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Case Notes

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DENIED BOARDING—THIRD PARTY DAMAGE AWARD—A Non-Ticket Holder Awaiting her Husband's Arrival at the Airport Was Entitled to Damages Under Section 404(b) of the Federal Aviation Act for the Emotional Distress Suffered When She Was Given No Valid Explanation by the Air Carrier for her Husband's Failure to Arrive on Schedule. Mason v. Belieu, ------- F. Supp. -------, 13 Av. L. Rep. 17, 114 (D.D.C. 1974)

Mason, an engineer who was attempting to return to Panama from Miami after having been forcibly deported earlier in the day, was denied passage by Pan American Airlines. His rather bizarre behavior on the deportation flight, such as refusing to leave the plane so that police had to carry and place him in a wheelchair and his calling of an airport news conference to air his grievances, resulted in a refusal of carriage on a Panama-bound flight for which he held a ticket. Mason subsequently made passage on another airline and arrived in Panama two hours behind schedule.

Mason's wife, who was waiting in Panama, made inquiries of the carrier as to the whereabouts of her husband when he failed to appear on his scheduled flight, but her questions were unanswered. Subsequently, Mason and his wife brought a *pro se* suit seeking compensation for mental distress and severe inconvenience caused by failure to transport Mason and for the emotional distress suffered by Mrs. Mason as a result of her husband's unexplained delay.[1] Although the suit sounded in both tort and contract, it was treated by the court[2] as stating a cause of action under the anti-discrimination provision of the Federal Aviation Act of 1958.[3]

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[1] A claim of the Masons' daughter, Lark Mason, was dismissed at pretrial. Her sole contact with the case was a call from her father in Miami stating that he would be on a later flight. Lark related this information to her mother when her mother called home after not finding her husband on the Pan American flight.

[2] Mason v. Belieu, — F. Supp. —; 13 AV. L. REP. 17,114 at 17,117 (D.D.C. 1974).

[3] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970), *formerly* Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 [hereinafter referred to as "the Act"].

The court found that section 1111 discretion,[4] the authority to refuse passage, was unreasonably exercised, that discrimination was present as comprehended by section 404(b),[5] the anti-discrimination provision, and that Mr. Mason was entitled to actual but not punitive damages for the outrage and humiliation he suffered in violation of his right to passage aboard a common carrier.[6] More importantly, the court expanded the application of section 404(b) with respect to third parties. *Held:* A non-ticket holder who was awaiting her husband's arrival at the airport was entitled to damages under section 404(b) of the Federal Aviation Act for the emotional distress suffered when she was given no valid explanation by the air carrier for her husband's failure to arrive on schedule. *Mason v. Belieu,* 13 Av. L. Rep. 17, 114 (D.D.C. 1974).[7]

Under section 1111 of the Act,[8] any carrier, subject to reasonable rules and regulations, may refuse passage or transportation when in the opinion of the carrier such transportation would be inimical to the safety of the flight. On the other hand, section 404(b) of the Act provides that no carrier shall subject a person, port, or locality, to any unjust discrimination or unreasonable prejudice or disadvantage in any respect whatsoever.[9] No court, prior to *Mason,* has awarded damages to a third party, non-passenger, non-ticket holder under the anti-discrimination provision of the Act. This novel holding is to be distingiushed from *Nader v. Allegheny Airlines,*[10] where the court awarded damages

[4] 49 U.S.C. § 1511 (1970).

[5] 49 U.S.C. § 1374(b) (1970).

[6] 13 Av. L. Rep. at 17,118.

[7] *Id.*

[8] 49 U.S.C. § 1511 (1970).

[9] 49 U.S.C. § 1374(b) (1970).

[10] Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973), *rev'd,* — F.2d — (D.C. Cir. 1975). The *Nader* case referred to throughout this note is the lower court opinion. This opinion was reversed on May 2, 1975. The Second Circuit held that the findings of fact with respect to Nader's 404(b) recovery were based on erroneous legal conclusions regarding the application of section 404(b) to the carrier's priority rules for "bumped" passengers. The court held that Nader's recovery on the basis of fraudulent misrepresentation would be reversed and stayed until a determination be made by the C.A.B. whether Allegheny's practices were deceptive.

The third party award on the basis of fraudulent misrepresentation was reversed, the court holding that even if the practices were fraudulent, the third party was not within the class which could recover.

To the extent that the third party award in *Mason* is based on *Nader, Mason* cannot stand on appeal. However, the *Nader* appeals court never addressed

to the third party on the basis of an intentional tort. Section 404(b), enacted in 1938 as part of the Civil Aeronautics Act, and adopted in full in the Federal Aviation Act of 1958, provides that:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever.[11]

Examination of legislative discussions on section 404(b) and case treatment of the section reveals that the intended scope of the statute has been broadened through judicial interpretation.[12] Section 404 is entitled "rates for carriage of persons and property,"[13] and the 400 series of sections is entitled "Air Carrier Economic Regulations."[14] Considering the titles of these sections, and statements by the court in *Wills v. Trans World Airlines*,[15] there is nothing to show that the original intent of the section was other than that the section have application to cases of economic preferences in terms of rate differentials between persons, not to cases in the current "civil rights" sense.[16] The court in *Wills* recognized the

squarely the issue of a third party recovery under 404(b), which is the proposition for which *Mason* stands. Such a theory is even more tenuous than the theory argued in *Nader* and leads to the conclusion that *Mason* will similarly not stand on appeal.

[11] 49 U.S.C. § 1374(b) (1970).

[12] *See* Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956); Williams v. Transworld Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975); Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973), *rev'd* — F.2d — (2d Cir. 1975); Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961); *see also* H.R. REP. No. 2635, 75th Cong., 3d Sess. 3 (1938), where the House managers submitted the Senate substitute bill (S. 3845) in place of the House proposal. In summarizing the differences in the two bills, the managers concluded that Senate sections 403 and 404(b) were comparable to House section 404 entitled "Tariffs of Air Carriers."

[13] 49 U.S.C. § 1374 (1970).

[14] 49 U.S.C. §§ 1371 *et seq.* (1970).

[15] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 363 (S.D. Cal. 1961). The court stated there that "[f]ew guidelines exist to aid in determining what is 'undue or unreasonable preference' and 'unjust discrimination' within the meaning of the Act. No explanation of these terms appears in the record of pre-enactment Congressional debate, which dealt largely with the question of whether air regulation should be under the basic control of the Interstate Commerce Commission or, as proposed, under a separate authority." *Id.* at 363.

[16] *See* cases cited note 12 *supra*.

paucity of congressional guidance in understanding the intent of section 404(b). The court pointed out that the legislative history of section 404 dealt largely with the question of control of air transportation rather than a delineation of guidelines for determining what constituted a section 404(b) violation.[17] The economic focus of the statute,[18] however, has been expanded to provide a cause of action for discrimination in any form.[19]

Section 1111, concerning authority to refuse transportation, was enacted in 1961 and was added to the 1958 Act under a subchapter entitled "Miscellaneous."[20] It provides:

> Subject to reasonable rules and regulations prescribed by the Administrator, any air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when, in the opinion of the air carrier, such transportation would or might be inimical to the safety of the flight.[21]

There has been a similar lack of consideration by the courts and the Congress of this statute and its possible concurrent operation with section 404(b). Section 1111 was enacted together with a number of criminal statutes as part of an anti-hijacking bill, and was added to the 1958 Act.[22]

The common law rules upon which these statutes are based[23] have long been that the carrier was bound to receive for carriage, without discrimination, all proper persons who properly present themselves for passage.[24] On the other hand, the carrier could refuse passage to those who were believed to endanger the safety of the other passengers,[25] to whom the carrier owes a high duty of

[17] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 363 (S.D. Cal. 1961).

[18] *See* cases cited note 12 *supra.*

[19] Analogizing to the Interstate Commerce Act, this is the conclusion of the court in Wills v. Trans World Airlines, Inc., 200 F. Supp. at 363. This is relied on in Mortimer v. Delta Air Lines, 302 F. Supp. at 279.

[20] 49 U.S.C. § 1511 (1970).

[21] *Id.*

[22] *Id.*

[23] *See* cases cited notes 24, 25, 26 *infra.*

[24] *See also* Casteel v. American Airways, 261 Ky. 818, 88 S.W.2d 976 (1935); Hannibal R.R. v. Swift, 79 U.S. (12 Wall.) 262 (1870); Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S.W.2d 356 (1931).

[25] *See* cases cited note 24 *supra*; Connors v. Cunnard S.S. Co., 204 Mass. 310, 90 N.E. 601 (1910); Owens v. Macon & B.R. Co., 119 Ga. 230, 46 S.E. 87 (1903). *See also* Pearson v. Duane, 71 U.S. (4 Wall.) 605 (1866), where it was held that a common sea carrier may refuse to accept as a passenger a person

care.[26] The practical operation of these rules was that a person wrongfully excluded had an action for damages, but the carrier could defend against the action by offering evidence justifying the exclusion.[27] Sections 1111 and 404(b) work in the same way.[28] Therefore the logical way to challenge the validity and existence of section 1111 authority is to bring an action alleging discrimination under section 404(b).[29] The more reasonable the carrier's belief of danger in exercising section 1111 authority, the less likely that the carrier will be held liable for discrimination.[30] While a mere assertion that passage was denied on the basis of section 1111 authority will not exculpate the carrier from possible liability in a 404(b) action, if evidence justifying refusal is presented, and there exist no material controverted facts, defendant will be entitled to summary judgment.[31] For example, in *Mason*, the section 1111 clause and a clause exculpating carrier from liability when passage was refused were part of the carrier's tariff and therefore part of the contract between carrier and passenger.[32] The reasonableness of the carrier's belief that exclusion was proper, however, was subject to consideration in a 404(b) action. In *Williams v. Transworld Airlines*,[33] where a fugitive from justice was denied passage and brought an action under section 404(b), the court took this point of view noting that tariff restrictions do not allow acts which con-

who has been forcibly banished and expelled from a jurisdiction when the bringing back and landing of such person would cause difficulty. There the passenger was under threat of death if he was to return.

[26] *See generally* Michell v. N.Y. Lake Erie and Western R.R. Co., 146 U.S. 513 (1892); Wilson v. Capital Airlines, 240 F.2d 492 (4th Cir. 1957); Annot., 73 A.L.R.2d 346 (1960); Annot., 50 A.L.R.2d 1072 (1956); Annot., 32 A.L.R. 1190 (1924).

[27] S. Louis, I.M. & S. Ry. Co. v. Lawrence, 100 Ark. 544, 153 S.W. 799 (1913); *see* Williams v. Transworld Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975).

[28] *See generally* Williams v. Transworld Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975).

[29] Williams v. Transworld Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975).

[30] *Id.*

[31] *See* Motion for Summary Judgment for Defendant at 2-4, Mason v. Pan American World Airways, Civ. Action No. 1340-73 (D.D.C. 1973).

[32] Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401 (2d Cir. 1969); Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); *see* Rule 15(B), C.A.B. Tariff No. PR-6 (1972).

[33] Williams v. Transworld Airlines, Inc., 369 F. Supp. 797 (S.D.N.Y. 1974), *aff'd*, — F.2d — (2d Cir. 1975).

stitute discrimination as contemplated by section 404(b).[34] Therefore, section 1111 is a defense to a section 404(b) action.

