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The Role of the Civil Aeronautics Board in Licensing Foreign Air Carriers

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INTERNATIONAL REVIEW

THE ROLE OF THE CIVIL AERONAUTICS BOARD IN LICENSING FOREIGN AIR CARRIERS†

BY WHITNEY GILLILLAND††

The international air route structure which serves the free world has been developed largely under a series of bilateral agreements between nations. The United States has more than fifty. They deal with many subjects including access, law of the contract, airport charges, capacity, rates, disputes, and termination. All of these relate to an exchange of routes. My comments will be directed primarily to the route grants, and the steps required to implement them.

Fundamental in the United States conception of international air routes, and of bilateral agreements, is the view that once operating authority has been granted, a carrier shall have reasonable opportunity to develop a route, and will not be subject to unilateral limitations of frequencies or capacity. Consequently, the exchange set forth in a bilateral and the subsequent procedures concerning operating permission are regarded as matters of much importance. It is by these two steps that a balance of rights is to be achieved and tested—not by later steps unspecified in the bilateral.

Although negotiation of agreements is carried on under the leadership of the Department of State, the Civil Aeronautics Board, whose functions are primarily economic, has an equally important duty. This is so because the Declaration of Policy of the Federal Aviation Act requires the Board to consider, as in the public interest, and in accordance with the public convenience and necessity, the development of an air transportation system properly adapted to the needs of the foreign commerce of the United States.[1] Another section requires the Secretary of State to consult with the Board concerning negotiations.[2] Still another section provides that no foreign air carrier shall engage in air transportation to and from the United States, unless there is in force a permit issued by the Board.[3] A fourth section imposes similar requirements on United States carriers.[4]

† Address presented at the Third Interamerican Law Conference, University of Miami Law Center, Coral Gables, Florida, 22-24 March 1966.

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[1] Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964). For the complete text of the act (as amended through July 1963) and related statutes, see CAB, AERONAUTICAL STATUTES AND RELATED MATERIALS (1963).

[2] Federal Aviation Act of 1958, § 802, 72 Stat. 783, 49 U.S.C. § 1462 (1964).

[3] Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. § 1372 (1964).

[4] Federal Aviation Act of 1958, § 401, 72 Stat. 754, as amended, 76 Stat. 143 (1962), 49 U.S.C. 1371 (1964).

Accordingly, it is the custom for the Board to subject the international route structure to constant study. When negotiations are in the offing, it is the practice to consult carefully with the United States carriers whose operations may be affected, and to prepare and submit a report, together with recommendations, to the Department of State. It is also the custom to take part in the negotiations. An agreement, when consummated, is not self-operating and a carrier which aspires to serve a route has further steps to take. First it must seek and obtain from its own government a designation to serve the route. This is required by the bilateral.[5] Then it must seek and obtain from the other government permission to operate the route.[6]

The complexity of procedures varies between nations and the requirements of each should be borne in mind in the course of negotiations. Ours are complex and sometimes cause misunderstandings to applicants. Unless understood they may also cause us embarrassment, particularly in cases where reciprocal applications have been quickly granted. However, the United States procedures place no burden upon foreign carriers to which United States carriers are not subjected, for the latter generally face much greater tests upon their applications to the Board for certificates of public convenience and necessity, and upon which their designations to foreign governments are founded. The United States procedures must be evaluated in the light of the deeply entrenched habit of mind prevalent in this country which calls for uniformity, for public hearings, and for full and adequate opportunity to be heard in cases where private rights may be affected by administrative action. This has been the state of affairs since colonial times and has been manifested throughout our governmental structure. It accounts for the Administrative Procedure Act, which requires uniform and impartial procedures of all administrative agencies,[7] and for the provisions of the Federal Aviation Act with which we are concerned. Thus, public adversary hearings are readily to be expected on questions which are reserved under a bilateral for the grantor government's determination.[8] Furthermore, there is no means to publicly come to grips with the terms in advance of execution. Accordingly, hearings serve a purpose as an accounting for stewardship.

