

2003

The Ninth Circuit of the United States Court of Appeals Holds That the Warsaw Convention Does Not Apply to an Entity Acting as an Agent to More than One Principal: *Dazo v. Globe Airport Security Services*

Christa Brown

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Christa Brown, *The Ninth Circuit of the United States Court of Appeals Holds That the Warsaw Convention Does Not Apply to an Entity Acting as an Agent to More than One Principal: Dazo v. Globe Airport Security Services*, 68 J. Air L. & Com. 639 (2003)
<https://scholar.smu.edu/jalc/vol68/iss3/8>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**THE NINTH CIRCUIT OF THE UNITED STATES COURT
OF APPEALS HOLDS THAT THE WARSAW CONVENTION
DOES NOT APPLY TO AN ENTITY ACTING AS AN
AGENT TO MORE THAN ONE PRINCIPAL:
DAZO V. GLOBE AIRPORT SECURITY SERVICES**

CHRISTA BROWN*

CCOURTS HAVE consistently and almost uniformly applied the Convention for the Unification of Certain Rules Relating to International Transportation by Air¹ to an airline's agents² and employees.³ In considering whether to continue the consistency of other courts, the Ninth Circuit of the United

* J.D. Candidate, 2004, Southern Methodist University Dedman School of Law; B.S.E.E., 2001, Rice University. The author would like to thank Christopher Ashworth, attorney for the Plaintiff, and Jill Backer, legal assistant for the Plaintiff's attorney, for their help in providing the briefs submitted to the courts.

¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 40105 (West 2001) [hereinafter Warsaw Convention].

² A principal may be liable for the tortious conduct of an agent even if the principal does not authorize the conduct of the agent or personally violate the duty to the third party. RESTATEMENT (SECOND) OF AGENCY § 216 (1958).

³ *See e.g.*, *Reed v. Wiser*, 555 F.2d 1079, 1092 (2d Cir. 1977) (applying the Warsaw Convention to employees of airlines and protecting the employees by the Convention's liability limitations); *Kabbani v. Int'l Total Servs.*, 805 F. Supp. 1033, 1034 (D.D.C. 1992) (holding that the liability limitations of the Convention applied when the security services took charge of an international passenger's carry-on bag at the airport); *Croucher v. Worldwide Flight Servs.*, 111 F. Supp. 2d 501, 505-06 (D.N.J. 2000) (holding that the Warsaw Convention applied to a cleaning service because the services were in furtherance of the contract of carriage); *In re Disaster at Lockerbie, Scotland* on Dec. 21, 1988, 776 F. Supp. 710, 711-12 (E.D.N.Y. 1991) (finding that non-employee agents are protected by the liability limitations of the Warsaw Convention); *Baker v. Landsell Protective Agency, Inc.*, 590 F. Supp. 165, 170-71 (D.C.N.Y. 1984) (concluding that the Warsaw Convention limits the liability of a security company that had an agreement with a carrier to perform a baggage security check, which fell within the scope of the Convention). *But see Pierre v. E. Air Lines, Inc.*, 152 F. Supp. 486, 489 (D.C.N.J. 1957) (holding that the Warsaw Convention did not apply to agents or servants of carriers).

States Court of Appeals ultimately declines⁴ to apply these principles in the recent case of *Dazo v. Globe Airport Security Services*.⁵ Applying the Warsaw Convention to an airline's agents was a question of first impression in the Ninth Circuit.⁶ By not applying the persuasive precedent of several jurisdictions, the court incorrectly concluded that the Warsaw Convention did not apply to an agent of an airline. The majority's reason not to apply the Warsaw Convention is based on a misapplication of the breadth of the Convention and a misunderstanding of agency law.

