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Case Notes

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CERTIFICATES—EMERGENCY REVOCATION—A Statute Empowering the Federal Aviation Administration to Revoke an Air Taxi Certificate, Without Notice or a Prior Hearing, When It Determines an Emergency Exists Is Neither Unconstitutionally Vague Nor Violative of Due Process. *Air East, Inc. v. National Transportation Safety Board,* 512 F.2d 1227 (3rd Cir. 1975), *cert. denied,* ———U.S.———(1975).

On January 16, 1974, an airplane owned by Air East, Inc.[1] crashed while attempting to land at Johnstown, Pennsylvania, killing twelve passengers and crew members. Pursuant to the Federal Aviation Act of 1958[2] (the Act), the National Transportation Safety Board (NTSB) began an investigation[3] to determine the cause of the accident. In the course of this investigation, the NTSB received information concerning Air East's general safety practices. This information was transmitted to the Federal Aviation Administration (FAA), which then instituted a separate investigation[4] to

[1] Brief for Petitioner at 5, Air East, Inc. v. National Transportation Safety Board, 512 F.2d 1227 (3d Cir. 1975), *cert. denied,* ___ U.S. ___ (1975). Air East, Inc. d/b/a Allegheny Commuter, was the holder of Air Taxi Commercial Operator Certificate No. 14-EA-69 issued on August 21, 1969, and Repair Stations Certificate No. 114-2 issued on August 21, 1970. Air East, Inc., prior to March 7, 1974, conducted scheduled air taxi passenger operations serving the Pennsylvania communities of Pittsburgh, Johnstown, Altoona, and Harrisburg, and scheduled air mail operations serving Pittsburgh, Johnstown, Bradford, DuBois, and Harrisburg. In connection with these air taxi operations, Air East was also an authorized aircraft repair station.

[2] 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 sometimes cited in text as "the Act"]

[3] 49 U.S.C. § 1441(a) (1970):

> It shall be the duty of the Board to . . .
> (2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;
> (3) Make such recommendations to the Administrator as, in its opinion, will tend to prevent similar accidents in the future;

[4] 49 U.S.C. § 1429(a) (1970):

> The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result

determine whether some action should be taken regarding the air taxi certificate held by Air East and the individual certificates held by the vice-president, chief pilot, training officer, and the chief mechanic.[5]

Following a seven-week investigation, during which the FAA examined company records and deposed numerous present and former Air East employees, the FAA issued emergency orders on March 7, 1974, revoking the aviation certificates held by Air East and four individuals. The revocation orders concluded that an

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of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificates should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of Section 1486 of this title, and the Administrator shall be made a party to such proceedings.

[5] 512 F.2d at 1229. The individuals involved are: Charles Allan McKinney, Air East's Vice-President of flight operations, who held a commercial pilot certificate; James Avery Tallent, Air East's operations officer and chief pilot, who held an airline transport pilot certificate; Jeffery H. Wilkinson, Air East's training officer and captain, the holder of a commercial pilot certificate; and Thomas Reddecliff, Air East's chief mechanic and holder of a mechanic certificate.

emergency existed and immediate effectiveness was required.[6] Air East and the four individuals immediately filed an appeal[7] and on March 21, 1974, a hearing was begun before an administrative law judge. Following twenty-five days of testimony and argument, the law judge sustained all of the revocation orders. The NTSB affirmed the revocations and the law judge's findings except as to one charge against the chief pilot.[8] Air East then petitioned for

[6] 49 U.S.C. § 1429(a) (1970), 49 U.S.C. § 1485(a) (1970):

> Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided*, That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further*, That the Administrator shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter.

[7] 49 U.S.C. § 1429(a) (1970).

[8] Alexander P. Butterfield v. Air East, Inc., NTSB Order No. EA-581 (May 13, 1974). In sustaining the revocation of Air East's air taxi certificate, the Board found that Air East as a matter of company policy on numerous occasions had, *inter alia*: (1) exceeded maximum aircraft takeoff weights and center-of-gravity limitations; (2) falsified load manifests as to takeoff weights and centers of gravity; (3) used unapproved instrument landing approaches at two airports; (4) violated minimum altitude and visibility regulations at those airports; (5) operated flights at Johnstown airport without obtaining required weather data; (6) adopted improper procedures for reporting equipment malfunctions; (7) falsified aircraft maintenance records; (8) operated aircraft in an unairworthy condition on commercial flights; (9) utilized pilots who had not passed required flight checks; (10) falsified pilot training records; and (11) coerced or intimidated its pilots and mechanics to comply with these illegal, unapproved, or unsafe procedures. McKinney, Tallent, and Wilkinson were found to have engaged in the following practices, *inter alia*, on numerous occasions while acting as pilot-in-command of Air East flights: (1) operated aircraft which exceeded weight and center-of-gravity limitations; (2) used unapproved instrument landing approach procedures at two airports; (3) violated minimum altitude and visibility regulations at those airports; (4) deviated from air traffic control clearances without permission; (5) failed to maintain minimum required distances from clouds. With respect to Air East's repair station and petitioner Reddecliff, Air East's chief mechanic, the Board found numerous instances in which (1) aircraft had been returned to service without required work having been performed in a proper manner; (2) aircraft or aircraft parts had been returned to service without an inspection for airworthiness by a qualified inspector; (3) maintenance records had been falsified.

judicial review[9] contending *inter alia* that the emergency revocation of the licenses without a hearing was a denial of due process, the charges were not supported by probative and substantial evidence, and the sanctions were excessive.[10] *Held, affirmed*: A statute empowering the FAA to revoke an air taxi certificate, without notice or a prior hearing when it determines an "emergency"[11] exists is neither unconstitutionally vague nor violative of due process.

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[9] 49 U.S.C. § 1429(a) (1970). 49 U.S.C. § 1486 (1970):

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this Section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in Section 2112 of Title 28.

(d) Upon transmittal of the portion to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in Section 1254 of Title 28.

[10] *Air East* is a consolidation of six suits, each an appeal of the revocation of the certificate involved. This case note, while discussing facts surrounding the violations and factual contentions made by Air East and the four individuals, will concentrate primarily on the constitutional issues presented as they affect Air East rather than the individuals involved.

[11] 49 U.S.C. § 1429(a) (1970).

Broad rulemaking authority regarding safety is delegated to the FAA under the Act, and the FAA sets safety requirements for almost every facet of aircraft operation. The legislative history of the Act indicates that Congress envisioned that the FAA would promulgate a comprehensive framework of regulations and enforce them fairly to insure the maximum safety and efficiency in air operations. Authority was given to the FAA not only in the area of rulemaking, but also in accident investigations, airport location, and military participation, with the only limitation being that the FAA discharge these powers in the public interest and provide for the national defense.[12] It was recognized even before the Act was adopted that this broad rulemaking power could result in problems when the FAA was required to balance the equities between economic and safety considerations.[13] Section 609[14] was included in the Act to protect certificate holders from arbitrary action by the FAA,[15] by allowing a complete review of the FAA's order by the NTSB before it goes into effect unless the Administrator advises the NTSB an "emergency" exists.[16] The examples of the application of the emergency revocation procedure under the Civil Aeronautics Act of 1938, found in the legislative history, however, include no instance of an application of this procedure to an air taxi certificate; rather the procedure had only been applied to pilot and mechanic certificates.[17]

A typical use of the emergency procedure is *Walker v. C.A.B.*,[18] in which the pilot had his license suspended but continued to fly, disregarding the suspension. A subsequent revocation by the Civil Aeronautics Board (CAB) insured compliance. Similarly, in *Specht*

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[12] *See*, U.S. CODE CONG. & AD. NEWS 3746 (1958).

[13] *Id.* at 3765. James R. Durfee, Chairman of the CAB in 1958, pointed out this potential problem as it applied to "local service and smaller trunkline carriers," and concluded that "the minimum safeguard required is the right of complete review by the Board, not only on grounds of economic hardship, but in matters where air safety has been compromised."

[14] 104 CONG. REC. 16080-16081 (1958). The section referred to is now 49 U.S.C. § 1429(a). Section 609(b) was added in 1971, Pub. L. No. 92-159, § 2(a) (Nov. 18, 1971).

[15] *Id.*

[16] 49 U.S.C. § 1429(a) (1970).

[17] 104 CONG. REC. 16081 (1958) (remarks of Cong. Harris).

[18] 251 F.2d 954 (2d Cir. 1958).

v. C.A.B.,[19] a pilot's certificate was revoked because the Administrator believed that the pilot's unjustified violations of safety regulations demonstrated that the pilot lacked the qualifications required of an air transport pilot, regardless of his technical skills. Both *Walker* and *Specht* were determined under the predecessor to the current Act. A more recent application is *Nadiak v. C.A.B.*,[20] in which the pilot appealed a temporary suspension and precipitated a full-scale investigation that lasted over eight months and brought into review twelve years of the pilot's professional career. The investigation culminated in the issuance by the Administrator of an emergency order revoking Nadiak's certificates, and this order was upheld.[21]

Several recent cases have challenged the Administrator's finding of an "emergency" justifying immediate effect to a revocation order. In one of these cases, *United States v. Harper*,[22] the district court clearly misunderstood the effect of a finding of an "emergency" by the Administrator. The filing of the appeal by the certificate holder

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[19] 254 F.2d 905 (8th Cir. 1958).

[20] 305 F.2d 588 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963).

[21] It is significant to note that *Nadiak* is indistinguishable from *Air East* in its application to the individuals involved. As was pointed out in both cases, as applied to the individuals, the revocation of a certificate only precludes the individuals from reapplying for another certificate for one year, unless the revocation order provides otherwise. *See*, 14 C.F.R. § 63.11(d) (1975) (revocation of crew member certificate); 14 C.F.R. § 65.11(d)(2) (1975) (revocation of mechanic or repairmen's certificate). The regulations governing issuance of a certificate to an air carrier following revocation, however, are substantially different. 14 C.F.R. § 121.51(b) (1975) provides:

> The Administrator *may* deny an application for a certificate under this subpart if he finds—
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> (1) That an air carrier or commercial operator certificate previously issued to an applicant was revoked;
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> (2) That a person who was employed in a management position similar to any listed under § 121.59 [general manager, director of operations, director of maintenance, chief pilot, chief inspector] with (or has exercised control with respect to) any air carrier or commercial operator whose operating certificate has been revoked, will be employed in any of these positions or a similar position (or will be in control of or have a substantial ownership interest in the applicant), and that the person's employment or control contributed materially to the reasons for revoking that certificate . . . [emphasis added].

This potential difference in treatment following a revocation is the reason for the focus in this case note upon the application of the summary procedure to Air East rather than the individuals.

[22] 335 F. Supp. 904 (D. Mass. 1972), *vacated as moot*, 406 U.S. 940 (1972).

necessitates a disposition of the case by the NTSB within sixty days.[23] Thus, in the event the Administrator's determination is not upheld by the NTSB, the certificate holder actually suffers, at most, a sixty day suspension. The court in *Harper* agreed with the certificate holder that the emergency procedure involved a denial of procedural due process, but said there could be circumstances when a limited suspension would be constitutionally valid if the immediate risk of harm to the public outweighed the certificate holder's interest in being heard prior to the revocation.[24] By failing to realize that on the facts presented in *Harper*, only a potential sixty day limited suspension was involved if the FAA finding was not sustained, the district court never balanced the interests of the certificate holder against those of the government and the public to determine the constitutional validity of the emergency revocation procedure.

This same approach of balancing the potential risk to the public against the threat of harm to the certificate holder was used in two other cases involving challenges of "emergency" revocations. In *Priority Air Dispatch, Inc. v. Brinegar*,[25] the FAA sought both termination of an exemption allowing an air taxi to carry hazardous materials and revocation of the air taxi's certificate. To support his action under section 609(a) of the Act, the Administrator recited in conclusory terms, without any evidence to support his findings, that an "emergency" existed and the order should go into effect immediately. The district court enjoined the FAA from taking this action without a showing that safety in air commerce required this solution as there was a substantial likelihood of immediate and irreparable harm to the air taxi if the revocation went into effect.

Ample evidence of potential danger to the public in support of the Administrator's summary seizure of a "restricted"[26] aircraft, coupled with the comparatively slight potential harm of the seizure to the certificate holder led to the approval of this "emergency" procedure in *Aircrane, Inc. v. Butterfield*.[27] The court in *Aircrane*

[23] 49 U.S.C. § 1429(a) (1970).

[24] 335 F. Supp. at 906.

[25] Civil No. 1573-73 (D.D.C. August 15, 1973), 12 AV. L. REP. ¶ 18,046 (1973).

[26] 14 C.F.R. § 21.25 (1975).

[27] 369 F. Supp. 598 (E.D. Pa. 1974), noted, 40 J. AIR L. & COM. 749 (1974). In *Aircrane*, the statutory scheme provided that the owner could recover his property by posting a $1,000 bond to secure the payment of the penalty the FAA be-

examined closely the Administrator's evidence of the potential danger to the public, however, and noted that it would be an error to accept the Administrator's determination that an emergency exists simply by his reference to "safety" as the overriding purpose of the Act.[28]

The Supreme Court, in cases involving summary action by the government, either state or federal, has also relied upon a balancing test when the interest in prompt action to protect the public outweighs the individual's interest in having an opportunity to be heard before the government acts.[29] Thus summary action has been sustained in many areas in which the government has undertaken to protect the public, such as protecting the national security,[30] protecting the federal government's revenues,[31] protecting the public against economic injury,[32] protecting the public health,[33] and a variety of other situations in which "emergency" action was felt to be justified.[34] All of these cases involve a governmental taking of property or an imposition of governmental will giving rise in each case to considerations of due process.[35]

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lieved was owing. The court felt this bond was negligible compared with the total value of the property. 369 F. Supp. at 608.

