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AVIATION

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AIRLINE SUBSIDIES AND POOLING

The increase in the cost of fuel resulting from the world's energy crisis has seriously affected U.S. international air carriers. Citing the fact that the cost of fuel used on international air routes, because it was not subject to Federal price controls, increased up to three times faster than that of domestic jet fuel, both Pan Am and TWA early in 1974 indicated the need for subsidies to cover higher fuel bills since November 1, 1973. The airlines position was endorsed by the Chairman of the Civil Aeronautics Board in an appearance before the Aviation Subcommittee of the Senate's Commerce Committee.

While the above matter remained unresolved, Pan Am in late March asked the Board for authority to negotiate consolidation of trans-Atlantic services with TWA on the grounds that "skyrocketing" fuel prices had plunged it into a "serious financial crisis." Specifically, Pan Am sought permission to discuss with TWA "possible consolidation of operations, coordinated services and sharing of revenues on trans-Atlantic routes." TWA endorsed Pan Am's position before the Board and filed a petition of its own.

The airlines' position found little favor with the Justice Department which, in a brief filed with the Board in early April, stated that the proposal would diminish competition and harm the public. The Department's Anti-Trust Division cited that (1) pooling would not make the financial impact of the fuel situation any less severe, (2) international air travelers are better served by the present system of competition among U.S. carriers than by pooling, and that (3) pooling arrangements inevitably diminish carrier's incentives to provide efficient, economical and adequate service, among other reasons for objecting to the airlines' request. How-

ever, on April 19, the Board granted the airlines concerned authority to work out a plan for sharing revenues on operations on flights between the United States and Europe.

Prior to the above ruling by the Board, i.e. on April 3, both Pan Am and TWA formally asked the Board for substantial subsidies to enable them to continue overseas service. Pan Am asked for \$194 million; TWA did not specify an amount. The subsidy requests were made under provisions of the Federal Aviation Act of 1958 which provide that the Board may ask Congress for subsidy funds to enable an airline to continue operations required for the nation's commerce, its postal service and its national defense. Subsidies for Pan Am and TWA, if granted, would be the first for any major United States airlines since 1968 payments to Northeast Airlines for its New England operations. Northeast has since merged with Delta. The nation's eight regional or local-service airlines are receiving about \$69 million in subsidies in the current fiscal year to compensate them for losses sustained in maintaining uneconomical service to numerous small cities and towns.

In still another move related to the fuel crisis, Continental Airlines in April filed suit against its three major suppliers of jet fuel, alleging they conspired to raise fuel prices in violation of Federal price limits. The suit contends the price rises are costing Continental more than \$25 million a year, and the airline seeks triple damages. Defendants are the EXXON Corporation, the Shell Oil Company and the Phillips Petroleum Corporation. Continental also charges in the suit that the oil companies violated Federal antitrust laws and conspired to breach their fuel contracts with the airline.

FARES

In March, 1974, the CAB ordered U.S. scheduled airlines to make two major adjustments in the price of passenger tickets. The first change required airlines to more equitably price first-class and coach tickets. In order to pay for the level of service given, first-class passenger ticket fares will rise, but coach ticket prices must decline, ending the long standing support for first-class service. In a second ruling, the CAB required U.S. airlines to realign ticket prices to more reasonably represent the distance travelled. Passenger tickets for cross-country or other lengthy inter-state flights will decline in price, while tickets for shorter flights will be more expensive. The CAB, in addition, announced that it would

investigate the lawful level of night coach fares. The Board indicated that it would direct its attentions to such areas as traffic control, cost savings, and the effects on equipment usage.

VIP CLUBS

On February 12 the U.S. CAB ordered all airlines to open their VIP Clubs to the general public. The clubs, which for a long time offered luxury services to special customers and friends of certain airlines, were long under attack on the grounds that the travelling public overall was paying for the amenities being shown to a selected few. The CAB order resulted from a "one man crusade" waged by a Providence, Rhode Island businessman who was refused membership in American's exclusive Admiral's Club. The initial incident took place in December, 1965 and culminated in the Board's order in 1974. The order does not do away with the clubs, nor does it force the airlines to admit anyone to the club premises. The airlines retain the right to charge for memberships in the club, without which the average traveller's position remains unchanged. The annual dues amount to about \$25, but there appears to be no great rush on the part of the public to "sign up."