The procedural steps are in brief as follows.[9] The application for a foreign air carrier permit is filed with the Board through diplomatic channels and public notice of its filing is given. The matter is then set for a public hearing before one of the Board's hearing examiners. The proceeding is conducted in much the same fashion as a case is tried in one of the ordinary civil courts. The great bulk of the cases are not contested and, at the conclusion of the hearing, a recommended decision is issued

[5] Air Transport Agreement With Great Britain, 11 Feb. 1946, 60 Stat. 1499, T.I.A.S. No. 1507 [Bermuda Agreement]; British Overseas Airways Corp., Foreign Permit Amendment, 29 C.A.B. 583, 585 n.2 (1959).

[6] *Ibid.*

[7] 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964).

[8] Bermuda Agreement, *supra* note 5, arts. 2 & 6.

[9] Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. § 1372 (1964).

by the examiner. In these instances no exceptions are filed and the case is submitted immediately to the Board for its consideration. There are, however, cases in which United States domestic carriers intervene, and vigorously contest some or all of the authority sought by the foreign air carrier. In such cases, the evidence is frequently voluminous and the length of time to assimilate it is considerable. When that has been done, the hearing examiner issues a recommended decision which may be subject to exceptions and briefs to the Board. Thereafter the Board considers the recommended decision, may hold oral argument, and either adopts it or prepares one of its own.

The decision does not issue at this point however. Unlike the United States carrier domestic route certificate cases, but like the United States carrier foreign route certificate cases, the Board's decision is not final until it has been reviewed by the President.[10] The President may require a revision in any respect, and may seek the advice of the Departments of State or Commerce, or of any other departments or agencies. Thus, although his views are articulated by the Board, he is in effect the final determinor of the matter. The decision is not subject to review in the courts.[11] The issues considered by the Board in such a case are these:

(1) Is the applicant carrier fit, willing, and able to properly perform such air transportation and to conform to the provisions of the Federal Aviation Act and the rules, regulations, and requirements of the Board thereunder, and

(2) Will the proposed transportation be in the public interest?[12]

The Board is not limited in its decisions to acceptance or rejection of an application but may prescribe the duration of any permit and may attach to it such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.[13]

In actual practice the issues seldom prove formidable. The vast majority of cases are of a pro forma, perfunctory nature, merely providing the mechanical means for making the record upon which the Board can base its statutory findings. The time involved is determined mostly by the procedural requirements, and is infrequently prolonged by the complexity of the issues.

It is not surprising, however, that in some cases a United States carrier, perceiving its economic status to be threatened by new route competition without compensating advantages, and accustomed to slugging it out vigorously against competitors in domestic route cases, albeit with greater chances of success, should resist foreign carrier applications with much energy.

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[10] Federal Aviation Act of 1958, § 801, 72 Stat. 782, 49 U.S.C. § 1461 (1964).

[11] Federal Aviation Act of 1958, § 1006, 72 Stat. 795, as amended, 74 Stat. 255 (1960), 75 Stat. 497 (1961), 49 U.S.C. 1486 (1964). Chicago & So. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); Pan American-Grace Airways, Inc. v. CAB, 342 F.2d 905 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 934 (1965). See also Calkins, *Acquisition of Operating Authority by Foreign Air Carriers: The Role of the CAB, White House, and Department of State*, 31 J. AIR L. & COM. 65 (1965).

[12] Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. § 1372 (1964).

