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AIR TRANSPORTATION OF ANIMALS: PASSENGERS OR PROPERTY?

MICHELLE D. DANIEL

I. ANIMALS: PROBLEM PASSENGERS AND FRAGILE CARGO

LIVE ANIMALS make up one to two percent of all cargo shipped by air.¹ But animals, by their nature, are more difficult to transport by air than either humans or ordinary baggage or cargo.² Human beings, unlike animals, understand the process and purpose of air transportation. They are boarding an airplane to sit in a seat while the airplane flies from one location to another. Unlike animals, humans usually fly voluntarily; and children are generally accompanied by adults who are responsible for them. Human beings are capable of following rules and regulations, at least minimally, and can ask a flight attendant for food, drink or even medical assistance if necessary. On long flights, meals are provided for humans. Humans can also utilize restroom facilities aboard the plane without assistance. Humans know the length of their flight, the time of their arrival and whether someone will meet them at their destination.

Ordinary baggage, while quite different from human passengers, is also relatively easy to transport. It can be packed and stored on an airplane without requiring access to food, water, or restroom facilities. Baggage will feel no pain even if tossed around and beaten as the gorilla did to

¹ Telephone interview with Jerry Cornish, International Air Transportation Association (Jan. 4, 1985).

² See *infra* notes 6-29 and accompanying text for a full discussion of specific problems in transporting animals by air.

the suitcase in the old Samsonite commercial. Ordinary cargo will feel no fear even if stranded for days in Miami while its owner is in Anchorage, Alaska. Baggage is also usually not harmed seriously by fluctuations in temperature and pressure.³

This discussion illustrates the dichotomy between the treatment of humans and the treatment of baggage, or property, during air transportation. Animals, though, are by nature less rational than humans yet more sensitive than inert cargo. As a result, animals may actually require more care during air transportation than either humans or baggage. Animals have little or no understanding of the purposes of air transportation and cannot be expected to follow rules and regulations. They cannot ask for food, water or medicine other than by inarticulate cries, and must be confined, so that they do not escape and injure themselves or others. Animals are also unable to eliminate bodily wastes without soiling their travelling container unless assisted.

Animals are also different from ordinary baggage. They must have air, food, and water. They feel pain and fear when injured, roughly handled, abandoned or neglected. Animals suffer and die, much the same as human beings. Because animals are less intelligent than humans, yet more vulnerable than other tangible property, there are no perfect answers as to how they should be treated under any circumstances, including air transportation. Those who view animals as *creatures*, not far removed from humans, support a humanitarian approach which borders on treating animals as passengers. Others who view animals as mere property, emphasize an economic approach where animals are treated like ordinary cargo. Under the economic approach, some animal pain, suffering and even death becomes acceptable as long as profits are maximized. Whether animals are viewed as "passengers" or cargo will help determine the standard of care required by

³ See H.R. REP. NO. 801, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 758, 759.

law for their transportation by air. This tension in interests is in fact reflected in the two areas of law which cover air transportation of animals, which for purposes of this comment will be referred to as the Humanitarian Laws⁴ and the Property Laws.⁵

But before examining the law concerning air transportation of animals, it is necessary to consider some other special problems in transporting animals. First, many animals are biologically highly sensitive and thus poorly equipped to travel at all.⁶ Second, air transportation can be extremely stressful, even to a healthy animal.⁷

While most of the case law discussed in this comment⁸ involves domestic pets, many exotic animals are also transported by air every year for zoos, wildlife preserves, research facilities, and other purposes.⁹ These animals, particularly wild ones, can be extremely sensitive, and thus cause special problems in air transportation.¹⁰ Birds also present a special problem in that they can carry many diseases dangerous to man.¹¹ Certain species of wild parrots, for example, are thought to carry a strain of Exotic Newcastle Disease which only erupts when they are exposed to the stress of capture and travel.¹² Some marine mammals also pose particular problems, especially those accustomed to life in near-freezing waters.¹³ Porpoises,

⁴ See *infra* notes 53-130 and accompanying text.

⁵ See *infra* notes 131-220 and accompanying text.

⁶ See Nilsson, *Birds*, in ANIMALS AND THEIR LEGAL RIGHTS 102 (E. Leavitt ed. 1978) [hereinafter cited as ANIMALS]. According to Nilsson, certain delicate species of wild birds suffer a mortality rate of 80% during the capture stage alone. *Id.* at 108.

⁷ *Animal Welfare Improvement Act of 1975: Hearings on S. 1941, S. 2070 and S. 2430 Before the Subcomm. on the Environment of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 55 (1975)*, at 80 (letter from G.D. Hanneman, D.V.M.) [hereinafter cited as 1975 Animal Welfare Hearings].

⁸ See *infra* notes 40-176 for these cases involving injury or death of animals during air transportation. See also notes 31-40, *infra*, and accompanying text.

⁹ See Finnley, *Laws to Protect Wildlife*, in ANIMALS, *supra* note 6, at 182.

¹⁰ See Nilsson, *Birds*, in ANIMALS, *supra* note 6, at 110-12.

¹¹ See *id.* at 106. Even domestic canaries can carry the diseases psittacosis and avian tuberculosis. *Id.*

¹² *Id.* at 110-111.

¹³ See 9 C.F.R. §§ 3.112 - .118 (1984) for some of the care requirements of these

for example, must have their skin kept moist and relatively pressure-free at all times to prevent death of the tissue.¹⁴ Sea otters also require a moist, cold environment to keep their fur healthy.¹⁵ Extremely young animals of all kinds are usually delicate and difficult to transport as well.¹⁶

These special care needs are easily overlooked in air transportation.¹⁷ In fact, airlines, air carriers and even animal shippers have tended to treat many animals like ordinary baggage.¹⁸ Baggage compartments of airplanes, where animals are usually kept during transportation, are frequently subject to major fluctuations in temperature and pressure.¹⁹ The extreme fluctuations in heat and humidity which often occur during the air transportation of animals can cause degeneration of brain cells, internal hemorrhaging, and other damage to the heart, kidneys and lungs.²⁰ Under these conditions, even healthy, do-

animals. For example, federal regulations for transporting sea otters require that "[n]ot less than one-half of the floor area in a primary enclosure used to transport sea otters shall be leak-proof and shall contain sufficient crushed ice or ice water to provide each sea otter contained therein with moisture necessary to allow each sea otter to maintain its hair coat by preventing it from drying and to minimize soiling of the hair coat. . . ." *Id.* at § 3.116(c).

¹⁴ *Id.* at § 3.116(b).

¹⁵ *Id.* at § 3.116(c).

¹⁶ See Stevens, *Dogs*, in *ANIMALS*, *supra* note 6, at 76; see also H.R. 801, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 758.

¹⁷ See Nilsson, *Birds*, in *Animals*, *supra* note 6, at 108.

¹⁸ 1975 Animal Welfare Hearings, *supra* note 7, at 58 (statement of Fay Brisk). Ms. Brisk also noted that "[m]any airlines are telling pet owners that animals fly in 'passenger comfort' . . ." *Id.* However, some cargo manuals report just the opposite. *Id.* One airline cargo manual contained the following warning: "CAUTION: Plastic kennels with slippery, rounded bases tend to cartwheel/flip backwards on steep angled jetveyors at aft bulk compartments of wide-body aircraft. *Be Alert to prevent this* — especially since this is in view of passengers in the aircraft and visitors at the terminal windows." *Id.* at 58 n.3 (emphasis in the original).

¹⁹ See *id.* at 80-81. (letter from G.D. Hanneman, D.V.M.).

²⁰ *Id.* Dr. Hanneman conducted experiments where he exposed animals to conditions similar to those which occur in air transportation. The doctor stated:

Because an animal does not die or show outward signs of illness when stressed by environmental conditions does not mean it is in the best of health. Just because an animal is able to tolerate such conditions as temperature, humidity, varying CO₂ levels, noise, confinement, reduced air flow (air changes), and total darkness rather than light does not mean the animal is being treated humanely or safely.

mesticated dogs and cats may suffer injury or even death.²¹

Animals may also be injured in flight because of inadequate containers.²² They may suffer injury if the containers are too small or contain sharp or protruding edges.²³ Some animals have been crushed because their containers were too flimsy to withstand the pressure of other shifting cargo during flight.²⁴ Animals may suffocate if their container is inadequately ventilated or if the cargo is packed so as to prevent adequate ventilation.²⁵ Loading and unloading poses further problems when animals are roughly handled or exposed to extreme heat, cold or precipitation during the process.²⁶ It is also a fairly common practice for airlines to send pets out to their owners on the conveyor belts used for ordinary baggage — animals may be bruised, jarred and frightened by this practice as well.²⁷ Finally, animals may suffer from dehydration, extreme hunger and soiling by disease-carrying filth if left unattended for long periods of time.²⁸ Animals may be left alone for hours during long flights or when they, like lost luggage, are accidentally separated from their owners and misrouted.²⁹

Id.