Ester Dazo entered Terminal C of the San Jose International Airport on May 12, 1999 to board an 11:50 a.m. flight on Trans World Airlines, Inc. ("TWA") to Toronto, connecting in St. Louis.⁷ Globe Airport Security Services ("Globe") operated the security checkpoint at Terminal C on behalf of three air carriers: America West Airlines, Inc., TWA, and Continental Airlines ("the three airlines").⁸ Globe examined the people using metal detectors and screened their possessions using x-ray machines.⁹ Both ticketed passengers and the general public were allowed to enter the secured area, which contained the embarkation gates and retail stores.¹⁰

Dazo placed her carry-on bag onto a conveyor belt that led to an x-ray machine; she then passed through the metal detector.¹¹ An unknown person or persons took her carry-on bag after it passed through the x-ray machine and traveled an additional ten to fifteen feet.¹² According to Dazo, the bag contained jewelry with a wholesale value of approximately \$100,000 in the Philippines and worth even more in the United States.¹³

⁴ The Ninth Circuit Court of Appeals initially decided this case on May 16, 2001, and applied the Warsaw Convention to cover the agents of airlines. *Dazo v. Globe Airport Sec. Servs.*, 268 F.3d 671, 677 (9th Cir. 2001). The circuit judges granted a petition to rehear the case after the initial decision. Upon rehearing, the panel decided to withdraw the opinion reported at 268 F.3d 671 and substituted another order in its place. *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 936 (9th Cir. 2002) (replacing the first decision by the Ninth Circuit panel).

⁵ *Dazo*, 295 F.3d at 939.

⁶ *Dazo*, 268 F.3d at 675.

⁷ *Dazo*, 295 F.3d at 936.

⁸ *Id.* at 936-37.

⁹ *Id.* at 936.

¹⁰ *Id.* at 937. After the tragic events of September 11, 2001, the general public is no longer allowed to enter the secured area.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Dazo filed a complaint against Globe and the three airlines in the Northern District of California; she asserted claims of negligence and breach of the implied contract of bailment, and sought punitive damages for willful misconduct.¹⁴ The district court granted the defendants' motion to dismiss, holding that the Warsaw Convention preempted her claims because the theft occurred while Dazo was "in the course of embarking."¹⁵ Additionally, Dazo's allegations of willful misconduct were insufficient to escape the Convention's limitation on liability.¹⁶ The district court granted Dazo leave to file an amended complaint to conform to the ruling; however, Dazo did not wish to file an amended complaint.¹⁷

Dazo then filed a timely appeal to the Ninth Circuit of the United States Court of Appeals.¹⁸ When the panel of the Ninth Circuit first heard the appeal, they affirmed the district court's holding that extended the Warsaw Convention and limited Globe's liability to Dazo.¹⁹ Dazo filed a petition for a panel rehearing, and the panel granted the petition.²⁰ Upon rehearing, the panel withdrew the previous opinion, reversed the district court's holding, and remanded the case for further proceedings.²¹

In the Ninth Circuit's second opinion, Judge Tashima wrote the majority opinion, focusing most of the analysis on the application of the Warsaw Convention to determine the extent of Globe's possible liability.²² The court answered the following questions to determine whether the Convention applied to Globe: (1) was the flight an international transportation of passengers and cargo; (2) were the services provided by Globe "in furtherance of the contract of carriage of an international flight;" and (3) was Globe a "carrier" within the meaning of the Warsaw Convention, acting as an agent of the three air carriers.²³ In addressing the first and second questions, the majority focused on the destination of Dazo's flight and the type of ser-

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Dazo*, 268 F.3d at 677; *see supra* note 4.

²⁰ *Dazo*, 295 F.3d at 936.

²¹ *Id.* at 941.

²² *Id.* at 937-40.

²³ *Id.* at 938-39.

vices that Globe rendered to the airlines' passengers.²⁴ The court focused on agency principles and Globe's service to the three airlines to determine if Globe may be afforded "carrier" status under the Convention.²⁵ Addressing the willful misconduct issue, the majority agreed with the district court that Dazo did not provide sufficient evidence to establish willful misconduct; therefore, the opinion did not provide a detailed analysis of the second issue.²⁶

