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Aviation

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NOTE: The Editor wishes to clarify that in the June 1976 issue the Aviation Report up to RECENT CASES was submitted by Contributing Editor Kent. The rest of the Report was prepared by Mr. Glenn H. Mitchell, J.D. Candidate, University of Miami. In this issue Ms. Kent has contributed up to CONCORDE OPERATIONS and Mr. Mitchell has prepared the remainder.

CAB TERMINATES RULEMAKING PROCEEDING ON DISCRIMINATORY EMPLOYMENT PRACTICES OF AIR CARRIERS

By Advance Notice of Proposed Rulemaking SPDR-30, dated July 27, 1972,[1] the Civil Aeronautics Board announced consideration of the possible issuance of a notice of proposed rulemaking concerning racial, sexual, religious and ethnic discrimination in airline employment practices. The Board invited public comment bearing upon the question of its jurisdiction to adopt rules prohibiting such discrimination or whether it had constitutional or statutory responsibility to adopt such rules. Further, the Board's concern was whether it should consider airline employment practices as a criteria of the public interest when passing upon certain applications submitted to it. In conclusion, the Board requested suggestions for future exercise of its discretion if it should have to act in these areas.

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The air carriers, Alaska Airlines, Inc., American Airlines, Inc., Allegheny Airlines, Inc., Braniff Airways, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Frontier Airlines, Inc., National Airlines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Southern Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., Western Air Lines, Inc., World Airways, Inc., and the Air Line Pilots Association, generally maintained that the Board could not, and in any event should not, adopt regulations pertaining to employment discrimination by air carriers.[2]

Other comments filed by, *inter alia*, American Civil Liberties Union, Center for Community Change, National Urban League, Woman's Equity Action League, American Jewish Congress, Employment Opportunity Commission, and the Department of Justice, urged, in general, that the Board has the authority, if not the affirmative obligation, to take action against discrimination in airline employment.

Board action on the Advance Notice of Proposed rulemaking was deferred pending a final determination in a suit initiated by the National Association for the Advancement of Colored People (NAACP) against the Federal Power Commission (FPC) wherein the NAACP sought to determine whether it was the duty of a Federal regulatory agency to prohibit employment discrimination practices in the industries over which it has economic regulatory jurisdiction. The United States Supreme Court eventually decided the question and held that the FPC had no authority to prohibit discriminatory employment practices since broad references, in its enabling statute, to the "public interest", pertain only to its duty to promote orderly development of power sources at reasonable rates and are "not a directive to the Commission to seek to eradicate discrimination."[3] However, the Court found that the FPC could "consider the consequences of employment discrimination in performing its mandated regulatory functions."[4]

On August 13, 1976, the Civil Aeronautics Board issued a Notice Terminating Proceeding SPDR-30A in CAB Docket 24639 wherein the Board stated:

> The statutory mandate of the Civil Aeronautics Board, under the Federal Aviation Act of 1958, as amended, cannot be significantly distinguished from the FPC's enabling statutes, as discussed and analyzed by the Supreme Court in *NAACP v. FPC*, insofar as it was there held that such legislative authority does not empower a regula-

> tory agency to adopt rules prohibiting its regulatees from engaging in discriminatory employment practices. Consequently, there is no doubt that the Board should not proceed to consider adoption of rules specifically intended to eliminate such practices by its regulatees. Similarly, there is no doubt that our enabling legislation is sufficiently similar to that of the FPC so as to make applicable to the Board the Supreme Court's further holding that costs attributable to a carrier's discriminatory employment practices must be disallowed for ratemaking purposes.[5]

The Board noted, however, that it did not interpret the Supreme Court's decision as precluding the consideration of evidence of discriminatory employment practices as relevant in such matters as applications for operating authority, approval of mergers,[6] and in consideration of an air carrier's "fitness" to perform its obligations under the Act and the Board's regulations where there have been prior violations involving such discrimination.[7] Thus, apart from the aforementioned exceptions noted by the Board where the Board intends to consider certain evidence of discriminatory employment practices, the Board found no apparent reason to promulgate a new rule "since [their] existing procedures have not been shown to be inadequate."[8]