[28] *Id.* at 605.

> As a starting point, we believe that the dangers inherent in summary governmental action impel the courts to scrutinize closely governmental interests which supposedly justify such procedures. We do not believe that the sections which are challenged as unconstitutional should be upheld simply by referring to the overriding purpose of the Federal Aviation Act. . . . The legitimate objectives of a statutory scheme as extensive as the FAA Act do not necessarily immunize from attack each and every section and regulation promulgated under it.

[29] For a full discussion of this area through 1972, *see* Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

[30] Bowles v. Willingham, 321 U.S. 503 (1944) (summary action to establish maximum rents during wartime).

[31] Phillips v. Commissioner, 283 U.S. 589 (1931) (summary seizure of property to collect taxes).

[32] Fahey v. Mallonee, 332 U.S. 245 (1947) (summary authority to appoint a conservator to enter into possession of a bank).

[33] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (authority to seize misbranded drugs).

[34] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (authority to seize movable property being used for unlawful purposes).

[35] U.S. CONST. amend. V.

The Supreme Court in *Fuentes v. Shevin*[36] though, set out a rigid three-pronged test that seems to supersede the more traditional balancing test for due process and to adopt stricter requirements that must be passed before a revocation or seizure can be sustained without notice or opportunity for a prior hearing. These requirements are:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in that particular instance.[37]

Subsequently, the Supreme Court's holding in *Mitchell v. W. T. Grant Co.*,[38] a Louisiana sequestration statute case, seemed to call for a return to a balancing test. But, after *Mitchell*, the Supreme Court's holding in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[39] makes it explicit that *Fuentes* is not completely dead. In *Di-Chem*, the Supreme Court struck down a Georgia garnishment statute because it did not contain the procedural safeguards that saved the Louisiana statute in *Mitchell*.[40] To what degree the holding in *Di-Chem* reaffirms *Fuentes* remains unclear,[41] since *Di-Chem* requires an "early hearing"[42] after garnishment, rather than a prior hearing as in *Fuentes*. But, the favorable citations to *Fuentes* in *Di-Chem* coupled with the Supreme Court's approval of a summary seizure of a boat suspected of use in illegal activities in *Calero-Toledo v.*

[36] 407 U.S. 67 (1971). Even though there may be some question whether an air taxi certificate constitutes "property," the taking of which requires due process, Congress has provided in its legislative scheme that once a certificate has gone into effect it cannot be altered or revoked without either notice, a hearing, or a sufficient emergency to justify the lack of notice and a hearing. *See* 49 U.S.C. §§ 1371(f) and 1429(a) (1970) and CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961).

[37] *Id.* at 91.

[38] 416 U.S. 600 (1974).

[39] 419 U.S. 601 (1975).

[40] *Id.* at 722.

[41] *See* Catz and Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUTGERS L. REV. 541 (1975).

[42] 419 U.S. 601 (1975).

Pearson Yacht Leasing Co.,[43] an opinion rendered two days after *Mitchell*, would connote continued recognition by the Supreme Court of certain "extraordinary" situations that justify postponing notice and opportunity for a hearing.[44]

With this background, the Court of Appeals in *Air East* considered the constitutionality of the revocation of the air taxi certificate by the FAA without prior notice or opportunity for a hearing. The court recognized that the language of section 609(a) is broad enough to include air taxi certificates as well as certificates held by individuals.[45] The court's task in *Air East* was to determine whether the "emergency" found by the Administrator under section 609(a), which justified the immediate revocation procedure, fit due process standards. *Fuentes*, even though modified by *Di-Chem*, still provides the most rigorous test for due process, and one that recognizes the need for a flexible approach when "extraordinary situations" exist. Even though the *Air East* court never cited *Fuentes*, the three-pronged test outlined in *Fuentes* provides the applicable yardstick to measure due process in an "emergency" revocation.

In analyzing the first test, whether the revocation was necessary to secure an important governmental or general public interest, the court noted the recognition by Congress of the duty of air carriers to perform their services "with the highest possible degree of safety in the public interest."[46] Considering that the allegations concerning Air East involved serious violations of safety procedures[47] and the inherent general public interest in air safety, either as passengers or as bystanders on the ground, the *Air East* court had little difficulty in determining that the revocation was necessary.[48] The court, though, also injected the balancing test, using traditional notions of due process, and demonstrated that under this traditional ap-

[43] 416 U.S. 663 (1974). The statutory standard given for seizure of the yacht is 24 P.R. Laws Ann. § 2512(a)(4) which provides:

> (a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico: (4) All conveyances, including aircraft, vehicles, mounts or vessels, which are used, or are intended for use, to transport . . . property described in clauses (1) and (2) [controlled substances] of this subsection; . . .

[44] 407 U.S. at 90.

[45] 512 F.2d 1227, 1232 (1975).

[46] *Id.* at 1229, citing 49 U.S.C. § 1421(b) (1970).

[47] *See* note 8 *supra*.

[48] 512 F.2d at 1231.

proach the revocation was also justified. The court weighed the potential damage to Air East, even if the revocation amounted to only a sixty day suspension, and concluded that the public interest in safety outweighed any potential hardship to Air East even if the charges of the FAA were found to be without merit.[49] The court noted, nevertheless, that different considerations would apply if the charges against Air East had not pertained to flight safety or if the charges had been of dubious authenticity.[50]

The second requirement of *Fuentes*, a special need for prompt action, was found by the *Air East* court in a somewhat novel manner, in that the emergency and the need for prompt action were shown despite the fact that it took the Administrator over six weeks to determine that this action was necessary. The court reasoned that this lengthy investigation sufficiently established the reality of the safety hazards and justified the use of emergency revocation procedure.[51] It would seem, however, that while the time for the investigation might be termed reasonable in this instance for determination of an emergency, at some point this type of analysis must break down because the longer it takes to determine the facts, the more obvious it becomes that prompt action is not necessary.[52]

The *Air East* court also concluded that the lengthy investigation afforded the air taxi a measure of extra-judicial due process and that there was an opportunity to present explanatory material prior to the revocations. Using these two facets of the lengthy investigation, the Administrator's final determination of an emergency and an opportunity for extra-judicial hearing, the court said it was unnecessary to determine under what circumstances the Administrator should give the certificate holder a more formal opportunity to present explanatory material.[53]

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[49] *Id.*

[50] *Id.* at 1232. The third part of the court's opinion deals with whether there was substantial evidence to support the findings of the Board. In this part of the opinion, all of Air East's contentions that the charges raised were of dubious authenticity were rejected.

[51] *Id.*

[52] *But see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). There the Supreme Court sustained a summary seizure as one necessitating prompt action despite a lapse of over two months from when the alleged crime took place. Douglas, J., dissenting, 416 U.S. at 691. Also, in Nadiak v. CAB, 335 F. Supp. 904 (D. Mass. 1972), the investigation took eight months before the emergency revocation was invoked.

[53] 512 F.2d at 1232.

The final requirement to be satisfied under *Fuentes* was whether the revocation is necessary under a narrowly drawn statute that keeps strict control on the government's "monopoly of force." The court in *Air East* treated this point in rather summary fashion, by simply concluding that broad authority is necessary to avoid frustrating the congressional intent in enacting this statutory scheme. The court avoided all questions of whether the Administrator should be required to formulate guidelines for the exercise of his discretionary power in this area.[54] The standard for the Administrator, "safety in air commerce,"[55] is analagous to the broad standard upheld in *Ewing v. Mytinger & Casselberry, Inc.* of "misleading to the injury or damage of the purchaser or consumer."[56] In *Ewing* the Supreme Court approved the Food and Drug Administrator's summary seizure of misbranded drugs on the grounds that the potential harm to the public outweighed the detriment to the manufacturer. *Ewing* is cited with approval in *Fuentes* as an example of an "extraordinary" situation.[57]

A broad grant of discretionary power to the Administrator is justified in this area to allow freedom of action to meet a wide spectrum of possible violations. Without broad discretion to promulgate new rules and modify or revoke old ones, the Administrator would be constantly lagging behind the aviation community as it developed new equipment and techniques. This would clearly frustrate the Congressional policy in this area.[58] Broad delegation of authority to executive agencies by Congress is not unusual in the federal system and has been sustained by the Supreme Court in a wide variety of situations.[59] Yet, implicit in these broad grants of

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[54] DAVIS, ADMINISTRATIVE LAW TEXT, 52 (3d ed. 1972). *Cf.* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Joplin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

[55] 49 U.S.C. §§ 1429(a), 1485(a) (1970) quoted in note 6 *supra.*

[56] 339 U.S. at 595-96:

> probable cause to believe . . . that the labeling of the misbranded articles . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer . . . .

[57] 407 U.S. at 92.

[58] U.S. CODE CONG. & AD. NEWS 3746 (1958).

[59] Fahey v. Mallonee, 332 U.S. 245 (1947) (power given to the Federal Home Loan Bank Board to prescribe by regulating the terms and conditions for appointment of a conservator to a federal savings and loan association); Currin v. Wallace, 306 U.S. 1 (1939) (power of Secretary of Agriculture to establish standards

power is the necessity for rules and regulations defining limits to the exercise of the power. The basic concept, as noted by Chief Justice Hughes in *Panama Refining Co. v. Ryan*, is that Congress may determine the policies and standards for a given area of legislation and leave to selected agencies the making of rules within these prescribed limits.[60] The court in *Air East* recognized that due process within this concept must be flexibly analyzed in the context of the particular fact situations presented.[61]

While section 609(a) clearly keeps strict governmental control on the "monopoly of force," it hardly fits within the ambit of a "narrowly drawn statute"[62] as required by the third prong of *Fuentes*. The broad term "emergency" should be narrowed by regulation to provide the aviation community with notice of when and on what conditions this summary revocation procedure will be invoked, especially in light of the possibly punitive consequences existing under current regulations.[63] Without limitations in this area, certificate holders cannot be sure what conduct will lead to a determination of an "emergency" by the Administrator, and without administrative guidelines there is a strong possibility of uneven application and selective enforcement.

Even though the extensive violations[64] alleged in *Air East* may have constituted an "emergency" within the original intention of the framers of the statute, the question remaining is what degree of violation short of that alleged in *Air East* will also constitute an emergency.[65] Certainly, there are standards in many areas of aviation that relate directly to safety. These would include such things as requirements on approach and landing altitudes, computing weight and center-of-gravity requirements, and obtaining accurate

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for tobacco and to designate and regulate markets); and Yakus v. United States, 321 U.S. 414 (1944) (power of Price Administrator to fix commodity prices).

[60] 293 U.S. at 421 (1935).

[61] 512 F.2d at 1231.

[62] 407 U.S. at 91.

[63] *See* note 21 *supra.*

[64] *See* note 8 *supra.*

[65] *Av. Week*, Vol. 100, No. 12, p. 26 (March 25, 1974) reports that, including Air East, 29 air taxi certificates were revoked and 11 were suspended of a total 2900 air taxis inspected in a stepped-up inspection campaign in 1973 due to concern with increased air taxi accidents. Presumably, some of those certificates revoked involved lesser violations than those alleged in *Air East.*

weather information. Violations of these major standards can easily lead to an "emergency" situation, and a suspected history of violation of these requirements by a certificate holder should continue to be sufficient cause to invoke the emergency revocation procedure.

Certain other standards established by the FAA are of a minor nature and only peripherally related to safety. These would include such things as registration requirements for aircraft and requirements for maintaining a business office. Violations of this type of regulation alone should be clearly insufficient to justify use of the emergency revocation procedure. Still other regulations fall in between these two categories. An example would be permissible monthly flying time. These have some basis in safety factors and also an element of administrative convenience. Determination of the regulation's effect on flight safety if violated depends on the nature and extent of violation. In this category and the category including regulations of a minor nature, accumulated violations can still be weighed and form the basis for determination of an "emergency" revocation, but there should be explicit administrative guidelines in this area. This is necessary both to give objectivity to the determination of an "emergency" and to give prior notice to certificate holders.

Even though the *Air East* court never cited *Fuentes*, by undertaking to apply the form of the three-pronged analysis for testing the constitutional validity of the statutory emergency revocation procedure, the court has subjected the scheme to a stricter review than that of a traditional case-by-case balancing of interests. By upholding the statutes after this strict review, the court has put this emergency revocation scheme on firmer constitutional footing and has given *Air East* precedential value when the emergency revocation procedure is utilized in other situations.[66]

Unfortunately, there are still no guidelines on what type of factual presentation by the Administrator will justify the use of these punitive sanctions against a holder of an air taxi certificate. Without administrative guidelines in this area, members of the

[66] In fact, since the decision in *Air East*, it has been cited as authority for upholding the constitutional validity of 49 U.S.C. § 1429 in Morton v. Dow, No. 75-1088 (10th Cir., Sept. 8, 1975) and as authority for the proposition that 49 U.S.C. §§ 1485(a) and 1486(a) provide adequate protection of a litigant's constitutional claims in Robinson v. Dow, No. 75-1026 (6th Cir., July 23, 1975).

aviation community will remain uncertain of what conduct or omissions will constitute a sufficient "emergency" for invoking this revocation procedure. With judicial approval for invocation of the procedure without a hearing, the air taxi certificate holder may never receive notice in time to remedy the situation.

