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CONSEQUENTIAL AND SPECIAL DAMAGES: TEMPEST IN THE TARIFF

Under the provisions of section 404(a) of the Federal Aviation Act,¹ it is the duty of every air carrier to establish, observe, and enforce just and reasonable classifications, rules, regulations, and practices relating to interstate and overseas air transportation. Each carrier is required to file with the Civil Aeronautics Board (CAB) tariffs showing all such classifications, rules, regulations, practices, and services in connection with air transportation between points served by it and points served by other airlines.²

In complying with the CAB filing requirements, the air carriers involved in the air freight industry have frequently submitted rules tariffs by which they attempted to exculpate themselves from liability for consequential³ and special⁴ damages to air freight ship-

¹ Federal Aviation Act of 1958 § 404(a), 49 U.S.C. § 1374(a) (1970):

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

² Federal Aviation Act of 1958 § 403(a), 49 U.S.C. § 1373(a) (1970):

Every air carrier . . . shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation . . . [and] all classifications, rules, regulations, practices, and services in connection with such air transportation. . . . [T]he Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. . . .

³ Consequential damages have been defined as those which follow on account of special conditions imputed to the defaulting party which increase the standard of liability. *See Hycel, Inc. v. American Airlines, Inc.*, 328 F. Supp. 190, 193 (S.D. Tex. 1971).

⁴ Special damages grow out of an unusual or peculiar state of facts which may be known to one of the parties and not the other. They follow the injury as a natural and proximate consequence in the particular case, by reason of special circumstances or conditions. *Id.*; *see also Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 130 F.2d 582 (9th Cir. 1942).

ments.⁶ As a result of shipper dissatisfaction with the exculpatory tariffs, in 1967 the CAB initiated an informal inquiry of the air freight liability and claim rules and practices of domestic air carriers directed at improving uniformity, removing ambiguity, and increasing shipper acceptance and understanding of air transportation.⁶ Between 1967 and 1970 a substantial volume of correspondence indicating public dissatisfaction with respect to the air carriers' rules and practices concerning air freight liability claims was received by the CAB.⁷ Consequently, the CAB initiated a formal investigation to determine if the existing liability and claim rules practices of the domestic air carriers were unjust, unreasonable, or otherwise unlawful.⁸ The *Liability and Claim Rules and Practices Investigation*, as the formal investigation came to be known, culminated in an initial decision of the Administrative Law Judge in 1973.⁹

After considering the objections and arguments from both carrier and shipper interests, the Administrative Law Judge in the *Liability Investigation* ruled in his initial decision that henceforth air carriers would be liable for consequential and special damages incurred in the course of handling air freight.¹⁰ He specifically found that all versions of present rule 30(B)(1)(d) on file with the CAB as part of Official Air Freight Rules Tariff No. 1-B, CAB No. 96 (Aug. 18, 1972), which exempted the carriers from such liability,

⁶ These tariffs, which act as the statutorily imposed contract between the carrier and the shipper, govern rules, rates, terms, and liability. The tariffs are usually filed with the CAB by agents representing several air carriers. For example, Official Air Freight Rules Tariff No. 1-B, CAB No. 96, Rule 30(B)(1)(d) (Dec. 2, 1974), filed on behalf of American, Braniff, Delta, Eastern, TWA, and several other air carriers by Airline Tariff Publishers, Inc., Agent, provides that "[t]he carrier shall not be liable for any consequential or special damages whether or not the carrier had knowledge that such damages might be incurred." [This rule, and the identical 1972 version, are hereinafter cited as present rule 30(B)(1)(d).] Exculpatory tariffs such as this, which provide essentially that the carrier shall not be liable except for its actual negligence, have been in effect for nearly all air carriers since the method of transportation became important in commerce.

⁶ See CAB Order No. 70-7-121 (July 24, 1970); CAB Order No. 69-10-4 (Oct. 1, 1969); CAB Order No. 69-6-32 (June 6, 1969).

⁷ See CAB Order No. 70-7-121 (July 24, 1970).

⁸ *Id.* at 6.

⁹ *Liability and Claim Rules and Practices Investigation*, CAB Docket No. 19923 *et al.*, Initial Decision of Administrative Law Judge John E. Faulk (served July 23, 1973) [hereinafter cited as *Liability Investigation*].

¹⁰ *Liability Investigation* at 22.

were unlawful in that they constituted an unreasonable practice.¹¹ A revised rule 30(B)(1)(d), proposed by the Bureau of Economics of the CAB as rule 30(B)(5), was adopted instead as the lawful rule.¹² That rule provided that the carriers would not be liable for any consequential or special damages unless they were notified in advance in writing upon the airbill of the greater valuation and an additional transportation charge were paid. The Administrative Law Judge reasoned that the advance notice provision and the provision allowing for additional shipping charges in proposed rule 30(B)(5) would adequately protect the air carriers from unexpectedly high loss or damage claims.