ROUTE SWAP VACATED

By Order 75-1-133 (January 30, 1975), *reconsideration denied,* Order 75-2-108 (February 27, 1975), the Civil Aeronautics Board approved an agreement between Trans World Airlines and Pan American World Airways which permitted temporary changes in some Transatlantic and Transpacific routes operated by each. The Board's approval was premised upon a serious financial crisis which threatened both carriers and the agreed route exchange would have provided significant cost savings to the carriers. The Board acted under certain sections of the Federal Aviation Act which arguably permit such changes without requiring modification of air carrier certificates, without holding an evidentiary hearing and without submitting the final action to the President under section 801(a) of the Act, 49 U.S.C. §1461(a).[9] Additionally, the Board found that the financial problems encountered by the two carriers stemmed in part from a sudden rise in full costs and a reduction in passenger traffic. The Board considered the situation grave enough to constitute "unusual circumstances" thereby justifying a CAB grant of temporary exemption authority under section 416(b)(1), 49 U.S.C. §1386(b)(1)[10], and to make temporary

suspension of certain routes "in the public interest" pursuant to section 401(j), 49 U.S.C. §1371(j).[11] It also found that approval for the agreement could be derived from section 412, 49 U.S.C. §1382, rather than from section 408, 49 U.S.C. §1378, which is more restrictive.[12]

In its opinion, the Board recognized that it could only act under and rely upon the aforementioned sections of the Federal Aviation Act temporarily in response to a crisis situation. Therefore, the Board provided that the exemption and suspension authority would expire two years after the order or 90 days after final Board action in the *Transatlantic Route Proceeding*, CAB Docket 25908, whichever period was shorter.[13]

In *Northwest Airlines, Inc. v. Civil Aeronautics Board*, Nos. 75-1127, *et al.*, [C.A.D.C. June 30, 1976), Northwest Airlines and others challenged the Board's action complaining that the Board improperly circumvented certification provisions of the Act by acting without the basis of an evidentiary hearing.

The Court vacated the Board's order as exceeding Board authority under sections 401(j) and 416(b)(1) based upon the fact that its action allowed the temporary exemptions and suspensions to be operative for up to two years without an intervening opportunity for opposing parties to present their objections. The Court said:

> The temporay changes should have been implemented only until such time as the Board could complete narrowly focused, expedited proceedings—including proper notice and hearing—looking toward a decision on permanent changes in certificate authority. Such proceedings should generally be carefully limited to consider only the precise interim changes granted. And the Board should assign sufficient personnel to guarantee speedy consideration. (This was, after all, an emergency, at least in the eyes of the Board and the two carriers.) Had the Board done this, the temporary route changes would have been in effect during the pendency of the proceedings, thus affording immediate relief to the distressed carriers, but the opposing parties would have been given an early opportunity to challenge the changes at a full hearing. If the Board saw fit after the hearing to make any of the route changes permanent, the resulting certificate modifications would be presented to the President for his review. *See* Executive Order No. 11,920, 12 Weekly Compilation of Presidential Documents 1040 (June 10, 1976) (establishing procedures for presidential review of CAB decisions).

Since the Court found that TWA, Pan Am and the Board had relied upon the validity of the Board's order in planning operations, the Court stayed that portion of its order vacating Board action for 60 days to allow a transition back to the route authority existing prior to January 3, 1975.

AVIATION CONSUMER ACTION PROJECT v. CIVIL AERONAUTICS BOARD[14]

This action was brought under the Freedom of Information Act (FOIA), 5 U.S.C. §552, to compel the defendant, Civil Aeronautics Board (CAB), to produce a Board decision pertaining to the merger of Eastern Airlines, Inc., (Eastern) and Caribbean-Atlantic Airlines, Inc. (Caribbean). In addition, the plaintiff, Aviation Consumer Action Project (ACAP), sought to enjoin the CAB from failing to disclose future similar decisions until approved by the President.

By decision dated August 3, 1972, the CAB disapproved the proposed Eastern-Caribbean merger.[15] Pursuant to statutory authority, the President, by letter dated October 19, 1972 returned the decision to the Board ordering further consideration. On October 30, 1972, the Board published its August 3, 1972 opinion and, by supplemental opinion of February 2, 1973, disapproved the merger for the second time. The President then directed the CAB to approve the merger on April 11, 1973. Plaintiff, on February 23, 1973, requested access to the Board's supplemental opinion of February 2, 1973. The CAB denied plaintiff's request by letter dated March 6, 1973. The document in question was made public on April 19, 1973, subsequent to presidential action on the Board's decision.