Robert M. Allen

NEGLIGENCE—FEDERAL TORT CLAIMS ACT—The "Discretionary Function" Exception to the Federal Tort Claims Act Did Not Relieve the Government of Liability for the Negligent Conduct of an FBI Agent, and the Activity of Forcibly Disabling a Hijacked Aircraft, Which Resulted in the Death of all Persons Aboard, Was Negligence under the Law of Florida. *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975)

On October 4, 1971, an incident of air piracy, resulting in the death of three persons, began in Nashville, Tennessee, and ended in Jacksonville, Florida. An armed hijacker, with an associate, took his estranged wife, the pilot, and the copilot captive aboard a chartered plane and ordered it to be flown to Freeport, Bahamas. Aware of the need for refueling for the overseas flight, the hijacker agreed to a brief stop in Jacksonville, Florida, where alerted FBI agents, headed by a special agent, awaited the aircraft's arrival. The pilot repeatedly requested fuel and supplies for the flight, yet the FBI agent refused to comply, preferring instead to play a "waiting game" with the hijacker. The hijacker allowed the copilot and the associate to leave the plane to negotiate with the FBI for the supplies, but upon deplaning both men were taken into custody and were not allowed to reboard the plane. At this point, the agent chose to prevent the aircraft's departure by using rifle fire to deflate the tires and disable one of the engines. During or after this attack the hijacker killed his wife, the pilot, and himself. The survivors of the wife and pilot brought a wrongful death action[1] in District

[1] Owners of the aircraft, Big Brother Aircraft, Inc., sued for damages to the airplane caused by the rifle fire. The District Court disallowed recovery under the theory of trespass holding that the agent's conduct was necessary to the per-

Court of the Middle District of Tennessee against the United States under the Federal Tort Claims Act (FTCA)[2] alleging that the F.B.I. agent's negligent handling of the incident caused both victims' deaths. The Government argued that the FBI agent's conduct fell within the "discretionary function" exception[3] to the Federal Tort Claims Act and, therefore, the suit was barred by application of the sovereign immunity doctrine. Furthermore, the Government contended, under the law of Florida, the agent had not been negligent. The court, sitting without a jury,[4] ruled against the plaintiffs and held that, although the "discretionary function" exception did not bar the action, the FBI agent had not been negligent.[5] Plaintiffs appealed to the Sixth Circuit Court of Appeals asserting error in the lower court's finding on the negligence issue.[6]

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formance of his duties and therefore was privileged. The Court of Appeals reversed.

[2] 28 U.S.C. § 1346(b) (1970):

Subject to the provisions of Chapter 171 of this title, district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[3] 28 U.S.C. § 2680 (1970):

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[4] 28 U.S.C. § 2402 (1970). The FTCA requires action against the U.S. be tried without a jury.

[5] Downs v. United States, 382 F. Supp. 713 (1974).

[6] Plaintiffs appealed on four different issues. Numbers 3 and 4 will not be discussed in this casenote.

(1) Negligence Per Se: The Government's guidelines in the FBI Handbook constituted administrative rules setting out the standard of care required by agents in a hijacking situation. Plaintiff asserted that any violation of these rules would be negligence per se.

(2) Simple Negligence: The agent's attempt to capture the hijacker rather than continuing with the "waiting game" was a breach of the standard of care required by an agent which caused the death of two hostages.

(3) Trespass to Chattel: see note 1 *supra*.

(4) Measure of Damages: Florida law allows beneficiaries of the estate the capitalized value of the decedent's expected earnings rather than the lower court's

The Government urged reconsideration of the "discretionary function" issue which, if reversed, would warrant the suit's dismissal. *Held, affirmed in part; reversed in part*: The "discretionary function" exception to the Federal Tort Claims Act did not relieve the government of liability for the negligent conduct of an FBI agent, and the activity of forcibly disabling a hijacked aircraft, which resulted in the death of all persons aboard, was negligence under the law of Florida.

In existence since 1946,[7] the Federal Tort Claims Act waives the national government's defense of sovereign immunity in all but a few specifically enumerated instances.[8] The FTCA gives federal courts jurisdiction to hear claims based upon the tortious conduct of governmental agents acting within the scope of their employment.[9] Prior to the passage of this act, injured parties were relegated to introducing private bills in Congress to obtain individual relief from negligent acts. The FTCA relieves Congress of the burden of investigating and passing upon these private bills[10] by placing complaints against the United States in the court room, the forum that hears all other actions for negligence.[11]

One of the specifically retained defenses incorporated into the FTCA is the important, yet much debated, section known as the "discretionary function" exception. This exception shields the government from liability for acts committed by its servants pursuant to governmental policy decisions and plans.[12] The sparse legislative

determination of the amount of monetary support the decedent would have provided in a lifetime.

[7] Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 812.

[8] Before the 1946 enactment of the FTCA, direct actions against the government were limited. Legislation waiving governmental immunity included: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1970). The Senate is presently considering a bill, S. 2558, H.R. 10439, introduced by Senator Roman Hruska on October 10, 1973, which would remove the following actions from 28 U.S.C. § 2680(h): false arrest, false imprisonment, assault, battery, malicious prosecution, and abuse of process.

[9] 28 U.S.C. § 1346(b) (1970). For full text see note 2 *supra*.

[10] United States v. Muniz, 374 U.S. 150, 153-55 (1963).

[11] Feres v. United States, 340 U.S. 135, 140 (1950). The reason for the FTCA enactment: "The volume of the private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subject members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication."

[12] It has been suggested that the discretionary function exception was adopted

history[13] of the FTCA indicates that the exception is intended to preclude any possibility that the government would be sued for damages growing out of an authorized activity when no negligence is shown, and when the basis for suit is the contention that the same conduct by an individual would be tortious. Examples of authorized activities cited by the Congress included flood-control or irrigation projects and regulatory measures taken by agencies such as the Federal Trade Commission and the Securities and Exchange Commission. Refraining from fixing an exact definition, Congress left it to the courts to set the parameters of the exception as its applicability arose in specific cases.[14]

The Supreme Court's first examination and construction of the "discretionary function" exception came in *Dalehite v. United States* in 1953.[15] In that case, the Court found that it had no jurisdiction to consider complaints of the governmental negligence in manufacturing, packing, and shipping fertilizer in Texas because these acts were of a "governmental nature or function"[16] for which Congress had not intended governmental liability. The decision to perform these acts was discretionary[17] because it evolved out of the government's policy of producing and exporting fertilizer for the preservation of world food supplies. Immunity from liability protects the decision-making processes of the government from judicial scrutiny so the government may choose its policies without the threat of ensuing liability.[18]

primarily to preserve a proper relationship between the judiciary and the other branches of the government. *See*, Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function*, 31 Wash. L. Rev. 207 (1956).

[13] H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1945); *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess., at 33 (1942).

[14] The legislature expected the courts to read a discretionary function exception into the Act regardless of whether it was included in the statute or not. *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess., at 29 (1942).

[15] Dalehite v. United States, 346 U.S. 15 (1953). This case is referred to as the Texas City Disaster case in which 560 persons were killed and much of the Texas city was destroyed because of an explosion and fire occurring on a ship carrying sulphur and fertilizer at the order of the Office of War Mobilization and Reconstruction.

[16] *Id.* at 28.

[17] *Id.* at 35-36. "Where there is room for policy judgment and decision, there is discretion."

[18] *Id.* at 57. "[I]t is not a tort for government to govern, . . ."

While stating that it was unnecessary to define, apart from *Dalehite's* specific facts, precisely when discretion ends, the Court used language which distinguished between discretionary *planning* decisions and non-discretionary *operational* decisions.[19] This planning-operational distinction has been adopted by many lower courts[20] as establishing a criterion for determining the applicability of the exception.[21] The usefulness of this distinction, however, diminishes when it is categorically applied to differing fact situations.

Two Supreme Court decisions handed down since *Dalheite* have been used by other courts to support a more restrictive view of the "discretionary function" exception. Those decisions rested, not upon section 2680(a), the "discretionary function" exception, but rather upon sections 2674[22] and 1346[23] of the FTCA. In *Indian Towing Co. v. United States*,[24] the government conceded that in this case the "discretionary function" exception was not applicable to the "operational" level of government activity, but argued that U.S. Coast Guard maintenance of a lighthouse was a "uniquely governmental"[25] activity and, therefore, because the language of section

[19] *Id.* at 42.

[20] Supreme Court cases which have relied upon the planning-operational distinction: Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co., Inc. v. United States, 350 U.S. 61 (1955). Both cases involve the interpretation of the § 2674(a) "discretionary function" and both concur that the Government's liability should be expanded to cover "negligence" occurring in an "operational" activity. " . . . [T]he very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented government liability." Rayonier, Inc. at 139. Other cases discussing the planning-operational distinction: United States v. Washington, 351 F.2d 913 (9th Cir. 1965); White v. United States, 317 F.2d 13 (4th Cir. 1963); United States v. Gregory, 300 F.2d 11 (10th Cir. 1962); Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

[21] Peck, *supra* note 12, at 219. Peck suggests that the majority was trying to determine where discretion lay more than they were trying to establish a viable distinction between the planning and operational levels of government activity.

[22] 28 U.S.C. § 2674 (1948):

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[23] 28 U.S.C. § 1346(b). *See supra* note 2.

[24] 350 U.S. 61 (1955). The government was held liable for the Coast Guard's failure to maintain a lighthouse beacon properly.

[25] For arguments distinguishing the § 2674 argument, *see* Feres v. United States, *supra* note 11; Dalehite v. United States, *supra* note 15.

2674 imposes liability "in the same manner and to the same extent as a private individual under like circumstances," there could be no government liability.[26] Since the performance of U.S. Coast Guard activities has no private sector counterpart, sovereign immunity was preserved. The Court dismissed this argument, noting that Congress was not likely to predicate liability on such a completely fortuitous circumstance as the presence or absence of an identical private activity.[27] Moreover, the language of the statute allows a finding of government liability under circumstances "like," but not "identical" to those of a private person. The Court, in *Rayonier, Inc.* v. *United States*,[28] subscribed to *Indian Towing's* refutation of government liability based solely upon a proprietary-governmental distinction, holding that the very purpose of the FTCA was to waive the all-encompassing immunity and impose liability, notwithstanding that such governmental liability may be "novel and unprecedented."[29]

Unfortunately, a precise definition of the "discretionary function" exception has not been attempted by Congress or the courts; however, it is possible to construct a spectrum of the factors considered by the courts to be important in determining the applicability of the exception. At one end of the spectrum are cases in which the government has suggested that literally any exercise of judgment by one of its agents would be sufficient to bring the exception into play[30] and if taken to their logical conclusion would rarely, if ever, permit the government to be held liable for its actions. Such a broad standard for applying the "discretionary function" exception would reinstate governmental immunity altogether. Opposite these cases which uphold the governmental position are those cases in which the "discretionary function" exception is argued, but only by implication through other provisions of the FTCA.[31] The technical

[26] *See also* United States v. Muniz, *supra* note 10; Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956); Fair v. United States, 234 F.2d 288 (5th Cir. 1956).

[27] Indian Towing Co. v. United States, *supra* note 20.

[28] 352 U.S. 315 (1957). U.S. Forest Service agents negligently permitted a forest fire to spread and damage plaintiff's land.

[29] *Id.* at 319.

[30] Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

[31] Rayonier, Inc. v. United States, *supra* note 28; Indian Towing Co. v. United States, *supra* note 20.

arguments of statutory construction are discarded in these cases in favor of granting a forum for redress to plaintiffs who might otherwise be remediless.

Between these extremes is the planning-operational model derived from the language in *Dalehite*. The planning stage of governmental policy involves discretion and, therefore, is not actionable, while the operational stage, putting the policy into play, can be actionable if done negligently.[32] This formula is objectionable because it identifies an immune position as one of higher responsibility; while the decision, not the position, should be immune.[33]

Completing the spectrum are theories proposing a balancing of factors to determine whether governmental acts should be immune, much like a calculus of risk analysis[34] helps to determine whether there has been negligence. One author advocates a successful defense based on the discretionary function exception when the government agent takes the risk, after evaluation, because such risk is a necessary means to achieve the objective for which he has been given authority.[35] Others argue that this formulation is too narrowly defined, noting that the requirement that a risk be necessary seems inconsistent with the concept of discretion, which rests on the power to choose among appropriate means.[36] Before finding the "discretionary function" applicable, the court should consider the plaintiff's injury, the possible alternative remedies to government liability, the capacity of the court or jury to evaluate the agent's actions and the effect of the liability on the treasury or the efficient administration of the law.[37] Still others have proposed that the "discretionary function" standard should be based upon the relationship between the choice made by the government official and the creation of official policy.[38] The spectrum, therefore, in-

[32] *See generally* United States v. Washington, 351 F.2d 913 (9th Cir. 1965); White v. United States, 317 F.2d 13 (4th Cir. 1963); Mahler v. United States, 306 F.2d 713 (3rd Cir.), *cert. denied*, 371 U.S. 923 (1962); United States v. Gregory, 300 F.2d 11 (10th Cir. 1962).

[33] Clark, *Discretionary Function and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 A.F.L. Rev. 33, 40 (Spring 1974).

[34] Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915).

[35] Peck, *supra* note 12, at 225.

[36] Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 238 (1963).

[37] *Id.* at 291.

[38] Clark, *supra* note 33, at 32.

cludes standards which differ in theory, perhaps only in the slightest degree, but when each is applied to a particular situation may produce different results.