²¹ See *infra* notes 31-40 and accompanying text.

²² 1975 Animal Welfare Hearings, *supra* note 7, at 74.

²³ See 9 C.F.R. § 3.12 (1984).

²⁴ 1975 Animal Welfare Hearings, *supra* note 7, at 74.

²⁵ See 9 C.F.R. § 3.12 (1984).

²⁶ Letter from Kathryn A. Wallis to Frank Borman, President of Eastern Airlines, (Sept. 14, 1984). Ms. Wallis' pet cat was unloaded from a plane and left sitting outside in 100 degree temperatures in his cage for over 45 minutes, despite her attempt to retrieve him. Eastern Airlines did not allow Mrs. Wallis to remove the animal from the heat, but explained to her that "she would have to wait as the pet was freight and would have to be processed according to standard procedures." *Id.*

²⁷ Letter from Christine Kolstad to Phyllis Wright, Vice-President for Companion Animals, Humane Society of the United States, (May 14, 1984) (concerning Piedmont Airlines' policy at National Airport of putting crated animals on the conveyor belts with other luggage). *Id.*

²⁸ See *infra* notes 34-37 for an example of this kind of mistreatment.

²⁹ *Id.*

While some laws³⁰ have partially alleviated these problems, they are far from eliminated. Here are just a few examples of maltreatment of animals reported in 1984: A two-year-old English bulldog died during transport by American Airlines.³¹ According to the veterinarian's report, "[t]he animal's body was covered with saliva and mucous . . . cause of death in this case would be . . . heart failure due to respiratory collapse from heat stroke."³² The airline then sent the dead dog out to the baggage area in its container on the conveyor belt to be picked up by the family.³³

In another case, a Great Dane puppy, shipped from Pennsylvania in apparent good health, arrived in Kansas unable to stand and severely traumatized.³⁴ The puppy had been given no food or water and was "wet and wallowing in his own defecation."³⁵ Upon examination, a veterinarian determined that the tendons in the puppy's rear legs were torn.³⁶ During the veterinarian's examination, the dog went into cardiac arrest and died.³⁷

One final example illustrates more clearly how such traumatic injuries can occur. A cocker spaniel flying on Continental Airlines was separated from its owner during a connecting flight and, as a result, was locked up in lost

³⁰ See *infra* notes 53-130 and accompanying text.

³¹ Letter from Cheryl R. McNamara to American Airlines (Oct. 16, 1984) (concerning death during air transportation of pet bulldog).

³² Letter from Thomas Pastor, D.V.M. to Charlotte Hoskins, American Airlines, (Aug. 17, 1984) (concerning necropsy on bulldog owned by Cheryl McNamara), see *supra* note 31.

³³ Letter from Cheryl R. McNamara to American Airlines, *supra* note 31.

³⁴ Letter from Alfred S. DeVono, II to USAir, Washington National Airport (Jan. 31, 1984) (concerning injury and death of Great Dane puppy).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* In a later investigation, a Department of Agriculture veterinarian concluded that the puppy's death could not be attributed to mishandling by USAir. Instead, the veterinarian concluded the puppy did not recover from anesthesia while being radiographed. Letter to Janet Frake, Humane Society of the United States (Aug. 28, 1984). However, no explanation was given for the puppy's torn tendons or other problems. *Id.*

and found storage overnight with other lost baggage.³⁸ The dog was stranded for over twenty-four hours without food or water, and was retrieved only after his owner made seven telephone calls and finally drove from Lexington, Kentucky, to Denver, where the airline had left the dog.³⁹ The dog was alive, but acted "shell-shocked", had an eye infection, and was so dehydrated that it had chewed up its plastic water dish.⁴⁰

These few examples clearly illustrate how ill-equipped the airplanes are to care for animals in transit. It is unrealistic to expect a transportation system which ships live animals in baggage compartments, loads and unloads them like ordinary suitcases, and sends them out to passengers on conveyor belts, to adequately meet the basic care needs of animals. Even when baggage handlers are trained to give special care to animals, the results may not be permanent, since there is frequently a high turnover rate among employees who handle baggage.⁴¹ Airports are also ill-equipped to deal with misrouted animals,⁴² at most providing someone part-time to take stranded animals to a kennel.⁴³ Some airports have experimented with their own temporary shelters, or "animalports," but to date only one airport in the United States has such a shelter.⁴⁴

Of course, the simplest solution to the problems in air transportation of animals is to provide maximum care for animals, regardless of the cost. The airlines could pro-

³⁸ Letter from Dr. Donna L. Gutterman to Frank Lorenzo, President of Continental Airlines (Oct. 26, 1984) (concerning misrouting of her cocker spaniel).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Telephone interview with Dr. Richard Crawford, Chief Staff Veterinarian for Animal Care, United States Department of Agriculture (Nov. 19, 1984) (concerning current problems in animal air transportation).

⁴² See *supra* notes 38-40 and accompanying text.

⁴³ Telephone interview with Dr. Richard Crawford, *supra* note 41.

⁴⁴ Nilsson, *Birds*, in ANIMALS, *supra* note 6, at 109. There is a small "animalport" at Kennedy Airport in New York, run by the American Society for the Prevention of Cruelty to Animals (ASPCA), but it is not staffed around the clock. Such animal ports, common in England, are run by the Royal Society for the Prevention of Cruelty to Animals (RSPCA). *Id.*

vide a caretaker for every animal from departure to arrival, and have temperature-controlled, pressurized compartments built especially for animals. While these aggressive measures might be effective in meeting the safety needs of animals in air transportation, they ignore the competing economic needs of airlines and of animal shippers. Securing adequate ventilation and temperatures, feeding and watering animals, cleaning their cages, and preventing overcrowding and crushing of crated animals in airplane luggage compartments is extremely expensive.⁴⁵ Consequently, the pet and animal dealers, medical schools and research laboratories which most frequently patronize animal air transportation services have a financial interest in keeping the cost down.⁴⁶ Similarly, air carriers have an economic interest in shipping the maximum number of animals per flight.⁴⁷

The competing interests of economics and animal safety have each produced their own area of the law which governs air transportation of animals. The Humanitarian Law⁴⁸ approach is primarily concerned with animal safety, while the Property Law⁴⁹ approach is mainly concerned with allocation of the economic loss which occurs when animals are destroyed during air transportation.

II. THE HUMANITARIAN LAWS GOVERNING AIR TRANSPORTATION OF ANIMALS

In 1978 one commentator on animal law stated, "legal jurisdiction over animals in transport is at present unclear."⁵⁰ Unfortunately, the situation is not much better today. A plethora of laws cover humanitarian treatment

⁴⁵ 1975 Animal Welfare Hearings, *supra* note 7, at 80 (letter of G.D. Hanneman, D.V.M.). See also 9 C.F.R. §§ 3.12, 3.13, 3.16, 3.17 (1985) for some of the federal regulations governing these requirements.

⁴⁶ 1975 Animal Welfare Hearings, *supra* note 7, at 48-49.

⁴⁷ Live animals make up one to two percent of all cargo shipped. See *supra* note 1.

⁴⁸ See *infra* notes 50-130 and accompanying text for a full discussion of the humanitarian laws governing air transportation of animals.

⁴⁹ See *infra* notes 131-220 and accompanying text.

⁵⁰ Nilsson, *Birds*, in ANIMALS, *supra* note 6, at 109.

of animals,⁵¹ and these laws vary depending on the type of animal transported and whether the flight is domestic or international.⁵²

A. *The Animal Welfare Act Amendments of 1976*

1. *Purpose and Legislative History*

The most significant piece of legislation governing air transportation of animals is the Animal Welfare Act Amendments of 1976 (1976 AWA Amendments).⁵³ The 1976 AWA Amendments cover a broad range of matters affecting the welfare of animals, but one specific purpose of these amendments was to assure that animals would receive humane treatment during transportation in commerce.⁵⁴ The Congressional hearings relating to these amendments included testimony of the Secretary of Agriculture and various voluntary humane organizations.⁵⁵ This testimony detailed the widespread mistreatment which animals had received in the course of air transportation.⁵⁶

One reason for this widespread mistreatment was Congress' failure to delegate sufficient authority to any federal agency to comprehensively and effectively provide for the

⁵¹ See *infra* notes 50-130 and accompanying text.

