Delta Air Lines, Inc. v. CAB: Air Line Control of Radioactive Cargo?

The use of radioactive materials has increased dramatically in recent years. Whether one views this development favorably or unfavorably, there is no dispute that the transportation of these materials necessitates recognition of numerous problems. Since no single federal agency has exclusive jurisdiction in this area, the regulations which have evolved are complicated, sometimes overlapping, and confusing to the persons affected by them. In far too many cases, the regulations have not been followed or have been ignored.

The transportation of radioactive materials by air poses special problems, for two reasons. First, a possibility exists that significant radiation will be released if a plane carrying radionuclides crashes.[1] Second, with air travel there is necessarily a time lag between the discovery of an emergency and corrective action. Thus, a package emitting high levels of radiation can create a more serious threat in air transport than in other transportation modes.

Sensitivity to these problems, especially the latter one, has led private groups to press for stricter control of air shipments of radioactive materials. For example, since February 1975 the Air Line Pilots Association (ALPA) has refused to fly airplanes carrying radioactive materials unless air carriage is essential for reasons of human health, as may be the case with shipments of radiopharmaceuticals. More recently, several air lines have proposed tariff revisions[2] generally following the guidelines of the ALPA embargo. Because the shipping policies advocated by ALPA and the air lines are more restrictive than existing federal regulations, ques-

1. In response to this problem, Congress has recently prohibited the Nuclear Regulatory Commission from licensing air shipments of plutonium (except plutonium intended for human medical use) until a container has been developed which can withstand crash impact. 42 U.S.C.A. § 5841 note (Supp. 1976). Similar restrictions have been placed on plutonium shipments by the Energy Research and Development Administration. Pub. L. No. 94-187, §§ 501-02 (Dec. 31, 1975). Plutonium is an extremely toxic radionuclide which is present in the nuclear energy fuel cycle.

2. Tariffs are filed by the air lines with the Civil Aeronautics Board (CAB) and show "all classifications, rules, regulations, practices, and services" related to the transportation provided by the air lines. 14 C.F.R. § 221.3(a) (1976). An air line revision of a tariff goes into effect after thirty days' notice unless the CAB suspends the revision in order to investigate its lawfulness. 49 U.S.C. §§ 1373(c), 1482(g) (1970).

Published by Digital Commons @ DU, 1976

tions are raised as to the legitimate role held by private groups such as ALPA and the air lines in affecting regulatory policy and also as to ultimate federal agency responsibility for safe air transport of radioactive materials.

It is the purpose of this note to address these questions by examining *Delta Air Lines, Inc. v. CAB*,[3] a recent case involving the air line tariff revisions mentioned above. Here, the Civil Aeronautics Board (CAB) summarily rejected tariff revisions on the grounds that they were inconsistent with a CAB regulation requiring tariff conformity with federal safety regulations. In vacating the rejection orders of the CAB and remanding the case to the agency, the court held that the CAB had ignored its statutory duty when it rejected the tariffs without first affording the air lines a hearing.[4]

The impact of the *Delta* decision, however, extends beyond this narrow procedural holding to a four-step process specified by the court for the mandated CAB hearing. Accordingly, this note will consider the mechanics and substance of this hearing procedure by developing two discussion sections. First, statutes and regulations pertaining to air shipments of radioactive materials are reviewed, with particular attention given to the regulatory interplay among federal agencies. The second section analyzes the four-step hearing outlined by the *Delta* court, reviews several cases which preceded *Delta* and laid a foundation therefor, and describes possible rationales for CAB approval of the tariff revisions.

I. Federal Regulation of Air Shipments of Radioactive Materials

To one degree or another, the safe carriage of radioactive materials by air is the responsibility of several different federal agencies, including the CAB, the Federal Aviation Administration (FAA), the Materials Transportation Bureau (MTB), and the Nuclear Regulatory Commission (NRC).[5] Since NRC regulations do not apply to air carriers,[6] only the other

3. No. 74-1984 (D.C. Cir., June 22, 1976; as amended on denial of rehearing, Aug. 20, 1976) [hereinafter cited as Delta]. The CAB has decided not to appeal this decision to the United States Supreme Court.

4. In the court's view, the CAB could reject the tariff revisions without a hearing only if they were technically deficient or if they were "substantive nullities." Delta at 8, 32. Since the tariffs were filed in proper form and were not on their face in violation of federal law or regulation, a CAB hearing was required.

5. The CAB and the NRC are independent regulatory bodies, while the FAA and the MTB are within the Department of Transportation.