Because the ruling in the *Liability Investigation* constituted a radical departure from prior liability rules, the CAB on its own motion ordered a review of the initial decision.¹³ Consequently the initial order giving effect to the proposed rule 30(B)(5) imposing liability on the air carriers for consequential and special damages was stayed until further order of the CAB.¹⁴

To fully appreciate the significance of the *Liability Investigation* and its CAB-imposed liability rules, it will be necessary to examine several topics: the historical development of carrier liability at common law; the conceptual basis of liability for consequential and special damages; and the primary jurisdiction of the CAB over exculpatory tariffs. In addition, the arguments presented during the *Liability Investigation* by the shippers and the air carriers for

¹¹ *Id.* at 23.

¹² Prescribed Rule 30 (B):

The liability of the carrier shall be subject to the following provisions: . . . (5) The carrier shall not be liable for any consequential or special damages unless the carrier is so notified in advance in writing upon the airbill, and, where such damages would exceed the carriers' assumed liability as set forth in Rule 32, unless a greater valuation is declared on the airbill and an additional transportation charge on such declaration is asserted in accordance with Rule 32.

Liability Investigation, Appendix B at 16 [hereinafter cited as proposed rule 30(B)(5)]. Prescribed Rule 32 sets the total liability of the carrier for loss, delay of or damage to any shipment as a dollar amount per pound plus transportation charges for excess declared values. *Liability Investigation*, Appendix B at 19.

¹³ CAB Order No. 73-8-33 (Aug. 8, 1973).

¹⁴ *Id.* As of January 1, 1975, virtually every major domestic air carrier, except United Air Lines, Inc., had an exculpatory tariff in effect which provided that it would not be liable for consequential or special damages whether or not the carrier had knowledge that such damages might be incurred.

and against such liability must be examined for an understanding of the initial decision rendered by the Administrative Law Judge.

I. LIABILITY OF CARRIERS AT COMMON LAW

A common carrier who agreed to carry a shipment was liable under the common law for all loss or injury except that due to acts of God, the public enemy, the fault of the shipper, or the inherent vice of the cargo.¹⁵ The common law rule of liability was so rigid that carriers were often regarded as insurers of the goods entrusted to them.¹⁶ Carriers were liable for damages whether they were negligent or not if they could not prove the damage or loss was occasioned by one of the excepted causes;¹⁷ the shipper had only to show that the shipment was tendered in good order and that it arrived in a damaged condition or not at all.

The policy underlying the rule of full carrier liability was set forth by Lord Holt in 1703 in *Coggs v. Bernard*.¹⁸ Liability was imposed because shippers, who were obligated to entrust their goods to the carrier, might otherwise be defrauded. The common law courts, however, regularly upheld agreements between shippers and common carriers to exchange limited liability for a lower transportation charge. This limitation on liability was permitted only if it was reasonable and was supported by consideration in the form of lower or reduced rates for the transportation involved.¹⁹ While carriers were permitted to limit the amount of monetary recovery for shipping losses, they were not permitted to exculpate themselves from their own negligence.²⁰

The courts of this country have generally followed the common law and have usually held that a common carrier cannot exempt

¹⁵ See, e.g., *Chesapeake & O. Ry. v. Thompson Mfg. Co.*, 270 U.S. 416, 421 (1926); *Whitlock Truck Serv., Inc. v. Regal Drilling Co.*, 333 F.2d 488, 491 (10th Cir. 1964).

¹⁶ R. SIGMON, *FREIGHT LOSS AND DAMAGE CLAIMS* 5 (1967).

¹⁷ *Missouri Pac. R.R. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964).

¹⁸ 92 Eng. Rep. 107 (K.B. 1703).

¹⁹ See *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884).

²⁰ See note 17 *supra*; *Secretary of Agriculture v. United States*, 350 U.S. 162 (1956); *New Jersey Steam Navigation Co. v. Merchants Bank*, 16 U.S. (6 How. 344) 722 (1847).

itself from liability for its own negligence or that of its employees.²¹ As early as 1873, the United States Supreme Court in *Railroad Company v. Lockwood*²² indicated that the rule of full common carrier liability was based on the policy of insuring the utmost care in the carrier's performance of its duties. In 1915, the Supreme Court reaffirmed that policy:

It is the established doctrine of this Court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation. . . . The rule rests on broad grounds of public policy justifying the restriction of liberty of contract because of the public ends to be achieved. The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence "seeks to put off the *essential duties* of his employment."²³

Although the general rule that carriers cannot completely escape liability for their own or their agents' negligence was fashioned by the courts, the Supreme Court has said that since the rule has been continuously accepted as a guide to common carrier relationships for more than a century, it has acquired the force and precision of legislative enactment.²⁴

As the commerce of the nation gradually developed, statutes were enacted which affected the carrier-shipper relationship. Among the first of these was the Interstate Commerce Act of 1887.²⁵ Because many carriers attempted to avoid liability contractually, in 1906 Congress enacted the Carmack Amendment²⁶ which prohibited carriers from exempting themselves from liability for loss or damage to property in their charge. *Adams Express Co. v. Croninger*²⁷ restricted the scope of the Carmack Amendment by

²¹ *Adams Express Co. v. Croninger*, 226 U.S. 491, 509 (1913); see *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865).

²² 84 U.S. (17 Wall.) 357 (1873).