⁵² See Nilsson, *Birds*, in ANIMALS, *supra* note 6, at 109.

⁵³ Animal Welfare Act of 1970, Pub. L. No. 91-579, 84 Stat. 350, 7 U.S.C. § 2131 (codified as amended (1982)). The 1970 Animal Welfare Act expanded upon its predecessor, the Federal Laboratory Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966). Congress designed the 1966 Act to prevent theft of pet dogs and cats for sale for use in research. It was also designed to encourage humane treatment of cats, dogs and certain other laboratory animals by dealers and research facilities. The 1970 Act extended protection to almost all live or dead warm-blooded animals. Auction sales and exhibitions were subjected to regulation, and the Secretary of Agriculture was given authority to regulate activities which obstruct, burden or substantially affect interstate commerce. H.R. REP. NO. 801, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 758, 759 (1976).

⁵⁴ H.R. REP. NO. 801, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 758, 759 (1976).

⁵⁵ H.R. REP. NO. 801, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 760 (1976).

⁵⁶ *Id.*

humane air transportation of animals.⁵⁷ Prior to the 1976 AWA Amendments, three different government agencies — the Department of Agriculture (USDA), the Federal Aviation Administration (FAA), and the Civil Aeronautics Board (CAB) — each had “ill-defined and incomplete jurisdiction over shipments of animals by air.”⁵⁸ The USDA had authority over “activities which burden, obstruct or substantially affect interstate commerce,”⁵⁹ but clearly did not have authority over air carriers or intermediate handlers.⁶⁰ The FAA did have certain authority over air carriers, such as the authority to promulgate climate control, stowage and tie-down regulations for aircraft, but lacked the expertise necessary to insure humane treatment of live animal cargo.⁶¹ The CAB had jurisdiction over tariffs of air carriers,⁶² but these tariffs were vague with respect to suitable containers for live animals and were rarely enforced.⁶³

2. *Specific Provisions Concerning Air Transportation*

The 1976 AWA Amendments attempted to eliminate much of the existing confusion and ineffectiveness in the regulation of animal transport by air. First, the amendments require that all carriers subject to their provisions

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ H.R. REP. NO. 801, 94 Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 759.

⁶⁰ H.R. REP. NO. 801, 94th Cong., 2d Sess. at 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 771.

⁶¹ H.R. REP. NO. 801, 94th Cong., 2d Sess. at 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 760.

⁶² A tariff is “a public document setting forth services of common carriers being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services.” BLACK’S LAW DICTIONARY 1306 (5th Ed. 1979).

⁶³ H.R. REP. NO. 801, 94th Cong., 2d Sess. at 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 760. While the CAB had conducted an investigation of live animal transportation by the air carriers, it agreed with the FAA that it could not promote effective rules, and supported passage of the 1976 Animal Welfare Act Amendments. H.R. REP. NO. 801, 94th Cong., 2d Sess. at 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 768.

must register with the USDA.⁶⁴ Second, the amendments require that a recent health certificate certified by a licensed veterinarian accompany all animals shipped in commerce.⁶⁵ Third, the amendments prohibit the shipment of animals C.O.D. (cash on delivery) unless the shipper has provided for round-trip transportation costs and animal care expenses.⁶⁶ Fourth, the amendments prohibit the shipment of extremely young animals.⁶⁷ Fifth, the amendments grant the Secretary of Agriculture exclusive authority to regulate intermediate handlers and carriers of animals so as to provide for the humane treatment of live animal cargo by setting standards for containers, feed, water, rest, ventilation, temperature and handling.⁶⁸ The Secretary, pursuant to this grant of authority, has promulgated regulations in each of these areas.⁶⁹ These regulations, however, do not apply to the transportation of birds, domestic farm animals and laboratory rats and mice.⁷⁰

3. *Inspections and Investigations*

The Veterinary Services Division of the Animal and Plant Health Inspection Service (APHIS) is the unit of the USDA responsible for inspections of airports and air carriers, and investigation of reported violations of the regulations promulgated under the 1976 AWA amendments.⁷¹ According to the USDA, inspections by APHIS are concentrated at airports with the largest volumes of animal

⁶⁴ United States Department of Agriculture, *Animal Welfare Enforcement FY 1982* at 3 (Report of the Secretary of Agriculture to the President of the Senate and the Speaker of the House of Representatives) (1982) [hereinafter cited as *Enforcement 1982*]. See *infra* notes 94-106 and accompanying text for a discussion of the Lacey Act, which covers birds.

⁶⁵ Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 10(b), 90 Stat. 419, (codified as amended at 7 U.S.C. § 2140 (1982)).

⁶⁶ *Id.* at § 10(d).

⁶⁷ *Id.* at § 10(c).

⁶⁸ *Enforcement 1982*, *supra* note 64, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

traffic.⁷² These inspections allow APHIS to assess compliance by both shippers and carriers.⁷³ Carriers must have personnel and facilities adequate to handle animals, and must uphold federal shipping requirements by refusing to accept live animals shipped in substandard containers.⁷⁴ The APHIS inspectors are required to check the health and condition of animals passing through the airport facilities and monitor the length of time animals spend in transit; size and construction of containers; temperature, ventilation, feeding and watering; and health care of animals in transit.⁷⁵

4. *Available Penalties for Violations of Regulations*

A variety of methods for dealing with violations of the regulations promulgated under the 1976 AWA Amendments are available, but only the USDA may act against violators.⁷⁶ A private individual may complain to the USDA of a violation, but investigation and enforcement are strictly up to the USDA.⁷⁷ The mildest of sanctions, used against first offenders, is the letter of warning.⁷⁸ An offender may also be assessed a civil fine up to \$1,000 per violation for each breach of regulation, rule or standard promulgated by the Secretary of Agriculture.⁷⁹ Each day

⁷² *Id.* at 5.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 6. APHIS acknowledged that it had "received help from humane associations, shippers, and others in enforcing the transportation standards." APHIS also noted that it had developed "a strong working relationship with the Civil Aeronautics Board (CAB) who forwards relevant complaints to APHIS. . . ." *Id.* This source of aid is no longer available since the sunset of the CAB as of January 1, 1985. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1744 (1978). See *infra* notes 131-193 and accompanying text for a further discussion of deregulation and its effect on the property law of air transportation of animals.

⁷⁶ Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 13(b), 90 Stat. 417, 420, (codified as amended at 7 U.S.C. § 2142 (1976)).

⁷⁷ *Id.*

⁷⁸ *Enforcement 1982, supra* note 64, at 8.

⁷⁹ 7 U.S.C. § 2142 (1982). The Secretary may compromise the penalties, however, and is required to give "due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity

a violation continues is a separate offense.⁸⁰ The Secretary of Agriculture may also issue a cease-and-desist order against the violator; however, no fine may be assessed and no order may be issued unless the alleged violator is given notice and an opportunity for a hearing concerning the violation.⁸¹ Orders and fines are final unless the affected person files an appeal with the appropriate United States Court of Appeals, which has exclusive jurisdiction to review the validity of the Secretary's order.⁸² Another tool of enforcement available to the USDA is suspension or revocation of the carrier's license.⁸³ If the carrier's mishandling threatens the health of regulated animals, APHIS may immediately suspend the violator's license for 21 days, or confiscate the suffering animals.⁸⁴

5. *Degree of Enforcement and Compliance*

In 1982, APHIS made 5,048 inspections of airports.⁸⁵ A total of thirty-eight violations involving common carriers were reported in 1982.⁸⁶ As of late 1984, a total of thirty-six violations by common carriers were reported for the year.⁸⁷ From these statistics, it would appear that many carriers are complying with the regulations issued under the 1976 AWA Amendments. One USDA official, however, recently indicated program funds are now being concentrated on investigation of dog dealers, with the re-

of the violation, the person's good faith, and the history of previous violations." *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* The Secretary has the authority to bring suit in district court to collect unpaid fines, and knowing failure to obey cease-and-desist orders subjects the violator to a fine of \$500 per offense per day. *Id.*

⁸² *Id.*

⁸³ *Enforcement 1982, supra* note 64, at 8.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 8. The 1983 report was not available from the USDA.