[13] *Ibid.*

For a long time the Board has been troubled by the question as to when, if at all, a foreign carrier permit application, authorized under a bilateral, is to be denied on public interest grounds. The Board's examiners have in fact recommended such denials in a few cases. The question arises very largely because of language in the Declaration of Policy of the act[14] which lists several specific criteria, primarily economic, and directs the Board to take them into consideration "among other things" in:

(1) determining the "public convenience and necessity," which it is required to do in United States air carrier "certificate" cases,[15] and

(2) determining the "public interest," which it is required to do in foreign air carrier "permit" cases.[16]

It appears on the face of it that the issues may be largely the same. However, such an interpretation must be examined in the light of the bilateral, and also of section 1102 of the act, which requires the Board to perform its powers and duties consistently with any obligation assumed by the United States in any agreement that may be in force between the United States and any foreign country.[17]

The Board has long recognized that where an outstanding bilateral agreement provides for the routes in question, it is normally in the public interest to grant the permit unless sufficient reasons are shown that such grant would be contrary to the public interest. Thus, the existence of the bilateral agreement and the designation of a carrier thereunder constitute highly significant evidence bearing on the public interest which, except in extraordinary circumstances, lies with the faithful adherence to our international agreements.[18] In its brief to the court in the recent *Pan American-Grace Airways* (re Lufthansa) case the Board stated: The existence of a bilateral agreement is a "prima facie public interest factor pointing to the grant."[19] Accordingly, I believe it can be regarded as established:

[14] Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. 1302 (1964):

> In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with public convenience and necessity:
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (e) The promotion of safety in air commerce; and
>
> (f) The promotion, encouragement, and development of civil aeronautics.

[15] Federal Aviation Act of 1958, § 401, 72 Stat. 754, as amended, 76 Stat. 143 (1962), 49 U.S.C. § 1371 (1964).

[16] Federal Aviation Act of 1958, § 402, 72 Stat. 757, 49 U.S.C. § 1372 (1964).

[17] Federal Aviation Act of 1958, § 1102, 72 Stat. 797, 49 U.S.C. § 1502 (1964).

[18] Lufthansa German Airlines, CAB Order No. E-22851 (22 Sept. 1965); Eagle Airways (Bahamas) Ltd., 33 C.A.B. 222 (1960); British Overseas Airways Corp., Foreign Permit Amendment, 29 C.A.B. 583 (1959).

[19] Pan American-Grace Airways, Inc. v. CAB, *supra* note 11.

(1) That a bilateral makes a prima facie case on the public interest question, and (2) It will prevail in the absence of extraordinary circumstances. What constitutes extraordinary circumstances is less clear. That the burden is heavy, and the extraordinary circumstances truly extraordinary, is demonstrated by the fact that although there have been a large number of cases, no route right granted under a bilateral agreement has ever been denied by the Board on public interest grounds. However, neither the fact situations reviewed in the cases nor the language of them are devoid of some indication of bench marks.

A good illustration is to be found in the *British Overseas Airways Corp.* case decided in 1959.[20] In that case BOAC sought an amendment to its permit, pursuant to a bilateral and the United Kingdom's designation, to extend its London-New York-San Francisco services, via Honolulu and Tokyo, to Hong Kong. Northwest Airlines, already serving the Pacific but suffering under poor load factors, objected to the grant of Tokyo on the ground that "even if called for by the bilateral agreement" it "would nonetheless be contrary to the public interest," and contended "that the public benefits normally flowing from adherence to an international obligation" were "outweighed by its estimate of 1960 BOAC diversion from United States carriers."[21] Northwest estimated diversion from Pan American and Northwest at $12,712,000 or twenty-five per cent.[22] The Board's estimates, although lower, were substantial.[23] The Board among other things said:

> Stripped to its bare essentials, this proceeding presents the question whether estimated diversion of $7.8 million . . . should cause us to override our . . . agreement . . . to grant . . . a . . . route including Tokyo . . . . The establishment by bilateral agreement of a sound intercontinental route system for U.S.-flag carriers necessarily involves the grant of reciprocal air routes to carriers of other nations, with attendant diversionary consequences, and cannot be overthrown merely by showing that burdens as well as benefits flow from the bargain. If an affected U. S. carrier demonstrated that the economical consequences of a route exchange would be *disastrous* to its system, or that the basic agreement was *improvident*, then the Board might take the necessary steps to recommend *renunciation* of the bilateral. No such case, however, has been presented here . . . .[24] (Emphasis supplied).