²³ *Santa Fe, P. & P. Ry. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 184-85 (1913).

²⁴ See 84 U.S. (17 Wall.) 357 (1873).

²⁵ 24 Stat. 379 (1887).

²⁶ The amendment, which is now found at 49 U.S.C. § 20(11) (1970), at the time of its enactment provided in effect that any common carrier would be liable for any loss, damage, or injury to property which it had reserved for transportation, and no contract, receipt, rule, or regulation would be allowed to exempt the common carrier from the liability imposed.

²⁷ 226 U.S. 491 (1913).

holding that the prohibition against limiting liability was not violated when the limited liability was exchanged for a lower transportation rate.

In 1915 Congress enacted the First Cummins Amendment²⁸ to the Interstate Commerce Act, imposing liability on the carrier for the full loss, damage, or injury caused by it or any connecting carrier regardless of any agreement for limitation of liability. That amendment was largely nullified in 1916 by the Second Cummins Amendment²⁹ which provided that carriers might lawfully limit their liability by utilizing released rates which had been specifically authorized by the Interstate Commerce Commission.

Each of these acts was evidence of additional governmental intervention into the shipper-carrier relationship. By the time the air transportation industry had developed sufficiently to warrant legislative intervention between air carriers and shippers, other legislation had been in effect sufficiently long to provide experience for imposing or exempting air carrier liability. Liability provisions of the Civil Aeronautics Act of 1938 were largely patterned after those of the Interstate Commerce Act. It is important to note, however, that the liability provisions of the Federal Aviation Act of 1958 do not contain a section similar to section 20(11),³⁰ which prohibited an exemption from liability for the carriers.

II. LIABILITY FOR CONSEQUENTIAL AND SPECIAL DAMAGES

An important facet of common carrier liability has been the development of liability for consequential and special damages. The landmark case at common law defining the right to recover for consequential damages was *Hadley v. Baxendale*.³¹ The British Court of the Exchequer in *Hadley* laid down the governing rule as follows:

[T]he damages which the injured party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may have reasonably been supposed to have been in the contem-

²⁸ Cummins Amendment, 38 Stat. 1196, 1197 ch. 176 (1915).

²⁹ Cummins Amendment, 39 Stat. 441, ch. 301 (1916).

³⁰ 49 U.S.C. § 20(11) (1970).

³¹ 156 Eng. Rep. 145 (Ex. 1854).

plation of both parties, at the time they made the contract, as the probable result of a breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.³³

The Supreme Court of the United States stated the same rule in slightly different terms in *Globe Refining Company v. Landa Cotton Oil Co.*,³³ in which the Court held that "[a] person can only be held to be responsible for such consequences as may reasonably supposed to be in the contemplation of the parties at the time of making the contract."³⁴

As the air transportation industry developed, special liability rules evolved as a result of extensive federal regulation. Virtually every air carrier that came within the jurisdiction of the CAB filed tariffs that included the carriers' attempts to exempt themselves from liability for consequential and special damages, as well as other provisions to limit their liability to some extent.³⁵ Shippers quickly challenged the validity of these various exculpatory provisions as being contrary to the general law of damages for common carriers.³⁶

One of the earliest decisions dealing with the liability issue was the decision of the Second Circuit in *Lichten v. Eastern Air Lines*,³⁷ which involved the mistaken delivery of the plaintiff's baggage by the defendant air carrier to an unknown individual. The baggage contained three articles of jewelry, valued at over \$3,000, which were unknown to the carrier. Although the passenger contended that the Civil Aeronautics Act had not empowered the CAB to modify the common law rule that a common carrier may not by contract relieve itself from liability for the consequence of its own negligence, the court of appeals in *Lichten* reasoned that questions

³² *Id.* at 151.

³³ 190 U.S. 540 (1903).

³⁴ *Id.* at 544.

³⁵ See note 5 *supra*.

³⁶ *Cf.* *Randolph v. American Airlines, Inc.*, 103 Ohio App. 172, 144 N.E.2d 878 (1956).

³⁷ 189 F.2d 939 (2d Cir. 1951).

of reasonableness of rates and practices were to be left to the administrative agency. Citing sections of the Civil Aeronautics Act which empowered the CAB to decide if any rule or regulation were unjust or unreasonable, the circuit court applied the doctrine of primary jurisdiction and stated that the provisions of a tariff properly filed with the CAB and within its authority were deemed valid until rejected.³⁸ The *Lichten* court thought that the absence of an express provision in the Civil Aeronautics Act such as section 20(11) of the Interstate Commerce Act³⁹ compelled the conclusion that an exemption was not forbidden and that the CAB could properly accept the air carrier's tariff which contained an exculpatory clause.⁴⁰

