Journal of Air Law and Commerce

Volume 35 | Issue 1 Article 6

1969

Current Legislation and Decisions

Bowel L. Florsheim

Jerry M. Traver

Bruce L. Ashton

James C. Floyd

CURRENT LEGISLATION AND DECISIONS

NOTES

RAILWAY LABOR ACT—COVERAGE—INTERNATIONAL AIR CARRIAGE

I. INTRODUCTION

In the past several years there has been a tremendous growth in the number of air carriers flying into and out of the United States, and an even greater growth in the number of passengers and amount of cargo carried by these airlines. This growth, coupled with today's constantly changing technology, has resulted in the employment of more and more personnel outside of the carriers' own national borders.[1]

It is the purpose of this note to analyze the extent to which the Railway Labor Act applies to such personnel and how that applicability is determined. The discussion will, necessarily, involve reference to various international agreements, United States statutes, and case law, as well as the Railway Labor Act itself. It should be kept in mind that the problem is not *how to apply* the Railway Labor Act, but whether the Act is applicable at all.[2] Also, the reader should keep in mind that in any area of law involving international relations as here, there are political influences which are beyond the scope of this paper, but which often are controlling in a given situation.

II. TERRITORIAL SOVEREIGNTY: THE CHICAGO CONVENTION AND THE BILATERAL AGREEMENTS

Of major importance in the applicability of the Railway Labor Act to airline employees in international commerce is the concept of national territorial sovereignty, and the obligation that air carriers observe the local laws and regulations of any nation into which they fly. The Chicago Convention of 1944[3] established many of the basic rights and obligations

[1] The major projections of total employment in civil aviation and its principal divisions are as follows: Total employment is projected to increase by nearly 80,000 by 1970. About 46% of the additional employment will be in the scheduled airlines. The number of American citizens employed by foreign flag lines is expected to double by 1970. United States Department of Labor, Bulletin No. 1367, *Employment Requirements and Changing Occupational Structure in Civil Aviation* (June 1964).

[2] The cases involving foreign air carriers and foreign personnel which were found treated employees of those carriers exactly the same as employees of any domestic carrier once it was determined that there was coverage under the Act.

[3] Convention on International Civil Aviation, 7 Dec. 1944 (hereinafter Chicago Convention), 61 Stat. 1180, 15 U.N.T.S. 295.

recognized in the international air industry, among which are the following:

> ARTICLE 1: The contracting States recognize that every State has *complete and exclusive sovereignty* over the airspace above its territory [Emphasis added.].[4]
>
> * * *
>
> ARTICLE 6: No scheduled . . . air service may be operated . . . into the territory of a contracting State, except with the special permission . . . of that State, and *in accordance with the terms of such permission or authorization* [Emphasis added.].[5]

The importance of the above two provisions is that the signatory nations specifically recognize that all nations have absolute control over all of their territorial airspace and over any airline entering from another nation.[6]

Another article of the Chicago Convention which is of interest at this point is article 11, which states, in part, that:

> the laws and regulations of a contracting State relating . . . to the operation . . . of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft . . . while within the territory of that State.[7]

The importance of article 11 is that it recognizes that aircraft of any nationality are subject to local laws and regulations, thus avoiding any problems of sovereign immunity and the "law of the flag" which often arise in connection with maritime law.[8]

Because the Chicago Convention is not considered to be a grant of operating privileges to any airline,[9] most international air transport is based on a large number of bilateral agreements which are an exchange of specific rights and obligations between nations.[10] Many of the features of the Chicago Convention, such as the theory of national territorial sovereignty, are incorporated into the bilaterals, including those of the United States.[11]

While it is not the purpose of this paper to go into any detail concerning the bilateral agreements, several features should be kept in mind in considering them in relation to other points discussed herein.

(1) The standard bilateral agreements used by the United States incorporate those features of the Chicago Convention which make an airline subject to the laws and regulations of the nation into which it flies.[12]

(2) The agreements provide that an operating permit may be revoked for failure to comply with local law.[13]

---

[4] Chicago Convention, Article 1.

[5] Chicago Convention, Article 6.

[6] B. CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT, 110 (1962). Hereinafter cited as B. CHENG.

[7] Chicago Convention, Article 11.

[8] Under the maritime law of the flag, a ship is considered to be the territory of the nation whose flag that ship flies. Through the Chicago Convention and other conventions and treaties, this concept is not carried over to aircraft. The national registration of aircraft does not carry with it any special protection or national immunity.

[9] Chicago Convention, Article 6.

[10] Pourcelet, *The International Element in Air Transport*, 33 J. AIR L. & COM. 75, 76 (1967).

[11] *United States Standard Form of Bilateral Air Transport Agreement (1960)*, AERONAUTICAL STATUTES AND RELATED MATERIALS, Civil Aeronautics Board (1 May 1967).

[12] *Id.*

[13] *Id.* at Article 4.

(3) It is generally understood, though not always specified, that air carriers are to be allowed to maintain a staff of operational and technical personnel in the nation into which they are flying. (It should be noted that this provision relates only to citizens of nations other than that which is entered.)[14]

(4) The bilateral is an executive agreement which does not have the status of a treaty.[15]

(5) Individual airlines have no rights under the bilateral agreement itself. Rights are exchanged between the sovereign powers and any airline must still obtain a proper operating permit before entering another nation.[16]

III. The Federal Aviation Act and International Air Carriers

Any scheduled air carrier, whether foreign or domestic, that desires to operate into or out of the United States, whether under the auspices of a bilateral agreement or unilaterally, must first obtain operating permission from the Civil Aeronautics Board (CAB).[17] In the case of a United States flag carrier, the procedure is the same as in any domestic route proceeding,[18] but a foreign air carrier must obtain a "foreign air carrier operating permit" from the CAB.[19]

In both instances, the CAB has wide discretion as to the qualifications which must be met as a condition of such operating authority. While no cases were found in which the CAB imposed conditions relating to labor relations in direct relation to international transport, there is little doubt that such action could be taken. The only limitation on the Board's power to impose such a condition upon foreign flag carriers comes from section 1102 of the Federal Aviation Act,[20] requiring that CAB actions be consistent with any treaty, convention, or agreement in force between the United States and a foreign nation.

Another important point relating to the operating permission granted to foreign carriers is that the granting of a foreign carrier permit and any related provisions and conditions are subject to the absolute and final control of the President of the United States.[21] As stated by the Supreme Court of the United States:

> We conclude that orders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate.[22]

---

[14] B. Cheng at 356.

[15] Lissitzyn, *International Aspects of Air Transport in American Law*, 33 J. Air L. & Com. 86, 91 (1967).

[16] B. Cheng at 361.

[17] Federal Aviation Act of 1958, §§ 401, 402(a), 72 Stat. 757, 49 U.S.C. 1371, 1372(a) (1964).

[18] Federal Aviation Act of 1958, § 401, 72 Stat. 757, 49 U.S.C. 1371 (1964).

[19] Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. 1372 (1964).

[20] Federal Aviation Act of 1958, § 1102, 72 Stat. 797, 49 U.S.C. 1502 (1964).

[21] Federal Aviation Act of 1958, § 801, 72 Stat. 782, 49 U.S.C. 1461 (1964).

[22] Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1947).

Therefore, if the CAB or the President imposed a condition relating to labor relations, it would be final and binding and would not be reviewable in any court in the nation.

Neither the Federal Aviation Act nor the bilaterals specifically indicate that the Railway Labor Act is to apply to foreign operations or any elements thereof.[23] Therefore, the Railway Labor Act must, of its own terms and intent, be applicable to foreign commerce through the various agreements and laws discussed above.

IV. The Railway Labor Act—General

A. *The Power To Regulate*

Throughout most of the cases concerned with the application of the Railway Labor Act to both foreign and United States flag carriers (as well as in those cases involving similar problems in the maritime industry), there has been considerable discussion of the power of Congress to regulate activities outside the United States and how far Congress could go if it had the power. It is sufficient to say that under the commerce clause of the Constitution of the United States,[24] Congress has the power to regulate labor-management controversies in those industries affecting commerce.[25]

It has been pointed out that Congress has the power to make the Railway Labor Act applicable to employees of United States flag airlines who work wholly outside the United States,[26] and it could have considerable influence on foreign flag carriers as well, even to their operations which are wholly outside of the United States.[27] Additionally, Congress could have made the Labor Management Reporting Act of 1947[28] applicable to wage disputes arising on foreign vessels when those vessels came within the territorial waters of the United States.[29] Exactly what Congress has done or intended to do has been a much discussed point in many of the cases arising in this area.

B. *Applicability Of The Railway Labor Act*

In 1936 the Railway Labor Act was amended to cover common carriers by air who were engaged in "interstate or foreign commerce" and their employees.[30] Section 202 of Title II provides, however, that the duties, requirements, and obligations which had been set out in Title I (with the exception of section 3) "shall apply to said carriers by air and their employees in the same manner and to the same extent as though such

[23] Section 401(k) of the Federal Aviation Act requires compliance with labor legislation as a condition of holding a certificate for operation from the C.A.B. It appears, however, that this section would not apply to foreign flag carriers since they are not certificated within the meaning of the Act, but instead operate under a special permit.

[24] U.S. Const. art. I, § 8.

[25] Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

[26] Air Line Stewards and Stewardesses Assoc., Int'l v. Northwest Airlines, Inc., 162 F. Supp. 684 (D. Minn. 1958), *aff'd* 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959).

[27] *Supra* Sections II and III.

[28] Labor Management Reporting Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.* (1964).

[29] Benz v. Compania Navece Hidalgo, S.A., 353 U.S. 138 (1957).

[30] RLA, § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964).

carriers and their employees were specifically included within the definition of 'carrier' and 'employee,' respectively, in section 1 thereof."[31] While a literal reading of section 201 of the Railway Labor Act[32] would indicate that it would cover *every* employee of *any* carrier over which the United States had any jurisdiction, the courts have held otherwise.[33] On the basis of the wording of section 201 that "[a]ll of the provisions of Title I of this Act . . . are extended to and shall cover every common carrier by air . . . ,"[34] the courts have held that section 201 must be interpreted in the light of the applicability under section 1, First.[35] This interpretation is further reinforced by the legislative history of the Title II amendment, which strongly indicates that Congress intended the Railway Labor Act to extend to air carrier employees exactly as it did to railroad employees.[36] Therefore, the courts have held that section 1, First is controlling as to the territorial applicability of the Railway Labor Act, despite the ambiguous wording of section 201.[37]

Under section 1, First, coverage of the Railway Labor Act is determined by the coverage of the Interstate Commerce Act.[38] The Interstate Commerce Act is limited in its application to commerce which takes place within the territorial boundaries of the United States,[39] and on this basis the Interstate Commerce Commission (ICC) has ruled that the jurisdiction of the ICC over foreign commerce is limited solely to that portion of transportation as actually takes place within the territorial boundaries of the United States.[40] Coverage is further limited by the ICC's decision that a continuous movement between foreign points, which merely passes through the United States, *whether it stops in transit or not,* is neither interstate nor foreign commerce as defined in the Act.[41] Following this decision, the National Mediation Board held that the coverage of the Railway Labor Act was limited in its territorial application in the same manner as is the Interstate Commerce Act,[42] and the courts have upheld such decisions.[43]

---

[31] RLA, § 202, 49 Stat. 1189, 45 U.S.C. § 182 (1964).

[32] RLA, § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964).

[33] Air Line Stewards and Stewardesses Assoc., Int'l v. Trans World Airlines, Inc., 173 F.2d 369, 373 (D.D.C. 1959).

[34] RLA, § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964).

[35] RLA, § 1, First, 44 Stat. 577, 45 U.S.C. § 151, First (1964).

[36] Comments by Senator Black, *Hearings Before a Subcommittee of the Senate Committee on Interstate Commerce on* S. 2496, Cong., 1st Sess. at 12 (1935).

[37] Air Lines Stewards and Stewardesses Assoc., Int'l v. Trans World Airlines, Inc., 173 F. Supp. 369 (D.D.C. 1959); Air Lines Stewards and Stewardesses Assoc., Int'l v. Northwest Airlines, Inc., 162 F. Supp. 684 (D.C. Minn. 1958), *aff'd*, 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959).

[38] Interstate Commerce Act, 36 Stat. 547, *as amended*, 49 U.S.C. § 1 *et seq.* (1964).

[39] Interstate Commerce Act, § 1(2), 36 Stat. 544, 49 U.S.C. § 1(2) (1964).

[40] Western Peat Co., Ltd. v. Illinois Cent. R. Co., 297 I.C.C. 273 (1955); Mayo Shell Corp. v. Baltimore & O. R., 297 I.C.C. 133 (1955).

[41] Enciso Freight Forwarder Application, I.C.C. Case No. FF-238, Div. 4 (1955).

[42] NMB Case No. R-1150 (15 Apr. 1945).

[43] Air Line Stewards and Stewardesses Assoc., Int'l v. Northwest Airlines, Inc., 162 F. Supp. 684 (D. Minn. 1958), *aff'd*, 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959); Air Line Dispatchers Assoc. v. NMB, 189 F.2d 685 (D.C. Cir. 1951).

V. The Railway Labor Act and the Air Carriers

A. *Development Of The Law Applied To United States Carriers*

As early as 1939 it was stated that foreign nations have exclusive jurisdiction over their respective territories and airspace.[44] This was one of the first indications that extra-territorial operations of United States flag carriers would be governed by the law of the country in which the carrier operated. In 1951, the decision in *Airline Dispatchers Ass'n v. National Mediation Board*[45] definitely established the trend for determination of applicability of the Railway Labor Act. The dispatchers had brought an action against the Board for a determination that the Board had jurisdiction of a representation dispute between United States flag carriers and their foreign based employees, and also that the Board should decide the dispute. The United States District Court for the District of Columbia dismissed the complaint. The court of appeals affirmed, holding that the Railway Labor Act did not operate extra-territorially, and agreed that "the Act does not extend to an air carrier and its employees located outside the continental United States and its territories."[46]

In the *Dispatchers* case, the court pointed out that the Railway Labor Act defines the carriers to which it applies[47] as "any . . . carrier by railroad subject to the Interstate Commerce Act . . . ,"[48] and that an employee is defined as a "person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . ."[49] The court next noted the language of the Interstate Commerce Act limiting its application to those common carriers who are engaged in interstate and foreign transportation, "but only in so far as such transportation . . . takes place within the United States."[50] This language leads to the inevitable conclusion that, as applied to railroads, the Railway Labor Act definitely does not extend beyond the continental United States and its territories, and the court applied the same reasoning to air carriers by finding that the language of the pertinent sections of Title II (as governed by Title I) made it clear that the territorial scope of the Act and, therefore, the Board's jurisdiction over air carriers was the same as that applicable to railroads.

The legislative history surrounding the amendments to the Railway Labor Act supports the court's view. At hearings before a Senate Subcommittee on Interstate Commerce, Senator Black referred to the amendments as giving "exactly the same range to the men engaged in air transport as would be invoked by men engaged in railroad employment."[51] Mr. George A. Cooke, who was then the Secretary of the National Mediation Board, stated that these amendments would apply uniformly to both classes of

[44] Pan American Airways Co.—Certificate of Public Convenience & Necessity, 1 C.A.A. 118 (1939).
[45] 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951).
[46] 189 F.2d at 690.
[47] RLA, § 1, First, 44 Stat. 577, 45 U.S.C. § 151, First (1964).
[48] 49 U.S.C. § 1 (1964).
[49] RLA, § 1, Fifth, 44 Stat. 577, 45 U.S.C. § 151, Fifth (1964).
[50] 49 U.S.C. §§ 1(1)(c) & 1(2) (1964).
[51] *Supra* note 36.

employees.[52] This debate, along with other testimony, indicated to the *Dispatchers* court that the Act had no extra-territorial application. The court also noted that in the absence of specific intent by Congress to the contrary, legislation could not be given extra-territorial application.[53]

It is extremely important to note in the *Dispatchers* case that the court referred only to foreign based United States' citizens employed abroad by United States flag carriers. The question of foreign nationals who were employed by those same carriers was later settled in *Air Line Stewards and Stewardesses Association, Int'l v. Northwest Airlines, Inc.*[54] in which the court followed the same reasoning as the *Dispatchers* court. The court in the *Northwest* case made a further important point in holding that the maritime doctrine of "law of the flag," under which the crew of a vessel generally is covered by the law of the nation of that vessel's registry, did not apply to aircraft.

It was argued in *Northwest* that such a decision restricting the scope of the Railway Labor Act was unconstitutional since it discriminated on the basis of citizenship or race. The court rejected this argument holding that such exclusion was applied equally to all persons on the basis of territorial distinctions and not because of race, color, or citizenship.[55]

A year later, the same union brought a similar case before the Sixth Circuit Court of Appeals, this time bringing their action against Trans World Airlines.[56] Citing both the *Dispatchers* and *Northwest* cases, the court used the same reasoning and reached the same decision. It was noted in the TWA case that Congress showed no intention to regulate foreign-based, alien airline employees, who were generally subject to the laws of their own nations.

Because the Railway Labor Act is dependent upon and has incorporated the jurisdictional standards of the Interstate Commerce Act, those employees based outside of the United States are excluded from coverage. Thus, the employer is not required to bargain with or about these employees or their representatives under the laws of this nation. However, this does not mean that aircrew personnel who are based in the United States or who fly regularly into the United States are not covered by the Act. The fact that they enter this country in the course of their employment and are employed United States flag carriers brings them within the territorial jurisdiction of the Railway Labor Act.

B. *Foreign Carriers And The Railway Labor Act*

As seen from the above discussion, a foreign flag carrier merely by entering the United States makes itself subject to United States law, including

---

[52] *See also*, 79 Cong. Rec. 10,059 (1935); H. Rept. No. 5039 (1936).

[53] Foley Bros. v. Filardo, 336 U.S. 281 (1949).

[54] 162 F. Supp. 684 (D. Minn. 1958), *aff'd*, 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959).

[55] Here, only the word "employee" was used in several instances, while "foreign national" was used elsewhere in the opinion. This was yet another indication that United States citizens based abroad are excluded under the Act.

[56] Air Line Stewards and Stewardesses Assoc., Int'l v. Trans World Airlines, Inc., 173 F. Supp. 369 (S.D.N.Y. 1959), *aff'd*, 273 F.2d 69 (2d Cir.), *cert. denied*, 362 U.S. 988 (1959).

the Railway Labor Act. The majority of employees affected by the Act are, of course, employees of foreign carriers *permanently* based in the United States. They include mechanics, fleet service, passenger service, and similar personnel, and are usually United States citizens. Since all, or almost all of the work performed by these employees is done within the territorial borders of the United States, there is little argument that they fall within the jurisdictional requirements of the Railway Labor Act established by the courts.[57] Only a few cases involving employees of foreign flag air carriers were found, and in all such cases, both the National Mediation Board and the courts treated the carriers and employees as though the case involved a domestic carrier.[58] The primary reason for this paucity of cases is that most foreign carriers use the facilities and personnel of domestic carriers; thus, the number of employees employed directly by these airlines is relatively small in relation to the total number of employees in the United States air industry.[59]

Most foreign carriers maintain at least a small, temporary staff of personnel in this country who are technical experts or corporate officials employed on a contract basis, and either do not fall under the Railway Labor Act as employees or do not desire organized representation under the Act.[60] As previously stated, most bilateral agreements[61] provide that such technical and operational personnel will be allowed to enter and work in the United States in the capacity of transitory employees, and they are generally not subject to the laws of the United States governing labor and technical licensing requirements.[62] However, the National Mediation Board has held that foreign nationals who are admitted to this country under special agreements with the government to work for foreign carriers may be covered by the Railway Labor Act if the agreement so provides.[63]

Aircrew and similar employees who are foreign nationals and who are permanently based outside of the United States do not fall within the scope of the Railway Labor Act, since their work constitutes commerce which merely passes through the United States between foreign points,[64] even though their flights may involve stopovers at purely domestic points in this country. The same result can be reached by analogy to those cases involving foreign employees of United States carriers. The National Mediation Board has held (and has been upheld by the courts) that foreign nationals employed by United States carriers are not covered by the Act

[57] As of 1967, approximately 11,000 United States citizens were employed by foreign carriers. *Air Transport Facts and Figures, 1967*, The Air Transport Association.

