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# CURRENT LEGISLATION AND DECISIONS

## COMMENTS

### Procedure and Judicial Review Under Section 2, Ninth of the Railway Labor Act

#### I. INTRODUCTION

Under Section 2, Ninth of the Railway Labor Act,<sup>1</sup> the National Mediation Board has responsibility for certifying collective bargaining representatives. The Board's determinations are generally final and conclusive and not subject to judicial review. The Supreme Court recently, in *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*,<sup>2</sup> clarified this area and set out the extent of review available. The NMB's ultimate finding regarding certification of a collective bargaining representative is unreviewable, but the procedure used in reaching its decision is reviewable to insure that the Board performs its statutory duty and accords the parties due process. This comment will examine the exceptions to non-reviewability, the criteria used by the NMB in reaching its decisions, and some unanswered questions under section 2, Ninth.

#### II. BACKGROUND

##### A. *The Act*

The general purposes of the Railway Labor Act set forth in title I, section 2, among others, are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon the freedom of association among employees . . . ; (3) to provide for complete independence of carriers and of employees in the matter of self-organization . . .<sup>3</sup>

Section 2, Third gives employees the right to select their bargaining representatives without carrier interference, influence, or coercion.<sup>4</sup> Under

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<sup>1</sup> 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1964).

<sup>2</sup> 380 U.S. 650 (1965) [hereinafter *ABNE*].

<sup>3</sup> 44 Stat. 577 (1926), 45 U.S.C. § 152 (1964). In *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1934), the Court stated that the "major objective [of the act] is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee. . . . [The statute is] aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employee. . . ." *Id.* at 547-48.

<sup>4</sup> 44 Stat. 577 (1926), 45 U.S.C. § 152, Third (1964).

section 2, Fourth they have the right to organize and choose their representative by majority vote of the craft or class involved.<sup>5</sup> Section 2, Ninth was added in 1934, and established the procedure to be used in selecting the representative of the employees.<sup>6</sup> The NMB was given jurisdiction to settle disputes arising among a carrier's employees regarding the proper bargaining representative. It has the duty to investigate such disputes upon request of either party and to certify the proper representative within thirty days from the invocation of its services. A carrier is placed under the duty to "treat" with the certified representative.<sup>7</sup> The Board has dis-

<sup>5</sup> 44 Stat. 577 (1926), 45 U.S.C. § 152, Fourth (1964). This has been interpreted to mean a majority of those employees voting rather than a majority of the entire craft or class involved. *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1934). See also text accompanying notes 70-74 *infra*.

<sup>6</sup> 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1964). In fact, most of the substantive rules published by the NMB concern this procedure. See 29 C.F.R. § 1206 (1965).

<sup>7</sup> 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1964). This duty can be enforced (1) by the judiciary as in the *Virginian Ry.* case, *supra* note 3, (2) by strike, or (3) by filing a complaint with the CAB under the Federal Aviation Act of 1958, § 401(k) (4), 72 Stat. 754, as amended, 49 U.S.C. § 1371(k) (4) (1964) which requires compliance with the Railway Labor Act as a prerequisite for holding a certificate of public convenience and necessity. In this type proceeding the CAB will not consider the propriety of an NMB craft or class determination. See *Southern Pilots Ass'n v. CAB*, 323 F.2d 288, 290 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 954 (1964). Where the complainant goes to the CAB under § 401(k) (4), as in *Southern Pilots Ass'n*, *supra*, alleging unfair labor practices in violation of the Railway Labor Act, the CAB has jurisdiction to hear the complaint, but possibly has discretion to refuse to hear the complaint if it finds that a hearing would not be in the public interest, even if reasonable grounds are found and the complaint is legally sufficient. See *Flight Eng'rs Int'l v. CAB*, 332 F.2d 312 (D.C. Cir. 1964):

[T]he Board does have a discretionary power to dismiss a complaint which states reasonable grounds for believing that the Act has been or is being violated when it reasonably concludes that it would be in the public interest to do so, although this discretion is subject to review. . . . [T]he Board is not expected to act as a general labor board . . . [but] if the Board is denied [the power to dismiss] that is the role it would be obliged to assume. *Id.* at 314-15.

See also *Air Line Pilots Ass'n v. CAB*, Civil No. 19694, D.C. Cir., 28 April 1966; *Flight Eng'rs Int'l v. Western Airlines*, 34 C.A.B. 834, 835-36 (1961). Since the CAB has clearly stated that it will not review NMB determinations (See *Air Line Pilots Ass'n v. Southern Airways, Inc.*, CAB Docket No. 11654, CAB Order No. 19162 (3 Jan. 1963)) a further question presents itself. If the CAB does accept jurisdiction and hears the charges, does it have to decide them, especially when a representation dispute is involved? The Supreme Court has not passed on the question of CAB discretion in this situation. The Federal Aviation Act of 1958, § 401(k) (4), uses mandatory language: "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with sections 181-188 of Title 45." (Emphasis added.) However, support is found for the exercise of discretion by the CAB in § 401(g): "The Board upon petition or complaint . . . may . . . suspend any such certificate . . . or may revoke any such certificate . . . for intentional failure to comply . . . [with § 401(k) (4)]. . . ." Federal Aviation Act of 1958, § 401(g), 72 Stat. 754, as amended, 49 U.S.C. § 1371(g) (1964). (Emphasis added.) This provision was used as supplemental support for upholding the CAB's refusal to act in *Flight Eng'rs*, *supra* at 315. A further question is whether a judicial determination that the Railway Labor Act has been violated requires the CAB to follow such decision and withhold a carrier's certificate under § 401(k) (4). Stated differently, could a union, after a judicial determination, go to the CAB and ask for withholding of the carrier's certificate without having to relitigate the issue? This question may arise and be answered in the multifaceted proceedings involving Aaxico Airlines, Inc. Here the CAB had deferred determination until related federal district court proceedings were decided. These involved both a contract dispute and alleged violations of the Railway Labor Act. The contract dispute is now before the System Board of Adjustment. The district court also found that Aaxico had violated title II of the act. See *Aaxico Airlines, Inc. v. Air Line Pilots Ass'n*, 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 851 (1964), reversing the district court's finding on the contractual dispute. On remand, the district court reaffirmed its earlier finding that Aaxico had violated title II of the act. *Air Line Pilots Ass'n v. Aaxico Airlines, Inc.*, Civil No. 2996, W.D. Tex., 3 March 1965 (supplemental order, 12 March 1965), *aff'd per curiam*, 2 LAB. REL. REP. (61 L.R.R.M.) 2560 (5th Cir. 9 March 1966). Conceding that the CAB's initial jurisdiction is discretionary, would it have to act after a determination by the court, and if it refused to act would it be an abuse of discretion? The CAB's original deferral of the question of alleged labor violations arising in context with a merger between Aaxico and Saturn Airlines which itself was approved, see examiner's

cretion as to the manner in which the determination is made, the only caveat being to insure freedom from carrier "interference, influence, or coercion." Under section 2, Ninth the NMB must first ascertain whether there is a representation dispute. If one exists, the Board may, in its discretion, order an election. If an election is held, the NMB must determine which employees are eligible to vote, *i.e.*, the scope of the craft or class.<sup>8</sup>

### B. Procedure Under Section 2, Ninth

The NMB's statutory duty under Section 2, Ninth is to investigate the facts upon application of a party. Once the facts, which may include an election, are determined, its function ceases except for certification of the representative.<sup>9</sup> It seems that the Board itself determines what is reasonable and necessary,<sup>10</sup> and the courts will not review its determination except to insure that due process was accorded and that the Board was not acting in excess of its statutory command.

In making a craft or class determination, the NMB fulfills its duty to investigate by considering "all relevant elements, most important of which is the intent of the Act in settling disputes and promoting stable labor relations."<sup>11</sup> The Board has set out several general criteria which it considers and weighs in making its determination:

- (1) the composition and relative permanency of employee grouping along craft or class lines on carriers in general as well as the particular carrier;
- (2) the extent and effectiveness of past arrangements;
- (3) the functions, duties, and responsibilities of the employees and the general nature of their work;
- (4) the community of interest existing between jobs, *i.e.*, the existence of a close work relationship with other employees within the group; and

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initial decision in *Saturn-Aaxico Merger Case*, CAB Docket No. 15675 (1 June 1965), *petition for review dismissed but order amended in other respects*, CAB Order No. E-22680 (21 Sept. 1965), was questioned on appeal as an abuse of discretion. This question was answered negatively. *Air Line Pilots Ass'n v. CAB*, Civil No. 19694, D.C. Cir., 28 April 1966. *Virginian Ry. v. System Fed'n No. 40*, *supra*, is the leading case interpreting section 2, Ninth. It involved an enforcement proceeding to make a carrier bargain with the certified representative. The Court held that a carrier had the duty to bargain with the representative and that this duty was enforceable through the general equity power of the courts. There are no enforcement provisions in the act itself and, unless enforced by the courts, no way exists to enforce collective bargaining. This was expressly recognized in *Switchmen's Union v. NMB*, 320 U.S. 297, 300 (1943). See also *Tunstall v. Brotherhood of Ry. & S.S. Clerks*, 323 U.S. 210 (1944) (jurisdiction exists to protect minority of a craft or class from violation of the statutory duty of a union to represent the entire group).

<sup>8</sup> The act itself does not define the terms "craft or class." As the NMB has put it: "The Board has no power . . . to create crafts or classes. . . . It does, however, have the power to designate what employees may participate. . . ." *Representation of Employees of the KLM Royal Dutch Airlines—Passenger & Cargo Agents, Operations Clerks, Fleet Service & Stores Clerks, Chauffeurs & Commissary Personnel*, 3 NMB Determinations of Craft or Class 1, 4 (1953) (File No. C-2098).

<sup>9</sup> 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth (1964). See *Switchmen's Union v. NMB*, 320 U.S. 297, 305 (1943). The employees themselves elect the representatives. 45 U.S.C. §§ 152, Third & Fourth. See, *e.g.*, *United Transp. Serv. v. NMB*, 179 F.2d 446 (D.C. Cir. 1949). It should be noted that § 2, Ninth allows the NMB to appoint a committee to determine craft or class issues. The most striking example was the Donaldson Committee's determination that the cockpit crew at United Air Lines was one unit. It was this decision which has given rise to all the litigation involving the Flight Engineers International. The NMB also has unrelated functions under § 5 of the act. 44 Stat. 580 (1926), as amended, 45 U.S.C. § 155 (1964). See note 32 *infra*.

<sup>10</sup> See text accompanying notes 11-15 *infra* for the criteria used in reaching a determination.

<sup>11</sup> NMB, *ADMINISTRATION OF THE RAILWAY LABOR ACT 1934-1957*, at 20 (1958).

(5) previous Board decisions.<sup>12</sup>

The Board has the power to "splinter," "amalgamate," or "regroup" historic bargaining groups in light of technological and functional changes in the industry.<sup>13</sup> However, as a general policy factor, the NMB is inclined to avoid unnecessary multiplication of the craft or class groupings. It feels that excessive groupings tend to thwart the purposes of the act by creating rather than solving numerous labor disputes, and impairing efficiency of operation.<sup>14</sup> The investigation does not have to take any particular form and need be no more than the nature of the case requires.<sup>15</sup> As stated in *Hannah v. Larch*:<sup>16</sup>

The requirements of due process . . . vary with the type of proceeding involved . . . . When governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

### III. JUDICIAL REVIEW

#### A. Craft Or Class Determinations

In *Switchmen's Union v. NMB*,<sup>17</sup> section 2, Ninth of the act was interpreted by the Supreme Court to forbid judicial review of NMB determinations of craft or class. The Court stated that:

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<sup>12</sup> *Id.* at 20-21. For other statements of the factors considered by the Board in arriving at its determinations, see 26 NMB ANN. REP. 29 (1960) (past practice in grouping; the nature, supervision, lines of promotion, and seniority; protection of employees from arbitrary action; aid efficient operation by development of definite lines of grouping; and finally, the public interest in interstate commerce). See also 16 NMB ANN. REP. 22 (1950) (stabilization of well-recognized crafts or classes tend to stabilize collective bargaining relationships and as a policy factor such groupings would be followed).

<sup>13</sup> *UNA Chapter, Flight Eng'rs Int'l v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962).