SPACE VEHICLES

On April 1, a \$22 million runway was begun at Cape Canaveral, Florida for landing of space shuttle vehicles. Construction of the runway is part of a \$52 billion program to develop shuttle craft to carry out hundreds of orbital missions in the 1980's. Basic to the program is a delta winged "orbiter" which will be launched from Florida, riding piggy-back on recoverable solid-fuel rockets and a disposable liquid-fuel tank.

Completion of the runway which is to be 300 feet wide, 15,000 feet long and 16 inches thick is scheduled for July, 1976. The dimensions of the runway, far in excess of those required at commercial airports, are necessary to accommodate an 83-ton craft, returning from space at a 15-to-20 degree angle, at a speed of nearly 160 knots, with only a single opportunity to land and only small onboard engines for maneuvering. To reduce the speed of the 122-foot-long shuttle craft, which is compared to a DC-9 jetliner in size, the astronaut pilots will have the help of parachutes, brakes on the wheels, and a net at the end of the runway.

RADIOACTIVE LEAKAGE

On April 25th, on the same day that a U.S. House of Representatives subcommittee opened hearings on the transportation by air of radioactive materials and other hazardous cargo, the Federal Aviation Administration proposed that all shipments of radioactive isotopes be tested for radiation before they are placed on board of passenger or cargo jetliners. According to the FAA proposed rules, all air shipments of radioactive cargo would be pre-tested before the flights and scanned with radiation monitoring equipments. The use of radiation monitors was also proposed, with a view to checking the cabin floor above the cargo hold before take-off of passenger-carrying jets transporting radioactive materials. A further check would also be made in the cargo compartment after the aircraft has landed and the radioactive material unloaded. In the course of the hearings, the Air Line Pilots Association presented written testimony to the effect that present FAA regulations are ignored by most shippers, and that aircraft "do not afford immediate protection to passengers and crew in preventing leaking fumes, smoke or radiation emanating from cargo, from reaching cabin and cockpit areas."

During the above hearing, the Subcommittee was informed of two incidents concerning a major U.S. airline in which passengers received radiation doses up to twenty five times the level considered generally acceptable for an entire year, and substantially higher doses were received by thirty four persons who handled the packages on the ground. This led to a tracking down of the passengers concerned who fortunately had not experienced any adverse effects. Responding to these incidents the FAA on April 26 published a proposed regulation that would require airlines to scrutinize such shipments better and to use a geiger counter or other devices in the passenger cabins before each flight to assure that there were not dangerous levels of radiation reaching the compartment. The F.A.A. will receive public comments on the proposal before considering its final promulgation.

CONCORDE

Repeated concern continues to be voiced in England about the future of the Concorde supersonic aircraft. The misgivings are mainly in the economic area and stem from the rise in price of each unit, which has climbed from \$16 to \$45 million. The elevated cost per unit, plus the continuous increase in oil prices make for a gloomy picture indeed and

were largely responsible for the British Chancellor of the Exchequer not providing for further spending on development or production of the Concorde "beyond the existing program" in his budget message late in March.

The Concorde project has already cost Britain and France about \$25 billion. Of the sixteen planes scheduled for production, four have been built and only nine have been bought — the latter by State-owned airlines of the two governments. China and Iran have expressed interest but the orders have not been confirmed. U.S. airlines whose orders were vital to the Concorde's success withdrew their options to buy, and their move was followed by other international airlines.

In the light of the above, Britain gives every indication of desiring to withdraw from the project, but France does not appear willing - at this stage - to abandon the venture. On the contrary, it wishes to build nineteen, rather than sixteen, aircraft and to modify the design so the aircraft will be quieter and able to fly more passengers farther. The French position calls for additional substantial outlays, but French authorities argue that the added investment enhances the chances of commercial success, therefore reducing long-range losses. Were Britain to pull out unilaterally she would have to pay penalties to France, but in the absence of a precise agreement on this subject there would almost certainly be a dispute over the amount.

To complicate matters, intense pressure is being put on both governments by the 40,000 aircraft workers in the two countries whose jobs depend on the Concorde. Union representatives, planning their joint strategy in Bristol and Toulouse, sent telegrams to their respective Ministries demanding the program be continued. Adding to the anxieties in the Toulouse area have been layoffs of nine hundred workers since January at the Aerospatiale Company, the French Concorde builder, because of a slowdown in production.

Even if the Concorde is grounded, the Soviet TU-144 is still likely to be in international service within three years. To do so, however, it must overcome the major environmental objections being raised with increasing frequency by many nations of the world.