Chief Judge Frank dissented in *Lichten* and criticized the majority for assuming that the Civil Aeronautics Act authorized the CAB to validate a tariff provision which contravened the common law of damages. He argued that it was inconceivable that Congress had intended, merely by remaining silent, to authorize the Board to adopt a policy "flatly at odds with the hitherto uniform federal policy, frequently announced by the Supreme Court in decisions involving all sorts of transportation, and ultimately expressed by Congress in statutes governing carriers by rail, water carriers, and motor carriers."⁴¹ Judge Frank indicated that he could not see why the rule that encouraged care on the part of the carriers and protected shippers and passengers from imposition by the carriers did not apply with equal force to transportation by air.⁴² In examining the primary jurisdiction argument advanced by the majority, Judge Frank recognized that the issue of the reasonableness of a tariff provision was a technical one which called for the administrative expertise possessed by the agency in order to attain uniformity in enforcement through administrative determinations. He maintained, however, that Supreme Court decisions had held that a plaintiff

³⁸ *Id.* at 941. The court cited two cases to support its conclusion: *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), which dealt with the reasonableness of a rate; *CAB v. Modern Air Transport, Inc.*, 179 F.2d 622 (2d Cir. 1950), where the concept of primary jurisdiction was held not to apply to a violation of a rule.

³⁹ 49 U.S.C. § 20(11) (1970); *see* note 26 *supra*.

⁴⁰ 189 F.2d at 941.

⁴¹ *Id.* at 944-45.

⁴² *Id.* at 945; *cf.*, *Curtiss-Wright Flying Serv., Inc. v. Glose*, 66 F.2d 710 (3d Cir. 1933).

who asserted that the administrative action was void because it exceeded the particular agency's statutory authority could proceed directly in court without waiting for an administrative determination as to the validity of the action in question.⁴³

The issues discussed in *Lichten* go to the very heart of the question of air carrier liability. If air carriers are liable under the law applied to common carriers, and hence liable for consequential and special damages, then it cannot be said that Congress by its silence has empowered an administrative agency, the CAB, to exercise such pervasive authority and change the rule of damages.

By utilizing the doctrine of primary jurisdiction,⁴⁴ the CAB has maintained that it has complete power over the validity of tariff limitations which extend to liability for consequential and special damages.⁴⁵ In support of this position, the CAB has frequently cited *Lichten* and relied upon its rationale.⁴⁶ When convenient, the carriers themselves have agreed that the CAB rather than the courts may determine both the reasonableness of a tariff provision and the validity of exculpatory provisions if the CAB finds the provisions to be justified by the particular circumstances of the air transportation industry.⁴⁷

It has been contended by some air carriers that the validity of the *Lichten* decision has been clearly established by the Supreme Court's holding in *Southwestern Sugar and Molasses Co. v. River*

⁴³ 189 F.2d at 946.

⁴⁴ To many legal commentators and treatise writers, primary jurisdiction is merely a procedural device whereby the administrative agency is permitted to act upon the suit prior to a judicial determination. Professor Davis has written that the doctrine does not necessarily allocate power between courts and agencies, since it governs only the question whether the court or agency will initially decide a particular issue, not the question whether the court or agency will finally decide the issue. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* (1972). Other writers have taken the position that primary jurisdiction means more than preliminary resort to the administrative agency. One has said that the doctrine has been converted from a choice of forum rule to a substantive judge-made exception. See Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abandonment of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). Professor Jaffe has agreed and has said that it is a doctrine allocating the law making power over certain aspects of the carrier-shipper relation. Cf. Jaffe, *Primary Jurisdiction Reconsidered: The Antitrust Laws*, 102 U. PA. L. REV. 577 (1954).

⁴⁵ *Liability Investigation* at 11 (1973).

⁴⁶ *Baggage Liability Rules Case*, CAB Docket No. 15529, Initial Decision of Examiner (1966).

⁴⁷ Cf. *Tishman & Lipp, Inc. v. Delta Air Lines, Inc.*, 413 F.2d 1401 (2d Cir. 1969).

*Terminals Corp.*⁴⁸ Close examination of *Southwestern Sugar*, however, reveals that *Lichten* has been misapplied as a precedent. *Southwestern Sugar* dealt with a collision between a tow vessel and a bridge abutment, an accident which was governed by an exculpatory tariff provision filed with the Interstate Commerce Commission which exempted the tow vessel from liability for its negligence. The issue in *Southwestern Sugar* was whether considerations of public policy called upon by the courts to strike down private contractual arrangements between tugs and tow vessels were necessarily applicable to provisions of a tariff filed with and subject to the pervasive regulatory authority of an expert regulatory agency.⁴⁹ Cases prior to *Southwestern Sugar* had held that contracts exempting tow vessels from liability for their own negligence were void as against public policy.⁵⁰ *Southwestern Sugar* accepted the rule and its policy goals of discouraging negligence by making wrongdoers pay damages, and protecting those in need of goods and services from being overreached by others who have the power to drive hard bargains.⁵¹ Nevertheless, the Supreme Court in *Southwestern Sugar* recognized that the rule of *Bisso v. Inland Waterways Corporation*⁵² should be modified when the power to drive hard bargains was effectively controlled by a pervasive regulatory scheme. The Court based its decision on *Far East Conference v. United States*⁵³ which had held that regulatory agencies created by Congress should not be ignored since uniformity and consistency could be achieved only if the limited function of judicial review were rationally exercised. Preliminary resort to agencies that were better-equipped than the courts by specialization, by insight gained through experience, and by more flexible procedure would also promote uniformity.⁵⁴ In following *Far East Conference*, the Court in *Southwestern Sugar* held that exculpatory clauses should not be

⁴⁸ 360 U.S. 411 (1959).