6. The NRC's regulations apply only to its licensees. 10 C.F.R. § 71.2 (1976). The NRC requires a licensee to comply with safety regulations of the Department of Transportation (DOT), even if the licensee is not subject to DOT jurisdiction. *Id.* § 71.5. For a discussion of the relationship of the regulatory roles of the NRC and the DOT, see 40 Fed. Reg. 23768 (1975).

agencies' responsibilities will be discussed here.[7]

The Federal Aviation Act of 1958[8] established overlapping roles for the FAA and the CAB regarding the safe shipment of hazardous materials. The FAA was empowered to "promote safety of flight of civil aircraft in air commerce,"[9] while the CAB, charged with the economic regulation of aviation, was directed to consider safety, among other things, "as being in the public interest, and in accordance with the public convenience and necessity."[10] Thus, the roles of the FAA and the CAB were interrelated—the FAA had authority to establish air safety regulations, and the CAB had authority to regulate aviation in accordance with safety and other considerations.

The Transportation Safety Act of 1974[11] is a recent expression of congressional intent in the area of hazardous materials transportation and therefore is particularly relevant to the air line tariff controversy. Congress' declared policy in the Act was "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."[12] To this end, the Secretary of Transportation was granted broad authority to issue safety regulations governing this commerce.[13] Moreover, to insure that an adequate level of transportation safety would be maintained, the Act provided that any state or local hazardous materials requirement which is "inconsistent with" federal regulations is preempted unless it "(1) affords an equal or greater level of protection to the public than is afforded by [federal regulations] and (2) does not unreasonably burden commerce."[14] Considered together, the Act's declaration of policy and its preemption provisions convey a two-barreled congressional purpose: the transportation of hazardous materials should be regulated enough "to protect the Nation adequately," but not regulated to the point of imposing an unreasonable burden on commerce.

---

7. An air line's common carrier duty to provide safe transportation is discussed in the next section of the note. *See* p. 301 *infra*.

8. 49 U.S.C. § 1301 (1970).

9. *Id.* § 1421(a).

10. *Id.* § 1302. Besides assurance of the "highest degree of safety" in air transportation and the "promotion of safety in air commerce," other factors to be considered by the CAB as being in the public interest include the "encouragement and development of an air-transportation system properly adapted to the present and future needs of . . . foreign and domestic commerce . . ., of the Postal Service, and of the national defense," the "[c]ompetition . . . necessary to assure the sound development of [such] an air transportation system," the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges," and the "regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, . . . and foster sound economic conditions in, such transportation." *Id.*

11. 49 U.S.C. § 1801 (Supp. IV, 1974).

12. *Id.*

13. *Id.* § 1084.

14. *Id.* § 1811(a)-(b).

In addition to establishing a general regulatory framework for transportation safety, the Act dealt specifically with air transport of radioactive materials. In section 108 Congress mandated regulations which:

> prohibit any transportation of radioactive materials on any [passenger-carrying] aircraft unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety.[15]

The regulations implementing this section defined "research" in a manner which encompassed both medical and non-medical research.[16] In contrast, the air line tariffs at issue in *Delta* propose to ban radioactive materials intended for non-medical research use,[17] and, as a result, are more restrictive than federal regulations.

The implementation of the 1974 Act has narrowed the FAA's safety role by transferring a large part of its duties to the Materials Transportation Bureau (MTB), a new division within the Department of Transportation. In 1975, the MTB was established and delegated authority to issue safety regulations for all modes of hazardous materials transport.[18] Although the FAA is no longer responsible for promulgating regulations for air shipments of hazardous materials, it retains the duty to enforce these regulations.[19] Significantly, the Act in no way altered or elucidated the scope of the CAB's safety authority, nor were air carriers required to accept all packages shipped in accordance with MTB regulations.

Neither the Federal Aviation Act nor the Transportation Safety Act specifies the precise relationship between the CAB and the MTB as to air transport safety, but the implementation of the former act has established this relationship to a certain extent. The 1958 Act requires air line tariff adherence to regulations prescribed by the CAB,[20] which in turn requires that tariffs be "in conformity with" MTB safety requirements.[21] In the *Delta*

15. *Id.* § 1807(a).

16. 40 Fed. Reg. 17141 (1975). These regulations were codified in 14 C.F.R. Part 103 and, with the exception of the research definition, have since been transferred to Title 49 of C.F.R. *See* note 18 *infra*. Although the research definition has not been reissued under Title 49, presumably "research" continues to include non-medical as well as medical research.