[58] Decker v. Linea Aeropostal Venezolana, 258 F.2d 153 (D.C. Cir. 1958); Rutas Aereas Nacionales, S.A. v. Edwards, 244 F.2d 784 (D.C. Cir. 1957).

[59] This information was gained by the writers from conversations with various airline and government personnel. For example, the writers were told that over a dozen foreign airlines use the service and maintenance facilities of Eastern Airlines.

[60] *Id.*

[61] Section II, *infra.*

[62] Pilot certificates and licenses and mechanic certificates, for example, held by a citizen of a foreign nation will be recognized without further qualification in the United States so long as certain minimum standards are maintained by the issuing nation.

[63] NMB Case No. R-1430, 24 May 1945.

[64] Section IV B, *infra.*

if they are *based* outside of the country, even though they may enter the United States on a temporary basis.[65]

Because of the reciprocity of international air transport, governments hesitate to impose their own laws upon foreign citizens merely because their employment brings them into that country. Most foreign nationals are covered by their own labor laws and are party to employment contracts negotiated in their own countries. If each nation attempted to bring these transient personnel under labor laws other than those of their own nation, the problems and embarassment thus created could seriously hamper international aviation.

C. *Employment Contracts In International Air Commerce*

Although the jurisdiction of the Railway Labor Act does not extend beyond the territorial boundaries of the United States and a United States flag carrier cannot be *required* to bargain with or about foreign-based employees, such bargaining *may* be done on a purely voluntary basis. In *Air Line Pilots' Association, Int'l v. Capitol Airways, Inc.*[66] it was made clear that, even though the provisions of the Act do not extend to foreign-based and operating employees of United States flag carriers, an employment contract negotiated under the Act is enforceable as a contract. In the *Capitol* case, the employer contended that he was not required to follow the grievance procedure established by the contract with respect to foreign based pilots who operated entirely outside of the United States, even though, by its own terms, the contract covered those pilots. The pilots' union contended that the contract, including coverage of foreign-based pilots, had been entered into voluntarily, and the employer was bound to follow its provisions. Relying on the "Steelworkers' Triology,"[67] the court refused to determine whether the contract did in fact cover foreign-based personnel, but held that the arbitration procedure would establish the coverage of the contract, and that *the contract is not limited by the geographical scope of the Railway Labor Act.* The court stated that "although the parties may not be *required* to bargain with respect to foreign based employees . . . they are not forbidden to do so and, indeed, such negotiations are entirely within the spirit and purpose of the Act."[68] Therefore, the contract can extend to foreign personnel if they are represented by that particular union and if the contract is entered into voluntarily. In as much as the contracts under which foreign-based personnel operate are bargained for under the Act, these contracts will apply to them at all times unless a specific exemption is agreed upon by the carrier and the union.[69]

Contracts entered into by United States citizens and foreign air carriers

---

[65] *Supra* notes 37, 43 and 56.

[66] 10 Av. Cas. 17,160 (M.D. Tenn. 1966).

[67] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[68] 10 Av. Cas. at 17,164.

[69] Copies of the contracts of various carriers and their operating unions were requested from both unions and carriers. However, no replies were received from any of the parties contacted, so it is impossible to determine how many of the contracts contain such an exemption.

have also been enforced by the courts of this country. In *Rutas Aereas Nacionales, S.A. (RANSA) v. Robinson*[70] the court held that nothing in the federal law disfavors the application of the law of another nation to an American citizen where the resident has voluntarily entered into contracutal relations with that foreign country or its citizens. The *RANSA* case involved a suit by an American citizen living in Florida who had been wrongfully discharged while flying for a Venezuelan flag air carrier, and was seeking benefits under the Venezuelan Labor Code. The suit was brought in Florida and the court applied the Florida conflict of laws doctrine, stating that the critical factors were that the contract was entered into in Venezuela, performed between Florida and Venezuela, and embodied by reference the Venezulan Labor Code. The language of the case indicates that a contract entered into between a foreign carrier and a United States citizen will be enforced when it is not in opposition to the labor policy of the United States, and that the forum will apply its own conflict of laws rules when making a determination of applicability.

This concept was further expanded in *Hallock v. Trans World Airlines, Inc.*[71] In that case, a workmen's compensation award was in issue; specifically, the question presented was whether the plaintiff had been an employee of Trans World Airlines, who had actually hired the plaintiff, or by Ethiopian Air Lines (EAL), for whom the work had been performed. The court decided that TWA had been acting merely as a hiring agent for EAL, and that since the contract was for services with EAL and the work was performed for that line, EAL was the actual employer, and the contract would be enforced accordingly.

The importance of these decisions relating to employment contracts cannot be over emphasized. Airline employee unions are taking an ever increasing interest in foreign based personnel, and more contracts will be extended to cover them.[72] At a recent conference involving numerous South American and United States unions it was made clear that the various labor organizations involved will, in the future, work more closely on the problems of the foreign based employee.[73]

VI. A Comparison with the National Labor Relations Act

Coverage of foreign transportation operations under the National Labor Relations Act and the Railway Labor Act is very similar. The maritime industry, because of its international character, provides an opportunity to study the results of cases involving circumstances similar to those arising in the air transport industry. In fact, at one time, an attempt was made to include air transport in the maritime jurisdiction of the United States. However, in *United States v. Cordova*[74] it was held that an aircraft does not constitute a "vessel" within the meaning of the applicable maritime statutes,

[70] 9 Av. Cas. 17,324 (5th Cir. 1964).
[71] 8 Av. Cas. 17,448 (Mo. 1963).
[72] *Aviation Daily*, 247 (12 Oct. 1967).
[73] *Id. See also, Aviation Daily*, 277 (18 Oct. 1967).
[74] 89 F. Supp. 298 (D.C.N.Y. 1950).

and therefore does not fall within their coverage.[75] The pattern which has developed with respect to both the maritime and air transport industries has, however, resulted in approximately the same treatment of like circumstances.

At one time, the National Labor Relations Board asserted jurisdiction over events which occurred on United States *owned* ships on the high seas and over acts which were committed within the territorial jurisdiction of the United States, when such acts involved seaborne trade falling within commerce provisions of the National Labor Relations Act.[76] This was so even though the ship was of foreign registry and its crew composed of non-resident aliens. Under this coverage, the jurisdiction asserted under the NLRA was clearly much broader than that under the RLA.

In 1963, the above doctrine was partially overturned in *McCulloch v. Sociedad Nacional de Marineros de Honduras.*[77] In that case, the NLRB asserted jurisdiction over foreign flag vessels, which were owned by a foreign subsidiary of a United States corporation. The Board determined that this was actually joint ownership. The Supreme Court, however, rejected the NLRB's determination, saying that the Board has no jurisdiction, discretionary or otherwise, over foreign flag vessels in the absence of specific statutory language indicating Congressional intent to cover such vessels. The Court also relied heavily on the doctrine of international law under which "the law of the flag state ordinarily governs the internal affairs of a ship" and deemed this necessarily so in view of the "highly charged international circumstances."[78] The Court did, however, state that Congress did have the power to assert jurisdiction over foreign flag vessels *while they were in United States waters.*

Immediately following the *McCulloch* case came *Incres Steamship Co. v. Int'l Maritime Workers Union,*[79] in which it was held that the National Labor Relations Act did not apply to ships of foreign registry, *regardless of actual ownership*, which employ seamen of foreign nationality. Application of the labor laws of the United States to the maritime industry, therefore, depends primarily upon the registry of the vessel rather than on the nationality of the owner as with aircraft, though otherwise, coverage is much the same, since both acts are based on *territorial* jurisdiction.

This similarity is further demonstrated by reference to a case involving operations of a Canadian bus line which had about ten percent of its operations within the United States.[80] The NLRB ruled that the operations of a foreign corporation which take place outside of the United States are outside of the jurisdiction of the NLRA. As in the similar cases decided

---

[75] *See also*, United States v. Peoples, 50 F. Supp. 462 (D.C. Cal. 1943); Dollins v. Pan American Grace Airways, Inc., 27 F. Supp. 487 (D.C.N.Y. 1939).

[76] *See, e.g.*, Peninsular & Occidental Steamship Co., 132 N.L.R.B. 10 (1961); Eastern Shipping Corp., 132 N.L.R.B. 930 (1961); Hamilton Bros., Inc., 133 N.L.R.B. 868 (1961).

[77] 372 U.S. 10 (1961).

[78] The Developing Labor Law: The Board, The Courts, and the NLRA, (C. Morris, ed. 1968) at chapter 28.

[79] 372 U.S. at 21.

[80] Pennsylvania Greyhound Lines, 13 N.L.R.B. 28 (1939).

under the Railway Labor Act, the decision was based on the coverage of the Interstate Commerce Act.

As to the ten percent of the operations taking place within the United States, the NLRB, under its discretionary powers, refused jurisdiction. The reason given was that all of the personnel involved were Canadian citizens and were adequately covered by Canadian law and that it would, therefore, not be in the best interests of the United States to assert jurisdiction. As can be seen, the NLRB, through the exercise of its wide discretionary powers, has closely paralleled the jurisdiction granted to the National Mediation Board under the Railway Labor Act.

VII. Conclusion

The labor problems of international airlines are, in many ways, unique. No other industry is based so much on reciprocity between nations in areas relating to individual business firms. Also, in no other industry is there such a constant movement of employees across national borders. The system of labor law coverage presented above is, under the circumstances, probably the best that could be effectively enforced. The realities of international politics and diplomacy require a flexible system that can meet the day to day needs of international commerce, and these political considerations often must take precedence over any nation's statutory law. Any attempt by any nation at broader coverage of employees by local labor laws would result in political and economic complications for the United States, foreign nations, and the international air carriers that could seriously disrupt a growing and vital segment of the transportation industry.

Bowel L. Florsheim
and
Jerry M. Traver

Railway Labor Act — Boards of Adjustment — Jurisdiction

Plaintiff, an airline stewardess, was discharged for alleged violations of United Air Lines' travel policies. In accordance with the collective bargaining agreement entered into between United and the Air Line Pilots Association (ALPA), the union representing flight personnel with United, plaintiff appealed her dismissal through the company grievance machinery. Failing to be reinstated, plaintiff asked ALPA to submit her appeal to United's system board of adjustment, established pursuant to the Railway Labor Act.[1] Before any action was taken by the board, but after ALPA had submitted the appeal,[2] plaintiff filed suit in a federal district court against United to recover compensatory and punitive damages, alleging that she had been wilfully and wrongfully discharged. She also sought to enjoin further administrative action by the board or United, urging that she could not get a fair hearing since she was not a member of the union. The district court granted United's motion for dismissal for lack of jurisdiction over the subject matter. *Held, affirmed:* a court is precluded from hearing a case until the plaintiff's administrative remedies are exhausted because the system board has acquired exclusive jurisdiction to decide the grievance. *Stumo v. United Air Lines*, 382 F.2d 780 (7th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968).

I. The Railway Labor Act

Ideally, labor disputes involving major industries should be settled quickly in order to prevent an extended disruption of the national economy. This assumption underlies the Railway Labor Act (RLA), enacted in 1926.[3] The function of this legislation, as Congress saw it, was to ensure, *inter alia*, the uninterrupted flow of interstate commerce on the nation's rail and, later, air carriers.[4] To serve this end, the RLA, by the amendments of 1934,[5] provided for a National Mediation Board (NMB) and a National Railway Adjustment Board (NRAB).[6] The creation of this dual machinery recognized two types or degrees of labor disputes, each of which required a different type of administrative treatment.[7] The NMB is designed to arbitrate "major" disputes between unions and railroads, that is,

[1] Railway Labor Act (hereinafter RLA), 44 Stat. 577, *as amended*, 45 U.S.C. §§ 151-88 (1964).

[2] RLA, § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964). Inasmuch as the union shop is permitted under the RLA, § 2, Eleventh, and all provisions of the RLA are applicable to air carriers, the union is the proper body to submit the appeal. *See* Railway Employees' Dept., AFL v. Hanson, 351 U.S. 225 (1956).

[3] RLA, § 2 (1) & (4), 44 Stat. 577, *as amended*, 48 Stat. 1168, 45 U.S.C. § 152 (1) & (4) (1964). *See also* Virginia Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937).

[4] *Id.*

[5] 48 Stat. 1185 (1934).

[6] RLA, §§ 4 & 3 respectively, 44 Stat. 577, *as amended*, 48 Stat. 1189, 63 Stat. 880, 45 U.S.C. §§ 154 & 153 (1964).

[7] *See* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952).

disputes concerning the execution of collective bargaining agreements. "Minor" disputes, involving the day-to-day grievances over working conditions, or the interpretation of an existing collective bargaining agreement, are referred to the NRAB. In 1936, with the addition of Title II,[8] all provisions of the RLA except that establishing the NRAB were made applicable to air carriers.[9] Instead of creating an analogous *national* adjustment board for the air industry, Congress made it the duty of each airline or group of airlines to establish its own system or regional board of adjustment. Membership in these system boards was taken from both the carrier's management and the union representing the company's employees; these boards had jurisdiction over minor disputes.[10] Thus the system board is like a localized NRAB.

When it created the NRAB, Congress recognized the need for prompt and efficient settlement of disputes in the railroad industry. After experimenting with a cumbersome and ineffective independent grievance agency, which existed before the 1934 amendments,[11] Congress decided to refer these disputes to an appeal board (the NRAB) composed of representatives of the companies and members of the unions who presumably had the greatest knowledge of the needs and desires of the parties and were thus more capable of solving the operational labor problems of the railroads. Given this premise, it follows that the more localized the grievance panel, the more intimate its knowledge and the more "expertise" which it could bring to bear on industry problems. Hence, Congress required the formation of the system boards, which, in a certain sense, can be called panels of local experts. The value of such a scheme is that it permits disposal of relatively insignificant disputes quickly and fairly without involving the entire union membership and running the risk of a strike.[12] The efficacy of this procedure was ensured by making decisions of the system boards "final and binding on the parties to the dispute"[13] thereby foreclosing resort to the courts.

The grievance procedure established by the RLA requires that disputes be processed initially through the grievance channels created under the contract between the employer and the union.[14] But when the grievance cannot be settled by the parties themselves, pursuant to their contract, the distinctions, noted earlier, between major and minor disputes and between the types of grievance machinery to be utilized, become critical. In the case of a major dispute, either party may invoke, or the NMB may "prof-

---

[8] 49 Stat. 1189 (1936).

[9] RLA, § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964). It is because of this point that cases involving railroads apply equally to the airlines and *vice versa* with minor exceptions.

[10] RLA, § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

[11] 44 Stat. 577 (1926).

[12] *See generally* Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257 (1965).

[13] RLA, § 3, First (m), 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 153, First (m) (1964) provides that "awards made by the NRAB shall be final and binding upon both parties to the dispute." This finality is extended to the system boards by implication in § 204. *See, e.g.*, Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., 372 U.S. 682 (1963).

[14] RLA, § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

fer," the mediation services of the NMB.[15] If the aid of the NMB is not sought or if the procedures under section 5 of the RLA are exhausted without settlement, the parties may resort to economic "self-help," such as strikes or lock-outs. Yet because submission of a dispute to the system boards is mandatory when the dispute is of a minor character[16] and the decisions of the boards are final and binding, neither the union nor the employer may resort to self-help in the solution of minor disputes;[17] they are required by the RLA to submit the grievances to the system board which they must establish under their collective bargaining agreement.[18]

II. Jurisdiction of the System Board

The courts, in interpreting the position of the system boards, have consistently upheld the exclusive original jurisdiction of these panels over minor disputes,[19] with one important exception which will be discussed below.[20] The reasoning of the courts in recognizing this jurisdiction has been that if, in the majority of cases, the grievant could bypass a process which is supported by sound reasons of public policy, there would be no reason for having the procedure in the first place. If one accepts the argument that men in the airline industry with their special and intimate knowledge of the problems of that industry should handle disputes of this character, then allowing resort to *either* the administrative process *or* the courts undercuts the very reasoning on which the RLA was originally founded.

This is not to say that minor disputes are automatically shunted into a special pigeonhole never to emerge to the light of public or judicial scrutiny. There can be judicial review of the "final and binding" decisions of the boards.[21] Before 1966 this review was fairly broad, though it was generally held that the board's findings of fact were "conclusive on the parties";[22] only if the carrier failed to comply with an order of the board, could there be review in a court of law.[23] It has been suggested that this system actually worked in favor of the carriers.[24] Refusal by the carrier to comply with an unfavorable order permitted it to seek judicial review of the board's decision when the union sued for enforcement; but since

[15] RLA, § 5, First, 44 Stat. 577, *as amended*, 48 Stat. 1195, 45 U.S.C. § 155, First (1964): "The parties . . . *may* invoke the services of the Mediation Board . . ." [Emphasis added.].

[16] RLA, § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964) provides: "disputes *may* be referred . . . to an appropriate adjustment board . . ." [Emphasis added.]. In the 1926 RLA, 44 Stat. 577, Congress had provided that disputes "*shall* be referred" [Emphasis added.] [§ 3, First (i)]; it is generally held that the wording change did not make referral permissive. *See* Brotherhood of R.R. Trainmen v. Chi. R. & Indiana R.R., 353 U.S. 30 (1957).

[17] Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R., 373 U.S. 33 (1963).

[18] RLA, § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

[19] *See* 382 U.S. 257 (1965); Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R., 373 U.S. 33 (1963); Brotherhood of R.R. Trainmen v. Chi. R. & Indiana R.R., 353 U.S. 30 (1957).

[20] Moore v. Ill. Cent. R., 312 U.S. 630 (1941).

[21] RLA, § 3, First (p), 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 153, First (p) (1964).

[22] *Id. See also* Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257 (1965).

[23] Walker v. So. Ry., 385 U.S. 192 (1966) provides a good discussion.

[24] *Id.*

the union could only sue on the decision when the carrier failed to comply, a decision in favor of the carrier, with which the carrier would comply, prevented the employee from seeking review. As a corollary, it was held that once the board had denied him relief, the employee was foreclosed from suing at common law for damages resulting from the alleged wrong committed by the carrier.[25] The reasoning behind this decision was that to allow such a suit would undercut the purpose of the RLA.

In 1966 the inequity of allowing the employer to obtain judicial review of the board's decisions while refusing it to the employee was remedied.[26] The RLA now provides that an employee or group of employees may seek review of the board's decisions whether in their favor or against them or even if the board fails to render a decision.[27] Courts are permitted to set aside the order of the board "for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the award."[28] That is, a reviewing court may only set aside an award when the award either could not or should not have been made, as when the board lacked jurisdiction or where there was a failure of due process, or when the decision was the result of some serious impropriety.

III. Exception to the Rule

The major exception to the general rule of the board's exclusive original jurisdiction is in the case of a discharged employee.[29] Even though discharge is characterized as a "minor dispute," the discharged employee may either prosecute his grievance through administrative channels, *or* he may accept his discharge as final and sue in a court of law for damages for breach of his employment contract.[30] This notion of "election of remedies," as it affects the grievance procedure under the RLA, was first announced by the Supreme Court in 1941 in *Moore v. Illinois Central Railroad Co.*[31] in which plaintiff, following his discharge, brought suit in a state court for damages but not for reinstatement. The court upheld an award in his favor, declaring that "nothing in [the RLA] . . . purports to take away from the courts the jurisdiction to determine a controversy over wrongful discharge. . . ."[32] The Court found from Congressional intent and the history of the RLA that its provisions were meant to provide a voluntary scheme for mediation which did not require that the plaintiff "seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."[33] The Court was obliged to explain the *Moore* de-

[25] Whitehorse v. Ill. Cent. R., 349 U.S. 366 (1955).
[26] 80 Stat. 208 (1966).
[27] RLA, § 3, First (p) & (q), 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 153, First (p) & (q) (1964) extended to air carriers by implication in § 201.
[28] RLA, § 3, First (p), 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 153, First (p) (1964).
[29] Moore v. Ill. Cent. R., 312 U.S. 630 (1941).
[30] *Id.*
[31] *Id.*
[32] *Id.* at 634.
[33] *Id.* at 636.

cision in 1950 in *Slocum v. Delaware L. & W. Railroad Co.*[34] by making it clear that the exception was to apply only to the case of the discharged employee and not to other "minor disputes," again recognizing that the RLA would be meaningless without such a limitation. The Court stated in *Slocum* that the reason for allowing the exception in the case of discharge was that the employee was then outside the employer-employee relationship.[35] It seemed to suggest that, because the employment relationship had terminated, the discharged employee should not have to seek his remedy in a grievance machinery which was essentially circumscribed by that relationship.