⁴⁹ *Id.* at 417.

⁵⁰ See, e.g., *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

⁵¹ 349 U.S. at 91.

⁵² 360 U.S. at 418. The Court cited 49 U.S.C. § 906(d), which is similar to section 403(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1373(a) (1970), which requires tariffs to be filed with the CAB which concern rates, rules and practices.

⁵³ 342 U.S. 570 (1952).

⁵⁴ *Id.* at 574-75.

struck down as a matter of law, and that the parties should be afforded a reasonable opportunity to obtain a determination of the validity of the exculpatory clause from the ICC.⁵⁵

However, the Court in *Southwestern Sugar* specifically limited its holding in two ways. First, it noted that the settled common law rule that common carriers could not by any form of agreement secure exemption from liability caused by their own negligence had not been imposed on the tug-tow relationship.⁵⁶ Consequently there was no basis for ruling that the exculpatory tariff clause was void as a matter of law. Second, the Court specifically assumed that the question whether an exculpatory clause of a duly filed tariff offended public policy was one appropriate for ultimate judicial rather than administrative resolution.⁵⁷

The second limitation is most important in that the Supreme Court emphasized that the courts were to decide the validity of exculpatory clauses. In *Lichten* the Second Circuit has abdicated that responsibility for the ultimate judicial determination in favor of the administrative agency, although no statute had authorized the agency to change the law of carrier liability. Because of this second limitation, therefore, the validity of the *Lichten* decision is not established by *Southwestern Sugar*, and without the support of *Lichten*, the attempt by carriers to exempt themselves from liability for their negligence is just as insupportable as it was before the *Lichten* decision.

Additional support for the argument that the CAB is extremely limited in its powers to recognize an invalid exculpatory tariff is contained in the provisions of the Federal Aviation Act of 1958 that gave the courts of appeals of the United States the power to review orders by the Board Administrator.⁵⁸ While Board findings of fact which are supported by substantial evidence are conclusive, the courts have exclusive jurisdiction under the Act to affirm, modify, or set aside the order complained of or to order further Board proceedings.⁵⁹ Consequently, an exculpatory tariff provision which

⁵⁵ 360 U.S. at 421.

⁵⁶ 360 U.S. at 418 n.6; *see, e.g., The Steamer Syracuse*, 79 U.S. (12 Wall.) 167, 171 (1870).

⁵⁷ 360 U.S. at 420.

⁵⁸ Federal Aviation Act of 1958 § 1006(a), 49 U.S.C. § 1486(a) (1970).

⁵⁹ Federal Aviation Act of 1958 § 1006(e), 49 U.S.C. § 1486(e) (1970).

had been filed with the Board can be challenged with a substantive objection by a third party having a sufficient interest in the outcome, and the Board order disposing of that challenge can be reviewed in the federal courts. If the exculpatory tariff were found to be contrary to the law of damages, absent a specific statutory exception, a court of appeals can declare the tariff to be invalid.

III. LIABILITY OR NONLIABILITY

During the hearings before the Administrative Law Judge in the *Liability Investigation*, arguments for imposing liability on the air carriers were presented by the Bureau of Economics of the CAB and several shipper groups.⁶⁰ These arguments favoring carrier liability were centered around three factors: the general law of damages; the needs of modern industry; and the actual practices of the air carriers.

Perhaps the most important of the shipper contentions was that tariffs which totally excluded liability for consequential and special damages are grossly unreasonable because they deviated significantly from the general law of damages.⁶¹ Shippers represented by the National Industrial Traffic League argued that the common law of consequential damage liability for carriers should not be changed merely by the submission of a tariff by the carriers to the CAB.⁶² They maintained that the present rule 30(B)(1)(d) "ship at your own risk" prescription did not provide a healthy climate for the growth of air freight. They also contended that if common law liability was to be modified for interstate air carriers, it should be altered only by statute, not by arbitrary tariff provisions.⁶³

Although the Supreme Court has not dealt with that argument concerning CAB tariffs, in dealing with ICC tariff provisions the Court has said that "[t]he lawful conditions and limitations . . . duly filed with the Commission are binding until changed by that body . . . but not so of conditions and limitations which are . . . illegal, and consequently void."⁶⁴ As the ICC has stated, in dealing

⁶⁰ See *Liability Investigation* at vi.

⁶¹ Direct Exhibits and Testimony of the National Industrial Traffic League, Exhibit NITL-T-1 at 38, CAB Docket No. 19923 *et al* (July 14, 1972).

⁶² *Id.* at 20.