One member of the Board, concurring in the result, expressed the view that:

> In my reading, that section [1102] clearly intends that a bilateral agreement shall settle the public interest aspect . . . and I believe therefore that in such a case there is no real issue of public interest to be tried by the Board.[25]

He can hardly be correct in this for, as the chairman pointed out in another, separate statement, the statute requires consideration of the question.[26]

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[20] British Overseas Airways Corp., Foreign Permit Amendment, *supra* note 5.
[21] *Id.* at 586.
[22] *Id.* at 609.
[23] *Id.* at 590, n.17.
[24] *Id.* at 592.
[25] *Id.* at 595 (Louis J. Hector, concurring in result).
[26] *Id.* at 594 (concurring opinion of James R. Durfee).

Consideration, however, does not necessarily require examination on the formal hearing, and unless someone is prepared to show truly extraordinary circumstances there may be little gained by going into it. Of course, if one of the parties in good faith wishes to undertake the task of showing the bilateral to be so out of balance that immediate revision is called for, it is entitled to be heard. As Judge Carl McGowan put it in similar context:

> This all seems to me to say that one who hopes to persuade the Board to recommend to the President the denial of a foreign air carrier permit contemplated by an executive agreement has something of an uphill road. But the way is there if he can make it . . . .[27]

Seldom are judges afforded opportunity to comment on this subject, but such a situation did arise in the *Pan American-Grace Airways* case referred to, involving a permit application of Lufthansa, which reached the Court of Appeals on procedural questions. The court in part said:

> Petitioners contend that the criteria set forth in Section 102 of "public interest," pertinent to foreign air carrier applications . . . compels the Board to consider the same factors as are involved in determining the "public convenience and necessity" applicable to a domestic carrier . . . . But the public interest has many facets. Under Section 102 . . . the Board may consider other criteria than those therein specifically mentioned, and Section 1102 directs the Board to act consistently with obligations assumed by the United States in bilateral agreements. We cannot carry the use of phraseology of similar character in the two sections to the point of overcoming the fact that the public interest involved in our obligations under the bilateral Agreement cannot be equated with the public convenience and necessity referred to . . . .[28]

It is probable that precise definitions pointing unerringly to the answer in all situations can never be stated. Nevertheless, these two cases, *BOAC* by the Board and *Pan American-Grace* (re Lufthansa) by the Court of Appeals for the District of Columbia Circuit, have gone a long way to clarify the matter and to assist the Board in its future determinations.

The Board's activities in the field of foreign air carrier licensing are certainly one of its most important functions. As I have shown, its statutory promotional duties require it to take a leading part in developing an adequate international system and in the negotiation of bilateral agreements. Its statutory licensing duties require it to process the air route applications of foreign carriers in adversary proceedings fairly and impartially. Although the procedures may be complex they are thorough, are carried through with reasonable expedition, guard against mistakes, and insure the public interest.

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[27] Pan American-Grace Airways, Inc. v. CAB, *supra* note 11, at 913.
[28] *Id.* at 908.

STATEMENT OF THE PRESIDENT ON A PROPOSED TREATY ON THE MOON AND CELESTIAL BODIES†

The following statement by the President of the United States was released at San Antonio, Texas, on 7 May 1966:

Just as the United States is striving to help achieve peace on earth, we want to do what we can to insure that explorations on the moon and other celestial bodies will be for peaceful purposes only. We want to be sure that our Astronauts and those of other nations can freely conduct scientific investigations of the moon. We want the results of these activities to be available for all mankind.

We want to take action now to attain these goals. In my view, we need a treaty laying down rules and procedures for the exploration of celestial bodies. The essential elements of such a treaty would be as follows:

The moon and other celestial bodies should be free for exploration and use by all countries. No country should be permitted to advance a claim of sovereignty.

