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Comments

FROM PREFERRED CARRIER TO COMMON CARRIER: CHANGES IN THE LIABILITY RULES FOR LOST, DAMAGED, OR DELAYED FREIGHT

GUY H. KERR

By recent investigation order,¹ the Civil Aeronautics Board (CAB) completed its first overall examination of air carrier rules and practices concerning liability for air freight damage, loss, or delay. Initially ordered in 1970,² the investigation was not intended to be as comprehensive as it became. The scope of the investigation was broadened four times³ before the Administrative Law Judge (ALJ) handed down his *Initial Decision*⁴ in 1973. In that decision, the ALJ found air carrier rules and practices illegal in many respects and suggested changes which radically departed from prior rules of liability. As a result, the CAB on its own motion ordered a review of the *Initial Decision*.⁵ The CAB's conclusions represent the first comprehensive look at the liability rules and practices of the air transportation industry. Because the measures prescribed therein will likely have an effect on this particular phase of air carrier service, this Comment will trace the development of common carrier liability in an effort to conclude what type of impact the CAB's recent *Liability Investigation* will have on the present-day air carrier as it attempts to provide better freight and baggage services at lower rates.

¹ Liability and Claims Rules and Practices Investigation, CAB Docket No. 19,923 *et al.*, Order Serial No. 76-3-139 (Mar. 22, 1976) [hereinafter cited as *Liability Investigation*].

² See CAB Order No. 70-7-121 (July 24, 1970).

³ See CAB Order No. 70-9-159 (Sept. 30, 1970); CAB Order No. 71-3-108 (Mar. 18, 1971); CAB Order No. 71-6-38 (June 7, 1971); CAB Order No. 71-7-116 (July 21, 1971).

⁴ Liability and Claims Rules and Practices Investigation, CAB Docket No. 19,923 *et al.*, Initial Decision of Administrative Law Judge John E. Faulk (served July 23, 1973) [hereinafter cited as *Initial Decision*].

⁵ CAB Order No. 73-8-33 (Aug. 8, 1973).

I. SURFACE CARRIERS' STANDARD OF LIABILITY

At early common law, a carrier of goods was held liable for all loss or injury to such goods except for that damage caused by "Acts of God, and by the enemies of the King."⁶ With the passage of time, these exceptions were later broadened to include the fault of the shipper, the acts of a public authority, and the inherent nature or vice of the cargo.⁷ In practice, these exceptions were so narrow that carriers were regarded as insurers of the goods entrusted to them.⁸

This theory of strict liability was first espoused in 1601, in the case of *Southcote v. Bennet*,⁹ where a gratuitous bailee¹⁰ was held liable for loss of goods even though the goods were stolen from him. This rule was applied, with few exceptions, to all bailments until *Coggs v. Bernard*,¹¹ where a gratuitous bailee was sued for damages incurred in moving a cask of brandy from one cellar to another. In overruling the blanket approach set out in *Southcote*, the court reviewed the whole field of bailments and laid down several rules establishing varying degrees of care applicable to the various types of bailments. When discussing the rule applicable to the common carrier for hire, Lord Holt, speaking for the court, pointed out that the carrier must answer for the goods at all times. Lord Holt reasoned that if the law were otherwise, carriers could conspire with thieves to swindle persons entrusting goods to such carriers.¹²

⁶ *Coggs v. Bernard*, 92 Eng. Rep. 107, 112 (K.B. 1703).

⁷ See, e.g., *Whitlock Truck Serv., Inc. v. Regal Drilling Co.*, 333 F.2d 488, 491 (10th Cir. 1964); *Chesapeake & Ohio Ry. v. Thompson Mfg. Co.*, 270 U.S. 416, 421 (1926).

⁸ R. SIGMON, *MILLER'S LAW OF FREIGHT LOSS AND DAMAGE CLAIMS* 5 (1967) [hereinafter cited as *LAW OF FREIGHT LOSS*].

⁹ 4 Coke 83b, Cro. Eliz. 815 (1601).

¹⁰ A *bailee* is a species of agent to whom something movable is committed in trust for another. *BLACK'S LAW DICTIONARY* 718 (Rev. 4th ed. 1968). A *gratuitous bailee* is a bailee who performs such a service without receiving consideration.

¹¹ 92 Eng. Rep. 107 (K.B. 1703).

¹² To use Lord Holt's words:

The law charges this person thus entrusted to carry goods, against all events, but Acts of God, and the enemies of the King. For though the force be ever so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable, . . . for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and

In an effort to avoid or limit possible liability under this standard, carriers entered into various agreements often exchanging a provision of limited liability for reduced transportation charges.¹³ When judicially challenged, these agreements were upheld only if they were reasonable and the consideration for limited liability was in the form of lower shipping rates.¹⁴ While carriers could limit their potential exposure to damages in this manner, they could not alter the common-law standard of strict liability by inserting exculpatory provisions or clauses whereby the carrier would stipulate against damages or losses resulting from his own negligence.¹⁵ One of the basic purposes underlying this rule was to insure that the carrier performed his duties with the utmost care and diligence.¹⁶ Probably more important, however, was the fact that the courts began to recognize the unequal bargaining position held by the shipper and

yet doing it in such clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon that point.

Id. at 112.

¹³ Initially, common carriers sought to escape their extraordinary liability by publication of notices to the effect that their liability would be limited to indicated amounts unless the shipper elected to pay a higher rate which would impose upon the carrier the assumption of greater liability. By the posting of these notices, the common carriers hoped the courts would consider that knowledge of the conditions under which the goods would be carried would be brought home to the owner and by custom would become part of the transportation contract. Even though this was a loose arrangement, the courts early recognized that it was sufficient to limit the carriers' liability when there was reason to believe that notice had been brought to the attention of the shipper or reasonably should have been known to him. *LAW OF FREIGHT LOSS*, *supra* note 8, at 5-6. *See also* Smith, *Contractual Limitations in Commercial Transactions*, 12 *HAST. L.J.* 122 (1960).

¹⁴ *See* *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Hart v. Penn. R.R.*, 112 U.S. 331 (1884); *New York Cent. R.R. v. Lockwood*, 17 Wall. 357 (1873).

¹⁵ *See* note 13 *supra*; *Kansas City So. Ry. v. Carl*, 227 U.S. 639 (1913); *Santa Fe, P.&P. Ry. v. Grant Bros. Const. Co.*, 228 U.S. 177 (1913). *See also* Bickle, *Agreed Valuation as Affecting the Liability of Common Carriers*, 21 *HARV. L. REV.* 32 (1907).

¹⁶ This policy was set out in *New York Cent. R.R. v. Lockwood*, 17 Wall. 357 (1873), and was reaffirmed in *Santa Fe, P.&P. Ry. v. Grant Bros. Const. Co.*, 228 U.S. 177 (1913), when the Court noted:

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."