17. Delta at 13-14.

18. 49 C.F.R. § 1.4(i)(2) (1975). The MTB has consolidated the original FAA hazardous materials regulations (14 C.F.R. Part 103) with other DOT shipping regulations (49 C.F.R. Parts 170-177), 41 Fed. Reg. 15972 (1976), and has reissued all transportation safety regulations under authority of the Transportation Safety Act, 41 Fed. Reg. 38175 (1976). Regulations pertaining to air transport of hazardous materials are now found primarily at 49 C.F.R. Part 175. *See* 41 Fed. Reg. 16106 (1976).

19. 49 C.F.R. § 1.47(i) (1975). In addition, the FAA is responsible for establishing procedures to monitor and enforce MTB regulations pertaining to shipments of radioactive materials by passenger aircraft. *Id.* § 1.47(j).

20. 49 U.S.C. § 1373(a) (1970).

21. 14 C.F.R. § 221.38(a)(5) (1976).

proceedings, the CAB argued that the strict tariffs proposed by the air lines were not "in conformity with" MTB regulations and therefore were deserving of summary rejection.[22] The court, while recognizing that the MTB has exclusive authority to issue air safety regulations, dismissed the notion that air lines must necessarily accept all cargo shipped in compliance with MTB regulations.[23] Before the CAB could reach such a conclusion, it must "consider and decide those economic and other issues which are not to be . . . considered by the [MTB], but are statutorily reserved to the CAB."[24]

II. The Four Step Hearing

As mentioned earlier, rather than holding only that a CAB hearing was required, the appellate court chose to pursue the mechanics of that hearing. Judge Wilkey defined specific perimeters of and mandatory considerations for a four-step CAB hearing:

> *First*, . . . the CAB should obtain in writing the FAA's [MTB's] authoritative position on the safe transportation of each category of hazardous materials excluded by the air line's tariffs. . . .
>
> *Second*, since the [MTB] is not concerned with economic questions, it remains for the CAB to strike a balance between what the air lines possibly *could* carry without jeopardizing the safety of their passengers and crew, and what it would cost the carriers to undertake the transportation of all such cargo, in comparison with alternate means of transportation.
>
> *Third*, the Board will have to determine whether the air lines are under a common carrier obligation (statutory or common law) to carry some or all of the dangerous articles which comply with [MTB] safety criteria.
>
> *Finally*, if the Board finds such a duty to carry, it will also have to determine to what extent it has the authority to enforce this obligation by compelling air lines to carry specific materials.[25]

As this procedure indicates, the ultimate decision to approve or reject the tariffs will depend on several specific CAB determinations, including a finding as to whether the proposed tariffs conflict with MTB (previously FAA) safety standards,[26] an accounting of economic costs incurred in

---

22. Brief for Respondent at 24.

23. Delta at 27. In fact, the CAB's own regulations contemplate hazardous materials tariffs more restrictive than MTB regulations. For example, the CAB requires tariffs to list the hazardous materials "which are not acceptable for transportation as well as those articles which are acceptable for transportation only when specified packing, marking, and labeling requirements have been met." 14 C.F.R. § 221.38(a)(5) (1976). This implies that some MTB-approved cargo can be banned by air line tariffs. Elsewhere, the CAB authorizes an air line to file a separate governing tariff which "may contain restrictions on the extent to which . . . carriers will accept [hazardous materials] for transportation." *Id.* § 221.104. Arguably, if the CAB did not contemplate tariffs stricter than MTB regulations, it could have simply required the separate governing tariff to incorporate MTB regulations in full.

24. Delta at 27 (footnote omitted).

25. Delta at 23-24 (footnote omitted).

26. The FAA's authority to issue safety regulations has been transferred to the MTB. *See* p.

shipping hazardous cargo by air and by other transport modes, an evaluation of common carrier responsibilities, and an estimation of the CAB's enforcement powers.

The *Delta* tariff revisions, somewhat more restrictive than MTB regulations, would presumably satisfy existing MTB safety criteria. Excepting the more straightforward questions of enforcement and formal MTB input, the focus of the hearing is on the basic economic costs and common carrier duties. Relative importance of these considerations justifies discussion of the second and third steps of the mandated hearing before discussion of the first and fourth steps.

A. Economic Considerations

The second hearing step requires the CAB to compare the economic costs which the air lines would incur in shipping all MTB-approved cargo to the costs of shipping this cargo by other transportation modes.[27] On the basis of this cost comparison, the CAB is to "strike a balance" which would determine whether it is economically justified for the air lines to ban certain cargo. Apparently, if the CAB finds that air line costs in the safe shipment of tariff-banned materials exceed the comparable costs in other transportation modes, the economic soundness of the tariff is demonstrated.

