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## AIR LAW EDUCATION 1967-91

PAUL B. LARSEN\*

### INTRODUCTION

**I**N 1966, Southern Methodist University offered me the opportunity to teach at the Law School. I eagerly seized the opportunity, primarily because the teaching position was associated with editing the *Journal of Air Law and Commerce*, the preeminent law journal in its field. Out of that partnership of teaching and editing grew many diverse and exciting events, one of which was the first air law symposia.

This year, on the occasion of the twenty-fifth anniversary of the annual SMU Air Law Symposium, the *Journal* has invited me to describe how these conferences came into being and succeeded. I have chosen to look at the conferences not just historically, but also from the point of view of air law education.

### I. THE JOURNAL OF AIR LAW AND COMMERCE CONFERENCES

The *Journal's* professional prestige is based not only on its publications but also on its long history of publication. Fred D. Fagg, Jr. and John H. Wigmore founded the *Journal* at Northwestern University in Chicago in 1930. Because Northwestern University's Transportation Center

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for the Law School and the School of Business published the *Journal*, it originally contained as much air commerce as air law. Fagg and Wigmore edited the *Journal* themselves, and faculty continued to edit it as long as it was at Northwestern, the only exception being that a practitioner, G. Nathan Calkins, edited the *Journal* from 1958 until 1960.

Toward the end of the 1950s, Northwestern University decided to terminate its publication of the *Journal* because its Transportation Center had changed priorities. SMU's enterprising Dean John W. Riehm learned of this opportunity and, in 1960, announced to a surprised SMU law faculty that the *Journal* was coming to SMU.

Due to its suddenness, the transfer of the *Journal* to SMU was not without trauma. One result of the change was that the *Journal* had to combine two years' publication into one year in 1961-62 in order to catch up on its publication lag. Subsequently, the *Journal* resumed its usual regularity. The law school gradually introduced student editors into the management of the *Journal*. Much of the progress in this direction took place in 1965 under an energetic student editor-in-chief, Charles A. Thompson.

My arrival at SMU in 1966 was part of a decision by the School of Law to establish a United States center for air law education. The respected *Journal of Air Law and Commerce* was the center piece of this ambitious and exciting program. I envisioned my role as Associate Senior Editor and then as Senior Editor of the *Journal* to involve working with the student editorial board to move the *Journal* and the SMU School of Law into an activist role which would affect the development of air law.

The very first symposium evidenced this vision. The subject was the Warsaw Convention,<sup>1</sup> possibly the most widely accepted international treaty other than the United Nations Charter. This treaty, regulating the terms of pas-

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1982).

senger and cargo carriage, is fundamental to international air carriage. The United States' denunciation of the Treaty in 1965 had cast air carriage into turmoil. Other countries were trying to understand the actions of the United States, but, plainly, most did not.

My attendance at the Legal Committee discussions of the International Civil Aviation Organization (ICAO) during my studies at McGill University's Institute of Air and Space Law, and during subsequent travels in Europe while doing research at the German Institut für Luftrecht and Weltraumrechtsfragen in Cologne contributed to the idea for a *Journal* symposium on this subject. I was personally acquainted with most of the persons involved and believed interesting discussions would result from inviting all my friends and acquaintances to SMU to talk about their favorite subject under informal circumstances. The student board readily accepted this idea. Thus, the letter of invitation read as follows:

We have in mind three days of concentrated study on the effects of the interim CAB Agreement on the Warsaw Convention,<sup>2</sup> which will provide an unofficial "airing" of the diverse points of view on liability systems, a useful limit, insurance, airline tickets, and prospects for amendment of the convention. While providing a factual introduction to these problems for airline attorneys and executives, the symposium will also allow the opinions of foreign scholars and governments to be forcibly and articulately presented. The *Journal* Board believes that general worldwide understanding of the Warsaw question has not yet been achieved, and that no programs can be made in amending the convention until larger aviation powers are attentive to the meritorious arguments of other States which feel uneasy under the pressure to conform.<sup>3</sup>

The conference took place in August 1967. A number of United States and foreign delegates to the ICAO Legal

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<sup>2</sup> CAB Agreement 18900 (1965) (now commonly known as the Montreal Agreement).

<sup>3</sup> Letter from Paul Larsen to Professor Peter H. Sand, (Nov. 23, 1966) (discussing first symposium).