⁸⁷ Letter from John Kinsella, Compliance Officer of Veterinary Services Division, United States Department of Agriculture, to Michelle Daniel (Nov. 20, 1984) (concerning current enforcement of the Animal Welfare Act provisions governing air transportation of animals).

sult that fewer airport inspections are conducted.⁸⁸ The official stated that, because of fewer airport inspections, "there could be a lot of deficient shipments going through and we would never know about them."⁸⁹ The USDA also relied heavily on the now-defunct Civil Aeronautics Board⁹⁰ for referrals of animal care violations.⁹¹ A spokesperson for the Humane Society of the United States also indicated that the number of complaints received by their organization had decreased in 1984 as the CAB was closing.⁹² The actual cases discussed in Section I also indicate that compliance may not be widespread.⁹³

B. *The Lacey Act*

Another law governing air transportation of animals is the Lacey Act,⁹⁴ which gives the Secretary of the Interior the authority to prescribe requirements and issue permits "for the transportation of wild animals and birds under

⁸⁸ Telephone Interview with John Kinsella, Compliance Officer, Veterinary Services Division, United States Department of Agriculture (Nov. 18, 1984) (concerning enforcement of Animal Welfare Act provisions concerning air transportation of animals).

⁸⁹ *Id.*

⁹⁰ The Civil Aeronautics Board was originally established under the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, ch. 601, 52 Stat. 973, (repealed 1958) and continued as an agency of the United States under the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended 42 U.S.C. 1321 (1976)), (repealed 1978). Under the Federal Aviation Act of 1958, Congress gave the Civil Aeronautics Board exclusive authority and responsibility over the air transportation industry. 42 U.S.C. 1321 (1976). All functions, powers and duties of the Civil Aeronautics Board were transferred or terminated by Pub. L. 95-504, § 40(a), 92 Stat. 1744. (codified at 49 U.S.C.A. § 1551 (West Supp. 1985)). The Animal Welfare Act Amendments of 1976, 7 U.S.C. § 2131 (1982), provided for regulation of animals and activities "to assure the humane treatment of animals during transportation in commerce." *Id.* When the CAB went out of existence in 1984, all functions, powers and duties of the CAB under the 1976 AWA Amendments were transferred and vested in the Secretary of Transportation, effective January 1, 1985. 49 U.S.C.A. § 1553(a)(3) (West Supp. 1985).

⁹¹ *Enforcement 1982*, *supra* note 64, at 8.

⁹² Telephone Interview with Phyllis Wright, Vice-President for Companion Animals, Humane Society of the United States (Nov. 17, 1984) (concerning number of complaints involving air transportation of animals received in 1984 and since the beginning of the sunset of the CAB, *see supra* note 64 at 8).

⁹³ *See supra* notes 31-40 and accompanying text.

⁹⁴ 18 U.S.C. § 42 (1982).

humane and healthful conditions.”⁹⁵ The Lacey Act also makes it a crime for any person or importer to knowingly transport into the United States “any wild animal or bird” under inhumane or unlawful conditions.⁹⁶ In a criminal prosecution for such a violation, both the conveyance and the enclosures of the wild animals or birds may be considered as evidence.⁹⁷ A “substantial ratio of dead, crippled, diseased or starving animals,” within the conveyance is *prima facie* evidence of a violation.⁹⁸

Prior to 1981, authority to prosecute under the Lacey Act was vested in the Secretary of the Treasury,⁹⁹ but enforcement was almost non-existent.¹⁰⁰ Although the Secretary of the Treasury had held this authority since 1949, no standards had ever been issued.¹⁰¹ Entire shipments of dead birds failed to result in indictments.¹⁰² Current regulations do not set actual care standards, but require permits from various government agencies for importing or transporting wild animals or birds.¹⁰³ For example, all wild cud-chewing animals may be imported only under a permit from APHIS and must be inspected on arrival by APHIS veterinarians.¹⁰⁴ However, these permit requirements and inspections focus mainly on health concerns, such as disease prevention, rather than on preventing animal suffering in transit.¹⁰⁵ Thus, it is questionable whether the Lacey Act’s provisions concerning humane care during transportation have accomplished their

⁹⁵ *Id.* § 42(c) (1982). The main purpose of the Lacey Act, however, is to prohibit importation or shipment of injurious or diseased animals. *Id.* at § (a)(1).

⁹⁶ *Id.* at § (c).

⁹⁷ *Id.* at § (c)(1).

⁹⁸ *Id.* at § (c)(2).

⁹⁹ S. REP. NO. 123, 97th Cong., 1st Sess. 18, 19, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748, 1765-66.

¹⁰⁰ Nilsson, *supra* note 6, at 108-12.

¹⁰¹ S. REP. NO. 123, 97th Cong. 1st Sess. 18, 19, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748 at 1766.

¹⁰² Nilsson, *supra* note 6, at 112.

¹⁰³ See 19 C.F.R. § 12.26 (1985).

¹⁰⁴ *Id.* at § (b)(3).

¹⁰⁵ See *id.* and Nilsson, *supra* note 6, at 108-12.

purpose.¹⁰⁶

C. *Some State Laws Which Affect Animals in Air Transportation*

Thirty-eight states, the District of Columbia, and Puerto Rico have anti-cruelty laws which make it a crime to transport animals in an inhumane manner.¹⁰⁷ Mississippi's statute is fairly typical: "if any person shall carry, or cause to be carried by hand or in or upon any vehicle or other conveyance, any creature in a cruel or inhumane manner, he shall be guilty of a misdemeanor."¹⁰⁸

The states vary as to what kinds of animals are covered by these statutes.¹⁰⁹ Five states protect only domestic animals,¹¹⁰ while Indiana's law protects "any living animal, fowl or bird."¹¹¹ The rest of the states that have anti-cruelty laws concerning transportation protect "any crea-

¹⁰⁶ See 18 U.S.C. § 42 and Nilsson, *supra* note 6, at 108-12.

¹⁰⁷ Leavitt, *The Evolution of Anti-Cruelty Laws*, in ANIMALS, *supra* note 6, at 19.

¹⁰⁸ MISS. CODE ANN. § 97-41-5 (1972).

¹⁰⁹ Minnesota has a more complex statute than most:

1. *Penalty.* Any person who does any of the following is guilty of a misdemeanor: (a) Carries or causes to be carried, any live animals upon any vehicle or otherwise, without providing suitable racks, cars, crates, or cages in which the animals can both stand and lie down during transportation and while awaiting slaughter; (b) Carries or causes to be carried, upon a vehicle or otherwise, any live animal having feet or legs tied together, or in any other cruel or inhuman manner; (c) Transports or detains livestock in cars or compartments for more than 28 consecutive hours without unloading the livestock in a humane manner into properly equipped pens for rest, water and feed for a period of at least five consecutive hours, unless requested to do so as provided in subdivision 2, or unless prevented by storm or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, or (d) Permits livestock to be crowded together without sufficient space to stand, or so as to overlie, crush, wound, or kill each other.

2. *Exception.* A person or corporation engaged in transporting livestock may confine livestock for 36 hours if the owner or person with custody of that particular shipment of livestock requests in writing that an extension be allowed. That written request shall be separate from any printed bill of lading or other railroad form.

MINN. STAT. ANN. § 343.24 (West Supp. 1984).

¹¹⁰ Leavitt, *Evolution of Anti-Cruelty Laws*, in ANIMALS, *supra* note 6, at 19. The five states are California, Idaho, Nebraska, Washington and West Virginia. *Id.*

¹¹¹ IND. CODE ANN. § 35-46-3-2 (Burns Supp. 1984).

ture" or "any animal", but their definitions of "animal" vary.¹¹² The available fines range from \$10 to \$100 in some states and up to \$1,000 in others.¹¹³ Sentences vary from up to 60 days in Indiana to a maximum of one year in New York.¹¹⁴ These laws, then, may provide some small additional deterrent to protect animals from mistreatment during air transportation.