<sup>14</sup> *NMB, ADMINISTRATION OF THE RAILWAY LABOR ACT*, *op. cit. supra* note 11, at 21. For an application of these factors to a particular fact situation, see, *e.g.*, *Representation of Employees of the National Airlines, Inc.—Airline Mechanics*, 1 NMB Determinations of Craft or Class 423 (1947) (commonly referred to as *Case No. R-1706*). This is the keystone case for the particular craft or class grouping involved in *ABNE*. The record was developed from the mediators' investigations, public hearings, and written briefs. There was, at this time, little or no uniformity in groupings on air carriers. The Board found that "clerical, office, stores, fleet, and passenger service employees" was the proper grouping. In so determining, the NMB used a variety of the considerations listed in the text. While the Board in the *ABNE* case followed the *R-1706* grouping, no reason exists for its not reconsidering this unit upon proper application, if the evidence warranted. It said as much in its denial of a rehearing in the *R-1706* case (at p. 445) and reaffirmed this statement in a later case. *Representation of Employees of the Northwest Airlines, Inc.—Clerical, Office, Stores, Fleet & Passenger Service Employees*, 2 NMB Determinations of Craft or Class 60, 67 (1951) (*Case No. R-2357*). In fact the Board has reexamined and not followed its determination in *R-1706*. See, *e.g.*, *Representation of Employees of Trans-Texas Airways, Inc. & the North Central Airlines, Inc.—Stock & Stores Employees*, 3 NMB Determinations of Craft or Class 16 (1956) (File Nos. C-2252, C-2389). In this case and also in *Representation of Employees of Northwest Airlines, Inc.—Stock & Stores Employees*, NMB Case No. R-2783 (1953), the stock and stores employees, which the NMB included in the *R-1706* grouping but treated as a separate grouping in these cases, had historically (before *R-1706*) been represented as a separate craft or class (separately represented on twenty-four carriers and grouped under *R-1706* on only six carriers). *ABNE* may indicate that the NMB has determined to consolidate under *R-1706*, hence avoiding unnecessary multiplication of groupings. See 380 U.S. at 665 n.4.

<sup>15</sup> See, *e.g.*, *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *WES Chapter, Flight Eng'rs Int'l v. NMB*, 314 F.2d 234 (D.C. Cir. 1962).

<sup>16</sup> 363 U.S. 420, 442 (1959).

<sup>17</sup> 320 U.S. 297 (1943). For an excellent criticism of this case, see JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 343-45 (1965).

Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave no enforcement functions. It was to find the fact and then cease. . . . Here . . . the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.<sup>18</sup>

Expressly reserving all constitutional questions,<sup>19</sup> the Court based its decision on its interpretation of the act's legislative history. The Court stated that a NMB determination of an appropriate craft or class was incidental to its power to resolve controversies under section 2, Ninth.<sup>20</sup> In a vigorous dissent Mr. Justice Rutledge warned that the Court was allowing the NMB's interpretation of the statutory standards enacted for its guidance to be final and conclusive.<sup>21</sup> In a companion case dealing with the question of which of two unions should have been certified, the Court reserved the question of "whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under 2, Ninth. . . ."<sup>22</sup>

Since the decision in *Switchmen's* and its companion cases,<sup>23</sup> the lower courts have almost consistently adhered to the doctrine of unreviewability in a number of varying factual situations.<sup>24</sup> In *Rose v. Brotherhood of Ry. & S.S. Clerks*,<sup>25</sup> the court stated that a court could, in a proper case, review the validity or sufficiency of a certification by the NMB in a proceeding for judicial enforcement.<sup>26</sup> However, the court refused to review the certification in question prior to an enforcement proceeding.<sup>27</sup> The Administrative Procedure Act (APA),<sup>28</sup> passed after the decision in *Switchmen's*, established minimum procedural safeguards to be used by all federal agencies unless exempted. Section 10 of the APA<sup>29</sup> gives the right to judicial review "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. . . ."

<sup>18</sup> 320 U.S. at 305.

<sup>19</sup> *Id.* at 301.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.* at 318-19, 321-22.

<sup>22</sup> General Comm. of Adjustment, Bhd. of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R., 320 U.S. 323, 336 n.12 (1943).

<sup>23</sup> General Comm. of Adjustment, Bhd. of Locomotive Eng'rs v. Southern Pac. Co., 320 U.S. 338 (1943); General Comm. of Adjustment, Bhd. of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R., 320 U.S. 323 (1943).

<sup>24</sup> See, e.g., *Flight Eng'rs Int'l v. NMB*, 338 F.2d 280 (D.C. Cir. 1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Flight Eng'rs Int'l v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir. 1963); *WES Chapter, Flight Eng'rs Int'l v. NMB*, 314 F.2d 234 (D.C. Cir. 1962); *Air Line Stewards & Stewardesses Ass'n v. NMB*, 294 F.2d 910 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 810 (1962); *UNA Chapter, Flight Eng'rs Int'l v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); *Decker v. Linea Aeropostal Venezolana*, 258 F.2d 153 (D.C. Cir. 1958); *Rutas Aereas Nacionales, S.A. v. Edwards*, 244 F.2d 784 (D.C. Cir. 1957); *American Air Export & Import Co. v. O'Neill*, 221 F.2d 829 (D.C. Cir. 1954); *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951); *Flight Eng'rs Int'l v. NMB*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd*, 338 F.2d 280 (D.C. Cir. 1964); *Droggos v. NMB*, 227 F. Supp. 61 (N.D. Ohio 1963).

<sup>25</sup> 181 F.2d 801 (4th Cir.), *cert. denied*, 340 U.S. 851 (1950).

<sup>26</sup> This was based on the decision in *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1934).

<sup>27</sup> See cases cited note 24 *supra*.

<sup>28</sup> 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-10 (1964).

<sup>29</sup> 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

Thus, the existing law as set forth by *Switchmen's* was not altered.<sup>30</sup> One court<sup>31</sup> has held that the APA provides for review of the Board's jurisdiction over a dispute. The question, however, went to the power of the Board to make a determination, as distinguished from the correctness of it, and the court recognized that no review was available where *Switchmen's* prevented it.

### B. De Facto Jurisdiction Over "Unfair Labor Practices"

If in the course of NMB proceedings under section 2, Ninth, a party alleges that a union and/or the carrier have been violating the act, then the question arises as to whether the NMB has exceeded its jurisdiction by deciding a prohibited labor practice under section 2, Third, Fourth, or Fifth of the act.<sup>32</sup> The courts have declined to consider the question directly, stating instead that they have no jurisdiction to review a determination under section 2, Ninth.<sup>33</sup> In *Ruby v. American Airlines*,<sup>34</sup> the Air Lines Pilots Association (ALPA) alleged in a representation proceeding instituted by a new union that the new union, composed solely of pilots on American Airlines, was employer dominated and assisted. ALPA contended that *Switchmen's* did not bar review because there the allegation was an unlawful selection of the bargaining representative; here, the allegation was that the NMB had condoned illegal tactics. The court, however, held that it could not compel bargaining in the face of a representation dispute pending before the NMB; that the Board, under *Switchmen's*, had exclusive jurisdiction to determine the claim; and that its determination was not subject to review.<sup>35</sup> As stated in *Flight Eng'rs Int'l v. Eastern Airlines, Inc.*,<sup>36</sup> where there is doubt as to representation, such doubts are to be re-

<sup>30</sup> See *American Air Export & Import Co. v. O'Neill*, 221 F.2d 829 (D.C. Cir. 1954); *Kirland v. Atlantic Coast Line R.R.*, 167 F.2d 529 (D.C. Cir. 1948); *Davis, Unreviewable Administrative Action*, 15 F.R.D. 411, 427 (1959).

<sup>31</sup> *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951). The question was whether the NMB had violated the act by denying it had jurisdiction to hear a representation claim of employees located outside the United States.

<sup>32</sup> Under section 2, Ninth, 48 Stat. 1188 (1934), 45 U.S.C. § 152, Ninth, the NMB does not have jurisdiction to find prohibited practices under the act, nor do §§ 4 & 5 give the NMB jurisdiction. 44 Stat. 579, 580 (1926), as amended, 45 U.S.C. §§ 154, 155 (1964). Under § 5 the NMB can only provide mediation services in "major" disputes and related functions. In limited circumstances, under § 5, Second the NMB can interpret agreements, *i.e.*, "minor" disputes, provided the agreement was arrived at by mediation. See also text accompanying notes 6-9 *supra*.

<sup>33</sup> See, *e.g.*, *Flight Eng'rs Int'l v. NMB*, 338 F.2d 280 (D.C. Cir. 1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Flight Eng'rs Int'l v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir. 1963); *WES Chapter, Flight Eng'rs Int'l v. NMB*, 314 F.2d 234 (D.C. Cir. 1962); *UNA Chapter, Flight Eng'rs Int'l v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962). See text accompanying notes 34-40 *infra*. It should be noted however, that this does not prevent the courts from taking jurisdiction where the context has strongly indicated either that the NMB by refusing to act has obliterated rights guaranteed to employees, see, *e.g.*, *Air Line Dispatchers Ass'n v. NMB*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951), or has acted in excess of its statutory authority, see text accompanying notes 41-47 *infra*. Also this does not prevent the courts from reviewing the Board's procedure. See *WES Chapter, Flight Eng'rs Int'l v. NMB*, *supra* at 237. See text accompanying notes 58-67 *infra*. The NMB itself has set aside an election after finding a violation of § 2, Fourth during the election by the carrier. Representation of Employees of Linea Aeropostal Venezolana—(1) Airline Mechanics, & (2) Stockroom Employees, 3 NMB Determinations of Craft or Class 54 (1955) (commonly referred to as *Case No. R-2938*).

<sup>34</sup> 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

<sup>35</sup> This case was cited with approval in *ABNE*, 380 U.S. at 662 n.3.

<sup>36</sup> 311 F.2d 745 (2d Cir. 1963).

solved by the NMB, even if a prohibited labor practice is alleged by one of the parties.<sup>37</sup> Since the CAB has also refused to review NMB determinations under section 2, Ninth,<sup>38</sup> the ultimate determination of a prohibited labor practice claim when it arises in conjunction with a representation dispute seems to rest with the NMB. It should be pointed out that the NMB probably has discretion to decline to act on a petition under section 2, Ninth. This is pointed up by the NMB's action in a pending proceeding arising out of the Aaxico dispute.<sup>39</sup> Independent Flight Crew Association, an independent union formed at Aaxico, has petitioned the NMB for certification. The NMB has not acted on this petition, not even to the extent of assigning it a file number. It has, however, solicited comments from all the parties involved, and is evidently awaiting the outcome of the various court proceedings before taking action. Thus, it would seem that the NMB has, in this proceeding, satisfied its duty to investigate, and is merely exercising its discretion in refusing to act until the court proceedings are determined.<sup>40</sup>

### C. Action In Excess Of Statutory Authority

Although no case has been found holding that the NMB acted in excess of its statutory authority,<sup>41</sup> a leading case holding that a parallel agency acted in excess of its statutory authority is *Leedom v. Kyne*.<sup>42</sup> The National Labor Relations Board had issued a representation certification order under Section 9(b)(1) of the National Labor Relations Act.<sup>43</sup> The petitioner argued that the NLRB determination of employee status (the question of whether professional employees belonged in the bargaining unit) was "made in excess of its delegated powers and contrary to a specific prohibition in the Act."<sup>44</sup> The Supreme Court held that the federal courts had the power to review a determination by the NLRB which exceeded its statutory authority, even though no provision for direct

<sup>37</sup> The court cited *General Comm. of Adjustment, Bhd. of Locomotive Eng'rs v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323 (1943), as authority.

<sup>38</sup> See note 7 *supra* (extended discussion of the CAB's role).

<sup>39</sup> Discussed in note 7 *supra*. The petition for certification was filed while the trial in the district court was being conducted.