Committee attended the conference. The catalysts of discussion, however, were private sector attorneys like Lee Kreindler, representing the American trial lawyers, and John E. Stephen, representing the airlines. These attorneys turned the event into a forum for explaining their positions directly to the ICAO Government delegates. The legendary Sir William Hildred, who had just retired as Secretary General of the International Air Transport Association also honored the conference by his appearance. Sir William not only carried a silver pass which entitled him to fly free on any IATA member airline, but he also claimed to have persuaded the United States government to withdraw its denunciation of Warsaw in 1966.

Persons in attendance at the conference quickly established friendly personal contacts. The generosity of a Dallas lawyer, Erin Bain Jones, contributed to the general goodwill when she spontaneously invited the entire conference to dinner at her country club. The visit to a local rodeo, dramatically interrupted by a Southwest thunderstorm, was a highlight for the foreign visitors.

Clearly, the conference had been a valuable experience<sup>4</sup> and had succeeded in moving the Warsaw legal issues towards resolution. Participants in the conference informed us that there was so much progress on the Warsaw issues that, in their view, another Warsaw symposium would bring the Convention even closer to ultimate change. The editorial board, however, believed that aviation safety was another issue ripe for a conference and chose it as the topic for the next Symposium, as evidenced in this general letter:

We have in mind a symposium patterned on the one held last August at SMU which, even though we knew it was thoroughly planned, astonished us with its degree of success. Within this arrangement we would be the catalyst in bringing together speakers and guests representing air traffic control groups, pilot's associations, airlines, aircraft

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<sup>4</sup> See Letter from Secretary of Transportation, Alan S. Boyd to Paul Larsen, (Nov. 18, 1967) (discussing the value of the conference).

manufacturers, scholars, engineers, government representatives and private air law attorneys and turn the group's attention not toward a manifesto or ultimate blueprint, but an intense, complete look at all aspects of air traffic control that need attention. Inevitably, there will be concrete proposals and suggestions about not only what should be changed but how it can be changed and financed. In our experience, it is more useful to bring together about one hundred informed, influential men who normally have little personal contact with each other and let them develop their ideas in two or three days of constant opinion interchange, than to concentrate on complete general agreement for several recommendations. When these authorities return to their own offices they will have in hand the "other side's" proposals, and most probably remain in personal contact.<sup>5</sup>

Experts were exceedingly helpful in advising those involved in planning the conferences. Professor Charles O. Miller, then at the University of Southern California and subsequently director of the NTSB's office of accident investigation, helped with the second and succeeding conferences. At the first conference we received invaluable assistance from the Dallas bar, primarily from Eugene Jericho but also the general counsel for Braniff, Jay Jackson, and many others.

In sum, we envisioned the *Journal* conferences as formative of the law and incidentally, but consequentially, as education. The conferences became a forum for representatives of various points of view to be heard on numerous issues and, as a result, for forward movement of those issues at the conference and afterwards. Some lawyers came to learn about air law and to become part of its formation process. The students on the *Journal* enjoyed a fantastic opportunity to become acquainted with a variety of legal issues and actually meet the people representing various points of view in air law. Also, the students met potential employers.

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<sup>5</sup> General letter from Paul Larsen (undated).

## II. AIR LAW EDUCATION PROGRAMS

In 1966, SMU intended to establish itself as the preeminent United States center for air law education. The *Journal* was SMU's greatest asset in this effort. Realistically, law students do not become air law experts overnight by being appointed to the *Journal*. They have to learn about air law writing in order to meet the expectations of the *Journal's* readers. After all, while the students' main objective is to obtain a legal education, the readers do not subscribe in order to subsidize that legal education. The readers expect worthwhile, well presented national and international information. Consequently, the Law School established an ongoing air law journal seminar for which only *Journal* students were eligible. The thirty participating students on the *Journal* received one credit hour each semester towards graduation, and the seminar was a recognized part of my teaching assignments.

The air law journal seminar participants discussed and critiqued all student contributions to the *Journal*. They analyzed papers not only for substance, but also for form. The students received the valuable combination of both peer and expert faculty review. The faculty member who taught the seminar had a law school-assigned responsibility to be a resource for journal writing. One result was that *Journal* students did not feel abandoned to their own resources in their writing projects. All members of the seminar treated one another with professional respect. Thus, the seminar worked well.