An important underpinning of this judicial position is that the air lines at some stage in the administrative process must be given the opportunity to present economic data in support of their ban on air transport of certain classes of hazardous materials. The court saw that the CAB's ruling had effectively prevented any representation of economic concerns before an administrative agency, since the rulemaking proceedings which produced the safety regulations had precluded the opportunity to raise specific economic factors.[28] The dialectics of regulation and economy

---

296 *supra*. Consequently, the remainder of this note will refer to the MTB as the agency which establishes air safety standards.

27. Economic costs cited by the court include "the cost of training special personnel to handle and inspect dangerous articles, the cost of creating special segregated areas at airports and on airplanes to accommodate such cargo, and the cost of inspecting all cargo to make sure that it complies with [MTB] safety standards." Delta at 21.

28. *Id.* at 20. Ironically, economic costs were not put forward by the air lines as grounds for approval of the tariffs; the air lines sought to justify the tariffs solely on the basis of their duty to provide safe transportation. *Id.* at 43, n. 98. On petition for rehearing, the CAB argued that the air lines' failure to raise economic justifications for the tariffs precluded the need for a hearing. The court held that even though a hearing on economic matters might not be required in this instance, a hearing was still necessary to decide whether the CAB has jurisdiction to permit the tariffs on safety grounds alone. Furthermore, if future tariff filings were to raise economic questions, the CAB would be bound to entertain them at a hearing. *Id.* The practical effect of this ruling is that at some point—either at the mandated hearing or at a future hearing—the CAB will be required to address the issue of economic costs outlined in the second step of the *Delta* hearing procedure.

must be present—the denial of such a crucial factor in industry regulation lacks social utility.

There is interesting analogy between the cost/benefit analysis necessary for a tariff revision and the burden-of-commerce test involved in scrutinizing a state or local regulation.[29] The court noted that the tariffs would not ban all nuclear material transport, but rather would include carriage of materials when speed was so essential as to overcome the dangers concomitant with that carriage.[30] While it must be kept in mind that the *Delta* decision is directed to a private action, the economic balancing is strikingly similar to the traditional constitutional test for upholding or voiding state laws affecting commerce.

This test, asserted in *Southern Pacific Co. v. Arizona*,[31] declares that the nature and extent of the burden of the state law should be balanced against the merits and purposes to be derived therefrom.[32] When concerning only one mode of interstate carriage (*i.e.*, air transport), a ban of some cargoes, even if universal among the participating carriers, does not necessarily burden commerce *if other modes can effectively assume transportation of the banned items*. Commerce concerns the national economy;[33] it can be asserted that the national economy properly includes various alternative transport modes. Since it is the economic cost which now determines the degree of carriage by each mode, cost is also determinative of the burden on commerce whether it is a private carrier who proposes a single modal regulation or whether it is a state or local requirement affecting a single mode of carriage. If the goods cannot be shipped economically by alternate modes, then a burden on commerce occurs; if the shift of transportation modes does not materially decrease the number of shipments or impede the flow of nuclear materials as goods, then there is little burden.

To justify a burden on commerce, even if slight, a substantial interest must be demonstrated by the state. This interest can be in safety, health or other areas, but in the end reduces to the measure of benefit which results from the suspect regulation. Regardless of the terminology, a substantial state interest is comprised of benefits such as the safety and economic benefits found in step two of the prescribed administrative hearing in *Delta*.

Preemption questions have been raised in attempts by state and

29. *See* p. 295 *supra*.
30. Delta at 24.
31. 325 U.S. 761 (1945).
32. *Id.* at 768-69.
33. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942), where the Supreme Court held that commerce could be reached by Congress "if it exerts a substantial economic effect on interstate commerce . . . ." *Id.* at 125.

local governments to augment federal regulations in the field of air transport of nuclear materials.[34] Perhaps the best example is that of a Louisiana regulation requiring notification to passengers of the presence of nuclear cargo on an airplane. This regulation, not allowed to pass under the preemption provisions of the Transportation Safety Act,[35] was invalidated by the MTB as "inconsistent" and therefore "preempted."[36] The problem which inheres in this preemption provision is the measure used to evaluate consistency. No clear rule emerged from MTB's finding that the ordinance was inconsistent with and so preempted by federal regulation,[37] but rather the MTB decided that "not in conformity with" was the meaning of "inconsistent."