<sup>40</sup> The NMB has not publicly stated its reasons for its refusal to take any further action on the union's petition which was filed on 12 June 1965 and refiled on 18 November 1965 after Aaxico applied to the CAB for approval of the proposed merger with Saturn Airlines. The reason stated is this writer's opinion. The NMB's action here can be contrasted with its action in *Flight Eng'rs Int'l v. NMB*, 338 F.2d 280, 282 (D.C. Cir. 1964). In this case the NMB decided an issue of employee replacement in the context of a representation dispute. The court affirmed the NMB's jurisdiction to make such a determination as incidental to its power to determine voter eligibility under § 2, Ninth. See also *Flight Eng'rs Int'l v. CAB*, 332 F.2d 312, 316 (D.C. Cir. 1964).

<sup>41</sup> In the cases decided after *Switchmen's*, where the question was raised, the courts have found no merit to the claim. See cases cited note 33 *supra*; see text accompanying notes 32-37 *supra*. See also *Air Line Stewards & Stewardesses Ass'n v. NMB*, 294 F.2d 910 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 810 (1962). One point used by the courts in these cases is that the NMB did not admit it had acted in a way which violated a clear and express command of the act. See notes 44 & 47 *infra*.

<sup>42</sup> 358 U.S. 184 (1958).

<sup>43</sup> 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), 29 U.S.C. § 159(b)(1) (1964). This is similar to the procedure used by the NMB under § 2, Ninth.

<sup>44</sup> 358 U.S. at 188. The NLRB admitted that it had acted contrary to the express language of the act in determining, without their prior consent, that professional employees belonged in the bargaining unit.

review was provided by the statute. In *Boire v. Greyhound Corp.*,<sup>45</sup> the Supreme Court reemphasized the "painstakingly delineated procedural boundaries of *Kyne*," where the NLRB had determined<sup>46</sup> that Greyhound was a joint employer with Floors, Inc., which furnished attendants for Greyhound's terminals. Greyhound, in a suit for injunctive relief, contended that the Board's determination violated the act. The lower courts agreed and found that Greyhound was not a joint employer with Floors, Inc. In reversing, the Supreme Court distinguished and limited *Kyne*. In *Kyne* the question was one of statutory construction but here the question was a factual one which was not clearly in excess of the NLRB's authority, and hence not subject to direct judicial review.<sup>47</sup>

#### IV. BROTHERHOOD OF RY. & S.S. CLERKS v. ASSOCIATION FOR BENEFIT OF NON-CONTRACT EMPLOYEES

Due to a merger between Capital Airlines, Inc. and United Air Lines, Inc. a dispute arose concerning the proper bargaining representative for a craft class grouping known as "clerical, office, stores, fleet and passenger service employees."<sup>48</sup> The Brotherhood of Railway & Steam Ship Clerks (Railway Clerks) petitioned the NMB to conduct a certification proceeding. After investigation the NMB scheduled an election by secret ballot. United sought to enjoin the election<sup>49</sup> after the Board denied its request for a hearing, with its participation, on the scope of the designated craft or class. The action was dismissed and United appealed. While the appeal was pending, a group of United's employees (part of the craft or class)<sup>50</sup> formed the Association for the Benefit of Non-Contract Employees (ABNE) and petitioned the NMB to allow its intervention in the pending proceedings.<sup>51</sup> The NMB dismissed the petition on the ground that ABNE was not a proper party in interest. ABNE filed suit to enjoin

<sup>45</sup> 376 U.S. 473 (1964).

<sup>46</sup> Under the National Labor Relations Act § 9(c), 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(c) (1964).

<sup>47</sup> The act provides for indirect review in an enforcement proceeding. 49 Stat. 453 (1935), as amended, 61 Stat. 143 (1947), 29 U.S.C. § 159(d) (1964). It should be noted, as pointed out in *Kyne* that "this suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order . . . made in excess of its delegated powers. . . ." 358 U.S. at 188. After the decision in *Boire*, the *Kyne* doctrine probably applies only when no factual dispute exists and all the parties agree that there has been a violation of the act. See note 44 *supra*.

<sup>48</sup> See note 14 *supra*. This is the R-1706 grouping.

<sup>49</sup> *United Air Lines, Inc. v. NMB*, Civil No. 402-63, D.D.C., 25 March 1963. United also sought an order directing the NMB to hold a hearing and redetermine the form of the election ballot used. In the Railway Clerks' original petition it did not seek to represent the R-1706 grouping, but when United and the competing union (IAM) objected, it amended its petition. Railway Clerks also instituted suit in a federal district court in Illinois against United to enforce its collective bargaining agreement which it had with Capital, although the agreement had not been imposed upon United by the CAB as a condition to its merger. The court dismissed on the ground that it involved a dispute over the bargaining representatives and hence under NMB jurisdiction. The Sixth Circuit affirmed, stating that the court had no jurisdiction where the validity of a contract depends on the merits of a representation dispute. *Brotherhood of Ry. & S.S. Clerks v. NMB*, 325 F.2d 576 (6th Cir. 1963).

<sup>50</sup> Composed of those employees not represented by either IAM or Railway Clerks.

<sup>51</sup> NMB Case No. R-3590 (pending Railway Clerks application). ABNE asked the NMB to redetermine the craft or class grouping with or without a hearing, and to change the ballot form so as to provide a place for a no vote. After requesting intervention, ABNE informed the NMB by letter that (1) it was not seeking recognition as a bargaining unit, and did not want its name on the ballot and (2) it would dissolve after it had served its purpose.

the Board from holding the scheduled election.<sup>52</sup> Granting ABNE's request for an injunction, the district court ordered the NMB to change its ballot form and remanded ABNE's request for a hearing on the craft or class grouping for the Board's consideration.<sup>53</sup> The Board and Railway Clerks, which had intervened as a party defendant, appealed. Consolidating United's appeal with that of the NMB and Railway Clerks, the court of appeals affirmed per curiam.<sup>54</sup> All three parties petitioned for certiorari which was granted and consolidated for argument.

United argued that it possessed a substantial economic interest in the composition of the craft or class,<sup>55</sup> and since there is no administrative or judicial review, it had a right to participate in such determination. It further contended that the Board did not fulfill its duty to investigate the dispute.<sup>56</sup> The Supreme Court, in deciding these issues, answered the question reserved in *Switchmen's* and its companion cases.<sup>57</sup> The Court held that "the Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute."<sup>58</sup> The Court stated that the methods and procedures used were within the Board's discretion and that the Court would review them only to determine whether they comported with procedural due process and the duty to investigate.<sup>59</sup> In reviewing the sufficiency of the investigation the Court laid down several factors which were considered in determining whether the NMB performed its statutory duty and accorded United procedural due process:

- (1) the Board's past experience in the area under review;<sup>60</sup>
- (2) whether the craft or class in question was "tried and true" or was new and untested by experience;<sup>61</sup>

<sup>52</sup> *Association for Benefit of Non-Contract Employees v. NMB*, 218 F. Supp. 114 (D.D.C. 1962). ABNE wanted the election enjoined unless the NMB (1) conducted a hearing on the craft or class grouping, (2) granted ABNE status as a party in such hearing, and (3) changed the ballot form to allow a "no" vote.

<sup>53</sup> *Ibid.*

<sup>54</sup> *United Air Lines, Inc. v. NMB*, 330 F.2d 853 (D.C. Cir. 1963). In United's case no grounds had been stated for the dismissal, but the court treated it as if the ground had been lack of standing. Judge Wright dissented from the result in the NMB and Railway Clerks appeal, contending the court was without jurisdiction to interfere with the Board's determination.

<sup>55</sup> 380 U.S. at 660-61. United contended that since it had to treat with the certified representative, any determination without its participation deprived it of its right of freedom of contract and right to be free from arbitrary restraint in the pursuit of its business. Further, United argued that there was not a community of interest existing among the employees and such grouping would tend to disrupt morale among them and would have an adverse effect on its organizational structure. Brief for United Air Lines, pp. 24-26, *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

<sup>56</sup> 380 U.S. at 660-61.

<sup>57</sup> See text accompanying note 22 *supra*.

<sup>58</sup> 380 U.S. at 661.

<sup>59</sup> *Id.* at 661, 667. It seems that the review allowed, in effect, is merely whether the Board has followed its criteria in reaching its decision and has considered any data submitted to it in light of its policy as set out by these criteria. See text accompanying notes 11-14 *supra*. This approximates the extent of review generally given by the courts to the general policy criteria of other agencies subject to the substantial evidence rule. See, e.g., *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956). It is not clear exactly what data, if any, United presented in its communication with the NMB. Possibly the submission of a detailed brief by a carrier presenting data backing up its contentions would alleviate most of the problems, as the duty to investigate should include serious consideration of such data. See text accompanying notes 65-66 *infra*.

<sup>60</sup> 380 U.S. at 662, 666. This is merely giving due weight to the "expertise" of the Board.

<sup>61</sup> *Id.* at 665. The Board itself seems to consider this in reaching its determination. See note 14 *supra*.

(3) whether the party objecting to the composition of the craft or class was a proper party to the dispute, *i.e.*, a union or employees seeking representation, or an "outsider";<sup>62</sup>

(4) the extent, if any, of prior participation of the party in a former investigation of the same craft or class and the position it advocated then;<sup>63</sup> and

(5) the type of carrier involved as compared with the type involved in a prior determination.<sup>64</sup>

As minimum procedural due process, the Board must consider any data and letters submitted by a party contesting or supporting the craft or class grouping,<sup>65</sup> and as long as this is done, the NMB has performed its duty to investigate and has accorded a party procedural due process.<sup>66</sup> The Court buttressed its conclusion by stating:<sup>67</sup>

It must be remembered that United is under no compulsion to reach an agreement with the . . . representative. . . . "The quality of the action compelled, its reasonableness, and therefore the lawfulness of the compulsion, must be judged in the light of conditions which have occasioned the exercise of . . . power. . . ." Thus, while the Board's investigation . . . might impose some additional burden on the carrier, we cannot say that the latter's interest . . . requires the full panoply of procedural due process. We find support for this conclusion when we consider the burden that acceptance . . . would visit upon the administration of the Act. To require full-dress hearing . . . would fly in the face of Congress' instruction. . . . It places beyond reach the speed which the Act's framers thought an objective of the first order.

A second and related question before the Court was the attack by United and ABNE upon the form of the election ballot. Both contended that the Board had exceeded its statutory authority. Two courts had previously held that the ballot form was unreviewable<sup>68</sup> and only one district court case,<sup>69</sup> decided before *Switchmen's*, enjoined an election because the ballot did not provide a place for a "no" vote. United and ABNE contended that the ballot deprived an employee of the opportunity to vote against representation. While the suit had been pending, the NMB changed the ballot to give notice to employees that a desire for no representation

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<sup>62</sup> *Id.* at 663, 666. The Board considers only those who are seeking to represent the craft or class as proper parties to the dispute. Carriers are forbidden from interfering with the choice by the employees of a representative, and an investigation to determine the scope of the electorate is but an incident to its duty to certify under the act. *Switchmen's Union v. NMB*, 320 U.S. 297, 301 (1943). As to whether a group of employees opposed to representation is a proper party, see text accompanying notes 84-91 *infra*.

<sup>63</sup> 380 U.S. at 662-64, 667.

<sup>64</sup> *Id.* at 664-65. *I.e.*, a trunkline carrier as opposed to a major airline such as United.

<sup>65</sup> *Id.* at 666-67. This was done by the Board in this case through correspondence with United, and its consideration of the claims made by United in such correspondence. See note 59 *supra*.

<sup>66</sup> 380 U.S. at 666-67. Since the NMB "could not by a mere craft or class determination occasion a deprivation of appellant's property . . . no notice of intention to make such a determination was constitutionally necessary." *United Transp. Serv. v. NMB*, 179 F.2d 446 (D.C. Cir. 1949). The full protection afforded by procedural due process is not required. See text accompanying notes 15-16 *supra*.

<sup>67</sup> 380 U.S. at 667-68.

<sup>68</sup> *Rose v. Brotherhood of Ry. & S.S. Clerks*, 181 F.2d 944 (4th Cir.), *cert. denied*, 340 U.S. 851 (1950); *Droggos v. NMB*, 227 F. Supp. 61 (N.D. Ohio 1963).