One other important limitation of the *Moore* exception was stated in *Transcontinental & Western Air, Inc. v. Koppal*[36] wherein the Court was careful to explain that there could only be an election when the "applicable state law" did not require exhaustion of the administrative process. The limitation, of course, had no effect on the rule that the employee who accepted his discharge as final and initiated no administrative proceedings could bring a common law action in court in the states which did not require exhaustion of the remedy. Under the *Koppal* decision in a state requiring this exhaustion, the employee was required by law to pursue an administrative remedy. However, in the states which did not require exhaustion, the employee could go to court *only* if he had not already initiated an appeal under the RLA. Thus, if state law required exhaustion *or* if the employee had initiated an administrative appeal even in the absence of state law governing the matter, the court in which a common law action was filed would have to dismiss for want of jurisdiction inasmuch as jurisdiction could *only* vest or *had already* vested in the system board.

Since the *Moore* case, the Supreme Court has rendered several decisions which seem, at least to critics of the exception, to require abandonment of the exception permitting election of remedies.[37] Most have merely been reiterations of the Court's earlier position announced in *Slocum*, that the system board has exclusive original jurisdiction to hear "minor disputes," with no mention of the *Moore* exception. There are, however, three decisions which deserve special note.

In *Pennsylvania R.R. v. Day*[38] suit had been brought by an employee seeking certain benefits allegedly denied him at retirement. The Court, in ordering dismissal of his action, held that the NRAB had exclusive jurisdiction because of the Board's "expertise" and because the scheme set up by Congress to reduce discontent of employees would be thwarted if the suit were allowed. The case would not be noteworthy but for the Court's attempt to distinguish the *Moore-Slocum* exception. As in *Slocum*, reliance was placed on the termination of the employment relationship; the discharged employee is, perforce, outside the relationship, whereas the retired employee remains, in a certain sense, within it since he continues to

[34] 339 U.S. 643 (1953).
[35] *Id.* at 244.
[36] 345 U.S. 643 (1953).
[37] *See* cases cited, *supra* note 19.
[38] 360 U.S. 548 (1959).

receive monetary support from the railroad. Therefore, retired employees do not fall within the *Moore* exception.

Decided the same day, *Union Pacific R.R. v. Price*[39] concerned an employee who had exhausted his administrative remedy following his discharge. The NRAB denied reinstatement, whereupon he filed suit for damages. The Supreme Court ordered dismissal; "Congress intended that the Board's disposition of a grievance should preclude subsequent action by the losing party."[40] Stressing that " 'the specification of one remedy normally excludes another,' "[41] the Court continued, "the instant common law action is precluded unless the overall scheme established by the RLA . . . clearly indicates a Congressional intention contrary to that which the *plain meaning of the words imports*"[42] [Emphasis added.]. Concluding that the language of the RLA would admit of no other result, the Court then held that submission of the grievance to the NRAB barred later resort to the courts in a common law action for damages.

In 1965 it appeared that the Supreme Court might be prepared to overrule the *Moore* exception and bring cases of wrongful discharge under the general rule. In *Republic Steel Corp. v. Maddox*,[43] a case under the National Labor Relations Act (NLRA),[44] the Court used reasoning which, if applied to the *Moore* exception, would seem to require such a result. In *Maddox* the Court refused to extend the exception to cases arising under the NLRA. The plaintiff had been laid off when his employer closed its mine. He brought an action to compel payment of certain severance benefits provided for under the contract which he claimed were due him. Although the contract provided for binding arbitration of grievances, plaintiff bypassed this process to sue for breach of contract. In denying judicial relief, the Court said:

> As a general rule, in a case to which Federal law applies, Federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of contract grievance procedures agreed upon by the employer and the union as the mode of redress [Court's emphasis.]. . . . A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . It would deprive the employer and the union of the ability to establish a uniform and exclusive method for orderly settlement of employees grievances. *If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement.* A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and the administration of collective agreements" . . . . *Grievances depending on severance claims are not critically unlike other types of grievances.* Although it is true that the employee asserting the claim will necessarily have accepted his discharge as final it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees . . . [Emphasis added.].[45]

---

[39] 360 U.S. 601 (1959).
[40] *Id.* at 608.
[41] *Id.*
[42] *Id.*
[43] 379 U.S. 650 (1965).
[44] National Labor Relations Act, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151-68 (1964).
[45] 379 U.S. at 652-56.

The Court here reasoned that the ultimate decision of the grievance, as well as the mode of its decision, could have repercussions on the labor relations between the employer and the union representing those still within the employment relationship. Thus, discharge of an employee was viewed in a context larger than the individual grievance; and it is clear that the reasoning of the case made the employee's acceptance of his discharge immaterial. It would appear that the Court was prepared to overrule the *Moore* exception; however, in a footnote, it indicated that the case was not to be construed as overruling *Moore* since it was not an appropriate vehicle.[46]

The following year the appropriate vehicle seemed to present itself in the case of *Walker v. Southern Railway*.[47] But the Court again refused *at that time* to overrule *Moore*. The 1966 amendments[48] providing for a more equitable review procedure had not gone into effect, and the Court noted that since the administrative remedy available to the plaintiff-employee in his case was in a sense "defective," the *Moore* exception must govern to better protect his rights. It appeared that the court was saying that the next case which came up involving suit in the district court by a discharged employee *would* be an appropriate vehicle for overruling the exception.

In 1967 the Court rendered a decision which would appear to reaffirm the *Moore* exception. In *Vaca v. Sipes*,[49] involving, as in *Maddox*, an employee under the NLRA rather than the RLA, the employee was laid off on the recommendation of his employer's doctors. The employee sought reinstatement through the contract grievance procedure but without success. When he then demanded that his case be taken to arbitration, the union refused. Suit was filed in state court against *the union* for its failure to seek arbitration of the dispute. Although it reversed a judgment for the employee on the ground that the state court applied state rather than the governing federal law, the Supreme Court said that the state court had jurisdiction even though there had been a failure to exhaust the contract grievance machinery requiring arbitration of grievances. It would appear that if there is no substantial difference in effect between exclusive grievance machinery established by contract and that established by law, the Court was retreating from its apparent readiness, expressed in *Walker*, to overrule the *Moore* exception. But a careful reading of the *Vaca* case indicates that it has little application to the area of the *Moore* exception.

The majority in *Vaca* found standing to sue in the face of a failure to exhaust an exclusive grievance procedure through a circuitous route: If, in a suit by the employee against his employer, the employer defends on the basis of the employee's failure to exhaust his "administrative" remedy, the employee can only rebut the defense by showing that the union breached its duty of fair representation. The employee's action against his em-

[46] *Id.* at 657, n.14.
[47] 385 U.S. 192 (1966).
[48] 80 Stat. 208 (1966).
[49] 386 U.S. 171 (1967).

ployer is justiciable under section 301 of the Labor-Management Relations Act.[50] Since the court thus has jurisdiction and must necessarily decide the unfair representation issue in order to decide the case against the employee, it seems inconsistent to say that the court cannot decide the question in a direct suit against the union itself. *Only* because of this inconsistency, did the Court hold that the employee did not have to exhaust the grievance procedure before suing at law. It was noted in dicta that, in the absence of a showing of breach of the duty of fair representation, the employee must "at least attempt to exhaust exclusive grievance and arbitration procedures,"[51] reaffirming what the Court had said in the *Maddox* decision.

Notwithstanding this discussion of a suit by a discharged employee against his employer, the *Vaca* decision has no applicability to the problem of discharge under the RLA. *Vaca* involved a suit against the union; the primary issue concerned the union's duty of fair representation. The basis for allowing suit was purely the inconsistency noted by the Court. Even in dicta, when the Court discusses the hypothetical suit by the employee against his employer, it recognizes that jurisdiction is based on the grant in section 301 of the Labor-Management Relations Act, and not by exception to a statute which removes jurisdiction. In the RLA situation, suit is allowed because the statute presumably does not cut off the common law contract rights of the employee. Irrespective of this distinction, the *Vaca* decision demonstrates the Court's apparent fidelity to the notion of reliance upon the administrative process unless pursuance of the remedy has become futile because of the union's breach of its duty of fair representation.

IV. Stumo v. United Air Lines

In *Stumo v. United Air Lines*[52] the plaintiff had, through the union, initiated an appeal of her discharge before the system board. Thereafter, she sought to bring a common law action in the district court for breach of contract. Were there no exception to the rule of exhaustion of remedies, plaintiff could not bring the action, for she would be obliged to pursue her administrative remedy. But even accepting the validity of the *Moore* exception, abandonment of the grievance process was not possible inasmuch as the jurisdiction of the system board had already attached, barring a suit in the alternative at law. The fact that the plaintiff in *Stumo* was not a union member is probably not reason for allowing suit, although the Supreme Court has never decided the matter.[53] Under the RLA, the union is made the exclusive bargaining agent for *all* the employees within the jurisdiction of the system board.[54] It seems unreasonable to think that Congress ignored the likelihood that some members of the

[50] Labor Management Relations Act, § 301, 61 Stat. 136 (1947), *as amended*, 29 U.S.C. § 181 (1964).

[51] 386 U.S. at 184.

[52] 382 F.2d 780 (7th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968).

[53] *See* Atlantic Coast Line R.R. v. Pope, 119 F.2d 39 (4th Cir. 1941).

[54] RLA, § 2, Fourth, 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 152, Fourth (1964), providing, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ." is extended to air carriers and their employees by RLA, § 201.

bargaining unit represented by the union would not be members.[55] Since Congress undoubtedly did recognize that at least some employees would not be union members, it can safely be assumed that Congress would have made some special provisions for non-union members had it thought that an employee's non-union status would be detrimental to his grievance interest as an employee.

An interesting aspect of the case presenting an area which the courts have not heretofore examined is the question of the notice requirement under the RLA. There is some possibility that the grievant in *Stumo* had no actual knowledge that her case had been placed before the system board.[56] Several problems arise: under the present state of the law, what is the effect on the board's jurisdiction if the grievant has no notice of the appeal? Section 3, First (j)[57] expressly provides that the parties shall be given notice of the hearings of the divisions of the NRAB; this notice provision is implicitly extended to system board hearings in Title II.[58] But this requirement gives rise to several relevant inquiries. Who is the grievant, that is, to whom is notice given? Is the notice requirement meant to extend to an appeal filed prior to the setting of a hearing? Can it really be said that a party has no notice, not even constructive, of the appeal when it is at his insistence that the appeal is made? When does the administrative action begin—at what point is the grievant prohibited from going to court? Does dismissal of the suit work an injustice on the grievant under facts such as those in the instant case, assuming that plaintiff had no knowledge that an appeal had been filed?

Only the most tentative answers can be offered for these questions. It is clear that the actual aggrieved party is the discharged employee. The appeal, however, is formally taken by the union as the bargaining agent. It would seem that since the union obviously knows that it has appealed the case, the most that can be implied from the statutory notice requirements is that the *union* has a duty to notify the employee who has requested the appeal. It is tenuous, at best, to suggest that because of this implied duty, the system board could be deprived of its jurisdiction if the union fails to perform its duty.[59]

Perhaps more basic is the question concerning the nature of the notice requirement. The statute merely provides for notice of hearings. We may assume that Congress felt that no notice was needed until a hearing date was actually set, or we must believe that the provision is defective. It seems unlikely that a law passed in 1926, amended four times since, and subject to minute judicial scrutiny all the while, is the product of over-

---

[55] *Id.*

[56] 382 F.2d at 784. The court in *Stumo* did not decide the issue, however.

[57] RLA, § 3, First (j), 44 Stat. 577, *as amended*, 48 Stat. 1189, 45 U.S.C. § 153, First (j) (1964).

[58] RLA, § 204, 48 Stat. 1189, 45 U.S.C. 184 (1964).

[59] Presumably, under the decision in *Vaca v. Sipes*, if the employee can prove a breach of the union's duty of fair representation, he could bring suit in court without exhaustion of his "quasi-judicial" remedies. But, according to the majority in that case, breach of the duty is only found when the "union's conduct . . . is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. The problems of proof for the aggrieved employee would be substantial.

sight. What seems more likely is that Congress felt that notice of the hearing alone was sufficient, since the parties would presumptively know of the appeal.

The most significant inquiry centers on the point at which the board's jurisdiction attaches so that the grievant is thereafter prevented from going to court. In the *Moore, Slocum,* and *Koppal* cases it was made clear that when any appeal of the discharge is taken, the employee is held to have elected his remedy and cannot sue at law. Thus, when plaintiff, in the present case, requested the union to initiate an appeal to the system board and the appeal was, in fact, initiated, she chose her remedy and could not abandon it. But even if the grievant had no knowledge that an appeal had been taken by the union to the system board, it would not seem prejudicial if the court dismissed the action at law on a showing by the employer that the union had filed the appeal before grievant had filed his suit. The employee would merely be relegated to his administrative remedy. Congress has said, in effect, in the RLA, that the administrative remedy is sufficient.[60] Unless the employee can demonstrate that he is not receiving fair treatment in this proceeding, it is submitted that he cannot be considered to have suffered from the court's dismissal of his suit; requiring the grievant to pursue a remedy which he requested, and one which Congress has declared to be best designed to protect his interests, is not an unreasonable demand.

V. Conclusion

Stumo v. United Air Lines is hardly an exceptional case. Were it not for recent decisions which suggest that the Supreme Court may abandon the *Moore* exception, the case would not be significant. In view of the facts of the case, the Supreme Court's denial of *certiorari*[61] indicates no more than that the case was not "the appropriate vehicle." The administrative process had apparently been properly invoked; even accepting the *Moore* exception, the case was correctly decided. The notice question which arose did not present so new and vital an issue that the Supreme Court felt constrained to consider it.

Though *Stumo* may not have presented an opportunity for re-examination of the *Moore, Slocum,* and *Koppal* decisions, it seems clear that when a proper case is presented, the Court should abandon the duality and confusion of the present rule. Numerous decisions concerning other types of minor grievances have held the grievance procedure to be mandatory.[62] The *Maddox* case shows the Court's unwillingness to extend the exception outside the RLA. *Maddox* and, in dicta, *Vaca* require that the grievant must *attempt* to exhaust his administrative remedy. The 1966 amendments reforming the appeal procedure have been in effect for almost three years. In the light of these decisions and the amendments, it seems clear that the exception is no longer, if indeed it ever was, tenable.

[60] 339 U.S. 239 (1950).
[61] 389 U.S. 1042 (1968).
[62] *See* cases cited, *supra* note 19.

The reasoning utilized by the majority in *Maddox* and in cases which involve other "minor" disputes appears to be equally applicable to discharge cases arising under the RLA. That is, it is inconsistent to establish a body of "experts" on the grounds that it is the best qualified to settle the cases involving its special area of competency and then to allow an aggrieved party to bypass this body by going into court. Even acknowledging that the courts have been careful to apply *Moore* rigidly in the light of *Slocum*, any exception is hard to justify. The courts have long held that the purpose of the RLA was to provide for the efficient, final, and uniform disposition of disputes in certain types of cases.[63] And yet in what is perhaps one of the most important areas of dispute—disciplinary discharge—the courts have said that this concept of efficiency and uniformity does not apply and the common law does. The only justification is that the plaintiff is now "outside" the protected area. As the court in *Maddox* said, "it does not follow that the resolution of a discharged employee's claim can have no effect on future relations between the employer and other employees."[64] The *Day* case, involving a retired employee, indicates the inconsistency of the Court's present position. A retired employee is as much outside the employment relationship as the discharged employee —or, conversely, each is equally within the relationship insofar as the effect of dealings with him will influence dealings with other employees. It is submitted, however, that whether the employee be regarded as within or without the relationship is immaterial, as indicated in *Maddox*. What is more pertinent and significant is that the RLA has provided for the means to resolve "minor" disputes by those most affected by the decisions. Whether the policy behind the law be sound or hopelessly idealistic, the courts have held it to apply in all cases except those of potentially the greatest impact on employer-employee relations. In fact, in discharge cases, the employee need not even "attempt" to comply with the "plain meaning of the words" of the statute. Clearly, it is time for an abandonment of the "distinction without a difference" manifested in the *Moore* exception.

Bruce L. Ashton

[63] *Id.*
[64] 379 U.S. at 656.

Warsaw Convention: Theme of Uncertainty

The Warsaw Convention,[1] a multilateral treaty, is adhered to by nearly 100 nations.[2] Drafted in 1929, the purposes of the Convention were to establish a uniform system of law in international transportation and to limit tort liability for the then infant aviation industry.[3] The lmited liability of the Convention, approximately $8,300,[4] was thought to be adequate when the United States ratified the Convention in 1934;[5] however, in later years, the limitations proved to be too low in relation to compensation awards for domestic tort liability.[6] Therefore, in the flux of heavy criticism,[7] the courts found, under Article 3 of the Convention,[8] an interpretation that would limit the carrier's defense of limited liability under Article 22.[9] Since this Article applies in the narrow factual situation where the carrier accepts a passenger without giving him adequate ticket delivery,[10] or reasonable notice,[11] few passengers were able to take advantage

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter cited as the Warsaw Convention), 29 Oct. 1934, 49 Stat. 3000, T.S. No. 876.

[2] *See*, Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 663 (1967). For a list of nations adhering to the Convention, *see*, CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIALS 319 (1 May 1967).

[3] *See* Lowenfeld & Mendelsohn, *The United States & the Warsaw Convention*, 80 HARV. L. REV. 495, 498 (1967). *See also*, Caplan, *supra* note 2, at 667.

[4] Warsaw Convention, art. 22(1), 49 Stat. 3015, T.S. No. 876 provides in part: "In the transportation of passengers, the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8,300] . . . ."

[5] *See*, Lowenfeld & Mendelsohn, *supra* note 3, at 499.

[6] For a statistical chart comparing awards under domestic and Warsaw accident suits, *see*, Lowenfeld & Mendelsohn, *supra* note 3, at 554.

[7] *See*, Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965) for a critical view of the Convention's low limitations of liability.

[8] Warsaw Convention, art. 3, 49 Stat. 3015, T.S. No. 876, provides:

> (1) In the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
>
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered it shall not be entitled to avail itself of those provisions of this convention, which exclude or limit its liability.

[9] *See, supra* note 3. Warsaw Convention, art. 3(2), 49 Stat. 3015, T.S. No. 876 provides that if the ticket is not delivered by the carrier, it may not avail itself of the limited liability of Warsaw Convention, art. 22, 49 Stat. 3019, T.S. No. 876, nor Warsaw Convention, art. 20(1), 49 Stat. 3019, T.S. No. 876, which allows it to exclude its liability if it proves that it was not negligent.

[10] If the carrier accepts a passenger without delivering his ticket so that the passenger may have reasonable opportunity to discover the limitations of liability that are on the ticket, as required by article 3(1), article 3(2) precludes the carrier from raising the defense of limited liability. Mertens v. Flying Tiger Line, Inc., 341 F.2d 323 (5th Cir.), *cert. denied*, 382 U.S. 816 (1965); Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965).