Plaintiff contends that the FOIA requires public disclosure of Board decisions as soon as such decisions have been transmitted to the President and seeks an order permanently enjoining defendant from withholding any CAB decision once it has been submitted to the President.

Defendant maintains that disclosure is prohibited by Section 801 of the Federal Aviation Act (FAA), 49 U.S.C. §1461, and that such prohibition triggers exemption 3 of the FOIA, 5 U.S.C. §522(b)(3). Alternatively, the Board asserted that the document was exempt from disclosure under exemption 5 of the FOIA, 5 U.S.C. §552(b)(5).

5 U.S.C. §552(b)(3) exempts from disclosure those matters which are "specifically exempted from disclosure by statute." The Board argues that

only after presidential approval or disapproval of a Board order or opinion can the decision be made public by virtue of the language of 49 U.S.C. §1461(a), which provides:

> The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. *Copies of all applications in respect to such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.* (emphasis added)

The Court found that this section of the FAA prohibited publication before submission to the President. However, the Court did not find an express prohibition of non-publication between the date of submission and the date of presidential action. Additionally, the Court found that *Chicago & Southern Airlines v. Waterman S.S. Corp*, 333 U.S. 103 (1948) did not prohibit publication and ultimately held that Section 1461(a) did not prohibit disclosures of Board decisions after their submission to the President.

The CAB broadly argued that 5 U.S.C. §552(b)(5) provides an exemption for such decisions since the section exempts "interagency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), the Court explained that exemption 5 was intended to protect documents which would be privileged within a civil discovery context. The Court went on to say:

> As in *Sears*, the privilege asserted here is the generally recognized privilege for confidential inter-agency advisory opinions, disclosure of which would be injurious to the consultative functions of government. *Id.* In determining the applicability of the privilege, therefore, this Court must, within the context of this case, look to the privilege's underlying policy of protecting the decision making processes of government agencies, determine whether publication prior to Presi-

dential action would inhibit "the frank discussion of legal and policy matters" within the agency, or would otherwise cause "injury to the quality of agency decisions." 421 U.S. at 150-51.

The Court reasoned that since Board members anticipate the eventual publication of their opinions subsequent to presidential action, and since views expressed in the opinions would be no less candid if publication occurred prior to presidential action, and finally, since no inhibitions upon presidential action could result by virtue of publication, the Court resolved that exemption 5 was inapplicable and enjoined the CAB from withholding decisions from the public after transmittal to the President. However, the Court advised that:

> [D]isclosure of material in the decisions which would be harmful to the foreign policy or national security of the United States can be prevented by classification pursuant to Executive Order 11652.

CAB AMENDMENT REQUIRES WRITTEN REQUESTS UNDER FREEDOM OF INFORMATION ACT

Part 310 of the Civil Aeronautics Board's Procedural Regulations[16] sets forth procedures for inspection and copying of Board opinions, orders and records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §552. Section 310.6 establishes procedures for requesting records and makes provision requests made in person, by telephone or in writing.

Recently, the Board has found an increase in the number of oral requests and found it necessary to establish a more efficient methodology to assure complete, accurate and timely records of requests and responses. The Board finds this is required to obviate disputes regarding the dates and contents of oral conversations. Therefore, it is the Board's belief that a requirement necessitating written requests under the Freedom of Information Act will solve the present administrative problems as well as more efficiently allocate staff resources. The Board amended Section 310.6 "to eliminate the possibility of oral requests and to require specific information which [would] be helpful in answering written FOIA requests" as follows:

> §310.6 *Procedures for requesting records.*
>
> (a) All requests for Board records made pursuant to the Freedom of Information Act (FOIA) shall be in writing and conform to

the requirements of this section. Oral requests will not be accepted as FOIA requests unless they are reduced to writing and conform to the requirements of this section.

(b) FOIA requests for records listed in Appendix A hereto shall be made to the office listed in Appendix A as the location of the record, and all other FOIA requests shall be made to the Office of the Secretary. Requests shall be mailed to the appropriate office, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428 or delivered in person to that office during the Board's regular business hours.