The cause of action for discrimination under the Act was first recognized in *Fitzgerald v. Pan American World Airways.*[35] In *Fitzgerald* the carrier refused to transport several black ticket holders and a white passenger who was traveling with them. The United States Court of Appeals for the Second Circuit found a cause of action in the Act for the ticket holders, and remanded for a damage determination. Although *Fitzgerald* dealt with an award to passengers, there is a possible hint that section 404(b) might have application to third parties. The court says, "[t]he latter section is for the benefit of persons, including passengers, using the facilities of air carriers."[36]

Since *Fitzgerald,* however, the anti-discrimination provision has found its greatest application in the passenger "bumping" cases. These cases, relying on the federal cause of action granted in *Fitzgerald,* have recognized a right to relief under the Act when a *prima facie* case of discrimination is made out.[37] The "bumping" cases had dealt only with providing a remedy for the aggrieved passenger until a third party recovered in *Nader v. Allegheny Airlines*[38] in 1973. In *Nader* not only did the ticket holder receive compensatory and punitive damages under section 404(b), but the citizens' group which Nader was unable to address due to his late arrival recovered nominal and punitive damages for their misplaced reliance on the carrier's representation that Nader would be transported.[39] The court reasoned that Allegheny held itself out and represented to the public that it uses a reservation system which will assure a guaranteed seat to a passenger who properly con-

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[34] *Id.* at 803.

[35] Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956).

[36] *Id.* at 501. It is this statement that gives rise to the belief that section 404(b) might have application to the third party situation. This statement may not allow the interpretation if "persons" modifies "using the facilities." It is possible that Mrs. Mason was using the carrier's facilities by being on the carrier's premises. However, neither the original intent nor the subsequent use of the statute in the cases has applied the section in this manner until Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973), *rev'd,* — F.2d — (D.C. Cir. 1975).

[37] *See* Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128, 132 (D.D.C. 1973), *rev'd,* — F.2d — (D.C. Cir. 1975).

[38] *Id.*

[39] *Id.* at 132-33.

firms his reservation.[40] The public is entitled to rely on such representations and to recover if injured by misrepresentation.[41]

The award to Ralph Nader individually was based on section 404(b) and was in line with the previous cases which awarded damages for unreasonable discrimination. The third party award in *Nader* was not, however, based on section 404(b). The third party damage award in *Nader* was based on the tort of intentional misrepresentation, a tort directly against the third party. As Prosser discusses, there is development in the law toward allowing recovery by third persons who have relied on defendant's misrepresentation.[42] The *Nader* court spoke of a legal duty which was violated by an intentional misrepresentation that affected a class of foreseeable plaintiffs such that recovery was proper.[43] This muddled negligence/intentional tort theory gives recovery to the third party outside of section 404(b). The significance of *Nader* vis-a-vis *Mason* lies in a mistaken application of the *Nader* third party damage analysis by the *Mason* court. The distressing aspect of *Mason* is that it seems to be authority for the proposition that a third party may recover for discrimination against another. Notwithstanding the hint in *Fitzgerald* that the remedy might be available to third parties, it is questionable that the *Mason* decision is properly supportable on section 404(b) alone, if at all.

The court in *Mason* stated that "although these facts may justify relief in contract or tort, the Court will follow the usual practice of treating such cases as stating a cause of action under the more generous antidiscrimination provision of the Federal Aviation Act of 1958, Section 404(b), 49 U.S.C. § 1374(b)."[44] Before concluding that plaintiff could recover, however, the court stated:

> Mrs. Mason's injuries were genuine but slight. . . . [S]he did not learn of her husband's late flight until more than an hour after . . . and during that period she was given no valid explanation for her husband's failure to arrive on that flight to counter her fears. . . .

[40] *Id.*

[41] *Id.*

[42] *See* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 246, 250 (1966); *see generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 105-10 (4th ed. 1971). The development is largely with respect to the commercial business context, but had application to *Nader* because the plaintiffs were in the class to which defendant had a duty.

[43] 365 F. Supp. at 133.

[44] 13 AV. L. REP. at 17,117.

> This emotional distress was directly and foreseeably caused by Pan American's actions, and justifies an award. . . .[45]

The difficulty in analyzing the third party recovery in *Mason* stems from the inability to determine the theory which plaintiffs pursued. The plaintiffs' action was *pro se* and the court allowed the parties great latitude in their compliance with the pleading details in which an attorney would demonstrate greater proficiency.[46] It is lack of specificity which makes interpretation of *Mason* especially difficult. The court equivocally states that a joint cause of action exists under section 404(b) but uses language of negligence and intentional tort before providing the third party with a remedy. The court is reluctant to base the third party award solely on the violation of a federally created right despite the fact that this is the proposition for which *Mason* improperly stands. It is possible that an incorporation of the *Nader* third party theory is to be assumed in *Mason*. In that situation *Mason* would not be significant except as a logical extension of *Nader*. Rather, *Mason* is independently significant insofar as it stands for a third party recovery based on an expansion of 404(b) coverage and not merely a following of *Nader*. Supporting this view is the fact that Mason and his wife were joint plaintiffs on a section 404(b) cause of action.[47]

Passengers have traditionally had a cause of action for injury in many forms; non-passengers, like Mrs. Mason, might recover for an act of direct tortious injury. Since the court was reluctant to summarily extend section 404(b) coverage, the court found it necessary to buttress the statutory third part recovery with additional support from the tort law.

If the necessary elements were present, it is clear that Mrs. Mason could recover exclusive of the statute for tortious conduct directed towards her on the basis of traditional tort concepts.[48] A *prima facie* case of intentional misrepresentation is made out by showing a misrepresentation by defendant, scienter, intent to in-

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[45] *Id.* at 17,118.

[46] A *pro se* action is one where the plaintiffs pursue their action without the assistance of counsel. In the present case the court went out of its way to allow the plaintiffs to pursue their action. In essence, the court fashioned plaintiffs' relief for them.

[47] Mason v. Belieu, 13 Av. L. Rep. at 17,117.

[48] Here the suggestion is that Mrs. Mason as the victim of a direct tortious act would have a traditional action for negligence or intentional tort.

duce plaintiff's reliance, justifiable reliance by plaintiff, causation, and damages.[49] In *Nader* the court held that the third party had made this case and thus was entitled to recover.[50] The facts in *Mason*, however, do not meet the criteria for this tort. First of all, there was no representation at all.[51] While a fraudulent concealment may be a basis for an action in misrepresentation, the defendant is usually under no duty to disclose the facts which he knows.[52] Secondly, there was no scienter, intent, or reliance in *Mason*. Finally, there is a serious problem with the requirement of damages. Prosser states that misrepresentation requires "that the plaintiff must have suffered substantial damage before the cause of action can arise."[53] The damages "must be established with a reasonable certainty and must not be speculative or contingent."[54] In fact, Prosser states that the "tort action carries a measure of damages based to the extent to which the plaintiff is out of pocket as a result of the misrepresentation."[55] The *Mason* court, in contrast, stated that Mrs. Mason suffered no "out of pocket expenses."[56]

Mrs. Mason might also have proceeded on the basis of a negligent misrepresentation, an action which, as Prosser discusses, differs from intentional misrepresentation only in regard to the defendant's duty of care.[57] The cases in this area are generally concerned with representations made by those in the business of supplying information for the guidance of others in business transactions, whose information is expected to be relied upon.[58] Again, the major stumbling block for the plaintiffs in the present case is that no representations were made at all. Furthermore, the general rule is that an action will not lie for tacit nondisclosure in the area of intentional misrepresentations.[59] This rule is similarly followed in negligent nondisclosures.

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[49] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 105 (4th ed. 1971).

[50] 365 F. Supp. 128 (D.D.C. 1973), *rev'd*, — F.2d — (D.C. Cir. 1975).

[51] 13 AV. L. REP. 17,117.

[52] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 106 (4th ed. 1971).

[53] *Id.* § 110.

[54] *Id.*

[55] *Id.*

[56] 13 AV. L. REP. 17,118.

[57] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 107 (4th ed. 1971).

[58] *Id.*

[59] *Id.* at § 106.

In either type of misrepresentation action recovery for emotional disturbance is extremely difficult. The intentional act causing the emotional distress must be the cause in fact and proximate cause of a severe emotional disturbance, which in turn is the cause in fact and proximate cause of physical injuries.[60] Alternatively, some courts have dispensed with the requirement of physical injury if defendant's conduct is sufficiently outrageous.[61] Regardless of the view, however, the facts in *Mason* do not fit the requirements for these actions. Nor do the facts give rise to emotional distress damages resulting from a negligent act. The general rule here is that ordinarily without physical injury there can be no recovery.[62] "The temporary emotion of fright," states Prosser, is usually not compensable in the negligence situation as distiguished from the intentional outrageous conduct cases.[63] Exceptions to the rule requiring physical injury in the negligence cases have developed in the negligent transmission of a message and the negligent mishandling of corpses; both are cases where there is a definite likelihood that mental distress would result.[64]

For reasons similar to those discussed above, it is difficult to understand how Mrs. Mason could have recovered for intentional or negligent infliction of mental distress. Carriers have been held liable for intentional infliction of mental distress,[65] but those cases involved an affirmative act as opposed to a failure to act as in *Mason*. While the law has allowed third party recovery for intentional infliction of mental distress,[66] those recoveries have generally been limited to cases of physical injury where the plaintiff was present.[67] In *Mason* there is no physical harm or language which

[60] Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939).

[61] State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952).

[62] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 54 (4th ed. 1971).

[63] *Id.*

[64] *Id.*

[65] The first cases were based on an implied contract to be polite. Bleeker v. Colo. & S. Ry., 50 Colo. 140, 114 P. 481 (1911); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899). The cases then awarded damages where no resultant physical injury; *see* Humphrey v. Mich. United Ry., 166 Mich. 645, 132 N.W. 447 (1911); Lipman v. Atl. Coast Line R.R., 108 S.C. 151, 93 S.E. 714 (1917).

[66] W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 12 (4th ed. 1971).

[67] *Id.* Those cases indicate that there have been no recoveries for intentional infliction of emotional distress where plaintiff was not present.

meets the "outrageous conduct" standard articulated by the courts. Furthermore, the requirement of an "act" is not met. Mrs. Mason would also have been unable to make out a *prima facie* case of negligent infliction of emotional distress. Although the "act" requirement may be satisfied by an omission to act, it is difficult to find a duty on the part of the carrier towards Mrs. Mason. The general rule here is that the failure to use due care must subject plaintiff to actual impact or the threat of physical impact.[68] Although the cases impose a high duty of care to passengers, the person attending a passenger is generally regarded as a business invitee or licensee and owed a duty of ordinary care.[69] Those holdings, if they apply, dealt with defects and dangers causing injury and are inapplicable, without tenuous expansion to a situation of emotional distress without physical injury.[70]

A passenger traditionally has had a cause of action for a breach of contract of passage and the emotional distress resulting therefrom.[71] The passenger also has had a damage action for delay but only for those damages which were reasonably within the contemplation of the carrier at the time of the making of the contract.[72]

[68] Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935). *See* cases cited at n.93 in W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 54 (4th ed. 1971).

[69] Kircher v. Atchison, T. & S.F. Ry., 32 Cal. 2d 176, —, 195 P.2d 427, 434 (1948); *see generally* McCann v. Anchor Line, 79 F.2d 338 (2d Cir. 1935); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 60-61 (4th ed. 1971); Annot., 92 A.L.R. 614 (1934). *See also* Suarez v. Trans World Airlines, Inc., 498 F.2d 612 (7th Cir. 1974), where the court held that the air carrier is obligated to exercise a high degree of care not only in the transit stage of its operation, but in the ticket-selling stage as well. Suarez did, however, intend to become a passenger, a fact not present in the *Mason* case.

[70] As to the cases above which apply to non-passengers, they all deal with defects and dangers and resultant injuries which are not present in *Mason.*

[71] *See* Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961); Southeastern Greyhound Lines, Inc. v. Freels, 176 Tenn. 502, 144 S.W.2d 743 (1940); Bonner v. Pullman Co., 160 S.C. 631, 159 S.E. 382 (1931); Illinois Cent. R. Co. v. Hawkins, 114 Miss. 110, 74 So. 775 (1917); Annot., 76 A.L.R. 927 (1932).