[11] Each ticket delivered to the passenger, in addition to an "adequate" delivery, *supra* note 10,

of this Article. However, court decisions which interpreted Article 3 clearly reflected their hostility to the Convention.[12] Continued adversity to the Convention's low limits of liability provoked the United States into a threat of denunciation of the treaty in 1965.[13] Fearing the effects of this withdrawal, an "Interim Agreement," known as the Montreal Agreement,[14] was formulated, raising the limit of liability in certain cases to $75,000;[15] the United States then acquiesced and withdrew its denunciation.[16]

Montreal was the strongest victory in the war waged by the Convention's critics, as limited liability is now more in accord with today's standard of living.[17] The "interim agreement," at present, has seemingly brought a period of tranquility to the issue of limited liability, as there are yet no cases which have arisen out of the Montreal Agreement's limited liability, and hence, no evidence of judicial reaction to it.

Thus, the purpose of this examination of the Convention is to illustrate the uncertainty of the Convention, supplemented by the Montreal Agreement and its higher limits of liability. Also, the analysis will reveal the many avenues left open to the courts in their future interpretation of the Convention.

To analyze the Convention in this light, one must first review prior court decisions, as they have promulgated a body of case law under Article 3 that applies to the Warsaw Convention, and undoubtedly to the Montreal Agreement.[18] Also, the courts' outlooks toward the Convention must be analyzed, as future interpretations of the Agreement's effects on the Convention will depend upon whether the courts retain the same attitude as reflected in case law prior to the Agreement.

Next, the terms of the Montreal Agreement must be viewed in light of earlier attitudes toward the Convention to determine how effectively the agreement has accomplished its purpose—that of quelling hostility to the

must contain reasonable notice of the Convention's application in print calculated to attract the passenger's attention. Lisi v. Alitalia-Linee Aeree Italiane, S.P.A., 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd per curiam*, 390 U.S. 455 (1967) (The Supreme Court affirmed by a four-four split decision, one Justice not taking part in the decision.).

[12] The *Lisi* case held that reasonable notice was required by article 3 of the Warsaw Convention, yet a literal reading of that article would deprive the carrier of limited liability only for failure to actually deliver a ticket.

[13] Dep't of State Press Release No. 268 (15 Nov. 1965).

[14] Civil Aeronautics Board Order No. E-23,680, 13 May 1966. This agreement is a bilateral contract between the carrier and the passenger, finding its authority under article 22(1) of the Convention which allows the parties to agree to higher limits of liability. The contract and agreement incorporate all other provisions of the Convention except those allowing the carrier to raise the defense of no negligence. This agreement is termed an "interim agreement," to remain in effect only until a permanent solution to the limited liability problem is reached. For a general discussion of the Warsaw Convention and events leading to the Montreal Agreement, *see*, Lowenfeld & Mendelsohn, *supra* note 2.

[15] The Montreal Agreement, *supra* note 14, provides that the limit of liability for each passenger is $75,000 inclusive of legal fees and costs or $58,000 exclusive of legal feels and cost. Also, the Agreement provides that the carrier may not avail himself of the defense of negligence under the Warsaw Convention art. 20(1), 49 Stat. 3019, T.S. No. 876. The practical effect of the provision is that the passenger need only prove damages up to $75,000 to recover, regardless of whether he has proved that the carrier was negligent.

[16] Dep't of State Release No. 111 (14 May 1966); Dep't of State Release No. 110 (13 May 1966).

[17] *See supra* note 6.

[18] The delivery requirements of article 3 are incorporated as part of the requirements of the Montreal Agreement.

Convention. The extent to which this end is accomplished will determine the Agreement's usefulness—present and future.

Finally, the Convention's future must be analyzed in the context of its uncertainty as there is, as of yet, little evidence upon which to predict its future course. Also, in light of a prior foundation of hostile court decisions, as opposed to a once favorable attitude of the courts to the treaty,[19] there are many options open to American courts to interpret the treaty in such a way as to strengthen its provisions or render it useless. Therefore, an examination of the Montreal Agreement's future effect on the Warsaw Convention revolves around a theme of uncertainty.

The court decisions which were rendered before Montreal were concerned with Article 3 of the Convention, which upon a literal reading, requires that a carrier may not assert the defense of negligence or limited liability if it does not deliver a ticket to the passenger.[20] Thus, Article 3 was the most prevalent and successfully used provision to escape limited liability,[21] and quite appropriately, the focal point of judicial hostility to the Convention. But before discussing the cases to which judicial animosity was directed, it is first necessary to examine the earlier favorable position taken by the courts toward the Convention, in order to understand the impact of later decisions upon the Convention.

One of the first American cases to interpret the requirements of delivery under Article 3 was *Ross v. Pan American Airways*.[22] There, transportation for the appellant had been arranged by an agent, but the appellant never physically received her ticket. The plane crashed and the injured plaintiff brought suit contending that since she never received the ticket, the limited liability of the Warsaw Convention did not apply. The court, rejecting this argument, held that the limitation of Article 3(2) were those created by the Convention itself, not by "consenual agreements between the parties."[23] Therefore, the limitation of Article 3(2) applied automatically when a ticket was issued by the carrier, regardless of whether the ticket

---

[19] At one time, the courts were favorable to the treaty; then, the limited liability provisions were thought to be reasonable. For the leading American case indicative of a favorable attitude to the treaty, *see* Ross v. Pan American Airways, 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd*, 80 N.Y.S.2d 755 (1st Dept. 1948), 85 N.E.2d 880 (N.Y. Ct. App. 1955). *See also* the district court opinion in Grey v. American Airlines, 95 F. Supp. 756 (S.D.N.Y. 1950). The case was appealed on the issue of willful misconduct, 227 F.2d 282 (2d Cir.), *cert. denied*, 350 U.S. 989 (1956).

[20] *Supra* note 8.

[21] The passenger may also escape liimted liability if he proves that the carrier contributed to his injury by willful misconduct. (Warsaw Convention, art. 25, 49 Stat. 3020, T.S. No. 876.) However, the effect of this article is not considered in the present examination of the Convention, as the Montreal Agreement does not alter the application of this article. For a discussion of willful misconduct under the Convention, *see* Acosta, *Willful Misconduct under the Warsaw Convention Recent Trends and Developments*, 19 U. MIAMI L. REV. 575 (1966), D. BILLYOU, AIR LAW 140 (2d ed. 1964). For the United States interpretation of the Warsaw Convention, art. 25, 49 Stat. 3020, T.S. No. 876, *see* K.L.M. v. Tuller, 292 F.2d 775 (App. D.C. 1961), *cert. denied*, 368 U.S. 921 (1961); Grey v. American Airlines, 227 F.2d 282 (2d Cir.), *cert. denied*, 350 U.S. 989 (1956); Goepp v. American Overseas Airlines, 281 App. Div. 105, 117 N.Y.S.2d 276 (1st Dept. 1952), *aff'd w.o. op.*, 305 N.Y. 830, 114 N.E.2d 37 (1953); *cert. denied*, 346 U.S. 874 (1953); Pekelis v. Transcontinental & Western Air, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951); American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949).

[22] 77 N.Y.S.2d 257 (Sup. Ct. 1948), *aff'd*, 80 N.Y.S.2d 755 (1st Dept. 1948), 85 N.E.2d 880 (N.Y. Ct. App. 1955), 2 Av. Cas. 14,911 (1949).

[23] 2 Av. Cas. at 14,915.

had been physically delivered to the passenger;[24] the passenger was *presumed* to know the law and was bound accordingly.[25] This strict interpretation became the leading American case representing the judicial test to be applied in Article 3(2) situations.[26]

With the rising standard of living and increased awards for tort liability the courts began to look with disfavor upon the limited liaiblity provisions of the convention.[27] The first appellate case to reflect the courts' changing attitudes was *Merten v. Flying Tiger Line, Inc.*,[28] which arose from the crash of an international carrier chartered by the United States Government to transport military troops. In that case none of the military passengers were given their tickets until the plane was actually in flight. The court in *Mertens* reasoned that each passenger must be given a reasonable opportunity to take precautions against his limited recovery,[29] the test of reasonable opportunity being determined from the surrounding circumstances of each case.[30] Clearly, an airline that is not issuing passenger tickets until the plane is in flight does not meet the standard required by this interpretation. However, the court further stated that its opinion was not necessarily inconsistent with *Ross v. Pan American Airways*.[31] Reconciliation of these two cases on the facts is difficult, except that in *Ross* the appellant was never given her ticket, while in *Mertens* the appellant's decedent was not given his ticket until the airplane was in flight. The only logical distinction between these two cases appears to be the court's interpretations as to what kind of delivery fulfills the requirements of Article 3(2).

After *Mertens* was decided, *Warren v. Flying Tiger Line, Inc.*[32] strengthened the rationale of *Mertens* and apparently disregarded the well-settled *Ross* doctrine. *Warren* arose out of a crash which occurred enroute from California to Viet Nam.[33] Prior to departure, the passengers, all military personnel, were given "boarding passes" and upon arriving at the boarding ramp, each passenger was given a "boarding ticket" which referred in small print to the Warsaw Convention. After the departure from California, the aircraft made intermediate stops in Honolulu, Wake Island, and Guam, before disappearing without a trace. The Ninth Circuit, in deciding *Warren*, held that the delivery of the aircraft "boarding ticket" to the passengers as they were boarding the plane was not delivery as contemplated by Article 3(2) of the Convention.[34]

Through strengthening the *Mertens* rationale, *Warren* is far more im-

[24] *Id.* at 14,916.
[25] *Id.*
[26] The *Ross* doctrine was never seriously questioned until the 1963 district court opinion in Mertens v. Flying Tiger Line, Inc., 35 F.R.D. 196 (S.D.N.Y. 1963), was rendered.
[27] *See supra* note 6.
[28] 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).
[29] *Id.* at 856.
[30] *Id.* at 857.
[31] *Id.* at 856.
[32] 352 F.2d 494 (9th Cir. 1965).
[33] Two cases later arose out of the same crash. The district courts, in each case, relied on the rational set forth in *Warren*. Glassman v. Flying Tiger Line, Inc., 9 Av. Cas. 18,296 (1966); Demanes v. Flying Tiger Lines, Inc., 10 Av. Cas. 17,611 (1967).
[34] 352 F.2d at 498.

portant in that its dicta set forth a theory of Article 3 that was to become the accepted American view toward the Convention. Also, since *Warren* raised unanswered questions which may greatly affect the Agreement's future, it, therefore, justifies an in depth analysis.

In setting forth its theory of Article 3, *Warren* strongly emphasized that the purpose of Article 3 was to warn the passenger of low limits of liability and take precautions of this danger. The court, in demonstrating this theory, held that the passenger must be given adequate ticket delivery well in advance of his embarkment upon the plane.[35] It clearly implied that the limited liability provision of the Convention would not apply unless there is a reasonable length of time between the period the passenger is given the ticket and the time he boards the plane, thus affording opportunity to obtain additional protection such as the purchase of insurance.[36] The court also set forth the rule that the right of the passenger to protect himself from the limited liability of the Convention must be given by the carrier at the time of initial departure of the trip.[37] Albeit the aircraft had made an intermediate stop in Honolulu, giving the passengers an opportunity to obtain flight insurance, the court stated that once the airline has accepted the passenger without an adequate delivery having been made, the carrier loses its right to limited liability under the Convention.[38] Therefore, there must be a reasonable opportunity to obtain additional protection at the time the passenger is *first accepted* on board the aircraft. A subsequent opportunity of the passenger to discover the low limits is not sufficient and, therefore, not a valid defense to the carrier.

Foreshadowing a new approach to the Convention, *Warren* spoke of the passenger's right to an adequate ticket delivery as concurrent with the carrier's right to avail itself of limited liability. In putting the carrier and the passenger on a quid pro quo basis with regard to the question of limited liability, the court stated: "The passengers were deprived of a right which was intended to be afforded them as a *concomitant* to the carrier's right to limit its liability" [Emphasis added.].[39] This language illustrates the departure from the language used in *Ross* which had held that the Convention applied by full automatic impact and the only requirement on the carrier was to merely issue a ticket.

The court, however, did not imply that the passenger's right to have an adequate delivery is without limitation. Dicta states that the passenger may be responsible for the loss of this right if he arrives too late to read his ticket or accepts stand-by status which would require him to board the plane on short notice.[40] The court did not state what the penalty for this loss of the passenger's right would be, but it may be assumed that the passenger would lose the right to adequate delivery and the limitations of the Convention would apply. Thus, there is a suggestion that there may be

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

a valid defense for the carrier even if it has not met the court's new requirement of Article 3(2). There are as of yet no cases on this possible defense.

The major significance of the *Warren* dicta is that it endorses the theory that the passenger has a right to adequate ticket delivery so that he can have *notice* of the Convention's application. The court noted that Article 3(2) does not stand alone but is to be read with all of Article 3, particularly Article 3(1)(e), which requires that a provision appear on the ticket stating that limited liability provisions of the Convention apply to the passenger.[41] The court recognized that the purpose of this statement was to "notify passengers of the applicability of the Convention."[42] Perhaps the strongest dictum on the right to notice is manifested in the following statement by the court: ". . . . they were entitled to *adequate notice* which would have enabled them to purchase additional insurance covering the entire flight" [Emphasis added.].[43] Thus, the rationale is that there must be adequate notice to the passenger. For there to be adequate notice, there must be an adequate ticket delivery.

The court took note of the fact that the ticket fell short of the requirements of Article 3(1),[44] in that the ticket issued by the carrier did not contain the names of the passengers, nor the agreed stopping places enroute to the destination. Furthermore, the court noted that one could not read the fine print on the tickets which warned of the limitation of liability without a magnifying glass.[45] It was unnecessary to consider the consequences of these defects since the court first reasoned there was no notice in light of no delivery as required by Article 3(2), and hence, no limited liability.[46]

The court in *Warren* implied that the main purpose of Article 3 was to give notice. This theory was logically extended in *Lisi v. Alitalia Lines Aeres Italians, S.P.A.*[47] where the court held that the carrier would be deprived of his right to limit liability if it either delivered a ticket to the passenger which contained no warning of the liability limitations of the Convention, or if it used print too small to read and thus ineffective to give the passenger adequate notice.[48] In the *Lisi* case there was delivery, but no

[41] Article 3 of the Convention requires that the ticket contain a notice stating that limited liability of the Convention may be applicable. However, a literal reading of article 3(2) states that if the requirement of article 3(1)(e) is not met, the carrier may still limit his liability. The *Warren* court apparently looked with disfavor upon this provision, but it was unnecessary to determine its effect as the case was decided on ticket delivery alone.

[42] 352 F.2d at 498.

[43] *Id.*

[44] *Supra* note 41.

[45] *Id.*

[46] *Supra* note 41.

[47] 370 F.2d 508 (2d Cir. 1966).

[48] *Id.* at 511. In an earlier decision, the Federal District Court for the Southern District of New York had considered whether omission of the requirements of the Warsaw Convention, art. 3(1), on the ticket subjected the carrier to unlimited absolute liability under article 3(2). The court held that article 3(2) only required delivery of the ticket. Grey v. American Airlines, 95 F. Supp. 756 (S.D.N.Y. 1950). On appeal, only the issue of willful misconduct was considered. 227 F.2d 282 (2d Cir.), *cert. denied*, 350 U.S. 989 (1955). Thus, *Lisi* appears to be the first time the Court of Appeals for the Second Circuit considered the effect of a ticket that failed to set forth particulars required by article 3(1).

adequate notice. *Lisi*, just as *Warren*, required adequate notice; however, the court in *Lisi* found inadequate notice because of the small print of the ticket whereas the court in *Warren* found no notice because of an inadequate ticket delivery. Considering the two cases together, two requirements under Article 3 are mandatory to satisfy adequate notice: (1) adequate ticket delivery as set forth in *Mertens* and *Warren* and (2) proper print setting forth the terms and conditions of the Convention as required in *Lisi*.

Logically, this judicially imposed interpretation of Article 3 is very desirable from the standpoint of the passenger bringing suit in an American jurisdiction. However, the *Lisi* doctrine has been severely criticized.[49] As a literal interpretation, it is in direct conflict with the language of the Convention itself,[50] yet it is a logical extension of the *Warren-Mertens* doctrine. These two cases merely find additional implied terms in the treaty which do not conflict with its language, while *Lisi*, though in logical accord with this reasoning, contradicts the terms of the treaty.[51] When looking at the judicial evolution of the interpretation and the purpose of Article 3, the chain of events from *Ross* to *Lisi* clearly shows that the break with the *Ross* doctrine came in the *Mertens* and *Warren* decisions. It was the dictum in *Warren* that clearly showed *Lisi* was soon to come. Mr. George Whitehead correctly stated the new attitude of the court when he said:

> The growth of new legal devices, expansion of existing legal rules and introduction of novel theories of recovery required, and found, a favorably disposed judiciary much concerned, as the 21st century approaches, with individual rights.[52]

Although there has been indignation and anxiety toward the courts' evolution in their treatment of Article 3,[53] there is some merit to their judicial activism toward a flexible interpretation of the treaty. This "court-made loophole" in Article 3 affords better protection to the individual passenger; he is given notice enabling him to obtain additional protection to offset the limited recovery for damages permitted by the Convention. He is given ample opportunity to discover the Convention's limitations. If the carrier fails to provide notice through an adequate delivery or effective warning on the ticket, the passenger may avail himself to the unlimited liability of the carrier. This fact may be justified if it is viewed with the policy consideraton that the carrier in an aircraft disaster is more able to bear the burden of compensation than the passenger. When the Convention was first formulated in 1929, $8,300 was an adequate sum; but now the airline industry is thriving economically and the standard of

[49] *See* Whitehead, *Still Another View of the Warsaw Convention*, 33 J. AIR L. & COM. 65 (1967); Caplan, *Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention*, 33 J. AIR L. & COM. 663 (1967).

[50] Note, 33 J. AIR L. & COM. 698 (1967).

[51] *Supra* note 50.

[52] Whitehead, *supra* note 49, at 651.

[53] *Supra* notes 49 & 50.

living has greatly increased.[54] It is hardly realistic to expect passengers to be subjected to such a low limit of liability.

Also, it must be realized that when *Mertens* and *Warren* were decided, there was great hostility to the Convention's low limits of liability in this country. Undeniably, the scales of public policy had become "overbalanced" and weighted in favor of the carrier, who was, paradoxically, far more able to bear the burden of an aircraft disaster. Just after *Lisi* was decided, the United States threatened to withdraw from the Convention.[55] Since the courts were not acting within a vacuum, they were sensitive to the American attitude of hostility toward the Convention and were influenced by it. Their decisions enabled the court to slightly ease damaging tensions that opponents to the Convention had created.[56]

Following these interpretations of Article 3, the United States entered into the Montreal Agreement in which the carrier by "special agreement" was subjected to $75,000 limited liability and was precluded from raising the defense of negligence.[57] This significant increase in the amount of liability caused some resentment in this country over the Convention's low limits to subside. Whether the courts, because of the higher limits of liability, will retreat from the approaches taken in *Lisi, Warren,* and *Mertens* has yet to be decided. There are as of yet no cases to demonstrate how the Montreal Agreement will affect this new interpretation of Article 3.[58]

Though it is mere speculation whether the higher limits of liability under the "interim agreement" will temper the courts' dissatisfaction with the limited liability provisions of the Convention, the question is of great importance because it is intertwined with the future of the Convention itself.[59] If the courts wish to depart from the literal terms of the Convention, they now have a foundation of case law to more fully harmonize the agreements' effects with today's high standard of living in the United States. The extent to which this departure may be accomplished without jeopardizing the desirability of a uniform international aviation agreement is a delicate task resting with the United States judcial system. At the very heart of the matter lies the task of balancing the scales of public policy equally between two conflicting interests—the passenger's right to adequate compensation and protection from aircraft disasters and the

[54] One of the purposes of the $8,300 limitation of liability in 1929 was to protect the then infant aviation industry. *Supra* note 3. However, a key point raised by proponents of the Convention is that while the United States aviation industry is thriving economically, that of many underdeveloped countries is still in its infancy and accordingly, needs protection. The purpose of this examination, however, is to limit consideration of the Convention to its effects upon the American passenger. Thus, international effects of limited liability are not analyzed.