According to the court, the Warsaw Convention did not apply to this set of facts, and the court remanded the case for further proceedings to determine whether Globe is liable for negligence or breach of the implied contract of bailment.²⁷ Globe and the three airlines argued that Dazo was a "passenger" under the Convention because she possessed a "contract of carriage" for "international transportation."²⁸ The appellate court did not focus the discussion on this argument, but readily found that Dazo's flight was "international transportation" and did not analyze Dazo's status as a passenger.²⁹ Globe and the three airlines also argued that the bag disappeared while it was in the exclusive custody of the airlines; therefore, Dazo was in the "course of embarking," so as to apply the Warsaw Convention.³⁰ However, the appellate court found that the services rendered by Globe were basic airport services; therefore, Dazo was not in the "course of embarking and Globe was not a 'carrier' within the meaning of the Convention."³¹

The Ninth Circuit Court of Appeals Judge O'Scannlain dissented with the majority's opinion and found that Globe was entitled to the protection of the Warsaw Convention.³² The dissent argued that because the Warsaw Convention extends to airlines' agents and employees, then, to the extent that Globe acts

²⁴ *Id.*

²⁵ *Id.* at 939-40.

²⁶ *Id.* at 940-41.

²⁷ *Id.* at 939.

²⁸ Airline Appellees' Response to Petition for Rehearing and Suggestion for Hearing *En Banc* at 2-5, *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934 (9th Cir. 2002) (No. CV 99-20548-JW); Appellee, Globe Airport Security Services' Response to Petition for Rehearing and Petition for Rehearing *En Banc* at 4-5, *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934 (9th Cir. 2002) (No. CV 99-20548-JW).

²⁹ *Dazo*, 295 F.3d at 938.

³⁰ Airline Appellees' Brief at 5-8, *Dazo* (No. CV 99-20548-JW); Globe Airport Security Services' Brief at 7-9, *Dazo* (No. CV 99-20548-JW).

³¹ See *Dazo*, 295 F.3d at 938-39.

³² *Id.* at 941.

as an agent, it must be afforded the protection of the Convention.³³ Furthermore, Globe's service to the three airlines did not affect their protection under the Convention, because an agent may serve more than one principal.³⁴ Accordingly, Globe's association with America West and Continental did not destroy its agency relationship with TWA.³⁵ Additionally, the dissent noted that the experience of September 11, 2001 may have affected the majority's reasoning, and charged the court to apply the law faithfully and evenhandedly.³⁶

The *Dazo* court incorrectly refused to apply the liability limitations of the Warsaw Convention to Globe. In coming to the conclusion that the Warsaw Convention was not applicable in this situation, the court correctly concluded that Dazo's flight was an international flight. The court analyzed that the flight's stop in St. Louis before Toronto did not change the flight's status as international under the Convention.³⁷ This analysis is correct because flight layovers do not affect the final destination of the flight, and a stop should not affect the consideration of the flight as international. However, the court failed to mention whether Dazo was a "passenger" of international transportation within the meaning of the Convention. Dazo asserts that she is not a "passenger" because she is passing through an inspection point and is "far removed from the operation of an aircraft."³⁸ While the court should not have accepted Dazo's argument because Dazo possessed a ticket for an international flight, the court should have addressed this argument.

The court also erred in determining that the services rendered by Globe did not advance Dazo's contract for an international flight on TWA. The court asserts that because Globe performed a security check that was required under federal law, Globe only performed basic airport services, not services required by the Warsaw Convention.³⁹ The court fails to distinguish these facts from the case of *Baker v. Lansdell Protective Agency, Inc.*,⁴⁰ which had very similar facts; however, that court

³³ *Id.* at 942.

³⁴ *Id.*; RESTATEMENT (SECOND) OF AGENCY § 226 (1958).

³⁵ *Dazo*, 295 F.3d at 942.

³⁶ *Id.* at 943.

³⁷ *Id.* at 938.

³⁸ Appellant's Petition for Re-Hearing and Suggestion for Hearing *En Banc* at 5-6, *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934 (9th Cir. 2002) (No. 00-15058).

³⁹ *Dazo*, 295 F.3d at 938-39.