⁶³ *Id.*

⁶⁴ *Boston & Main R.R. v. Piper*, 246 U.S. 439, 445 (1918).

with its tariff filing requirements, an unlawful and void limitation attached to a rate provision can gain no sanctity by tariff publication.⁶⁵ Although different statutes are involved in CAB tariffs, absent material differences, the mere filing of a tariff with the CAB in no way assures the validity of its provisions.⁶⁶

In his initial decision, the Administrative Law Judge utilized the same reasoning. He noted that while an air carrier could not be prohibited from filing an exculpatory rule with the Board, the mere act of filing did not establish the lawfulness of the rule.⁶⁷ The *Liability Investigation* concluded that there was no basis in the record which warranted an air carrier's total avoidance of consequential and special damages as a common carrier.⁶⁸

Another argument presented was that lack of liability for consequential and special damages liability failed to reflect the public nature of an air carrier's duties and disregarded the inequality in bargaining positions of shippers and carriers.⁶⁹ Since carriers are required to provide services to the public without unjust discrimination, failure to pay consequential damages is akin to denying effective carriage to a portion of the public. It was further contended that lack of such liability overlooked the fact that the transported property was in the absolute possession and control of the carrier, and the shipper was helpless to protect his own property or minimize

⁶⁵ *North Packing & Provision Co. v. Chicago, M. & St. P. Ry.*, 80 I.C.C. 737, 740 (1923).

⁶⁶ *Bernard v. United States Aircoach*, 117 F. Supp. 134, 138 (S.D. Cal. 1953).

⁶⁷ *Liability Investigation* at 12.

⁶⁸ *Id.* at 22. See *Pan American World Airways, Inc., et al., Conditions of Carriage and Related Traffic Regulations*, 24 C.A.B. 575, 589 (1957), where the Board found that a provision of the condition of carriage which disclaimed liability for consequential or special damages was adverse to the public interest and was in contravention of the general law as to damages. See also *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936) (per curiam), where the Court held that consequential damages caused by negligent delay could be recovered from a common carrier, provided that the rate of compensation paid by the shipper bore a reasonable relation to the risk and responsibility assumed by the carrier; *Gellert v. United Air Lines, Inc.*, 474 F.2d 77 (10th Cir. 1973), where the circuit court expressed serious doubts as to the validity or effectiveness of a tariff provision substantially identical to rule 30(B)(1)(d) by which carriers could exempt themselves from all liability for consequential damages. But see *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), where liability for special damages for gross negligence in handling the remains of plaintiff's deceased wife were denied on the basis of an exculpatory tariff similar to rule 30(B)(1)(d).

⁶⁹ *Supra* note 61, at 22.

his damages.⁷⁰ Under this view, to require the shipper to prove actual negligence on the part of the carrier in effect exculpated the carrier from all liability.⁷¹

Actual shipping practices of the air carriers were also cited in support of the argument favoring removal of tariffs providing nonliability for consequential damages. It was noted that while one hundred and four claims for consequential damages were filed during September and October of 1971, fourteen of such claims were paid.⁷² The importance of those claims payments is not that so many were denied, but rather that the claims were paid in the face of an apparently absolute tariff provision denying all liability. If shippers had general knowledge of the practice of the carriers in paying consequential and special damage claims, it is quite likely that additional claims would have been filed. Many shippers, knowing of the prohibition of rule 30(B)(1)(d), probably did not even bother to file claims. Some shippers concluded that since some carriers were not honoring their tariff provisions denying consequential and special damages, the tariff rules should be stricken or revised.⁷³

Another practice of the air carriers that drew criticism was the laxity of security measures taken to protect air cargo. Because of limited liability for cargo theft, some shippers contended that the airlines found it economically more feasible to ignore security measures rather than pay for strict security enforcement.⁷⁴

⁷⁰ Direct Testimony of the Bureau of Economics, Exhibit BE-DT-119 at 4, CAB Docket No. 19923 *et al.* (May 1, 1972); Brief of the Department of Defense at 3, *Liability Investigation*.

⁷¹ Exhibit BE-DT-119 *supra* note 70, at 4.

⁷² Direct Testimony of the Bureau of Economics, Exhibit BE-DT-101 (A) at 24, CAB Docket No. 19923 *et al.* (May 1, 1972).

⁷³ *Id.* at 25. Part 239 of the CAB Economic Regulations requires all certificated route carriers to periodically submit a Report of Freight Loss and Damage Claims. Section 239.1, as amended by Amendment No. 5, effective February 6, 1975, 40 Fed. Reg. 1039 (1975), defines "Actual Shipper Loss" as required by the reports to mean the total dollar amount on each claim actually suffered by the claimant because of loss, damage, delay, etc., based on the invoice value at destination (per pound, per unit, etc.), or origin invoice plus freight charges. "Delay" is defined as including, but not limited to consequential or special damages. Operation of these regulations furnishes the CAB with information concerning claims filed for consequential and special damages. The carriers, however, maintain that they are not liable for such damages.

⁷⁴ Brief of the Department of Defense at 3, *Liability Investigation*. A glaring example of how the present limits on liability for air cargo loss are insufficient inducement for air carriers to adopt sound loss prevention programs for the con-

One other practice was mentioned which revealed the need for clear rules of liability. If a shipper, in planning shipment arrival time, had utilized "Reserved Air Freight," there was no appropriate tariff rule, and therefore no legal contract setting forth the conditions of the contract of carriage. While the shipper assumed that he had reserved space for his cargo on a specific flight departing at a given time, the carrier had in fact promised only to *attempt* to move the shipment on the specific flight.⁷⁵ If the flight were delayed, litigation might develop with the issue of the measure of damages looming large before the court.