[55] *Supra* note 13.

[56] One must take this statement with the caveat not to over emphasize roles of the courts in easing tension toward the Convention. *Lisi* raised an outcry of criticism from the airline industry, yet, it became a catalyst in that it provided an outlet for Convention opponents' feelings of rage, and, paradoxically, at the same time, it clearly demonstrated that some step had to be taken to provide a more reasonable solution. Viewed in this context, *Lisi* was a strong stimulant for the action taken at Montreal.

[57] *Supra* note 14.

[58] As of this writing, there are yet no cases interpreting the Montreal Agreement.

[59] *Supra* note 18.

policy of the carrier's interest in uniform international aviation laws.[60] Too much weight on either side could easily upset the delicate balance achieved by the United States at Montreal. With the courts lie the difficult option of further extending the logic which spawned *Lisi* or retreating in the direction of *Mertens* or *Warren*, or even total retreat toward the once solid *Ross* doctrine.

The most workable solution seems to have been established by the terms of the Montreal Agreement which requires that notice of the absolute limited liability be: (1) set forth in at least 10 point type in ink contrasting to the stock of the ticket, (2) set forth on a piece of paper placed either in the ticket envelope with the ticket or attached to the ticket, and (3) appear on the ticket envelope.[61] The Agreement effectively endorses the theory set forth by *Lisi*, since reasonably calculated notice is required to attract the passenger's attention.

The argument of *Lisi*'s critics no longer has validity in that it no longer contradicts the language of the treaty[62] as modified by the Montreal Agreement. Far more important, *Lisi*, if read in connection with the Agreement, provides a workable solution since liability is not unreasonably limited and the passenger is armed with adequate protection of notice. This is not an unduly harsh result to the passenger; reasonably limited liability, coupled with adequate notice, provide him with needed protection. The agreement and the decision harmonize each other in giving adequate protection to both passenger and carrier.

Although a workable solution of the Convention seems to have been approached, it is yet unclear how the courts will react to the Montreal Agreement. As yet there are no federal cases and only one state court decision to provide any insight as to the future of limited liability of the Convention.

In this state court decision, *Burdell v. Canadian Pacific Airlines, Ltd.*,[63] an Illinois circuit court, without precedent, declared the limited liability[64] and venue provisions[65] of the Warsaw Convention unconstitutional.[66] In this case, an aircraft crashed while in flight from Hong Kong to Tokyo and liability was determined by Article 22(1) of the Warsaw Convention

[60] There also exists the policy interest of the United States in stable international relations. This interest is integrated with the airlines interest of lower limits of liability, however, international policy is not examined in this analysis. *See supra* note 54.

[61] Civil Aeronautics Board, Order No. E-23,680, 13 May 1966.

[62] A major criticism of *Lisi* is that it conflicts with the language and intent of the Convention. *See supra* note 50.

[63] 10 Av. Cas. 18,151 (1968).

[64] *Supra* note 3.

[65] Warsaw Convention, art. 28, 49 Stat. 3020, T.S. No. 876 provides four places where an action may be brought at the plaintiff's option: In the territory of one of the High Contracting Parties; either in the carrier's domicile, his principal place of business, his principal place of business through which the contract has been made, or at the place of the passenger's destination.

[66] Indemnity Insurance Co. of North America v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1945), held that the Warsaw Convention was Constitutional under the treaty making power of Congress and was not an encroachment upon the power of Congress to regulate commerce. Also, it has been held that the Convention is self-executing, that is, it does not require legislation to implement its terms. *See also*, Garcia v. Pan American Airways, 269 App. Div. 287, 55 N.Y.S.3d 317 (2d Dept. 1945), *aff'd w.o. op.*, 295 N.Y. 852, 67 N.E.2d 257 (1946), *cert. denied*, 329 U.S. 741 (1946), where the court held that the Convention was the law of the land because of its status as a treaty.

rather than the Montreal Agreement.[67] Suit was brought in the Illinois state court[68] which held that Singapore was not a signatory to the Convention; therefore, the Convention did not apply.[69] The court further stated that even if the Convention did apply, the carrier had not met the requirement of notice as set forth by *Lisi*,[70] and assuming if it had, the limited liability and the venue requirement[71] of the Convention were unconstitutional as they violated the 5th Amendment of the Constitution by taking property without just compensation.

Though the validity of the holding of *Burdell* is to be seriously questioned,[72] this decision appears to be the latest case interpreting limited liability of the Convention since Montreal was ratified.[73] The possible future effects of *Burdell* cannot yet be predicted;[74] however, the decision must be examined in the context of this court's hostility toward limited liability,[75] as it has its foundation in animosity promulgated by *Mertens*, *Warren* and *Lisi*, even though it has further expanded the scope of hostility.

The fact that the court, having two other reasons, both valid, upon which to decide the case, struck down part of the Convention as being unconstitutional, is evidence of a hostility stronger than that existing before Montreal. That the case was decided two years after Montreal suggests the possibility that once prevailing judicial attitudes toward limited liability have not diminished since Montreal.

If this court's hostility is valid evidence of the attitude still existing in the American courts, there is alarm for the Convention's proponents as *Burdell* uttered the strongest criticism ever levelled at the Convention by an American court when it blatantly stated:

> The court finds that such provisions are *arbitrary, capricious* and *indefensible* as applied to this case. . . . Such preferential treatment to airlines is *unconstitutional* [Emphasis added.].[76]

While one may speculate that this language would not have been applied

---

[67] Since Montreal was inapplicable, the amount of liability in issue was $8,300 rather than the $75,000 limit of Montreal.

[68] If the venue provisions of the Convention had applied, *supra* note 65, the plaintiff would not have been able to bring his suit anywhere in the United States.

[69] 10 Av. Cas. at 18,154. Under the Warsaw Convention art. 1, 49 Stat. 3015, T.S. No. 876, the Convention would not apply by the contract of carriage, the flight began in the territory of a High Contracting Party and ended in the territory of a non-contracting party.

[70] 10 Av. Cas. at 18,152.

[71] The court was hostile toward the venue provisions as it would prevent the passenger from bringing suit in the Illinois court. *Id.* at 18,160.

[72] One must be aware of the validity of *Burdell* as it cannot be seriously considered as authority of the unconstitutionality of the Convention. Of extreme doubt is its restriction on the treaty making power of the federal government since there were other grounds to hold limited liability inapplicable. Therefore, it is unlikely that higher courts on appeal will reach the grounds of unconstitutionality, as a rule of constitutional construction is that a court will not reach a constitutional question unless absolutely necessary. Light v. United States, 220 U.S. 523, 538 (1911); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Nevertheless the case should be considered in an evidentiary context to demonstrate judicial hostility toward the Convention.

[73] There have been no cases interpreting Montreal at this time.

[74] *Supra* note 71. If the Convention were to be held unconstitutional, the Montreal Agreement would also be unconstitutional as it has its foundation in the Convention, *supra* note 14.

[75] *Supra* note 71.

[76] 10 Av. Cas. at 18,161.

by the court in consideration of Montreal's limits or that it is an isolated judicial outburst, there is alarm for the airline industry in that *Burdell* may be indicative of future judicial hostility to the Convention. Beneficiaries of the Convention's provisions cannot lightly dismiss the possible consequences, if *Burdell* has opened the door to similar attacks on the Convention. Thus the main concern of *Burdell* is to be summed up with the question: Is the case to be representative of judicial opinion toward the Convention in the future?

Burdell illustrates one of the many options open to the courts in future applications of limited liability in international aviation transportation. Another important question, raised by *Mertens, Warren* and *Lisi*, but never settled, is that of whether the passenger must have actual *subjective* notice of limited liability, or whether notice must be reasonably calculated under the circumstances to attract the passenger's attention. The solution will depend on the attitude that the courts display toward the supplemental Montreal Agreement.

If actual *subjective* notice is required, the courts have at their disposal, an effective weapon to restrict the carrier's defense of limited liability. The carrier would be forced to prove that each passenger had actual knowledge of the Convention's application, regardless of whether the passenger should have known of the limited liability.[77] This possibility, now open to the courts, would be a successful strategy to Convention opponents if they succeeded in promulgating the hostility to the Convention which once existed in the courts before the higher limits of Montreal went into effect.

The other option available to the courts is one which, on its face, seems to more fully harmonize and integrate *Mertens, Warren* and *Lisi* with Montreal's requirement of notice. The approach, that of notice which, under the circumstances, is reasonably calculated to attract the passenger's attention, seems to follow the theory set forth in the CAB agreement authorized by Montreal.[78] Thus, if the CAB's requirement of "ten point type print"[79] is found to be reasonable, there is a good cause to believe that it gives the passenger an opportunity so that he knows or *should have known* of the Convention's application. This theory of notice is more effective to harmonize the quid pro quo of the "Interim Agreement" between passenger and carrier, if the court and critics accept that quid pro quo as reasonable. Dependent upon the future requirement of notice lies the yet unknown attitudes of the courts.

Another unsolved question, raised and unanswered by *Warren*, is whether the passenger's right to adequate delivery, and accordingly, rea-

[77] The burden of proof is on the passenger to prove that the carrier did not meet the requirement of Warsaw Convention, art. 3, Berguido v. Eastern Airlines, Inc., 369 F.2d 874 (3d Cir. 1966). If the passenger is required to have actual subjective notice of the Convention's application, it is probable that the burden of proof would still be upon him to prove that he received deficient notice. However, if the court shifted the burden of proof to the carrier, the loophole under article 3 would be further widened.

[78] The requirement of burden of proof is also relevant here as the one who bears it has a substantial advantage in the amount of evidence required to be presented.

[79] Civil Aeronautics Board, Order No. E-23,680, 13 May 1966.

sonable notice, is an absolute right that the carrier must always protect. This problem would arise if the passenger arrived too late to get an adequate ticket delivery before disembarking, or would be required to board on short standby notice.[80] If the passenger's right to adequate delivery and reasonable notice is absolute and unqualified, another weapon is stored in the arsenal for opponents of the Convention.

However, the *Warren* court implied the contrary, as it talked in terms of concomitant rights of passenger and carrier.[81] Logically, this theory would demand that a carrier conveying required notice by a delivery most reasonable under the circumstances would not lose its right to limited liability. If passenger and carrier are truly on a quid pro quo basis, the passenger's right to reasonable notice would be qualified in the above manner. If this question arises in the future, the interpretation will depend upon whether the courts wish to broaden the scope of Article 3 to escape limited liability.

As has been illustrated, the courts, in the surrounding context of unanswered issues concerning the Convention, may greatly modify the effects of the Convention which Montreal sought to implement, if they so desire. The key to this answer is whether the agreement has brought about a reasonable settlement in the conflicting interests of passenger and carrier.[82]

It must be remembered that the Montreal Agreement is only an interim agreement which is to remain in effect until a more permanent solution is achieved.[83] Yet, the Agreement seems to be the most practical solution to limited liability, and for this reason, it will probably remain in effect for an indefinite time.[84] Undeniably, if the Agreement becomes permanent, it will one day unreasonably limit liability as did Warsaw, if the American standard of living continues to rise as it has in past years. Yet, as to the immediate future of the Convention, supplemented by Montreal, its longevity will depend on its success in practical application, if the courts accept this premise and refuse to shorten its life span by adverse judicial decisions.

James C. Floyd

[80] 352 F.2d at 498.
[81] *Id.*
[82] *See supra* note 60.
[83] *See supra* note 14.
[84] *See* Whitehead, *supra* at note 49.

Tariff Limitations — Delay in Delivery — Consequential Damages

Pursuant to an engagement to deliver a series of five lectures, the first two before a statewide convocation of doctors and nurses in Wichita, Kansas, plaintiff, a physician, purchased a ticket aboard a Trans World Airlines flight from Philadelphia, Pennsylvania, to Wichita, Kansas. Prior to boarding the plane, plaintiff consulted TWA's ticket agent and told him that he was to give a medical presentation that evening and the next morning and asked what steps he might take to insure that his suitcase, which contained materials essential to his lectures, would arrive on time and that its contents would be protected from damage. The plaintiff relied upon assurances from the ticket agent that the agent would personally see to it that the plaintiff's suitcase would be protected from damage, and that it could be claimed by the plaintiff upon his arrival at the Wichita airport. The actual value of the contents of the suitcase was less than $250 (the amount of the tariff limitation), and the plaintiff did not declare any value or pay any additional transportation charge. Upon the plaintiff's arrival at the Wichita airport the suitcase was not there and was not delivered to him until he was about to return to Philadelphia the next day. The plaintiff's entire series of lectures had been cancelled because of his inability to give the first two without the scientific materials in his suitcase. The plaintiff brought an action for damages based upon the defendant's delay in delivery of the suitcase and for a small amount of physical damage to the contents of the suitcase. The defendant did not dispute its liability for the physical damage to the contents of the suitcase but denied all liability for the plaintiff's claim for consequential damages resulting from the cancellation of his lecture engagement, these damages consisting of financial loss, damage to the plaintiff's reputation as a responsible medical lecturer and impairment of his opportunity to obtain lecture engagements in the future. The defense was based upon the tariff which was in effect at the time the suitcase was delivered to the defendant which reads in part:

> [T]he liability, if any of all participating carriers for . . . damage to, or delay in the delivery of any personal property, including baggage . . . shall be limited to an amount equal to the value of such property, which shall not exceed . . . $250 . . . unless the passenger, at the time of presenting such property for transportation, when checking in for flight, has declared a higher value and paid an additional transportation charge, at the rate of 10 cents for each $100.00 or fraction thereof, by which such higher declared value exceeds the applicable amount set forth above, in which event carrier's liability shall not exceed such higher declared value.[1]

[1] Rule 71(A), Local and Joint Passenger Rules Tariff No. PR-4.

The plaintiff conceded that the terms of the tariff were applicable. The defendant moved for a partial summary judgment on the issue of liability for the consequential damages resulting from delay in the delivery of the plaintiff's suitcase. *Held*, Judgment for the plaintiff in the amount of damage to the plaintiff's personal property; judgment for the defendant on liability for the plaintiff's claim for consequential damages: ". . . although the tariff is concerned primarily with loss or damage to property, it appears that the limiting provision is 'the liability for the loss of or damage to, *or delay* in the delivery of any personal property shall not exceed $250.00 if no higher value has been declared by the passenger at the time of checking his baggage' [Emphasis by the court.]. This indicates clearly that the framers of the tariff had in mind more than merely loss of or physical damage to passengers' baggage and it follows that the limitation provision covers consequential damages." *Bendersky v. Trans World Airlines, Inc.*, 10 Av. Cas. 18,123 (E.D. Pa. 1968).

The common law rule is that a common carrier is an insurer of goods transported.[2] The Federal Aviation Act in no way affects, limits or alters this common law rule,[3] and therefore, absent an applicable tariff, a common carrier is strictly liable for the goods it transports. There are five general exceptions to the strict liability rule:

(1) Where the damage is proximately caused by an act of God;

(2) Where the damage is proximately caused by an act of a public enemy;

(3) Where the damage is proximately caused by an act of state;

(4) Where the damage is proximately caused by an act of the shipper;

(5) Where the damage is proximately caused by the inherent nature of the goods.[4]

The harshness of the common law rule of strict liability has given way to tariff rules. With respect to a common carrier limiting or excluding its liability for goods or passengers by tariff, private contract or otherwise, the general rule in the United States is that such limitation or exclusion must be just and reasonable.[5] Two oft-cited reasons for the rule are that such contracts withdraw an important motive for due care and correspondingly make common carriage unreliable, and secondly, that the law should prevent a carrier from taking advantage of its superior bargaining position.[6] Both of the reasons for the rule have been subjected to widespread criticism. The possibility of the carrier exercising less care has been said to be unconvincing because other factors pressure a carrier to exercise a

[2] *See*, New York Cent. R.R. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873).

[3] Federal Aviation Act of 1958, § 1105, 72 Stat. 798, *as amended*, 76 Stat. 921, 49 U.S.C. 1505 (1964).

[4] For an excellent article on tariff limitations in air carriage, *see*, Pratt, *Tariff Limitations In Air Carriage Contracts*, 29 J. AIR L. & COM. 14 (1963).

[5] 84 U.S. (17 Wall.) 357 (1873). *Cf.*, *earlier cases of* N.J. Steam Navigation Co. v. Merchants Bank, 47 U.S. (6 How.) 344 (1848) (Agreement that goods were at all times exclusively at the risk of the shipper held not to affect carrier's liabilty for the gross negligence of his servants and agents); York Mfg. Co. v. Ill. Cent. R.R., 70 U.S. (3 Wall.) 107 (1866) (Carrier may restrict or diminish its common law liability by contract so long as it does not attempt to cover losses by negligence or misconduct).

[6] *See*, Bank of Ky. v. Adams Express Co., 93 U.S. 236, 239 (1952).

high degree of care, *e.g.*, the carriers' employees' concern for their own personal safety, the carriers' desire to maintain public confidence, and carriers' preoccupation with maintaining reliable service in a highly competitive market.[7] Further, the adhesion contract argument has been said to be even less convincing today since the government, through tariffs, strictly regulate rates and other aspects of the carrier-passenger relationship.[8] Also, the government by adherring to the Warsaw Convention has indicated that it accepts as not unreasonable some conditions which limit liability for negligence. Nevertheless, the court-made common law rule is still very much the law. In 1952, the Supreme Court in *United States v. Atlantic Mutual Insurance Company*[9] said that over a century's use had given the rule "the force and precision of a legislative enactment."[10]

There is one significant amendment to the general rule that has been fashioned by the courts. Although a carrier may in no way contract away its liability for its negligence, it may limit its liability for negligence[11] subject to the qualifications that the shipper or passenger must be given a freedom of choice as to whether he will enter into such an agreement and the shipper or passenger must be given some consideration such as a lower rate for so doing.[12] Once these qualifications are met, the shipper or passenger is estopped from alleging a greater value even if the actual value and the contracted value of the goods are grossly disproportionate.[13]

Although it has been argued that the common law rule should not be applied automatically to air carriage as common carriers,[14] these pleas have by and large fallen on deaf ears with respect to relevant case law,[15] thereby delegating the responsibility of ameliorating the stringency of the common law rule to applicable tariffs.

The Civil Aeronautics Act of 1938[16] established the tariff system for the air industry for the purpose of preventing discrimination, insuring uniformity and generally placing the passengers, shippers and carriers on

[7] Pratt, *Tariff Limitations On Air Carriage Contracts*, 29 J. AIR L. & COM. 14, 15 (1963).

[8] *Id.*

[9] 343 U.S. 236 (1952).

[10] United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 239 (1952).

[11] Hart v. Pennsylvania R.R., 112 U.S. 331 (1884), in which it was said at 440: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater."

[12] *See* Union Pac. R.R. v. Burke, 255 U.S. 317, 321-22 (1921). "[V]aluation agreements have been sustained only on principles of estoppel, and in carefully restricted cases where choice of rates were given . . . . This valuation rule . . . is . . . an exception to the common law rule of liability of common carriers and the latter rule remains in full effect as to all cases not falling within the scope of such exception." *See generally* S. WILLISTON, CONTRACTS § 1110 (rev. ed. 1936).

[13] *See* George N. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915). (Plaintiff recovered $50 for lost automobiles, the actual value of which was $20,000).

[14] *See* Allen, *Limitations of Liability to Passengers by Air Carriers*, 2 J. AIR L. & COM. 325 (1931), disagreeing with Greer, *Civil Liability of an Aviator as Carrier of Goods and Passengers*, 1 J. AIR L. & COM. 241 (1930); Edmunds, *Aircraft Passenger Ticket Contracts*, 1 J. AIR L. & COM. 321 (1930).