D. *Some International Humanitarian Laws Governing International Air Transportation of Animals*

Two major international agreements offer humane protection to animals in international transportation by air.¹¹⁵ These agreements are the European Convention for the Protection of Animals in International Transport¹¹⁶ and the Convention on International Trade in Threatened and Endangered Species of Wild Fauna and Flora (CITES).¹¹⁷ The Convention for the Protection of Animals during International Transport was initiated by the Council of Europe,¹¹⁸ and specifies the standards which must be met during air transportation of wild and domestic animals, reptiles, amphibians and birds.¹¹⁹ This Convention has been ratified by all the European Economic Community¹²⁰ except the Netherlands, and also by Spain

¹¹² Leavitt, *Evolution of Anti-Cruelty Laws*, in ANIMALS, *supra* note 6, at 19. See *id.*, Appendix, at i-ii for a complete list of these statutes.

¹¹³ *Id.*, Appendix at i-ii.

¹¹⁴ *Id.* See IND. CODE ANN. § 35-46-3-2 (Burns Supp. 1984), and N.Y. AGRIC. & MKTS. LAW § 359 (McKinney 1972).

¹¹⁵ Stevens, *International Animal Protection*, in ANIMALS, *supra* note 6, at 214-15.

¹¹⁶ Convention for the Protection of Animals in International Transportation, 788 U.N.T.S. 195 (Dec. 13, 1968), reprinted in ANIMALS, *supra* note 6, Appendix at ix-xxvii.

¹¹⁷ Convention on International Trade in Threatened and Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, discussed in Stevens, *International Animal Protection*, in ANIMALS, *supra* note 6, at 214-15.

¹¹⁸ Stevens, *International Animal Protection*, in ANIMALS, *supra* note 6, at 214-15. The Council of Europe is the executive body of the European Economic Community.

¹¹⁹ *Id.*

¹²⁰ The European Economic Community (EEC) is a supernational body formed by and comprised of the majority of European countries. The EEC sets rules and

and Finland.¹²¹ Its basic provisions include 1) veterinary inspection and certification for fitness of all animals prior to loading for international transportation; 2) safe, clean, ventilated containers with adequate space for the animals, marked to indicate "right side up" and "live animals"; and 3) feeding and watering of animals at least every 24 hours.¹²² The Convention of International Trade in Threatened and Endangered Species of Wild Fauna and Flora¹²³ was mainly drafted to protect animals from extinction. However, in seven different places it specifies that "any living specimen [must] be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment."¹²⁴ This Convention has been ratified or acceded to by 46 nations, including the United States and most of Europe.¹²⁵ There is little information available, however, about the extent of compliance with these agreements.¹²⁶

regulations with regard to trade, agriculture and other economic matters affecting the relations between the member nations interse and between member nations and non-member nations. For a general discussion of the EEC see Norton, *Overview of European Community Law : A Primer for Businessmen and Attorneys*, 29 Sw.L.J. 347 (1975).

¹²¹ *Id.*

¹²² See ANIMALS, *supra* note 6, Appendix, at ix-xvii.

¹²³ Stevens, *International Animal Protection*, in ANIMALS, *supra* note 6, at 214.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* However, there is information which indicates that most countries are not in compliance with CITES. Memorandum to Dr. Grandy and Jeanne Roush, from Nancy Blaney (April 3, 1984) (summarizing the informal discussion of CITES matters on March 29, 1984), at 7. In fact, shortly before publication, the *London Daily Express* published an article concerning a report by the Environmental Investigation Agency of animal deaths at Heathrow Airport in England from 1979-1983. The report included the following cases of animal suffering during air transportation:

Over 560 exotic birds dead on arrival from Senegal.

Ten howler monkeys from Paraguay killed after being squeezed on their sides in an 8 ft. high crate.

Eight out of 10 Canadian river otters suffocated in a cramped crate.

One thousands [sic] garter snakes from Miami crushed to death by their own weight.

Four hundred lovebirds in crates from Tanzania dead on arrival.

29 squirrel monkeys from Bolvia [sic] found with their tails plaited into knots, which took a vet 20 minutes to untie.

Seventy-one monkeys dead on arrival from Bolivia.

The 1976 Animal Welfare Act Amendments,¹²⁷ the Lacey Act,¹²⁸ and other state¹²⁹ and international laws¹³⁰ all recognize the need for humane treatment of animals during air transportation. They do not, however, consider the property questions involved when an animal dies or is injured in air transportation.

III. THE PROPERTY LAW GOVERNING AIR TRANSPORTATION OF ANIMALS

Animals have traditionally been treated as chattels, or property, in the law.¹³¹ When an animal dies or is injured during air transportation, the owner will often seek compensation for his loss of property. He or she may do this by bringing a civil negligence suit against the air carrier.¹³² Historically, liability of air carriers for death or injury of animals on domestic flights was governed by tariffs filed by the carrier with the Civil Aeronautics Board.¹³³

Flamingoes that never walked again after being bound in cloth because of their delicate legs. The lucky ones died in transit.

Scandal of the Flying Animals, London Daily Express (Mar. 23, 1985), reprinted in Animal Air Transportation Assn., Inc. (Vol. VIII, No. 1, June 1985), at 14-15.

According to John Brookland, an EIA Investigator:

The guidelines issued by the Convention on International Trade in Endangered Species and the International Air Travel Association are not enforced and ignored wholesale. The shippers ignore the rules and the airlines accept their crates. The airlines therefore have some responsibility for what happens. No airline is worse than another — they all carry animals in a cruel way at some time or another. What we have recorded at Heathrow is what happens at the best regulated airport in the world. What happens internationally is a nightmare.

Id.

¹²⁷ 7 U.S.C. § 2131 (1982); see *supra* notes 53-59 and accompanying text for a full discussion of the 1976 AWA Amendments.

¹²⁸ 18 U.S.C. § 42 (1982); see *supra* notes 94-106 and accompanying text for a full discussion of the Lacey Act.

¹²⁹ See *supra* notes 107-114 and accompanying text.

¹³⁰ See *supra* notes 115-126 and accompanying text.

¹³¹ See Knappen, *Constitutional and Legal History of England*, 191-92 (1964), and Leavitt, *Introduction*, in ANIMALS, *supra* note 6, at 8-10.

¹³² See, e.g., *Klicker v. Northwest Airlines Inc.*, 563 F.2d 1310 (9th Cir. 1977), discussed *infra* notes 161-177 and in accompanying text.

¹³³ See, e.g., *Hauslohner v. Eastern Airlines*, 18 Av. Cas. (CCH) ¶¶ 17,238, 17,239 (E.D. Pa. 1983), discussed *infra* notes 145-150 and accompanying text.

These tariffs would usually limit the amount of damages for which a carrier would be liable if cargo was lost, damaged, or destroyed.¹³⁴ How the Airline Deregulation Act of 1978¹³⁵ and the 1985 sunset of the CAB¹³⁶ have affected these liability limitations is not yet clear.¹³⁷ Liability for similar losses in international flights is governed by the Warsaw Convention.¹³⁸

A. *Liability for Injury or Death of Animals in Domestic Air Transportation*

1. *Before Deregulation*

From 1938 to late 1984, the air transportation industry was governed by a system of detailed economic regulation which severely discouraged competition.¹³⁹ Before a carrier could engage in air transportation, it had to first obtain a certificate of public convenience and necessity from the CAB.¹⁴⁰ Once the CAB certified a carrier, the carrier was obligated to provide air transportation upon reasonable request.¹⁴¹ This requirement forced air carriers to transport almost any cargo, regardless of their ability to care for it.¹⁴² Carriers were also required to set forth their

¹³⁴ *Id.*

¹³⁵ 49 U.S.C. § 1551 (1982).

¹³⁶ *Id.* See *supra* note 90 for a discussion of the termination of the CAB.

¹³⁷ See Davison & Solomon, *Air Carrier Liability Under Deregulation*, 49 J. AIR L. & COM. 31 (1983).

¹³⁸ Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S.No. 876, 137 L.N.T.S. 11 (1934), reprinted in 49 U.S.C. § 1502 (1976) [hereinafter cited as Warsaw Convention]. The Warsaw Convention is a "multilateral treaty, drafted and adhered to by most countries who have international routes. The Convention standardizes various liability and notice rules involving international travel and domestic segments of international journeys." Davison and Solomon, *supra* note 137, at 40 n.56. For a general overview of the Convention see *In re* Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982).