[72] *See, e.g.*, Morris v. Colorado Ry. Co., 48 Colo. 147, 109 P. 430 (1910). *But see* Killian v. Frontier Airlines, Inc., 150 F. Supp. 17 (D.C. Wyo. 1957); Trammel v. Eastern Air Lines, 136 F. Supp. 75 (W.D.S.C. 1955); Jones v. Northwest Airlines, Inc., 22 Wash. 2d 863, 157 P.2d 728 (1945). *See* note 32 *supra* where it is suggested that the clause exculpating for failure to transport is merged into the contract at time of purchase. The court in *Wills* found emotional distress compensable for violation of a right, 200 F. Supp. at 366, and the court in *Williams* intimated that reasonableness of section 1111 authority was subject to judicial review, and not final according to the opinion of the FAA Administra-

Here, it is questionable whether the parties would contemplate that the breach would result in emotional distress to a third party.[73] Furthermore, Mrs. Mason does not qualify as a third party beneficiary under her husband's contract with the carrier and thus cannot recover on that basis.

It is evident that Mrs. Mason could not recover on the basis of direct tortious injury as did the third party in *Nader*. Rather, the court in *Mason* improperly grounded the third party section 404(b) recovery on the discriminatory acts toward the ticket holder as well as the failure to provide information to the third party.[74] That is, discrimination against the passenger resulted in third party fears which were held actionable under section 404(b).[75]

Analysis of the theories reveals two possible views of the *Mason* holding. Either the third party is a victim of a direct tortious act and entitled to recovery on that basis, or on the other hand, discrimination toward the ticket holder causes circumstances of distress for which the third party has a cause of action under section 404(b). While the first theory merely follows the *Nader* analysis, the latter, relied upon by the court in *Mason*, expands the statutory coverage[76] and stretches traditional tort analysis to reach the result.

The *Mason* court improperly cited *Nader* for the proposition that the victim of an intentional tort or a negligent act is covered by section 404(b); the third party in *Nader*[77] recovered exclusive of the statute.[78] In *Mason* it is evident that the third party could not recover on the basis of tort concepts. Even if the tort elements were present, however, the applicability of section 404(b) would still remain since the parties were in court on the basis of a section

tor. While the court does not explicitly state this conclusion, the holding implies it. 369 F. Supp. at 803.

[73] The third party here does not fall into a category of beneficiaries having rights under the contract. *See* RESTATEMENT OF CONTRACTS §§ 133, 147 (1932). Nor does the party fall into the RESTATEMENT (SECOND) OF CONTRACTS formulation of intended beneficiaries.

[74] A line of railroad cases established that passengers must be provided with information to enable them to safely make their journey. *See* Hassletine v. Southern Ry. Co., 75 S.C. 141, 55 S.E. 142 (1906); Appleby v. St. Paul City Ry. Co., 54 Minn. 169, 55 N.W. 1117 (1893).

[75] 13 AV. L. REP. at 17,117 (1974).

[76] *See* cases cited note 12 *supra*.

[77] 365 F. Supp. at 132-33.

[78] 13 AV. L. REP. 17,114, 17,118 (1974).

404(b) cause of action.[79] Although the court found a "violation of a right"[80] resulting in emotional distress, the court never made it clear whether this is a federally created right, protected by the statute, or whether "right" refers to "duty" as required in negligence law. The court in *Fitzgerald* held that the right to carriage is a right at law,[81] and *Mason* represents a negligent breach of this right resulting in emotional distress actionable under section 404(b) by the foreseeable third party victim. Realizing that recovery by one party for injury to another is a tenuous situation, the court spoke of "breaches and violations of rights" directly to the third party and finds a cause of action for the "unforeseeable plaintiff."[82] Therefore, the court expanded not only the coverage of the statute but also stretches concepts of foreseeability and intentionality to arrive at the result.

The implications of this holding are significant to the carrier and passenger alike. The consequences of the court's analysis would be to expand the coverage of federal statutes so as to compensate peripheral plaintiffs for injury to those clearly within the intended scope of the statute.[83] Since *Fitzgerald*, the courts have applied section 404(b) to discrimination in any form. Theoretically, to expand section 404(b) opens up a greatly expanded class of bystanders. It seems, given the case development,[84] the legislative history, and the rules of statutory construction,[85] that the statute should only apply to passengers and ticket holders. It makes no difference whether the third party recovers because the statute gives him rights against defendant's conduct or because rights are created for one party and the third party recovers as a foreseeable beneficiary of the statutory coverage. Simply stated, the statute here was intended for passengers. Although the cases modified the originally intended application of 404(b) from use in cases of eco-

[79] *Id.* at 17,117.

[80] *Id.* at 17,118.

[81] 229 F.2d at 500. The court cites section 403 of the Civil Aeronautics Act of 1938 as giving this right.

[82] 13 AV. L. REP. at 17,118 (1974).

[83] Research into the Civil Rights Statute, 42 U.S.C. § 1983, in particular, reveals no such expansion of statutory coverage to third parties which enables them to recover for the breach of another's right.

[84] *See* cases cited note 12 *supra.*

[85] 2 RESTATEMENT (SECOND) OF TORTS § 286 (1965). *See also* Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1974).

nomic discrimination to use in any discriminatory situation, the group covered by the statute has remained unchanged. This fact alone does not demand that traditional coverage remain the same, but considering the original intent and the difficulty of protecting the new class, the restricted application is proper.

Pragmatically, this expansion of liability raises difficulties for the airlines in terms of insuring and protecting against the unforeseeable plaintiff. If the basis of the tort law is fault, it is difficult to see where the airline was guilty with respect to the third party in *Mason*. It is evident that *Nader* is inapplicable to the *Mason* situation. Simply stated, the third party in *Nader* was the victim of tortious conduct. Here, however, that was not the case. The anomaly of the situation is realized when the relationship of section 404(b) to the denied boarding compensation sections of the *Federal Aviation Regulations* are considered.[86] As an alternative to pursuing a section 404(b) cause of action, a plaintiff passenger may accept compensation. It would seem that the class covered by section 404(b) should be the same class as is covered by the denied boarding compensation statute. Such a conclusion, however, does not follow. Mrs. Mason, who is not covered by section 404(b), would not have been entitled to compensation under the statute. Congressional guidance, therefore, on the proper coverage of section 404(b) is both necessary and desirable.

Difficulty in allowing third party recovery based solely on the statute caused the court to rely on tort concepts in allowing the plaintiff to recover. Since the *Nader* third party recovery was not based on section 404(b), reliance on *Nader* is incorrect. If the third party recovery in *Nader* is upheld on appeal, the third party award in *Mason* may be saved by its reliance on "foreseeability" language drawn from *Nader*,[87] notwithstanding the fact that Mrs. Mason is in court on the basis of a section 404(b) cause of action. The tenuousness of a section 404(b) third party recovery is indicated by the court's need to hang the decision on the established tort concepts. In fact, however, the third party could *not* recover on the basis of tort concepts alone. The court engages not only in a questionable expansion of statutory coverage, but a questionable appli-

[86] Part 250 of the FEDERAL AVIATION REGULATIONS provides rules for compensation if boarding is denied. 14 C.F.R. §§ 250.1-250.10 (1974).

[87] 13 AV. L. REP. at 17, 118 (1974).

cation of tort law as well. The resulting proposition that a third party non-passenger may recover under a statute traditionally applied only to passengers will be a difficult one for the court to accept on appeal.

James M. Lober

CONFLICT OF LAWS—SIGNIFICANT RELATIONSHIP—In Oklahoma, When the Facts of a Suit for Personal Injuries Sustained as a Result of an Aircrash Occur in more than one State or Nation, the Local Law of the State which has the Most Significant Relationship to the Occurrence and to the Parties Determines the Substantive Rights of the Parties Involved. *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974).

Dr. Theodore Brickner, a resident of Oklahoma, crashed his small Oklahoma registered and hangared aircraft and his three Oklahoma passengers into the soil of Mexico, creating a conflict of laws problem.[1] As a result of injuries sustained by the passengers, three separate actions based on negligence were brought and later consolidated for trial in the Oklahoma District Court, Tulsa County. All negligence on the part of Dr. Brickner was alleged to have occurred in Mexico;[2] thus, since Mexico was the place of wrong, application of the *lex loci delicti* rule would require the use of the law of Mexico to determine the liabilities and substantive rights of the parties. In an interlocutory order, the district judge ruled that *lex loci delicti* had been replaced in Oklahoma by the significant relationship doctrine. Upon motion of the defendant doctor, the order was certified for review by the Oklahoma Supreme Court. The question read:

> In tort actions, is the law of the place wherein the cause of action arose controlling on the substantive rights of the parties, or does

[1] R. LEFLAR, AMERICAN CONFLICTS LAW 3 (1968). Any case whose facts occur in more than one state or nation, or any case whose facts occur in one jurisdiction but the suit is brought in another, is a conflict-of-laws case when it is necessary to choose between the relevant laws of the differing jurisdictions.

[2] Brickner v. Gooden, 525 P.2d 632, 634 (Okla. 1974).

> the local law of the state which has the most significant relationship with the occurrence and with the parties determine the substantive rights and liabilities of the parties?[3]

Held, affirmed: In Oklahoma, when the facts of a suit for personal injuries sustained as a result of an aircrash occur in more than one state or nation, the local law of the state which has the most significant relationship to the occurrence and to the parties determines the substantive rights of the parties involved. *Brickner v. Gooden,* 525 P.2d 632 (Okla. 1974).

The decision to change the conflict of laws rule from the old *lex loci delicti* rule to the more modern significant relationship doctrine should not have surprised Oklahoma practitioners. In 1973, the Oklahoma Supreme Court had almost renounced the old rule but felt restrained by *stare decisis*.[4] The two companion cases before the court at that time, *Richey v. Cherokee Laboratories, Inc.* and *Wood v. Cherokee Laboratories, Inc.*,[5] had arisen out of the same aircrash as a case decided in 1965 under the old rule.[6] The Oklahoma Supreme Court felt that the three cases were so intrinsically connected as to require a *stare decisis* ruling on the conflict of laws issue.[7] Even so, in a special concurring opinion four justices of the court advocated overruling the *lex loci delicti* standard prospectively, and replacing it with the significant relationship test as set forth in the Restatement (Second) of Conflict of Laws.[8]

In *Brickner*, however, the Oklahoma Supreme Court went further than the foreseeable affirmation of the lower court's interlocutory order. Without determining whether a conflict existed or returning to the lower court the question of which law should apply, the court decided that Oklahoma, not Mexico, had the most significant relationship to the suit.[9] This makes the case notable to litigators of

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[3] *Id.*

[4] Richey v. Cherokee Labs., Inc., 515 P.2d 1377 (Okla. 1973).

[5] *Id.*

[6] Cherokee Labs., Inc. v. Rogers, 398 P.2d 520 (Okla. 1965).

[7] 515 P.2d at 1379 (concurring opinion).

[8] *Id.*

[9] Brickner v. Gooden, 525 P.2d 632, 634-35 (Okla. 1974). Pursuant to a request by the Oklahoma Supreme Court, the parties had stipulated:

> All parties herein agree that in the event this Court holds that the law of lex loci delicti no longer obtains in Oklahoma but that the trial courts are to invoke the significant relationship doctrine as defined by the Restatement of Conflict of Laws, such determination

aircrash suits[10] since *Brickner* provides not only an example of the switch to the significant relationship doctrine, but also, an interpretation of that doctrine. Unfortunately, the interpretation by the Oklahoma Supreme Court shows a misunderstanding of the method and purpose behind the newer theory. Study of this misunderstanding is important to future decisions and to a better understanding of the conflict of laws problems in aircrash litigation.

That the Oklahoma court could misapply the significant relationship doctrine is a possible result of widespread confusion in this area of tort law. As a result of numerous legal battles, a national rhubarb over the method that a forum court should use to determine the law to apply when the facts of a case occur in more than the forum state[11] has divided the American legal community into two camps.[12] One camp supports the older *lex loci delicti* theory; the other camp supports the old rule's antithesis, the significant relationship doctrine.