[15] *See, e.g.*, Siwalk v. Pennsylvania-Central Airline Corp., 1 Av. Cas. 900 (Cir. Ct. Mich. 1940); Randolph v. American Airlines Inc., 144 N.E.2d 878 (Ohio Ct. App. 1956). For discussions of the common law rule and personal injuries, *see* Bernard v. U.S. Aircoach, 117 F. Supp. 134 (S.D. Cal. 1953); Crowell v. Eastern Air Lines, Inc., 240 N.C. 20, 81 S.E.2d 178 (1954).

[16] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

equal footing. The Act also established the Civil Aeronautics Board (CAB)[17] as an independent agency to regulate air commerce.

The principal requirement of the Act is the filing with the CAB, posting and publishing of tariffs.[18] Strict observance of its tariffs is required of the carrier,[19] and deviation therefrom is a criminal offense.[20] The carrier has the duty of establishing just and reasonable tariffs[21] and the Act prohibits discrimination in their application.[22] The Act places with the Board limited judicial powers. If in the opinion of the Board the traiff departs from the requirements of the Act, it can suspend a new tariff provision from going into effect.[23] Once a tariff provision has gone into effect, the Board can, upon complaint or upon its own initiative, determine whether it is or will be unjust, unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial and it can prescribe a lawful provision to take its

[17] A complete statement of CAB's organizations and functions may be found in Public Notice No. 10 of the CAB issued 1 Jan. 1956. Printed in full in S. SPEISER, PREPARATION MANUAL FOR AVIATION NEGLIGENCE CASES (Ch. 4) (New York, 1958).

[18] Federal Aviation Act of 1958, § 403(a), 72 Stat. 758, *as amended*, 74 Stat. 445, 49 U.S.C. § 1373(a) (1964). "Every carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void . . . ."

[19] Federal Aviation Act of 1958, § 403(b), 72 Stat. 758, *as amended*, 49 U.S.C. § 1373(b) (1964). "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or lessor different compensation for air transportation or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein . . . ."

[20] Federal Aviation Act of 1958, § 902(a), (d), 72 Stat. 784, *as amended*, 75 Stat. 466, 76 Stat. 921, 49 U.S.C. § 1472(a), (d) (1964).

[21] Federal Aviation Act of 1958, § 404(a), 72 Stat. 760, 49 U.S.C. § 1375(a) (1964): "It shall be the duty of every carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

[22] Federal Aviation Act of 1958, § 404(b), 72 Stat. 760, 49 U.S.C. § 1374(b) (1964). "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[23] Federal Aviation Act of 1958, § 1002(g), 72 Stat. 788, 49 U.S.C. § 1482(g) (1964). "Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; . . . after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice had become effective . . . . Provided, that this subsection shall not apply to any initial tariff filed by any air carrier."

place if need be.[24] The Board has investigative power over suspected violations of the Act[25] and offenders can be compelled by the Board to comply with the Act.[26] The Act in no way abridges or alters common law and statutory remedies existing at the time the Act was passed but is in addition to those remedies.[27]

In short, under the Act a limitation of liability provision filed with the CAB to be valid must first be authorized by statute,[28] *i.e.*, it must be a rule regarding air transportation and the Board's regulations must require its filing. To be required by the Board's regulations, it must be a rule which affects rates, fares or charges or which governs terminal services or other services provided by the carrier.[29] Once a limitation provision meets this test of being statutorily authorized, it must then meet the second test of reasonableness.

Properly filed tariffs are binding on all parties irrespective of actual notice because such tariffs become part of the contract of carriage, and any inconsistent contracts or agreements are void.[30] The Supreme Court established these principles in construing the effect of valid tariffs and they have been followed without dissent.[31]

> [T]he rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in § 3 of the Interstate Commerce Act. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a

---

[24] Federal Aviation Act of 1958, § 1002(d), 72 Stat. 788, 49 U.S.C. § 1482(d) (1964). "Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, collected or received by any carrier for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare or charge (or the maximum or minimum, or the maximum and minimum thereof), thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective . . . ."

[25] Federal Aviation Act of 1958, § 1002(a), (b), 72 Stat. 788, 49 U.S.C. § 1482(a), (d) (1964).

[26] Federal Aviation Act of 1958, § 1002(c), 72 Stat. 788, 49 U.S.C. § 1482(c) (1964).

[27] Federal Aviation Act of 1958, § 1006, 72 Stat. 255, *as amended*, 74 Stat. 255, 75 Stat. 497, 49 U.S.C. § 1486 (1964). "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

[28] 14 C.F.R. §§ 221.33-221.41 (1967).

[29] 14 C.F.R. § 221 (1967): Rules & regulations: (a) Contents. Except as otherwise provided in this part, the rules and regulations of each tariff shall contain:

> (1) Such explanatory statements regarding the fares, rates, rules or other provisions contained in the tariffs as may be necessary to remove doubt as to their application,
>
> (2) All the terms, conditions or other provisions which affect the rates, fares or charges for air transportation named in the tariff,
>
> (3) All of the rates or charges for and the provisions governing terminal services and all other services which the carrier undertakes or holds out to perform on, for, or in connection with air transportation,
>
> (4) All other provisions and charges which in any way increase or decrease the amount to be paid on any shipment or by any passenger or by any charterer or which in any way increase or decrease the value of the services rendered to the shipment or passenger or charterer.

[30] For a detailed discussion of the evolution of these principles, see Markham & Blair, *The Effect of Tariff Provisions Filed under the Civil Aeronautics Act*, 15 J. AIR L. & COM. 251 (1948).

[31] Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921); Boston & M. R. Co. v. Hooker, 233 U.S. 97 (1914).

rate lawfully established must apply equally to all, whether there is knowledge or not.[32]

Any agreement inconsistent with the tariffs is void for these same reasons.[33] These rules apply equally to tariffs filed under the Civil Aeronautics Act.[34]

A primary question in tariff litigation is who has jurisdiction to determine the validity of a tariff on file with the CAB. To date, the majority of the courts in the United States give primary jurisdiction to the CAB to determine the validity of such tariffs under a concept known as the primary jurisdiction doctrine.[35] Further, once a tariff is shown to be statutorily authorized, the only grounds upon which its validity may be attacked are that it has been, is, or will be unreasonable, unjust, unjustly discriminatory, unduly preferential or unduly prejudicial.[36]

The primary jurisdiction doctrine was first enunciated by the Supreme Court in *Texas & P.R. Co. v. Abilene Cotton Oil Co.*[37] The case was based on the Interstate Commerce Act and a major factor in the decision was the fact that the Interstate Commerce Commission (ICC) had the power to award reparations to individuals for wrongs unlawfully suffered from the past application of an unreasonable rate. Since the Interstate Commerce Act by its terms in Article 22 was in addition to common law or statutory remedies, the continued existence of similar powers in the courts would be inconsistent with the terms of the Act.[38] Further, the courts' having such powers would render a uniform standard of rates impossible.[39]

The landmark case applying the primary jurisdiction doctrine to tariffs filed with the CAB is *Adler v. Chicago & Southern Air Lines.*[40] The main

[32] 256 U.S. at 573. *See also* American Ry. Express Co. v. Daniel, 269 U.S. 40 (1925) (Carrier knew that a servant of the plaintiff was unaware of a package's value and did not know that lower values secure lower rates. Nevertheless carrier's liability was limited); American Express Co. v. U.S. Horseshoe Co., 244 U.S. 58 (1917) (Contract may not be avoided, where it is valid from the point of view of the established rate sheets on file with the I.C.C. by the suggestion that by neglect or inattention, the contract was not read by the shipper).

[33] Chicago & Atl. R.R. Co. v. Kirby, 225 U.S. 155 (1912); Texas & Pac. R.R. Co. v. Mugg & Dryden, 202 U.S. 242 (1906). *Cf.* So. R.R. Co. v. Prescott, 240 U.S. 632 (1916). "It is . . . clear that with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations." *See also* Davis v. Cornwall, 264 U.S. 560 (1924).

[34] Jones v. Northwest Airlines, 22 Wash.2d 863, 157 P.2d 728 (1945); Mack v. Eastern Air Lines, 87 F. Supp. 113 (W.D. Mass. 1949). *Cf.* Wilhelmy v. Northwest Air Lines, Inc., 86 F. Supp. 565 (W.D. Wash. 1949). *Also* Lichten v. Eastern Air Lines, Inc., 189 F.2d 939 (2d Cir. 1951). ("To the extent that these rules are valid, they become a part of the contract under which the appellant and her baggage were carried:" Judges Chase and Frank, who dissented, did not disagree with this proposition); Furrow & Co. v. American Air Lines, Inc., 102 F. Supp. 808 (D. Okla. 1952); Wittenberg v. Eastern Air Lines, Inc., 126 F. Supp. 459 (D.S.C. 1954) (Promise by ticket agent to plaintiff that a connection would be made in time, held invalid and unenforceable since it was inconsistent with tariff rule providing that carrier is not liable for failure to operate a flight on schedule); United Air Lines, Inc. v. Krotke, 363 P.2d 94 (Nev. Sup. Ct. 1961) (Failure to introduce tariff regulations in evidence held fatal to passengers claim, since it precluded a determination by the court of the terms and conditions of the contract of carriage of which they formed a part); Slick Airways, Inc. v. U.S., 292 F.2d 515 (U.S. Ct. Cl. 1961) (Air carrier was entitled to an increased rate after it had filed a new tariff and although it continued to receive the old rate due to a clerical error in billing); Rosenchien v. Trans World Airlines, Inc., 349 S.W.2d 483 (Mo. Ct. App. 1961).

[35] Pratt, *Tariff Limitations On Air Carriage Contracts*, 29 J. AIR L. & COM. 14, 23 (1963).

[36] *Id.*

[37] 204 U.S. 426 (1907).

[38] *Cf.* Civil Aeronautics Act of 1938, ch. 601, § 1106, 52 Stat. 1027.

[39] 204 U.S. at 440.

[40] 41 F. Supp. 366 (E.D. Mo. 1941).

criticism of the application of the doctrine to aviation is that unlike the ICC, the CAB has no power to grant reparations for the past application of an unreasonable tariff; nor can the CAB pass on the retroactive validity of a tariff.[41] Thus, if an agency has no jurisdiction at all, it certainly cannot have primary jurisdiction.[42] Another theory is that, although the doctrine should apply to interstate aviation, it should be limited to rates and technical regulations with which the CAB has the competence to deal. Provisions relating to limitations on liability should be left to the courts whose judges have experience in dealing with such matters.[43]

In *Jones v. Northwest Airlines*[44] the dichotomy of the doctrine with respect to aviation was illustrated. The Court cited the *Adler* case with approval and stated that, to insure uniformity of practices, the reasonableness of tariffs must first be presented to the CAB and administrative remedies exhausted before access will be permitted to the courts. On the other hand, the Court said, where the carrier has violated its own tariffs on file with the CAB the doctrine does not apply and access may be had directly to the courts because the action is simply one sounding in contract and there is no technical fact to be determined.

Federal law, in the form of the Civil Aeronautics Act and CAB Regulations, applies to determine the validity of a tariff.[45] State law or common law applies to matters not within the scope of the Civil Aeronautics Act.[46]

The first case to consider the validity of a tariff provision similar to the one in the principal case was *Harris Trust and Savings Bank v. United Air Lines, Inc.*[47] In *Harris* no reasons were given for declaring a tariff limiting liability for baggage to an agreed valuation to be valid.

Perhaps the most important case construing a tariff's validity is the second circuit decision in *Lichten v. Eastern Air Lines, Inc*,[48] in which one of the appellant's bags was not delivered to her upon her arrival in Philadelphia but instead was mistakenly carried on to Newark. The bag was handed to an unknown person in Newark without the surrender of a baggage check. The bag was later returned to the carrier *sans* three articles of jewelry valued at over $3,000. In defense to a suit by the appellant, the carrier relied upon a tariff on file with the CAB which provided that jewelry "will be carried only at the risk of the passenger."

The sole question was one of the tariff's validity, because as the court noted, "to the extent that these rules are valid, they became a part of the contract under which the appellant and her baggage were carried."[49] Commenting that under the Civil Aeronautics Act and the primary jurisdiction doctrine, the provisions of a tariff properly filed with the CAB and

---

[41] Federal Aviation Act of 1958, § 1002(d), 72 Stat. 788, 49 U.S.C. § 1481(d) (1964).
[42] Pratt, *Tariff Limitations On Air Carriage Contracts*, 29 J. AIR L. & COM. 14, 25 (1963).
[43] *Id.*
[44] 22 Wash. 2d 863, 157 P.2d 728 (1945).
[45] Mack v. Eastern Air Lines, Inc., 87 F. Supp. 113 (W.D. Mass. 1949).
[46] Wittenberg v. Eastern Air Lines, Inc., 126 F. Supp. 459 (E.D.S.C. 1954).
[47] (1951) U.S. Av. Rep. 33 (Cal. Sup. Ct. 1951).
[48] 189 F.2d 939 (2d Cir. 1951).
[49] Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921); Mack v. Eastern Air Lines, Inc., 87 F. Supp. 113 (W.D. Mass. 1949).

within its authority are deemed valid until rejected by it, the court said that, if the Act was to be interpreted as investing the Board with power to approve and accept the tariff in issue, the reasonableness of the rule could be raised in court only after the exhaustion of administrative remedies.

The appellant argued that under common law a common carrier may not by contract relieve itself from liability for its own negligence and that the Act should not be construed to allow the CAB to modify the common law rule. The court reasoned, however, that in the interest of uniformity of rates and services, the broad regulatory scheme set up by the Act and not the common law should govern the contract between the parties. The court was influenced by the fact that the Interstate Commerce Act is similar to the Civil Aeronautics Act and contains an express provision prohibiting exemption from liability for any loss or damage to baggage caused by the carrier.[50] Therefore:

> [T]he absence of a similar provision in the Civil Aeronautics Act compels the conclusion that such an exemption is not forbidden to air carriers and that the Board could properly accept the appellee's tariff.[51]

This decision, however, would seem to ignore the principle often stated by the Supreme Court that:

> [N]o statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.[52]

Judge Frank, in a now famous dissenting opinion, took issue with the majority on the proposition that the absence in the Civil Aeronautics Act of a provision similar to the Carmack Amendment to the Interstate Commerce Act (expressly disallowing tariffs excluding liability for negligence) thereby indicated that the Civil Aeronautics Act authorized such tariffs. Where the Act is silent the common law applies and since the common law declares invalid any disclaimer of liability for negligence, the tariff in question was invalid and the Board had no authority to approve it. Citing *Adams Express Co. v. Croninger*,[53] Judge Frank argued that the purpose of the Carmack Amendment was to substitute the general Federal common law rule for a series of conflicting state statutes and decisions on the subject. Therefore, even before the Carmack Amendment, the ICC could not have legally authorized a tariff provision exempting a carrier from liability for its own negligence. Thus, the Civil Aeronautics Act must be read as would the Interstate Commerce Act before the enactment of the Carmack Amendment since:

---

[50] The Carmack Amendment, 1906. 34 Stat. 593.

[51] 189 F.2d 939, 942 (D.C. Cir. 1951).

[52] Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 565 (1879). *Cf.* Texas & Pac. R.R. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) (" . . . a statute will not be construed as taking away a common law right existing at the date of its enactment unless that result is imperatively required, that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provision nugatory."). *See also* Krawill Mach. Corp. v. Herd, 359 U.S. 297 (1959).

[53] 226 U.S. 491 (1913).

> it is inconceivable that Congress intended, merely by remaining silent, to authorize the Board to adopt a policy flatly at odds with the hitherto uniform federal policy . . . .[54]

Since the tariff was not statutorily authorized and therefore the CAB exceeded its statutory power by accepting it, the primary jurisdiction doctrine did not apply and the plaintiff could proceed directly in court.[55]

Judge Frank then went one step further and suggested that even if only the reasonableness of the tariff were at issue, the primary jurisdiction doctrine might not be applicable. The CAB has no power to grant reparations and thus the Board could only order the defendant to discontinue the use of the tariff provision. This conclusion seemed to him to be particularly justified where, as in *Lichten*, no administrative skill or wisdom is needed to ascertain the reasonableness of the exculpatory provision. Also an application of the primary jurisdiction doctrine would result in the "exhaustion of litigants," a "delaying formalism" and "idle form" which is contrary to the ancient Anglo-American principle that every citizen ought to obtain "justice promptly and without delay."

Despite the persuasiveness of Judge Frank's opinion, the vast majority of subsequent cases have followed the decision of majority of the court in *Lichten*.[56] Nevertheless, a number of cases differ as to the majority ruling in the *Lichten* case thereby casting doubt upon it.[57]

Finally, in 1964 the Supreme Court of Alaska in *Odom v. Pacific Northern Airlines, Inc.*[58] broke entirely with the *Lichten* decision. The Alaska court described *Lichten* as "a case become famous in legal annals for a new concept of the law and for the devasting logic of its lone dissenter, Judge Jerome Frank,"[59] and further stated:

> [W]hile the rule thus established in *Lichten* has been followed in several other jurisdictions since, it has never been passed upon by the Supreme Court of the United States. We do not propose to adopt it as the law for Alaska, the reason being that we are more firmly persuaded by Judge Frank . . . .[60]

In *Odom* the plaintiff, executor of the estate of a passenger killed in the crash of defendant's plane, brought an action to recover the value of the jewelry and other personal property worn or carried aboard the plane by the decedent and destroyed in the crash. The pertinent tariff provisions

---

[54] 189 F.2d 939, 944 (2d Cir. 1951).

[55] *See*, Boston & M. R.R. v. Piper, 246 U.S. 439 (1918). Judge Frank did concede, however, that the defendant "with the Board's acquiescence, might have provided in its tariff (a) perhaps that it would not carry jewelry at all or (b) possibly, that its liability for any and all items contained in passengers' baggage would be limited to a certain, reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation." 189 F.2d 939, 945 (2d Cir. 1951).

[56] Pratt, *Tariff Limitations On Air Carriage Contracts*, 29 J. AIR L. & COM. 14, 46 (1963). *See, e.g.*, Vogelsang v. Delta Air Lines, Inc., 193 F. Supp. 613 (S.D.N.Y. 1961); S. Toepfer, Inc. v. Braniff Airways, Inc., 135 F. Supp. 671 (W.D. Okla. 1955); Wilkes v. Braniff Airways, Inc., 288 P.2d 377 (Okla. Sup. Ct. 1955); Wadek v. American Airlines, Inc., 269 S.W.2d 855 (Tex. Civ. App. 1954).

[57] *See, e.g.*, Randolph v. American Airlines, Inc., 144 N.E.2d 878 (Ohio Ct. App. 1956); Rosenchien v. Trans World Airlines, Inc., 349 S.W.2d 483 (Mo. App. 1961).

[58] 393 P.2d 112 (Alaska Sup. Ct. 1964).

[59] *Id.* at 116.

[60] *Id.* at 117.

provided that the carrier's liability for baggage was limited to $100 unless a higher value was declared and additional charges paid and further that unchecked baggage or other personal property was to be carried at the risk of the passenger.[61] The defendant argued that its tariff rules absolved it from any liability for its negligence or, in the alternative, limited its liability, if any, to the amount of $100, which it had tendered to the court. Additionally, it argued that the reasonableness and validity of its tariffs could not be attacked in the courts in the first instance, because the CAB has exclusive and primary jurisdiction to hear and decide such an issue. The court, following the reasoning of Judge Frank in *Lichten*, held the tariff provision invalid in derrogation of common law by effectively exempting the defendant from liability for its own negligence. With reference to the defendant's alternative plea the court stated:

> [T]he defendant would have us hold instead that, while 10 II and 10 III E may be divergent with 10 III A . . . , 10 III A takes precedence over the other two tariffs and offers the passenger the opportunity to choose between a higher and lower liability by paying a greater valuation charge, even as to jewelry and other articles carried by the passenger since they are within the definition of "baggage and other personal property" mentioned in 10 III A. The defendant theorizes that under the provisions of its three tariffs rules, all that the passenger had to do was advise the airline that he was carrying on board certain jewelry and other personal property, declare the value thereof and pay the increased charge. The theory fails because 10 II and 10 III E inform the passenger in no uncertain terms that jewelry, whether checked as baggage nor not, and other personal property not checked as baggage, are carried at his own risk.[62]

Having concluded that defendant's tariff rules were void, the court held the primary jurisdiction doctrine inapplicable quoting the reasoning of Judge Frank in *Lichten*:

> [H]owever, with exceptions not here pertinent, the Supreme Court has held that a plaintiff who asserts that administrative action is void, because in excess of the administrative body's statutory authority, may proceed directly in court without awaiting an administrative determination as to the validity of that administrative action. Especially does that seem to be true when the administrative body is not a party to the suit.[63]

Turning to the present case, the sole question presented was whether the applicable tariff does limit the passenger's claim for consequential damages arising from delay in delivery. The court found no reason that the

[61] Federal Aviation Act of 1958, § 403(a), 72 Stat. 758, 49 U.S.C. § 1373(a) (1964).