There should be freedom of scientific investigation, and all countries should cooperate in scientific activities relating to celestial bodies.

Studies should be made to avoid harmful contamination.

Astronauts of one country should give any necessary help to Astronauts of another country.

No country should be permitted to station weapons of mass destruction on a celestial body. Weapons tests and military maneuvers should be forbidden.

I am convinced that we should do what we can—not only for our generation, but for future generations—to see to it that serious political conflicts do not arise as a result of space activities. I believe that the time is ripe for action. We should not lose time.

I am asking Ambassador Goldberg, in New York, to seek early discussions of such a treaty in the appropriate United Nations body.

† Official White House Press Release, News Conference No. 436-A, Saturday, 7 May 1966, at San Antonio, Texas.

THE WARSAW CONVENTION— RECENT DEVELOPMENTS AND THE WITHDRAWAL OF THE UNITED STATES DENUNCIATION

On 14 May 1966, the United States withdrew its denunciation[1] of the Warsaw Convention.[2] The denunciation, which had been deposited with the Polish government on 15 November 1965, was to have been effective 15 May 1966. The following three documents, furnished to the Journal through the gracious assistance of State Department Legal Adviser Leonard C. Meeker, give a summary of the events leading up to the withdrawal plus the text of the withdrawal itself. Essentially, the United States withdrew the denunciation after the world's major international carriers agreed to a tariff provision allowing $75,000 maximum damages, based upon strict liability.

DEPARTMENT OF STATE

WASHINGTON

5 May 1966

UNITED STATES GOVERNMENT ACTION CONCERNING THE WARSAW CONVENTION

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, was negotiated in 1929 and is today one of the principal multilateral agreements applicable to international air transportation. It establishes uniformity of documentation and creates a uniform body of law with regard to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. In addition, its application has had the effect of making it unnecessary for the courts of the United States to decide many difficult and unsettled international conflicts of law issues. On the other hand, in cases of injury or death to passengers, the Convention limits the liability of air lines to only $8,300.

The Convention came into force on 13 February 1933. The United States joined the Convention in 1934. Eventually, over ninety countries became parties to the Convention.

In September 1955, following several preparatory international meetings under the auspices of the International Civil Aviation Organization (ICAO), and as a result primarily of United States dissatisfaction with the low limits of liability, a diplomatic conference was called to amend the Warsaw Convention. The conference, held at The Hague, resulted in a Protocol that amended the Warsaw Convention in several respects. But despite urging by the United States to reach agreement on a higher limit, the conference agreed to increase the limit only to

[1] See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965) for a discussion of the events leading up to the denunciation.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 12 Oct. 1929, 49 Stat. 3000, T.S. 876 (1934).

$16,600. The Protocol was transmitted to the Senate on 24 July 1959, but was not acted upon.

In the summer of 1961, the Administration undertook a broad study of the relationship of the United States to the Warsaw Convenion and the Hague Protocol. The Interagency Group on International Aviation (IGIA), which is composed of representatives of agencies and departments of the Government having an interest in international aviation affairs, was given the task of studying the problem and making appropriate recommendations. Between the summer of 1961 and 1964, the IGIA conducted an intensive review in consultation with interested industry and public representatives. In addition, public hearings were held and the views of all interested parties were invited at several different stages of the study. After full consideration, the IGIA made two basic and related recommendations to the Secretary of State: first, that efforts be continued to ratify The Hague Protocol, and, second, that this be coupled with complementary legislation providing for automatic compulsory insurance in the amount of $50,000. Together with The Hague Protocol limit of $16,600, this would have permitted a maximum recovery of $66,600.

On 7 August 1964, the legislation and the recommendation to ratify The Hague Protocol were transmitted to the Congress. The 88th Congress did not act on the legislation or the Protocol and the package proposal was resubmitted, without change, on 30 April 1965.