AIRCRAFT REPAIRS OVERSEAS

In 1948 the Customs Service (a division of the U.S. Treasury Department) promulgated a regulation levying a duty on repairs made

abroad on U.S. ships and aircraft. The duty, amounting to 50% of the cost of repairs, was intended to protect U.S. labor from cheaper labor overseas. In the case of aircraft, the declaration that repairs had been made and payment of the duty were not required under two conditions: (1) the repairs were necessary by stress of flight, and (2) repairs were required for the safety of the aircraft by FAA rules.

In 1973 Customs investigators received information that two U.S. international airlines had had repairs performed abroad without making the required declaration to the Customs Service. Investigators travelled aboard and allegedly drew up a strong case against the airlines, with potential liability of \$2.5 million for one airline and \$1.5 million for the other. These cases prompted a review of the regulation and led to proposed changes in January, 1974 under which only one of the two conditions in paragraph one above need be met. The required declaration may also be avoided if the equipment used in the repairs was manufactured in the U.S., and the work is done by U.S. citizens.

Although the two airlines concerned still face the possibility of penalties for the work done in the past, the revision of the 1948 regulation should accrue to their benefit as well as to the future benefit of all U.S. international air carriers.

DC-10 CRASH

On March 3, 1974, the crash of a Turkish DC-10 Jumbo Jet outside Paris took the lives of 346 persons. As a result, two far-ranging class action suits have been filed in behalf of five United States citizens in U.S. courts, naming the Federal Government and Mc Donnell-Douglas, the DC-10's manufacturer, as co-defendants. Uniquely, punitive as well as compensatory damages are being sought with the punitive figure for the five plaintiffs involved to reach \$33.5 million. The cause of the crash, according to the official report of the French-Turkish Board of Inquiry, announced April 8, 1974, was a faulty cargo door that was torn off in flight.

Prior to this incident, in March of 1972, an American Airlines DC-10, with 56 passengers aboard, had its rear cargo door blown out while over Windsor, Canada. Air immediately rushed into the pressurized cabin causing the cabin floor to collapse, thereby severely damaging the aircraft's control cables located beneath the cabin floor. The American pilot safely landed the aircraft although the rear engine was dead and its rudder snagged.

As a result of the 1972 incident, McDonnell-Douglas instituted improvements of the cargo door's latching mechanism. The National Transportation Safety Board urged the Federal Aviation Administration (FAA) to order two additional design changes: (1) to make it impossible to close the cargo door unless the locking pins were in place, and (2) installation of relief vents between the cargo hold and the passenger cabin so the cabin floor would not collapse. The FAA rejected the Board's suggestion but was disposed to issue a mandatory "airworthiness directive," having the force of law, to insure all DC-10's were fitted with the improved latching mechanism. McDonnell-Douglas successfully argued that it should be permitted to issue "voluntary" service bulletins to its customers, alerting them to the necessity of installing the new cargo door latch; the FAA agreed.

The Turkish DC-10 was delivered in December, 1972 complete with the appropriate maintenance certificate, signed by the manufacturer's employees, indicating the required improvement in the cargo door latch mechanism had been made. It was later revealed that in fact the design change had not been made.

The incident in question, aside from its legal ramifications, has brought into focus the U.S. Government's system for assuring safety in airline travel. Far reaching measures are anticipated and these will affect all key segments of aviation, including the FAA, the National Transportation Safety Board, the manufacturers and the airlines. Ultimately the traveling public will be the beneficiary of the measures taken to revitalize and strengthen those systems designed to prevent accidents in the air.

HIJACKING

A declaration repudiating air hijacking and requesting labor unions to join in the crusade for increased safety measures at airports was passed by the eight country congress of the *Organización Iberoamericana de Pilotos* (Spanish-American Organization of Air Line Pilots) held in Bogotá during March. The thirty-three delegate pilots signed the declaration requesting member associations to work toward the ratification of international agreements by their respective governments, and the signing and enforcement of advisable bilateral agreements; the standardization in all signatory countries of the regulations and sanctions contained in those agreements, so that eventually the same repudiation and sanctions will be observed throughout the world; the application to domestic flights,

under the laws of each country, of the same provisions and penalties which are applicable to international flights; the increase and improvement of security measures observed at the airports; acceptance by the respective governments of the principles that the aircraft commander is the supreme authority, and that commercial aircraft are not war weapons and the lives on board such aircraft are not the lives of soldiers.

RECENT U.S. CASE LAW

Voyager 1000 v. Civil Aeronautics Board, 489 F.2d 792 (1973).