When the "discretionary function" exception is used, the FTCA provides that the applicable law of negligence is the law of the state in which the act occurred.[39] In *Downs v. U.S.*, the required standard of care under Florida law is the ordinary and reasonable care which should be exercised under a particular set of circumstances. The law also demands, however, that a higher standard of care, consistent with an individual's ability, apply to the person with skills, knowledge, or training superior to that of the ordinary man.[40] Law enforcement officers are held to this higher standard of care and their conduct is measured against what the reasonable and prudent police officer would do in a similar situation.[41]

The Sixth Circuit Court of Appeals in *Downs* rejects the "discretionary function" exception after recounting and analyzing the historical arguments and trends in this area and applying the best of these theories to this specific case. In could do little more. The court is consistent with other courts[42] when it dispenses quickly with the technical argument, manufactured from section 2674 of FTCA that private persons do not engage in FBI activities and, therefore, the government cannot be liable. In equally sweeping fashion, the court shuns the planning-operational distinction, even though emphasized by some courts, because the concept fails to delineate the scope of the exception in all but the most obvious situations. Conceding that the FBI agents exercised judgment in the handling of the situation, the court relies on what it considers to be the underpinning of all the theories about the discretionary function exception: whether the judgment made by the FBI agent involved formulation of government policy. The court notes that the exception

[39] Freeman v. United States, 509 F.2d 626 (6th Cir. 1975); Bibler v. Young, 492 F.2d 1351 (6th Cir. 1974), *cert. denied*, 419 U.S. 996 (1974).

[40] Miriam Maracheck Inc. v. Mausner, 264 So.2d 859, 861 (Fla. App. 1972). *See generally*, F. HARPER & E. JAMES, THE LAW OF TORTS § 16.11 (1966); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33 (4th ed. 1971); Annot. 80 A.L.R.2d 5 (1961).

[41] Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972).

[42] *See* Indian Towing Co. v. United States, *supra* note 20; Rayonier, Inc. v. United States, *supra* note 28; Dahlstrom v. United States, *supra* note 26; Fair v. United States, *supra* note 26.

protects the government's power to devise policy for the benefit of those governed. Because that policy was formulated and recorded in the FBI Handbook[43] prior to the incident, the court states that the agent's action taken in the field did not involve making government policy, rather, it involved the type of day-to-day decision exacted by the duties of those persons who are FBI agents. According to the Sixth Circuit, there appears to be no valid reason why this decision and the resulting injuries should be shielded by governmental immunity.

In an effort to buttress its stand on the "discretionary function" issue, the Appeals court analogizes and perhaps confuses the principle of government immunity with official immunity. Official immunity exempts an individual from personal liability for actions taken within the scope of his official duties, because, in theory, officials can carry out their duties more effectively if they are not threatened with the possibility of liability.[44] It must be emphasized that this concept of official immunity concerns state laws for intentional torts and involves both absolute and qualified privileges. Regardless of whether official immunity encourages fearless enforcement of the law[45] or whether the prospect of liability causes a slackening in enforcement practices, the principle is not applicable in this case. Direct individual liability does not result under the FTCA; therefore, the analogy breaks down.

Stressing the compelling need to compensate injured citizens, the court's final argument in denying governmental immunity is simply that the general trend is toward increasing the scope of the waiver of immunity through the FTCA. While this *may* be true, the court used language from a 1951 decision[46] to support the existence of a trend today. Moreover, the case cited for that principle concerns impleading the government as a third party defendant, not the "discretionary function" exception.

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[43] The FBI Handbook is a set of "guidelines" used by agents in situations like a hijacking incident. The court ruled that the Handbook was secret and must remain out of the record.

[44] Jaffe, *supra* note 36.

[45] *See* Schuer v. Rhodes, 416 U.S. 232 (1974); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1972); Barr v. Mateo, 360 U.S. 564 (1959).

[46] United States v. Yellow Cab, 340 U.S. 543 (1951).

Turning to the issue of negligence, the question before the court was whether the reasonable FBI agent in the same circumstances would have concluded that forcible intervention would have caused an unreasonable risk of harm to innocent persons. Reconstructing the situation through the eyes of an agent with 21 years of FBI experience, the court recounted the knowledge and particular facts about the hijacking which were used to arrive at the agent's decision to attack the airplane. From the beginning of his involvement with the hijacking, the FBI agent knew the pilot had requested that fuel and supplies be available upon landing. He was also informed that two armed men hijacked the aircraft and that a woman was held hostage along with the pilot and co-pilot. After the airplane's landing, the special agent in charge was told of the renewed request for fuel and a parking area clear of all personnel. Information about the plastic explosives was also relayed to him. The agent said later that, fearing the plane might depart, he opted to block the runway with two FBI cars and to continue his "waiting game." The two men who deplaned told the agent that the remaining hijacker had been drinking, but no attempt was made to solicit information about the hijacker's mental state. The court considers this oversight to be significant. The consolidation of all these facts and the ensuing decision to intervene forcibly to prevent departure took less than fifteen minutes. The "waiting game" ended very quickly.

The court found that the trained agent, who was issued the FBI Handbook and who supposedly was familiar with these guidelines, violated the specific FBI policy on hijackings.[47] The agent disregarded the explicit and urgent requests of the pilot to keep away from the aircraft and to allow departure with an adequate supply of fuel. This blatant disregard is found by the court to be the cause of the victims' deaths.

[47] FBI Handbook, Plaintiff's Brief page 5. "The FBI is charged with the responsibility of taking whatever action is necessary when a hijacked aircraft is not in flight. FAA is charged with the responsibility of taking whatever action is necessary when a hijacked aircraft is in flight. . . . Good judgment should be exercised and prime consideration given in every instance to the safety of the passengers and crew. No action should be taken to forcibly disable or board an aircraft without the express permission or request of the Captain of the aircraft in question, as actions by outside forces without the prior knowledge and complete cooperation of the Captain and his crew could result in total disaster." (App. 102).

The court did not hold the agent liable for negligence *per se* but found ample justification for finding simple negligence. Negligence *per se* is predicated on a statute and, as the court notes, the FBI handbook is an agency guideline and not a statute. Yet, the reviewing court places much more emphasis on this guideline than did the lower court.[48] The Court of Appeals found that the special agent failed to follow the FBI procedures which require the prime consideration of the agent to be the safety of the passengers and crew. Choosing force rather than continuing the wait evidences that the prime objective of the agent was to capture the hijacker. Certainly, the fear that the plane would depart was valid concern (arguably, however, the plane could not take off at all because two FBI cars blocked the runway), but it was not sufficient to warrant such drastic action. The alternative, suggested by the Appeals Court and overlooked by the lower court, would have been to continue the "wait" until the fuel from the running engine was depleted. This, according to the Court of Appeals, was a better method to protect the hostages' well-being and, in failing to choose it, or another non-forcible alternative, the F.B.I. agent breached the standard of care established by his agency's own guidelines. The failure to find the agent negligent was held to be clearly erroneous and the Court of Appeals reversed.

Downs v. U.S. has a double impact on the law since it expands the government's liability to include the FBI agent's decisions to intervene and it restricts the methods of handling a hijacking to those alternatives found in the FBI guidelines. Certainly, expansion of governmental liability was likely, though the analysis by the Sixth Circuit of the "discretionary function" exception was little more than a recount of other cases which did not find the government's decision to be within the exception. As the court notes, the trend in the law has been to increase the scope of the waiver and this seems to be an important justification for this court's decision. Clearly, such a trend, if it actually exists, is a part of a larger trend in tort law which places the risk of loss on the party most able to bear it. Apparently the court decided the government was able to pay damages; therefore, it should bear the loss. The concept of fault appears to have little or no place in this analysis.

[48] The lower court judge himself was a former FBI agent.

The negligence determination has, perhaps, even more implications than the finding of government liability. Now, when an FBI agent is assigned to a hijacking, he must comply strictly with the FBI guidelines and avoid any forcible intervention without the pilot's cooperation and approval. Options which fall short of an attack on the plane, yet are still designed to free the passengers from the hijacker, are available to the agent. The Sixth Circuit suggests additional delay, attempting to reason with the hijacker, or dressing as an airport crewman and approaching the airplane to make an arrest. If the Sixth Circuit's theory is adopted by other courts, intervention over the pilot's objection will lead to a finding of negligence. The only possible recourse for an agent to avoid this finding and the resulting governmental liability will be to distinguish the facts of this case. Presumably there will be no finding of negligence if the pilot requests intervention. If the agent fully informs himself about the hijacker's mental state at the time of the hijacking and if he determines no previous record or disposition to violence, the court might find it reasonable to intervene because of a balancing of the risks. The more dangerous the hijacker is, the more likely a forcible intervention would be considered negligent by the courts.

That forcible intervention against the pilot's wishes must be the last resort is the logical conclusion of this case.[49] Agents will have to exercise options less violent than shooting at the airplane. The waiting game is perhaps the safest; however, the decision as to which option is best is far easier after the fact than before. For the present, FBI agents must adhere strictly to their own guidelines and must avoid seeking to capture hijackers if hostages' lives are in danger.

Marcy Leachman

[49] The haunting question is whether this alternative, of using force, is available at all, or if available it is only at the price of governmental indemnification.

CAB LABOR JURISDICTION — EXEMPT AIR CARRIERS — The CAB Does Not Have Jurisdiction Over an Air Taxi Operator Who Is Operating Under an Exemption From the Certification Requirements of the Federal Aviation Act of 1958 to Enforce Compliance With the Railway Labor Act. *Union Of Professional Airmen v. Civil Aeronautics Board*, 511 F.2d 423 (D.C. Cir. 1975).

The Union of Professional Airmen (UPA)[1] was certified in 1971 by the National Mediation Board,[2] under the Railway Labor Act,[3] as the representative of crews in the employ of Shawnee Airlines. Immediately prior to UPA's certification and subsequent thereto Shawnee engaged in activities that allegedly violated the Railway Labor Act.[4] The UPA sought an order from the CAB which requested, *inter alia*, that the CAB direct Shawnee to comply immediately with section 401(k)(4) of the Federal Aviation Act of

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[1] UPA, an affiliate of the Airline Pilots Association International, is a labor organization designed to represent crews in the employ of air taxi operators, commuter airlines and other similar carriers.

[2] Railway Labor Act § 2, *as amended*, 45 U.S.C. § 152 (1972) [formerly ch. 347, § 1, 44 Stat. 577] provides that the National Mediation Board (NMB) shall settle disputes over the representative of a carrier's employees. The NMB is vested with the duty to designate and certify the representative of those employees to the carrier.

[3] Railway Labor Act § 2, 45 U.S.C. § 151 *et seq.* (1972).

[4] Railway Labor Act § 201, 45 U.S.C. § 181 (1972) makes applicable to all air carriers the provisions of 45 U.S.C. § 151 *et seq.* (1972). The UPA alleged violations of the Railway Labor Act § 2, First, Second, Third and Fourth, 45 U.S.C. § 152, First, Second, Third and Fourth (1972). Specifically, UPA prayed for an order of the Board:

> 1. Directing and requiring Shawnee to cease and desist from the acts and conduct complained of herein.
>
> 2. Directing and requiring Shawnee to take immediate and effective measures to comply with Section 401(k)(4) of the Federal Aviation Act of 1958 and the Railway Labor Act, within a time to be fixed by the Board.
>
> 3. Directing and requiring Shawnee to offer immediate reinstatement of pilots Schultz, Langelier, Fleming, Bell and Dinges in their former positions with Shawnee and that they be made whole for all losses suffered by reason of the unlawful discharges complained of herein; and
>
> 4. Providing that in the event of the failure of Shawnee to cease and desist from the acts and conduct complained of herein or to promptly comply with the remedies directed by the Board, that all authority now possessed by Shawnee to engage in air transportation be terminated and withdrawn forthwith.

1958[5] as well as the applicable provisions of the Railway Labor Act.[6] Shawnee moved the CAB to dismiss for lack of jurdisdiction on the grounds that section 401(k)(4) applied only to air carriers certificated under section 401(a)[7] of the Act, and that since they were exempted from certification[8] and did not operate under a certificate,[9] the Board had no jurisdiction to force Shawnee to comply with section 401(k)(4) of the Act. The Board granted Shawnee's motion and dismissed the enforcement proceeding.[10] The UPA appealed the decision of the Board to the Court of Appeals for the District of Columbia. *Held, affirmed*: The CAB does not have jurisdiction to hear a complaint under section 401(k)(4) of the Act against an air taxi operator who is operating under an exemption from the certification requirement of section 401(a) of the Federal Aviation Act of 1958.

Section 401(k)(4) of the Federal Aviation Act of 1958 provides:

> It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with section 181-188 of Title 45.[11]

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[5] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1972), *formerly* Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 [hereinafter referred to as "the Act"]. *See also* Federal Aviation Act of 1958 § 401(k)(4), 49 U.S.C. § 1371(k)(4) (1972).

[6] Section 401(k)(4) requires certificated carriers to comply with sections 181-88 of the Railway Labor Act.

[7] 49 U.S.C. § 1371(a) (1972).

[8] Federal Aviation Act of 1958 § 416(b)(1), 49 U.S.C. 1386(b)(1) (1972) provides that:

> The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

[9] Federal Aviation Act of 1958 § 401(a), 49 U.S.C. § 1371(a) (1972).

[10] CAB Order No. 73-3-43 (March 14, 1973).

[11] Sections 181-88 of the Railway Labor Act, *as amended*, 45 U.S.C. §§ 181-88 (1972) encompass the collective bargaining provisions of section 151-52 and 154-63 of the Railway Labor Act, *as amended*, 45 U.S.C. §§ 151-52, 154-63 (1972).

The issuance of such a certificate[12] is made mandatory by section 401(a) of the Federal Aviation Act of 1958 which states:

> No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.[13]

Section 416(b)(1) of the Federal Aviation Act of 1958, however, sets forth the proposition that the CAB may, as it sees fit, exempt any air carrier or class of air carriers from the requirements set forth by the economic regulations of the Act.[14] Pursuant to this exemption power, the Board has bestowed by regulation,[15] a blanket exemption for air taxi operators,[16] from obtaining a certificate of public convenience and necessity as required by section 401(a).

The present case was one of first impression for the Board, the issue being whether the CAB had jurisdiction over an air taxi operator (Shawnee), who operated pursuant to an exemption,[17] but

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[12] Federal Aviation Act of 1958 § 401(a), 49 U.S.C. § 1371(a) (1972).