(c) FOIA requests shall be captioned "FREEDOM OF INFORMATION ACT REQUEST." This caption shall appear on the request and on the envelope if one is used. Such request, shall be dated, shall list the address of the person making the request and, for each document requested, shall set out all information known to the person making the request which would be helpful in identifying and locating the document, and any known relevant dates or form/report numbers. At the requester's option, a telephone number may be included. The requester shall specify whether personal inspection or copies of the record(s) or both are desired.

(d) Failure to address or mark the envelope and the request in accordance with paragraphs (b) and (c) of this section will result in the request being deemed to have been received on the date the request is determined to be in fact an FOIA request. In such cases, the requester shall be advised of the actual date of receipt.

(e) Where a requested file or record does contain exempt information, the file or a copy of the record will be made available with appropriate deletions whenever this can be done without revealing the exempted information. Although the Board's staff need not honor blanket or generalized requests for records, it will endeavor to do so if compliance would not unduly burden or interfere with Board operations because of the staff time consumed or the resulting disruption of files.

Since oral requests under FOIA were often denied orally, the Board also determined to amend Section 310.9 to require that all refusals to FOIA requests be communicated in written form. The amendment is to read as follows:

§310.9 *Refusal to make record available.*

* * *

(b) Where the material requested is not a record, is an exempted record, or is otherwise unavailable, the person making the request will be so informed in writing by the office to which the request was made. The notification shall include a reference to the specific exemption under this regulation and the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld and contain a description of the appeal procedure within the agency and of the ultimate availability of judicial review as set forth in paragraph (e) of this section. A copy of all denial letters and all written statements explaining why exempt records have been withheld will be collected and maintained for public inspection in the Public Reference Room.

* * *

(Sec. 204(a) of the Federal Act of 1958, as amended, 72 Stat. 743, 49 U.S.C. 1324, and the Freedom of Information Act, 81 Stat. 54, 5 U.S.C. 552).

The Civil Aeronautics Board announced the amendments in the adoption of Regulation PR-153 on July 29, 1976, to become effective August 4, 1976.

PROPOSED UPGRADING OF AIRPORT MEDICAL FACILITIES

Based upon Federal Aviation Administration (FAA) results obtained from its annual inspection of certified airports, the FAA has issued a Notice of Proposed Rule Making (Notice No. 76-6) to require airports receiving air carrier service to have a detailed medical plan for coping with accidents and other emergencies. Current FAA regulations governing airport certification merely require that medical services be provided by airport operators.

Under the FAA's present proposal, airport operators would have to describe emergency plans and facilities and list agencies and personnel that have agreed to provide treatment and transportation services. The services would have to be able to accomodate the "maximum number of persons who might be on board the largest aircraft authorized to serve the airport."

Those items that the FAA has proposed be included in the emergency plan are as follows:

*name, location and emergency capability of participating hospitals and other medical facilities;

*name and location of each rescue squad, ambulance service and/or military installation under agreement to provide transportation and/or medical assistance;

*the number of surface vehicles and aircraft to be provided by any cooperating medical or non-medical agencies, facilities or personnel;

*designated building or areas for sheltering passengers and crew members and for holding and identifying deceased persons;

*name and location of each safety or security agency under agreement to provide forces for traffic or crowd control.

In addition, the FAA would require airport operators to show that the emergency plan was developed in cooperation with all appropriate parties affected by the plan's implementation. In particular, the FAA is concerned that coordination be established with law enforcement, firefighting, and rescue and medical organizations.

DABS

On March 4, 1976, the Federal Aviation Administration announced that an $11.9 million dollar contract had been awarded to Texas Instruments Inc. of Dallas, Texas, for the development of a new air traffic control radar beacon system to improve the accuracy and reliability of aircraft surveillance and provide "data link" communications between pilots and controllers.

The new system is to be known as the Discrete Address Beacon System (DABS) and the FAA describes it as a key element in its plan "for the evolutionary upgrading of the automated air traffic control system to accommodate the projected traffic loads of the 1980's and beyond."

The FAA characterized DABS as "an advanced version of the present air traffic control radar beacon system—also known as 'secondary radar'—in which an airborne transponder signals aircraft identity and altitude when triggered by ground interrogators mounted on FAA radar antennas." The information is processed and then immediately reproduced on radar scopes used by air traffic controllers.

Equipment, currently in operation, occasionally garbles transponder replies. This is due to overlapping of aircraft in high-density traffic areas.