In this case the Court had before it a CAB decision that held a private corporation to be engaged in air commerce without economic authority from the CAB and without safety authority from the FAA. The case involved the following facts. Voyager 1000 was founded as a non-profit corporation whose original plan was to acquire an aircraft for recreational travel for a limited membership of 1000. Dues and an initiation fee were required. After four years of operations, the club, needing additional funds, embarked on a membership drive which included among other things open houses, extensive newspaper advertisements, magazine and radio ads, and the mass mailing of brochures to 100,000 people. Membership in Voyager rose substantially, its flight programs became more and more extensive, and though participation in the flights, elections, and social activities of the club continued to be limited to members, the waiting period between joining the club and taking a flight was eliminated.

The complaint against Voyager alleged that the club was operating as a common carrier for compensation without authority from the Board. The Administrative Law Judge dismissed the complaint; the CAB reversed on the ground that there was insufficient evidence to support dismissal.

The Seventh Circuit at the outset noted that engaging in air transportation was conditioned upon obtaining economic authority from the CAB and safety authority from the FAA, with an exception to this requirement carved out in favor of air travel clubs. Under 14 C.F.R. §§ 123.1 - 53, such a club is described in terms of its differences from the commercial transport business: its operations are non-profit, its schedules sporadic, and its aircraft are operated for relatively small periods of time. The record, however, showed Voyager to have seven aircraft, its own airport terminal, a very large flight frequency, and 43,000 members.

Voyager argued that it was an air travel club because its advertisements were addressed to "members only" and because its avowed purpose was group travel. The Court did not accept these reasons, having found that the only affinity existing among Voyager members was their common interest in travel. The Court was of the opinion that where club-membership affinity relates solely to travel, the nature of the travel services provided by the air travel club must be differentiated from the individually ticketed market. Since Voyager members were eligible to fly as soon as they joined and since there was no prescribed waiting period between making reservations and flying, the Court found a void of evidence to establish sufficient differentiation between Voyager's services and individually ticketed services. Consequently, Voyager was required to cease and desist from engaging in air transportation.

Civil Aeronautics Board v. Aeronautic Travel Corp., 489 F.2d 251 (1974).

In this case the Second Circuit Reviewed an order of the District Court staying a CAB action to enjoin alleged violations of the Federal Aviation Act. The defendants in the District Court had moved to dismiss or stay the proceedings on the ground that the doctrine of primary jurisdiction required the CAB to initially determine the defendants' status as either ticket agents or indirect air carriers. The Second Circuit reversed, holding that it was error to stay the proceedings by applying the doctrine of primary jurisdiction.

The Court found that the CAB has the power to enforce the Federal Aviation Act by two means:

1. suit in the District Court for enforcement purposes, or
2. in-house investigations and orders which can then be enforced in the District Court.

The Second Circuit recognized that the intent of Congress was to give the CAB power to enforce the Act and its own regulations without an initial determination by the Board that they had been violated. The CAB was found to have discretion in choosing appropriate enforcement procedures. It was concluded that, if the CAB chose to resort to the District Court for enforcement, it made little sense to refer the very question at issue back to the Board. Hence, the doctrine of primary jurisdiction was held inapplicable where the CAB itself is party-plaintiff.

Speir v. United States, 485 F.2d 643, (1973).

On October 17, 1973, the United States Court of Claims decided the

above case. Speir was the owner of a 683-acre tract of land located in a sparsely populated area sixteen and a half miles west of Savannah, Georgia. Portions of the tract were used for the growing of crops and for beef cattle raising. Speir also lived in a farm-house on the tract. Aside from the farming operations, the land was used to some extent for the recreational purposes of dove and quail hunting. On October 18, 1967, the United States Army started helicopter training flights from neighboring Hunter Army Airfield. The frequency of these flights varied from 9,000 to 11,000 per month. The flights were six days a week from 7 a.m. until 8 p.m. The helicopters generally flew over Speir's land at a height of less than 500 feet and often as low as 250 feet. Although the flights did not interfere with the crops or cattle, life at the farmhouse was disturbed, i.e., poor television reception, unbearable noise, and the virtual impossibility of face-to-face and telephonic conversations. Additionally, the quail hunting was seriously disrupted.

On the above facts, the Court of Claims held that the flights over Speir's land at low altitude substantially interfered with the use and enjoyment of the property and that an avigation easement was created.