The *lex loci delicti* rule for conflict of laws questions in cases sounding in tort is easily traceable to Joseph Beale's 1916 work, *A Treatise on the Conflicts of Laws or Private International Law.*

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should be made by the trial court with the applicable guide lines and rules laid down by this Court.

Letter from the Parties to the Oklahoma Supreme Court, April 26, 1974.

[10] Since air accidents often occur such that they involve interstate travelers and because the suit for damages may then be brought in any of the jurisdictions that the parties reside in, the conflict of laws area is of significance when choosing the forum to bring the action. Further, federal courts sitting in Oklahoma must apply Oklahoma conflict-of-law rules. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941) *applying* Erie R. Co. v. Thompkins, 304 U.S. 64 (1938).

[11] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Explanatory Note § 1, comment *c* at 2 (1971).

> Broadly speaking, three views are possible in dealing with cases involving foreign elements. First, the court might refuse to hear all such cases. Second, the court might decide them all by its own local law. Lastly, special rules might be devised to deal with such cases in a manner designed to promote the smooth functioning of the international and interstate systems and to do justice to the parties.

Id.

The argument has always been over the special rules devised to accomplish this last method.

[12] The leading major works in the area are: D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962); R. LEFLAR, AMERICAN CONFLICTS LAW (1968); A. VON MEHRER & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971). The dispute was continued in 1974 by over 15 law review articles.

Beale, while he was the American Law Institute's Reporter on conflict of laws, incorporated his views into the first Restatement of Conflict of Laws.[13] Beale's theory was to determine in advance the most important factor in a transaction. This factor would subsequently identify the place whose law should apply.[14] In a case involving a tort, all substantive questions were to be governed by the local law of the place of the wrong.[15] For example, the original Restatement announced that the place of wrong was "the state where the last event necessary to make an actor liable for an alleged tort takes place."[16] In most cases this would mean that the law of the state in which the injury occurred, the *lex loci delicti*, would control the substantive questions raised by aircrashes or other accidents involving passengers from varied states.[17]

Criticism of Beale's theories began early,[18] but the problem of suggesting an alternate system or rule really began only when the automobile and the airplane made the old rule's mechanistic approach seem unjust. A more mobile society created many more conflict situations—situations where the state of the last event bore only a slight relationship to the occurrence and the parties with respect to a particular issue.[19] This modern situation became especially burdensome when courts were required by the *lex loci* doctrine to apply the law of a different state when the conflict was caused fortuitously.[20] In *Kilberg v. Northeast Airlines, Inc.*,[21] the Court of

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[13] Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

[14] LEFLAR, *supra* note 1 at 205-06 (1968).

[15] Section 142 of the original Restatement announced:

> The measure of damages for a tort is determined by the law of the place of wrong.

RESTATEMENT OF CONFLICT OF LAWS § 142 (1934).

[16] *Id.* § 377.

[17] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note, § 145-74 at 412 (1971).

[18] Leflar, *supra* note 13 at 268, citing two works of Beale's early critics: FALCONBRIDGE, ESSAYS ON THE CONFLICT OF LAWS (1947) and LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

[19] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 17 at 413; First Nat'l Bank v. Rostek, 514 P.2d 314 (Colo. 1973).

[20] Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1960).

> Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . An air traveler from New York may in a flight of a few hours' duration pass through several

Appeals of New York began the judicial formulation of an alternative to the Bealean position. The majority opinion stated that even though the administrator of the estate of a deceased passenger could recover for negligence under Massachusetts law, New York public policy would prevent the New York courts from applying the damage limitation in that same statute.[22] Such a dodge around the old rule is transparent, since each time the laws of the forum state and the state where the wrong took place conflict, the public policy of the forum state, as represented by the legislative act, will also conflict. The New York Court was, however, attempting to circumvent the old rule, but had not yet developed a new vocabulary to deal with the problem.

In 1963, *Babcock v. Jackson*[23] established a new vocabulary and assured New York judicial leadership in developing an alternative to the Bealean doctrine. *Babcock* created the significant relationship doctrine which requires the forum court to examine the laws that are in conflict, using prescribed standards, to determine which law has the *most* significant relationship to the issue. This new theory was incorporated by the authors of the Restatement (Second) of Conflict of Laws in the tort area, and two new sections were created to cure the mechanistic problems of the old doctrine. Sections 6 and 145 are the direct result of the New York attempt to achieve more flexibility in the choice of law field.[24] Finally, the

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> of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous.

Id. at 527.

[21] *Id.*

[22] 9 N.Y.2d at —, 172 N.E.2d at 528.

[23] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 6 & 145 (1971). § 6 reads:

> Choice-of-Law Principles
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

New York Court, in *Dym v. Gordon*,[25] established a correct methodology or procedure to use in applying the *Babcock* rule. According to the *Dym* opinion, after determining the particular issue involved and that the jurisdictions' laws do conflict, the court should identify the policies behind the laws in conflict and examine the contacts of the respective jurisdictions "to ascertain which has the superior connection with the occurrence and thus would have a superior interest in having its policy or law applied."[26] By 1966, the New York court had brought to fruition the academicians' hoped-for alternative, creating a complex and complete system to act as the antithesis of the old method of choosing the law that the forum should apply in tort conflict of laws problems.[27]

(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in determination and application of the law to be applied.

§ 145 reads:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.
(2) Contacts to be taken into account in applying the principle of section 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

[25] 16 N.Y.2d 120, 209 N.E.2d 792 (1965). In this case, two New York domiciliaries temporarily residing in Colorado were involved in a car accident. The accident took place in Colorado, a state where the guest statute would bar recovery. The New York Court applied Colorado law and announced that the relationship of the parties to each other was formed in Colorado. Some critics have said that *Dym* is in conflict with Babcock citing the fact that the majority in *Babcock* is the dissent in *Dym*, however, the dissent is really over the outcome of the case and not with the method used to reach the decision.

[26] 16 N.Y.2d at —, 209 N.E.2d at 794. The majority wrote:

[I]t is necessary first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.

[27] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note, § 145-74 at 413 (1971). Of course New York was not isolated in its attacks on

The final incorporation in 1968 of the significant relationship doctrine into the Restatement (Second) did not signal the ultimate victory of the new doctrine; that it did not do so was a result of the variety of reactions and responses of other jurisdictions to the new idea, most of which may be classified as judicial retrenchment.[28] Texas decided that, without legislative action, its courts cannot extend their judicial powers beyond the state borders.[29] Stare decisis has, as in the Oklahoma cases of *Richey* and *Wood*, paralyzed some courts,[30] while Connecticut has steadfastly maintained that there is no reason to change from the old doctrine.[31] But the major criticism of the significant relationship theory has been that it is uncertain.[32] *Lex loci delicti* may appear arbitrary and un-

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the old theory. The following cases, in chronological order, are representative of the development of the antithesis:

Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1960); Babcock v. Jackson, 12 N.Y.2d 73, 191 N.E.2d 279 (1963); Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968).

The enthusiasm for the new rule can best be seen in the words of the last two decisions cited above. In *Clark*, the New Hampshire Supreme Court wrote,

> That old rule [lex loci delicti] is today almost completely discredited as an unvarying guide to choice of law decisions in all tort cases. . . . No conflict of laws authority in America today agrees that the old rule should be retained. . . . No American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule. . . . It is true that some courts, even in recent decisions, have retained it. . . . But their failure to reject it has resulted from an unwillingness to abandon established precedent . . . not to any belief that the old rule was a good one.

107 N.H. at —, 222 A.2d at 206.

In *Schwartz*, the Supreme Court of Arizona concluded:

> This movement away from lex loci culminated in 1968 in its rejection by the Restatement (Second) of Conflict of Laws. While the majority of jurisdictions have yet to repudiate the lex loci delicti rule, we feel that the recent, better-reasoned decisions evidence the trend away from its application.

103 Ariz. at —, 447 P.2d at 255.

[28] F. WEINTRAUB, COMMENTARY ON CONFLICT OF LAWS 37-49 (1971).

[29] Marmon v. Mustang Aviation, 430 S.W.2d 182 (Tex. 1968). *See generally* WEINTRAUB, *supra* note 28 at 37-39; Note, *Wrongful Death—Conflict of Laws—Significant Contacts vs. Loci*, 34 J. AIR L. & COM. 309 (1968); Note, *The Doctrine of Most Significant Contacts in Texas: Marmon v. Mustang Aviation, Inc.*, 22 SW. L. J. 863 (1969). For a parallel decision see McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 891 (1966).

[30] *See* notes 4, 5, 7, 8 *supra*.

[31] St. Pierre v. St. Pierre, 158 Conn. 620, 262 A.2d 185 (1969); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966).

[32] Folk v. York-Shipley, Inc., 239 A.2d 236 (Del. 1968); Friday v. Smoot,

fair sometimes, but the certainty with which it may be applied is, according to these critics of the new method, not to be discarded so lightly.[33] In 1972, three states' upper courts, after examining the effects of the new doctrine, came to the conclusion that too often the outcome of one case is in conflict with an earlier decision even though the facts are similar.[34] Two of the courts, the Supreme courts of South Dakota and Tennessee, adopted a "wait and see" attitude, prefering to retain the traditional place of wrong rule until the new doctrine could match the old virtues of certainty, simplicity, and ease of application.[35] The third court, possibly the most influential, was the New York Court of Appeals. In *Neumeier v. Kuehner*,[36] Justice Fuld, the author of the *Babcock* decision, surveyed with candor the historical development of the significant relationship doctrine since that decision and determined that it was frequently difficult to discover the purposes of policies underlying the relevant local law rules of the state laws in conflict and that it was even more difficult—assuming these policies could be found—to determine on a principled basis which was more important.[37]

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211 A.2d 594 (Del. 1965); Hopkins v. Lockheed Aircraft Corp., 201 So.2d 743, *rev'd on rehearing* 201 So.2d 749 (Fla. 1967); White v. King, 244 Md. 348, 223 A.2d 763 (1966); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

[33] Friday v. Smoot, 211 A.2d 594 (Del. 1965); White v. King, 244 Md. 348, 223 A.2d 763 (1966). The Delaware court in *Friday* declared:

> It may well be that the rule of lex loci delicti in some instances may appear arbitrary and unfair, but at the same time it has one positive asset. It is certain. The same cannot be said of the rule of more significant relationship for, as the majority opinion in Griffith v. United Air Lines, Inc. states, it is "the beginning . . . of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts."
>
> We think we may not depart by judicial fiat from a rule settled in this state to adopt a "flexible approach" which must be made certain by future litigation.

211 A.2d at 597.

In *White*, the Maryland court was of a like mind:

> [C]ertainty in the law is not so common that, where it exists, it is to be lightly descarded.

244 Md. at —, 223 A.2d at 765.

[34] Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454 (1972); Heidemann v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972); Winters v. Maxey, 481 S.W.2d 755 (Tenn. 1972).

[35] Heidemann v. Rohl, 86 S.D. 250, 255, 194 N.W.2d 164, 169 (1972).

[36] Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454 (1972).

[37] *Id.* at —, *Id.* at 457.

The New York court decided that the securing of predictability and uniformity was of immediate import, and that possibly *Babcock* allowed too much judicial discretion.[38]

The effect of this *retrenchment* has been to slow the rush to join the new camp. The impact of the South Dakota and Tennessee cases on the fledgling significant relationship doctrine is difficult to gauge, but the withdrawal of the New York court from its position in the vanguard supporting its adoption has had an immediate effect.[39] In *First Nat'l Bank v. Rostek*,[40] the Colorado Supreme Court, opposing the *lex loci delicti* rule, adopted a narrower and more limited rule than the broad significant relationship doctrine by deciding to follow New York's recent moderate approach. *First Nat'l Bank* and *Neumeier* may represent an attempt to synthesize the two doctrines, but the major result has been to halt growth of either camp and thus, until *Brickner*, to freeze the great debate.