DABS will be particularly advantageous in these areas since it will have the capability to interrogate and receive transponder replies from specific aircraft rather than from all aircraft in close proximity to one another within a "zone of coverage."

DABS will also enhance the development and implementation of a ground based collision avoidance service called Intermittent Positive Control (IPC). IPC will involve air traffic control computers tracking aircraft using transponder and other information and flashing a warning via the data link when potential traffic conflicts are detected.

The DABS equipment will possess a capacity of 16,777,216 codes which is greatly in excess of the 4,096 code capacity of present radar beacon units. This will eventually permit a permanent industry code assignment to all operating aircraft. Under its contract, Texas Instruments will deliver the first ground sensor in 1977 and the FAA will begin its first testing.

LOOSE MATCHBOOKS CLASSIFIED AS HAZARDOUS MATERIALS

On June 22, 1976, the Federal Aviation Administration (FAA) announced that it was both dangerous and illegal to carry loose matchbooks in luggage in air transportation. The FAA has classified matches as hazardous since the heads are composed of a flammable solid.

In support of its ruling, the FAA noted that it had received past reports of matches starting luggage fires. In one case, a fire was discovered by a baggage handler who noticed smoke emanating from a suitcase while it was being unloaded from the baggage hatch. In another case, two books of matches caught fire in a suitcase containing 89 other books of matches which could have ignited.

The FAA cautioned that fires can start when the cover of one matchbook is open and aircraft vibration cause the exposed matches to rub across the striking strip of another matchbook. Ordinarily, this process results in small, smoldering fires that merely damage the contents of one suitcase. However, in one instance, an explosion occurred when a fire ignited the contents of a can of hair spray.

Thus, the FAA has ruled that persons carrying loose book matches in carry-on or checked baggage be subject to fines for carrying hazardous materials on board an aircraft in violation of FAA regulations. The

penalty for violation is a fine of up to $10,000. If criminal intent can be proven, the maximum penalty is a $25,000 fine, five years in prison, or both.

FAA MONITORS CONCORDE ENVIRONMENTAL EFFECTS[18]

As part of the decision rendered on February 4, 1976 authorizing two daily Concorde operations at Washington's Dulles International Airport and four at New York's Kennedy International Airport for a 16 month trial period, Transportation Secretary William T. Coleman, Jr. assigned responsibility to the Federal Aviation Administration (FAA) to monitor Concorde flights. On May 18, 1976, prior to the inaugural flight scheduled for May 24, 1976, the FAA announced its primary objectives for Concorde monitoring operations. The objectives were established subsequent to consultation with representatives of the National Aeronautics and Space Administration, Environmental Protection Agency, and local governments in New York and Virginia and were set forth as follows:

*To measure and then compare the environmental impact of noise and low altitude emissions to that reported in the Final Environmental Impact Statement on the Concorde.

*To determine the response of the airport communities to Concorde operations.

*To measure low frequency noise vibrations on buildings near the airport, including historical sites.

*To confirm or disprove any allegations of sonic booms caused by Concorde operations.

Noise monitoring began in the Dulles Airport area in mid-May 1976, and involved information collection designed to form a data base to compare the Concorde with regularly scheduled air carriers and other aircraft. In cooperation with local government authorities, the FAA selected fifteen monitoring sites. Eight of the sites were designed to provide both instrument readings and graphic noise data recordings on a 24 hour basis for comparisons. The remaining monitor sites record noise levels only during Concorde operations. In addition, the effect of low frequency noise vibrations on buildings in close proximity to airports was measured by NASA.

On June 11, 1976, the FAA released its initial report on Concorde operations at Dulles Airport for the period of May 24 through May 31, 1976. The report included data on noise levels, engine emissions, vibra-

tion effects and local community reactions. The FAA did not attempt to draw averages or other statistical data since there were only 12 Concorde operations during the subject period which thereby created a very limited sampling. FAA highlights of the report included:

*Approach and departure noise levels for the Concorde were comparable to those published in the FAA's Environmental Impact Statement, released in November 1975. Approach noise levels one nautical mile from the runway threshold ranged from 109.6 to 120.6 EPNdB, compared to 116.5 EPNdB measured under standardized FAR 36 test conditions. Departure noise levels 3.5 nautical miles from brake release ranged from 111.2 to 125.2 EPNdB, compared to 119.5 EPNdB measured under the standardized conditions.