Id. at 184-85 (emphasis is by the court).

recognizing such, sought to protect him.¹⁷ In *New York Central Railroad Co. v. Lockwood*,¹⁸ the Court pointed out that the individual shipper could challenge the carrier's practices but only at the risk of going out of business.¹⁹

Recognition of this inequality as well as the fact that railroads had a virtual monopoly on the transportation field caused Congress to enact the Interstate Commerce Act in 1887.²⁰ Standing alone, this legislation failed to improve the plight of the shipper; carriers continued to limit their liability, often relying on varying interpretations of state law or policy.²¹ In an effort to create some uniform treatment in this regard, the Carmack Amendment²² was passed in 1906, taking away from the initial carrier its right to limit its liability by contract and, at the same time, making connecting carriers the agents of the initial carrier. These measures provided the claimant with a more convenient way of meeting the burden of proving which carrier was responsible.²³ While the shipper was aided by the Carmack Amendment, the Supreme Court continued to recognize the carrier's right to limit its liability in return for lower shipping rates.²⁴ Therefore, in 1915, Congress passed the first Cummins Amendment,²⁵ which imposed liability on the carrier for full loss or damage caused by it or any connecting carrier

¹⁷ See *Santa Fe, P.&P. Ry. v. Grant Bros. Const. Co.*, 228 U.S. 177, 185 (1913). See also *New York Cent. R.R. v. Lockwood*, 17 Wall. 357 (1873), where the Court in discussing the plight of the individual shipper noted:

[The customer] is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business.

Id. at 379.

¹⁸ 17 Wall. 357 (1873).

¹⁹ See note 17 *supra*.

²⁰ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887).

²¹ LAW OF FREIGHT LOSS, *supra* note 8, at 14.

²² This amendment, ch. 3591, § 7, §§ 11-12, 34 Stat. 595 (1906), which is presently codified in 49 U.S.C. § 20 §§ 11-12 (1970), provided at the time of its enactment that any common carrier, railroad, or transportation company would be liable for all loss, damage or injury to property which it had received for transportation and furthermore, no contract, receipt, rule or regulation would be allowed to exempt the common carrier from the liability imposed.

²³ LAW OF FREIGHT LOSS, *supra* note 8, at 14-15.

²⁴ *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).

²⁵ Cummins Amendment, ch. 176, 38 Stat. 1196 (1915).

regardless of any contrary agreement. To modify the harshness of this rule, the first Cummins Amendment was itself amended²⁶ a year later so as to provide that carriers might lawfully limit their liability by establishing and maintaining a system of "released rates"²⁷ which were to be authorized by and filed with the Interstate Commerce Commission (ICC).

The rapid development of motor vehicles as a mode of carriage caused Congress to extend this regulatory scheme to highway transportation in the Motor Carrier Act of 1935.²⁸ To insure uniform standards of liability for all surface carriers, Congress simply provided that section 20, paragraph 11²⁹ of the Interstate Commerce Act would apply to motor carriers as well as rail carriers.³⁰ As a result, all surface carriers today are subject to a standard of strict liability (with the generally recognized common-law exceptions)³¹ except where the ICC has specifically approved "released" rates.³²

²⁶ Cummins Amendment, ch. 301, 39 Stat. 441 (1916).

²⁷ In general, the "released rate" system permits the establishment of rates based upon the declared or released value of the property transported, which value thus becomes the measure of the carrier's maximum liability. This system will be discussed more fully later in the text. See text accompanying notes 55-71 *infra*.

²⁸ Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935).

²⁹ See text accompanying note 56 *infra*.

³⁰ The Interstate Commerce Act provides:

The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

49 U.S.C. § 319 (1970).

³¹ The common-law exceptions are: Acts of God, fault of the shipper, acts of public authorities, inherent nature or vice of the cargo, and war-time acts. See text accompanying notes 6-7 *supra*.

³² See note 27 *supra*. The Uniform Commercial Code has a somewhat limited application in this particular area. U.C.C. § 7-309 provides:

(1) A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. *This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.*

U.C.C. § 7-309 (1972 version) (emphasis added). U.C.C. § 7-309(2) sets forth the contractual limitation of the carrier's liability. The Official Comment, however, points out that this section is a generalized version of the Interstate Commerce Act provisions regarding the same. Furthermore, section 7-103 of the Code

II. AIR CARRIERS' STANDARD OF LIABILITY

While railroads have been regulated since 1887, the airplane was first comprehensively regulated less than thirty years ago with the passage of the Civil Aeronautics Act of 1938.³³ This regulation was enacted in order to bring stability, uniformity, and safety to a rapidly developing industry which was supposedly plagued with cut-throat competition, economic instability, and unsafe operating conditions.³⁴ Proponents of this regulation argued that the airline had the characteristics of a natural monopoly and could be analogized to the railroads which had been regulated for over fifty years.³⁵ While this line of argument was made, problems and characteristics unique to air travel caused Congress to adopt a somewhat different approach, at least with regard to liability provisions.³⁶

recognizes the controlling nature of any statute or tariff which might conflict with the provisions of the Code.

³³ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938). Note, however, that congressional investigation of aviation began as early as 1918. R. CAVES, *AIR TRANSPORT AND ITS REGULATORS* 123 (1962).

³⁴ For a discussion of the historical arguments behind the regulation of the air transportation industry, see Comment, *An Examination of Traditional Arguments on Regulation of Domestic Air Transport*, 42 J. AIR L. & COM. 187 (1976).

³⁵ *Id.* at 194. See also Lloyd-Jones, *De-regulation and Its Potential Effect on Airline Operations*, 41 J. AIR L. & COM. 815, 834-39 (1975), in which the author asserts that although the airlines are not a natural monopoly, there are sufficient similarities to natural monopolies to justify regulation.

³⁶ See *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951), in which the court of appeals discussed this difference and the basic underlying rationale, as follows:

A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. . . . To achieve this, it is essential, in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services. . . . Accordingly, this broad regulatory scheme, and not the common law, must govern the contract of the parties. [citing authorities]

In its purpose, as in its general statutory provisions, the Civil Aeronautics Act is similar to the Interstate Commerce Act. . . . The latter, however, contains an express provision prohibiting exemption from liability for any loss or damage to baggage caused by the carrier, regardless of negligence, but permitting reasonable valuation agreements to limit that liability. . . . The absence of a similar provision in the Civil Aeronautics Act compels the conclusion that such an exemption is not forbidden to air carriers, and that the Board could properly accept the appellee's tariff.

Id. at 941.

The statute governing the airline industry today—the Federal Aviation Act of 1958 (Act)³⁷—does not establish any standard of liability whatsoever. In fact, air carriers have traditionally been able to effectively establish their own standard of care by filing a tariff with the Civil Aeronautics Board. Absent a CAB finding that such tariff is unreasonable or unjust, the tariff as submitted conclusively controls the rights and liabilities between airlines and shippers or passengers.³⁸ More specifically, section 403(a)³⁹ of the Act requires every domestic and foreign air carrier to file tariffs showing not only the rates, fares, and charges for air transportation but also showing all classifications, rules, regulations, practices, and services in connection with such transportation.⁴⁰

But see *Odom v. Pacific N. Airlines, Inc.*, 393 P.2d 112 (Alas. 1964), in which the Supreme Court of Alaska, refusing to recognize the filed tariff as exculpating the defendant airlines from liability, noted:

While the rule thus established in *Lichten* has been followed in several other jurisdictions, since it has never been passed upon by the Supreme Court of the United States, we do not propose to adopt it as the law of Alaska, the reason being we are more firmly persuaded by Judge Frank . . .