[13] *Id.*

[14] *See* note 8 *supra.*

[15] 14 C.F.R. § 298.11(a) (1974) states in part:

> Air taxi operators are exempt from the following provisions of Title IV of the Act:
>
> (a) Subsection 401(a).

[16] 14 C.F.R. § 298.3(a)(2) (1974) states:

> (a) There is hereby established a classification of air carriers, designated "air taxi operators" which engage in the direct air transportation of passengers and/or property, and/or in the transportation within the 48 contiguous States, Alaska or Hawaii of mail by aircraft and which:
>
> (2) Do not hold a certificate of public convenience and necessity or other economic authority issued by the Board.

[17] Federal Aviation Act of 1958 § 416(b)(1), 49 U.S.C. § 1386(b)(1) (1972). *See* note 8 *supra. But see* The Complaint of the Air Line Pilots Association (ALPA) against Commuter Airlines, Inc., Docket No. 18844 where the Director of the Bureau of Enforcement said:

> Commuter holds its authority from the Board pursuant to the exemption provisions of section 416(a) of the Act and section 298 of the Board's regulations providing for air taxi service. Commuter, therefore, comes within the provisions of 401(k)(4) of the Act and holds its authority from the Board subject to compliance with Title II of the Railway Labor Act. [January 19, 1968, letter of the Director, Bureau of Enforcement, dismissing the complaint, Docket No. 18844].

Here, however, the complaint was dismissed solely on the basis of public policy because the collective bargaining mechanism offered by the National Mediation Board was available. In the present case, no such public policy reasons readily demand finding that jurisdiction is not present.

who allegedly failed to comply with section 401(k)(4). Section 401(k)(4) conditions the holding of a certificate of public convenience and necessity, as required by section 401(a), upon compliance with the Railway Labor Act.[18] The Board, in deciding that it lacked the requisite jurisdiction to hear the complaint, cited its lack of expertise in labor matters, its long standing policy of abstension in labor matters, its limited resources and manpower, and the availability of other more capable forums to which recourse could be had for such disputes.[19] The Board also noted that it "is not expected to act as a general labor board for the airline industry in all cases where a carrier has violated the Railway Labor Act."[20] The Board therefore concluded not only that it did not have the requisite jurisdiction over such violations, but it likewise was not delegated such responsibility by section 401(k)(4).[21]

An examination of the relevant case law demonstrates that the CAB has not been totally consistent in deferring the adjudication of labor matters. The CAB has exercised jurisdiction over labor matters arising during mergers. In *Kent v. Civil Aeronautics Board*[22]

[18] Railway Labor Act §§ 201-08, *as amended*, 45 U.S.C. §§ 181-88 (1972).

[19] CAB Order No. 73-3-45 at 3 (March 14, 1973). *See generally* Hickey, *Airline Labor Laws—A Fresh Look*, 38 J. AIR L. & COM. 231, 251 (1972).

[20] CAB Order No. 73-3-45 at 3 (March 14, 1973). *See also* Flight Engineers' International Ass'n, EAL Chapter v. CAB, 332 F.2d 312 at 315 (D.C. Cir. 1964), where the court held that the CAB did not abuse its discretion in dismissing a complaint arising under § 401(k)(4) filed against a certified carrier. The court reasoned that the third sentence of § 1002(a) of the Act gave the Board discretionary powers of investigation in response to complaints. Hence, since the Board concluded that such an investigation and hearing would not be in the "public interest," it dismissed the otherwise sufficient complaint.

[21] CAB Order No. 73-3-45 at 3 (March 14, 1973). The Board was "unable to conclude that section 401(k)(4) charges the Board with responsibility for ascertaining whether an air taxi operator is in violation of the Railway Labor Act or vests any special jurisdiction in it with respect to any such violation."

[22] 204 F.2d 263 (2d Cir. 1953). This case involved the integration of employees of two certified air carriers into a combined seniority list arising out of the North Atlantic Route Transfer Case. The court held that the Board had jurisdiction over the labor dispute under § 408 of the Civil Aeronautics Act of 1938, 49 U.S.C. § 488. It upheld the Board's power to impose protective labor conditions which were designed to lessen any adverse effects of the merger. *See also* United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701, 707-08 (1950) in which the Board stated that in addition to the interest of employees in labor protective provisions, there is a general public interest in insuring "route transfers and mergers . . . not be prevented or delayed by labor difficulties arising out of hardships to employees;" and Airline Employees Ass'n v. CAB, 413 F.2d 1092 (D.C. Cir. 1969); American Airlines, Inc. v. CAB, 445 F.2d 891 (2d Cir. 1971); Airline Pilots Ass'n, Int'l v. CAB, 360 F.2d 837 (D.C. Cir. 1966).

the court held that the Board's express authority to deal with mergers gave rise to an implicit power to deal with labor matters of a protective nature.[23] The court, in *Outland v. Civil Aeronautics Board*,[24] noted that the Board's experience and expertise is not in the area of labor relations, yet it upheld an order of the Board in a merger directing integration of seniority lists of employees. The *United-Capital Merger Case*[25] set forth labor protective provisions which have been employed in subsequent merger disputes. Despite the continued use of these provisions the Board and courts have consistently reaffirmed the Board's position that it has not transformed itself into a labor board bound to pass on every question of labor law related to the airline industry.[26]

In the area of temporary suspensions of certificated carriers, the Board has to a large extent declined to utilize its labor protective power.[27] Ever since *Seven States Area Investigation*,[28] the Board has been hesitant to exercise its labor protective orders in the area of suspensions.[29]

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[23] The court reasoned that since an almost identical section of the Interstate Commerce Act gave the ICC such power over adversely affected employees, the CAB must have a like power. 204 F.2d 263, 265 (2d Cir. 1953). *See also* Western Airlines v. CAB, 194 F.2d 211 (9th Cir. 1952).

[24] 284 F.2d 224 (D.C. Cir. 1960).

[25] 33 CAB 307 (1961). See Appendix A of that opinion for the protective labor provisions. The imposition of these provisions demonstrates that the CAB has involved itself in labor matters to more than just a negligible degree.

[26] *See* note 22 *supra.*

[27] *See* Air Line Pilots Ass'n, Int'l v. CAB, 154 U.S. App. 316, 322, 475 F.2d 900, 906 (D.C. Cir. 1973) in which the court held that the Board had discretion to determine whether hearings on labor protective provisions were warranted in a multilateral schedule reduction agreement; Air Line Pilots Ass'n, Int'l v. CAB, 494 F.2d 1118, 1130 (D.C. Cir. 1974) in which the court stated:

> The Board has grounded its special treatment of suspensions on its determination that a suspension of a particular route or routes, unlike a merger, will not normally substantially affect employees and thus will not threaten airline labor strife. It has further distinguished suspensions by noting that labor protective provisions might "tend to nullify one of the principal benefits of suspensions, *i.e.*, the reduction in costs which the carrier will experience. We think the Board has thus developed a rational policy for the exercise of its discretionary labor protective power.

See, e.g., Trans World Airlines, Inc., CAB Order 71-8-91 (August 19, 1971); Slick Airways, Suspension of Service, 26 CAB 779, 782 (1958).

[28] 30 C.A.B. 473 (1960). There, an affirmative showing of substantial impact on employees due to the suspensions and deletions of service justified CAB imposition of labor protective provisions.

[29] *See* note 27 *supra. See also* Frontier Airline, Inc., CAB Order 72-1-100 (January 28, 1972).

The question of whether the CAB should make the initial determination of alleged violations by air carriers of the Railway Labor Act has also been inconsistently settled. The issue was first determined in *Airline Pilots Association v. Southern Airways.*[30] Although the jurisdictional issue was dropped prior to the hearing, the Board nevertheless asserted that it had jurisdiction and was the proper agency to determine whether a certificated air carrier had violated the Railway Labor Act.[31] This result was based upon the conclusion of a CAB examiner that the CAB was required to investigate complaints and hold hearings before an air carrier's certificate of public convenience and necessity could be revoked.[32]

The CAB, while not overruling *Southern Airways*, has changed its position and consistently declined to adjudicate labor disputes arising out of alleged violations of the Railway Labor Act. In *Flight Engineers' International, EAL Chapter v. Civil Aeronautics Board*[33] the court affirmed an order of the Board which dismissed a complaint alleging violations of the Railway Labor Act. The court stated that the Board does have discretionary power to dismiss a complaint if the dismissal is in the public interest.[34] Furthermore, such discretion was implicit in the Railway Labor Act and

[30] 36 C.A.B. 430 (1962).

[31] *Id.* In the Southern case the CAB examiner rejected Southern's contention that the Board's jurisdiction arises only after an initial determination by another forum that an unfair labor practice, *i.e.*, violation of the Railway Labor Act, had occurred. It should be noted, however, that the only other possible forum, the National Mediation Board (*see* note 65 *infra*) had no authority in the area of controversy. The Board there stated:

> [T]he exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled and . . . the legislative history of section 401(k) is of little or no help in resolving whether the Board was an appropriate forum for the hearing and determination of complaints alleging violations of the Railway Labor Act.

[32] Section 1002(a) and 401(g) of the Act, 49 U.S.C. §§ 1482(a) and 1371(g) (1972) respectively. The former section imposes a duty upon the CAB to investigate a complaint if there is any "reasonable ground" and provides the Board with the power to compel compliance. The latter section provides that the Board may, after notice and hearings, suspend or revoke any certificate for "intentional failure to comply with any provision" of the Act or any "condition of certification." Note, however, that nowhere in the Act is there explicit provision for action to be taken against an exempt carrier for violations of the Railway Labor Act comparable to section 401(g).

[33] 332 F.2d 312 (D.C. Cir. 1964).

[34] *Id.* at 314. The court also stated that the matters under dispute could and should be determined by the NMB.

Federal Aviation Act since a lack of discretion would force the Board to act as a general labor board for the airline industry in all cases involving violations of the Railway Labor Act.[35] The CAB's policy of deferral was reasserted in *IBT v. Western Airlines.*[36] There, the Board refused to entertain a grievance arising under section 401(k)(4) which would have involved post-merger protective labor conditions. The existence of a more appropriate forum, the National Mediation Board, justified deferral.

In the present case the Board held that it did not have *jurisdiction* over a complaint filed against an air taxi operator because section 401(k)(4) contains a *built-in limitation* upon its applicability. That is, the Board has jurisdiction over complaints arising under section 401(k)(4) only if instigated against a carrier operating pursuant to a section 401(a) certificate, not a section 416(b)(1) exemption.

In affirming the decision of the Board, the court extensively examined the legislative history of section 401(k)(4) but found it of little assistance in determining the sole question presented.[37] The court differentiated and distinguished the marked contrast between sections 401(k)(1), (2), and (4) by examining Senate and House committee hearings.[38] The first two sub-sections make the minimum wage and maximum hour standards of Decision No. 83 of the

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[35] *Id.* at 315. The court noted that:

> the burden thus imposed would greatly hinder the Board in making available its resources quickly to solve those labor controversies into which it should enter to protect the public interest in undisrupted air transportation.

It should also be noted that the carrier involved was certificated under section 401(a) of the Act. Violations of section 401(k)(4) were alleged. Yet discretion to dismiss a complaint which stated reasonable grounds for believing violations of the Act had occurred was upheld as being "in the public interest."

[36] CAB Order 71-12-109 (December 23, 1971).

[37] 511 F.2d 423 (D.C. Cir. 1975). Since the court held that the CAB's determination that it lacked jurisdiction under section 401(k)(4) to hear the complaint was a correct interpretation of the statute, it summarily disposed of the issue of whether the CAB abused its discretion. Since the CAB did not have jurisdiction it was obvious that it could not abuse its discretion in declining to exercise a power it did not possess. Note that administrative construction of an Act is entitled to great weight, American Airlines v. CAB, 178 F.2d 903, 908 (9th Cir. 1949).

[38] *Hearings on H.R. 9738 Before the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3rd Sess., at 209, 262 (1938); *Hearings on S. 3659 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 75th Cong., 3rd Sess., 65 (1938).

National Labor Board[39] applicable to *every air carrier* even if it does not operate pursuant to a certificate. Sub-section (4) applies, at least on its face, only to air carriers holding a section 401(a) certificate of public convenience and necessity.

The court noted that the relevant legislation, as initially proposed by the president of Air Line Pilots Association,[40] conditioned the holding of a section 401(a) certificate upon compliance with Decision No. 83.[41] When enacted, however, the minimum wage and maximum hour provisions of that decision, which are now embodied by sections 401(k)(1) and (2), were extended to every air carrier, whether they operated under a section 401(a) certificate or a section 416(b)(1) exemption. The court distinguished the wording of section 401(k)(4) by placing heavy reliance upon statements made by President Behncke of Air Line Pilots Association[42] before the Senate and House Committees on Interstate and Foreign Commerce to the effect that the labor provisions proposed by the pilots should only be applied to air carriers holding certificates of public convenience and necessity.[43] The emphasis placed by President Behncke upon the purposes behind the condition that the holding of a certificate by any air carrier is subject to compliance with the Railway Labor Act,[44] was also afforded probative value by the court.[45] Indeed, the court viewed President Behncke's testimony as determinative in explaining the discrepancy in the wording of section 401(k)(1), (2), and (4). The court concluded that Congress was

[39] Decision No. 83, National Labor Board (May 10, 1934).

[40] *Hearings on S. 3659 Before a Subcomm. of the Senate Comm. on Interstate Commerce*, 75th Cong., 3rd Sess. (1938).

[41] Decision No. 83, National Labor Board (May 10, 1934).