*No sonic booms were detected along the East Coast during Concorde arrivals or departures.

*The Dulles Airport Sound Complaint Center received 58 calls concerning Concorde operations—47 complaints and 11 favorable comments.

*Structural vibrations measured at Sully Plantation by NASA engineers indicated that Concorde operations caused more structural vibrations than other aircraft, but not as much as non-aviation sources such as touring groups and a vacuum cleaner.

Future monitoring reports will be issued on a monthly basis and may be obtained from the Department of Transportation.

CONCORDE OPERATIONS[18]

On May 19, 1976, the United States Court of Appeals for the District of Columbia cleared the way for the May 24, 1976 landing of the Concorde at Washington's Dulles Airport. The Court ruled that the 16-month trial period that had been authorized on February 4, 1976 by the U.S. Secretary of Transportation was not arbitrary, capricious or otherwise in violation of the law. The Court rejected the argument of the Environmental Defense Fund that the Secretary of Transportation had not sufficiently considered noise and other environmental problems.

Fairfax County, one of the two Virginia counties where Dulles is located, has issued an ordinance aimed at keeping the Concorde from landing. Whether the County Ordinance will affect future Concorde service is uncertain at this time.

The Concorde's service to Kennedy Airport in New York has been temporarily blocked due to a ban imposed by the Port Authority of New York and New Jersey. The foreign carriers are fighting the ban in the Federal District Court in Manhattan, and a federal court hearing has been scheduled.

On June 28, 1976, the U.S. House of Representatives showed its unwillingness to interfere with the Secretary of Transportation's decision by defeating three amendments to the Transportation Department authorization bill which sought to ban the Concorde from U.S. airports.

Meanwhile, the government of India refused to allow supersonic flights over Indian territory partially because of the Indian fear that overflight will have an injurious effect on the health of the Indian people.

STRATOSPHERIC MONITORING AGREEMENT

On May 5, 1976, the United States, the United Kingdom and France agreed to undertake a five-year cooperative effort designed to achieve a better understanding of the potential depletion of the ozone layer and other possible modifications of the upper atmosphere caused by such man-related substances as aviation emissions, fluoro-carbons, and other chemicals. Negotiations on this agreement were initiated as the result of a request by the United States Secretary of Transportation in his February 4, 1976 decision which authorized the Concorde SST landing rights for a 16-month trial period.[19]

The agreement specifically calls for collaboration with the World Meteorological Organization, the United Nations Environment Program, and the International Civil Aviation Organization to, respectively, expand global ozone monitoring capabilities, increase research on the biological and climatic impacts of stratospheric modification, and evaluate the need for international stratospheric-pollution standards for civil aviation. The agreement will also build upon a variety of cooperative stratospheric-related programs and activities already being carried out by technical agencies of the three countries.

Under the terms of the agreement, the three governments will seek ways to improve the collection, processing, exchange and analysis of stratospheric ozone data, expand the exchange of information on stratospheric research and analysis programs underway or planned in the three coun-

tries, and pursue opportunities for new collaborative research. Provision is made for joint analysis of the state of knowledge about trends in stratospheric ozone levels, with recommendations for possible improvements in existing ozone-monitoring networks.

Participating U.S. organizations include the Federal Aviation Administration, National Oceanic and Atmospheric Administration, National Aeronautics and Space Administration, Department of Defense, and the Environmental Protection Agency. The Department of the Environment will coordinate the United Kingdom's participation and in France the Committee on Coordinated Action in regard to the Stratosphere of the General Delegation on Scientific and Technological Research (DGRST) and the Committee on Consequences of Stratospheric Flight (COVOS) will organize the research.

"BUMPING" — *NADER v. ALLEGHENY AIRLINES, INC.*[20]

On June 7, 1976, the U.S. Supreme Court reversed a decision of the Court of Appeals,[21] and held that the petitioner (Ralph Nader) who was "bumped" from a flight reservations, had a common law cause of action based on alleged fraudulent misrepresentation by the airline. The ruling further decided that it was not necessary for Nader to first obtain a ruling from the CAB that the practice was unfair or deceptive. The case arose from an incident occuring on April 28, 1972, when Mr. Nader was denied access to a flight on which he had previously obtained a reservation. The reservation was not honored because the airlines had accepted 107 reservations on a flight where only 100 seats were actually available.