The *Delta* court interpreted statutory and regulatory language of conformity and consistency differently than the CAB, holding that "carrier tariffs, when filed, can *not* provide for the carriage of materials which [the MTB] *has banned* from air transportation."[38] The difference of interpreting this language as a boundary over which air lines may not cross and a precise regulation which the air lines must mirror invites the economic evaluation in the hearing, yet potentially allows air line flexibility. The long-range effect of this approach is to provide a cost/demand availability of service with a maximum limit set by federal regulations.[39] Carriage of certain nuclear materials such as radiopharmaceuticals would not be undermined since the CAB could likely rule that the benefits of carriage for

34. For example, the commission of the Minneapolis-St. Paul airport passed an ordinance which established a system to monitor radioactive materials packages at the airport. The ordinance, which took effect before passage of the Transportation Safety Act of 1974, has successfully withstood a preemption challenge. Braniff Airways, Inc. v. Minneapolis-St. Paul Metropolitan Airport Comm'n, 377 F. Supp. 1190 (D. Minn. 1974).

35. 49 U.S.C. § 1811 (Supp. IV, 1974).

36. Determination by the MTB, Letter from Herbert H. Kaiser, Jr., to Charles W. Tapp, September 22, 1975. In the MTB's view, preemption was automatic because the Louisiana regulation was inconsistent with federal regulations. One court has disagreed with this interpretation, stating that the regulation would be preempted only if it compromises MTB safety standards or unreasonably burdens commerce. Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 173, n. 24 (D.C. Cir. 1976).

37. The MTB did, however, offer its logic, stating that "[t]he warning required by your rule would be misleading in that it would foster an unwarranted apprehension for personal safety without imparting any information of value to the passengers." Determination by the MTB, *supra* note 34. The MTB found additional support from the fact that "a closely related provision [requiring passenger notification] was considered and rejected in the issuing of radiation monitoring regulations." *Id.*, *citing* 39 Fed. Reg. 14612 (1974).

38. Delta at 26.

39. It is doubtful, however, that banning certain cargo would be an efficient and economically sound means of compensating for air line shipping costs. Instead, the CAB would better allow air lines to recoup these costs through higher shipping prices to the public. The outright ban of certain cargo would appear to be justifiable only as a safety measure, not as an economic measure. Perhaps it was for this reason that the air lines did not raise the issue of economic costs in the *Delta* proceedings. *See* note 28 *supra*.

medicinal purposes outweigh other considerations presented at a formal tariff hearing. Hence, a built-in safeguard exists.

A final observation remains in contrasting the MTB ruling on the Louisiana regulation with the *Delta* decision. After invalidating the Louisiana regulation, the MTB suggested that the State submit the regulation for allowance as: (1) stricter than federal regulations and (2) not an unreasonable burden on commerce. Since both Louisiana's regulation and the *Delta* tariffs are clearly more restrictive than federal regulations, the respective burden on commerce and cost/benefit analyses become the basis of evaluation. Apparently, equivalent data underlie each analysis, reducing state, local and even private attempts at strengthening control of air transport of nuclear materials to a common denominator.

B. Common Carrier Duties

The third step of the hearing concerns an air line's common carrier duty to carry some or all of the articles which comply with federal agency safety criteria, notwithstanding the economic validity of the tariff revision. Congress outlined the scope of an air carrier's duty to provide carriage of persons and property in section 404(a) of the Federal Aviation Act:

> It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor . . .; to provide safe and adequate service, equipment, and facilities in connection with such transportation; [and] to establish, observe, and enforce . . . just and reasonable classifications, rules, regulations, and practices relating to such air transportation. . . .[40]

The common carrier duty which derives from this statute consists first of that which inheres in an air line's certificate of public convenience and necessity, and second of that which is necessary for providing safe and adequate service concomitant with such transportation. Consequently, it is necessary for the agency hearing to consider both the duty to carry cargo as specified by an air line's certificate, and an air line's common law duty of safety owed to passengers.[41]

---

40. 49 U.S.C. § 1374(a) (1970). *See also id.* §1421(b).

41. Actually, it is not entirely clear that the terms of the third step contemplate CAB approval of the tariffs on the basis of the air lines' duty to refuse unreasonably dangerous cargo in the interest of safe transportation. Steps three and four speak of a common carrier *duty to carry* some or all MTB-approved cargo, but do not specifically mention a *duty to refuse* this cargo when its carriage would be unsafe. In step two, moreover, the phrase "what the air lines possibly *could* carry without jeopardizing the safety of their passengers and crew" is reasonably interpreted to mean simply all MTB-approved cargo, in which case there would be no room for a carrier determination of what constitutes "safe cargo." As a practical matter, however, it is not important whether the four-step hearing procedure itself allows for CAB consideration of carrier duty to provide safe transportation, for this consideration is mandated elsewhere by the *Delta* court. *See* p. 303 *infra*.

