welner, *The Continuing Attacks by American Courts on the Warsaw Convention*, 4 INT'L LAWYER 915, 920 (1970); J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES ch. 7 at 2 (1968). Mr. Kennelly discusses the issue he later raised as plaintiff's attorney in Burdell v. Canadian Pacific Airlines, Ltd., 10 Av. Cas. ¶ 18,151, ¶ 18,161 (Ill. Cir. Ct., Cook Ct. 1968): "It is almost inconceivable that this treaty has been permitted to stand, without having been challenged concerning its constitutionality on the basis of the simple application of the due process clause of the United States Constitution." Burdell was later withdrawn and revised to moot the issue of Warsaw's unconstitutionality, 11 Av. Cas. ¶ 17,351, ¶ 17,354 (Ill. Cir. Ct., Cook Ct. 1968), and then settled for $215,000. For discussions of the case *see* Mankiewicz, *La Convention de Varsovie devant la Constitution des Etats-Unis d'Amerique*, 23 REVUE FRANCAISE DE DROIT AÉRIEN 256 (1969) and Comment, *Warsaw Convention: Theme of Uncertainty*, 35 J. AIR L. & COM. 123, 131-33 (1969).

[15] *See, e.g.*, Rhyne, *International Law and Air Transportation*, 47 MICH. L. REV. 41, 54-61 (1948); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504 (1967); S. SPEISER, RECOVERY FOR WRONGFUL DEATH 493-94 (1966).

[16] *See* SPEISER, note 15 *supra* at 489-90. Judicial opposition to limits on recoveries is expressed in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[17] This disparity in recovery is discussed in 1 L. KREINDLER, AVIATION ACCIDENT LAW 12B-8-12B-12 (rev. ed. 1971); *see also* recovery tables published in 33 J. AIR L. & COM. 591-93 (1967).

of the passenger ticket and the legibility of the information contained thereon.[18]

The motive for this evasionary approach is commendable; it is based on a genuine concern for international travellers whose recoveries in case of death or injury are severely restricted by the Warsaw Convention, and who should be put on notice of the limitations so they might be able to make an informed decision on whether supplemental insurance should be purchased. The concept of adequate and sufficient notice of limited liability is a notion basic to the United States system of fundamental fairness and equity in the awarding of monetary damages. This judicial altruism does, however, present serious problems because it promotes regulation of the international aviation industry by one country. American courts have tried their hand in judicial treaty-making and have, in fact, worked unilateral alterations in the Warsaw Convention. The instant regulation takes that process one step further. For the first time an agency of the United States Government has, on its own initiative, without benefit of international approval, promulgated a regulation that alters an international treaty.

The necessity of unifying international aviation law has long been recognized and is evidenced by the passage of the Warsaw Convention which clearly attempts to achieve this goal.[19] A fundamental principle of international aviation law is that each nation has complete sovereignty over the airspace above its territory;[20] this principle demands the existence of multilateral agreements both in the use of international airspace and for the resolution of claims arising in the course of international flights. International air transportation raises questions of whose law should apply to

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[18] *See* cases cited note 8 *supra.*

[19] For an idealistic view of the need for uniformity see W. WAGNER, INTERNATIONAL AIR TRANSPORTATION AS AFFECTED BY STATE SOVEREIGNTY 175 (1970):

> It is, of course, evident that aviation being the most international of all means of transportation, it requires a complete standardization, a uniformity of national legislations under an international set of rules to be applied to the air space. The air is an international public domain; it has to serve all nations, be freely accessible to them, and should be managed by the whole civil community.

[20] Convention on International Civil Aviation, signed at Chicago on December 7, 1944, 61 Stat. 1180 (1947). Article 1 of the Chicago Convention provides: "The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory."

the citizens of which countries under what circumstances and which tribunals should apply that law. The Warsaw Convention attempts to resolve these questions in a uniform manner[21] and additionally to provide uniformity in the form and content of the various documents of international air carriage. Most importantly, Warsaw has established a uniform rule of liability which imposes upon the carrier a presumption of liability for damages in case of an accident, but limits that liability to a specific amount.[22] It was hoped that this uniform rule would protect all international travellers from widely varying rules relating to liability throughout the world. Although the arbitrary imposition of liability and its limitation are departures from the ordinary rules of liability in the United States and other countries, Warsaw's framers recognized the desirability of providing for speed, sufficiency and certainty of recovery in these multinational aviation situations.[23]

Having adhered to the Warsaw Convention, the United States formally espoused the Convention's goal of uniformity. Additionally, the Federal Aviation Act of 1958 establishes that the actions of the CAB must be consistent with all treaties, conventions and agreements to which the United States is a party.[24] The *Lufthansa* decision poses serious questions in terms of international law and foreign policy with regard to the sometimes conflicting roles of the CAB, the International Air Transport Association and the United States State Department.