The Supreme Court held that §411 of the Federal Aviation Act of 1958[22], which allows the CAB to investigate and determine whether any air carrier has engaged in unfair or deceptive practices, is not coextensive with a breach of duty under common law. The Court in its holding further relied on §1106 of the Act which provides that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The ruling is certain to affect the manner in which the airlines accept reservations for flight service.

AIRLINE ROUTES

Miami—Grand Cayman Market: U.S. flag service in the Miami-Grand Cayman market was awarded to a local service air carrier to strengthen its route system and reduce its dependence on federal subsidies and because the carrier would have the greatest incentive to provide service responsive to the requirements of the market.

PERU GRANTS AVIATION PERMIT

The government of Peru has renewed the Faucett Aviation Company's permit to operate for 5 years, to provide a regular national air transportation service for passengers, freight and mail covering the entire national territory. The operating permit will expire on February 28, 1979. The roster set by Faucett will have to be approved by the General Department of Air Transportation and Communications. In accordance with the terms of Ministerial Resolution No. 01-TC/AE, the company's frequencies and itineraries will be approved by the General Department of Air Transportation.

MULTILATERAL TREATY INFORMATION

Protocol relating to an amendment to the Convention on International Civil Aviation (TIAS 1591). Done at Rome September 15, 1962. *Entered into force* September 11, 1975. Ratifications deposited: Lesotho — September 11, 1975; U.S.S.R. — September 4, 1975; Proclaimed by the President of the U.S. — December 16, 1975.

BILATERAL TREATIES WITH THE UNITED STATES

Brazil

Agreement permitting Brazilian built planes and aviation equipment to be used in U.S. territoy. Signed at Brasilia, Brazil, in June 1976.

Colombia

Agreement relating to the sale of six C-47 aircraft to Colombia for civilian cargo and passenger service. Signed at Bogota April 21, 1976. Entered into force April 21, 1976.

Ecuador

Agreement supplementing the commercial air transport agreement of January 8, 1947, as amended (TIAS 1606, 2196). Effected by exchange of notes at Quito, December 31, 1975. Entered into force December 31, 1975.

Mexico

Agreement extending the air transport agreement of August 15, 1960, as amended and extended (TIAS 4675, 7167). Effected by exchange of notes at Mexico and Tlatelolco, December 10 and 15, 1975. Entered into force December 15, 1975.

Agreement relating to the provision of two helicopters by the U.S. to support U.S.-Mexican efforts to curb the production and traffic in illegal narcotics. Effected by exchange of letters in Mexico, October 24 and 29, 1975. Entered into force October 29, 1975.

Agreement relating to the provision of aircraft by the U.S. to support U.S. - Mexican efforts to curb the production and traffic in illegal narcotics. Effected by exchange of letters at Mexico, January 29, 1976. Entered into force January 29, 1976.

Agreement relating to the provision of supplies, equipment, and services by the U.S. to support U.S. - Mexican efforts to curb the production and traffic in illegal narcotics. Effected by exchange of letters in Mexico, February 4, 1975. Entered into force February 4, 1976.

RECENT CASES

Herring v. Administrator, Federal Aviation Adm., 532 F.2d 1003 (5th Cir. 1976), in an action to suspend a pilot's certificate for violation of Federal Aviation Regulations, an administrative law judge could sustain charges against the pilot as to preflight action and careless operation although there was no examination of the plane itself or records of its owner immediately after the incident involving engine failure. *Golden Holiday Tours v. C.A.B.*, 531 F.2d 624 (D.C. Cir. 1976), CAB rejection of inclusive tour operator's prospective amendment, whereby the operator sought to add seating on charter flights returning tour participants from Europe to the U.S. on the ground that the selling of tour tickets utilizing the additional space more than 15 days prior to the filing of the amendment was arbitrary and an abuse of discretion. *Udseth v. United*

States, 530 F.2d 860 (10th Cir. 1976), in the absence of evidence to establish whether the decedent or his government-employed flight instructor was flying the plane at the time of the accident or evidence of who was negligent, liability could not be imposed on the flight instructor. *Graham v. National Transportation Safety Board*, 530 F.2d 317 (8th Cir. 1976), there was no denial of due process when the NTSB rejected the applicant for an airman's first class medical certificate because of prior history of alcoholism.