<sup>69</sup> *McNulty v. NMB*, 18 F. Supp. 494, 501 (N.D.N.Y. 1936).

should be expressed by merely failing to vote.<sup>70</sup> Although the Board has the power to certify even though less than a majority of the craft or class votes,<sup>71</sup> the Board's policy has been to require a majority vote within a craft or class before it will certify.<sup>72</sup> Thus, if a majority did not vote, no certificate would be issued.<sup>73</sup> The NMB has not followed the presumption in *Virginian Ry. v. System Fed'n No. 40* that those not voting assent to the will of the majority of those who do vote.<sup>74</sup> The Court held that since the ballot is a discretionary means of election, the form chosen is discretionary and not a violation of an express statutory command.<sup>75</sup> Therefore, *Leedom v. Kyne*, as limited by *Boire v. Greyhound Corp.*,<sup>76</sup> had no application, and the ballot form was not reviewable. Mr. Justice Stewart dissented, contending that since substantive determinations by the NMB were excluded from review there was need for review of the Board's procedures to insure that they were fair and lawful. "[T]o deprive courts of jurisdiction to review the fundamental procedures used by the Board in arriving at those determinations," he argued, "would indeed be to 'turn the blade inward.'"<sup>77</sup> After reviewing the legislative history of the act, he concluded that the ballot form should be changed.<sup>78</sup>

## V. CONCLUSION

Ultimate determinations of the NMB are discretionary and not subject to review. The rules and criteria used in settling representation disputes<sup>79</sup> will be reviewed only to the extent necessary to insure that the Board performs its statutory duty to investigate. This seems to, or should, include review to insure that the rules and criteria used bear a reasonable relationship to the goals sought by the act. Less clear, however, is the question of whether the courts can review and reform arbitrary action either in the formulation or in the application of the Board's rules and criteria used in the exercise of its duty under section 2, Ninth. There is authority<sup>80</sup>

<sup>70</sup> The ballot now has the following caption:

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified.

<sup>71</sup> See 40 OPS. ATT'Y GEN. 541 (1947).

<sup>72</sup> See NMB, ADMINISTRATION OF THE RAILWAY LABOR ACT 1934-1957, at 16-17 (1958). See, e.g., *Aviation Daily*, 22 Oct. 1965, p. 303; *Radio Officers Union v. NMB*, 181 F.2d 801 (D.C. Cir. 1950).

<sup>73</sup> See note 72 *supra*.

<sup>74</sup> As the Court notes, the NLRB does follow this presumption. 380 U.S. at 670. See *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 560 (1934).

<sup>75</sup> The act says nothing about the form of the ballot, only that a secret ballot may be used. 45 U.S.C. § 152, Ninth.

<sup>76</sup> See text accompanying notes 41-47 *supra*.

<sup>77</sup> 380 U.S. at 672 (dissenting opinion).

<sup>78</sup> *Id.* at 674-75. The legislative history shows that the drafters did not intend to deprive employees of the right to oppose representation. The majority of the Court recognized this. 380 U.S. at 669 n.5.

<sup>79</sup> The procedure might be outlined as follows:

(1) Investigation

a. rules for invoking the Board's jurisdiction  
b. criteria used in determining the scope of the electorate  
c. rules for the election

(2) Certification

<sup>80</sup> See *United Transp. Serv. Employees v. NMB*, 141 F.2d 724 (D.C. Cir. 1944); *Order of Ry. Conductors v. NMB*, 141 F.2d 366 (D.C. Cir.), *cert. dismissed sub nom.*, *Order of Ry. Conductors v. Pennsylvania R.R.*, 323 U.S. 166 (1944).

to the effect that there is no review of an arbitrary decision by the Board. This would seem logically to follow under a strict adherence to *Switchmen's*, in that even if arbitrary, the decision itself is precluded from review.<sup>81</sup> However, if the courts, in reviewing the NMB's duty to investigate, hold that failure to follow established rules or apply stated criteria is a failure to perform its statutory duty, then this seemingly unjust result can be avoided.

The dissent in *ABNE* seems to view the majority opinion as precluding review of the Board's procedure as well as its substantive determination, at least in so far as the form of the ballot is concerned.<sup>82</sup> As stated by the majority, the form of the ballot is a policy question to be resolved by the NMB,<sup>83</sup> but it is submitted that the Court's statement as to unreviewability is misleading.<sup>84</sup> If the sufficiency of the Board's investigation is subject to review to insure that its duty was performed and due process accorded, it follows that the Court would not refuse to strike down a ballot so unfair as to be arbitrary and thereby deny employees the right to choose, or oppose, a representative. The method of selection should at least accord a minimum of fairness. However, the ballot used by the NMB appears to be fundamentally fair and within the Board's discretion.

The Court's opinion in *ABNE* leaves unanswered the question of whether a group of employees opposing representation have a right to intervene as a party in interest in a Board proceeding under section 2, Ninth.<sup>85</sup> The NMB stated, "We agree . . . that *ABNE* has standing to challenge the form of the ballot."<sup>86</sup> The Board opposed, however, the idea that *ABNE* had the right to seek an injunction.<sup>87</sup> Although the Board has previously

<sup>81</sup>See, e.g., *Brotherhood of Ry. S.S. Clerks v. United Transp. Serv. Employees*, 137 F.2d 817 (D.C. Cir.), *rev'd per curiam*, 320 U.S. 715 (1943) (on the basis of *Switchmen's* and its companion cases). See also JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 345 (1965) (criticizing *Switchmen's* and its effect in this case).

<sup>82</sup>380 U.S. at 672 (dissenting opinion).

<sup>83</sup>380 U.S. at 668-69, 671.

<sup>84</sup>*Id.* at 671: "[T]he Board's choice of its proposed ballot is not subject to judicial review . . . [because] such questions were left to the Board." The Court went on to note that the proposed ballot under consideration was fair as was the Board's procedure.

<sup>85</sup>*Id.* at 660: "The Association concedes that the order does not enjoin the holding of the election. . . . Thus, we need not reach the question of the Association's right to demand or participate in proceedings leading to such a determination."

<sup>86</sup>Brief for the NMB, p. 20, n.7, *Brotherhood of Ry. & S.S. Clerks v. Association for Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

<sup>87</sup>*Ibid.* The NMB evidently construes the act as barring from participation any party not seeking recognition, since the only reason for making a determination of craft or class composition is so an election can be held and a representative certified. Thus, an association opposing collective bargaining has no legally cognizable interest in the composition of the electorate. See § 2, First, Third, Fourth & Ninth, 44 Stat. 1188 (1926), as amended, 48 Stat. 1188 (1934), 45 U.S.C. § 152, First, Third, Fourth & Ninth (1964):

General Purposes . . . (2) to forbid any limitation upon freedom of association . . . or any denial . . . of the right of employees to join a labor organization. . . . First. It shall be the duty [of carriers and employees] to exert every reasonable effort to make and maintain agreements. . . .

Third. Representatives, for the purposes of this Act, shall be designated . . . without interference. . . .

Fourth. Employees shall have the right to organize and bargain collectively through representatives. . . .

Ninth. If any dispute shall arise among a carrier's employees . . . it shall be the duty

recognized the right of an employee association to be a party where it was seeking recognition as a bargaining representative, it denied ABNE the right to intervene because it did not seek such recognition.<sup>88</sup> Conceding that the act is structured for collective bargaining,<sup>89</sup> what rights should ABNE have possessed to oppose the selection of a collective bargaining representative? As an association of employees it is made up of members of the craft or class involved. They have a vital interest in its composition and should have the right to be heard. If unlimited this right could amount to a "backdoor" means of avoiding the Court's decision, and might tend to disrupt and impede NMB proceedings in contravention of the thirty-day limitation in the act.<sup>90</sup> However, the Board itself has asserted that a representation dispute exists between those employees (or the union) who wish representation and those who are opposed or indifferent to having a representative.<sup>91</sup> A different question is presented when the association is formed after a representation dispute between two competing unions is begun. In such a case the Board already has jurisdiction, and the association is trying to intervene in an established proceeding. It should have the right to be heard, but this is not to say it is entitled to a full hearing. Perhaps the NMB should adopt a procedural rule similar to that of the CAB, giving a person limited party status.<sup>92</sup> Even if this is done the question will arise as to whether an association such as ABNE is entitled to the same rights as a union—the most important aspect, under past Board practice, being the grant of a hearing when disagreement over the composition of the craft or class arises. A denial of such a hearing or a refusal by the NMB to allow intervention would present the courts with the question of whether such refusal was a denial of due process and a deprivation of a right which constituted a failure to perform its statutory duty.

A. J. Harper II

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of the Mediation Board, upon request . . . to certify to both parties . . . the name or names of the individuals or organizations . . . authorized to represent the employees involved in the dispute. . . .

<sup>88</sup> Brief for the NMB, *supra* note 85, at 19, 61.

<sup>89</sup> See note 86 *supra*.

<sup>90</sup> The thirty-day limitation in the act was used by the Court in *ABNE* as a basis for denying full-dress hearings. 380 U.S. at 668.

<sup>91</sup> See 30 NMB ANN. REP. 32 (1964); 29 NMB ANN. REP. 35 (1963). See also McIntyre, *The Railway Labor Act—A Misfit for the Airlines*, 19 J. AIR L. & COM. 274, 277-78 (1952).

<sup>92</sup> 14 C.F.R. § 302.14 (1965).

# State Regulation of Interstate Utility Securities — The Need for a Reappraisal

## I. INTRODUCTION

An issuance of securities may often go unnoticed by the general public. Normally only a relatively small group of persons such as corporate officials, underwriters, brokers, and eventually, the investor, will be directly affected by the basis and purpose behind the issuance of securities. If the securities are unattractive to future investors and they decline in value, the investor and perhaps the corporation will most heavily feel the impact and not the public at large. However, this may not be the case when a public utility issues securities. Because of a utility's effect on the consuming public, the basis, purpose, and application of the proceeds of a public utility security issuance may have a direct influence on the quantity and quality of the service it provides. A utility's capital structure may be reflected in the price of an airplane ticket or a telephone call. For this reason, most states have established public utility commissions to regulate the securities, rates, and other matters dealing with public utilities. The recent case of *United Air Lines, Inc. v. Illinois Commerce Comm'n*<sup>1</sup> illustrates the working of one of these commissions in dealing with a multi-million dollar security issuance by a large interstate utility.

This Comment will examine the differences between a blue sky law and a state public utility security regulation, the purpose behind each, and in the case of a public utility, if the individual state can carry out its purpose.

## II. BACKGROUND

### A. *Utility Regulations—Their Development*

The present degree of public utility regulation is often taken for granted. The recent transit strike in New York City brought about an acute awareness of the necessity for continuing service by a public utility and the need for regulatory controls. During the early history of public utilities it was thought that there was little need for regulation.<sup>2</sup> Gradually state commissions were established to regulate railroad rates and the power was extended to other utilities providing necessary public services. The regulation of utility securities has been aimed primarily at preventing overissuance, from which many evils were feared:

- (1) excessive dividend or debt service requirements which might be

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<sup>1</sup> *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 32 Ill. 2d 516, 207 N.E.2d 433 (1965).

<sup>2</sup> FINE, *LAISSEZ FAIRE AND THE GENERAL WELFARE STATE* 107-09 (1956).

met at the expense of adequate maintenance or reserves, with resultant reduction of quality of service to the public;<sup>3</sup>

(2) higher rates to consumers;

(3) undue profits to promoters;

(4) dilution of the value of outstanding securities;<sup>4</sup>

(5) dilution of earnings and securities values, to the detriment of the utility's ability to obtain future capital;

(6) excessive dividend or debt service requirements which might be defaulted with resultant adverse effects on the utility's credit,<sup>5</sup> or on its ability to obtain (and the cost of raising) future capital; and perhaps even

(7) the financial failure of the utility through inability to meet debt service requirements.<sup>6</sup>

Although investor protection is considered, the principal emphasis is on protection of the general public<sup>7</sup> and the utility, as evidenced by the preoccupation with the capital structure as an influence on the cost of capital.<sup>8</sup>

### B. Blue Sky Laws Distinguished

Utility regulations should not be confused with the blue sky laws, which are concerned with the investing public rather than the public as a whole.<sup>9</sup> These laws employ various protective regulations to minimize fraud in a securities offering. A corporation subject to the blue sky laws, unless exempted, must register its securities in each state in which they are to be sold.<sup>10</sup> If a state finds the sale of securities to be inconsistent

<sup>3</sup> For an interesting discussion of the pre-regulatory period, see JOSEPHSON, *THE ROBBER BARONS* ch. 8 (1962).