⁴⁰ *Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984).

decided that the security screening is part of the embarkation process of an international flight. In the *Baker* case, an airline passenger's jewelry was stolen from her carry-on bag while she passed through a federally mandated security checkpoint.⁴¹ Like *Globe*, the security checkpoint was run by an independent security agency.⁴² The district court decided that: (1) the security company "is entitled to invoke the liability limitation of the Convention," and (2) "it is appropriate to characterize [the passenger] as being in the course of one of the operations of embarking" where the passenger was engaged in pre-flight security screening.⁴³ Therefore, the Ninth Circuit incorrectly decided that because federal law requires the security checkpoint, the services did not promote the operation of embarkation on an international flight, which the Warsaw Convention governs.

Additionally, the court reasoned that because passengers and non-passengers went through the security checkpoint, the Convention would not apply.⁴⁴ This reasoning is skewed because as *Dazo* passed through the security point, she was in the course of embarking, and the Warsaw Convention would apply to an international passenger embarking on an international flight. The airlines assert that because ticketed international passengers must pass through the security checkpoint to board the aircraft, the passengers are embarking.⁴⁵ This proposition is correct because the passengers would not have any way of getting onto the aircraft without passing through this point. Accordingly, it is of no consequence that non-ticketed passengers were also allowed through the checkpoint.

The crux of the court's error occurred in the analysis of the agency status of *Globe* and how it affected their status under the Warsaw Convention. The court incorrectly found that "no case supports the proposition that a security company that is acting as the common agent of multiple airlines, domestic and international," should be accorded "carrier" status under the Convention.⁴⁶ However, in *Julius Young Jewelry Manufacturing Co. v. Delta Air Lines*, the court extended the liability limitations of the Warsaw Convention to an independent contractor that performed

⁴¹ *Id.* at 167.

⁴² *Id.*

⁴³ *Id.* at 170.

⁴⁴ *Dazo*, 295 F.3d at 939.

⁴⁵ Response of Appellee, *Globe Airport Security Services to Appellant's Opening Brief* at 6 n.3, *Dazo v. Globe Airport Sec. Servs.*, 268 F.3d 671 (9th Cir. 2001).

⁴⁶ *Dazo*, 295 F.3d at 939.

inter-line baggage transfer for Delta.⁴⁷ In the present case, both parties agreed that Globe operated as the common agent of the three airlines, and acted on behalf of the three airlines at the time of the theft.⁴⁸ The court reasoned that when an agent serves two masters, both masters must be liable because of the agent's negligence; however, the principles of agency law do put such a restriction on the masters.⁴⁹ This reasoning is based on a misunderstanding of agency principles and overextending the discretionary language of the Restatement. Agency principles have established that an agent may serve more than one master "if the service to one does not involve abandonment of the service to the other."⁵⁰ It does not follow that all three airlines that Globe served would be liable because the bag was stolen while Globe served the Airlines. If Dazo could link Globe's actions, while handling her bag, to each of the airlines, then liability may follow for each of the airlines. However, in Dazo's case, it is of no concern that Globe serviced two other airlines in addition to TWA, which is the airline Dazo intended to board. Globe's service to TWA does not involve abandonment to the other airlines; therefore, Globe may be a "carrier" under the Warsaw Convention even though it serves more than one airline.

The Ninth Circuit of the United States Court of Appeals has declined to follow the consistency of several other circuit courts, and has decided not to apply the Warsaw Convention to airlines' agents. This decision by the court has brought confusion to a consistently applied law. Although the court's reasoning is flawed in several respects, as discussed above, this opinion may increase the number of cases that are brought against airlines' agents with the possibility of winning exorbitant damages. This opinion does little to improve judicial efficiency, and has allowed the public's inflamed passion to interfere with the correct application of the law.

⁴⁷ *Julius Young Jewelry Mfg. Co. v. Delta Air Lines*, 414 N.Y.S.2d 528, 530 (N.Y. App. Div. 1979).

⁴⁸ *Dazo*, 295 F.3d at 938.

⁴⁹ *Id.* at 939-40; RESTATEMENT (SECOND) OF AGENCY § 226 (1958). Both masters may be liable for an agent's actions, but both masters do not have to be liable.

⁵⁰ RESTATEMENT (SECOND) OF AGENCY § 226 (1958).