As part of its effort to become the United States center for air law education, SMU also enhanced its air law curriculum. The SMU Institute of Aerospace Law began operations in July, 1967. It was designed to fill the needs of industry, government, and international organizations for lawyers trained in all aspects of air and space activities. Moreover, the Institute was prepared to conduct major research in the field. Within the framework of the Institute, SMU offered two air law courses, Private Air Law (airports, accident investigations, carrier and air traffic

control liability, products liability, insurance) and Public Air Law (CAB regulation of domestic and international routes and fares, FAA regulation of safety, ICAO, IATA). In 1967, the faculty granted me permission to offer three semester credit hours for each of the two courses.

The School of Law's larger scheme was to make these two courses available to undergraduate as well as graduate students. Within the framework of the SMU Aerospace Law Institute, graduate law students could take a core program of air law, space law, air transport labor relations, economics of transportation, international law, and related courses in administrative law, comparative law, admiralty, problems of doing business abroad, and international organizations law.

McGill University's Institute of Air and Space Law served as a model for the SMU effort. Being a graduate of its program, I knew of the high quality of its curriculum. McGill's program, however, is much influenced by its proximity to ICAO and IATA in Montreal. It is a truly international program, which is the key to its importance and its success. There will always be room for and a need for that kind of a program. The United States, however, is the largest pool of air traffic in the world; as such it needs a national legal education program in air and space law. The American Bar Association recognized that need in 1967 when it adopted a resolution favoring the establishment of United States Aerospace Law Institutes as follows (the entire resolution is quoted here because it continues to have application. The actual text is not well known):

WHEREAS mankind is making enormous advances in aerospace science and technology;

WHEREAS there exists a need to assure that the rule of law is abreast of such developments;

WHEREAS, there have not been established in the United States sufficient or adequate courses in aerospace law, including communications;

WHEREAS, individuals, and private and public institutions have made known their desire for legal research and



study facilities to resolve aerospace problems and to train individuals in the developing field of aerospace law; and

WHEREAS, other nations have already provided specialized institutes for such studies and research:

NOW THEREFORE, BE IT RESOLVED THAT

1. The American Bar Association encourages the immediate establishment at appropriate law schools in the United States of Aerospace Law Institutes for continuing study and research.

2. Public and private agencies are encouraged to support the establishment and operation of such Institutes by grants of funds, awards or research contracts, and otherwise;

3. The International and Comparative Law section should undertake such actions as would be appropriate, consonant with existing rules of the American Bar Association, toward fruition of the above; and

4. The International and Comparative Law Section should inform the Association of American Law Schools and other appropriate institutions, public and private, of the position taken by the American Bar Association.<sup>6</sup>

SMU intended the Institute of Aerospace Law to be the entity the American Bar Association desired. In fact, the report of the ABA Section on International and Comparative Law mentioned the SMU institute with approval in its explanation of the draft resolution to the ABA House of Delegates in 1967.<sup>7</sup>

### III. AIR LAW TEACHING TOPICS

Air law teaching has changed significantly since I began to teach at SMU in 1966. The magnitude of the legal issues has grown proportionately with the industry. The technology and the economy of the industry, its carriers, the way it is regulated, its rules of competition, and the kinds of people involved have all changed. There is a

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<sup>6</sup> ABA Resolution.

<sup>7</sup> This is not to say that SMU is the only law school that teaches air law and space law. For example, I now teach the two courses every year at Georgetown University Law School. Other law schools also have active air law programs.

much larger and more vital role for air lawyers in 1991 than there was twenty-five years ago. Some of the changes are noted here with the hope that projections for air law education in the future may be made.

#### A. *Airline Routes and Fares*

Deregulation<sup>8</sup> has fundamentally changed the airline industry. In domestic carriage, the airlines are now free to choose routes and fares. Internationally, regulation has weakened and even eliminated some carriers. The fiercer competition between airlines has eliminated venerable companies like National, Northeast, and Braniff, and the trend is likely to continue. Whereas governments saw airlines as national institutions to be protected from extinction in 1967, they now permit airlines to perish that cannot survive economic competition with other carriers.

#### B. *Liability*

In spite of the greater insights into air carrier liability that the first annual SMU conference in 1967 generated, the United States has managed, beyond anyone's imagination, to string out the agony over the Warsaw Convention. The trial lawyers wanted unlimited liability in 1967, and it appears that they have finally won their battle by forcing the United States government to agree to a domestic supplement providing unlimited liability.<sup>9</sup> It appears as of this writing, however, that whereas their clients recommend adoption of the new liability package,<sup>10</sup> the trial lawyers will not stop the war.