<sup>4</sup> SPURR, *GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION* 53-54 (1924). It was also stated that:

those in control of railroads through stock ownership had too frequently directed their thoughts and given their attention to the manipulation of the stock for speculative purposes, rather than to the legitimate operation of the railroads for railroad purposes. *Id.* at 47.

<sup>5</sup> *Id.* at 53-54.

<sup>6</sup> *York Ry. v. State Pub. Util. Comm'n*, 131 Pa. Super. 126, 198 Atl. 920, 922 (1938) (utility regulation "does not refer to the general investing public"). See generally 73 C.J.S. *Public Utilities* § 43 (1951):

While such statutes [utility regulations] are not Blue Sky Laws in the generally accepted sense, and the public for whose protection such statutes are primarily concerned is the public which uses or desires to use the service of the utility company . . . and which may be affected by the operation of the public utility and not the general investing public, investors may benefit incidentally.

See generally Annot., 41 A.L.R. 891 (1926).

<sup>7</sup> *Petition of Derry Electric Co.*, 180 Atl. 697, 700 (N.H. 1935). The court stated that the "primary purpose of the Public Service Commission Law is the assurance to the public of reasonable rates and service. . . . [T]he protection of investors also may be a factor." Accord, *People v. County Transp. Co.*, 303 N.Y. 391, 103 N.E.2d 421 (1952). The purpose of a utility statute is to protect the public against the sudden deprivation of bus service. *But see* *Electric Light Co. v. Department of Pub. Util.*, 333 Mass. 536, 131 N.E.2d 922 (1956), and *Venner v. Michigan R.R.*, 205 Mich. 573, 172 N.W. 567, 569 (1919), where the respective state utility statutes were looked upon as being for the benefit of investors. The Michigan court stated that the purpose of their regulation was to "protect the stockholders and investing public against the issue of securities for reckless and unlawful expenditures."

<sup>8</sup> NICHOLS & WELCH, *RULING PRINCIPLES OF UTILITY REGULATION* 144, Supp. A (1964).

<sup>9</sup> See generally Annot., 87 A.L.R. 42 (1933). 1 LOSS, *SECURITIES REGULATION* 33 (2d ed. 1961). Blue sky laws are divided into three types: (1) antifraud provisions, (2) provisions requiring the registration or licensing of certain persons engaging in the securities business, and (3) provisions requiring the registration or licensing of securities.

<sup>10</sup> CHOKA, *AN INTRODUCTION TO SECURITIES REGULATION* 113 (1958).

with its investor-protection standards, permission to sell in the state may be denied.<sup>11</sup> A state has authority under the police power to protect its citizens from fraud and may freely exercise this power in the absence of preemptive congressional regulation.<sup>12</sup> While blue sky laws may prohibit the sale of securities in a state, they do not bar the spending within the state of money raised by sales in other states. Because the blue sky laws only regulate the sale of securities within one jurisdiction,<sup>13</sup> they have been held an indirect burden on interstate commerce and hence valid.<sup>14</sup>

### C. Present Regulations

Most jurisdictions have established public utility laws and commissions to regulate their various public utilities and exempt them from their blue sky laws.<sup>15</sup> The Illinois Public Utilities Act illustrates the assorted powers of a commission. The act requires a utility to show the purpose for an issuance of securities and the commission must be satisfied that the money raised will not be applied toward operating expenses.<sup>16</sup> Securities issued without commission approval are declared void.<sup>17</sup> The commission has the power to enforce its orders by mandamus or injunction,<sup>18</sup> and a utility may be fined for failure to obey an order.<sup>19</sup> A utility may also be fined for applying the proceeds of a securities issuance in a manner contrary to the act,<sup>20</sup> which apparently includes a failure to obtain an order from the commission. It seems that the effects of a blue sky law and a utility regulation might differ. If under its utility regulations State A finds that a securities issuance would result in an over-capitalization under local standards, any sale of securities in State B would be illegal in the eyes of State A. Since utility regulations are based on the utility's entire capital structure, State A's determination might be binding on the corporation in every state it operates in. It is also possible that a determination by one

<sup>11</sup> See, e.g., CAL. CORP. CODE ANN. ch. 4 § 25507 (Deering 1962).

If the commissioner finds that the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly . . . the commissioner shall issue to the applicant a permit.

A similar standard is found in the UNIFORM SECURITIES ACT § 306(2) E. & F. Two of the grounds stated for denial, suspension and revocation of registration are:

E. The offering has worked or tended to work a fraud upon purchasers or would so operate;

F. The offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options.

<sup>12</sup> *Mulhern v. Gerold*, 116 F. Supp. 22 (D. Mass. 1953). 15 C.J.S. *Commerce* § 88 (1939).

<sup>13</sup> 1 LOSS, *SECURITIES REGULATION* 73, n.211 (2d ed. 1961). "Though most of the statutes which contain any geographical reference say 'within this state' a few make it illegal to offer or sell, without registration or fraudulently as the case may be, 'within or from this state.'" *Ibid*.

<sup>14</sup> *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917). For a discussion on why such regulations should be held to be a burden on interstate commerce, see Millonzi, *Concurrent Regulations of Interstate Securities Issues: The Need for Congressional Reappraisal*, 49 VA. L. REV. 1483 (1963).

<sup>15</sup> LOSS & COWETT, *BLUE SKY LAWS* 358 (1958). The authors state that it is common for most states to exempt utilities from their blue sky laws. The Uniform Securities Act contains this exemption in § 402(a) (7).

<sup>16</sup> ILL. REV. STAT. ch. 111½ § 21 (Supp. 1965).

<sup>17</sup> ILL. REV. STAT. ch. 111½ § 23 (1963).

<sup>18</sup> ILL. REV. STAT. ch. 111½ § 79 (Supp. 1965).

<sup>19</sup> ILL. REV. STAT. ch. 111½ § 80 (1963).

<sup>20</sup> ILL. REV. STAT. ch. 111½ § 24 (1963).

state will prejudice the utility's issuance in other states. In any case, the disapproving state will be able to prohibit the spending within the state of the money raised by the sale of the securities in other states. However, by contrast to the blue sky laws it appears that each state could individually determine whether the securities of an interstate utility represent an over-capitalization, and a determination by one state would not be binding on another or on the corporation.<sup>21</sup> The discussion of utility regulations and blue sky laws leads to a consideration of present state power to regulate a securities issuance by an interstate utility.

#### D. *The Case Law*

An interstate utility is subject to the multiple regulations of the federal government and of the states in which it does business. Each state has jurisdiction to act within its borders,<sup>22</sup> but its acts may not directly burden interstate commerce.<sup>23</sup> Most state cases concerning jurisdiction over the issuance of securities by an interstate utility have not been decided on the basis of federal constitutional law. These cases have generally turned on two factors: (1) the interpretation of the local statute or (2) the utility's investment within the state. Several courts have held that their statutes exclude foreign utilities<sup>24</sup> or that the commission has jurisdiction only if the utility is going to spend part of the money raised within the state, and have not been forced to examine the ability of their commissions to regulate the securities of a foreign utility. Some of the cases rest on a factual finding of how extensive the investment of the utility is within the state,<sup>25</sup> how much of the money raised by the issue will be spent in the state, or to what degree the state is attempting to regulate. An excellent illustration is *Union Pac. R.R. v. Public Serv. Comm'n*,<sup>26</sup> where a Utah railroad operated 6/10 of a mile of track in Missouri. The railroad had a total property value of \$280 million, \$3 million of which was in Missouri. The railroad was seeking to issue \$30 million of bonds secured by its entire line running through several states. The Missouri Commission ruled that it had jurisdiction to authorize the issuance and to charge a fee on the entire issue. On appeal the United States Supreme Court held that the charging of a fee based on the entire issue was a "direct unconstitutional

<sup>21</sup> If the United States Supreme Court treats the public utility commissions in the same manner as the state security commissions, control could be exercised only within the state. In *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), the Court stated that the purpose of the blue sky law was to regulate securities sold within the state and the burden on interstate commerce would be indirect. This seems to indicate that a state regulation which attempted to control or regulate securities sold outside the state would be unconstitutional.

<sup>22</sup> *Pennoy v. Neff*, 95 U.S. 714 (1877).

<sup>23</sup> *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

<sup>24</sup> In the *Matter of Fryeburg Water Co.*, 79 N.H. 123, 106 Atl. 225 (1919). The court held in *Fryeburg* that the language of the statute was broad enough to include a foreign utility, but since the issuing of stock is regulated by the laws of the incorporating state the court would not presume that the legislature intended to give the commission the power to regulate the internal affairs of a utility. Accord, *Citizens Util. Co.*, 86 P.U.R. (n.s.) 59 (Me. Pub. Serv. Comm'n 1950). Prior to this decision Maine had held that it did have jurisdiction over the securities issuance of a foreign utility in so far as disbursements were to be made in the state. *New England Tel. & Tel. Co.*, 1923A P.U.R. 795 (Me. Pub. Serv. Comm'n 1922).

<sup>25</sup> *Western Union Tel. Co.*, 9 P.U.R.3d 151 (Mo. Pub. Serv. Comm'n 1955).

<sup>26</sup> 248 U.S. 67 (1918).

interference with interstate commerce."<sup>27</sup> There was no finding that Missouri lacked the power to regulate a foreign utility, only that the state could not regulate the entire bond issue under the guise of a fee. The Supreme Court has followed this reasoning in cases where a state attempts to tax a foreign corporation on its net sales from all states,<sup>28</sup> or a tax on gathering gas measured by the entire volume of gas taken,<sup>29</sup> or where a state tries to impose a charter fee tax on the entire amount of stock issued by a corporation.<sup>30</sup> The apparent basis for holding unconstitutional state taxes such as these is that, "interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."<sup>31</sup> This same reasoning is found in some of the state decisions denying the state commission's power to regulate a foreign utility. In these cases the utility provided most of its service outside the state that was claiming the power to approve and levy a fee on the entire issue.<sup>32</sup> Some courts have reasoned that the issuance of securities by a foreign utility is subject only to the authority of the incorporating state.<sup>33</sup> While this is perhaps the better view because of its simplicity, it is not universal and in some jurisdictions even the incorporating state refuses to exercise supervision.<sup>34</sup> If the incorporating state alone had the power to approve and assess fees on a utility's securities issuance, there would be no double regulation or fee charging and apparently no burden on interstate commerce. However, if the incorporating state disclaims jurisdiction the utility would be relatively free to issue securities with no state having regulatory power. One of the latest decisions has pointed toward the direction of federal control over the securities issuance of an interstate utility when it held that the facts demonstrated that a securities issuance by an interstate utility is a national problem rather than a local one.<sup>35</sup> Generally, the states find a lack of power to regulate under their laws and are not faced with the question of using the power.

### III. A RECENT VIEW—UNITED AIR LINES, INC. v. ILLINOIS COMMERCE COMM'N

Between 1956 and 1960, United Air Lines, a Delaware corporation providing interstate service to 110 cities in thirty-two states, received permission from the Illinois Commerce Commission to issue securities consisting of unsecured notes, convertible and unconvertible debentures,

<sup>27</sup> *Id.* at 68.

<sup>28</sup> *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

<sup>29</sup> *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

<sup>30</sup> *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910). The court did say that the property of an interstate corporation in a state may be taxed equally with other local property.

<sup>31</sup> *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938).

<sup>32</sup> *Public Serv. Comm'n v. Baltimore & O.R.R.*, 121 Md. 179, 88 Atl. 348 (1913) (issuance by domestic utility on entire system not subject to jurisdiction); *Application of United Air Lines*, 172 Neb. 748, 112 N.W.2d 414 (1961) (local interests only incidentally involved, if involved at all).

<sup>33</sup> *Southern Sierras Power Co. v. Railroad Comm'n*, 205 Cal. 479, 271 Pac. 747 (1928). *Contra*, *Western Air Lines, Inc. v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

<sup>34</sup> *People v. New York Cent. R.R.*, 233 N.Y. 679, 135 N.E. 967 (1922).