Judge Frank, the dissenting judge in *Lichten*, discussed the development of federal common law and concluded that an airline was not different from other common carriers in that it cannot, he argued, limit its "common-law liability" by special contract. 189 F.2d 939, 942-45 (dissenting opinion). The decision in *Odom* has been severely questioned in *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360, 366 (S.D. Fla. 1972), but has not been overruled as the law in Alaska.

³⁷ 72 Stat. 731, as amended, 49 U.S.C. § 1301 *et seq.* (1970), formerly Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

³⁸ *Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961).

³⁹ 49 U.S.C. § 1373(a) (1970):

Every air carrier and every foreign air carrier shall file with the Board . . . tariffs showing all rates, fares, and charges for air transportation between points served by it . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the 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.

⁴⁰ The Act further provides that it is the duty of every air carrier to establish, observe and enforce just and reasonable rules, regulations, classifications, and practices with regard to such transportation. *See* 49 U.S.C. § 1374(a) (1970). Typically, tariffs are filed with the CAB by agents representing several airlines. When the *Initial Decision* of the ALJ was handed down in 1973, the tariff filed by Airline Tariff Publishers, Inc., agent, on behalf of American, Braniff, Delta, Eastern, TWA, and others was known as Official Air Freight Rules Tariff No. 1-B, CAB No. 96 (Aug. 19, 1972). At issue in the administrative proceedings was a part

As mentioned, these filed tariffs constitute the controlling contract between the parties whether they be shippers or passengers.⁴¹ Where the parties execute a special contract for transportation, any clauses or terms inconsistent with the carrier's tariff are invalid and unenforceable,⁴² regardless of the passenger's or shipper's lack of knowledge or assent to such terms.⁴³ Thus, when baggage is lost or freight is damaged, the disposition of any claim is controlled by the applicable tariff rules and regulations.

Historically, airlines have filed tariffs containing exculpatory clauses whereby the airlines would disavow all responsibility for certain specified items, regardless of the fault determination.⁴⁴ The tariffs under which several airlines operated prior to the *Initial Decision* handed down in 1973, contained an exculpatory provision which required a finding that the airline was actually negligent

of the above tariff known as Rule 30(B) [hereinafter cited in text as "Original Rule 30"] which controlled the carriers' liability.

⁴¹ See *Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961); see also *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 477 F.2d 564 (5th Cir. 1973); *Tishman & Lipp, Inc. v. Delta Air Lines, Inc.*, 413 F.2d 1401 (2d Cir. 1969).

⁴² *Emery Air Freight Corp. v. United States*, 499 F.2d 1255 (Ct. Cl. 1974); *Northeast Airlines, Inc. v. United States*, 444 F.2d 1097 (Ct. Cl. 1971).

⁴³ *Mao v. Eastern Air Lines, Inc.*, 310 F. Supp. 844 (D.C.N.Y. 1970); *Mustard v. Eastern Air Lines, Inc.*, 338 Mass. 674, 156 N.E.2d 696 (1959); but note, in order to alleviate the harshness of such a rule in the passenger context, the CAB has established certain requirements. In the *Baggage Liability Rules Case*, 45 C.A.B. 182, 188 (1966), the CAB recognized that signs posted at ticket counters advising passengers of tariff limitations were inadequate to fully inform the average traveler of the legal implications. In that proceeding, however, the CAB refused to prescribe what notice was adequate, instead relying on the ordered increase in the liability ceiling (see note 119 *infra*) to reduce the number of persons adversely affected by lack of notice. The CAB did respond in 1972 and prescribed by 14 C.F.R. § 221.76 the requirements that if a carrier wished to avail itself of the limited liability, it must: (1) display "conspicuously" at each ticket selling location and baggage checking location a sign giving notice of its limited liability and (2) include a notice of limited liability for baggage on each ticket.

⁴⁴ See, e.g., *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951), where the tariff in issue provided in part:

[N]o participating carrier shall be liable for the loss of, or any damage to, or any delay in the delivery of, any property of the following types which is included in a passenger's baggage, whether with or without the knowledge of the carrier: fragile or perishable articles, money, jewelry, silverware, negotiable paper, securities, or other valuables, samples, or business documents; or any other loss or damage of whatever nature resulting from any such loss, damage, or delay.

Id. at 940.

before a shipper or passenger could recover.⁴⁵ Under this portion of the tariff, known as Original Rule 30, shippers or passengers were required to prove that the damage or loss occurred while in the airline's possession. The ALJ found this rule unreasonable and therefore unlawful on the grounds that a carrier should not be able to escape liability on the basis of facts peculiarly within his knowledge.⁴⁶

In the CAB review proceeding, a rule was advanced by the CAB's Bureau of Economics whereby the airline would be liable if the cause of the damage or delay occurred at any time during the transportation encompassed in the airway bill.⁴⁷ Unsatisfied with this rule as well as the rule handed down by the ALJ in the *Initial Decision*, the CAB found both rules unreasonable and unlawful, noting that neither would adequately protect the shipper.⁴⁸ The CAB, finally recognizing that the air carriers and shippers do not occupy a position of equal bargaining power, prescribed a rule of strict liability similar to that governing surface carriers.⁴⁹

⁴⁵ The tariff provision, Original Rule 30, referred to in note 40 *supra*, is set out fully in *Liability Investigation*, *supra* note 1, app. B, at 15-16, col. 2.

⁴⁶ *Liability Investigation*, *supra* note 1, at 7.

⁴⁷ This rule, generally referred to as the "due diligence" rule, had certain important exceptions whereby the carrier could avoid liability if it could prove that it took all necessary measures to avoid the loss or that it was impossible to take such measures. See Rule 30(B), *Liability Investigation*, *supra* note 1, app. B, at 16-17, col. 2.

⁴⁸ For example, the CAB pointed out that while the "due diligence" rule requires the airline to establish that it exercised care, disputes will still result as to the degree of care which it took or should have taken. Furthermore, the CAB was concerned with the vagueness of the phrases "all necessary measures" and "impossible for it to take such measures." *Liability Investigation*, *supra* note 1, at 8-9.