Another justification for the imposition of liability for consequential and special damages included the practical effect of the model rules proposed by the Bureau of Economics of the CAB. The Bureau contended that advance notification by the shipper in writing on the airbill of the value of the shipment and the provision for additional charges for larger valuations would adequately protect the air carriers and place them on notice of potential damages.⁷⁶

Air carrier opposition to liability for consequential and special damages can be summarized and placed into four broad categories. These objections are based on regulatory, economic, judicial and practical grounds, all of which were presented to the Administrative Law Judge. The air carriers objected to the prescription of air freight tariffs by the CAB as governmental dictation replacing carrier initiative and competition in the development of such rules. They contended that the Board would in effect replace carrier management as the persons responsible for determining the terms and conditions under which the carriers would hold out their services to the public.⁷⁷ Under such a system, the carriers argued, carrier initiative in developing new or experimental services and procedures

trol and protection of cargo entrusted to their care occurred during September, 1968, when diamonds and cash valued at \$262,000 were stolen from an airport terminal at John F. Kennedy International Airport. The shipment weighed 48½ pounds and the air carrier's liability was a mere \$362.79. 117 CONG. REC. 13283 (1971) (remarks of Senator Bible). In such a situation if the shipper declared his profitable sale price as the value of the shipment and paid additional transportation charges, rule 32 would limit the carrier's liability to the actual value of the shipment. In addition, the present rule 30(B)(1)(d) would deny liability for consequential or special damages even if the carrier had knowledge that such damages might be incurred.

⁷⁵ Exhibit BE-DT-111 at 1, CAB Docket No. 19923 *et al.* (May 1, 1972).

⁷⁶ Exhibit BE-DT-119 *supra* note 70 at 7.

⁷⁷ Brief of Joint Respondents at 12 (Sept. 17, 1973), *Liability Investigation*.

of the type reflected in tariff rules would be stifled, and carrier competition in those areas would be seriously weakened, if not destroyed.⁷⁸ One carrier spokesman contended that it would be unwise for the Board to impose different rules of liability for different carriers, since "freezing" the rules would act as a deterrent to competition.⁷⁹ Instead, the carriers contend that the Board could best discharge its regulatory responsibilities by limiting itself to the adjudication of controversies concerning the legality of individual rules, and by identifying the deficiencies or excesses in such rules which rendered them unlawful.⁸⁰ The carriers would then retain the initiative and responsibility of revising and maintaining their rules within the legal boundaries fixed by the Act and the Board's decisions. In performing its function of adjudicating controversies and defining the limits of lawfulness, the Board would then recognize that there is a "zone of reasonableness" in the area of rules and regulations as well as in the area of rates.⁸¹ Carrier management could operate for the best interest of their companies within that zone without governmental interference.

A second major objection was the likely economic impact of liability for consequential and special damages. The carriers contended that they would be exposed to liability of staggering proportions wholly unrelated to the value of the shipment transported.⁸² For example, in the absence of a tariff limitation, loss, damage, or delay of a relatively inexpensive machine part, needed to prevent the shutdown of a production line, could result in a claim for damages of hundreds of thousands of dollars. Absent tariff limitations, such potential liability could have a devastating effect upon carrier claims and insurance costs.⁸³ Even if liability for consequential dam-

⁷⁸ *Id.* at 13.

⁷⁹ Reply Brief of Joint Respondents at 10 (Oct. 8, 1973), *Liability Investigation*. One carrier representative had testified that uniformity was a desirable ideal, but noted that there were cases where it would not be logical. "Braniff, basically a short haul trunk carrier with limited all cargo operations cannot and should not be expected to operate under the same rules as applied by Flying Tiger, an all cargo carrier seeking total containerization." Direct Exhibits & Testimony of Braniff Airways, Inc., Exhibit BI-T-1 at 2, CAB Docket No. 19923 *et al.* (July 14, 1972).

⁸⁰ *Supra* note 77, at 16.

⁸¹ *Cf.* *Texas & Pac. Ry. v. United States*, 289 U.S. 627, 636 (1933); *Air Freight Rate Investigation*, 9 C.A.B. 340, 353 (1948).

⁸² Brief of Joint Respondents at 46 (Dec. 29, 1972), *Liability Investigation*.