<sup>35</sup> *Application of United Air Lines*, 172 Neb. 748, 112 N.W.2d 414 (1961).

and preferred and common stock. During this period United made seven separate security offerings, each time requesting that the Commission disclaim jurisdiction over the right to approve them and to assess fees.<sup>36</sup> In each instance the Commission reserved the jurisdictional question. United's only Illinois intrastate route, Chicago to Moline, represented 0.092 per cent of its total passenger miles. The proceeds were used principally to purchase equipment, none of which was applied to this route. In 1963, pursuant to section 21 of the Illinois Public Utilities Act,<sup>37</sup> the Commission asserted jurisdiction over the past issuances of the convertible debentures, and the preferred and common stock, and the right to assess fees. The Commission found that it had jurisdiction over these securities solely because they created a property right in Illinois.<sup>38</sup> On appeal an Illinois circuit court reversed holding that Illinois had no power to regulate the issuance of securities by a foreign utility, and even if the state had the power, its exercise would be an undue burden on interstate commerce.<sup>39</sup> The case is significant because the Illinois Supreme Court reversed and held that Illinois has the power to regulate the issuance of securities by a foreign utility to the extent that the securities create an interest in Illinois property, but that in this case it could not be exercised. The decision was based on sections 21 and 31 of the Public Utilities Act and the court's holding in *Bowman v. Armour & Co.*<sup>40</sup> In 1951, section 21 of the act was changed to provide that foreign utilities could issue securities without the Commission's approval if the securities do "not directly or indirectly constitute a lien or charge on, or right to profits from, any property used or useful in rendering service within the state."<sup>41</sup> Section 31 of the act was also amended at this time to establish fees chargeable to a foreign utility in "the same portion of the whole issue as the property situated in this State is of the

<sup>36</sup> *Illinois Commerce Comm'n v. United Air Lines, Inc.*, Illinois Commerce Commission Docket No. 47380 (24 April 1963).

<sup>37</sup> ILL. REV. STAT. ch. 111½ (1963), as amended, ILL. REV. STAT. 111½ (Supp. 1965). Public utilities may issue securities in Illinois provided that they:

21. shall first have secured from the commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied and that in the opinion of the commission, the money, property or labor to be procured or paid for by such issue is reasonably required for the purpose or purposes specified in the order, and that except as otherwise permitted in the order in the case of notes or other evidence of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income.

Other pertinent provisions of this chapter are:

10. "Public Utility" defined.  
"Utility" means and includes every corporation, company, . . . that now or hereafter:  
(a) May own, control, operate or manage, within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property. . . .
20. Power to issue stocks, bonds, etc.  
The power of public utilities to issue stocks, stock certificates, bonds, notes and other evidence of indebtedness and to create liens on their property is a special privilege, the right of supervision, regulation . . . shall be exercised by the commission.

<sup>38</sup> *Illinois Commerce Comm'n v. United Air Lines, Inc.*, Illinois Commerce Commission Docket No. 47380, at 4 (24 April 1963).

<sup>39</sup> *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 32 Ill. 2d 516, 207 N.E.2d 433 (1965).

<sup>40</sup> 17 Ill. 2d 43, 160 N.E.2d 753 (1959).

<sup>41</sup> ILL. REV. STAT. ch. 111½ § 21 (Supp. 1965).

total property on which such securities issue creates a lien or charge."<sup>42</sup> The court in *Bowman* had ruled that a share of stock creates an indirect right to profits within the state, and based on this decision the Commission held that it had the power to approve the securities and to assess a fee.<sup>43</sup> United contended that the amount of fees "must constitutionally be limited to that portion of the security issue in question represented by the portion of United's Illinois interstate business to its total business."<sup>44</sup> The Commission rejected this argument and ordered the hearings reopened to determine what per cent of United's property was located in Illinois.<sup>45</sup> In reversing, the Illinois Supreme Court reasoned that the issuance of securities by an interstate utility is a single act, and the issue can not be "fractionalized and given portions allocated to specific states."<sup>46</sup> Each state can not apply its own standards in approving the issuance of securities to an interstate carrier such as United Air Lines, because "the result . . . would be chaotic."<sup>47</sup> The court further held that the local interest involved in seeing that the service of the utility continue was outweighed by the competing national interest in a free flow of commerce.<sup>48</sup> The opinion suggests that these two reasons are mutual and complementary. However, if the issuance of securities can not be divided between the states for approval, then it would presumably make no difference that the court believed the issuance of securities by a utility is not a matter of local interest. Possibly what the court was doing was to lay down the following test for future cases: whenever a security issue covers many states it can not be apportioned and it will never be a matter of local interest. Conversely, when a security issue is made in one or possibly two states it can be apportioned and it will be a matter of local concern. The facts in *United Air Lines v. Illinois Commerce Comm'n* are similar to the cases previously mentioned and the impression is conveyed that if the local interests were strong enough the Commission could exercise the power of approval over the securities issuance of an interstate utility. The extended discussion concerning the power of the Commission is an additional reason for believing that the court intended to limit its ruling to situations involving a large interstate utility. Of course, a power that may

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<sup>42</sup> ILL. REV. STAT. ch. 111½ § 31 (Supp. 1965). This is a percentage based on the ratio of the intrastate property to the interstate property.

<sup>43</sup> *Illinois Commerce Comm'n v. United Air Lines, Inc.*, Illinois Commerce Commission Docket No. 47380, at 7 (24 April 1963). "[We] feel that the language of section 21 imposes on us a duty to pass on stock issues of foreign utility corporations doing business in Illinois since they do create a right to profits from Illinois Utility property." The Commission had previously used this same reasoning in *Illinois Commerce Comm'n v. Natural Gas Pipeline Co.*, 47 P.U.R.3d 103 (Ill. Commerce Comm'n 1962). A Delaware utility was seeking to issue stocks and bonds in Illinois. The Commission stated that it could not assess fees based on the whole amount of a securities issue of an interstate utility but only on the amount representing local property. Accordingly, jurisdiction was taken over the stocks.

<sup>44</sup> *Illinois Commerce Comm'n v. United Air Lines, Inc.*, Illinois Commerce Commission Docket No. 47380, at 9 (24 April 1963). This would be a percentage of interstate business to intrastate business.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 32 Ill. 2d 516, 207 N.E.2d 433, 438 (1965).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

not be exercised is an empty one, but it is possible that the power could be exerted where an interstate utility plans to spend, within the state, a large percentage of the money raised by a security issue or where the utility operates a limited interstate service.<sup>49</sup> Between these extremes can arise various situations, perhaps based on questions of degree, which the Illinois court may have to decide in the future.

In *United Air Lines v. Illinois Commerce Comm'n*, the Illinois Supreme Court mentioned its own earlier decision<sup>50</sup> where it had said that Illinois could not charge a fee on an entire security issue covering many states. This prior holding was in accord with the previous holding of the United States Supreme Court.<sup>51</sup> These holdings illustrate with some certainty what the states are unable to do in the area of a security issue by a foreign utility. First, the states lack the power to charge a fee based on the entire securities issuance of an interstate utility.<sup>52</sup> Second, since the states are unable to assess fees on an entire issue it would seem to follow that they could not exercise the right to approve the issuance of such securities.<sup>53</sup> As a practical matter the states are probably only concerned with the collection of fees rather than a gratuitous power to approve. Under these limitations some states have taken steps to retain limited control over the securities issuance of a foreign utility. As illustrated by the 1951 amendments to the Illinois Public Utilities Act interpreted in *United Air Lines*, statutes have been passed which granted to the state utility commissions the power to approve and charge a fee to the extent that a securities issuance created property rights in the state.<sup>54</sup> Since the Illinois Supreme Court accepted the dual premises that the state did have the power to regulate an interstate utility when it issues securities, and that the stock<sup>55</sup> created a property right in Illinois, the court could have upheld the Commission's ruling as a case of regulating and controlling Illinois property rights. However, the court chose to nullify the effect of the 1951 amendments in this case rather than hold them unconstitutional per se. The court stated, "to say that our Commission may assert jurisdiction in this

<sup>49</sup> *People v. County Transp. Co.*, 303 N.Y. 391, 103 N.E.2d 421 (1952). A New York statute required approval from the public service commission before a utility could issue securities. The court upheld the statute in its application to a domestic bus line whose only interstate route was from New York City to Connecticut.

<sup>50</sup> *Missouri Pac. R.R. v. Public Util. Comm'n*, 292 Ill. 427, 127 N.E. 41 (1920). A Missouri utility sought to issue bonds on its entire line, serving nine states with 6,785 miles of track. The utility's total property value was \$380 million, \$11 million of which was in Illinois.

<sup>51</sup> *Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67 (1918).

<sup>52</sup> *Ibid.*

<sup>53</sup> See note 21 *supra*.

<sup>54</sup> See MICH. STAT. ANN. ch. 208 § 22.11 (1937). In Michigan, when a utility issues securities on property located partly within and partly without the state, a fee is placed on the proportion of the entire issue as the amount of such property within the state bears to the total amount of the property upon which the securities are issued. Michigan does take jurisdiction over a securities issuance by a foreign utility. See *Verner v. Michigan R.R.*, 205 Mich. 573, 172 N.W. 567 (1919); *Peninsular Power Co. v. Secretary of State*, 169 Mich. 595, 135 N.W. 656 (1912). A Wisconsin railroad sought to issue securities in Michigan in order to make improvements within the state and was required to obtain the approval of the state commission. *Contra, Chicago, N.S. & M.R.R.*, 54 P.U.R. (n.s.) 315 (Wis. Pub. Util. Comm'n 1944).

<sup>55</sup> *United Air Lines, Inc. v. Illinois Commerce Comm'n*, 32 Ill. 2d 516, 207 N.E.2d 433, 437 (1965). The court did not mention the convertible debentures, but stated that "we hold that the stocks issued were not exempt."

case is to allow it to intrude into an area of overwhelmingly predominant national interest."<sup>56</sup>

#### IV. SHOULD THE STATES REGULATE?

In *United Air Lines v. Illinois Commerce Comm'n* the court left open the power of the Illinois Commerce Commission in future cases. Whether a state should have any control over a securities issuance by an interstate utility and if so, to what extent, is an especially pertinent question in the air transportation industry, where new equipment must constantly be purchased. The Illinois Supreme Court recognized this when it said that if United could not secure funds by selling securities "its continued existence in the highly competitive interstate air transportation industry would be difficult, if not impossible, to sustain."<sup>57</sup> This might not be the case where a public utility conducts limited interstate operations. There, as one court found, the national interests may be minute.<sup>58</sup> However, the national interest in maintaining a free flow of interstate commerce is extremely prevalent in the case of the larger interstate utilities. Allowing each state to pass on a securities issuance of such a utility and to apportion the fees chargeable would result in a burden on interstate commerce. The burden would arise, not only from the delay involved, but in the effect one state's refusal would have on the utility's interstate operations. The denial of the selling of the securities or the spending of the proceeds by one state might adversely affect the flow of commerce between all the states. By its very nature a securities transaction of this type can never be local, even if the interstate utility is a domestic utility or plans to spend a large part of the money raised by the securities within the state that is attempting to regulate the issuance. In either case the issuance would directly affect the entire interstate operation. The states can best serve the public by disclaiming jurisdiction over a security issuance by an interstate utility because of the national interest involved. When one state applies its own local standard to a capital structure covering many states the determination may not be in the best interests of the other states. In addition, the necessity for each state to scrutinize a security issuance by an interstate utility no longer seems to exist. This is because of modern communications, corporation disclosure requirements, the general filing and disclosure rules of the different federal governmental agencies before securities may be issued, more public responsibility on the part of management, and the fact that utilities are already heavily regulated. Based on such factors, the added requirement of seeking approval from each state, may not serve to further protect and benefit the public or the utility.

One possible solution to the question of who should regulate the securities issuance of an interstate utility would be to allow the federal agency that sets the utilities tariffs to pass on its securities. This would have the

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<sup>56</sup> *Id.* at 438. (Emphasis added.)

<sup>57</sup> *Id.* at 437.