⁴⁹ The CAB-ordered Rule 30 is as follows:

(A) *Exclusions From Liability*

- (1) The carrier shall not be liable for loss, damage, delay, or other result caused by:
 - (a) Acts of God, perils of the air, public enemies, public authorities acting with actual or apparent authority in the premises, authority of law, quarantine, riots, strikes, civil commotions, or hazards or dangers incident to a state of war.
 - (b) The act or default of the shipper or consignee.
 - (c) The nature of the shipment, or any defect, characteristic or inherent vice thereof.
 - (d) Violation by the shipper or consignee of any of the rules contained in this tariff or other applicable tariffs, including, but not confined to, improper or insufficient packing, securing, marking, or addressing, and failure to observe any of the rules

III. MEASURE OF DAMAGE—SURFACE CARRIERS

As a result of the CAB's *Liability Investigation*, all common carriers, which heretofore had operated under different standards of liability, are now strictly accountable for loss, damage, or delay of any shipment of baggage or freight, subject to the common-law exceptions previously discussed.⁵⁰ The problem thus becomes how to measure the damages which result from such liability. In general contract law, compensatory damages are awarded on the premise of placing the aggrieved party in the same economic position he would have been in had the contract been performed.⁵¹ While this objective is often obfuscated by the regulatory provisions allowing for limitations of liability, the general purpose remains the same.⁵²

When dealing with surface carriers regulated by the ICC, damage recovery is tied to both the transportation contract, represented by a bill of lading or receipt, and the tariff authorized by the ICC. Section 20 paragraph 11 of the Interstate Commerce Act provides, in part, as follows:

Any common carrier . . . (operating in interstate commerce) . . . shall issue a receipt or bill of lading . . . and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered . . . and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier . . . from the liability hereby imposed; and any such common carrier shall *be liable* to the lawful holder of said receipt or bill of lading . . . *for the full actual loss, damage, or injury to such property* caused by it or by any such common carrier . . . (emphasis added).⁵³

relating to shipments not acceptable for transportation or shipments acceptable only under certain conditions.

- (e) Compliance with delivery instructions from the shipper or consignee or noncompliance with special instructions from the shipper or consignee not authorized by applicable tariffs. CAB Order No. 76-3-139 (Mar. 22, 1976).

⁵⁰ *Id.* See also *Coggs v. Bernard*, 92 Eng. Rep. 107, 112 (K.B. 1703); *Chesapeake & Ohio 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).

⁵¹ C. McCORMICK, *CASES AND MATERIALS ON THE LAW OF DAMAGES* 561 (2d ed. 1952).

⁵² *Atlantic Coast Line Ry. v. Roe*, 118 So. 155 (Fla. 1928).

⁵³ 49 U.S.C. § 20(11) (1970).

In the absence of "agreed value rates"⁵⁴ or "released rates,"⁵⁵ the court is often faced with a confusing and complexing fact determination as to exactly what is the "actual loss or damage."⁵⁶ When the transportation of goods is delayed, the general rule is that the shipper may recover the difference in the market value of the goods at the time and place when delivery should have been made and their market value when delivery was actually made.⁵⁷ This rule, known as the "market value rule," is not applied blindly and uniformly in all cases of delay. The court must examine the facts of the case and determine whether the rule most precisely measures the actual loss or damage suffered.⁵⁸

Typically, when property is lost or damaged or its transportation is delayed wrongfully, the shipper incurs damages beyond the market price of the goods. These special, or consequential, damages, first recognized in the landmark case of *Hadley v. Baxendale*,⁵⁹ are recoverable by a shipper only if the shipper, at or before the time he tendered the goods to the carrier, informed the carrier

⁵⁴ "Agreed value rates" or "actual value rates" are those rates imposed by the carrier based upon the value of the goods agreed upon by shipper and carrier. When such rates are utilized, the carrier is still liable for the "full actual loss or damage" but the damages are awarded based upon, but not limited to, this agreed value. See LAW OF FREIGHT LOSS, *supra* note 8, at 308-09.

⁵⁵ "Released rates," on the other hand, are the rates which must be authorized by the ICC and published whereby the shipper can obtain a lower transportation rate in exchange for the limitation of liability. See note 27 *supra*. See also LAW OF FREIGHT LOSS, *supra* note 8, at 350-62.

⁵⁶ For example, in the case of loss of fungible goods, the court must decide what is the proper valuation to use. See, e.g., *Chicago, M. & St. P. Ry. v. McCaull-Dinsmore Co.*, 253 U.S. 97 (1919), where the Court found market value at destination to be the proper measure. But see *Illinois Cent. R.R. v. Crail*, 281 U.S. 57 (1930), where the Court found wholesale value at destination to be the proper measure. See also *International & G.N. Ry. v. Nicholson*, 61 Tex. 550 (1884), where the goods lost had no market value and, thus, were held to be worth the actual value to the owner, taking into consideration such factors as the property's cost, the practicability and expense of replacing it, and other factors peculiar to the individual case; but not including any sentimental value. See also *Twersky v. Pennsylvania R.R.*, 152 Misc. 300, 273 N.Y.S. 328 (Sup. Ct. 1934). For an excellent review of the traditional law of damages in this context, see *Gore Products, Inc. v. Texas & N.O. R.R.*, 34 So. 2d 418 (La. Ct. App. 1948).

⁵⁷ *New York, L.E. & W. R.R. v. Estell*, 147 U.S. 591 (1892); *Mitsubishi Shoji Kaisha v. Davis*, 291 F. 882 (S.D.N.Y. 1922), *cert. denied*, 263 U.S. 706 (1923).

⁵⁸ See, e.g., *Great Atl. & Pac. Tea Co. v. Atchison, T. & S.F. Ry.*, 333 F.2d 705 (7th Cir.), *cert. denied*, 379 U.S. 967 (1964), in which the court held for the carrier on the grounds that even though there was a wrongful delay, the shipper failed to establish actual loss.

⁵⁹ 156 Eng. Rep. 145 (Ex. 1854).

of the special circumstances which rendered the prompt transportation and delivery necessary.⁶⁰ Stated differently, "a person can only be held responsible for such consequences as may be reasonably supposed to be in contemplation of the parties at the time of the making of the contract."⁶¹ If sufficient notice is given, the courts have not hesitated, in the case of surface carriers, to award a variety of special damages.⁶²

The transportation of baggage, personal effects, and other household goods has been exposed to a somewhat different treatment when questions of liability and damage arise. The general rule that a carrier shall be liable for "full actual loss, damage, or injury" has an exception, Section 20(11) of the Interstate Commerce Act,⁶³ which permits the establishment of rates based upon the declared or released values of the property, which then become the measure of the carrier's maximum liability.

The released rate must be "expressly" authorized by the ICC. Furthermore, a carrier's tariff filed pursuant to a released rate order must, in order to be effective, contain specific reference to

⁶⁰ *Simons-Mayrant Co. v. Atlantic Coast Line R.R.*, 207 F. 387 (D.S.C. 1913).

⁶¹ *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903).

⁶² *See, e.g., Security Stove & Mfg. Co. v. American Ry. Express Co.*, 227 Mo. App. 175, 51 S.W.2d 572 (1932), where the carrier delayed shipment of part of an oil-burning stove which it knew was to be exhibited at an industry-wide convention. Due to the notice of special circumstances, the court awarded damages including express charges to and from, hotel accommodations, and the cost of renting space at the convention. *See also H.C. Parker, Inc. v. Herrin Transp. Co.*, 183 So. 606 (La. Ct. App. 1938), where the court awarded lost profits which would have been made if a shipment of sample furniture had arrived on time.

⁶³ Section 20(11) provides in part as follows:

[T]he provisions hereof respecting liability for full actual loss, damage, or injury . . . shall not apply . . . to property . . . received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to value, be held a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission . . . shall contain specific reference thereto and may establish rates varying in value so declared and agreed upon . . .