The Court then addressed itself to the nature of the easement: whether a temporary or permanent easement was created. The court noted that the training flights were in existence solely to provide support for the Vietnam conflict. The flights in fact terminated on March 22, 1972, with the winding down of the war. The court viewed the Government's intention as the controlling fact and therefore held the easement to be temporary.

The Court considered lastly the question of compensation, and recognized that the Government was required to pay "just compensation" under the Fifth Amendment, and that the measure of this compensation was fair market value. The compensation also was required to be determined as of the time and place of the taking. The problem in the instant case concerned Speir's contention that he would have developed the land for residential use *but for* the helicopter flights. The court viewed the undeveloped nature of the land, the lack of access roads, and the lack of water and sewer service in deciding that the highest and best use of the land was for agricultural, and not residential, purposes. It found additionally that the helicopter flights did not in fact deprive Speir of an opportunity to develop the land. Damages were left for a subsequent proceeding.

Nader v. Allegheny Airlines, Inc., 365 F.Supp. 128 (1973).

Consumer advocate Ralph Nader had made a confirmed reservation and purchased a ticket for an Allegheny Airlines flight from Washington, D.C. to Hartford, Connecticut. Nader was scheduled to speak to the Connecticut Citizens Action Group. Upon his arrival at National Airport, and after presenting his ticket, Nader was denied boarding because Allegheny had over-sold the flight. In this case, the Court found that Allegheny Airlines had a practice of systematically overbooking its flights by accepting more confirmed reservations and selling more tickets for a flight than the number of seats available on the aircraft. This practice was found to result in denials of boarding to many persons holding confirmed reservations and in severe distress and financial loss to those who had relied upon such confirmed reservations.

Allegheny's advertising had continuously represented to the public that it offered reliable reservation policies. Nothing in that advertising or in the tariffs filed with the CAB was found to clearly advise the public in detail of the intentional practice of overbooking. The CAB requires all airlines to tender compensation to all those who are denied boarding on a flight and does specify in 14 C.F.R. § 250.8 that full judicial redress is an alternative.

The Court found that plaintiff Nader was unreasonably discriminated against under the Federal Aviation Act, Section 404 (b), 49 U.S.C. § 1374(b), and that his reliance on the confirmed reservation was reasonable and was the cause of his injuries and damages. Nader recovered \$7.00 as compensatory damages for the cost of a long distance telephone call and \$3.00 for the additional cost of another ticket. Because of the wanton and malicious actions of Allegheny Airlines, Nader also recovered \$25,000 in punitive damages.

The Court also held that Allegheny had intentionally misrepresented the facts concerning a confirmed reservation and that the Connecticut Citizen Action Group, because of their reliance on the misrepresentation, could recover even in the absence of privity of contract. The consumer group recovered \$1.00 compensatory and \$25,000 punitive damages.

Burnett v. Trans World Airways, Inc., 368 F.Supp. 1152 (1973).

In the *Burnett*, the plaintiffs entered into contracts of carriage with defendant Trans World (hereinafter TWA) for a tour through Asia and certain Mediterranean countries. During the trip the aircraft was hijacked

by members of the Popular Front for the Liberation of Palestine. The diverted aircraft, with all passengers and crew remaining on board, was taken to, and landed in, a dry lake bed in the desert. Plaintiffs were held captive aboard the aircraft for six days, being deprived of regular food and drink, and exposed to the great temperature extremes of the desert. One plaintiff suffered from the swelling of his feet and the filling of his ankles with fluid. Both plaintiffs suffered various other physical ailments. Plaintiffs also experienced severe emotional trauma from the actions of the hijackers, feeling that their lives were in jeopardy.

In this action for damages, plaintiffs sought relief for both bodily injury and mental anguish. The parties agreed that the Warsaw Convention and the Montreal Agreement were applicable, and that an "accident" under those agreements had taken place. The Court framed the issues presented as follows:

- (1) whether mental anguish alone, without accompanying bodily injuries, is compensable under Article 17 of the Warsaw Convention; and
- (2) whether mental anguish resulting from a bodily injury is compensable under Article 17.

Article 17 provides that a carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger in the event of an accident.

The Court observed that the key phrase was "bodily injury" which was required to be interpreted within the context of the French legal meaning. This phrase in French, as used in the original treaty, was *lésion corporelle*. The Court defined its task to be a determination whether mental anguish (*lésion mentale*) was included within bodily injury (*lésion corporelle*). The Court noted at the outset that French law distinguished sharply between the two terms, holding them to be mutually exclusive. This limited language of the treaty gave rise to the inference that recovery for mental anguish alone was precluded.