The Oklahoma Supreme Court in *Brickner* ignored the new New York stance, although it did cite the Colorado decision,[41] and adopted the Restatement (Second) without reservation.[42] Listing what it felt were the three major reasons given by other courts for rejecting the significant relationship doctrine as (i) no compelling reason for the change, (ii) that uncertainty would result, and (iii) that the new rule could not be uniformly applied,[43] the Oklahoma Supreme Court countered all of these objections by quoting from the 1967 decision in *Riech v. Purcell*:[44]

> Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated to the objective of proper choice of law in conflict cases, i.e., to determine the law that most appropriately applies to the issue involved. . . .[45]

The *Brickner* decision is an affirmation of the need for broad judi-

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[38] *Id.*

[39] *See* Symposium—Neumeier v. Kuehner: A Conflicts Conflict, 1 HOFSTRA L. REV. 98 (1973).

[40] 514 P.2d 314 (Colo. 1973).

[41] Curiously, the Oklahoma court did not cite the *Babcock* decision in either *Richey* or *Brickner*; possibly to avoid the recent *Neumeier* corrollary.

[42] 525 P.2d at 637.

[43] *Id.*

[44] 67 Cal. 2d 551, 432 P.2d 727 (1967).

[45] *Id.* at —, *Id.* at 730, quoted at 636 of 525 P.2d.

cial discretion as required by the *Babcock* rule.[46] But this adoption of the Restatement (Second), when placed in perspective, may simply be the last hurrah of the significant relationship doctrine rather than the trumpeting of a second wave of pro-Restatement (Second) decisions. A good prognosis may be made after examining the method utilized by the Oklahoma Supreme Court in applying the significant relationship theory.

To follow the *Dym* procedure[47] the Oklahoma Supreme Court in *Brickner*, after determining each point at which the Mexican and Oklahoma laws were in conflict, should have examined the policies behind the conflicting laws. The Court then should have carefully determined which contacts with the jurisdictions by the parties or the occurrence would create a superior interest of one jurisdiction in seeing that as to that particular issue, its policies were carried out. Unfortunately, the Oklahoma court reversed the procedure and baldly announced:

> Although the Republic of Mexico would be concerned with the conduct of parties while they were within its borders and the accident occurred in Mexico, Oklahoma has the most significant relationship to the occurrence and the parties.[48]

Such a naked assertion destroyed the advantage of the significant relationship theory because it failed to recognize the doctrinal purpose to weigh the policies behind the laws to get the best law for each issue presented. This misapplication of theory overshadows the effect of the Oklahoma court's zealous acceptance of the significant relationship doctrine.

The principal problem is that the Oklahoma court never identified the laws in conflict, never identified the issues before the lower court, and therefore could not begin to weigh the policies behind those laws. Had the laws of Oklahoma and Mexico not been in conflict then no real issue would have existed; yet, the Oklahoma Supreme Court never determined what the issues involved in the case were nor what laws might have been in conflict. The facts in *Brickner* suggest possible conflicts over the standard of care required of a pilot or the possible statutory prohibition of a husband-wife suit,

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[46] *See* note 41 *supra.*

[47] *See* notes 25, 26 *supra.*

[48] 525 P.2d at 638.

but these are mere second-guesses since the court never isolated any issue on which to base its decision.

By determining the state first and then looking to that state's law, the Oklahoma court utilized the same procedure as that of the *lex loci delitci* proponents.[49] As a result, *Brickner* would appear to require only a "toting up" of contacts,[50] as in the application of a long-arm statute, to determine which state has the most interest in the occurrence. The Oklahoma Supreme Court lumped all possible contacts together, and without identifying which contacts related to particular issues, weighed the two conflicting groups. No relationship was shown between particular contacts and state policies; as a result, the fact that the plane was hangared in Oklahoma was balanced against the fact that all alleged negligence was stipulated to have happened in Mexico. Since the approach of the Restatement (Second) is to choose between the rules of law by examining the policies behind those laws, the weighing of the domicile of the parties, which might be significant if the conflict arose over the relationship of the parties, against where the accident happened, which might belong to an entirely different issue, completely undermines the concept of "*most* significant relationship." The numerical superiority of one state's or nation's contacts with the parties should not be the decisive factor in determining which law will govern.[51]

Finally, the Oklahoma court determined that since the crash was fortuitous, the courts of Mexico would have no real interest in the parties. Such an argument, that only Oklahoma law shows an interest in Oklahoma citizens, might have been made in the courts of the Roman or British empires, but it shows little reflection on the fact that almost all aircrashes are fortuitous while the laws governing the liabilities caused by such crashes are not. The trip through Mexican airspace was intentionally taken and the laws controlling that airspace were written with just such activities in mind. If Mexi-

[49] LEFLAR, *supra* note 1 at 237, where the vested rights approach or the Bealean method, is shown to call for a choice between states, not between laws; exactly what the Oklahoma court has done in Brickner.

[50] *Id.* at 217, citing D. CAVERS, THE CHOICE-OF-LAW PROCESS 9, 79 (1965), and Cavers, *A Critique of the Choice-of-Law Problems*, 47 HARV. L. REV. 173, 178, 192 (1933). *Compare* Currie, *Comments on Babcock v. Jackson; A Recent Development in Con:ict of Laws*, 63 COLUM. L. REV. 1233 (1963) *with* LEFLAR, *supra* note 1 at 221.

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

co is concerned about aircraft flown by aliens, it should make no difference to the court that those aliens reside in Oklahoma when determining whether the policy behind such a law is directly related to an accident. After examining the Oklahoma opinion, Mexico might decide that the significant relationship doctrine is no more than a method of circumventing the *lex loci delicti* rule so that decisions may be made with familiar law.[52]

The Oklahoma court's failure to follow the *Dym* procedure, failure to determine the issues between the parties, failure to examine the policies behind the Mexican law or even to examine that law, and failure to apply the Restatement (Second) Section 145 properly in weighing the contacts with the two jurisdictions, will preclude any large following of the *Brickner* decision. *Brickner v. Gooden* was wrongly decided because of an attempt to oversimplify an entire area of intricate law.

Guyle E. Cavin

TARIFFS—NORTH ATLANTIC CARGO RATES—The Prescription of Transatlantic Cargo Rates Based Upon Mileage From European Points to United States Gateway Airports Rather Than a Common Rate Formula Did Not Exceed the Statutory Powers of the CAB. *Commonwealth of Virginia v. Civil Aeronautics Board*, 498 F.2d 129 (4th Cir. 1974), *cert. denied*, —— U.S. ——, 95 S. Ct. 623 (1974).

The Civil Aeronautics Board (CAB) initiated an investigation[1] in response to a complaint by the City of Baltimore that the North Atlantic cargo rate structure, recommended by the International Air Transport Association (IATA) and approved by the CAB,[2]

[52] As the Supreme Court of the United States wrote in Lauritzen v. Larsen, 345 U.S. 571, at 582 (1953):

> [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided.

[1] CAB Order No. 69-3-47 (March 13, 1969). The scope of the proceeding was expanded by CAB Order No. 69-4-139 (Apr. 30, 1969) and CAB Order No. 69-10-111 (Oct. 23, 1969).

[2] CAB Order No. 69-10-30 (Oct. 7, 1969).

violated section 404(b) of the Federal Aviation Act of 1958.[3] The complaint alleged that cargo rates for United States gateway cities[4] other than New York, computed by adding the domestic rate between the gateway city and New York to the Europe/New York base rate, were unduly preferential to New York and unduly prejudicial to competing gateways. The administrative law judge found the allegations in the petition valid[5] and ruled the rate structure adverse to the public interest.[6] Upon review, the CAB accepted the findings of the administrative law judge, but rejected his recommendation that a common rate[7] be prescribed for all gateway points and ordered instead that new transatlantic cargo rates be calculated by multiplying the distance between the United States gateway city and the European point by the New York/Europe rate per mile.[8]

The Commonwealth of Virginia and the State of Maryland[9] pe-

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[3] Federal Aviation Act of 1958, § 404(b), 49 U.S.C. § 1374(b) (1970) provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[4] A gateway city has direct service to Europe.

[5] Initial Decision of Administrative Law Judge William F. Cusick, Agreements Adopted by IATA Relating to North Atlantic Cargo Rates, CAB Docket No. 20522 (served Feb. 8, 1972). [hereinafter cited as *Initial Decision*]

[6] Federal Aviation Act of 1958, § 412(b), 49 U.S.C. § 1382(b) (1970) provides in pertinent part:

> The Board shall by order disapprove any . . . contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement . . . that it does not find to be adverse to the public interest, or in violation of this Act.

[7] A common rate or fare is an equal charge to two points that are at different distances from a point of origin. Hilo-Mainland Temporary Service Investigation, Order E-25253 (June 6, 1967).

[8] Agreement Adopted by IATA Relating to North Atlantic Cargo Rates, CAB Order No. 73-2-24 (Feb. 6, 1973), *aff'd on rehearing*, CAB Order No. 73-7-9 (July 5, 1973).

[9] The Department of Transportation of the State of Maryland v. CAB and Virginia v. CAB were consolidated on appeal. The City of Philadelphia, Metropolitan Washington Board of Trade, Pan American World Airways, Inc., Trans World Airlines, Inc., Chicago and Detroit Interests, Massachusetts Port Author-

titioned the United States Court of Appeals for the Fourth Circuit for review of the Board's order, averring two issues: (i) that the CAB is required as a matter of law to establish a common rate for all American gateway cities, and (ii), that the Board's distance scheme continues the previously existing preference and prejudice.[10] *Held, affirmed*: The prescription of transatlantic cargo rates based upon mileage from European points to United States gateway airports rather than a common rate formula did not exceed the statutory authority of the CAB. *Commonwealth of Virginia v. Civil Aeronautics Board*, 498 F.2d 129 (4th Cir. 1974), *cert. denied*, —— U.S. ——, 95 S. Ct. 623 (1974).

In reaching its decision, the United States Court of Appeals for the Fourth Circuit recognized the broad discretion of the CAB to fashion remedies for rate discrimination.[11] The exercise of this discretion will not be set aside absent proof that the CAB order lacks evidentiary support, exceeds a statutory or constitutional limit, or constitutes an abuse of discretion.[12] The court of appeals in *Virginia v. CAB* found substantial evidence for the Board's order because distance reflects most costs in air transportation and differences in distance justify rate differentials. The petitioners' contention that the CAB is bound by decisional precedents of the Interstate Commerce Act concerning preference and prejudice[13] was dismissed because substantial differences in cost ratios between railroads and airlines warrant separate regulatory approaches. The prescription of rates reflecting distance in nearly all domestic and most international fares and rates provided ample precedent for the Board's selection of a mileage standard. The Fourth Circuit further noted that the CAB would exceed its statutory authority under section 1002

ity, Greater Boston Chamber of Commerce and The Port Authority of New York and New Jersey were permitted to intervene.

[10] 498 F.2d 129, 133 (4th Cir. 1974).

[11] The CAB has primary jurisdiction to determine the reasonableness of airline rates and fares. Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973); Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951); Hycel, Inc. v. American Airlines, 328 F. Supp. 190, 193 (S.D. Tex. 1971); Tishman & Lipp, Inc. v. Delta Airlines, 275 F. Supp. 471, 475-76 (S.D.N.Y. 1967), *aff'd*, 413 F.2d 1401 (2d Cir. 1969). *See generally* Coultas, *The Doctrine of Primary Jurisdiction: Determination of Express and Implied Immunity From the Antitrust Laws*, 39 J. AIR L. & COM. 559 (1973).

[12] Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 592 (1949); Board of Trade v. United States, 314 U.S. 534, 546 (1942).