49 U.S.C. § 20(11) (1970). For the applicability of the Uniform Commercial Code in this area see note 34 *supra*.

such released values.⁶⁴ Mere publication of authorized released rates inadequately protects the carrier's attempted liability limitation. While such publication is required, the statute further requires that values must either be "declared in writing by the shipper" or "agreed upon in writing as the released value of the property."⁶⁵ The fact that the statute not only requires the ICC to establish rates for transportation based on these declared or agreed values but also recognizes the carrier's limited liability assures against two otherwise possible consequences. One, the shipper is precluded from understanding the value of his property for the purpose of reducing the rate and then recovering a larger "actual" value in case of loss.⁶⁶ Two, the fact that either the shipper declares the value or it is agreed upon prevents the carrier from arbitrarily fixing a low value whereby it can limit its liability in a manner not prescribed by statute nor allowed by common law.⁶⁷

IV. MEASURE OF DAMAGE—AIR CARRIERS

Historically, recovery for lost, damaged, or delayed shipments in the air carrier context has drastically differed from recovery in the surface carrier context. The primary reason for the traditional distinction centers on the comprehensive regulatory scheme fashioned by Congress. This regulation, by providing in general terms that passenger and cargo are to be treated equally by air carriers, was designed to insure that rates and services are offered on an equal basis to all who seek to use such carriers, to protect the traveling public, and to effectuate a rule of equality in the air transportation industry.⁶⁸

Recognizing that these objectives would be better served by a standard of liability similar to that which surface carriers have to meet, the CAB has established a standard of liability analogous

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Hart v. Pennsylvania R.R.*, 112 U.S. 331 (1884).

⁶⁷ *In re Released Rates*, 13 I.C.C. 550 (1908). See also note 15 and accompanying text. For a general discussion of the use of "released" rates in the baggage context, see Note, 26 WASH. & LEE L. REV. 153 (1969).

⁶⁸ *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir.), cert. denied, 390 U.S. 920 (1967); see also *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951).

to that applicable to surface carriers.⁶⁹ In addition to prescribing this uniform standard of strict liability, the CAB has, by its action in the *Liability Investigation*, altered its stance on the measure and type of damage which passengers as well as shippers can now recover. In general, blanket exculpations against special and consequential damage were deemed unlawful.⁷⁰ Furthermore, the CAB found unlawful the present monetary limit rule which limited the air carrier's out-of-pocket claim payments to the higher of fifty cents per pound (applied to the weight of the shipment) or fifty dollars, provided that a higher value was not declared and paid for.⁷¹ These actions constitute a significant change from the rules which have heretofore governed questions of the measure of damages recoverable by an injured shipper or passenger.

In the surface carrier context, questions of damages have largely been controlled by common-law principles.⁷² With the exception of ICC approved "released" rates, Congress has recognized that surface carriers are liable for the "full actual loss or damage."⁷³ When no "released" rates are approved, the measure of damages becomes a question of fact as to the actual loss suffered.⁷⁴ In contrast, it has been uniformly recognized that the rules of common law and the traditional law of damages do not apply to similar situations involving air carriers⁷⁵ because of the pervasive regulatory scheme enacted by Congress. In the aviation context, the role of the judiciary is not to make a fact determination but to answer questions of law involving the interpretation of tariffs filed with

⁶⁹ See note 52 *supra* and accompanying text.

⁷⁰ *Liability Investigation*, *supra* note 1, at 15.

⁷¹ *Id.* at 26. Note that the \$500 per passenger limitation imposed by the CAB in 1966, *infra* note 119, for baggage claims was not at issue in this proceeding.

⁷² See notes 59-65 *supra* and accompanying text.

⁷³ See notes 32 and 56 *supra* and accompanying text.

⁷⁴ See notes 59-65 *supra* and accompanying text.

⁷⁵ *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972), *aff'd*, 477 F.2d 564 (5th Cir. 1973); *Tishman & Lipp, Inc. v. Delta Airlines*, 275 F. Supp. 471 (S.D.N.Y. 1967), *aff'd*, 413 F.2d 1401 (2d Cir. 1969); *Illinois Produce Int'l, Inc. v. Reliance Ins. Co.*, 388 F. Supp. 29 (N.D. Ill. 1975); *Martin v. Trans World Airlines, Inc.*, 219 Pa. Super. Ct. 42, 280 A.2d 647 (1971); *Melnick v. National Airlines*, 189 Pa. Super. Ct. 316, 150 A.2d 566 (1959); *Crosby & Co., Inc. v. Compagnie Nationale Air Fr.*, 76 Misc. 2d 990, 352 N.Y.S.2d 75 (Sup. Ct.), *aff'd*, 348 N.Y.S.2d 957, 42 App. Div. 2d 1050 (1973); *Mustard v. Eastern Air Lines, Inc.*, 338 Mass. 674, 156 N.E.2d 696 (1959); *Randolph v. American Airlines, Inc.*, 103 Ohio App. 172, 144 N.E.2d 878 (1956); *Rosenchein v. Trans World Airlines, Inc.*, 349 S.W.2d 483 (Mo. Ct. App. 1961).

the CAB.⁷⁶ These tariffs, required to be filed by virtue of section 403 of the Act,⁷⁷ constitute the law between an air carrier and shipper and not merely a contract.⁷⁸ Limitation of liability contained in tariffs properly filed with the CAB are binding upon the shipper regardless of the fact that such limitations were not embodied in the specific transportation contract or airbill.⁷⁹ This result flows from the fact that once a tariff is filed with the CAB, it constitutes the contract which governs the legal relationships of the parties.⁸⁰ Shippers and passengers are "conclusively presumed" to know the contents of such tariffs.⁸¹ Even if the specific transportation contract, whether it be a shipper's airbill, a passenger's ticket, or some other document, contains limitations of liability which conflict with those contained in the tariff on file with the CAB, it is uniformly recognized that the provisions of the tariff are controlling.⁸² Furthermore, in contrast to the surface carrier situation, the shipper's or passenger's lack of knowledge or assent to such limitations does not alter the binding effect of such provisions.⁸³

Consequently, the tariff system as provided for in the Act occupies a position vastly different from that used by surface carriers. As previously discussed, air carriers have traditionally been able to file tariffs in which they could establish a ceiling on their maximum monetary liability.⁸⁴ Limitation to this ceiling is of course

⁷⁶ *Emery Air Freight Corp. v. United States*, 499 F.2d 1255 (Ct. Cl. 1974).

⁷⁷ *See Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961).

⁷⁸ *Blair v. Delta Airlines, Inc.*, 477 F.2d 564 (5th Cir. 1973). Note that tariffs properly filed with the CAB become part of the transportation contract even though the passenger or shipper is unaware of the provisions. *Hycel, Inc. v. American Airlines, Inc.*, 328 F. Supp. 190 (S.D. Tex. 1971); *Killian v. Frontier Airlines, Inc.*, 150 F. Supp. 17 (D. Wyo. 1957).