There is no question that the CAB can order an air line to perform certificated services.[42] In some instances, such as the shipment of radiopharmaceuticals, air transport is in the public interest even though a tariff banning these materials might be "economically sound." The unanswered question is, however, the CAB's propriety in emasculating the common carrier duties of safety—duties that section 404(a) acknowledges. Evidently, though, the CAB takes a strict compliance approach to a carrier's certificate, even when the totality of a particular service is acceptable.[43] Since, by statute, the CAB can force an air line to provide, to the letter, those services for which its certificate was issued, only the counterbalancing duty of safety, found in the same statute, can affect this broad agency authority.

It may be asserted that the proper limit on the CAB's power to compel certain activities is the common law duties owed passengers by a common carrier. In *Williams v. Trans World Airlines*,[44] the right of refusal by an air line to transport a passenger who was believed to be a threat was upheld based on the carrier's responsibility to protect its passengers from danger and inconvenience. In *Delta*, the CAB took the position that the air lines must accept anything defined by the MTB as safe for transport, no matter how offensive to basic common law duties owed passengers.[45] This is evidently predicated on the dictum that rejection is proper only on a case-by-case determination and not on a broad categorical basis.[46] However, this still fails to abolish common law obligations.

Ironically, it is the passengers who merit protection by the regulatory framework. Thus, even if the chance of injury from nuclear transport is small, unless that risk is necessary (as is perhaps true with radiopharmaceuticals), there should be no removal of common law duties to these passengers. If, of course, an air line chose not to ban certain materials which then resulted in injury to a passenger, the air line would be under common law liability for that injury;[47] to provide otherwise is to lessen the protection afforded those whom the law has sought to serve.

---

42. 49 U.S.C. §§ 1374(a), 1482 (1970).

43. Capital Airlines, Inc. v. CAB, 281 F.2d 48 (D.C. Cir. 1960). In this case, an air line had failed to provide certificated flights. The court (and the CAB) rejected the argument that the totality of flights was adequate, stating "that where a carrier is authorized to provide competitive service . . . the fact that other carriers provide . . . minimally adequate service does not discharge the offending carrier's obligations under its certificate." *Id.* at 51.

44. 509 F.2d 942 (2d Cir. 1975).

45. Brief for Respondent at 18.

46. Air Line Pilots Ass'n v. CAB, 516 F.2d 1269, 1276 (2d Cir. 1975).

47. There is a great difficulty in determining common law liability resulting from radiation injuries. First, it may be a long time before symptoms occur, and perhaps damage will only appear genetically. Second, the measure of damage, *i.e.*, extent of injury from radiation, becomes very difficult to prove. Extensive discussions of the several concerns in common law liability can be found in Keyes & Howarth, *Approaches to Liability for Remote Causes: The Low*

An air line's duty to provide safe transportation is also raised when the court instructs the CAB, in addition to the mandated four-step process, to determine whether the agency has authority under section 102 of the Federal Aviation Act[48] to approve the tariffs for safety reasons alone. This instruction came in response to the argument of the air lines and intervenor Air Line Pilots Association (ALPA) that the tariffs were necessary to ensure safe transportation.[49] Responding to this argument, the court recognized that "[p]erhaps under section 102 the [CAB] retains a small residue of authority over safety issues whereby it could impose hazardous cargo standards stricter . . . than those of [the MTB]."[50] In an important footnote, the court elaborated:

> [I]f it turns out, as ALPA contends, that current safety regulations are not being adequately enforced by [the FAA], possibly the CAB has jurisdiction to permit the carriers, in the fulfillment of their common carrier obligation to exercise the highest degree of care toward their passengers (see Federal Aviation Act § 404 (a) . . .), to force additional safety measures on the shippers through the medium of more restrictive tariffs. This is another question which the CAB will have to face, in the first instance, at a hearing on [the air lines'] tariffs.[51]

This passage indicates that the CAB's safety jurisdiction, whatever its scope may be, is triggered by the existence of a situation which warrants an air line's restricting its carriage of hazardous cargo in recognition of its duty to provide safe transportation. In a sense, then, the CAB's section 102 duty to promote aviation safety merges with the air lines' section 404(a) duty to provide safe transportation.