On 26-27 May 1965, the Senate Foreign Relations Committee held hearings on the Protocol. Ten witnesses appeared. FAA Administrator Najeeb E. Halaby and Leonard C. Meeker, the State Department's Legal Adviser, supported ratification of the Protocol and enactment of the automatic insurance legislation. Five attorneys, specializing in the representation of claimants in aviation accident cases, opposed both ratification of the Protocol and enactment of the insurance legislation. The Air Transport Association (ATA), representing the United States domestic and international carriers, supported ratification of the Protocol and the $16,600 limit but opposed the insurance legislation.

The Foreign Relations Committee issued its report on 29 June 1965. The report indicated that "the Warsaw Convention establishes uniform rules as to the rights and obligations between air carriers and users of international transportation, and creates uniformity with respect to transportation documents required." The report noted, however, that "even the $16,600 limitation of liability provided for in The Hague Protocol is highly inadequate by United States standards" but that together with the complementary insurance legislation, maximum recoveries could be had of $66,600. On this basis, the Committee recommended ratification of the Protocol but added that if the legislation "is not enacted within a reasonable time (*i.e.*, prior to the adjournment of the 89th Congress), the Department of State should take immediate steps to denounce the Warsaw Convention and The Hague Protocol."

When Congress failed to take action on the compulsory insurance legislation, the Administration, like the Foreign Relations Committee, concluded that The Hague Protocol alone would not afford adequate protection to the American traveling public. If no supplementary protection could be made available, then withdrawal from the Convention and reliance on the common law would afford the best measure of protection. In search of a supplementary measure that would provide a satisfactory alternative to withdrawal from the Convention, the Administration suggested that the United States carriers voluntarily increase their limits of liability to $100,000. Such voluntary action is permitted under Article 22 of the Convention. After several meetings and conversations, it became apparent that some carriers were prepared to agree on a limit of $50,000 but no carrier was prepared to go as high as the $100,000 limit suggested by the Government. Moreover, some carriers would not agree on any amount unless the amount was also agreed upon by the principal foreign international carriers.

Following further consideration by the IGIA, it was decided that the United States should deposit a notice of termination of the Warsaw Convention on 15 November 1965. Article 39 of the Convention specifically permits such action by any state party to the Convention and provides that termination takes effect six months after deposit of the notice.

The United States deposited its notice[3] on 15 November, to be effective 15 May 1966. At the time the notice was deposited, however, the United States indicated that it would be prepared to withdraw the notice if two conditions were present: first, that the results of an ICAO international conference, which was then scheduled for 1 February 1966, showed that there was a reasonable prospect for a new convention with a limit of $100,000; and, second, that pending the effectiveness of such a new convention (which could take several years), the principal international carriers could work out an interim agreement, consistent with Article 22 of the Convention, for a limit of liability of $75,000.

The ICAO international conference was held, as scheduled, in Montreal, Canada, 1-15 February 1966. The conference was attended by representatives of sixty-one states. A majority of the countries were prepared to agree on limits of $50,000, although several indicated that in their countries, $33,000 and, in some cases, even $16,600 would be more than adequate. Some countries, primarily Western European, were prepared to go as high as $75,000 in order to avoid United States denunciation, but there was no support for the United States proposal, set forth at the time of the 15 November notice, of a limit of $100,000. Despite more than two weeks of discussion and debate, no agreement was reached on an acceptable limit.

Following the conference, the United States Government was asked by Sir William Hildred, then Director General of the International Air Transport Association (IATA), whether his Association could make an effort to arrive at an interim carrier arrangement that would be acceptable to the United States and permit the United States to withdraw its notice of termination. Hildred's suggested arrangement was similar to a proposal that had been made by the Swedish government, and supported by other governments, during the Montreal conference. The proposal provided for limits of liability of $75,000 and absolute liability on the part of the carriers.