⁷⁹ *Mao v. Eastern Airlines, Inc.*, 310 F. Supp. 844 (S.D.N.Y. 1970); *Tishman & Lipp, Inc. v. Delta Airlines*, 413 F.2d 1401 (2d Cir. 1969); *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951).

⁸⁰ *Berkman v. Trans World Airlines, Inc.*, 209 F. Supp. 851 (S.D.N.Y. 1962); *Killian v. Frontier Airlines, Inc.*, 150 F. Supp. 17 (D. Wyo. 1957).

⁸¹ *See* note 43 *supra*.

⁸² *See Emery Air Freight Corp. v. United States*, 499 F.2d 1255 (Ct. Cl. 1974); *Northeast Airlines, Inc. v. United States*, 444 F.2d 1097 (Ct. Cl. 1971).

⁸³ *See* note 43 *supra*.

⁸⁴ The CAB, in the *Liability Investigation*, *supra* note 1, at 19 n.30, summarized the contrasting positions of surface and air carriers with regard to "released" rates, as follows:

Under the system in effect for air freight since its inception, the

altered if the shipper or passenger declares a higher value.⁸⁵ Yet problems often arise because travelers or shippers are either unaware of this option to declare a higher value or they feel it is not necessary or economical.⁸⁶ Nevertheless, when their baggage is lost or shipment delayed, they are precluded from recovering more than is allowed by tariff even though the "actual loss or damage" is much greater.⁸⁷

Prior to 1966, most tariffs contained provisions that the carrier would not be responsible for certain kinds of items having a special value, such as jewelry, money, and perishables.⁸⁸ In 1966, however, the CAB ruled that airlines could not thereafter refuse to accept such valuable items for shipment as baggage.⁸⁹ The carriers argued that if the passenger could include in his baggage a substantial amount of cash, jewelry, or other valuables, he would be in a position to fabricate large claims which the carrier could not verify.⁹⁰ Furthermore, the carriers argued, liability for such valuables would require a change in the baggage handling procedures which would

quoted rate is itself referred to as a "released" (presumably low) rate, the carrier being released from liability beyond that stated in its tariff. The shipper's choice is to obtain greater protection by declaring excess value and paying a higher rate. This differs from the system in surface transportation under which the carrier is normally liable to the full extent of the loss suffered by the shipper and can offer a lower rate accompanied by reduced liability only if this "released" rate is specifically authorized by the Interstate Commerce Commission.

⁸⁵ When a shipper declares a higher value for goods to be shipped, he is normally charged from 10¢ to 15¢ per \$100 of declared excess value. In his *Initial Decision*, the ALJ found the tariffs providing for a 15¢ charge to be unlawful but, on review, the CAB declined to so decide, pointing out that different carriers have different experiences and, therefore, there is no need for a uniform declared value fee. *Liability Investigation*, *supra* note 1, at 35.

⁸⁶ The CAB has previously pointed out the possibility that many passengers simply rely on the coverage their personal insurance policies afford and therefore they often feel no need to declare excess value. *Baggage Liability Rules Case*, 45 C.A.B. 182, 200 (1966).

⁸⁷ See, e.g., *Vogelsang v. Delta Air Lines, Inc.*, 193 F. Supp. 613 (S.D.N.Y. 1961), where a passenger carrying \$69,000.00 of jewelry samples which were negligently given to a stranger was awarded only \$100.00, the tariff limitation in effect at the time. See also *Berkman v. Trans World Airlines, Inc.*, 209 F. Supp. 851 (S.D.N.Y. 1962), where a passenger claimed over \$57,000.00, but recovered only \$100.00 because of the tariff limitation.

⁸⁸ See note 44 *supra*.

⁸⁹ *Baggage Liability Rules Case*, 45 C.A.B. 182 (1966).

⁹⁰ *Id.* at 200.

cause delay and inconvenience to the traveling public.⁹¹ The CAB found the evidence insufficient to support such arguments and prescribed a rule requiring airlines to accept valuables, at least in checked baggage.⁹² Since that decision, the airlines have filed tariffs placing numerous restrictions on the acceptance of excess value items in an attempt to alleviate the risk which was previously negated by the exculpatory tariffs.⁹³

The recovery of special or consequential damages has traditionally been another area in which air carriers have been able to limit their liability contrary to the common-law principles governing surface carriers. As the air transportation industry grew, extensive federal regulation caused special liability rules to develop.⁹⁴ Most tariffs filed have contained blanket exculpations for special or consequential damages.⁹⁵ Shippers have argued that such exculpations were against public policy as well as the common-law rules of damages.⁹⁶ The courts, however, recognizing the CAB's power to

⁹¹ *Id.* at 201.

⁹² The order with regard to excess value items read:

The limitation of liability of the respective carrier parties for loss of, damage to, or delay in the delivery of money, jewelry, silverware, negotiable papers, securities, business documents, samples, paintings, antiques, artifacts, manuscripts, irreplaceable books or publications, or other similar valuables in checked baggage, shall be not less than the lawful limitation of liability for other personal property (as found herein) issued by the respective carriers. A declaration of value on such valuables in excess of the carrier's limitation of liability for loss of, damage to, or delay in the delivery of, such valuables, shall be accepted by the carrier when such valuable articles are not included in checked baggage.

Id. at 208.

⁹³ For example, the CAB ruled that when a shipper declares a value of \$5,000.00 or more, a carrier is obligated to accept such a shipment *only* when the shipper:

- (1) makes advance arrangements not less than three hours before tendering the shipment;
- (2) tenders the shipment at a designated terminal area not more than three hours prior to scheduled departure, unless the carrier is providing pickup service; and
- (3) if the carrier is not providing service, states in writing that the consignee will accept delivery at the airport within three hours after arrival.

Liability Investigation, supra note 1, at 64.

⁹⁴ See note 38 *supra* and accompanying text.

⁹⁵ See, e.g., note 92 *supra*.

⁹⁶ See *Lichten v. Eastern Airlines*, 189 F.2d 939, 941 (2d Cir. 1951). See also *Randolph v. American Airlines, Inc.*, 103 Ohio App. 172, 144 N.E.2d 878 (1956).

change such rules, have refused to accept such arguments.⁹⁷ Such tariff limitations have been upheld even when the carrier had complete notice of the special circumstances which gave rise to the special damages suffered.⁹⁸ In the surface carrier context, such notice would normally have been sufficient to render a negligent carrier liable for special and consequential damages if the court determined that such damages were part of the "actual" damages suffered.⁹⁹ Thus, while surface carriers have been subject to liability for special or consequential damages since 1854,¹⁰⁰ air carriers have, until 1976, enjoyed the privilege of denying such damages on the theory that Congress enacted a comprehensive regulatory scheme whereby the CAB would sanction such actions when it was deemed necessary for purposes of uniformity and protection of an infant industry.¹⁰¹

As noted at the outset of this comment, the CAB, in the *Liability Investigation* concluded in 1976, radically altered its position on the standard of liability now required of air carriers as well as its heretofore uniform¹⁰² assent to exculpation from liability for

⁹⁷ See *Blair v. Delta Air Lines, Inc.*, 477 F.2d 564 (5th Cir. 1973); *Gellert v. United Airlines*, 474 F.2d 77, 80 (10th Cir. 1973), where liability for special damages for gross negligence in handling the remains of plaintiff's deceased wife was denied on the basis of an exculpatory tariff; *Milhizer v. Riddle Airlines, Inc.*, 185 F. Supp. 110 (E.D. Mich. 1960), *aff'd*, 289 F.2d 933 (6th Cir. 1961); *Killian v. Frontier Airlines*, 150 F. Supp. 17 (D. Wyo. 1957), where plaintiff sought recovery of the cost of a plane ticket incurred in picking up flowers wrongfully shipped to another city.