¹³⁹ See *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 822 (D.C. Cir. 1980); see also *United States v. CAB*, 511 F.2d 1315, 1322 (D.C. Cir. 1975) (discussing the regulation of air transportation under the Federal Aviation Act, 49 U.S.C. § 1301 (1976)).

¹⁴⁰ 618 F.2d 822 (discussing 49 U.S.C. § 1371(a)).

¹⁴¹ 618 F.2d 822 (discussing 49 U.S.C. § 1374(a)).

¹⁴² *Id.*

rates and liability limitations in detailed tariffs filed with the CAB, and the Board had authority to prohibit rates or practices it determined to be unreasonable or discriminatory.¹⁴³ Thus, the CAB played a major role in determining to what extent an airline could limit its liability for loss or damage of transported property, including live animals.¹⁴⁴

*Hauslohner v. Eastern Airlines*¹⁴⁵ illustrates how a filed tariff limited an air carrier's liability for death of an animal. In *Hauslohner*, "Ch. Dhandy's Favorite Woodchuck," a pedigree pug, died during an Eastern Airlines flight.¹⁴⁶ The dog's owner brought suit against the airline, claiming that the dog was valued at \$85,000.¹⁴⁷ The damages were nonetheless limited to \$750, the amount specified for lost or destroyed baggage on Eastern Airlines' tariff.¹⁴⁸

Since Eastern Airlines had written the limitation on the ticket and also posted it at the ticket counter, the court held that the owner was given adequate notice of the tariff and therefore should be held to it.¹⁴⁹ The court also noted that the owner could have increased the liability limitation to \$5000 for a slightly higher rate or obtained private insurance.¹⁵⁰

When a tariff limits damages for death or injury of an

¹⁴³ *First Pennsylvania Bank v. Eastern Airlines*, 731 F.2d 1113, 1120 (3rd Cir. 1984) (discussing the CAB's authority under § 1002 of the Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 977 at 1018-20 (repealed 1958)).

¹⁴⁴ *See id.*

¹⁴⁵ 18 Av. Cas. (CCH) ¶ 17,238 (E.D. Pa. 1983).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 17,240.

¹⁵⁰ *Id.* at 17,239. The court stated:

Although the application of the limitation of liability provision under the facts and circumstances of this case may lead to a harsh result, it is not entirely unfair to the plaintiff. Woodchuck was described in the plaintiff's memorandum as a 'seasoned air traveller.' In view of the significant value of the plaintiff's pug after winning the Westminster Dog Show, plaintiff should have protected his investment by procuring adequate insurance. Plaintiff could have opted to increase the limitation of liability up to \$5,000 at a small cost and to

animal in transport, but does not provide for complete exculpation of the carrier, the stated limitations are the maximum amount of damages available.¹⁵¹ In *Young v. Delta Air Lines, Inc.*,¹⁵² a passenger brought suit for negligence and misconduct in connection with the death of her dog during air transportation.¹⁵³ The court held that claims of punitive damages could not increase damages above the \$500 liability limitation in the tariff.¹⁵⁴

A tariff which provided for exculpation from all liability (including the airline's own negligence) in carrying live animals as baggage was found to be unlawful in *Davis v. Northeast Airlines, Inc.*¹⁵⁵ In *Davis*, a breeder and seller of dachshunds flew from Manchester to Chicago with three dachshunds as excess baggage.¹⁵⁶ Northeastern Airlines had filed with the CAB a tariff which provided, "[the] owner assumes all risk for injury, sickness, or death of any pets accepted for transportation."¹⁵⁷ The tariff did provide for liability (maximum \$500) for death or injury requiring the animal be put to sleep, if the passenger declared a value on the animal and paid a small valuation charge.¹⁵⁸ When two dogs died and the third was injured, the breeder brought suit against the carrier.¹⁵⁹ Despite the breeder's failure to declare a value on the dogs, the Supreme Court of New Hampshire held that the exculpatory provisions of the tariff were invalid and remanded to

obtain additional insurance above the amount from a private insurer."

Id. at ¶ 17,240.

¹⁵¹ *Young v. Delta Air Lines, Inc.*, 16 Av. Cas. (CCH) ¶ 17,198 (N.Y. App. Div. 1980).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* The court also held that even despite the tariff provisions, New York state law did not permit recovery for mental suffering and emotional distress as an element of damages for loss of a passenger's property. *Id.*

¹⁵⁵ 14 Av. Cas. (CCH) ¶ 17,282 (N.H. 1976). The CAB had already determined such exculpatory provisions unlawful. CAB Order No. 74-12-124, 40 Fed. Reg. 1121, 1122 (1975).

¹⁵⁶ 14 Av. Cas. (CCH) ¶ 17,282 (N.H. 1976).

¹⁵⁷ *Id.* at 17,282.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the trial court for determination of damages not to be limited by the tariff.¹⁶⁰

A tariff limiting liability will not apply if a passenger is not allowed to declare a higher value for the animal.¹⁶¹ In *Klicker v. Northwest Airlines, Inc.*,¹⁶² the plaintiffs had shipped their valuable golden retriever, Sir Michael Robert, from Minneapolis, Minnesota to Billings, Montana. The airline required the Klickers to ship the dog in the cargo hold as "excess baggage."¹⁶³ Although the owners informed the airline of the dog's alleged value (\$35,000), they were not permitted to officially declare the dog's value or to pay extra charges for the shipping based on a declared valuation.¹⁶⁴ The airline, however, did demand and receive double the ordinary excess baggage charge to ship the dog.¹⁶⁵ During the flight the retriever died, and the Klickers brought suit.¹⁶⁶ Both the Klickers and Northwest stipulated that the dog's death was caused by the airline's negligence in transporting him.¹⁶⁷ The court rejected the airline's reliance on three tariffs.¹⁶⁸ The court found the first tariff, an absolute exculpatory tariff similar to the one in *Davis*,¹⁶⁹ to be unlawful, noting that the CAB had already declared such tariffs void as against public policy.¹⁷⁰ The second tariff limited the airline's liability to \$500 for loss or damage of any baggage unless the passenger had declared a higher value of the property and paid an appropriate higher rate.¹⁷¹ The court held this tariff did not apply since the Klickers were not al-

¹⁶⁰ *Id.* at 17,282-284.

¹⁶¹ *Klicker v. Northwest Airlines*, 563 F.2d 1310 (9th Cir. 1977).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1312-13.

¹⁶⁹ *Davis v. Northeast Airlines, Inc.*, 14 Av. Cas. (CCH) ¶ 17,282 (N.H. 1976), see *supra* notes 155-159 and accompanying text.

¹⁷⁰ *Klicker*, 531 F.2d 1310 (1977).

¹⁷¹ *Id.* at 1315.

lowed to declare a higher value.¹⁷² The third tariff relied on by Northwest provided that the airline would not accept "baggage the declared value of which exceeds. . . \$5,000."¹⁷³ The court concluded that this tariff, too, could not apply to the Klickers because the airline had refused to allow any declared valuation for the dog.¹⁷⁴ The court stated that "if the airline erred in accepting the animal, the responsibility for the mistake falls on the airline, not on the innocent shipper."¹⁷⁵ Thus, the Klickers were allowed to proceed with their suit without limitation of damages by the tariffs.¹⁷⁶ In short, *Klicker* and the other cases (with the exception of *Davis*) illustrate that, if a tariff was reasonable, non-discriminatory, and the passenger was given the conscious choice whether to accept it or pay for higher coverage, the CAB and the courts would uphold it.¹⁷⁷

2. After Deregulation

The impact of the sunset of the CAB and deregulation on liability of air carriers for loss of baggage, including animals, may not be as drastic as some first thought.¹⁷⁸ While there are no recent cases concerning death of animals during air transportation since deregulation and the sunset of the CAB, *First Pennsylvania Bank v. Eastern Airlines*¹⁷⁹ explains the effect of deregulation on an air carrier's liability limitations for lost or destroyed cargo, which were once provided by tariffs filed with the CAB.¹⁸⁰

¹⁷² *Id.*

¹⁷³ *Id.* at 1316, quoting Tariff Rule 370(c) (emphasis in court's quotation).

¹⁷⁴ *Klicker*, 531 F.2d at 1316.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See text accompanying notes 145-176.

¹⁷⁸ See *First Pennsylvania Bank v. Eastern Airlines*, 731 F.2d 1113, 1120 (3rd Cir. 1984).