[42] *Hearings on H.R. 9738*, note 38 *supra* at 238; *Hearings on S. 3659*, note 38 *supra* at 66. President Behncke pointed out in his testimony that:

> if the carrier is found to be in violation the penalty is compliance. If they do not comply, of course, then they will lose their certificate. I think this is very fair. It's not the least bit arbitrary . . . .

[43] Nothing in the legislative history of the Act's labor provisions supports the inference that the reference in section 401(k)(4) to "certificate" connotes a significant and deliberate limitation on that sections applicability. At the same time, however, the extremely limited amount of non-certified traffic contemplated at the date of the congressional hearings might give rise to such an implication even without a consideration of the literal reading of the section. *See also* Air Line Pilots Association v. Civil Aeronautics Board, 458 F.2d 846 (D.C. Cir. 1972).

[44] Railway Labor Act § 201, 45 U.S.C. § 181 (1972).

[45] *See* note 42 *supra.*

well advised when it limited the scope of section 401(k)(4) to those air carriers holding certificates of public convenience and necessity as required by section 401(a).

In rejecting UPA's contention that section 401(k)(4) must apply to every air carrier, the court examined the apparent intention of Congress in limiting section 401(k)(4) to section 401(a) certificate holders. The court concluded that Congress had "limited the duty of the Board to monitor compliance with the Railway Labor Act to cases involving substantial or 'significant' carriers, to whom the Board had issued a certificate"[46] because at the time the Act[47] was passed "no one could envisage any significant amount of air transportation being provided in the United States by any non-certified (sic) carrier."[48] The court did, however, state that the rationale behind the limitation might no longer exist[49] because of the proliferation of non-certificated air taxi operators.[50]

The court's exhaustive analysis and ultimate resolution of the congressional action, which provided for a literal but restrictive application of section 401(k)(4), eliminated the need for an extensive discussion of any of the other grounds asserted by UPA at the Board hearing and preserved for appeal. The court did summarily consider, however, the contention that the Board had previously interpreted the "certificate holder" phrase in section 406(a)[51] to include all air carriers, whether they operated under a section 401(a) certificate or 416(b)(1) exemption.[52] The court

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[46] 511 F.2d at 429.

[47] Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938).

[48] 511 F.2d at 429.

[49] *Id.*

[50] See Air Line Pilots Assn. v. CAB, 161 U.S. App. 199, 202, 494 F.2d 1118, 1121 (D.C. Cir. 1974) and Hughes Air Corp. v. CAB, 160 U.S. App. 301, 303, 492 F.2d 567, 569 (D.C. Cir. 1969) for a discussion of the growth and status of exempted air carriers.

[51] Federal Aviation Act of 1958 § 406, 49 U.S.C. § 1377 (1972).

[52] *See* Mail Transportation by Noncertified Carriers, 18 CAB 201 (1953); Surface-Mail-by-Air-Exemptions, 20 CAB 658 (1955), *aff'd sub nom.* American Airlines, Inc. v. CAB, 97 U.S. App. 324, 231 F.2d 483 (D.C. Cir. 1956). In the above cases the Board granted compensation for the carriage of mail by exempted carriers. Since section 406 of the Act authorizes the Board to fix rates of compensation "for the transportation of mail by aircraft . . . by each holder of a certificate authorizing the transportation of mail by aircraft . . . ," UPA argued that section 401(k)(4) must likewise be read as applying to both certificate holders and exempt carriers.

easily distinguished these cases on the ground that the "holder of certificate" phrase contained in section 406(a)[53] referred to holders of *mail certificates* issued by the CAB to enable these airlines to participate in a one year surface-mail experiment, notwithstanding these carriers were exempt from the section 401(a) certification requirement.[54] The fact that the carriers were exempt from section 401(a) yet were certificated for the purpose of mail carriage did not, according to the court, render the phrase "holder of a certificate" in section 401(k)(4) applicable to an airline operating under a section 416(b)(1) exemption.[55] This conclusion was necessitated since an air carrier could operate under a section 416(b)(1) exemption yet obtain a certificate enabling them to engage in the surface-mail experiment. Thus a mail certificate could not be equated with a section 401(a) certificate of public convenience and necessity.

Therefore, since the congressional hearings were dispositive of the issue of congressional intent with respect to section 401(k)(4) and the Board had not previously interpreted the certificate holder phrase to include exempt operators, the court of appeals held that the CAB did not abuse its discretion in concluding that section 401(k)(4) "itself contains a built-in limitation upon its applicability."[56]

The court avoided a confrontation with the mandate of section 416(b)(2),[57] which limits the Board's power of exemption only to

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[53] Federal Aviation Act of 1958 § 406, 49 U.S.C. 1377 (1972).

[54] 511 F.2d at 430.

[55] *Id.*

[56] *Id.*

[57] Federal Aviation Act of 1958 § 416(b)(2), 49 U.S.C. § 1386(b)(2) (1972) states that:

> [t]he Board shall not exempt any air carrier from any provision of subsection (k) of section 1371 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearings, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public

section 401(k)(1) and (2) by concluding that Congress was aware of and intended the different terminology embodied in sections 401(k)(1) and (2) as opposed to 401(k)(4). The court based its conclusion on testimony before the Senate and House Committees on Interstate and Foreign Commerce.[58] While never expressly addressing itself to the limitations of section 416(b)(2) in other than conclusory terms, the court affirmed the Board's determination that, notwithstanding those limitations,[59] section 401(k)(4) contained a *built-in limitation* on the Board's *jurisdiction* to hear such complaints.[60] The court, like the Board, was thereby able to bypass section 416(b)(2) and effectively avoid the congressionally authorized limitation contained therein.

Moreover, section 181 of the Railway Labor Act[61] extends the coverage of the Railway Labor Act to *all air carriers*. The court ignored the dictate of this section, probably because this section applies to all air carriers whether they operate under a section 401(a) certificate or 416(b)(1) exemption. Had the court, however, wanted to read section 401(k)(4) as *not* having a built-in limitation, it could have concluded that the express limitation contained in section 416(b)(2) precludes *any* exemption from section 401(k)(4). The court's decision leads to the conclusion that complaints arising under the Railway Labor Act against carriers operating under a section 416(b)(1) exemption have to be instigated in a more appropriate forum.

The court rejected the Board's suggestion, however, that because it lacked the requisite expertise in labor matters it could decline its *authorized* jurisdiction to hear complaints alleging violations of the Railway Labor Act.[62] Inasmuch as the decision in this case can

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interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this subchapter, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

[58] *See* note 38 *supra*.

[59] *Id.*

[60] CAB Order No. 73-3-45 at 5 (March 14, 1973).

[61] Railway Labor Act § 201, 45 U.S.C. § 181 (1972).

[62] *See* CAB Order No. 73-3-45 at 7 (March 14, 1973). *See also* 511 F.2d 423 at n.4 which states:

We reject the Board's suggestion, in its decision and on brief in this court, that because it lacks expertise in labor matters it could prop-

be considered an extension of alleged CAB abstention in the area of labor disputes,[63] the court not only evidenced its disapproval of the proposition, but explicitly rejected the Board's view of its role in such matters. The fact that certification is not a condition to the applicability of title II of the Railway Labor Act,[64] which affords potential complainants substitute forums (e.g., courts, the National Mediation Board, system boards of adjustment and arbitration),[65] did not justify the determination by the Board that it could refuse to exercise its statutorily authorized jurisdiction.[66]

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erly decline to assume jurisdiction over a complaint alleging violations of the Railway Labor Act. At least as to carriers operating under a *certificate*, Congress by section 401(k)(4) has given the Board such jurisdiction and certified the Board's competency to exercise it. See Air Line Pilots Association v. Southern Airways, Inc., 36 CAB 430, 431, 462-67 (1962) [emphasis added].

[63] Here, the Board, by deciding it does not have the requisite jurisdiction, is avoiding the problem of making initial determinations of alleged violations of the Railway Labor Act. In prior cases the Board has simply dismissed labor disputes on the basis of its discretion over such matters. *See* cases cited notes 22 and 27 *supra*. *See generally* Hickey, *supra* note 19.

[64] Railway Labor Act § 201 *et seq.*, 45 U.S.C. §§ 181-88 (1972). *See* Bullock v. Capital Airlines, 176 F. Supp. 449 (E.D.N.Y. 1959), which held that operation under a certificate of public convenience and necessity is not a condition to the applicability of the relevant provisions of the Railway Labor Act.

[65] There are three available forums for disputes arising between employees and their employers. Firstly, the Railway Labor Act provides for the National Mediation Board and systems boards of adjustment. The former has two major functions: (1) the establishment and administration of procedures for the certification of unions as collective bargaining representatives for employees; and (2) mediation. The latter is merely a tool by which the functions of the NMB are furthered. Secondly, the availability of enforcement of the Act's provisions through the courts is now well established. Chicago & North Western Railway Company v. United Transportation Union, 402 U.S. 570 (1971) held that the legal obligations imposed by the Railway Labor Act are enforceable by the courts. Therein, the Supreme Court, relying on Detroit & T.S.L.R. Co. v. United Transportation Union, 396 U.S. 142 (1969), stated that the NMB has no adjudicative role with regard to "labor matters," otherwise it would destroy the confidence of parties dealing with it. Lastly, the CAB, through section 1002(a) of the Act, 49 U.S.C. § 1482(a), has jurisdiction over complaints and other various matters. *See generally* Hickey, *supra* note 19.

[66] Federal Aviation Act of 1958 § 1002(a), 49 U.S.C. § 1482(a) (1972) states:

> Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. . . .

In rejecting the Board's assertion that it could decline jurisdiction, the court mentioned that the Board's decision in *Southern Airways*[67] authorized the Board to hear complaints against air carriers operating under a section 401(a) certificate who were allegedly violating the provisions of the Railway Labor Act. This determination by the court creates doubt relating to the Board's duty in such cases. Section 1002(a) of the Act[68] imposes a duty on the Board to investigate complaints when there is a "reasonable ground" for such an investigation. Prior cases have upheld, as a valid exercise of the Board's discretion under section 1002(a), dismissal of even a legally sufficient complaint, when jurisdiction was present,[69] if such dismissal was in the public interest. The present case deviates from those earlier decisions.

The court also endorsed, if only by inference, the Board's assertion that section 298.11[70] was not exhaustive on the subject of the power of the Board to allow exemptions from the title IV[71] requirements for air taxi operators. Inasmuch as this can be construed to be an abrogation of the CAB's intent,[72] the court erred in affirming the Board's decision that section 401(k)(4) contains a built-in limitation. That the court found it unnecessary to discuss this latter point is grounded upon the Board's decision that the built-in limitation contained in section 401(k)(4) precludes the necessity for an exemption pursuant to the provisions of section 298.11.[73]

The decision of the court must be viewed in its entirety. Although it precludes future determinations by the Board of alleged violations of the Railway Labor Act by non-certificated air carriers, the decision deviates from prior assertions of the Board that it

[67] Airline Pilots Association, Inc. v. Southern Airways, 36 C.A.B. 430 (1962).

[68] Federal Aviation Act of 1958 § 1002(a), 49 U.S.C. § 1482(a) (1972).

[69] *See* Flying Tiger Line, Inc. v. CAB, 350 F.2d 462 (D.C. Cir. 1965).

[70] 14 C.F.R. § 298.11 (1974). *See* note 15 *supra.*

[71] Title IV of the Federal Aviation Act of 1958 includes section 401 of the Act, 49 U.S.C. § 1371, and section 416 of the Act, 49 U.S.C. § 1386 (1972).

[72] The legislative history of section 298.11 is silent as to whether it was intended to supercede section 416(b)(1). Since, however, this is a currently updated list pertaining to available exemptions, it is not illogical to consider it as exhaustive authority on the CAB's exemption power. *See* ER-574, 34 F.R. 7126 (May 1, 1969), *as amended,* ER-621, 35 F.R. 7695 (May 19, 1970); ER-709, 36 F.R. 22230 (Nov. 23, 1971); ER-833, 38 F.R. 32437 (Nov. 26, 1973).

[73] CAB Order No. 73-3-45 at 5 (March 14, 1973).

could decline to adjudicate controversies as a valid exercise of its discretion even if jurisdiction exists. Thus the Board cannot make an initial determination of alleged Railway Labor Act violations by an exempt air carrier, but must make initial determinations if the carrier is certificated. Some doubt exists whether the Board could dismiss a complaint on discretionary grounds after asserting its jurisdiction over a certificated air carrier. Given that a literal reading of section 401(k)(4) was not necessitated by the other considerations addressed above, the court's decision creates an anomalous result.

The court has also deviated from the specific congressional grant to the CAB of broad regulatory jurisdiction over matters affecting interstate safety while effectuating the apparent wording and intention of the section. This enabled the court to comply with the purpose behind the narrow congressional grant to the CAB of regulatory jurisdiction over economic matters.[74] While it can be argued that the CAB's deferral of an initial determination of alleged Railway Labor Act violations by exempt air carriers may involve a longer period of time for resolution of the complaint than if the Board itself so decided, the availability of the courts, systems boards of adjustment, and the National Mediation Board[75] may refute the validity of this argument. Assuming, *arguendo*, that CAB deferral does create a more extended period of time for resolution of complaints, such a delay would not, *ipso facto*, have any significant impact upon the parties involved. Also, it can be argued that although the congressional grant of jurisdiction over economic matters to the CAB was narrow, it does allow the CAB to exercise jurisdiction over air carriers holding a certificate pursuant to section 401(a). If this is so, the CAB should exercise its jurisdiction over air carriers which it exempts from such certification requirements. Indeed, as of 1971 when the suit was instigated, carriers exempt from the section 401(a) requirement performed substantial economic services.[76] The proliferation of exempted

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[74] *See* Note, 40 J. Air L. & Com. 566, 571-72 (1974).