<sup>58</sup> *People v. County Transp. Co.*, 303 N.Y. 391, 103 N.E.2d 421 (1952).

desired benefit of combining both functions in the one agency capable of examining all aspects of the utility. This is currently the procedure followed by the Interstate Commerce Commission as to interstate railroads and certain other carriers.<sup>59</sup> The Commission approves each securities issuance by a railroad and the various states affected have the right to intervene and present their views on the issuance.<sup>60</sup> In the case of an airline at the present time, the Civil Aeronautics Board sets its interstate rates,<sup>61</sup> the various states it serves set the intrastate rates,<sup>62</sup> it must meet the general filing and disclosure requirements of the Securities Act of 1933,<sup>63</sup> and the possibility exists that various states will regulate any securities it may issue. By bringing all these factors under one authority, simplicity would be served.

It may be that what the states are concerned with is not the authority to regulate but rather the power to charge a fee. If the question of state approval is divorced from the question of the charging of fees based on property interests within the state, the problem is greatly simplified. A fee might be apportioned among the states where the securities are to be issued in proportion to the utility's property values in each state. Other possible formulas would be the proportion of the utility's intrastate service to its total business, or an apportionment based on sales within the state. Such an apportionment standard would follow the United States Supreme Court's reasoning in the cases of state income taxation of corporations engaged in interstate commerce,<sup>64</sup> but would require a sophisticated application to insure that there is no multiple taxation of the same property between the states.<sup>65</sup> For example, in the case of a common carrier, which state could include the value of an airplane for purposes of taxation? Would it be State A where the airplane is usually stationed or State B where it usually flies? If both states claim the value of the airplane in order to establish a percentage basis on which to set a fee for a proposed securities issuance the utility would be paying a double tax, unless there is

<sup>59</sup> Interstate Commerce Act § 1-27, 63 Stat. 487 (1887), as amended, 49 U.S.C. § 1-27 (1964).

<sup>60</sup> Interstate Commerce Act § 20a(6), 63 Stat. 487 (1887), 49 U.S.C. § 20a(6) (1964).

Upon receipt of any such application for authority to issue securities the Commission shall cause notice thereof to be given to and a copy filed with the governor of each state in which the applicant carrier operates. The Railroad commission, public service or utilities commission, or other appropriate State authorities of the State, shall have the right to make before the Commission such representations as they may deem just and proper. . . .

<sup>61</sup> Federal Aviation Act of 1958, § 403, 74 Stat. 445, 49 U.S.C. § 1373 (1964).

<sup>62</sup> *People v. Western Air Lines*, 42 Cal. 2d 621, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859 (1954).

<sup>63</sup> 48 Stat. 74, 15 U.S.C. §§ 77a-mm (1964).

<sup>64</sup> *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450 (1959). The state tax on the portion of net income earned within the state by a corporation engaged in interstate commerce was held not to be an undue burden on interstate commerce. The state used three methods to find the proportion of intrastate business to interstate business: (1) the proportion of corporate sales in the state to total sales, (2) the proportion of corporate property used in the state to the total business property, and (3) the proportion of the corporate payroll in the state to the total payroll.

<sup>65</sup> *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166 (1954). The difficulties of apportionment are illustrated by the following passage:

It is now well settled that a tax imposed on a local activity related to interstate commerce is valid, if and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot [*sic*] realistically be separated from it. . . .

found to be a double use. For an apportionment system of fees to be applied, it appears that the same assessment system and basis would have to be used by each state.<sup>66</sup>

#### V. CONCLUSION

Most states will not take jurisdiction over a securities issuance of a foreign utility, and in some cases over a domestic utility. Because of this it may well be that securities of an interstate utility no longer need to be examined for a potential over-capitalization. If so they could be treated as any other securities under the blue sky laws, with due regard to the protection of investors. This would involve elimination of the present exceptions for utility securities from the blue sky laws. Because of the importance of interstate utilities to the public, perhaps the conservative solution would be to place utility securities regulation under a single governmental agency. This for the most part would take nothing from the states but would insure the continued service of the utility.

*James Knox Murphey III*

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<sup>66</sup> Such a uniform apportionment system for taxation of interstate corporations has been proposed in H.R. No. 11798, 89th Cong., 1st Sess. (1965).

## NOTES

### Administrative Law — Indirect Air Carriers — Interagency Conflict

Prior to new regulations issued by the Interstate Commerce Commission,<sup>1</sup> indirect air carriers were exempt from economic regulation by the ICC so long as they performed a bona fide collection and delivery or transfer service within the terminal areas described in tariffs filed with the Civil Aeronautics Board. In practice, the ICC accepted as reasonable any terminal approved by the CAB.<sup>2</sup> The statutory basis for the exemption is Section 203(b)(7a) of the Interstate Commerce Act.<sup>3</sup> The new regulations limited terminal areas of indirect air carriers to a radius of twenty-five miles from an airport. If, under these regulations, an indirect air carrier wishes to service points outside this limit, its application will now be independently reviewed by the ICC after CAB approval is obtained.<sup>4</sup> Although the CAB's approval will be considered, it will not be binding; thus, the ICC will be the final arbiter of whether such indirect air carrier service falls within the section 203(b)(7a) exemption from regulation. (The CAB voluntarily disclaimed jurisdiction in the matter and adopted the regulations proposed for it by the ICC.<sup>5</sup>) Plaintiff Air Dispatch, Inc., an

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<sup>1</sup> On 4 May 1964, after proper rule-making procedure in accordance with the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964), the ICC adopted the report, order, and regulations entitled, Motor Transportation of Property Incidental to Transportation by Aircraft, 95 M.C.C. 71 (1964). The regulations adopted are set out in 49 C.F.R. §§ 210.40, 404.1, and 14 C.F.R. § 222 (1964). This discussion will be limited to motor transportation of property incidental to air transportation. The problem of motor transportation of passengers incidental to transportation by air is dealt with in a similar proceeding, Motor Transportation of Passengers Incidental to Transportation by Aircraft, ICC Order No. MC-C-4000 (1964). Discussions of the § 203(b)(7a) exemption as it relates to passengers appear in *Haltom Corp., Common Carrier Application*, 91 M.C.C. 725 (1962) and *Sky Freight Delivery Service, Inc., Common Carrier Application*, 47 M.C.C. 229 (1947).

<sup>2</sup> "The air carriers now establish their own terminal area limits by the filing of tariffs with the CAB, and our interpretation of the exemption . . . is based on the assumption that that agency would not hesitate to reject any publication which would result in an unreasonable enlargement of such an area." *Kenny Extension-Air Freight*, 61 M.C.C. 587 (1953).

<sup>3</sup> 52 Stat. 1237 (1938), 49 U.S.C. § 303(b)(7a) (1964).

<sup>4</sup> 49 C.F.R. § 210.40(c) (1964). This is not the first instance of an overlap in authority between regulatory bodies. See, e.g., *Burlington Truck Lines, Inc. v. ICC*, 194 F. Supp. 31 (1961), wherein a labor dispute caused this same type of problem between the NLRB and the ICC. The uncertainties created by divided authority as between the President and the Federal Communications Commission in the field of spectrum allocation are discussed in Rosenblum, *Low Visibility Decision-making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 *Ad. L. Rev.* 19 (1965). See also, *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 965 (1960).

<sup>5</sup> 14 C.F.R. § 222 (1964). The CAB instituted a proceeding to review their prior rule of thumb procedure in granting terminal areas at approximately the same time the ICC began its proceeding. 26 Fed. Reg. 8037 (1964). This proceeding was terminated when the CAB adopted the new ICC regulations.

air freight forwarder or indirect air carrier,<sup>6</sup> and intervenor plaintiffs<sup>7</sup> brought suit against the United States and the ICC to have the ICC's report, order, and regulations set aside. A temporary restraining order was issued by a three-judge court until a final decision could be made.<sup>8</sup> *Held*: It is the function of the ICC, rather than the CAB, to determine the scope of the section 203(b) (7a) exemption.<sup>9</sup> *Air Dispatch, Inc. v. United States*, 237 F. Supp. 450 (E.D. Pa. 1964), *aff'd without opinion*, 381 U.S. 412 (1965).

The regulation of air transportation began with the Air Commerce Act of 1926<sup>10</sup> which defined "air commerce" as transportation "in whole or in part by aircraft of persons or property for hire."<sup>11</sup> Subsequently, the Interstate Commerce Act was amended by the addition of the Motor Carrier Act of 1935.<sup>12</sup> For the purpose of motor vehicle regulation, interstate commerce was defined in the act as commerce between states "whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."<sup>13</sup> The Civil Aeronautics Act of 1938,<sup>14</sup> enacted three years later, is important here in three respects. After heated discussions, the CAB was given control of air transportation as defined in the act.<sup>15</sup> Secondly, the definitions of air transportation and air commerce were substantially the same as those in the act of 1926.<sup>16</sup> Finally, section 1107(j) of the act amended the Interstate Commerce Act by

<sup>6</sup> An air freight forwarder, or indirect air carrier, performs the service of pickup and delivery, or transfer, to and from the direct air carrier of shipments in a continuous line-haul movement on a through bill of lading issued by either the direct or indirect carrier.

<sup>7</sup> The intervenor plaintiffs were Air Freight Forwarders Association; Film Carrier Conference, Air Transport Association; and National Film Carriers, Inc. Several defendants were also allowed to intervene: American Trucking Association, National Motor Freight Traffic Association, National Bus Traffic Association, and National Association of Motor Bus Owners.

<sup>8</sup> A three-judge court is required by 28 U.S.C. §§ 2284, 2321-25 (1964).

<sup>9</sup> The court further held that any other question of the reasonableness of the regulations or possible conflict between the ICC and the CAB was premature since no attack had been made on the reasonableness of the Commission's action and since no conflict had actually arisen. These precise points were raised and answered three months later, the court holding the regulations reasonable and finding no interagency conflict. *Wycoff v. United States*, 240 F. Supp. 304 (D. Utah 1965).

<sup>10</sup> Ch. 344, 44 Stat. 568 (1926).

<sup>11</sup> Air Commerce Act of 1926, ch. 344, § 1, 44 Stat. 568 (1926). This definition was reenacted in the Federal Aviation Act of 1958, tit. I, § 101(3) & (10), 72 Stat. 737, 49 U.S.C. § 1301(3) & (10) (1964).

<sup>12</sup> 49 Stat. 543 (1935), 49 U.S.C. §§ 301-27 (1964).

<sup>13</sup> Interstate Commerce Act, § 263(a) (10), 49 Stat. 545 (1935), 49 U.S.C. § 303(10) (1964). There seems to be a difference in opinion as to whether this provision is to be construed restrictively or collectively. The plaintiff argued that: (1) through the application of the doctrine of *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another"; and (2) because of the fact that nine years earlier Congress had defined air commerce as transportation "in whole or in part by aircraft," without any limitation on other modes of transportation to be included, Congress could not be said to have made an omission on the theory that transportation by aircraft was not, at that time, sufficiently important to exclude. Brief for Plaintiffs, p.13, *Air Dispatch, Inc. v. United States*, 237 F. Supp. 450 (E.D. Pa. 1964). The court, however, did not discuss this question but merely pointed out that the defendants had argued that the term "express" mentioned in the definition meant "air express" as it was known in 1935. *Id.* at 452, n.6.

<sup>14</sup> 52 Stat. 973 (1938).

<sup>15</sup> Civil Aeronautics Act of 1938, § 1, 52 Stat. 973, 977. It is interesting to note that Congress was perplexed over whether to give jurisdiction over air transportation to the ICC or the new board proposed in the bill. This is especially interesting in view of President Johnson's recent recommendation for a Cabinet-level Transportation Department combining all transportation into one agency for certain purposes. He further suggested reorganization of several of the existing agencies. State of the Union Message, 112 CONG. REC. 129 (1966).

<sup>16</sup> Air Commerce Act of 1926, 44 Stat. 568 (1926).

adding to part II, section 203 (b) (7a), the exemption in question.<sup>17</sup> This section states:

Nothing in this part, [except certain safety provisions of section 204] shall be construed to include . . . the transportation of persons or property when incidental to transportation by aircraft . . . .