¹⁷⁹ 731 F.2d 1113 (3rd Cir. 1984).

¹⁸⁰ See *id.* at 1119-20; see also *Davison & Solomon*, *supra* note 137, at 32. The CAB had the power to prescribe what information must be included in tariffs which did not meet its requirements. Once on file with the CAB, a valid tariff governed the rights and liabilities of both the air carrier and its passengers. 731 F.2d at 1119-20.

In *First Pennsylvania Bank*,¹⁸¹ a bank sued Eastern Airlines for the loss of a low-cost express package containing checks worth millions of dollars.¹⁸² The bank was aware of the airlines \$500 liability limitation under the express system, and did not seek greater coverage from the airline or purchase insurance.¹⁸³ The court noted that, although the CAB no longer had the power to determine the reasonableness of tariffs, the federal common law would still apply.¹⁸⁴ The result in *First Pennsylvania Bank*¹⁸⁵ is not drastically different from similar cases decided before deregulation. The court held that under the common law doctrine of "released value", if a shipper and an air carrier agree, by tariff or otherwise, to a certain lower value of the property to be shipped, in order for the carrier to charge a lower rate, the shipper will be held to that value in the event of loss.¹⁸⁶ This protects the carrier from extravagant claims when losses do occur.¹⁸⁷ The court stated, "[t]he legal validity of an agreed value contract merely enabled the carrier's rate to be measured in accordance with the risk to which it was exposed by reason of the value of the property transported."¹⁸⁸

The holding in *First Pennsylvania Bank*¹⁸⁹ seems to indicate that air carriers may continue to limit their liability for loss or destruction of any cargo, including live animals, provided they offer the shipper the choice of declaring a higher value on the property and paying a correspondingly higher rate.¹⁹⁰ Under these circum-

¹⁸¹ 731 F.2d 1113 (3rd Cir. 1984).

¹⁸² *Id.*

¹⁸³ *Id.* at 1115.

¹⁸⁴ *Id.* at 1119. The court also pointed out that, while tariffs are no longer filed with the CAB, they are still published in the "Official Airline Freight Rate Tariff Book." The court refused to address the question whether this publication would be sufficient to inform a shipper of the availability of alternative services providing for full loss liability coverage. *Id.* at 1115.

¹⁸⁵ 731 F.2d 1113 (3rd Cir. 1984).

¹⁸⁶ *Id.* at 1116.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1113.

¹⁹⁰ *Id.* at 1117.

stances, a shipper of a valuable animal would do well to pay for increased coverage or to at least carry insurance for the value of the animal, since death of animals during air transportation is a fairly common occurrence.¹⁹¹ Furthermore, since air carriers may still limit their liability, it is not likely that they will refuse to ship animals even if they cannot care for them, as some animal shippers feared would happen when their "duty to transport" was removed by deregulation.¹⁹² The effect of deregulation on the safety of animals remains to be seen. Several humane associations objected to deregulation, arguing that tariff rules were necessary to ensure safe transportation of animals.¹⁹³ If airlines may limit their liability for death of an animal during transport, and may still carry animals, it is unlikely that they will have a greater incentive to ensure animal safety. The owner is left with both the risk of the loss of the animal and the responsibility for providing for compensation, by insurance or otherwise, if the animal dies.

B. *Liability for Death or Injury of Animals During International Flights*

When an animal dies or is injured during an international flight, claims for damages are covered by an international treaty known as the Warsaw Convention.¹⁹⁴ Article 18 of the Warsaw Convention provides for a carrier's complete liability for lost, damaged, or destroyed goods, provided that the occurrence causing the damage took place during the transportation by air.¹⁹⁵ Certain notice requirements must also be met in order for the ship-

¹⁹¹ See *supra* notes 31-40, 131-177 and accompanying text for examples of animal death and injury during air transportation.

¹⁹² 618 F.2d at 826.

¹⁹³ 618 F.2d at 831 n.28.

¹⁹⁴ Warsaw Convention, *supra* note 138.

¹⁹⁵ *Id.* at art. 18(1). Article 18(1) states: "The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." 49 U.S.C. § 1502 (1982).

per to collect damages.¹⁹⁶ Article 26 of the Warsaw Convention requires the shipper to give the carrier notice of damaged goods within seven days of receipt.¹⁹⁷ If the goods are lost, the Convention does not require the shipper to give any notice, since the carrier is presumably aware of the loss.¹⁹⁸ Curiously, the Warsaw Convention does not mention any notice requirement for destroyed goods.¹⁹⁹

A problem arose in interpreting the Warsaw Convention's gap concerning destroyed goods in *Dalton v. Delta Airlines*,²⁰⁰ where five greyhound racing dogs died during an air shipment from Shannon, Ireland, to Miami, Florida.²⁰¹ The dogs apparently suffocated during the second flight of the trip, from Boston to Miami.²⁰² Dalton, the owner of the dogs, sought \$60,000 in compensatory damages for lost income and profits he would have received

¹⁹⁶ See *Stud v. TransInternational Airlines*, 727 F.2d 880, 882-84 (9th Cir. 1984); see also Warsaw Convention, *supra* note 138, at art. 26.

¹⁹⁷ Warsaw Convention, *supra* note 138, at art. 26. Article 26 reads as follows:

(1) Receipt of the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation. (2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal. (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid. (4) failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Id.

¹⁹⁸ Warsaw Convention, *supra* note 138, at art. 13(3). Article 13(3) of the Warsaw Convention provides:

If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

¹⁹⁹ See *Dalton V. Delta Airlines*, 570 F.2d 1244, 1245-47 (5th Cir. 1978).

²⁰⁰ *Id.* at 1244.

²⁰¹ *Id.*

²⁰² *Id.* at 1245.

from racing the dogs, and for the dogs' value at the time of the loss.²⁰³ Delta defended on the grounds that Dalton did not give the airline timely written notice of the loss within seven days as required by the Warsaw Convention.²⁰⁴ The court found that the seven-day timely written notice provision was inapplicable here, since the dogs were not *damaged*, but *destroyed*.²⁰⁵ Because the airline was aware that the animals were dead upon arrival, the seven-day notice provision was not necessary.²⁰⁶ The court held that when goods, including live animals, are destroyed during an international flight, the shipper does not have to give written notice to the airline as implied by Article 26 of the Warsaw Convention.²⁰⁷

In a similar case, *Hughes-Gibb & Co. v. Flying Tiger Line, Inc.*,²⁰⁸ seventy-two out of 130 breeding swine died during or as a result of a flight from Chicago to the Philippines.²⁰⁹ When the shipper sued the airline, the damages question was governed by provisions of the Warsaw Convention.²¹⁰ The *Hughes-Gibb* court also distinguished between destroyed goods, the pigs which were dead on

²⁰³ *Id.*

²⁰⁴ Warsaw Convention, *supra* note 138, at art. 26. For the text of Art. 26, see *supra* note 197.

²⁰⁵ 570 F.2d at 1247-48. Delta argued that the greyhounds were not destroyed, but only damaged, hoping to bar the plaintiff from recovery since he had not filed timely written notice of the "damaged goods" within seven days as required by Article 26, *supra* note 197. The court refuted this argument, stating that the "dogs [were] bred, born and trained for kennel racing, not just for flesh, hide or hair. Recognizing, as we must, that live dogs are goods, when dead they are no longer at all the thing shipped." *Id.*

²⁰⁶ *Id.* at 1247-48. This reasoning is largely based on a serious gap in the Warsaw Convention. The Convention provides notice requirements for damaged goods (Article 26) and for lost goods (Article 13(3), no notice required) but fails to provide notice requirements of any kind for destroyed goods. See *supra* notes 138, 194-199 and accompanying text. The court reasoned that the written notice requirement for damaged goods was designed to protect the airline in the event that the damage was hidden. Since in the *Dalton* case the airline found the dogs dead, no further notice to the airline was required. An airline is just as aware when goods are destroyed as when they are lost. 570 F.2d at 1246-47.

²⁰⁷ 501 F.2d at 1248.

²⁰⁸ 16 Av. Cas. (CCH) ¶ 17,492 (N.D. Ill. 1981).

²⁰⁹ *Id.* at 17,493.