The CAB, as an administrative agency, owes its existence to the

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[21] 1 C. SHAWCROSS & K. BEAUMONT, AIR LAW 42-43 (3d ed. 1969) [hereinafter cited as SHAWCROSS & BEAUMONT]:

> The convention of Warsaw consists of a code which lays down certain conditions of contract for international carriage. It defines and limits the rights of passengers and owners of cargo in such carriage, and the corresponding liabilities of the carrier. It regulates the enforcement of those rights. It imposes upon the carrier a limited liability in most cases of accident or delay. . . .

[22] Article 22 of the Warsaw Convention limits that liability to approximately $8,300.

[23] *See* G. ORR, THE PROPOSED WARSAW CONVENTION REVISION 7-10 (1953).

[24] Federal Aviation Act of 1958, 49 U.S.C. § 1502 (1972) provides:

> In exercising and performing their powers and duties under this chapter, the Board . . . shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

Federal Aviation Act of 1958;[25] its powers, duties and the scope of its authority are necessarily limited by that Act. Due to the Act's inherent ambiguities, there has been variance in the interpretation of many of its broadly-worded powers and duties. The CAB has therefore been recognized as "a peculiar mixture of court, legislature, and political advisor."[26] Although decisions of the Board are normally reviewable by the courts,[27] it is questionable how objective a review of a CAB decision regarding the Warsaw Convention can be, realizing the judicial tendency to give great weight to the decisions of the expert, specialized administrative agencies and the judicial trend toward avoiding application of the limited liability provisions of the Warsaw Convention. These two factors lend strong judicial support to an extension of CAB authority.

The court of appeals in *Lufthansa* acted consistently with this extension when it found authority of the CAB's promulgation of the regulation in question by combining sections 204(a) and 403(a) of the Federal Aviation Act of 1958.[28] The combination and extension of these two sections, however, ignores two important factors. First, section 403(a) refers only to the tariffs that the carriers must file with the CAB. The court of appeals recognized that the economic regulation in question deals with passenger tickets, not tariffs, but indicated that the distinction was not a meaningful one because the filing of tariffs and making them available to public inspection would allow the CAB to control all notice to the public of all conditions of carriage.[29] This reasoning could enable the CAB to impose considerable administrative and financial burdens on air carriers by requiring the multivolume tariffs to be printed for distribution to every air traveller. The second factor not considered by the court of appeals in *Lufthansa* is that the specific notice requirement of the regulation relates only to the limitations on liability for baggage. Limitations for baggage are commonplace in domestic transportation in the United States, and if the limitations are properly filed by the carriers with the CAB, passengers

[25] Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1972). The CAB was originated in the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

[26] Calkins, *Appeals from Actions of the Civil Aeronautics Board (U.S.A.) Involving Foreign Air Carriers*, 1966 YEARBOOK OF AIR & SPACE LAW 32, 33.

[27] *Id.* at 33-55.

[28] *See* Federal Aviation Act of 1958, 49 U.S.C. §§ 1324(a) & 1373(a) (1972).

[29] 479 F.2d at 919.

are bound by them whether or not they have knowledge of the conditions enumerated in the tariffs.[30] Limits on liability relating to baggage losses have not been subject to the same public policy arguments that have arisen against limits for death or injury. The new CAB regulation discussed in *Lufthansa* creates a nonuniform, discriminatory system of baggage liability notification that places an arbitrary burden on international transporters while doing nothing to alleviate the same problem of notice to passengers on domestic flights.