[62] 393 P.2d 112, 117-18 (Alaska Sup. Ct. 1964). The tariffs read as follows: 10 II. "Articles Accepted as Baggage: Baggage shall consist only of wearing apparel, nonliquid toilet articles and similar effects for actual use which are necessary and appropriate for the comfort and convenience of the passenger for the purpose of the journey . . . Money, jewelry, silverware, samples, negotiable paper, securities and similar valuables or business documents will be carried only at the risk of the passenger.": 10 III A. "The passenger having been offered a choice of rates according to value, any liability of a carrier in respect to baggage and other personal property is limited to its declared value (or its actual value if less) which shall not exceed one hundred (100.00) (*sic*) per passenger, unless a higher valuation is declared in advance and additional charges are paid pursuant to the carrier's tariffs."; 10 III E. " . . . . Unchecked baggage or other personal property shall be carried at the risk of the passenger." For a case which seems to lend some support to the defendant's position, see Radinsky v. Western Air Lines, Inc., 242 P.2d 815 (Colo. 1952).

[63] Lichten v. Eastern Airlines, 189 F.2d 939, 946 (2d Cir. 1951).

principles governing consequential damages generally should not be applicable to the case at hand. The rule is that special damages beyond those ordinarily to be expected to result from delay in the delivery of property entrusted to a carrier are allowable when it can be shown that the carrier has notice that such special damages may result from a delay in delivery.[64]

Thus, although the assurances given by the ticket agent were not relevant to extend the defendant's liability as set by the tariff for the reason that the tariff was part of the contract of carriage and any agreement inconsistent therewith would be void, the assurances were material as evidence that the defendant had notice of the special circumstances on which the plaintiff supported his claim for consequential damages. Therefore, the defendant being liable for the consequential damages, two questions remained: (1) Was the defendant's liability limited by the tariff, *i.e.*, did the tariff extend in its application to consequential as well as actual damages, and, (2) if the tariff did apply to consequential damages, was the tariff valid? The Court answered both questions in the affirmative.

In answering the first question the Court simply reasoned that the wording of the tariff, "the liability for the loss of, or damage to, *or delay* in the delivery of any personal property shall not exceed $250.00 if no higher value has been declared by the passenger at the time of checking his baggage," (Emphasis by the court), indicates "clearly" that the framers of the tariff intended more than mere loss of or physical damage to baggage," and it follows that the limitation provision covers consequential damages."

In considering the tariff's validity, the Court recognized that to be valid the tariff must give the passenger a fair opportunity to choose between liability for higher or lower damages by paying a correspondingly greater or lesser rate.[65] The instant tariff limits the carrier's liability to $250 unless a higher value is declared. If the declared value is limited to the actual value of the baggage and its contents, then the passenger who suffers consequential damages is deprived of a fair opportunity to cover his loss and the tariff is therefore invalid. The Court held, however, that a proper construction of the tariff is that the declared value is merely intended to be used as a convenient means of fixing a dollar limit of the carrier's liability, and the passenger has a reasonable opportunity to cover his loss by declaring a "fictitious value" which might be far in excess of the actual value of his property and paying an additional charge.[66]

The most obvious implication of the *Bendersky* opinion is that tariffs which include a clause limiting the declared value to the actual value of the baggage and its contents are void, or at least inapplicable to those

[64] 13 C.J.S. *Carriers* § 229, "[W]here at the time of entering into a contract both parties knew and contemplated that, if a breach is committed, some injury will occur in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation or damages on the occurrence of the injury."

[65] The plaintiff had admitted that the tariff was applicable, *i.e.*, that it was statutorily authorized. Thus, the only question of the validity of the tariff was its reasonableness.

[66] The court noted that such a construction places no hardship on the carrier because it can always refuse to carry articles of a specified kind or of more than a declared value of a specified amount. *See*, Vogelsang v. Delta Airlines, 302 F.2d 709 (2d Cir. 1962); Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951).

passengers suffering special or consequential damages. Presumably, in such situations the common law rule would apply and the passenger could recover in full for consequential damages suffered regardless of whether or not he had declared a higher value.

It is submitted that although the Court's decision is a fair construction of the tariff in the instant case, an equally plausible argument may be made for the plaintiff that the tariff limitation deals with loss of or physical damage to personal property and that the matter of consequential damages arising from delay in delivery is not covered at all. The tariff is framed in terms of "value", *i.e.*, the value of the property is limited to $250 unless a higher value is declared. Inasmuch as under the terms of the tariff it is obvious that the value of the property has nothing whatever to do with consequential damages which result from a delay in delivery, it follows that the tariff does not cover such damages. The Court rebutts this argument by reasoning that the words, "or delay in the delivery of any personal property" in the tariff indicate that the framers of the tariff had in mind something more than loss of or physical damage to the baggage. This would seem obvious. But the Court goes further and supposes that this "something more" must be consequential damages. It is submitted that the Court's supposition may be unwarranted for at least two reasons. First, the framers could well have intended "delay" to cover such cases where something short of actual loss results in a diminished value of the property to the passenger, *e.g.*, perishables or a delay in delivery for such a length of time that the property has become obsolete. Secondly, if the framers had intended the tariff to cover special damages, they could have so provided.

The effect of the Court's ruling is that the mere inclusion of the four words, "or delay in delivery" extends the coverage of a tariff to consequential damages resulting from such a delay.

Although the primary jurisdiction doctrine has been severely criticized and limited in recent years and was not even considered by the court in the *Bendersky* case, it may well be that the doctrine has its most practical utility in cases such as the one at hand. The doctrine is generally only considered when the validity of a tariff is being attacked in one of two ways: (1) the tariff is not statutorily authorized, or (2) the tariff is unreasonable, unjust, unjustly discriminatory, unduly preferential or unduly prejudicial. Further, the reasoning of Judge Frank in *Lichten* and incorporated in the *Odom* decision is to the effect that the doctrine should not apply when the tariff is not statutorily authorized, thereby limiting its application to cases where the tariff is attacked as unreasonable. And this reasoning goes further to indicate that the doctrine may not then apply especially if no administrative skill or wisdom is needed to ascertan the reasonableness o fthe exculpatory provision. Under this theory the only room for the doctrine's application is where the administrative skill or particular technical expertise of the CAB is necessary to resolve the controlling issue in the cause. It would seem that often it is as necessary to call upon the CAB to construe the application of a tariff to a particular set of facts as

it is to construe the validity of the tariff itself. It is submitted that this would particularly seem to be true in situations such as the one in the instant case where the determination of the extent of the tariff's application could very well be determinative of the validity of the tariff itself, *i.e.*, if the tariff in the case at hand were construed to cover consequential as well as actual damages and the passenger is not given the opportunity under the tariff to declare a higher value sufficient to cover possible consequential damages, the tariff might be held invalid as in derogation of the common law rule. The result would be a further infringement upon the application of the primary jurisdiction doctrine.

Roy R. Anderson, Jr.

RECENT DECISIONS

Railway Labor Act — Wrongful Discharge — Hostile Discrimination

Plaintiff was employed by Trans World Airlines (TWA), and was a member of the International Association of Machinists (IAM, presently called the International Association of Machinists and Aerospace Workers). He disputed a dues increase approved by the local union at one of their meetings and refused to pay the additional dues. The union notified plaintiff by letter that he had not complied with the union security provisions of the TWA-IAM collective bargaining agreement, and would be discharged from his employment by TWA if he did not pay the outstanding dues within the time alloted in the letter. Plaintiff proceeded to pay the dues, but was charged with failure to pay the reinstatement fee which the union alleged was due. He was subsequently discharged for violating the union security provisions of the collective bargaining agreement. The discharge was appealed to the TWA-IAM System Board of Adjustment, which determined that the discharge was proper under the union security provisions. After another unsuccessful appeal before the Adjustment Board, and an unsuccessful rehearing petition, plaintiff filed suit in the United States District Court for the District of Delaware against both his employer and the union for wrongful discharge in violation of the Railway Labor Act,[1] and against his union for breach of its duty of fair representation. The district court held that it had jurisdiction and that plaintiff was entitled to recover under the claim for wrongful discharge in violation of section 2, Fourth and Eleventh, of the Railway Labor Act,[2] and, therefore, there was no need to reach a decision on the hostile discrimination claim. *Held, affirmed*: The district court was correct in holding that the federal courts had jurisdiction to hear the case, and that there was a violation of the union security agreement by both the union and the employer. The reinstatement and back pay award was correct. *Brady v. Trans World Airlines, Inc.*, 10 Av. Cas. 18,056 (3rd Cir. 1968); *cert. denied*, 37 U.S.L.W. 3262 (U.S. Jan. 21, 1969) (No. 735).

The court of appeals, in upholding the jurisdiction of the district court to hear this case, relied upon the ruling in *Conley v. Gibson*[3] which held that the power of the Adjustment Board goes to disputes between employees and their employers, and is not intended to include disputes solely

[1] Railway Labor Act, 44 Stat. 577, *et seq.*, 45 U.S.C. § 151 *et seq.* (1964).

[2] Railway Labor Act § 2 (Fourth) & (Eleventh), 44 Stat. 577, *as amended*, 48 Stat. 1186, 62 Stat. 909, 64 Stat. 1238, 45 U.S.C. § 152 (Fourth) & (Eleventh) (1964).

[3] 355 U.S. 41 (1957).

between the employee and his union. The court also pointed to the make up of the Adjustment Board and the inherent unfairness in requiring the employee to plead his case before representatives of the adverse parties. After determining that the Board did not have exclusive jurisdiction, this court upheld the district court's finding that the cause of action based upon the union's duty of fair representation was sufficient to give the federal courts jurisdiction over the suit.[4]

While this court agreed with the district court that plaintiff was not entitled to recovery on his hostile discrimination claim, it did not agree that the remedy for the unfair representation claim was the same as the remedy for wrongful discharge in violation of section 2, Fourth and Eleventh. The district court held that since the remedies were the same, a finding that there was violation of section 2, Fourth and Eleventh would be sufficient to preclude a ruling on the hostile discrimination claim.[5] This court felt there was a difference in the two claims and that the remedies were not the same. It stated that the hostile discrimination claim involved the fairness and propriety of the manner in which plaintiff was treated by IAM; it did not involve discrimination in plaintiff's discharge from his employment. This made the claim of hostile discrimination entirely an employee-union matter and not an employee-employer matter as in the violation of section 2, Fourth and Eleventh. The court stated:

> It has been the general rule and the rule of this circuit that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies or show adequate reason for failing to do so.[6]

The court went on to say:

> It is conceivable that an award of damages by a court against a union for hostile discrimination could supplement the relief available for a violation of section 2 (Fourth) and (Eleventh). However, in this case, Mr. Brady's claim for such damages may not be sustained because of his failure to exhaust internal union remedies or to adequately explain that failure.[7]

It appears from the language used by this court that, contrary to the districts court's ruling, if plaintiff exhausted his internal union remedies and was able to present a valid case for hostile discrimination, he would be entitled to damages from the union in addition to reinstatement and back pay for the violation of section 2, Fourth and Eleventh.

C.F.P.

---

[4] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[5] For an excellent discussion of the duty of fair representation and the district court ruling in this case, *see* B. Aaron, *The Union's Duty of Fair Representation Under the Railway Labor Act and the National Labor Relations Acts*, 34 J. AIR L. & COM. 167 (1968).

[6] 10 Av. Cas. at 18,068.

[7] *Id.* at 18,069.

Federal Pre-Emption — Municipal Ordinance — Noise Abatement

The town of Hempstead, New York, located close to Kennedy Airport, added a new article to its Unnecessary Noise Ordinance which forbade the operation of a mechanism or device (including airplanes) which created within the town a noise exceeding certain limits contained therein. A substantial number of the daily flights in and out of Kennedy Airport would have violated the ordinance. Nine major air carriers, *inter alia*, brought a suit seeking to enjoin enforcement of the ordinance, claiming it amounted to a forbidden regulation of interstate and foreign commerce. The town countersued seeking an injunction against violation of the ordinance by the airlines, claiming that the ordinance was a valid exercise of its police power to legislate for the public good of its citizens. The town further claimed that the ordinance did not operate in any area actually occupied by federal action or peculiarly reserved for federal action. The district court granted a temporary order enjoining enforcement on the threefold grounds that (1) the commerce clause precluded local action of the kind here involved, (2) the actual exercise by Congress of power to regulate in this field was so pervasive as to pre-empt the field from local regulation, and (3) that the ordinance is in direct conflict with valid applicable federal regulation.[1] *Held, affirmed*: The operation of the ordinance would conflict with the valid federal regulations operating in this field and, therefore, are invalid under the Supremacy Clause. *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 37 L.W. 3242 (1969).

The district court in Hempstead, in invalidating the ordinance, placed the least emphasis on the grounds that the subject matter was "national in scope" and therefore not susceptible to local regulation. As to this point the court said:

> It would be difficult to exaggerate the magnitude of the regional and national commitment to the Kennedy Airport, and the importance of *its* role in the interstate and intercontinental transport of mail, passengers and cargo . . . [Emphasis added.].[2]

The court concluded that: "The legislation operates in an area committed to federal care, and noise limiting rules operating as do those of the ordinance must come from a federal source."[3]

Given only slightly greater emphasis by the district court was the ground that the ordinance conflicted with federal regulation. Without stating that flight regulations established by the Federal Aviation Agency are given the force of federal law,[4] the district court concerned itself with the fact that the ordinance was in conflict with those regulations.

> If the Ordinance is to be complied with landing approaches and take-off

[1] American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967).
[2] *Id.* at 228.
[3] *Id.* at 231.
[4] *See* Tilley v. United States, 375 F.2d 678 (4th Cir. 1967).

> procedures long in use, and chosen for valid air traffic as safety reasons, will have to be abandoned.[5]

The fact of the conflict, the court concluded, invalidated the ordinance.

The ground for invalidating given the greatest weight by the district court was that of pre-emption. In viewing the extent of federal control in the area, the district court said:

> It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation.[6]

Instances of federal involvement in the field of aviation which the court cited were, *inter alia*, federal aid for public airport development and the provision for economic, technical, and operational regulations. The court discussed in some detail the extensive regulatory powers, both potential and exercised, of the Civil Aeronautics Board and the Federal Aviation Agency. These facts led the district court to conclude that "the federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance."[7]

In reaching this conclusion, the court relied on an earlier pre-emption case, *All American Airways v. Village of Cedarhurst*.[8] In *Cedarhurst* the town had passed an ordinance prohibiting overflights at altitudes lower than one thousand feet. In invalidating the statute, the *Cedarhurst* court said "[t]he federal regulatory system . . . has preempted the field below as well as above 1,000 feet from the ground."[9] The district court found the Hempstead ordinance, though expressed in different terms, to be the functional equivalent of the *Cedarhurst* ordinance in that it could prevent noise only by preventing overflight.

The court of appeals, in an opinion distinguished mainly by the voluminous number and extent of footnotes setting out the finding of facts made by the district court, affirmed the district court's determination of the invalidity of the ordinance. Although the appellate court noted that "[a]ny one of the District Court's three conclusions is enough, of course, to make the ordinance invalid,"[10] it chose to base its decision solely on the factual determination that the ordinance is in direct conflict with a valid applicable federal regulation. The appellate court found that compliance with the noise ordinance would require alteration in the flight patterns and procedures established by federal regulation and was therefore invalid.

Though both courts reached the correct result, the approach taken by the appellate court was the sounder of the two. Invalidating a local regulation on the basis of conflict with a federal ordinance involves mainly a factual determination; whereas, a determination of whether a given local

---

[5] 272 F. Supp. at 230.
[6] *Id.* at 232.
[7] *Id.* at 233.
[8] All American Airways v. Village of Cedarhurst, 106 F. Supp. 521 (E.D.N.Y. 1952); *aff'd sub. nom.*, Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956).
[9] 238 F.2d at 815.
[10] 398 F.2d at 372.

regulation will impose an undue burden on interstate commerce or whether it operates in an area pre-empted implicitly by the federal government is a question about which reasonable men could differ, as indeed they have.

D.L.B.

Travel Agencies — Ticket Sales Proceeds — Ownership

Wisconsin

Plaintiffs garnished funds in a general checking account of a travel agency which were deposited with a Wisconsin bank. The travel agency and the intervening defendant-airlines claimed that the funds were not the property of the agency, but rather were trust funds being held for the airlines and their assignees. Defendants' argument was grounded on the contract between the agency and Air Traffic Conference (ATC), which provided, in part: "All moneys [sic], less . . . commissions . . . collected by the Agent for air passenger transportation . . . shall be *held in trust* by the Agent until satisfactorily accounted for to the carrier [Emphasis added.]."[1] In 1963, ATC began requiring its agents to be bonded, and, as a result, ATC agents were no longer required to hold receipts from ticket sales in trust accounts. Accordingly, the travel agency deposited these receipts, along with all other of its monies, into general checking accounts, and from these accounts made remittances to ATC. As a depository for the receipts, the garnishee bank admitted indebtedness to the depositor travel agency to the total amount in the garnished checking account. The bank's admission was not traversed, and there was no evidence that the monies deposited with the garnishee bank were proceeds of tickets sold on any particular airline. *Held*: Monies deposited in a general checking account by a travel agency are not trust funds and therefore are subject to garnishment by creditors. *Larson v. Fetherston*, 10 Av. Cas. 18,119 (Wisc. Cir. Ct. 1968).

The court first found that elements of an agency relationship (in which the agent may subject his principal to personal liabilities)[2] existed between the agency and ATC. For example, ATC exercised exact and extensive controls over the agency's activities in the sale of airline tickets; the relationship was terminable upon notice of either party, as opposed to a trust relationship which is not ordinarily terminable at the will of either party.[3]

The court considered the purported trust relationship and found that, even if there were a trust relationship between the agency and the airlines, this did not necessitate a trust relationship as between the agency and the bank. ATC knew that deposits from the sales were made in general checking accounts and that remittances were made to ATC on checks drawn from those accounts; no notice, actual or constructive, was ever given to

[1] Larson v. Fetherston, 10 Av. Cas. 18,119, 18,120 (Wisc. Cir. Ct. 1968).
[2] *Id.* at 18,121.
[3] *Id.*

the bank to indicate that the monies deposited were to constitute trust funds. Although the court did not consider whether ATC and the travel agency should be estopped from claiming that the deposited ticket sales proceeds constituted trust funds, it did point out that good business practice required that separate trust funds be established rather than mixing these monies with other funds.

It was of no effect that the proceeds of these sales were claimed to be the property of the carriers rather than the agency; in order that a deposit of sales receipts such as these be actually held in trust, it must be clear from the actions of the parties that their intention was that the deposits constitute a trust fund. Here, there was no evidence to trace any specific amount of arlines' funds to any specific account, and the bank's answer of indebtedness to the depositor travel agency was not traversed. The bank, therefore, had title to any funds deposited in the checking account, and was a debtor as to the depositor travel agency. Accordingly the checking account was correctly found not to be a trust fund for the airlines, but a debt to the travel agency, and therefore subject to garnishment by its creditors. Thus, the plaintiffs' garnishment created a lien superior to the claim of the intervening defendants and any subsequent garnishments.