[75] *See* note 65 *supra*. It should be noted, however, that given the nature of UPA's complaint, the courts were the only available forum other than the Board. *See* 45 U.S.C. §§ 155, 183, 184 (1972).

[76] According to the CAB Bureau of Operating Rights, carriers exempt from the section 401(a) requirements carried over 4.9 million passengers, 27,000 tons

carriers, which has prevailed despite the stipulation that exemptions from certification are to be granted only in extraordinary cases,[77] may justify initial determinations by the CAB in all cases. Since the economic growth and significance of exempted carriers has continued, it would seem only appropriate that the CAB also concern itself with exempted carriers.

The decision of the court cannot be consistently construed with either of the two responsibilities vested in the CAB by the Federal Aviation Act of 1958.[78] With respect to the Board's responsibility to develop the airline industry, denying jurisdiction will only force the aggrieved employees to seek other available forums. It certainly cannot be said that Shawnee will be able to escape the labor provisions of the Railway Labor Act since other forums exist in which such employees can air their grievances. When, as here, the CAB declines to adjudicate the issues and forces the parties to go elsewhere, it cannot be said that substantive economic assistance will result. Indeed, quite the contrary could result. Substitute forums, unresponsive to the particular circumstances involved in the airline industry, could render decisions that are not tailored to the needs of the industry's development. Furthermore, when the Board's regulatory function is considered, it is obvious that the CAB can best resolve the conflicts arising in these cases. Regulation of certificated and non-certificated air carriers concerning labor provisions is achieved in sections 401(k)(1) and (2). Regulation of certificated air carrier's operating authority is provided in section 401(k)(4) in the event of noncompliance with the collective bargaining provisions of the Railway Labor Act. The Board is more aware of the problems inherent in and particular to the airline industry than any other forum even if it does not have the requisite resources and special expertise in labor matters. A determination by the CAB could be more readily fashioned into constructive re-

of cargo and 50,000 tons of mail, served 466 ariports, and operated an average of 65,710 scheduled flights per month. CAB COMMUTER AIR TRAFFIC STATISTICS, 1-3 (1972).

[77] *See* Large Irregular Carriers, Exemption, 11 C.A.B. 609, 610-11 (1960). *See also* Island Airlines, Inc. v. CAB, 363 F.2d 120, 125 (9th Cir. 1966).

[78] Gellman, *The Regulation of Competition In United States Domestic Air Transportation: A Judicial Survey and Analysis*, 24 J. Air L. & Com. 410, 415 (1957) states that the Board's fundamental responsibilities are:

1. The regulation of air carriers, and
2. The maximum promotion of development in air transportation.

lief aimed at the maximum regulation and development of the industry. The court, however, allowed the CAB's abdication of power instead of correcting that agency's abandonment of its duties.[79]

Notwithstanding these considerations, there are strong policy reasons which support the court's literal reading of section 401(k)(4). Section 401(k)(4) addresses itself only to unfair labor practices by employers. Thus it has been argued that CAB deferral is necessary to provide mutuality in the bargaining process. Otherwise, the unions are afforded an additional forum through which they may instigate grievances.[80] This lack of mutuality, when coupled with the conservation of resources that would result from having one forum other than the Board initially determine the validity of alleged Railway Labor Act violations, lends credence to a policy of deferral. These arguments are, however, at least partially weakened because, although other forums could be utilized, the Board must take action with respect to revocation of certification or exemption status.

The court has, in conjunction with Congress, created a situation which necessitates resolution. The proliferation of exempted air carriers has accentuated the need for congressional action in this area. In view of the past position and limited resources of the Board as well as the policy considerations addressed above, however, a literal reading of section 401(k)(4) was warranted. But the ultimate solution, either total CAB deferral or provisions for CAB determination of all such labor disputes, involves a value judgment. If no adequate forum presently exists, one should be created. If the CAB can develop the requisite expertise, then the necessary resources should be provided. Clearly, however, affirmative action as suggested by the court is both warranted and necessary to rectify the present situation.

David L. Botsford

[79] *See* NLRB v. Radio & Television Broadcast Engineers, Local 1212 (CBS), 364 U.S. 753 (1961).

[80] *See* Hickey, *supra* note 15.

AIR CRASH DISASTERS—CLASS ACTIONS—A Class Action Suit Is Not the Appropriate Procedure for Litigating Claims Involving Air Crash Victims Who Were Citizens of Diverse Countries and States Within the United States. *Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975).

On April 22, 1974, Pan American's Flight 812, which originated in Hong Kong and was scheduled to terminate in Los Angeles, crashed into a mountainside on the island of Bali, in Indonesia, killing everyone aboard. Of the ninety-six passengers only seventeen were citizens of the United States; seventy-six were citizens of some eight or nine foreign countries, and three others were residents of the United States but were not listed as citizens. The seventeen U. S. citizens were residents of seven states.[1] Under the Chicago Convention, because of the location of the crash, the government of Indonesia had jurisdiction and exclusive control over the investigation of the accident.[2] Plaintiff, as executor and personal representative of the two Virginia decedents, filed a motion for class action certification in an attempt to prosecute a wrongful death action on behalf of the heirs, personal representatives, and next-of-kin of all passengers killed aboard the flight. The motion was filed in the United States District Court for the Eastern District of Virginia pursuant to Rule 23 of the Federal Rules of Civil Procedure,[3] and was opposed by defendants, Pan American World

[1]

New York	6
California	3
Virginia	2
Delaware	2
Texas	2
Michigan	1
Washington	1
	17

[2] Convention on International Civil Aviation, Article 26, 3 CCH Av. L. Rep. ¶ 28,013 (1947). (Department of State Publication No. 2282.)

[3] Rule 23 states in pertinent part:

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Airways, Inc., and the Boeing Company, on the ground that all the requirements of that rule were not satisfied.[4] *Held*: Class action treatment under Rule 23 is not appropriate for the claims arising from this mass accident in Indonesia because the suit does not satisfy at least one of the three requirements of subdivision (b) of Rule 23 in addition to all four of the prerequisites set out in subdivision (a).

Though it might appear that a Rule 23 class action is a natural vehicle for consolidating litigation arising from a major air disaster, commentators have doubted its appropriateness for various reasons. According to one critic, "permitting a class action would create an unseemly rush to bring the first case and provide, through notice to all injured persons, a kind of legalized ambulance chasing."[5] Another writer warns of the difficult burden on the plaintiff to show

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(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[4] Brief for Defendants at 3, 9, Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975).

[5] Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 469 (1960).

that the class action is superior to other procedural devices.[6] For example, other consolidation methods generally do not necessitate the exorbitant expenditure of time and money that may be involved in searching out and notifying all ascertainable class members.[7] Moreover, considerations of justice suggest that a member of a class action "ought to be informed as well as represented,"[8] so the expenditure does not end with initial notice.[9] A third consideration is that the unusual pressures for the practical advantages of negotiated settlement in mass accident cases may render a class action unnecessary.[10] For still other reasons, the comments of the Advisory Committee on the amendment of Rule 23 of the Federal Rules of Civil Procedure indicate that the Committee itself did not anticipate the use of class action in mass accidents:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability would be present, affecting the individuals in different ways. In these circumstances an action conducted

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[6] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (J)*, 81 HARV. L. REV. 356, 393 (1967).

[7] Fed. R. Civ. P. 23(c)(2):

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

[8] Z. CHAFEE, SOME PROBLEMS OF EQUITY 230 (1950).

[9] Fed. R. Civ. P. 23(d):

> In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; . . . .

[10] Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. Rev. 433, 469 (1960).

nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[11]

Major writers on federal practice, however, favor class action treatment. Wright and Miller suggest that the argument for class action is particularly strong in mass accident cases such as plane crashes because there is little likelihood of individual defenses.[12] Moore points out that not only defenses but other issues in regard to liability are more apt to be uniform than in other situations.[13] He suggests, as well, that the use of "jumbo jets" and other large transportation facilities intensifies the desirability of determining liability for an accident in one proceeding.[14]

Prior to *Causey* two major cases had raised the question of class action treatment for claims arising out of air disasters. In *Petition of Gabel*,[15] the litigation grew out of a 1971 plane crash in California in which fifty persons died. Numerous suits had been filed in various jurisdictions, and these suits had been transferred to one court for the limited purpose of consolidated pretrial discovery proceedings under the Multidistrict Litigation Act.[16] The court authorized a class action suit for a declaratory judgment on the issue of liability alone,[17] with individual damage claims to be returned to the respective transferor courts for trial.[18] Notwithstanding the *Advisory Committee's Notes*, it was the opinion of the court that "the plain language [of Fed. R. Civ. P. 23] was devised for just such a situation as this."[19] The court held that the contemplated litigation satisfied Fed. R. Civ. P. 23(a) (numerosity, common questions of law or fact, typicality of claims, and fair and adequate representation),[20] 23(b)(1) (A) and (B) (risk of incon-

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[11] *The Advisory Committee's Notes to 1966 Amendments*, 39 F.R.D. 69, 103 (1966).

[12] 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1783, at 117 (1972).

[13] 3B MOORE'S FEDERAL PRACTICE ¶ 23.45(3), at 23-811 n. 35 (2d ed. 1974).

[14] *Id.*

[15] 350 F. Supp. 624 (C.D. Cal. 1972), rejected in McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. Cal., 523 F.2d 1083, 1085 (9th Cir. 1975).

[16] 28 U.S.C. § 1407 (1970).

[17] 350 F. Supp. at 630.

[18] *Id.* at 628.

[19] *Id.* at 627.

[20] *Id.* at 629-30.

sistent adjudications and adjudications damaging to the rights of others),[21] and 23(b)(2) (inaction on the part of a party opposing the class).[22] Since the ruling in *Causey*, however, this decision has been rejected by the 9th Circuit.[23] In *Hobbs v. Northeast Airlines, Inc.*,[24] personal injury and wrongful death claims arose out of the crash of a Northeast Airlines flight in New Hampshire. Certification of a class action was denied by the United States District Court for the Eastern District of Pennsylvania.[25] Although conceding that major disasters generating many claims could be appropriate for class action treatment,[26] the court held that the Pennsylvania forum was in this case inconvenient: the evidence, witnesses, and a majority of the potential plaintiffs had no connection with Pennsylvania.[27] The court went on to express concern about the class action device in similar situations: the danger of improper solicitation by attorneys,[28] the likelihood that similar economies of consolidation could be achieved through joinder or multistate litigation,[29] and the possibility that problems of mass accident litigation might be better handled by legislative action.[30] Unfortunately, the court did not articulate the circumstances under which it would grant a class action, nor did it indicate what legislative provisions might answer the problems of this kind of litigation.[31]

Outside the area of airplane crashes, petitioners have urged class

[21] *Id.* at 630.

[22] *Id.*

[23] McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. Cal., 523 F.2d 1083, 1085 (9th Cir. 1975).

[24] 50 F.R.D. 76 (E.D. Pa. 1970).

[25] *Id.* at 80.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 78.

[29] *Id.* at 80.

[30] *Id.*

[31] There has been considerable discussion of the need for uniform legislation covering such areas as causes of action, basis of liability, rules of damages, and a statute of limitations period. Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382, 386-87 (1968). *Cf.* Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299 (1969).

In 1969 Senator Joseph D. Tydings of Maryland introduced in the Senate *A Bill to Improve the Judicial Machinery by Providing for Federal Jurisdiction & a Body of Uniform Federal Law for Cases Arising out of Aviation and Space Activities.* S. 961, 91st Cong., 1st Sess. (1969).) The bill died in committee.

action in varied factual contexts: customers charging violations of the Truth-in-Lending Act by all pawnbrokers licensed under Oregon law,[32] decedents' personal representatives alleging negligence in a bus accident on the highway,[33] passengers alleging negligence in the serving of contaminated food on a pleasure cruise,[34] investors claiming stock manipulation,[35] and exhibitors alleging negligence in a fire that destroyed an exhibition hall.[36] The only pattern that emerges is one of careful scrutiny by courts of particular fact situations, case by case.

A strict examination of the facts and a restrictive reading of the rule provide protection for the forum court, the actual parties, and the potential parties. Though there may be economies and gains in efficiency in the class action suit, there may also be enormous management problems for the courts and substantial burdens on various parties.[37] For example, the court will be responsible for coordination, and various parties may have travel expenses which would be otherwise avoidable.[38] In addition, care is necessary because the court's decision as to the issue of certification binds absent potential members of the proposed class.[39]

[32] *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). Denied on the ground that the plaintiff could not represent persons who had claims against pawnbrokers with whom he had had no dealings, *i.e.* he was not a member of the class he sought to represent.

[33] *See* Daye v. Pennsylvania, 344 F. Supp. 1337 (E.D. Pa. 1972). Denied on the ground that none of the named plaintiffs was an adequate representative of the class proposed.

[34] *See* Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1974). Granted on the ground that uniformity of result was certain because the issue of negligence was subject to clear-cut determination. The outcome may also have been affected by the fact that recovery for all passengers would be limited to the value of the vessel under maritime law.

[35] *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968). Preliminary evidentiary hearing granted to give four plaintiffs an opportunity to show substantial possibility that they would prevail on the merits.

[36] *See* American Trading and Production Corp. v. Fischbach and Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969). Granted on the ground that all requirements of Fed. R. Civ. P. 23(a) and (b)(3) were easily met. The court placed emphasis on the location of the accident and the availability of witnesses.

[37] *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 468 (9th Cir. 1973); 3B MOORE'S FEDERAL PRACTICE ¶ 23.02-2 at 23-156 (2d ed. 1974).

[38] These administrative burdens do not justify denial of a class action (3B MOORE'S FEDERAL PRACTICE ¶ 23.45(4) at 23-893 (2d ed. 1974), and a plaintiff is not required to show more than that he is entitled to such an action, but in fact he may help his cause if he presents proposals for overcoming anticipated problems of notice and coordination, or solutions for choice of law complications.