[13] Interstate Commerce Act, 3(1), 49 U.S.C. § 3(1) (1970).

(e) of the Federal Aviation Act of 1958[14] (the Act) when determining remedial rates if the Board created a novel undue preference and discrimination. The Board, therefore, properly refused to establish common rates which deprive cities nearest to Europe of their geographical advantages. Moreover, the economic impact of common rates could raise freight costs. Finally, the petitioners' second claim that the new CAB rates did not remove the prejudice to American gateways other than New York caused by equal faring was rejected because the rate per mile for each transatlantic flight is the same, and European common faring is beyond the regulation and control of the CAB.[15]

The CAB has no direct statutory authority to establish the level of international air fares and rates; the Board may only review tariffs filed by air carriers.[16] Rather, the International Air Transportation Association, a trade organization of domestic and foreign airlines, determines rates by the unanimous agreement of its members present at periodic traffic conferences.[17] IATA resolutions are subsequently subject to ratification by parent nations of the member carriers. In the United States, all rate agreements must be filed with the CAB thirty days in advance of their implementation and kept open for public inspection.[18] If the procedural requirements of section 403[19] of the Federal Aviation Act are satisfied and no objections are filed, the tariff becomes effective in accordance with its terms. A substantive challenge that the rate is unreasonable, discriminatory, or unduly preferential and prejudicial, however, may be made by the Board or an interested third party

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[14] Federal Aviation Act of 1958, § 1002(e), 49 U.S.C. § 1482(e) (1970).

[15] 498 F.2d 129, 136 (4th Cir. 1974).

[16] Federal Aviation Act of 1958, §§ 404, 801, 1002(j), 49 U.S.C. §§ 1374, 1461, 1482(j) (1970).

[17] *See* National Air Carrier Ass'n v. CAB, 436 F.2d 185 (D.C. Cir. 1970); R. CHUANG, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (1972); Note, *CAB Approval of IATA Rate Agreements: The Evolution of the Standard of Public Interest Under Section 412 of the Federal Aviation Act of 1958*, 38 J. AIR L. & COM. 275 (1972); 5 N.Y.U.J. INT'L L. & POL. 281 (1972); Gazdik, *Rate-Making and the IATA Traffic Conference*, 16 J. AIR L. & COM. 298 (1949). The exercise of the unanimity rule by foreign carriers who oppose dilution of their revenues has frustrated efforts to apply the principle of common rates to the North Atlantic route. CAB Order No. 73-2-24 at 13 (Feb. 6, 1973).

[18] Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1970); 14 C.F.R. § 221.160 (1972).

[19] Federal Aviation Act of 1958, § 403, 49 U.S.C. § 1373 (1970).

at any time.[20] Upon a *prima facie* showing of discrimination, the Board must either justify the discrimination and demonstrate a public policy reason for not investigating or conduct an inquiry.[21] Pending an investigation, the CAB has the discretion either to suspend the rates or permit their continuation.[22]

The Act imposes a duty on every air carrier to establish just and reasonable rates and fares.[23] Under section 404(b) of the Act, no airline may unjustly discriminate, prejudice, or disadvantage in any respect any particular person, port, or locality in air transportation.[24] This prohibition against discrimination is a rule of reason and the legality of a tariff is a question of fact, not of law.[25] The provision against undue preference and prejudice to a port or locality seeks to avoid unreasonable economic discrimination. A preference or prejudice may be based either upon distance or location and may refer to the charging of the same fare for a different distance or different fares for the same distance without economic justification.[26] A preference, prejudice, or advantage, nevertheless, is lawful if not undue or unreasonable.[27] A *prima facie* demonstration of undue preference and prejudice in a rate structure requires evidence of four elements: (i) prejudice to one party and preference to another in the movement of traffic; (ii) a competitive relationship between the parties; (iii) the "undue" character of the

[20] Federal Aviation Act of 1958, § 1002(d), 49 U.S.C. § 1482(d) (1970).

[21] Trailways of New England, Inc. v. CAB, 412 F.2d 926, 932 (1st Cir. 1969).

[22] Federal Aviation Act of 1958, § 1002(g), 49 U.S.C. § 1482(g) (1970); Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); Note, *Summary Power of the Civil Aeronautics Board to Suspend Proposed Airline Rates*, 39 J. AIR L. & COM. 267 (1973).

[23] Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1970).

[24] Federal Aviation Act of 1958, § 404(b), 49 U.S.C. § 1374(b) (1970).

[25] Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); Board of Trade v. United States, 314 U.S. 534, 546 (1942) held "Whether a preference or advantage . . . is undue . . . is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission. . . ." *See also* Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304 (1937).

[26] Frontier Excursion Fares Case, 42 C.A.B. 440, 445 (1965); American Airlines Off-Coach Service, 28 C.A.B. 25, 26 (1958). *See generally* Rosenfield, *Factors in Determination of the Validity of Domestic Airline Fares*, 37 MO. L. REV. 246 (1972).

[27] Texas & Pacific Ry. v. Interstate Commerce Comm'n, 162 U.S. 197, 219 (1896). A rate may be reasonable and nonetheless create undue preference or prejudice to a locality. New York v. United States, 331 U.S. 284, 344-45 (1947).

preference and prejudice; and (iv) economic injury to the prejudiced party.[28] If the CAB finds an existing rate unduly preferential or prejudicial, the Board may adjust the rate under section 1002(f) of the Act[29] to the extent necessary to correct the discrimination. In modifying a rate structure, the CAB is required by statute to consider several criteria, including the effect of the new rates upon the movement of traffic and upon carrier revenues, the character and quality of service, the advantage of air transportation, and the public interest in an adequate and efficient transportation system.[30]

The CAB in *North Atlantic Cargo Rates*[31] found preference and prejudice in the preexisting rate structure formulated at the 1969 IATA Traffic Conference at Athens, Greece. The IATA resolutions determined rates for the United States gateway cities other than New York by the use of "arbitraries" or "add-ons."[32] The rate was calculated by adding the "arbitrary" to the New York/London base whether or not the flight actually stopped in New York. This scheme effected a generally lower rate per mile for shipments to and from New York than the equivalent rate per mile for shipments to and from other cities for almost every specific commodity rate.[33] The public interest was also adversely affected. A substantial volume of North Atlantic cargo moved by truck between New York and other gateway cities for reasons of price expediency in contravention of section 102 of the Act which provides that a goal of economic regulation is the promotion of air transportation.[34] Conse-

[28] CAB Order No. 73-2-24 at 5-6 (Feb. 6, 1973); *Cf.* Freas, *Ratemaking Power of the Interstate Commerce Commission*, 31 GEO. WASH. L. REV. 54, 72-76 (1962).

[29] Federal Aviation Act of 1958, § 1002(f), 49 U.S.C. § 1482(f) (1970).

[30] Federal Aviation Act of 1958, § 1002(e), 49 U.S.C. § 1482(e) (1970).

[31] CAB Order No. 73-2-24 (Feb. 6, 1973).

[32] The arbitrary is "determined by finding the lowest possible combination of rates from the U.S. point to London, including possible trans-border rates through Montreal, and then subtracting the New York/London rate from the total." CAB Order No. 73-2-24 at 5 (Feb. 6, 1973). This arbitrary is added to the base rate to determine the cargo rate for a gateway other than New York.

[33] Between sixty-five and eighty-five percent of all transatlantic air freight moves by specific commodity rates. CAB Order No. 73-2-24, at 8 (Feb. 6, 1973). General commodity rate differentials were approximately two to six cents per pound. *Initial Decision* at 42. The effect of the IATA rates was a "wide variance between the ratios of through rates and mileage compared to the New York-London leg." *Initial Decision* at 35.

[34] Federal Aviation Act of 1958, § 102(a), 49 U.S.C. § 1302(a) (1970) defines in the public interest: "The encouragement and development of an air

quently, eighty percent of all North Atlantic cargo flowed through New York, encouraging overcrowding, delay, pilferage, and customer dissatisfaction, while simultaneously depressing the utilization of other gateway ports below their available and potential capacities.[35]

All parties to the appeal before the Fourth Circuit in *Virginia v. CAB* assented to these findings, but the petitioners sought to reinstate the remedial rate structure recommended by the administrative law judge. The initial decision of the administrative law judge found that an equal rate per mile would not provide a complete solution for the discrimination and advised that freight rates be common-rated for all cities comprising the northeast corridor—including New York, Boston, Washington, Baltimore, and Philadelphia—to afford these cities the opportunity to compete on an equal basis.[36] The administrative law judge believed that viable alternative ports would relieve congestion at John F. Kennedy Airport in New York and would assure service during temporary periods when New York is closed by inclement weather.[37] The CAB, on the other hand, ordered that general commodity rates,[38] specific commodity rates, [39] and container rates be based upon the distance between the European point and the United States gateway port.[40]

Common transcontinental rates were inaugurated by the railroads to the West Coast at the end of the nineteenth century to compete with maritime carriers who charged equal fares to various western ports.[41] Under the group rate systems of the Interstate Commerce Commission (ICC) common faring became a frequent

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transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States . . . ."

[35] *Initial Decision* at 43-44, 49-50.

[36] *Id.* at 57-58.

[37] The CAB has previously found that accelerating the dispersal of commerce in the Northeast corridor would be in the public interest. Domestic Co-terminal Points-Europe All-Cargo Service Investigation, CAB Order No. 69-4-140 (March 17, 1969).

[38] A general cargo rate is the standard base rate which is applied to general merchandise. IATA, AGREEING FARES AND RATES 86 (1973).

[39] Specific commodity rates are special low developmental rates which are applied to carefully defined types of merchandise between two selected points. IATA, AGREEING FARES AND RATES 88 (1973).

[40] CAB Order No. 73-2-24 at 3 (Feb. 6, 1973).

[41] West Coast Common Fares Case, 15 C.A.B. 90, 92 (1952).

practice in surface rate-making.[42] The group rate was established by treating the various localities within an area as though they were all situated at a common point. Rates were calculated from a central point within the group. Generally, the longer the haul, the larger the size of the group of points would be[43] because differences in distances on long hauls produce only a small variation in costs since the cost per mile declines as the length of the haul increases.[44] The loss of revenue to the carrier from common fares was consequently small, and the shipper who was nearest the destination point and deprived of his geographical advantage paid only a slightly higher rate per mile than the other shippers in the group.

Common fares for air transportation have been reluctantly approved by the CAB only in the presence of special circumstances[45] or to promote international cooperation.[46] Special circumstances are required because common rates are considered by the CAB to be unjust and economically unsound. Common rates prefer the shipper farthest from the destination who absorbs a lesser proportionate share of the costs and prejudice the shipper nearest the destination since he assumes a relatively greater proportion of the costs.[47] The CAB held in the first *Hawaiian Common Fares Case*[48] that common rates to consecutive points are also ordinarily unsound in principle because equal rates do not reflect the proposition that costs tend to increase with distance in air transportation.

Although no uniformity of criteria exists for the factual determination of special circumstances, the Board has considered the costs of service, competition among carriers and among localities,

[42] *See* D. LOCKLIN, ECONOMICS OF TRANSPORTATION 189-92 (6th ed. 1966); R. WESTMEYER, ECONOMICS OF TRANSPORTATION (1952); 3 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 656-93 (1936); Group rates are criticized in Note, *Group Rates: A Questionable Feature of the Railroad Rate Structure*, 98 U. PA. L. REV. 204 (1949).

[43] Grain and Products, Oregon, Idaho, Utah to Pacific Coast, 268 I.C.C. 707, 728-29 (1947).

[44] K. HEALY, THE ECONOMICS OF TRANSPORTATION 209 (1940). The Interstate Commerce Commission has ordered common rates for competing points where the mileage difference was less than twenty-five percent. City of Wilmington v. Alabama Great Southern R.R., 316 I.C.C. 709, 725 (1962).