The CAB regulation at issue in *Lufthansa* also conflicts with the policy of the United States toward the International Air Transport Association. IATA is a voluntary trade association whose members consist of various airlines around the world. It was created to deal with the problem of implementing the broad goal of uniformity in international aviation law pursuant to the Warsaw Convention. A forum was needed that would be more flexible and responsive to the rapidly-developing aviation industry than could possibly be derived from the more cumbersome system of diplomatic conferences among governments. The organization thus allows "carriers themselves to perform the function [of an international CAB] while leaving to individual governments the opportunity of policing these agreements. . . ."[31] Resolutions passed by IATA and agreed to among its member airlines do not immediately become effective; they must be given approval by the individual governments affected before they can be implemented.[32]

IATA has been concerned primarily with international rate setting, but has also been responsible for establishing uniform transportation documents including passenger tickets, baggage checks and wayfare bills.[33] Although the format and content of IATA tickets have been approved by the CAB, American courts still have the option to disapprove the tickets if it is found that they

[30] *See* Herman v. Northwest Airlines, 222 F.2d 326 (2d Cir. 1955); Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); Mao v. Eastern Airlines, Inc., 310 F. Supp. 844 (S.D.N.Y. 1970).

[31] Bebchick, *The International Air Transport Association and the Civil Aeronautics Board*, 25 J. AIR L. & COM. 8 (1958).

[32] For a detailed discussion of IATA *see* R. CHUANG, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (1972).

[33] 1 SHAWCROSS & BEAUMONT 345: "all IATA members are *obliged* to use a standard form of air consignment note, passenger ticket and luggage ticket." Details of these documents are set out therein at 482-94.

do not give adequate notice to passengers of liability limitations.[34]

The CAB regulation in *Lufthansa* circumvents the IATA decision-making mechanism entirely, thus removing any sort of multilateral sanction to the CAB regulation. This action by the CAB is not consistent with other events to which the United States was a party. For instance, the United States established a precedent in 1966 for working through IATA in altering the notice provisions of Warsaw's limitations on liability for death or injury to passengers by cooperating in the creation of the Montreal Agreement.[35] The Montreal Agreement is the result of long and complex negotiations among IATA members and their respective governments. The crucial issue confronting the negotiators was the limitation on liability for death or injury to international passengers, the resolution of which through agreements among national governments had become impossible; the United States had threatened to denounce the Warsaw Convention entirely because of the issue.[36] On the eve of the American denunciation's becoming effective, IATA was able to provide a voluntary solution compatible with the interests of all the parties, albeit temporary, until new international negotiations could take place. In addition to raising the limitations on liability of international carriers having a stopping place in the United States, the Montreal Agreement included a provision requiring notice on passenger tickets that can be compared with the notice required pursuant to the CAB regulation at issue in *Lufthansa*. The notice provisions of the Montreal Agreement deal only with the death or injury limitations; it is of note, however, that the size type and the language requirements are identical to those of the CAB regulation.[37] Far from indicating any

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[34] *See* Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions: The Warsaw Convention's Days in Court*, 21 INT'L & COMP. L.Q. 718, 731 n.42 (1972).

[35] CAB Agreement No. 18990, approved by CAB Order No. E-23680 (May 13, 1966) [hereinafter cited as Montreal Agreement].

[36] The threatened U.S. denunciation of Warsaw and the other events precipitating the Montreal Agreement are given extensive treatment in A. LOWENFELD, AIR LAW, ch. 6, 88-138 (1972).

[37] The Montreal Agreement provides:

> 2. Each carrier shall, at the time of delivery of the ticket furnish to each passenger . . . the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket . . .
>
> Advice to International Passenger on Limitation of Liability

desire on the part of the international carriers to couch the notice of limited liability in obscure, minute terms, the Montreal Agreement indicates a voluntary willingness on the part of the carriers to impose on themselves the obligation to provide notice sufficient to advise international passengers of the limitations. A serious question is thus raised by the CAB's unilateral issuance of the instant regulation after the United States recognized and worked through an established diplomatic channel, IATA, to obtain successfully the desired degree of notice to passengers only five years earlier.