The remaining issue concerned plaintiffs' contention that they should recover for mental anguish suffered as a result of physical injury. The Court held that mental anguish directly resulting from bodily injury is *damage sustained in the event of bodily injury*, and therefore, within the purview of Art. 17. Emotional distress, when precipitated by the bodily injury, is to be considered part of the bodily injury and compensable if proven.

To be noted also is the fact that the Court rejected TWA's urging of the adoption of a contact rule, i.e., that any bodily injury sustained must be the result of physical contact between the body and another object. This contention was rejected as being contrary to the intent of the Warsaw framers.

Two important cases have recently been decided in United States Courts of Appeal construing various provisions of Title 49 U.S.C. § 1472.

1. *United States v. Dishman*, 486 F.2d 727 (1973). In this case the defendant was charged with attempting to board an aircraft while carrying a concealed .22 caliber starter pistol which was alleged to be a deadly and dangerous weapon. The defendant was arrested after a magnetometer showed the presence of metal on his person. The marshall testified that the "weapon" had eight .22 caliber bores in the cylinder which would allow it to carry blank cartridges. Although the gun had a fixed firing pin, the marshall stated that the gun as presently made was incapable of firing a projectile. The only danger would have been from powder burns, and then only at very close range.

Other testimony showed that the intended use and purpose of the starter pistol was to make a loud pop, similiar to the firing of a toy cap pistol. The barrel was solidly plugged near the end and the holes in the cylinder were partially blocked with metal, thereby being incapable of receiving cartridges.

On appeal from a judgment of conviction, the Ninth Circuit was faced with the problem of construing the "deadly or dangerous weapon" element of the statute. The Court recognized that the statute was purposed to protect the safety of the lives and property of the travelling public by avoiding the ready availability of a "deadly or dangerous weapon" for use in the perpetration of an air crime. It also determined that Congress left the decision in each case to the courts to determine whether a weapon is deadly or dangerous. Two rationales were considered:

a. *Per se* rationale — A dangerous weapon is one likely to produce death or great bodily injury because of the inherent capabilities of the weapon.

b. Use Rationale — Two standards apply in this system. A first consideration is the propensity of the object to cause bodily injury when it is used as a club or bludgeon. An additional standard is based on whether, under the circumstances, a victim could reasonably infer from

the method of use that the pistol was ready to fire so that the victim would be placed in fear.

The difference in the two rationales is clear when one considers an unloaded gun. Under the *per se* rationale, an unloaded gun in a person's pocket is not a deadly or dangerous weapon because of its inherent lack of capacity to inflict injury. The unloaded gun is classed as a deadly weapon only when it is used and the victim believes it to be loaded.

On the instant facts, the Ninth Circuit found that the starter pistol was not a deadly and dangerous weapon *per se* and could only achieve the necessary status under the statute if the defendant had attempted to use the pistol in an attempt to commit a crime. Dishman's conviction was reversed.

2. *United States v. Omirly*, 488 F.2d 353 (1973). This case involved a middle-aged woman who made a singularly inappropriate joke about having a bomb while she was boarding an aircraft. Mrs. Omirly's prosecution and conviction were under Title 49 U.S.C. § 1472(m)(1), which proscribed the furnishing of false information concerning an attempt, as in this case, to board an aircraft with a deadly or dangerous weapon.

The Fourth Circuit was confronted with a difficult problem of statutory construction: whether Title 49 U.S.C. § 1472(m)(1) was inconsistent with, and repugnant to, Title 18 U.S.C. § 35(a) because the latter deals specifically with non-felonious bomb hoaxes. The question of whether the more specific statute should have been applied to Mrs. Omirly was crucial because of the penalty provisions of the respective statutes. Title 49 U.S.C. 1472(m) is a *criminal* proceeding carrying the penalty of up to 1 year in jail and a \$1000 fine, whereas Title 18 U.S.C. § 35(a) is a *civil* proceeding carrying the sole penalty of a fine.

In relying on general principles of statutory construction, the Court took the view that the two statutes were repugnant and that Title 18 U.S.C. § 35(a) removed non-malicious bomb hoaxes from the scope of Title 49 U.S.C. § 1472(m)(1). In holding that all prosecutions for non-malicious threats must be under the provisions of Title 18, the Court relied on the legislative history and purpose of the instant statutes and the policy statement that a civil penalty would be more appropriate against jokesters. Mrs. Omirly's conviction was reversed.