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<sup>8</sup> Airline Deregulation Act of 1978, Pub. L. No. 508, 92 Stat. 1705.

<sup>9</sup> Statement of Jeffrey N. Shane, Assistant Secretary of Transportation before the Committee on Foreign Relations, United States Senate, Nov. 15, 1989 (discussing the Montreal Protocols).

<sup>10</sup> Montreal Protocol No. 3 plus a domestic supplement of unlimited liability. Teaching the Warsaw Convention has become exceedingly difficult, particularly after the agony of *Lisi v. Alitalia, Linee Aeree Italiane*, 370 F. 2d 508 (2d Cir. 1966) (microscopic print on passenger tickets insufficient to notify passengers of applicability of Warsaw Convention) followed by its Supreme Court reversal in *Chan v. Korean Airlines*, 109 S. Ct. 1676 (1989) (failure to provide notice of liability limitations in ten-point type).

In addition to the Warsaw Convention, several other developments also affect liability. Domestic air carrier liability has seen the disappearance of many states' wrongful death claim limits on recovery. Also, punitive damages have become a new factor.<sup>11</sup> Multi-district litigation<sup>12</sup> actions in both international and domestic claims litigation has changed the nature of claims litigation significantly. The Federal Government's liability under the Federal Tort Claims Act<sup>13</sup> for negligent air traffic control and for negligent certification of aircraft has developed in the direction of greater government liability for direct air traffic control. There is no liability, however, for negligent certification.<sup>14</sup> Finally, the manufacturer's liability burden under the existing law of products liability continues to be onerous in spite of numerous failed attempts to reform this law. Only the general aircraft manufacturers appear to have any products liability relief in sight.

### C. Safety

The Federal Aviation Administration has dedicated new legal resources to the enforcement of safety.<sup>15</sup> Airlines such as Eastern, Continental, and Delta have paid large fines,<sup>16</sup> and criminal actions are pending against employees of Eastern.<sup>17</sup> An interesting case developed from a 1979 Chicago DC-10 crash when the FAA temporarily prohibited DC-10 air traffic within the United States, whether certificated in the United States or abroad. Thus, foreign certificates were not given reciprocity. Foreign

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<sup>11</sup> Kennelly, *Litigation Implications of the Chicago O'Hare Airport Crash of American Airlines Flight 191*, 15 J. MARSHALL L. REV. 273, 274-83 (1982).

<sup>12</sup> 28 U.S.C. § 1407 (1988) (providing for consolidated pretrial proceedings in multiple cases pending in different courts but involving common issues of fact).

<sup>13</sup> 28 U.S.C. § 2674 (1988) (allowing federal governmental liability for tort claims).

<sup>14</sup> *Varig v. United States*, 108 S. Ct. 1954 (1988).

<sup>15</sup> Ratliff, *The FAA's Civil Penalty Assessment Demonstration Program - Enforcement Experiment Gone Astray?*, 55 J. AIR L. & COM. 383 (1989).

<sup>16</sup> *Aviation Daily*, Sept. 19, 1989, at 539.

<sup>17</sup> McKenna, *U.S. Expands Probe of Eastern Records*, AVIATION WK & SPACE TECH., Dec. 17, 1990, at 34.

airlines challenged the FAA regulation and the FAA lost this case, thus strengthening the role of foreign certification.<sup>18</sup>

#### D. *Drug Testing*

After much litigation,<sup>19</sup> entirely new case law has developed allowing the Department of Transportation to establish regulations for random drug testing of the airline and air traffic control work force. Very little drug use by airline personnel in safety and security-related positions has been detected, however.<sup>20</sup>

#### E. *Aircraft Accident Investigation*

The National Transportation Safety Board (NTSB) survived administrative changes from the CAB and DOT and finally became independent in 1974.<sup>21</sup> This small but very important agency continues to dedicate its meager resources to finding the probable cause of accidents and resisting lawyers' attempts to drag the agency's employees into private tort litigation. The agency also plays an important role in deciding contested penalty cases on appeal from the FAA.

### IV. WHERE DO THE *JOURNAL* CONFERENCES GO FROM HERE?

Since bringing the first *Journal* conferences to fruition, I have only participated vicariously. I have served on the *Journal's* Board of Advisors and read the *Journal* faithfully during the last twenty-five years, observing that the conferences have grown tremendously. The first conference attracted seventy-five attendants and managed to break even financially. The conferences are now so large that they must be held at a hotel. Law students participated

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<sup>18</sup> *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981).