[45] Group Inclusion Tour Basing Fares to Hawaii, CAB Order No. 70-7-60 (July 13, 1970); Hilo-Mainland Temporary Service Investigation, 47 C.A.B. 749 (1967); Hawaiian Common Fares Case, 37 C.A.B. 269 (1962); Pacific Northwest-Alaska Tariff Investigation, Order on Reconsideration, 18 C.A.B. 481 (1954).

[46] IATA Transatlantic Cargo Rates, CAB Order No. 73-10-55 (Oct. 15, 1973).

[47] Hawaiian Common Fares Case, 10 C.A.B. 921 (1949).

[48] *Id.*

and the factors listed in section 1002(e) of the Act.[49] In 1952, the Board found special circumstances in the *West Coast Common Fares Case.*[50] The CAB approved an existing common rate structure because the West Cost economy had developed with this scheme, and all the communities involved in the proceeding had benefited by the common rate structure. A few years later the CAB approved common rates from Anchorage to Seattle and Portland because Portland's freight traffic was instrumental to the economic and military development of Alaska, and the Seattle/Portland area was a common trade zone.[51] In 1961, a proposal for equal fares for passengers travelling along the same route to consecutive points was rejected by the Board as patently preferential, insufficient to cover the costs of the new service, and unjustified by competitive factors.[52] The second *Hawaiian Common Fares Case*[53] in 1962 reaffirmed the special circumstances test, but the CAB nevertheless held that it lacked authority to order common fares without evidence of the unlawfulness of the current fare scheme. The hearing examiner had determined that since the outer Hawaiian islands and Oahu were economically interdependent, public convenience and necessity required common rates to reverse the declining economy and population of the outer Islands.

Virginia v. C.A.B. is the first reported judicial opinion to construe section 404(b) of the Act[54] with respect to common rates. This absence of developed case law caused the petitioners to analogize to section 3(1) of the Interstate Commerce Act[55] and its judicial inter-

[49] Federal Aviation Act of 1958, § 1002(e), 49 U.S.C. § 1482(e) (1970); Northern Consolidated Airlines, Inc., Proposed Fares, 33 C.A.B. 440, 453 (1961); IATA Agreement Providing for North Atlantic Passenger Fares, 10 C.A.B. 330 (1949).

[50] 15 C.A.B. 90 (1952).

[51] Northwest-Alaska Tariff Investigation, 17 C.A.B. 903 (1953); Order on Reconsideration, 18 C.A.B. 481 (1954). The special circumstances of the importance of Portland's traffic and of a common trade area controlled the findings that Portland is 128 miles farther from Anchorage than is Seattle, and that common rates would dilute carrier revenues.

[52] Northern Consolidated Airlines, Inc., Proposed Fares, 33 C.A.B. 440 (1961).

[53] 37 C.A.B. 269 (1962). Common rates were imposed to protect intra-Hawaiian carriers from financial insolvency. Hilo-Mainland Temporary Service Investigation, 47 C.A.B. 749 (1947).

[54] Federal Aviation Act of 1958, § 404(b), 49 U.S.C. § 1374(b) (1970).

[55] Interstate Commerce Act, § 3(1), 49 U.S.C. § 3(1) (1959) provides:

> It shall be unlawful for any common carrier subject to the provi-

pretation[56] on the assumption that construction of legislation by an administrative agency and the judiciary is presumed to control with

sions of this part . . . to make, give, or cause an undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage to the traffic of any other carrier of whatever description;

U.S. CONST. art. I, § 9 states: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another . . . ."; Section 404(b) of the Federal Aviation Act of 1958 is fashioned upon section 3(1) of the Interstate Commerce Act. Until 1935, section 3(1) prohibited undue preference and prejudice only against a person, company, firm, corporation, locality, or description of traffic and did not include the word "port." Interstate Commerce Act, ch. 104, § 3(1), 24 Stat. 380 (1887). In 1933, the United States Supreme Court held that ports were not incorporated in the congressional use of the word "localities." Texas & Pacific Ry. v. United States, 289 U.S. 627, 638 (1933). Two years later, Congress amended the section to add the words "port, port district, gateway, transit point." Interstate Commerce Act, ch. 509, § 1, 49 Stat. 607 (1935). This amendment passed into section 404(b) of the Federal Aviation Act of 1958 through the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

The purpose of the inclusion of the reference to ports was to permit traffic to flow through a maximum number of gateways and to allow ports to compete equally for imports and exports. Rate schemes fostering port monopolies were declared, in effect, unlawful.

H.R. REP. NO. 1512, 74th Cong., 1st Sess. 2 (1935).

> The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will permit, and that no restrictions upon and impediments to the free moving thereof should be imposed that are not clearly shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports, and to deprive other ports of an opportunity to handle a part of such traffic. The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne.

[56] The Supreme Court has affirmed ICC endeavors to equalize competitive opportunities for localities with common rates in three decisions. In Ayshire Collieries Corp. v. United States, 355 U.S. 573 (1949), the Commission equalized rates to create a rate structure that would afford a fair opportunity for shippers to compete in the purchase, sale, and transportation of coal from Illinois, Indiana, and Western Kentucky mines to points in northern Illinois and Wisconsin. The ICC had ordered common rates to remove artificial trade barriers and to pro-

respect to similar and subsequent legislation on the same matter.[57] Specifically, the petitioners urged that the strict mileage tests ordered by the Board conflicted with congressional policy and judicial precedents seeking to ensure equality of opportunity among competing ports.[58]

The Fourth Circuit in *Virginia v. CAB* distinguished decisions construing the Interstate Commerce Act from actions of the CAB under the Federal Aviation Act, noting that substantial economic differences exist between the operations of railroads and airlines.[59] In the railway industry, there are low variable costs[60] and high fixed costs[61] which produce increasing returns to scale. Hence, average costs[62] decrease with distance because marginal cost[63] is less than average cost. For this reason, value-of-service pricing is pre-

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mote underdeveloped sections of the country in New York v. United States, 331 U.S. 284 (1947). In Ann Arbor R.R. v. United States, 281 U.S. 658 (1930), the Supreme Court stated: "The prohibition in 3(1) of the Interstate Commerce Act of any undue preference of one locality over another always has been treated as intended to prevent the use of rates as a means of promoting the artificial development of one locality to the detriment of another."

[57] Texas Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[58] Brief for The Commonwealth of Virginia at 24-36, Virginia v. CAB, 498 F.2d 129 (4th Cir. 1974); *Accord,* The Department of Transportation of the State of Maryland Brief for Certiorari at 8-12, 419 U.S. 1048 (1974).

[59] 498 F.2d 129, 134 (4th Cir. 1974). The court of appeals cited Chicago & So. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 108 (1948) and Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430 (9th Cir. 1962). In *Chicago* the Supreme Court found "no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two dimensional transit." Chicago & So. Airlines, Inc. v. Waterman S.S. Corp., *supra* at 108. The Ninth Circuit Court of Appeals was concerned that borrowing legal doctrines developed under the Motor Carrier Act involves "the risk of producing results inconsistent with the purposes and administrative scheme" of the Federal Aviation Act. Las Vegas Hacienda, Inc. v. CAB, *supra* at 437. Locklin has written that the "extent to which the theory of rates, developed with respect to railroads, is applicable to . . . other modes of transport depends upon the extent to which the same cost conditions exist . . . ." D. LOCKLIN, ECONOMICS OF TRANSPORTATION 156 (6th ed. 1966).

[60] Variable costs vary with output of production. *See* P. SAMUELSON, ECONOMICS (9th ed. 1973).

[61] Fixed costs are costs that do not vary with output of production.

[62] The average cost per unit of output is determined by dividing total cost by the number of units of goods produced.

[63] Marginal cost is the extra cost incurred by the production of one extra unit of output and is determined by division of the increase in total costs by the increase in output.

ferred over rates formulated on distance.[64] In the airline industry, however, costs of service, including those costs directly related to distance, are more determinative of rates because returns to scale are relatively constant.[65] Thus, the Fourth Circuit sustained the CAB determination that rate precedents under the Interstate Commerce Act cannot be indiscriminately applied to aviation rates since economic characteristics warrant different regulatory programs for each industry.[66]

The CAB may exercise its powers to fix remedial rates only to the extent necessary to remove an existing preference and discrimination.[67] Approval of a new rate scheme creating a novel undue preference or prejudice would exceed the Board's statutory authority.[68] The *Virginia* court held that common rates produce new preferences and prejudices among localities. Discrimination is effected because mileage distances within the concentric zones of a common rate system are disregarded. Shippers in the nearest ports to the destination such as Boston and New York would pay a higher rate per mile than shippers at the other gateway cities because the same rate is charged for unequal distances. Shippers outside of the concentric zone in the Chicago, Cleveland, and Detroit area would pay a proportionately higher rate per mile than the rate charged to

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[64] CAB Order No. 73-2-24 at 23 (Feb. 6, 1973); *e.g.*, Nueces Co. Navigation Dist. No. 1 v. Atchinson, Topeka & Santa Fe Ry., 325 I.C.C. 400, 408 (1965).

[65] CAB Order No. 73-2-24 at 23 (Feb. 6, 1973).

[66] 498 F.2d 129, 134 (4th Cir. 1974). The CAB has stated that "blindly to adopt rulings under another act without regard to real and substantial differences between the provisions of the two statutes, the purposes underlying their enactment, and the situations with which the two regulatory agencies may be faced, would be to fail in the duties entrusted to us." Caribbean Area Case, 9 C.A.B. 534, 549 (1948); *See* Transatlantic Charter Investigation, 40 C.A.B. 233, 270 n.5 (1964); *But compare* Certificated Air Carrier Military-Tender Investigation, 28 C.A.B. 902, 919-20 (1959) in which the Board stated:

> In administering the provisions of . . . (sections 403 and 404) of the Civil Aeronautics Act, the Board has consistently given great weight to the precedents established by the Courts and by the Interstate Commerce Commission in determining issues relating to alleged unlawful discriminations or other inequities in airline rates and fares.

See also United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932) interpreting the prohibition against undue preference and prejudice in maritime rates found in The Shipping Act of 1916, 46 U.S.C. § 815 (1958).

[67] Federal Aviation Act of 1958, § 1002(f), 49 U.S.C. § 1482(f) (1970); Virginia v. CAB, 489 F.2d 129, 135 (4th Cir. 1974).

[68] *Id.*

customers in Baltimore, Philadelphia, and Washington.[69] The statutory prohibitions against undue preference, the court of appeals declared, were not intended to deprive a favorably located port of its geographical advantages.[70] To support its position, the Fourth Circuit cited *United States v. Illinois Central Railway*[71] and *Alabama Great Southern Railroad v. United States.*[72] The two cases are not comparable, however, because neither is a port case. Their use by the *Virginia* court of appeals merely obscures the distinction developed in rate-making between ports and interior cities which may justifiy slight prejudice to inland points in favor of equality of opportunity for ports. Moreover, the United States Supreme Court in *Illinois Central* approved equal rates for competing points. Finally, the reasoning of the court in *Virginia* ignored the issue that common rates must be *unduly* preferential or prejudicial to be unlawful.[73] A city will be prejudiced only to the extent that its business declines from the diversion of traffic to other terminals.[74] The administrative law judge in the earlier *Virginia* hearings determined that common rates would not in any measurable manner undermine New York's position as one of the leading air transport centers in the world.[75]

In fashioning a standard for assessment cargo rates, the *Virginia* court stated that the courts may consider the economic impact of a proposed scheme.[76] If the rates for freight destined for gateways other than New York were reduced to the level of New York's rates, there would be a consequent reduction of carrier revenues. The airlines would also suffer decreased yields as a result of pro-rating

[69] The court of appeals in *Virginia* cited the example that if Baltimore is common-rated with New York, Cleveland would pay a rate 12.3% higher than Baltimore's rates although its air mileage is only 3.2% farther from Europe. 498 F.2d at 135.