A.L.H.

Illinois

In January, 1963, plaintiff bought a prepaid trip to Europe, including air transportation from Rome to Chicago via Paris, from Larkin Travel Service. Defendant, Air France, had issued a "certificate of appointment" authorizing Larkin to represent it subject to the terms of a sales agency agreement[4] with the International Air Transport Association. Larkin deposited plaintiff's check in its own account and never paid any money over to defendant. It gave plaintiff a detailed itinerary in which two flights were mentioned: (1) an undisclosed flight on April 12 from Rome to Paris, "leaving late P.M. and arriving in Paris approximately 5:00 o'clock P.M."; and (2) "April 17, 1963—Fly home to O'Hare via Air France." In February, plaintiff cancelled the trip and requested a refund. He was advised that Larkin had filed a voluntary petition in bankruptcy. When Air France refused to pay the refund, plaintiff filed this suit, alleging that Air France was liable as the travel service's principal. A judgment of $1,241, the cost of the two flights, was entered for the plaintiff. The trial court

[4] "The pertinent provisions of the I.A.T.A. agreement are (a) The agent shall request reservations only when he has had a request therefor, and if required by the carrier, a deposit has been paid, (b) the agent may represent himself as "Agent" or "Booking Agent" but not as "General Agent" and may not use the designations "Airline Ticket Office" or "Consolidated Ticket Office", (c) the agent is to display advertising material supplied by the carrier, (d) moneys collected for transportation sold are the property of the carrier and shall be so retained by the agent until satisfactory accounting is made therefor, (e) the carrier may, at its option, furnish agent with tickets and exchange vouchers, (f) prior to issuance of a ticket, agent is to secure confirmation from the carrier that a definite reservation has been made for a particular flight except that "open date" tickets may be issued if marked to indicate that no specific accommodation has been reserved." Simpson v. Compagnie Nationale Air France, 10 Av. Cas. 18,025, 18,027 (Ill. App. Ct. 1968).

held that Larkin had accepted the money as defendant's agent, and under the express condition of the IATA agreement, any monies collected for air transportation immediately became the property of the carrier airline. Defendant appealed, contending that Larkin was a special agent, that plaintiff acted at his own risk, and that plaintiff should have known the extent of Larkin's authority. *Held, affirmed in part, reversed in part*: The situation is governed by the IATA agreement. If the travel service designates either the airline or a specific flight, it has acted as agent of the airline; thus, any monies collected are the property of the airline, but only that portion directly corresponding to the designated airline or flight. *Simpson v. Compagnie Nationale Air France*, 10 Av. Cas. 18,025 (Ill. App. Ct. 1968).

Larkin's apparent authority was not at issue, as the court definitely stated: "the IATA agreement conferred upon [the travel agent] the authority to agree on defendant's behalf to furnish transportation via Air France."[5] The very purpose of the certificate which defendant issued was to give Larkin authority to sell air fare and collect monies for the defendant. If plaintiff and Larkin expressly agreed, at the time of the purchase, that the money in question was for air travel aboard Air France or one of its designated flights, defendant then became the immediate owner of the money. Defendant contended that until the travel service had issued plaintiff a ticket aboard the Air France flights, the money could not be designated as belonging to the defendant. A strong dissent agreed. The IATA agreement, however, had no such condition. Although Larkin had authority to issue "open date" tickets, it was not required to issue any ticket before exercising the authority to collect monies for the defendant.

The instant case concerned a flight from Rome to Chicago, but only the Paris to Chicago route was detailed in the itinerary which plaintiff received. The itinerary, in respect to the flight from Rome to Paris, mentioned only approximate times of departure and arrival, which times did not correspond to any of defendant's scheduled flights. Thus, without either a reference in the itinerary or a commitment from Larkin, the court did not agree that Larkin had accepted that portion of the money as defendant's agent. The judgment was therefore reduced to $1,098, the cost of the single flight from Paris to Chicago.

J.C.G.

Admiralty — DOHSA — Implied Warranty

A pilot and two passengers were killed when the Aloutte II helicopter in which they were flying crashed off the coast of Louisiana into the Gulf of Mexico on November 30, 1959. The crash was caused by a structural failure in the tail section of the aircraft. It was proved that the structural

[5] *Id.*

failure was due to a negligently made weld at the point of the break.[1] The action was brought in admiralty[2] against the manufacturers of the helicopter for the death of the pilot and passengers under the Death on the High Seas Act (DOHSA).[3] The court found that the accident occurred during normal flight with no abnormal stress applied to the defective tail section and that the pilot was not contributorily negligent. *Held*: The manufacturer is liable under the doctrine of implied warranty of fitness and merchantability. *Krause v. Sud-Aviation*, 10 Av. Cas. 17,921 (S.D.N.Y. 1968).

The court in *Krause* based its decision on two prior decisions of the District Court for the Southern District of New York in which the doctrine of implied warranty was used with the DOHSA.[4] The Delaware District Court in 1962 expressly refused to apply the doctrine in *Noel v. United Aircraft Corp.*[5] Judge Layton said in *Noel*:

> I hold that admiralty (even though it could) should not at this time adopt the doctrine of implied warranty of fitness and merchantability into federal maritime law. From this it follows breach of implied warranty of fitness and merchantability is not a claim upon which relief can be granted under section one of the DOHSA.[6]

The court in *Krause* pointed out, however, that in the six years from *Noel* to *Krause* there had been numerous decisions that have applied the doctrine of implied warranty to aircraft disasters occurring over land where the substantive laws of the states were applicable.[7] The court in *Krause* saw no reason not to apply implied warranty merely because the accident occurred over water instead of land. The manufacturer had impliedly warranted that its helicopter would not prove dangerous in ordinary use. The court said in *Krause*:

> A warranty is in essence a promise. We think it is reasonable for a passenger in an aircraft to proceed on the assumption that the manufacturer has made the plane, if not perfectly, at least in such a way that its ordinary use will not prove harmful. The very fact of manufacturing and offering a plane for sale implies a promise to this effect made to all persons who might reasonably be expected to ride in it.[8]

It is also well established in the Southern District of New York that privity of contract between the manufacturer and the injured party is not necessary to maintain an action of implied warranty in admiralty.[9] It

[1] The structural failure was caused by the failure of the upper right longeron at the point where the horizontal stabilizer bracket was welded to it.

[2] The accident occurred more than one marine league (three nautical miles) from the coast and therefore the substantive law of admiralty was applicable.

[3] Death on the High Seas Act, 41 Stat. 537, 49 U.S.C. § 761 (1964).

[4] Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964).

[5] 204 F. Supp. 929 (D. Del. 1962).

[6] *Id.* at 939.

[7] Swain v. Boeing Co., 337 F.2d 940 (2d Cir. 1964); Boeing v. O'Malley, 329 F.2d 585 (8th Cir. 1964); Banko v. Continental Motors Corp., 251 F. Supp. 229 (E.D. Va. 1966); King v. Douglas Aircraft Co., 159 So.2d 108 (Fla. App. 1963); Goldberg v. Kollsman Instruments Co., 12 N.Y.2d 432, 240 N.Y.S.2d 592 (1963).

[8] 10 Av. Cas. at 17,929.

[9] 231 F. Supp. 447; Middleton v. United Aircraft Corp., 204 F. Supp. 856 (S.D.N.Y. 1960).

is only necessary to prove that the injury was caused by a latent defect in the manufacturer's product.

Thus it appears that at least one district is now willing to apply the doctrine of implied warranty of fitness and merchantability to maritime law, and in light of the many recent applications of the doctrine in other areas, it appears that other districts may soon follow the Southern District of New York.

G.W.W.

Tariff Regulations — Limited Liability — Contract Interpretation

When her baggage, valued at $3,210, was destroyed in an airplane crash, plaintiff sued the defendant-airline for breach of the contract of carriage. The plaintiff admitted that she had not read the "Conditions of Contract" printed on her ticket. The words "sold subject to tariff regulations" were on the same side of the ticket in bold type. Nevertheless, the plaintiff contended that the conditions on the ticket were so ambiguous as to make the tariff regulations unenforceable. Defendant's tariff, filed pursuant to the Federal Aviation Act of 1958,[1] provided that its liability was limited to $250, unless the passenger declared the excess value and paid a higher rate. The trial court awarded judgment on a jury verdict of $1,500 for the plaintiff. *Held, affirmed conditionally*: The plaintiff must remit the amount of the award in excess of the tariff limit. *Eastern Air Lines v. Williamson, 211 So.2d 912 (1968).*

Because the case involved interstate commerce, the Supreme Court of Alabama applied the controlling federal law.[2] On the basis of federal legislation, the court held that it was plaintiff's duty to declare the excess value and pay a higher fee to receive protection above the $250 set by the tariff regulations. The purpose of the tariffs is to allow the airline to limit its liability for negligence and receive commensurate compensaton for the responsibility assumed. Tariffs approved by the Civil Aeronautics Board become part of the contract of carriage between the airline and its passengers. They are binding regardless of the passenger's lack of knowledge or assent thereto. Therefore, the inclusion of other ambiguous matter on the ticket does not constitute a waiver of the tariff regulations.

Even though the court indicated that its decision related to the large print of the words "sold subject to tariff regulations," it would seem that these regulations are binding because normal rules of contract requiring assent to the terms and conditions of a contract are simply not applicable. The tariffs are an essential element of the legislation and take precedence

[1] Federal Aviation Act of 1958, § 403, 72 Stat. 758, *as amended*, 74 Stat. 445, 49 U.S.C. § 1373 (1964).
[2] *Id.*

over the other conditions of the contract. Regardless of any other words in the contract, the tariff regulations apply and acceptance of them is presumed.

G.R.B.

Labor Law — Competing Unions Following Merger — Jurisdiction

Prior to a merger of Lake Central into Allegheny Airlines, the National Mediation Board (NMB) certified the International Association of Machinists (IAM) as the exclusive bargaining representative for Allegheny's employees and the International Brotherhood of Teamsters (IBT) as the bargaining representative for Lake Central's employees. During the Civil Aeronautics Board (CAB) proceedings to determine the conditions of the Allegheny-Lake Central merger, Allegheny stated that it would recognize the IAM as the sole representative of all the ground support personnel. The CAB Hearing Examiner did not condition or limit Allegheny's proposed recognition of the IAM and was not asked by IBT to review the Hearing Examiner's decision. Nevertheless, the decision did become final because the CAB refused to review the Airline Dispatchers Association's petition; that petition claimed that Allegheny should assume the obligations of all outstanding collective bargaining agreements of Lake Central as a condition of approval of the merger. IBT alleged that its representative status should continue after the merger until the question of representation was decided by the NMB. In lieu of seeking review, IBT filed for a preliminary injunction in federal district court to restrain Allegheny from recognizing or bargaining with IAM. *Held, motion denied*: A federal district court lacks jurisdiction over the subject matter, *International Brotherhood of Teamsters v. Allegheny Airlines, Inc.*, 10 Av. Cas. 18,069 (D.D.C. 1968).

Allegheny was found to be a carrier and its employees were found to be employees within the meaning of Title II of the Railway Labor Act.[1] The NMB has exclusive jurisdiction to settle a dispute between two unions because the matter involves an emloyee representation dispute under the Railway Labor Act.[2] The Federal Aviation Act provides that only the courts of appeals of the United States shall have jurisdiction to review CAB orders.[3] Because of the Federal Aviation Act, the district court was clearly precluded from hearing this case. The decision illustrates the doctrine that jurisdiction over the subject matter is needed before a court will hear a case.

D.C.T.

---

[1] Railway Labor Act, §§ 201, 202, 49 Stat. 1189, 45 U.S.C. §§ 181, 182 (1964).
[2] Railway Labor Act, § 2 (Ninth), 44 Stat. 577, *as amended*, 45 U.S.C. § 152, Ninth.
[3] Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963).

Eminent Domain — Inverse Condemnation — Jury Trial

Plaintiff brought suit for depreciation in value of his home which was located within three hundred feet of the defendants' airport-runway. He alleged that the noise and vibrations of low-flying aircraft substantially interfered with his proerty, thus constituting a "taking" for public use.[1] The defendants, a city and county operating the airport, demurred primarily on the ground that there had been no physical intrusion of the property. The demurrer was sustained and the plaintiff appealed. *Held, reversed and remanded*: Regardless of the physical intrusion element, a substantial and unreasonable interference with the use of property caused by low-flying aircraft may be an unconstitutional "taking" in the form of an easement for which compensation must be made.[2] *Johnson v. The City of Greenville*, 10 Av. Cas. 18,163 (Tenn. Sup. Ct. 1968).

The principal issue before the Tennessee Supreme Court was whether an actual physical invasion of property constituted the sole test for establishing a "taking." Relying on the reasoning of other state courts,[3] the instant court recognized that unreasonable noise and vibrations may constitute as much interference as a physical invasion. Adhering to a dissenting opinion in the Tenth Circuit case of *Batten v. United States*,[4] the Tennessee court reasoned that the problem is to weigh public versus private interests and to place the burden on the public when the interference is direct and of such magnitude that fairness requires it. Therefore, since aircraft flying extremely low over property may gain flight easements and cause great disturbance, the court concluded that justice demands that the public compensate the owner. However, the court recognized that an individual's right to free use of his property is not absolute, but is a matter of degree. Although the "physical intrusion" requirement was previously applied in determining a "taking' 'to insure that compensation was not given for minor injury, the court, relying on *Thornburg v. Port of Portland*,[5] reasoned that a continual interference may produce substantial injury. Thus, the court concluded that a jury should determine whether there has been a substantial interference with the use of property to constitute a "taking." Although the test for "substantial interference" is a nebulous one where case decisions must be relied upon to set the guidelines, the court implied that diminution in property value and interference with the normal use of the property are possible criteria for jury consideration.

F.J.F.

---

[1] Tenn. Const. art. I, § 21 (1870). "[N]o man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefore." *See also*, Tenn. Code Ann., art. 23-1423 (Supp. 1968), and cases cited therein interpreting a "taking" as not liimted to an actual physical intrusion.

[2] Moreover, the court held that the Tennessee statute of limitations, applying to inverse condemnation, begins to run when the planes begin flying rather than at the time of the acquisition of the land or of the completion of the airport. 10 Av. Cas. at 18,166.

[3] Griggs v. Allegheny Co., 369 U.S. 84 (1962); Thornburg v. Port of Portland, 253 Or. 118, 376 P.2d 100 (1962).

[4] Batten v. U.S., 306 F.2d 580 (10th Cir.) (dissenting opinion), *cert. denied*, 371 U.S. 955 (1962); *See also* 376 P.2d 100, where the Oregon court referred to the *Batten* dissent.

[5] 376 P.2d 100.

Admiralty — Contributory Negligence — State Wrongful Death

The pilots of two aircraft were killed in a mid-air collision over the Gulf of Mexico within the limits of Louisiana territorial waters. The pilots were acting within the scope of their employment as fish-spotters. At the time of the collision, flying conditions were optimum. Although there was one eye witness to the impact, his testimony was sketchy and inconclusive. The wife of each pilot brought suit against the employer of the other pilot to recover for the death of her husband, alleging negligence of the company's pilot. *Held*: Each pilot is guilty of contributory negligence and, in accordance with the substantive law pursuant to Louisiana's Wrongful Death Statute, is precluded from any recovery. *Hornsby v. The Fishmeal Company*, 285 F. Supp. 990 (D.C. La. 1968).

If an accident takes place within the territorial waters of a state, admiralty adopts the wrongful death statute of that state. The United States Supreme Court, in *The Tungus v. Skovgaard*,[1] recognized that the power of a state to create a wrongful death statute "includes of necessity the power to determine when recovery shall be permitted and when it shall not."[2]

Therefore, the critical inquiry in the instant case was whether the Louisiana Wrongful Death Statute encompassed the general maritime law concept of comparative negligence, or was contributory negligence a complete bar to recovery. The Louisiana courts had not spoken on this subject. In light of this fact, the district court held that it was bound to apply the state tort law that would be applied in an ordinary civil acion. Under the Louisiana Wrongful Death Statute,[3] "contributory negligence on the part of the deceased precludes recovery." If the state law had been found to be in accord with the comparative negligence provisions of general maritime law, contributory negligence on the part of the deceased would not bar recovery, but only serve to mitigate damages.[4]

The *Hornsby* court commented, in dictum, that a determination of state law by a federal court, in an area where state law is not settled, will be nullified as precedent once an authoritative state court rules on the point. For example, in two states (Florida and Texas) where federal courts had applied substantive common law to the precise question of the instant case, state judicial authority subsequently established the doctrine of comparative negligence as the preferred concept where a wrongful death resulted from an accident upon the navigable waters of the state.[5]

R.D.B.

---

[1] The Tungus v. Skovgaard, 358 U.S. 588 (1959).
[2] *Id.* at 594.
[3] La. Stat. Annot., Civ. Code, art. 2315.
[4] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
[5] Vassollo v. Nederl-Amerik Stoomr Moots Holland, 162 Tex. 52, 344 S.W.2d 421 (1961); Weed v. Bilbrey, 201 So.2d 771 (Fla. Ct. App. 1967).

Warsaw Convention — Jurisdiction — Place of Destination

Defendant's aircraft crashed in March of 1966 during an approach to Tokyo International Airport, and the decedent, a passenger on the plane, died as a result of that crash. Plaintiff, decedent's administratrix, brought a wrongful death action in the United States District Court for the Southern District of New York. Decedent had purchased a round trip ticket for a Southeast Asian tour from the Cleveland, Ohio office of B.O.A.C., with the place of both departure and destination was Buffalo, New York. At the decedent's request, the itinerary was changed and the defendant's Hong Kong to Tokyo flight was substituted for the carrier contemplated. The original ticket was merely revalidated by the defendant company at no extra charge. Buffalo remained the listed place of destination, and the Hong Kong to Tokyo flight was defined as a leg of the tour. The defendant contended that the decedent entered into a separate contract of carriage with him for the Hong Kong-Tokyo flight, and that Article 28 of the Warsaw Convention prohibited plaintiff from bringing suit in the United States.[1] Accordingly, the defendant made a motion to dismiss for lack of jurisdiction or venue. The plaintiff filed a cross-motion for partial summary judgment, contending that Article 28 did not exclude the jurisdiction of the court, because the defendant's flight was a mere substitution of carriers and was governed by the original contract of carriage, Buffalo being the place of destination. *Held, motions dismissed*: The court has jurisdiction until the defendant can prove that fatal flight was a separate contract. *Parkinson v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. 17,967 (S.D.N.Y. 1969).[2]

The court, in deciding a case involving the crash of an international flight, held that Article 28 of the Warsaw Convention would apply to the issue of jurisdiction.[3] To uphold either plaintiff's or the defendant's contentions, a factual inquiry had to be made as to whether the contract of carriage was a novation or a mere substitution within the original contract. The court only assumed jurisdiction until the defendant could offer proof of the alleged novation.

If the defendant can successfully prove the novation, it is clear that the plaintiff will be prohibited from seeking a remedy in a United States court.

H.A.M.

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter Warsaw Convention), art. 28, 49 Stat. 3020, T.S. No. 876, states: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principle place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." The plaintiff could maintain his action only if Buffalo was determined to be the place of destination.

[2] On subsequent resubmission, this court adhered to its original position and determined that the issue of novation was a factual one, and not the proper subject for summary judgment. 10 Av. Cas. 18,237 (S.D.N.Y. 1969).

[3] Warsaw Convention, art. 28, 49 Stat. 3020, T.S. No. 876, confers jurisdiction to the courts within the territory of one of the High Contracting Parties, but the question of venue is not in issue, and is determined by the laws of the nation state having such jurisdiction. *See*, Eck v. United Arab Airlines, 360 F.2d 804 (2d Cir. 1966); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965).