<sup>19</sup> See *Skinner v. Railway Labor Executives' Assoc.*, 109 S. Ct. 1402 (1989); *Blaustein v. Skinner*, 908 F.2d 451 (9th Cir. 1990).

<sup>20</sup> DOT News, Dec. 18, 1990.

<sup>21</sup> 49 U.S.C. § 1901 (1988).

freely in the meetings at the University, but such integration of the conferences into the life of the law school may no longer be possible. Intense student participation is more difficult when the conference is removed from the University. The *Journal* originally published the proceedings, creating both a record of the conference and a great deal of work for the *Journal* students. Subsequently, publication of all the proceedings became unmanageable.

It is a daunting task to make observations about the *Journal* conferences. Their tremendous success in attracting lawyers active in the aviation industry is proof that the *Journal* is proceeding in the right direction. Yet, I offer a few observations based on a twenty-five year perspective.

#### A. *The Journal Conference as a Market Place*

Elementary economics shows that a market place promotes trade and exchange of ideas. Thus, the *Journal* provides the profession with a valuable service in offering a market place in which businessmen may strike deals or in which lawyers may meet to establish contacts for later business. The facilitation of contacts for exchange of ideas and the creation of a foundation for future resolution of problems were certainly part of the original vision for the conferences.

#### B. *Continuing Legal Education*

Many bar associations, including the State Bar of Texas, now require a certain amount of continuing legal education for practicing lawyers. The *Journal* programs appear to be at a hands-on, practical level which satisfy continuing legal education needs. The maritime transport bar is well organized in a specialized Maritime Law Association (MLA) which organizes effective continuing legal education programs. While the aviation bar does not have a corresponding organization, the *Journal* conferences tend to fill the vacuum.

### C. *Formation of New Law*

The original conferences envisioned organized settings in which speakers and guests representing the different groups (representatives of governments, carriers, pilots, manufacturers, scholars, engineers, private litigators) could meet cooperatively to devise new law. The participants in the conference on the Warsaw Convention felt that they had resolved some issues at the first conference. Perhaps such an activist objective has declined over the years, possibly to the benefit of the marketplace concept. It is possible that the *Journal* students would need a much stronger education in air law in order to influence aviation policy information significantly. Conceivably, publication of the proceedings could be reintroduced to revitalize such an objective. Publication, however, would only be worthwhile if the conference itself were designed for policy formation.

### D. *Air Law Education of Journal Students*

Publication of the world's most prestigious journal on air law certainly benefits when those responsible have knowledge of the subject matter to be published. Therefore, the more education available for *Journal* students, the better they are equipped to engage in publication. The same may be said about planning the annual conferences. Ideally the *Journal* should require its members to take air law and related courses (administrative law, labor law, comparative law, admiralty, international law, conflicts of laws).

### E. *Student Exposure to the Practical World of Air Law*

The *Journal* conferences present a unique opportunity for the *Journal* students to meet lawyers who are involved in air law practice and to learn from those lawyers. The conferences also present unique employment opportunities for *Journal* students. For these reasons, I recommend maximum student involvement in the conferences. Likewise, the conference attendants should be alerted to the

benefits of *Journal* student contacts. Employment opportunities could, possibly, be advertised at the conference and interviews could be scheduled.

#### F. *Other Resources*

SMU has a tradition of inviting a significant number of foreign law students and lawyers to come to the SMU School of Law for graduate study. Some of these graduate students bring with them or develop an interest in air law.<sup>22</sup> In order to understand the inherently international aspects of air law and to introduce these aspects into the annual conferences, I suggest that the foreign graduate students be a resource for the *Journal*. Some of them could assist in the conferences and could become important foreign contacts in the future.

### V. CONCLUSION

This article has described the history of the annual *Journal* conferences and, based on the past, has made some suggestions for the future. Essentially, the idea of the *Journal* conferences has bloomed and anyone involved with the *Journal* and with SMU Law School may, as I do, take some pride in the success of the conferences. However, it is dangerous to rest on one's laurels. Thus, I offer these reminders of the past and suggestions for the future.

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<sup>22</sup> For example, Professor Leighton C. Morris of the law faculty of Monash University in Australia was such a graduate while I taught at SMU School of Law. His interest in air law developed at SMU.