In essence, absolute liability in this context means that a claimant would not be required to prove fault on the part of the carrier, but only the amount of his damages. Claimant would be able to recover the amount of his provable damages, though subject to a maximum limitation of $75,000. Should the claimant, under Article 25 of the Convention, attempt to prove wilful misconduct on the part of the carrier, the question of fault would of course be in issue. In such a case, should the claimant succeed in proving wilful misconduct, he would be subject to no limitation on his recovery. In addition, as presently provided in Article 21 of the Convention, contributory negligence on the part of the claimant would continue to be a bar to his recovery or to any recovery on his behalf.

With absolute liability, nearly every injured person will receive compensation. In most cases, it is expected that the amount will be fixed between the airline or insurance company and the claimant without need for litigation. The persons who need compensation the most urgently—*i.e.*, survivors of average or below average income earners—will receive their compensation when the need is greatest, without the risks and delays of accident investigation and litigation.

On 8 April 1966, the United States Government replied to IATA indicating that in order for such an arrangement to be acceptable, it would have to include twenty-four specified foreign carriers plus thirteen United States scheduled carriers and six United States non-scheduled carriers. We further stated that although the decision to terminate had been made and would be difficult to change at this late hour, we would try to do so if the IATA efforts were successful.

[3] For the text of the denunciation, see 31 J. AIR L. & COM. 303 (1965).

By 29 April, IATA informed the United States Government that it had obtained the agreement of all the foreign carriers specified by the United States Government except for two Mexican carriers and Air India, who were still undecided. According to a recent report from IATA, seventeen other foreign airlines, not specified by the United States, have also indicated their willingness to participate in the arrangement. Among United States carriers, the majority, including all the major international carriers, have agreed. Five primary domestic carriers (United, National, Delta, Northeast, and Western) and two supplemental carriers (TIA and World) have thus far not agreed. If the arrangement goes into effect, we anticipate that these seven carriers will eventually agree.

After careful consideration of the results of the IATA effort by all the interested agencies, it was decided that the United States Government could withdraw its notice if, but only if, three conditions were met prior to Friday, 13 May. These conditions are as follows:

(a) The contract provisions for the arrangement, including provisions for adequate notice to the public, can be worked out with IATA.

(b) The arrangement is filed with the CAB (and, where required, with other governments) by all carriers operating to or from the United States.

(c) The Governments whose carriers operate to or from the United States give assurances to the United States Government that they accept, or at least will not object to, the arrangement and that, in any event, they will permit the arrangement to remain in effect indefinitely, subject to termination only on twelve months' notice.

If these three conditions can be met and if the United States should withdraw its notice of termination, the effect will be to increase the limits of liability from $8,300 to $75,000. In addition, the claimant will not be required to establish fault on the part of the carrier in order to be assured of a recovery. Finally, the arrangement will be applicable to all international journeys that originate or terminate or have an agreed stopping place in the United States. The United States Government cannot reach a final decision on whether to withdraw the notice of 15 November until it is assured that the three conditions have been met and that, as of 16 May 1966, an arrangement will go into effect guaranteeing the broadest possible protection for the United States traveling public.

In addition, it should be emphasized that the arrangement, if accepted, will be in effect for an interim period only. It will be the subject of a diplomatic conference at some future date, at which time appropriate modifications to the arrangement can be made. Prior to the conference, all interested parties will be invited to present their views on all aspects of the issue. If the diplomatic conference reaches agreement on a new convention, that convention will be submitted for the advice and consent of the Senate, at which time public hearings will again be held. The United States Government is presently awaiting the outcome of its efforts to ascertain whether the three conditions can be met that will assure adequate and just recoveries to United States citizens in the event of international aviation accidents.

Department of State Press Release No. 110
13 May 1966

The Department of State, in consultation and with the concurrence of the Civil Aeronautics Board, the Federal Aviation Agency, the Department of Commerce, and the Department of Defense, has concluded that the interests of the United States traveling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are:

First. The limits of international carrier liability for passengers will be increased from $8,300 to $75,000 per person. Those travelers who wish to carry greater protection will be free to take out additional insurance to cover their needs. There will be no limit on liability where the carrier is guilty of wilful misconduct.