In a previous case, *Kappelmann v. Delta Air Lines, Inc.*,[52] a specific common law duty to warn passengers of danger was sought to be enforced. Here, the federal appellate court once again held that administrative remedy should be pursued where one desires to vary a regulatory policy.

Kappelmann, who had been a passenger on a flight during which a release of radioactivity had occurred,[53] not only sued for damages, but also sought an injunction which would require Delta to warn passengers of

---

Level Radiation Example, 56 IOWA L. REV. 531 (1971); Stason, *Tort Liability for Radiation*, 12 VAND. L. REV 93 (1959).

48. 49 U.S.C. § 1302 (1970). *See* note 10 and accompanying text *supra*.

49. Reply Brief for Petitioner at 4-5; Brief for Intervenor at 15.

50. Delta at 22.

51. *Id.*, n. 56.

52. 539 F.2d 165 (D.C. Cir. 1976).

53. This incident was investigated by Congress and made the subject of a special report. SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, REPORT ON AIR SAFETY: SELECTED REVIEW OF FAA PERFORMANCE, 93d Cong., 2d Sess. 179-80 (1974).

the carriage of nuclear materials.[54] The lower court had dismissed the injunctive aspects of the case since the plaintiffs had not petitioned for a federal regulation requiring the warning. The court determined that "it should be the agency charged with carrying out that policy that makes the initial decision whether the dangers and risks involved require that special warnings be posted."[55] The court refused to decide whether a common law right of warning still existed, but held that first resolution of this issue would still be with the administrative agency.[56]

The appellate court affirmed this ruling, commenting that such relief would amount to legislation by injunction.[57] The court referred to the opinion by the MTB determining the inconsistency and preemption of the Louisiana regulation discussed earlier. The court did not consider the MTB decision to contain a sufficient record for review and stated:

> [W]e are unwilling to permit appellants to substitute a MTB decision on a particular state regulation for the record that would be developed during a rulemaking proceeding on this subject. To do so would be to "short circuit" the path mandated by Congress and leave the court without the full record of the agency's reasons for refusing to adopt such a regulation, a record which is necessary to the proper resolution of the questions appellants raise.[58]

Faced with a challenge to an agency's safety procedures, the court demanded development of a thorough agency review concerning the challenge before ruling on the merits. It is this kind of thorough review which the *Delta* court mandated with regard to the air line tariffs.

To summarize the substance of the second and third steps of the mandated hearing, there are two rationales for CAB approval of the air line tariffs. The first rationale requires that the CAB find that the tariff is economically sound and there there exists no common carrier duty to transport materials which are banned by the tariff. The second rationale allows the CAB to approve the tariffs if they are necessary to ensure transportation safety. Interestingly, approval of a tariff for safety reasons would be based upon a CAB conclusion that MTB/FAA regulation is not effective and that therefore the air lines have a common carrier duty to

54. Common law duty to warn passengers of unusual hazards is certainly familiar in tort litigation. Appellant's brief cited numerous cases discussing this duty: Falcon v. Auto Buses Internacionales, 418 F.2d 673 (5th Cir. 1969); Garrett v. American Airlines, Inc., 332 F.2d 929 (5th Cir. 1964); Greyhound Corp. v. Wilson, 250 F.2d 509 (8th Cir. 1958); Brown v. American Airlines, Inc., 244 F.2d 128 (5th Cir. 1957); Strong v. Chronicle Publishing Co., 34 Cal. App. 2d 235, 93 P.2d 649 (1939). Brief for Appellant at 29, n. 2, Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976).

55. Kappelmann v. Delta Air Lines, Inc., 13 Avi. 17919 (D.D.C. 1975).

56. *Id.* at 17921. The court indicated that any state common law requirements inconsistent with the Transportation Safety Act were probably preempted. *Id.* at 17921, n. 1.

57. 539 F.2d at 169.

58. *Id.* at 173.

restrict their handling of MTB-approved cargo. In contrast, the first rationale for tariff approval presumes that MTB/FAA regulation is effective, but posits that economic considerations and an absence of common carrier duty to transport tariff-banned materials could justify the tariff.

C. MTB's Authoritative Position and CAB's Ability to Enforce

Finally, the first and fourth steps of the administrative hearing procedure can be analyzed together. The first step, formal input of the MTB's position on safe transport of those materials excluded by the tariff revisions, and the fourth step, the CAB's ability to enforce carriage based on its ruling, while clearly separated by the court in *Delta*, nevertheless have underlying unification. It is the MTB's position, tempered by economic and common carrier duties, which the CAB must follow thereby ensuring air line compliance with the precepts of the MTB's safety regulations.