[39] City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 51 (D.N.J. 1971).

In *Causey*, the court deferentially disagreed with the reasoning of the decision in *Gabel*[40] and cited language in *Hobbs* in support of its own position.[41] Since the 9th Circuit's rejection of the *Gabel* ruling,[42] the line-up of the only cases in the air crash field is presently unanimous and will undoubtedly give substantial pause to future parties or attorneys seeking certification of a class action in air-crash litigation. The value of *Causey* to future litigants will lie in the clarity of its exposition of the obstacles they will have to surmount.

The point which the court brought into sharp focus is that aside from the necessity of fulfilling the four prerequisites of Rule 23(a), the appropriateness of class action treatment in air crash cases depends entirely upon satisfaction of 23(b)(3),[43] which requires both the predominance of common questions of law or fact and the superiority of the class action to other procedures. Plaintiff in *Causey* did not even contend satisfaction of 23(b)(3), pleading only qualification under 23(b)(1)(A) and (B) and 23(b)(2).[44] Plaintiff's mistake, as the court noted,[45] apparently resulted from reliance on the original success of the *Gabel* motion based on those sections.[46]

If plaintiff could not satisfy any one of the provisions of Rule 23(b), as the Rule itself demands, there was no purpose in extensive study of the allegations in regard to Rule 23(a)(1)-(4). The court accordingly bypassed a judgment on the merits of those allegations and proceeded directly to consideration of the Rule 23(b) problem.[47]

In regard to Rule 23(b)(1) (risk of inconsistent adjudications), the court adopted the position that mass accident plaintiffs do not come within the ambit of this subdivision because neither they nor the defendant(s) stand in need of the protection offered there.[48]

[40] 66 F.R.D. 392, 397 (E.D. Va. 1975).

[41] *Id.* at 399.

[42] McDonnell Douglas v. U.S. Dist. Ct., C.D. Cal., 523 F.2d 1083, 1085 (9th Cir. 1975).

[43] 66 F.R.D. at 397.

[44] *Id.* at 396.

[45] *Id.* at 398.

[46] 350 F. Supp. at 630.

[47] 66 F.R.D. at 398.

[48] 3B MOORE'S FEDERAL PRACTICE ¶ 23.40 at 61, 63 (Cum. Supp. 1973).

The court quoted with approval an explanatory passage from an article on the subject:

> Neither of these criteria [i.e., prejudice to plaintiffs or prejudice to defendants] is met by mass accident suits. While separate trials of mass accident claims may result in inconsistent judgments, the defendant is not subject to incompatible standards of conduct; he merely has to compensate some plaintiffs but not others. Moreover, mass accident plaintiffs cannot be adversely affected by the judgment in another plaintiff's separate suit against the common defendant because, not having had their day in court, they cannot be bound.[49]

In addition to the writers cited by the court, the *Advisory Committee's Notes*,[50] and relevant case law[51] support this position; the *Gabel* reading of this section of the rule was greatly criticized.[52] The possibility of inconsistent liability judgments against an airline cannot alter its standard of care or subject it to conflicting standards of future conduct, and any res judicata possibilities are decidedly speculative. Though the trend appears to be toward emphasis on the identity of the issues and the use of either offensive or defensive collateral estoppel,[53] mass accident litigation continues to offer exceptions.[54] Courts are reluctant to deny to a plaintiff the due process requirement of an opportunity to be heard, perhaps because of a belief that personal injury or death creates a more substantial individual interest than that of the usual class litigant.[55] Courts may also deny effect to collateral estoppel when it produces such clearly unreasonable results as a conclusion of liability against

[49] Comment, *Mass Accident Class Actions*, 60 CAL. L. REV. 1617, 1620 (1972).

[50] 39 F.R.D. 69, 101 (1966).

[51] *See* La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973); Landau v. Chase Manhattan Bank, 367 F. Supp. 992, 997 (S.D.N.Y. 1973); Walker v. City of Houston, 341 F. Supp. 1124, 1131 (S.D. Tex. 1971).

[52] *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.35(1) at 61 and (2) at 63 (Cum. Supp. 1973).

[53] United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. and D. Nev. 1962), *aff'd sub. nom.*, United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964); Hart v. American Airlines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969).

[54] Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); Price v. Atchison, T. & S. F. Ry., 164 Cal. App. 2d 400, 402-03, 330 P.2d 933, 934-35 (2d Dist. 1958).

[55] *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-party*, 35 GEO. WASH. L. REV. 1010, 1043 (1967); *cf.* 2 BARRON & HOLTZOFF Sec. 562 at 71 (1966 Supp.).

a defendant who has won a number of suits and then lost one.[56] Moreover, there is still some feeling that if a plaintiff is not bound by an earlier judgment unfavorable to his cause, a defendant should not be bound by one that was favorable.[57]

Rule 23(b)(2) (inaction on the part of a party opposing the class) presented no difficulty for the *Causey* court because the subdivision has consistently been interpreted as inapplicable to cases in which the relief sought is exclusively or predominantly money damages.[58] Typically, mass accident litigation seeks precisely that.[59]

Therefore, mass accident litigation must qualify for class action treatment under Rule 23(b)(3) if it is to qualify at all. The court held that *Causey* did not.[60] Addressing the first requirement of this subdivision, that common questions of law or fact predominate over individual issues, the court concluded that the conflict of laws problems would be prohibitively complex if the class should include international passengers, and not much improved if limited to the American citizens.[61] Since plaintiff alleged wilful misconduct by the defendant air carrier,[62] the effective absolute liability of the air carrier under the Warsaw Convention[63] and the $75,000 recovery limit of the Montreal Agreement[64] would not apply[65] to eliminate

[56] *Collateral Estoppel in Multidistrict Litigation*, 68 COLUM. L. REV. 1590, 1596-97 (1968).

[57] *Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Non-party*, 35 GEO. WASH. L. REV. 1010, 1045 (1967).

[58] La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), *later app.* 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). *See also The Advisory Committee's Notes to 1966 Amendments*, 39 F.R.D. 69, 102 (1966); 3B MOORE'S FEDERAL PRACTICE ¶ 23.40 at 70 (Cum. Supp. 1973).

[59] 66 F.R.D. at 398.

[60] *Id.* at 398-99.

[61] *Id.* at 399. The shift from a conflict-of-laws rule applying *lex loci* to one applying the law of the state with the most significant relationship has compounded choice-of-law problems. See RESTATEMENT OF CONFLICT OF LAWS Sec. 378 (1934) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS Sec. 145 (1971). The *lex loci* in this case is Indonesia, by sheer happenstance, so any state may argue as forcefully as another that its interest in protecting its own injured citizens demands application of its own law. State laws may differ on all essential points: bases of liability, burdens of proof, defenses, theories of recovery. (Comment, *Mass Accident Class Actions*, 60 CAL. L. REV. 1615, 1622-23 (1972).

[62] 66 F.R.D. at 394.

[63] Art. 17, 20, 49 Stat. 3000, T.S. No. 876 (1934).

[64] Order Number E-23680, Vol. 31, No. 97, Fed. Reg. 7302 (May 19, 1966).

[65] L. Kreindler, 1 AVIATION ACCIDENT Sec. 12A.04 (1974).

the conflicts problems in regard to the cause of action against the carrier. Moreover, the allegations against the defendant manufacturer of the airplane for breach of warranty and strict tort liability[66] added new areas of likely conflicts. The court acknowledged that the conflict-of-laws complexity would not necessarily preclude a class action,[67] and investigation might have revealed that the anticipated complexity was not in fact overwhelming. The plaintiff, however, had the burden of showing the court that he was entitled to a class action, and he failed to address the problem.[68]

Both of the additional factors leading the court to deny a class action related to the second requirement of Rule 23(b)(3), that the action be superior to other available procedures for litigation. First, because of the large judgments generally asked and often recovered in wrongful death suits, the court recognized the likelihood of a strong interest of the individuals involved in controlling their own lawsuits.[69] Factors such as choice of attorney, choice of strategy, and ability to be present at trial may matter very much to various plaintiffs. Furthermore, the court noted that in the absence of such individual interest, a plaintiff could join in another's action under procedural provisions for permissive joinder.[70] Secondly, the court considered itself a thoroughly inconvenient forum for a class action in this case.[71] Only the named plaintiff and his two decedents had any connection with Virginia;[72] no anticipated evidence or witnesses were located in Virginia;[73] neither the airline's nor the manufacturer's home offices were in Virginia; the flight never touched Virginia; and the crash occurred thousands of miles away. With slight variations,[74] however, these factors applied to each of the states which might be a forum for such an action.

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[66] 66 F.R.D. at 394.

[67] *Id.* at 399.

[68] *Id.*

[69] *Id.* at 399. *Accord*, Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76, 79 (E.D. Pa. 1970).

[70] 66 F.R.D. at 399. (Of course, this suggestion presupposes that a would-be litigant knows of pending suits.).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] E.g., six decedents were residents of New York; Seattle, Washington, is Boeing's home office.

The plaintiff might well have argued that, though the forum was inconvenient, no other forum was significantly more convenient, and the class action should not be barred by the virtual impossibility of a convenient forum; but again, the plaintiff failed to carry his burden of persuading the court.

Though it denied the class action here, the court indicated that it is possible to meet the standards of Rule 23(b)(3), and suggested a model case:

> Perhaps the paradigm situation in which such treatment would be appropriate is one where: (1) the class action is limited to the issue of liability; (2) the class members support the action; and (3) the choice of law problems are minimized by the accident occurring and/or substantially all plaintiffs residing within the same jurisdiction.[75]

The desirability of factor (3) virtually eliminates the international "jumbo jet" crashes from class action litigation and may narrow the possibilities to chartered flights and local shuttles.

Even if the stated criteria are met, however, the burden of persuading the court of the superiority of the device remains.[76] Four alternatives must be considered: permissive joinder,[77] intervention,[78] multidistrict litigation,[79] and the test case. Joinder of parties serves well when the "class" is not large and jurisdiction can be obtained over all of its members.[80] Intervention is available at almost any point to plaintiffs who seek the economy of consolidated trial, and this method has the advantage of not forcing those who do not wish to join affirmatively to opt out.[81] The usefulness of this alternative, unfortunately, is contingent upon awareness of another's pending suit. The test case is an unusual arrangement and may appeal to adversaries who prefer to supervise the management of their own litigation rather than leave that to the court.[82] In order for this alternative to be effective, the parties must agree to be bound by

[75] 66 F.R.D. at 397.

[76] *Id.*

[77] Fed. R. Civ. P. 20.

[78] Fed. R. Civ. P. 24.

[79] 28 U.S.C. § 1407 (1970).

[80] Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 438-39 (1960).

[81] Fed. R. Civ. P. 23(c)(2). Text *supra* note 8.

[82] 3B MOORE'S FEDERAL PRACTICE ¶ 23.45(3) at 23-813 (2d ed. 1974).

the decision,[83] and both sides must have sufficient resources to assure full trial of the issues and enforceability of the result.[84] Such confidence and resources are perhaps seldom found within a random assortment of commercial airline passengers.

Of the four alternatives, multidistrict litigation, though limited to pretrial discovery, appears most likely to defeat a claim of class action superiority. Unlike consolidation of suits under Fed. R. Civ. P. 42, the device is not limited by any restrictions of venue and jurisdiction. Parties may realize all of the advantages of pretrial economy and efficiency through consolidation without sacrificing control of their own suits. Moreover, they circumvent choice-of-law tangles. This escape outweighs any disadvantage in having discovery in the hands of judges and attorneys other than those who will try the case.[85] The fact that, as a practical matter, the issue of liability is often settled in the process of the consolidated pretrial discovery[86] is a bonus that confers additional savings in time and expense. At the end of its opinion, the court specifically recommended that plaintiff consider the advantages of multidistrict litigation,[87] and the mainstream of air disaster cases to date has overwhelmingly supported that course.[88]

For would-be class action litigants who come after *Causey*, the array of unfavorable precedent now seems a formidable deterrent, and a class action arising out of a major airplane crash a negligible possibility. In theory, a plaintiff still can obtain certification for such a suit, but in practice, no plaintiff has yet succeeded in doing so.

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[83] *See* Doherty v. Bress, 262 F.2d 20 (D.C. Cir. 1958).

[84] *Supra* note 82.

[85] *Id.* at 23.

[86] In re Delta Airlines Crash at Boston, Massachusetts, 373 F. Supp. 1406, 1407 (J.P.M.L. 1974); Speiser, *Multidistrict Litigation in Air Crash Cases*, 79 CASE & COMMENT No. 4, p. 3, 4 (1974).

[87] 66 F.R.D. at 399.

[88] In re Air Crash Disaster Near Silver Plume, Colorado, on October 2, 1970, 352 F. Supp. 968 (J.P.M.L. 1972); In re Air Crash Disaster at Huntington, West Virginia, on November 14, 1970, 342 F. Supp. 1400 (J.P.M.L. 1972); In re Air Crash Near Denver, Colorado, on October 3, 1969, 339 F. Supp. 415 (J.P.M.L. 1972); In re Air Crash Disaster at Juneau, Alaska, on September 4, 1971, 350 F. Supp. 1163 (J.P.M.L. 1972); In re Air Crash Disaster at Florida Everglades on December 29, 1972, 360 F. Supp. 1394 (J.P.M.L. 1973); In re Delta Airlines Crash at Boston, Massachusetts, on July 31, 1973, 373 F. Supp. 1406 (J.P.M.L. 1974); In re Air Crash Disaster at Paris, France, on March 3, 1974, 376 F. Supp. 887 (J.P.M.L. 1974).

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