²¹⁰ *Id.* See *supra* note 138.

arrival, and damaged goods, the pigs which died later as a result of injury during the flight.²¹¹ The court followed *Dalton*, agreeing that no notice should be required to recover damages for destroyed goods, the sixty pigs which were dead on arrival in Manila.²¹² As for the twelve pigs that survived the initial flight but died soon thereafter, the court held that they were damaged goods — even if the damage was “hidden” — and that the shipper was required to give the carrier notice within seven days under the Warsaw Convention.²¹³ When the carrier asserted that the dead pigs were only “damaged” since they could have economic value as meat, the court noted,

(t)he economic value test for destroyed goods, however, as the *Dalton* court clearly noted, is whether the goods remain usable for the owner's purpose. In this regard, just as dead greyhounds cannot race, dead breeding swine cannot breed. Even for the purposes of Messrs. Swift and Armour, though, pigs that die on airplanes are without economic value. This is so because sausage made from pigs not killed in slaughterhouses is adulterated sausage. . . .²¹⁴

In *Stud v. Trans International Airlines*,²¹⁵ the Ninth Circuit Court of Appeals held that a carrier's actual knowledge of an animal's death *after* air transportation will not satisfy the “timely written notice” requirements of the Warsaw Convention.²¹⁶ Neville Stud paid \$300,000 for a race

²¹¹ 16 Av. Cas. (CCH) at ¶ 17,493-95.

²¹² *Id.* at 17,495.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ 727 F.2d 880 (9th Cir. 1984).

²¹⁶ *Id.* at 883. In determining whether the plaintiff could recover damages, the *Stud* court applied a different version of the Warsaw Convention known as the Hague Protocol, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371. The court applied the Hague Protocol because the contract of carriage was between Canada and New Zealand, two countries which are parties to the Hague Protocol. 727 F.2d at 881-82. Article 26(2) of the Hague Protocol requires that “[i]n case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within . . . fourteen days from the date of the receipt in the case of goods.” *Id.* at 882, *citing* 478 U.N.T.S. at 385. The original Article 26(2), still in effect in the United States, requires the shipper to give notice of the complaint within seven days of the receipt of the

horse named Super Clint.²¹⁷ One month after purchase, Stud shipped the horse from Canada to New Zealand on a Transamerica flight.²¹⁸ Although the horse seemed to be well when he arrived in New Zealand, he soon became visibly ill and died within 10 days of shipment.²¹⁹ An autopsy revealed the cause of death to be "pleuropneumonia probably brought on by the stress of travel."²²⁰ A final report a few months later concluded that the pneumonia was probably brought on by fluctuations in temperature in the airplane cabin where Super Clint was staying.²²¹ Widespread news reports of the famous horse's death provided actual notice to the airline within the required Warsaw notice period.²²² The *Stud* court, however, found that this knowledge was inadequate since it was not *written* notice as required by the Warsaw Convention.²²³ Because the horse's owner waited until after the final autopsy report, two months after Super Clint's death, before giving Transamerica written notice, his claim for damages was denied.²²⁴

Thus, liability of air carriers for death or injury of animals during international flights is somewhat different from domestic shipments, since it is governed by the Warsaw Convention.²²⁵ Most litigation regarding the former seems to center around the notice requirements, rather than the dollar limitations that are frequently litigated in domestic transportation cases.²²⁶

goods. 727 F.2d at 882 n.4, citing 49 Stat. at 3020. See *supra* note 197 for the original text of Article 26. See the *Dalton* case, discussed *supra* notes 200-207 and accompanying text for a United States case interpreting Article 26(2) of the original Warsaw Convention.

²¹⁷ *Stud*, 727 F.2d at 881.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 882.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 883.

²²⁴ *Id.*

²²⁵ *Id.* at 883-84. See *supra* note 216.

²²⁶ See *supra* notes 139-193 and accompanying text for a discussion of liability of air carriers for death or injury of animals during domestic flights.

CONCLUSION

To date, there are no satisfactory answers to the question of how animals should be treated during air transportation. The continuing tension between humanitarian concerns for animal safety and economic concerns for profitability has failed to produce a workable compromise. The law of animal air transportation has addressed both of these concerns, through humanitarian laws requiring adequate care during air transportation, and through property laws allowing compensation to an animal owner if an air carrier causes the animal's death. There is, however, grave doubt whether these laws are effective. The 1976 Animal Welfare Act Amendments have at least improved air transportation of animals by requiring safe standardized containers which are now widely used,²²⁷ but the problems of temperature, handling and neglect are far from solved.²²⁸ There also is little evidence to indicate that the Lacey Act or other state or international laws have been effective.²²⁹

The property problems, on the other hand, seem to be solving themselves. Deregulation should allow air carriers to charge higher rates for cargo that is more difficult to carry, such as live animals, and carriers will then have a stronger economic interest in providing adequate care for the animals.²³⁰ The airlines' freedom to limit their liability for animals in transit may prevent them from charging higher rates, though. Once airlines allow a shipper to obtain a lower rate in exchange for a lesser amount of coverage,²³¹ the airlines' economic incentive to care for the animal disappears. Once a regular animal shipper loses an \$80,000 show dog in air transport, however, and is limited to \$750 in damages because he agreed to a lower

²²⁷ Telephone Interview with Dr. Richard Crawford, *supra* note 41.

²²⁸ *Id.* See *supra* notes 31-40 and accompanying text for examples.

²²⁹ See *supra* notes 94-130 and accompanying text.

²³⁰ See *National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 826, 831 (D.C. Cir. 1980).

²³¹ See *Hauslohnner v. Eastern Airlines*, 16 Av. Cas. (CCH) ¶ 17,238 (E.D. Pa. 1983), discussed *supra* notes 145-150 and accompanying text.

shipping rate, as in *Hauslohner*,²³² the owner will probably obtain insurance before shipping a valuable animal again. To a certain extent the market place and good business sense can be relied on to take care of these kinds of property concerns.

The problem of animal suffering, though, is far from eliminated. The Code of Federal Regulations contains hundreds of standards for animal care under various humanitarian and health laws, but the federal agencies involved are hardly diligent in their enforcement.²³³ The property law which places the economic burden on the *shipper* to obtain insurance for animals in transit is also little incentive to the airlines to assure humane care. If an airline may still limit its liability to an amount less than \$1,000 for death of an animal, it may prove more cost-effective for them to occasionally pay for a dead pet than to increase the standard of care. On the other hand, air transportation of animals remains essential for agricultural and scientific purposes, and economics in this area will generally provide some incentive to keep the animals alive.

Yet these economic incentives will not protect the individual pet owner, who is far more at risk. Few pet owners are aware of the dangers involved in transporting animals by air, and the airlines are not required to warn animal

²³² *Id.*

²³³ Shortly before publication, the Reagan Administration Office of Management and Budget ("OMB") recommended eliminating all funds to the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) inspection program under the Animal Welfare Act. The OMB briefing document stated:

"States, industry, and humane groups should take responsibility for the humane treatment of animals. Given current fiscal constraints the Department must concentrate limited resources in areas that will protect American agriculture from pests and diseases. Consequently, the department proposed to eliminate the animal welfare program. . . APHIS will discontinue all inspections of . . . carriers. There will be no Federal investigations of complaints of alleged violations and cooperative efforts with other government agencies will cease."

Reagan Rebuffs Animal Welfare Programs, Animal Air Transportation Ass'n, Inc. Quarterly Newsletter, (Vol. VIII, No. 1 June 1985).

shippers of these dangers. Some airlines allow pet owners to purchase a seat and carry their small, anaesthetized pet in a kennel in the passenger compartment, but most still ship pets with ordinary baggage. Pets are still dying as a result of being shipped in baggage compartments. Even if the pet owner is adequately compensated when his pet dies in air transportation, he still feels an emotional loss, and an animal has needlessly suffered.

A better solution than all of the regulations for shipping pets might be to simply prohibit airlines from shipping individual pets at all without a special license. If certain airlines want to specialize in pet transportation, they could get such a permit, and then advertise their expertise to pet shippers. Fewer pet carriers would also require fewer federal inspections. The carriers could charge a higher rate in exchange for providing the special care needed by animals in air transportation. Another alternative would be to heavily penalize airlines for the death of individual pets, say at \$2,000 per death. This would also provide an economic incentive for the airlines to take better care of animals in their custody, or to refuse to ship animals at all. At a minimum, airlines could be required to warn shippers of the dangers involved in animal air transportation. But so long as airlines continue to ship animals and treat them like ordinary baggage, the problem of animal suffering will continue.