Second. Airlines in international travel will be absolutely liable up to $75,000 per passenger regardless of any fault or negligence. Recovery by those who need it most will thus be maximized and expedited. Long and costly lawsuits will be unnecessary in many cases.

Third. International airlines carrying well over ninety percent of Americans in international travel are participating in the plan. The recommendation of the Senate Foreign Relations Committee that no airline operating within the United States remain outside the plan has been substantially complied with. Those United States airlines which initially declined to come within the plan have now indicated their agreement to accepting an increase in liability from $8,300 to $75,000.

Fourth. This is an interim arrangement terminable on twelve months' notice. In the months ahead public hearings will be held for the purpose of determining the definitive United States position in preparation for further international discussions concerning the Warsaw Convention.

Fifth. The international carriers who have notified the Civil Aeronautics Board of their acceptance of the interim arrangements are: Aeronaves, Air Canada, Air France, Air India, Aer Lingus, Alitalia, BEA, BOAC, Canadian Pacific, CMA, El Al, Icelandic, Iberia, Japan Air Lines, KLM, Lufthansa, Olympic, Philippine Airlines, Qantas, Sabena, SAS, Swissair, Varig, and VIASA; American, Braniff, Continental, Eastern, Northeast, Northwest, Pan American, Panagra, TWA, and Western. The following United States airlines mainly engaged in domestic carriage which have accepted the increased limits of liability but not the feature of absolute liability are: Delta, National, and United. It is expected that other carriers will join the plan.

Sixth. Those guilty of sabotage and persons claiming on their behalf will not be entitled to recover any damages.

By acceptance of the plan the United States and all of the other participating countries have assured the continuation of the uniform system of law governing airlines, shippers and passengers and have demonstrated again the viability of the system of international cooperation in civil aviation and in international law.

Department of State Press Release No. 111
14 May 1966

In accordance with the decision announced yesterday, the United States Government today formally withdrew its notification of termination of adherence to the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air. The withdrawal took the form of a note delivered by the United States Embassy in Warsaw to the Polish Ministry of Foreign Affairs at 11:00 A.M. today local time.

The text of the note is as follows:

Excellency,

I have the honor, on instructions from my Government, to give formal notification to the Government of the Polish People's Republic of the withdrawal by the United States of America of the notice of denunciation submitted on November 15, 1965, of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and the Additional Protocol relating thereto signed at Warsaw on October 12, 1929.

At the time the notice under Article 39 was submitted, the United States Government stated that that action was taken solely because of dissatisfaction with the low limits of liability for death or personal injury provided in the Convention, even as those limits would be increased by the Protocol to amend the Convention done at The Hague on September 28, 1955. Since that time, intensive negotiations among carriers and among governments have succeeded in establishing a new interim arrangement in accordance with Article 22(1) of the Convention, whereby participating carriers have agreed, in cases of the death, wounding, or other bodily injury of a passenger, to limits of liability of $75,000 per passenger inclusive of legal fees and costs (or $58,000 exclusive of legal fees and costs in case of a claim brought in a State where provision is made for separate award of legal fees and costs) and have agreed not to avail themselves in any such cases of any defense under Article 20(1) of the Convention, or the Convention as amended by The Hague Protocol. This arrangement is applicable to all international transportation by the carrier as defined in the Convention or the Convention as amended by The Hague Protocol which according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

In view of the acceptance of this arrangement by the great majority of the world's international airlines, including all principal carriers serving the United States, the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention. The United States of America looks forward to participation by all carriers and governments in the provisional arrangement described above and to its acceptance on a world-wide basis. Further, the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.

My Government would appreciate it if the Government of the Polish People's Republic would inform the Government of each of the High Contracting Parties to the Convention of this notification.