The formal input of the MTB's position becomes the touchstone indicating the *intent* of safety regulations which, along with the exact language of the regulations, acts as the CAB's guide in allowing deviation from the letter of a regulation. Since the CAB's final ruling is dependent on the MTB's regulations, the CAB must modify its position to satisfy its statutory duty within the scope of the MTB's position. The court's interpretation was that "the [MTB] . . . decides what the air lines *may* carry under *safety* regulations, [while] [t]he CAB decides what the air lines *must* carry under their certificates of convenience and necessity and their obligations as common carriers."[59] Only by receiving the formal position of the MTB does the intent of the safety regulations manifest to enable evaluation of the dichotomy between the *upper limit* of "may" and the *absolute* of "must."[60]

In the final step of the hearing process, the CAB must determine whether it has the ability to enforce a decision that the air lines are under a duty to carry some or all of the cargo banned by the tariffs. Section 204(a) of the Federal Aviation Act empowers the CAB "to perform such acts . . . as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this [Act]."[61] Inasmuch as the *Delta* court felt that it was the CAB's duty under the Act to consider economic and safety considerations, it follows that so long as a CAB decision to reject the tariff revisions is made in accordance with these considerations, the CAB has the power to enforce this decision. As the *Delta* court concluded, "once the [CAB] holds a hearing and makes a determination, its directive must be obeyed unless and until it is set aside

59. Delta at 5.
60. *Id.* at 23.
61. 49 U.S.C. § 1324(a) (1970).

as unreasonable by a court of competent jurisdiction."[62]

Where a CAB order had properly issued, the Second Circuit Court of Appeals, in *Air Line Pilots Association, International v. CAB*,[63] implied a capability of enforcement, stating that "[t]he premise that the airlines have the right to disregard the entire regulatory scheme is not only violative of [statute] but of common sense as well."[64] Were it not for the court's tacit recognition of enforcement ability, the air lines could ignore administrative orders.

Even if the air lines were to comply with a CAB order rejecting the tariffs (thereby eliminating any challenge to CAB enforcement powers), a problem remains that ALPA might continue its restrictive policy with regard to piloting aircraft carrying radioactive materials.[65] This problem could be resolved, however, by court injunction compelling pilots to undertake such flights. Precedent for an injunction is found in *American Airlines, Inc. v. Air Line Pilots Association, International*,[66] where the court held that "[refusal to land or take off] unless enjoined, will interfere with [the air lines'] duties to render service under their certificates of public necessity."[67] This logic permits enjoining an ALPA refusal to fly when certain MTB-approved materials are to be carried, but only after a CAB ruling that the transport of those materials is required under the air lines' certificates of public necessity.

CONCLUSION

Delta Air Lines, Inc. v. CAB was strictly a procedural controversy, but in resolving the procedural issues, the court recognized inherent problems in air transport of radioactive materials. By mandating a specific, four-step hearing, the court integrated the difficult problem of safe, reasonable transport of passengers with federal regulatory policy regarding passenger transport and hazardous materials carriage. The CAB must now, for the first time, balance: (1) the costs and benefits of radioactive material transport and (2) the statutory and common law duties owed by air lines, as participants in a regulated industry, to both passengers and those who ship radioactive materials by air. Moreover, this balancing by the CAB, the economic regulator of air lines, must be made in accordance with MTB safety policy.

---

62. Delta at 25.
63. 516 F.2d 1269 (2d Cir. 1975).
64. *Id.* at 1276.
65. *See* p. 293 *supra*.
66. 187 F. Supp. 643 (N.D. Ill. 1960). Here, ALPA planned to picket airports at which a particular air line was certificated by the CAB. Participating pilots were to inform employer air lines that they would neither land nor take off from such airports.
67 *Id.* at 645.

While the *Delta* decision has immediate impact on the proposed tariff revisions, there is a potential for long-range influence of the mandated hearing as a model for determining the compatability of carrier tariffs with federal regulations. The *Delta* decision could not, on the issues raised, have considered more fundamental problems resulting from society's increasing dependence on radioactive materials. These problems will be determined as the imperatives of nuclear policy become more clearly defined by the cost/benefit considerations of technology and social needs. On the basis of its ruling, the *Delta* court should be applauded for the steps taken toward resolution of an issue in a continuing legal and social problem.

James K. Leonard
Timothy J. Martin