⁹⁸ See *Bendersky v. Trans World Airlines, Inc.*, 10 Av. Cas. 18,123 (E.D. Pa. 1968), where a doctor claimed that because his bag containing his lecture notes did not arrive on time, he suffered damages in the form of a lost lecture fee, an injured reputation as a lecturer, and the impairment of obtaining future lecturing engagements. See also *Schiff v. Emery Air Freight Corp.*, 332 F. Supp. 1057 (D. Mass. 1971), where a research specialist desiring to transport refrigerated goods from the west coast to the east coast was assured by the carrier that proper handling was available. When the goods arrived unrefrigerated and thereby damaged, the specialist claimed \$30,000.00 actual and consequential damages but was awarded only the \$50 tariff limitation.

⁹⁹ See notes 60, 61, 62 *supra* and accompanying text.

¹⁰⁰ This was the year *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), was decided.

¹⁰¹ See note 35 *supra*.

¹⁰² For one of the few times where an exculpatory tariff was not upheld, see *Pan American World Airways, Inc., Conditions and Related Traffic Regulations*, 24 C.A.B. 575, 589 (1957), where the CAB found that a provision of the condition of carriage which disclaimed liability for consequential and special damages was adverse to the public interest and was in contravention of the general law of damages.

special or consequential damages.¹⁰³ The shift in position began in 1973, when the ALJ found the rule 30(B)(1)(d) "ship at your own risk" prescription¹⁰⁴ unreasonable.¹⁰⁵

During the hearings before the ALJ, various shippers and other concerned entities advanced arguments upon which this change was finally made.¹⁰⁶ Shippers argued that abrogation of the common-law liability was not healthy for the growth of air freight and should not be allowed by merely filing a tariff, but should be altered by statute.¹⁰⁷ The Department of Defense argued that because of the limited liability, some airlines found it economically more feasible to ignore security measures rather than pay for strict security enforcement.¹⁰⁸ The CAB's Bureau of Economics argued that advance notification by the shipper, in writing on the airbill, of the value of the shipment would adequately protect the air carriers and place them on notice of potential damages.¹⁰⁹

The carriers countered by arguing that CAB prescription of liability would deter initiative and competition in the development of such rules.¹¹⁰ Second, the carriers contended that they would be exposed to liability of drastic proportions, totally unrelated to the value of the shipment transported.¹¹¹ Finally, the carriers advanced several theories regarding the practical improprieties for imposing such a rule of liability.¹¹² After weighing the arguments, the ALJ

¹⁰³ *Liability Investigation*, *supra* note 1, at 15.

¹⁰⁴ Rule 30(B)(1)(d), in effect as of Feb. 3, 1973, read as follows: "The carrier shall not be liable for any consequential or special damages whether or not the carrier had knowledge that such damages might be incurred." *Liability Investigation*, app. B, at 16, col. 2.

¹⁰⁵ *Initial Decision*, *supra* note 4, at 22.

¹⁰⁶ For an excellent discussion of the arguments raised, see Note, *Consequential and Special Damages: Tempest in the Tariff*, 40 J. AIR L. & COM. 704 (1974).

¹⁰⁷ Direct Exhibits and Testimony of the National Industrial Traffic League, Exhibit NITL-T-1 at 20, CAB Docket No. 19,923 *et al.* (July 14, 1972). Shippers also argued that the lack of liability for such damages failed to reflect the public nature of an air carrier's duties and disregarded the inequality in bargaining positions of shippers and carriers. *Id.* at 22.

¹⁰⁸ Brief of the Department of Defense at 3, *Initial Decision*, *supra* note 4.

¹⁰⁹ Direct Testimony of the Bureau of Economics, Exhibit BE-DT-119 at 7, CAB Docket No. 19,923 *et al.* (May 1, 1972).

¹¹⁰ Brief of Joint Respondents at 10, *Initial Decision*, *supra* note 4.

¹¹¹ Brief of Joint Respondents at 46, *Initial Decision*, *supra* note 4.

¹¹² One of the practical problems argued was that notice of an excess value item and potential for consequential damages would invite carriers to give preferential treatment to high risk shippers, a practice outlawed by the existing Official

prescribed a rule whereby carriers must accept liability for special or consequential damages, provided written notice is given by the shipper, and also provided the damages do not exceed the carrier's monetary limit.¹¹³

Upon review, the CAB summarily rejected the carrier's argument of higher claims, labelling it "speculative."¹¹⁴ The CAB went further and refused to accept the ALJ's prescribed rule on two grounds. One, the carriers receive sufficient notice when a shipper declares an excess value and pays the assessed fee.¹¹⁵ Two, removal of the written notice requirement would militate against the alleged potential for preference, *i.e.*, the carrier would be under no more pressure to provide expeditious handling than it would with respect to any declared value shipment.¹¹⁶ The CAB then concluded that the "lawful rule" should read:

The carrier shall not be liable for special or consequential damages where total damages (*i.e.*, special or consequential damages combined with any other damage for which the carrier is liable) would exceed the carrier's normally assumed monetary liability as set forth in Rule 32, unless a higher value is declared on the airbill and the additional transportation charge assessed by the carrier is paid. In no event shall the carrier's liability for special or consequential damages exceed such higher declared values.¹¹⁷

Now that the air carrier is strictly accountable for all types of damages, the important issue becomes to what extent the carrier will have to pay for such liability. In the absence of a higher declared value, the tariff limitation prior to the *Liability Investiga-*

Air Freight Rules Tariff No. 1-B, CAB No. 96, Rule 46(A) which provides that "All shipments are subject . . . to available space after accommodating passengers, air mail and air express, and the carrier will determine on a reasonable and not unjustly discriminatory basis, the priority of carriage as between shipments."

¹¹³ The ALJ's rule read:

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 assessed in accordance with Rule 32.

Liability Investigation, *supra* note 1, at 12 n.20.

¹¹⁴ *Liability Investigation*, *supra* note 1, at 14.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.* See also note 113 *supra*.