⁸³ *Id.*

ages were accompanied by an air carrier's right to reject goods if the exposure to loss were too great, the carriers contended that such a refusal of tariff would not be in the public interest.⁸⁴

Carrier objections to liability also involved the potential for numerous legal disputes caused by inadequately worded tariffs. The carriers contended that since consequential and special damages are vaguely defined concepts at common law, the tariff rules must define those terms succinctly and accurately.⁸⁵ If precise definitions are not forthcoming, they fear that excessive and speculative valuations might be declared by optimistic carriers. On the other hand, shippers declaring conservative value estimates would be hurt if such a precise definition were not available. In order to avoid this injustice, liability terms must be defined accurately within the tariff to ensure that damages which are too remote and speculative will not be allowed.⁸⁶

Most of the remaining objections to liabilities for consequential and special damages are practical in nature. For example, the lack of precision air transportation scheduling even in this modern age is not unlike the uncertain arrival times of sailing vessels of many years ago. This factor of uncertainty is further complicated by present tariff rules which place air freight boarding priority after passengers, mail, baggage, and air express.⁸⁷ In addition, air freight is usually scheduled and loaded in light of considerations of density and revenue, to ensure maximum efficient utilization of aircraft rather than on a first in, first out basis. The carriers contended that this lack of priority makes it impossible for a carrier to commit itself to a delivery time with any amount of certainty.⁸⁸ To compensate for the lack of certainty, the carriers might give preferential treatment to high value shipments. Such discriminatory treatment, however, would violate air freight tariff rule 46, which requires that the carrier determine shipments on a nondiscriminatory basis.⁸⁹

⁸⁴ Brief of the Flying Tiger Line, Inc., at 27 (Jan. 29, 1973), *Liability Investigation*.

⁸⁵ Cf. Direct Exhibits & Testimony of Braniff Airways, Inc., Exhibit BI-T-1, CAB Docket No. 19923 *et al.* (July 14, 1972).

⁸⁶ *Id.*

⁸⁷ *Supra* note 85, at 3.

⁸⁸ *Supra* note 85, at 2.

⁸⁹ See Official Air Freight Rules Tariff No. 1-B, CAB No. 96, Rule 46 (A), which provides:

All shipments are subject . . . to available space after accommodat-

Notice to the carrier of the excess value and potential for consequential damages liability would be an open invitation to the carrier to give a high risk shipment preferential treatment, an invitation which the carriers would find extremely difficult to resist.⁹⁰ Although advance notice would allow the carrier to make rules and arrangements prescribing the time, place, method and form in which goods could be tendered for shipment, the carriers also contended that they should have the right to refuse shipments which would be beyond their capability to handle, or did not comply with such rules.⁹¹ It would clearly not be in the public interest for carriers to refuse shipments, however, except when absolutely necessary.⁹²

Although drafting precise rules of liability for a tariff might prove to be difficult, an even greater practical problem would be encountered in attempting to administer such rules.⁹³ Field personnel at air carrier freight receiving stations would by necessity be required to exercise their best judgment regarding the acceptability of a shipment. Without a tariff limitation on consequential or special damages, a decision by a relatively low level employee could involve complicated questions of actual value, declared value, potential value, or damaged value of the shipment.⁹⁴

The last of what have been classed as practical objections does have merit although it is somewhat conjectural. The carriers argued that consequential and special damages liability for air freight would eventually be absorbed into passenger tariffs. Passengers could logically incur the same kind of consequential and special damages for themselves or their baggage.⁹⁵ Such an extension of liability concepts would obviously place the airlines in an untenable position because of highly conjectural valuation issues and problems of proof.

ing passengers, air mail and air express, and carrier will determine on a reasonable and not unjustly discriminatory basis, the priority of carriage as between shipments. . . .

⁹⁰ Brief of Joint Respondents at 46 (Dec. 29, 1972), *Liability Investigation*.

⁹¹ See, e.g., *Montgomery Ward & Co. v. Northern Pac. Terminal Co.*, 128 F. Supp. 475, 491 (D. Ore. 1953); *Smith v. Thompson*, 234 Mo. App. 605, —, 137 S.W.2d 981, 987 (1940).

⁹² *Supra* note 84, at 27.

⁹³ *Supra* note 90, at 45.

⁹⁴ *Supra* note 85, at 3.

⁹⁵ See, e.g., *Nader v. Allegheny Airlines, Inc.*, 365 F. Supp. 128 (D.D.C. 1973).

Taken together, these objections by the air carriers raise many questions of policy that must be answered in the administration of the tariff provisions. While the carriers would obviously prefer to retain the former rule of nonliability for consequential and special damages, their position in the economy as an increasingly important means of public conveyance for the articles of commerce cannot be disregarded. As common carriers, they should be subject to some type of liability for consequential and special damages. Drawing the line to determine the extent of such damages, however, may prove to be difficult.

IV CONCLUSION

Air carriers have traditionally been able to limit their liability for loss, damage, and delay to air freight shipments by submitting exculpatory tariffs to the CAB. Prior to 1967 these tariffs were accepted by the CAB, and with limited exceptions, enforced by the courts. The age of consumer and shipper, however, has dawned and rules of law once thought to be fixed have increasingly come under criticism for the harsh results which sometimes followed their unquestioned application. Present rule 30(B)(1)(d) of the air freight rules tariffs, with its exculpatory provisions, has been subjected to the onslaught of shipper and Bureau of Economics criticism. Although proposed rule 30(B)(5) has not yet become effective, liability for consequential and special damages is almost certain to be imposed at some future time. When such liability is finally imposed on the air carriers, issues such as the valuation of shipments, the amount of recovery allowed and other related problems are likely to result in complex litigation.

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