[70] 498 F.2d 129, 134 (4th Cir. 1974). This principle originated in an opinion by Mr. Justice Holmes in which he stated that "the law does not attempt to equalize fortune, opportunities, or abilities." ICC v. Diffenbaugh, 222 U.S. 42, 46 (1911). This maxim is not absolute. *See, e.g.*, note 77 *infra.*

[71] 263 U.S. 515, 524 (1924).

[72] 340 U.S. 216 (1951). The court of appeals in *Virginia* inconsistently cites to decisions reviewing actions by the Interstate Commerce Commission despite its own pronouncement that precedents under the Interstate Commerce Act are not controlling in airline regulation.

[73] Northern Consolidated Airlines, Inc., Proposed Fares, 33 C.A.B. 440 (1961).

[74] Whiterock Quarries, Inc. v. Penn. R.R., 266 I.C.C. 157 (1946).

[75] *Initial Decision* at 50.

[76] 498 F.2d 129, 135 (4th Cir. 1974).

shipments originating at or destined for gateways other than New York with domestic carriers. The combined impact of these effects would inevitably require higher rates unless the total volume of freight traffic would increase.[77]

Although the decision in the instant case is supported by the economic proposition that charging the same fare for unequal distances may be economically unsound under most flight conditions, the Fourth Circuit did not satisfactorily confront the issue of the special circumstances test which repudiates the concept that economic costs are the controlling determinants in rate-making.[78] The court of appeals merely recited that the CAB had approved some international common rates "because of 'special circumstances' not present here."[79] No reasons were given by the Fourth Circuit nor by the CAB to distinguish the *North Atlantic Cargo Rates* order from prior and subsequent Board orders approving international common rates. The northeast corridor gateway cities involved in this proceeding are currently common-rated to and from points in the

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[77] *Id.* at 135; CAB Order No. 73-2-74 at 21 (Feb. 6, 1974).

[78] The special circumstances test is a collorary to the principle in both air and surface transportation that distance is not a controlling factor in rate-making, but only one of several factors to be considered. Theodore Mfg. Corp., CAB Order No. 16343 (Sept. 30, 1965). The refusal by the ICC to approve new equal rates for northern and southern ports because the location of the southern cities justifies a different rate was reversed as arbitrary and capricious. Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689 (1959), *rev'd,* Boston & Maine R.R. v. United States, 202 F. Supp. 830, 837 (1962), *aff'd by an equally divided court,* 373 U.S. 372 (1963), *reh. denied,* 374 U.S. 859 (1963). These decisions are consistent with the non-cost oriented purpose of the discrimination provisions in both transportation statutes. Controlling weight has been given to considerations other than distance which reflect cost to a carrier. Goodman, *Recent Trends in Transport Rate Regulation,* 70 MICH. L. REV. 1223, 1245 (1972); *See* Brazos River Harbor Navigation Dist. v. Abilene & So. Ry., 319 I.C.C. 54 (1963), *aff'd,* Atchinson, Topeka, Santa Fe Ry. v. United States, 231 F. Supp. 422 (N.D. Ill. 1964), *aff'd mem.,* 383 U.S. 269 (1967); Nueces Co. Navigation Dist. No. 1 v. Atchinson, Topeka, Santa Fe Ry., 325 I.C.C. 400 (1965), *aff'd sub. nom.* City of Galveston v. United States, 257 F. Supp. 243 (S.D. Tex. 1966), *aff'd mem.,* 386 U.S. 269 (1967); Hillsborough Co. Port Authority v. Ahnapee & W. Ry., 313 I.C.C. 691 (1961), *aff'd per curiam sub. nom.* Alabama T. & N. P. Co. v. United States, 207 F. Supp. 638 (S.D. Ala. 1962). This policy has been extended to the construction of section 404(b) of the Federal Aviation Act through interpretation of the provision as a protective device primarily for shippers and not for carriers. Flying Tiger Line, Inc. v. CAB, 350 F.2d 462, 465 (D.C. Cir. 1965). *But compare* the CAB emphasis on pricing of inernational air fares according to costs and distance. IATA Transatlantic Fares Agreement, CAB Order No. 73-4-64 (Apr. 13, 1973).

[79] 498 F.2d 129, 135 (4th Cir. 1974).

Far East, South America, Hawaii, and Puerto Rico.[80] New York is common-rated with Washington and Baltimore to and from South American ports, even though Dulles International Airport is thereby deprived of its geographical advantage of some two hundred miles. West Coast ports and ten points in the Far East are charged equal rates despite the fact, for example, that Los Angeles is 994 miles farther from Seoul, Korea than is Seattle. The CAB itself acknowledged that "such common rating has been a customary practice in both surface and air transportation over the years. . . ."[81]

Virginia and Maryland contended that the mileage rates ordered by the CAB continued the undue preference for New York and prejudice to the other gateway points. The Board's order prescribed new rates by multiplying the New York/London base rate per mile by the mileage between the United States gateway city and the European point.[82] The petitioners urged that the new rates were higher for Dulles shippers than for New York shippers for every mileage category.[83] This disparity in the rate per mile is produced by common rates among European cities for transport to and from the United States.[84] The neglect of distances within Europe as rate determinants undermines the efforts of the CAB to fix rates on mileage flown and requires Baltimore and Washington shippers to pay

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[80] *Initial Decision* at 56; Commonwealth of Virginia Brief at 38-39, 42, Virginia v. CAB, 498 F.2d 129 (4th Cir. 1974); In the transatlantic rates under investigation in this case, New York is common-rated with Montreal even though there is a mileage differential of 200 miles. Brief for Commonwealth of Virginia for Certiorari at 7, Virginia v. CAB, 419 U.S. 1048 (1974). (Washington is only 190 miles farther from Europe than New York.) The Board upheld equal rates to the Far East in CAB Order No. 73-12-77 (Dec. 19, 1973) and South America in CAB Order No. 74-1-130 (Jan. 25, 1974). Intense competition between Detroit and Windsor, Canada has forced the CAB to retreat from its order of February 6, 1973 and equalize Detroit's rates with IATA rates to Windsor. CAB Order No. 74-7-130 (July 29, 1974).

[81] Theodore Mfg. Corp., CAB Order No. 16343 at 3 (Sept. 30, 1965).

[82] CAB Order No. 73-2-24 (Feb. 6, 1973); Tariffs were approved in CAB Order No. 73-11-63 (Nov. 14, 1973).

[83] Brief for the Commonwealth of Virginia at 16-24, Virginia v. CAB, 498 F.2d 129 (4th Cir. 1974).

[84] European common rating affects a general disregard of distances over Europe for flights to and from the United States. For example, the New York to Milan, Italy rate for 4,004 miles of transport is $.78 per pound but the Dulles rate to London for only 3,646 miles of transport is $.79 per pound of cargo. Virginia v. CAB, 498 F.2d 129, 136 (4th Cir. 1974).

more than New York customers to transport items similar distances.[85]

The Court of Appeals for the Fourth Circuit declared that the petitioners' argument was a comparison of oranges and apples[86] because the European common rating system is beyond the authority of the Board. Moreover, there was no unreasonable discrimination or preference because the mileage rate to any particular European point is the same for every United States gateway city.[87] The propriety of this conclusion must be questioned. Although the CAB lacks the power to prescribe rates in international transportation, the Board is required as a matter of law to remove undue preferences or prejudices in foreign rates.[88] The European common rate system does not purport to control intra-European traffic, but it does affect international transport to and from the United States. Furthermore, a higher charge to one shipper than to another for the same number of miles of transport is discriminatory.[89] Finally, shippers will as a practical matter continue to prefer the airport which provides the lowest rates in any corridor with close alternative cities.[90]

Virginia v. CAB provides a convenient framework to analyze the effectiveness of judicial review of agency actions. At the core of the court of appeals' opinion is the doctrine that an administrative agency may exercise a large measure of discretion in the formulation of rates.[91] The agency may fashion a remedy which is based upon the expertise of its administrative specialists and which

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[85] *Initial Decision* at 46; The CAB conceded that this difference in rates will be produced by its order. CAB Order No. 73-11-63 at 6 n.8 (Nov. 14, 1973). Add-on charges at Dulles/Friendship were increased three to five cents per kilo weight depending upon the particular European destination despite the finding by the CAB that the old charges were so high as to divert shipments to New York by truck. *Initial Decision* at 43, 49 and CAB Order No. 73-2-74 at 6 (Feb. 6, 1974).

[86] 498 F.2d 129, 136 (4th Cir. 1974).

[87] *Id.*

[88] Federal Aviation Act of 1958, §§ 404(b), 1002(j), 49 U.S.C. §§ 1374(b), 1484(j) (1970).

[89] New York v. United States, 331 U.S. 284 (1947); Hawaiian Common Fares Case, 37 C.A.B. 269 (1962).

[90] Brief of Intervenor Metropolitan Washington Board of Trade at 21, Virginia v. CAB, 498 F.2d 129 (4th Cir. 1974).

[91] Ayshire Collieries Corp. v. United States, 335 U.S. 573, 592 (1949); Board of Trade v. United States, 314 U.S. 534, 546 (1942).

promotes uniformity of regulation.[92] The court must affirm the agency's application of technical knowledge if the findings are supported by substantial evidence, and if the conclusions are not arbitrary, capricious or contrary to law or legislative intent.[93] This judicial deference, however, allows inconsistent agency actions. A prevailing problem of the CAB is its failure to develop and adhere to consistent policy standards.[94] The courts, however, have been reluctant to accept the view that an administrative agency should be required by law to treat all comparable cases similarly.[95] The CAB has been vested with discretion by statute because of its presumed expertise in implementing congressional policy towards air transportation. That discretion is proper only so long as the CAB continues to balance all of the considerations which Congress specified in the Federal Aviation Act of 1958. The exclusion of a policy which Congress intended for the Board to consider, or the unreasonable weight accorded to one factor, should be regarded as an abuse of discretion because the agency is no longer operating under its congressional mandate.[96]

The status of the special circumstances test for common rates is uncertain in the wake of this initial judicial interpretation of section 404(b) of the Act[97] with respect to common rates for international air cargo. The discretion of the CAB to order common rates in some markets and to prescribe mileage rates in other routes has been approved by the court of appeals in *Virginia v. CAB* without a pronouncement that distinguishing circumstances must be demonstrated by the agency. In the confusion, the Board has affirmed

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[92] Las Vegas Hacienda, Inc. v. CAB, 298 F.2d 430 (9th Cir. 1962), *cert. denied*, 369 U.S. 885 (1962).

[93] Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). A conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view. Capital Intern. Airways, Inc. v. CAB, 392 F.2d 511 (D.C. Cir. 1968).

[94] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1055, 1072-97 (1962).

[95] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 588 (1965); *See* Berger, *Administrative Arbitrariness Judicial Review*, 65 COLUM. L. REV. 55 (1965); *But compare* City of Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965).

[96] "It will not do to decide the same question one way between one set of litigants and the opposite way between another." B. CARDOZA, THE NATURE OF THE JUDICIAL PROCESS 33 (1921).

[97] Federal Aviation Act of 1958, § 404(b), 49 U.S.C. § 1374(b) (1970).

common rates from the northeast gateway cities to Far Eastern and South American points.[98] The CAB has also reversed its own decision and equalized North Atlantic cargo rates to Europe from Windsor, Canada and Detroit.[99] Other cities, such as Seattle which is equalized with San Francisco, may seek to realize their geographical advantage over competing ports by challenging both domestic and international common rates. In this respect, the decision of the Fourth Circuit Court of Appeals in *Virginia v. CAB* has created a need for guidelines for the CAB determination of alternative rate structure in air transportation.

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[98] CAB Order No. 73-12-77 (Dec. 19, 1973); CAB Order No. 74-1-130 (Jan. 29, 1974).

[99] CAB Order No. 74-7-130 (July 29, 1974).

Current Literature