Another conflict is presented by the CAB regulation which brings into question the role of the CAB in relation to that of the United States State Department. The Montreal Agreement was an effective means for reaching an immediate, but temporary result. The airlines, realizing that a permanent modification of the terms of the Warsaw Convention could only come to fruition through diplomatic conferences and the amending procedure which the Convention itself provides,[38] recognized the Agreement's temporary nature. While the challenged CAB regulation was being promulgated, the State Department was deeply involved in the international conference which the Montreal Agreement had anticipated. The Guatemala Protocol was the result of that conference, and, by its terms, the Warsaw Convention is modified specifically to exclude any notice requirements to passengers at all.[39] The Protocol

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> Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of . . . the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, . . . the liability of certain . . . carriers . . . for death of or personal injury to passengers is limited in most cases to . . . US $75,000. . . . For such passengers travelling . . . on a journey not to, from, or having an agreed stopping place in the United States, liability . . . is limited in most cases to approximately US $8,290 or US $16,580.

[38] Article 41 of the Warsaw Convention provides:

> Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. . . .

[39] A Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929, as Amended by the Protocol Done at The Hague on September 28, 1955, ICAO Doc. No. 8932 (1971). *See* 10 INT'L MATERIALS 613-16 (1971).

has not yet been implemented in the United States, but the American delegates did sign it, and were in fact the leading figures in the Protocol's formulation.[40] That two divisions of the United States government could be simultaneously working on their own, inconsistent ideas of uniformity in international civil aviation seems incongruous and unnecessary.

The desirability of notifying passengers on international flights that the liability of the airline for loss of, damage to or delay in delivery of their baggage is limited cannot be denied, nor can the couching of the terms of this notification in miniscule print be endorsed. In order to obtain this goal, however, the CAB had other means available to it that would be far more compatible with the United States' position as a signatory nation to the Warsaw Convention than was the promulgation of the instant regulation. Included among these alternatives are amending the Warsaw Convention as provided in its text and working through IATA as was done with the Montreal Agreement. The latter alternative would provide for an internationally acceptable interim agreement until the proper amendment to Warsaw could take place. Thus, more uniformity of interpretation of the Warsaw Convention and of the form of passenger tickets, as well as the certainty of all passengers on international journeys receiving adequate notice, would have been achieved. The CAB regulation challenged by *Lufthansa* represents an unwarranted effort on the part of the United States to usurp control over international aviation.

The court of appeals in *Lufthansa* had only two alternatives—to uphold the CAB's regulation or not. In choosing to uphold it, the court has brought into question once again[41] the good faith

[40] *See* Fitzgerald, *The Guatemala City Protocol to Amend the Warsaw Convention*, 9 CAN. YEARBOOK INT'L L. 219 (1971) and Boyle, Kreindler & McPherson, *The Guatemala Protocol: Three Views*, 6 AKRON L. REV. 123 (1973).

[41] American judicial manipulation of the Warsaw Convention has engendered much criticism from foreign writers. *See, e.g.*, Mankiewicz, *Irregularité des documents de transports prescrits par la Convention de Varsovie*, 8 DROIT EUROPÉEN DES TRANSPORTS 200 (1973); Mankiewicz, *The Judicial Diversification of Uniform Private Law Conventions: The Warsaw Convention's Days in Court*, 21 INT'L & COMP. L. Q. 718 (1972); Beaubois, *The Air Carrier's Unlimited Liability Under the Warsaw Convention and the Hague Protocol*, ITA Study No. 1969/8-E (1969); de la Pradelle, *Varsovie de nouveau en question*, 1966 REVUE GÉNÉRALE DE L'AIR ET DE L'ESPACE 10; Le Goff, *La jurisprudence des Etats-Unis sur l'application de la Convention de Varsovie*, 1956 R.G.A.E. 339 and 1957 R.G.A.E. 352.

Of the one hundred and five nations adhering to the Warsaw Convention, only

and credibility of the United States as a party to the Warsaw Convention and, because it was expedient, has sacrificed the unification of international aviation law.

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Canada has followed the United States' lead in circumventing the limitations imposed by the Convention. *See* Montreal Trust Co. v. Canadian Pacific Air Lines, Ltd., 12 Av. Cas. ¶ 17,197 (Montreal Super. Ct. Dec. 31, 1971), and Ludecke v. Canadian Pacific Air Lines Ltd., 12 Av. Cas. ¶ 17,191 (Montreal Super. Ct., December 7, 1971).

The dissent in the *Lisi* case, note 8 *supra*, summarized the problems posed by the approach taken by the courts toward the Warsaw Convention at 370 F.2d 508, 515:

> The majority here do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that a passenger have notice of the limitation of liability . . . . The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views should not prevail over the limitations fixed by the legislative and executive branches of the Government. . . .

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