¹¹⁷ *Id.* at 16.

tion provided that a shipper was limited to a recovery of the higher of fifty cents per pound or fifty dollars.¹¹⁸ In the passenger/baggage context, the special limitation of not more than \$500 per passenger was the rule until recent CAB action increased the ceiling to \$750 per passenger.¹¹⁹ The passenger baggage limitation was not at issue in the *Liability Investigation*, yet the CAB relied on one basic principle set forth in the *Baggage Liability Rules Case*,¹²⁰ where the \$500 limitation was prescribed, in order to find the present fifty cents/fifty dollars rule of freight shipments unreasonable. In that proceeding, the CAB held that the monetary limitation must be reasonably related to the value of the commodities in air transportation.¹²¹ In addition, the CAB considered a statistical survey in which it was found that a large percentage of amounts claimed by shippers were not recovered under the fifty cents/fifty dollars limitation.¹²² Shippers also complained that carriers provide poor security because of the preference to pay claims at fifty cents per pound rather than update security measures.¹²³ The CAB discounted this incentive theory somewhat and relied heavily on the fact that the fifty cents/fifty dollars limitation had been adopted in 1946, based on surface carrier rates used in the year 1861. Furthermore, it pointed out that the air freight industry was no longer an "infant" industry which needed the protection of such

¹¹⁸ See Rule 52, *Liability Investigation*, *supra* note 1, app. B, at 26.

¹¹⁹ Prior to 1966, there was a \$250 per passenger limitation, but this limitation was increased to \$500 per passenger by order of the CAB in the *Baggage Liability Rules Case*, 45 C.A.B. 182 (1966). The per passenger limitation was raised to \$750 in 1977 in the *Domestic Baggage Liability Rules Investigation*, CAB Docket No. 27,589, Order No. 77-2-9 (Feb. 2, 1977). Inflation and the failure to compensate passengers, as a practical matter, for a variety of consequential damages were the two main reasons cited for the increase.

¹²⁰ *Baggage Liability Rules Case*, 45 C.A.B. 182 (1966).

¹²¹ See *Liability Investigation*, *supra* note 1, at 19, 20. The CAB did not, however, accept the principal that the test in this regard was whether the limitation covers "all but the unusual or extraordinary cases." The ALJ had cited this test, originally formulated in the *Baggage Liability Rules Case*, 45 C.A.B. 182, 187 (1966), but the CAB found such a criterion unnecessary and therefore refused to accept it.

¹²² See *Liability Investigation*, *supra* note 1, at 21. To provide information concerning the rule's operation, the CAB requested carriers to file specific data for the period Sept. - Oct., 1971. From this survey it was found that only from 59% to 68% of all amounts claimed were recovered by shippers.

¹²³ *Id.* at 25.

inequitable limitations.¹²⁴ As required by Section 1002(d)¹²⁵ of the Act, the CAB then prescribed an interim rate of \$9.07 per pound, the current limit recognized in international air transportation.¹²⁶ As to what the "lawful rule" should eventually be, the CAB reserved decision until there was sufficient actual experience upon which to base such a determination.¹²⁷

V. CONCLUSION

At the beginning of its opinion in the *Liability Investigation*, the CAB noted that the examination at hand represented the CAB's first comprehensive look at air carrier rules and practices with respect to freight liability and claims. If one looks at some of the changes prescribed by the CAB as a result of such examination, one might readily conclude that such an effort was long overdue. Air carriers in 1976 were operating under liability limitations

¹²⁴ *Id.* at 26. In support of its position, the CAB noted that the domestic revenue ton-miles (a measurement of the extent of air freight shipments) increased from 12.8 million in 1946, to over 1.4 billion ton-miles in 1976.

¹²⁵ Federal Aviation Act of 1958 § 1002(d), 49 U.S.C. § 1482(d) (1970):

Whenever . . . the Board shall be of the opinion that any individual or joint rate, fare, or charge . . . for . . . air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge . . . thereafter to be demanded . . . or the lawful classification, rule, regulation, or practice thereafter to be made effective

¹²⁶ Article 22 of the Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), provides that in the case of checked baggage and goods, the liability of the carrier is limited to 250 francs per kilogram (approx. \$9.07 at the time of the *Liability Investigation*), unless a higher value was declared and paid for at the time the package was handed over to the carrier. For a general discussion of limited liability under the Warsaw Convention, see Note, 36 J. AIR L. & COM. 771 (1970). See also Parker, *The Adequacy of the Passenger Liability Limitation of the Warsaw Convention of 1929*, 14 J. AIR L. 37 (1947); Clare, *Evaluation of Proposals to Increase the Warsaw Convention Limit of Passenger Liability*, 16 J. AIR L. 53 (1949); Hyman, *Inadequacy of Liability Limits Under the Warsaw Convention*, 1952 INS. L.J. 533.

¹²⁷ *Liability Investigation*, *supra* note 1, at 29-30. Note that Hawaiian Airlines requested that it be permitted to retain the current 50¢/\$50 limit on the grounds that Hawaiian intrastate freight traffic differs from the mainland traffic, and on the grounds that the present limit provided adequate coverage of its claims. The CAB found no compelling reason for such a request and disallowed the request on the ground that the rule described is the minimum lawful rule for U.S. carriers in all fifty states. *Id.* at 31.

adopted in but unchanged since 1946. Tariffs filed by airlines, although subject to review by the CAB, have contained exculpatory provisions based upon assumptions formulated when the air transport industry was truly an "infant" industry. Yet those assumptions have little validity in the rapidly changing economy of today. Air carriers are no longer in need of the degree of protection that was afforded them in the earlier years of development.

More particularly, the CAB has apparently recognized that surface carriers and air carriers do not occupy significantly different positions with regard to the shipment of goods to justify the heretofore differing rules of liability. All common carriers—both air and surface—are now subject to a standard of strict liability. Shippers can now recover special and consequential damages regardless of which type of carrier they are forced to use. Of course, air carriers are still allowed to limit their ultimate monetary liability, but not at 1946 rates.

Without increasing the recovery rates, the CAB's action in this area of liability would not have been so significant. The true economic impact of these changes depends upon the persuasive ability of the carriers to justify the need for a related freight rate increase.¹²⁸ The *Liability Investigation* did not encompass this issue¹²⁹ and as such, only future experience can define the true impact of these changes. Shippers hope the increased liability exposure will force airlines to adopt tighter and more efficient security measures. On the surface, this appears to be a logical result. That, however, depends upon the success of the carriers in obtaining the higher freight rates which they argue are necessary in order to implement more stringent security measures.

Finally, while future experience will determine many of the potential effects of the recent changes in liability rules, there are a few certain results. First, air shippers no longer have the burden of showing negligence either in the actual transport of the freight or in the system maintained to assure such transportation. Second, air carriers will be forced to improve the efficiency of delivering freight promptly or else answer for possible claims of special dam-

¹²⁸ At the time the *Liability Investigation* decision was rendered, the CAB was also involved in deciding questions of adjustment of freight rates in *Domestic Air Freight Rate Investigation*, CAB Docket No. 22,859 (Dec. 8, 1970).

¹²⁹ *Liability Investigation*, *supra* note 1, at 5.

ages. And lastly, the shipper will not be forced to accept tariff regulations which have heretofore drastically differed from the corresponding requirements imposed on surface carriers. As a result of these changes, the air carrier no longer enjoys the preferred status of a protected "infant," but instead, it can now be truly considered a common carrier, subject to the general rules of liability which are finally somewhat uniform.