Stern v. Butterfield, 529 F.2d 407 (5th Cir. 1976), in an action by NTSB to revoke a pilot certificate, there was no error in the administrator's use of emergency procedures and lack of action did not violate the pilot's right of due process. *Falcones v. Lan Chile Airlines*, 13 Avi. 18,366, the two-year statute of limitations of the Warsaw Convention barred a passenger's personal injury action against the air carrier. *United States v. One Douglas* A - 26B Aircraft, 529 F.2d 1176 (5th Cir. 1976), an aircraft, which landed in Jamaica on a flight to Colombia, was exported without a license and was forfeited to the U.S. A defense of equitable estoppel or good faith was not established against the forfeiture claim. *Reed v. Wiser*, 13 Avi. 18,426, the term "carrier" as used in the Warsaw Convention refers only to the corporate entity and does not include the employees and agents acting on the carrier's behalf. Accordingly, the Convention does not limit liability of employees or agents of an air carrier for negligent acts. *Dear v. United States*, 13 Avi. 18,432, when an aircraft had encountered icing conditions, the air traffic controller's actions were not culpable negligence proximately causing the crash of the aircraft. *Idabel National Bank v. Tucker*, 544 P.2d 1287 (Okla. Ct. App. 1975), recording of a mortgage on an airplane under the Federal Aviation Act will not save the mortgage if it is void under state law.

NOTES

[1]37 F.R. 15518, August 3, 1972.

[2]American Airlines, Inc. conceded the Board might have the power to regulate air carrier employment practices, but it cautioned that such regulation should be carefully fashioned to avoid duplication of the actions of other agencies.

[3]*NAACP v. FPC*, ... U.S. ....., 44 Law Week 4659, 4662 (1976).

[4]*NAACP v. FPC, supra*, at 4662, n. 2.

[5]*NAACP v. FPC, supra*, at 4661.

[6]Citing *Palisades Citizens Association, Inc. v. CAB*, 420 F.2d 188 (D.C. Cir. 1969) which found that the Board, in a route proceeding, was bound to consider

the environmental impact of the route award as an element of the public interest. The Board, at the time of the determination of this case, had no explicit environmental responsibility although other governmental departments had such duties. *Cf. Denver Rio Grande Western Railroad Company v. U.S.*, 387 U.S. 458 (1967).

[7]The Board cited *Great Lakes Airlines, Inc. v. CAB*, 294 F.2d 217 (D.C. Cir., 1961), *cert. denied*, 366 U.S. 965 (1961).

[8]See 14 C.F.R. Part 302 generally and specifically Parts 302.14 and 302.15.

[9]Section 801(a) provides in pertinent part:

(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation * * * shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

[10]Section 416(b)(1) provides:

(b)(1) The Board, from time to time and to the extent necessary, may . . . exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest. The Board also exempted the carriers from certain provisions of section 401, 49 U.S.C. §1371 which provides in part:

(a) Essentiality.

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

* * *

(e) Terms, conditions, and limitations.

(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

[11]Section 401(j) provides:

No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Board, unless, upon the application of such air carrier, after notice and hearing, the Board shall find such abandonment to be in the public interest. Any interested person may file with the Board a protest or memorandum of opposition to or in support of any such abandonment. The Board may, by regulation or otherwise, authorize such temporary suspension of service as may be in the public interest.

[12]Pursuant to section 408(b), the Board is required to hold a hearing prior to the approval of any contract or arrangement which falls within section 408(a).

[13]The *Transatlantic Route Proceeding*, was designed to consider permanent changes in Transatlantic routes, including some routes covered in the TWA-Pan Am agreement. Any route changes flowing from the proceeding would presumably be submitted for Presidenial approval under section 801 of the Act.

[14]Civil Action No. 413-73 (D.C.D.C. May 10, 1976).

[15]49 *U.S.C.* §1461 vests the CAB with the duty to review and issue decisions regarding proposed mergers of domestic and foreign airlines.

[16]14 C.F.R. Part 310.

[17]*See* 8 Law. Am. 566-567 (1976).

[18]*Id.*

[19]*Id.*

[20]96 S. Ct. 1978 (1976)

[21]512 F.2d 527 (D.C. Cir. 1975)

[22]49 U.S.C. §1381 (1970).