The Federal Aviation Act of 1958<sup>18</sup> repealed the Air Commerce Act of 1926<sup>19</sup> and the Civil Aeronautics Act of 1938<sup>20</sup> but retained their definitions of air commerce and air transportation. The act, essentially a codification of all previous air transportation regulatory laws, sets out, among others, the following duties of the CAB: (1) to regulate commerce, which is "wholly by aircraft or partly by aircraft and partly by other modes of transportation";<sup>21</sup> (2) to control the ground gathering and delivery service in connection with air transportation;<sup>22</sup> and (3) to regulate the issuance of certificates of operating authority, and in all other ways to economically regulate the overall system of air transportation in the United States.<sup>23</sup>

The leading administrative decision in the area of section 203 (b) (7a) is *Kenny Extension-Air Freight*<sup>24</sup> which established the extent of the exemption. The *Kenny* doctrine previously stood for the proposition that motor carrier service is exempt from economic regulation by the ICC so long as: (1) it is a shipment of goods having immediately prior or subsequent movement by direct air carrier; (2) it is part of a continuous line-haul movement under a through bill of lading issued by either a direct or an indirect air carrier; and (3) such service is performed within the terminal area of either the direct or indirect air carrier according to its tariff.<sup>25</sup> This case has been uniformly followed by the ICC.<sup>26</sup> The ICC refused to put an absolute mileage limitation on the extent of the air freight forwarder's terminal area, preferring instead to rely on the wisdom and discretion of the CAB in granting terminal areas.<sup>27</sup> In *City of Philadelphia*

<sup>17</sup> 52 Stat. 1029 (1938), 49 U.S.C. § 303 (b) (7a) (1964).

<sup>18</sup> 72 Stat. 731 (1958), 49 U.S.C. §§ 1301-1342 (1964).

<sup>19</sup> 72 Stat. 806 (1958), 49 U.S.C. § 1401 (a) (1964).

<sup>20</sup> 72 Stat. 806 (1958), 49 U.S.C. § 1401 (b) (1964).

<sup>21</sup> Federal Aviation Act of 1958, § 101 (20) (c), 72 Stat. 737, 49 U.S.C. § 1301 (20) (c) (1964).

<sup>22</sup> Federal Aviation Act of 1958, § 403 (a) & (b), 72 Stat. 758, 49 U.S.C. § 1373 (a) & (b) (1964).

<sup>23</sup> Federal Aviation Act of 1958, §§ 102, 401, 72 Stat. 740, 754, 49 U.S.C. §§ 1302, 1371 (1964). The plaintiffs argued that, by an overall reading of the statute, the connotation of exclusive regulation is present. This does not seem to be an altogether unwarranted inference; however, the court apparently did not agree as the issue was not specifically discussed.

<sup>24</sup> 61 M.C.C. 587 (1953). The defendant in the instant case claimed that the new regulations were merely a codification of the *Kenny* doctrine. The court seemed to implicitly uphold that contention.

<sup>25</sup> At the time of the *Kenny* decision, the air freight forwarder was not considered an indirect air carrier, but this distinction was abolished in *Panther Cartage Co. Extension-Air Freight*, 88 M.C.C. 37 (1961).

<sup>26</sup> This seemed to be a workable plan at the time, and there has been little, if any, difficulty in its application. See, e.g., *Panther Cartage Co. Extension-Air Freight*, *supra* note 25.

<sup>27</sup> The CAB's "rule of thumb" in consideration of the reasonableness of a terminal area was a twenty-five mile radius from an airport. Any application for a larger area required specific proof as to reasonableness along with a showing of public convenience and necessity. This is substantially the same procedure followed to date. *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71, 89 (1964).

*v. CAB*,<sup>28</sup> the Flying Tiger Line, in compliance with its CAB certificate of public convenience and necessity, proposed to service Philadelphia by motor carrier from the Newark airport, some ninety miles away. Formerly, the service had been provided by small, "feeder" planes. The change was necessitated by the proposed use of jets which could not land at the Philadelphia airport. The CAB said that the motor transportation between Newark and Philadelphia was "air transportation" within the meaning of the Federal Aviation Act of 1958.<sup>29</sup> The court, however, in upholding the decision that the motor service was "air transportation" insofar as Flying Tiger's certificate was concerned, quoted with approval the Board's disclaimer of jurisdiction in the matter of whether such service was "incidental to transportation by aircraft" within the meaning of section 203 (b) (7a).<sup>30</sup>

In the instant case, plaintiffs argued that section 203 (b) (7a) is an explicit legislative exclusion from ICC regulation, and thus dispositive of the case because if an area is excluded from regulation rather than exempted, it is logical to require the agency which is to regulate the excluded portion to determine the scope of the exclusion.<sup>31</sup> The court, however, passed over the issue by reference in a footnote saying that the "semantic battle" was resolved in favor of the term exemption.<sup>32</sup> Plaintiffs further contended that there is a conflict between legislative intent, pointing toward exclusive jurisdiction of the CAB over transportation "wholly or partly by air," and the case law which indicates at least partial jurisdiction in the ICC.<sup>33</sup> In resolving the conflict, plaintiffs argued, the court should follow the congressional intent that the CAB exclusively regulate all air transportation.<sup>34</sup> The argument is strengthened because the exemption was added by the Civil Aeronautics Act of 1938.<sup>35</sup> Since the purpose of that act was the establishment and regulation of a national system of air transportation,<sup>36</sup> this, according to plaintiffs, demands exclusive regulation by the CAB because the burden of the success of the system rests on the CAB.

<sup>28</sup> 289 F.2d 770 (D.C. Cir. 1961). This case was erroneously construed by the plaintiffs as its application is clearly limited by the partial quote of the Board's opinion. See note 30 *infra*.

<sup>29</sup> *City of Philadelphia v. CAB*, 389 F.2d 770, 773 (D.C. Cir. 1961).

<sup>30</sup> *Id.* at 774:

Our finding goes no further than that Flying Tiger Line's proposed service will, as to it, constitute air transportation. . . . We are not asserting jurisdiction over the motor carrier as an air carrier, nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the . . . truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the requisite ICC authority in order for Flying Tiger Line to operate in the manner it proposes.

<sup>31</sup> Brief for Plaintiffs, *supra* note 13, at 20.

<sup>32</sup> *Air Dispatch, Inc. v. United States*, 237 F. Supp. 450, 451 n.1 (E.D. Pa. 1964).

<sup>33</sup> According to *City of Philadelphia v. CAB*, *supra* note 29, the ICC must determine whether a given motor carrier service is within or without the § 203 (b) (7a) exemption. It is interesting to note that the disclaimer of jurisdiction by the CAB seemingly indicates a belief that it lacked jurisdiction, but the question was not decided since the court was not squarely faced with the issue.

<sup>34</sup> It will be remembered that the definition used here is transportation "wholly or partly by air." See note 11 *supra* and accompanying text.

<sup>35</sup> 52 Stat. 973 (1938).

<sup>36</sup> See 83 CONG. REC. Parts 6-8 (1938).

The exemption, taken in the context in which it arose, exempts from regulation that transportation which is incidental to "transportation by aircraft" as defined in the Civil Aeronautics Act of 1938.<sup>37</sup> Thus, the contention is that the foregoing precludes the determination of that which is incidental to transportation by aircraft by any agency other than the CAB. The court again reasoned to the contrary by citing the several examples of safety, employees' hours and working conditions, etc., as areas over which the ICC has exclusive regulatory power. The court assumed that "the Commission also has authority to economically regulate all motor vehicles except when the motor vehicles are used exclusively in the collection, delivery, or transfer of goods incidental to transportation by aircraft."<sup>38</sup> According to the court, it follows that if the ICC has the exclusive power to regulate all motor vehicles except in those cases exempted by section 203(b)(7a), it must necessarily have the power to determine the scope of that exemption.

The *Air Dispatch* decision appears to be legally sound, although practically, some difficulties will arise. There will be a duplication of agency action on any application for a terminal area beyond a twenty-five mile radius<sup>39</sup> of the airport because of mandatory ICC review. There could be an undue burden on the applicant, in legal fees alone, if he must satisfy two agencies on the same application. The plaintiffs argued that the new regulations will require them to use ICC certificated carriers for services previously performed by themselves. They offered fast and efficient twenty-four hour service on a through bill of lading, with sole responsibility of loss to the shipper. With the restrictions imposed by the new regulations, much of this service may be put to an end. For example, if an air freight forwarder wishes to make a delivery outside his terminal area and must use an ICC certificated carrier for this purpose, responsibility for the shipment must be assumed by the ICC certificated carrier.<sup>40</sup> This added restriction on the forwarder does not seem to be within the congressional scheme of a well-ordered and efficient air transportation system. It is therefore submitted that the possibility of a conflict in jurisdiction does exist in this area,<sup>41</sup> and that there is need for congressional reexamination of the entire area to clarify which agency is to have jurisdiction over motor transportation incidental to transportation by air.

Daniel L. Penner

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<sup>37</sup> 52 Stat. 973 (1938).

<sup>38</sup> 237 F. Supp. at 458.

<sup>39</sup> 49 C.F.R. § 210.40(c) (1964).

<sup>40</sup> In the view of the author, there is also some question as to whether or not under the new regulations the goods may be shipped on a through bill of lading.

<sup>41</sup> Although the court suggested the use of a joint CAB and ICC board to correct any possible conflict, 237 F. Supp. at 452 n.5, the attempted use of the joint board has subsequently been disallowed. *Railway Express Agency v. CAB*, 345 F.2d 445 (D.C. Cir. 1965).

## Insurance — Aviation Exclusion Clauses — Judicial Interpretation

The deceased was killed while a passenger on an airplane owned and operated by Compagnie Nationale Air France (Air France). The flight was pursuant to a contract<sup>1</sup> entered into between Air France and the Atlanta Art Association of which the deceased was a member, and it was identified by a regularly scheduled and published Air France flight number.<sup>2</sup> Air France did not maintain scheduled flights to Atlanta, but a flight originating in Houston stopped in Atlanta, allowed the Association members to board, then flew to Paris via New York. The return flight crashed on takeoff at Orly Field, Paris. The defendant insurer denied liability for accidental death under the certificate of insurance held by the plaintiff's survivors. Defendant alleged that the death came within an exclusion clause in the certificate.<sup>3</sup> *Held*: The contract between Air France and the Association was a mere contract of affreightment and the aircraft was not a chartered aircraft within the meaning of the exclusion clause. Further, the Air France flight was held to be a scheduled passenger service and not within the exclusion clause. *Dorsey v. State Mut. Life Assur. Co.*, 238 F. Supp. 391 (N.D. Ga. 1965).

The most universally accepted rule applicable to the construction of exclusion clauses is that if conditions, limitations, and exceptions affecting the liability of an insurer are not expressed clearly and without ambiguity, they will be construed strictly against the insurer in favor of the insured.<sup>4</sup> However, the courts are not at liberty, even in light of the rule favoring liberal construction in behalf of the insured, to create a contract which the parties did not make themselves nor to impose on a party an obligation

<sup>1</sup> The contract, executed on 2 February 1962, was entitled "International Charter Flight Agreement."

<sup>2</sup> The regular flight from Paris to New York to Houston carried the number 007 in the schedule which was used for the flights on Sunday, Tuesday, and Thursday. The flight number 707 was used to designate flights on Monday, Wednesday, Friday, and Saturday which originates in Paris, flying to Mexico by way of New York. The tickets for the flight in the instant case carried the number 0707. It was explained by a representative of Air France that an additional digit (0) is added to the regular flight number whenever the flight is to depart from the regular route. Although the flight number in the contract was 007, the number on the tickets was 0707. Air France personnel said the use of the wrong number was merely a clerical error.

<sup>3</sup> The certificate contained the following exclusion, interpretation of which constituted the matter in controversy:

No benefits shall be payable for any loss which is caused or contributed to by . . . being in or on or in contact with any kind of aircraft, either on the ground, water or in the air, or falling or in any other manner descending with or from such aircraft, except loss resulting from flight or travel as a passenger in a licensed aircraft (other than a chartered aircraft) operated by a licensed pilot on a scheduled passenger service regularly offered between specified airports by a passenger carrier duly licensed by the proper licensing authority. . . .

<sup>4</sup> *Burns v. Mutual Benefit Life Ins. Co.*, 79 F. Supp. 847 (W.D. Mich.), *aff'd*, 179 F.2d 236 (6th Cir. 1948), *cert. denied*, 339 U.S. 947 (1950). See also 2 COOLEY, BRIEFS ON INSURANCE 971 (2d ed. 1927).

it did not voluntarily assume.<sup>5</sup> Parties to a contract are presumed to have reached an agreement as to its terms, and in the absence of an ambiguous term, a court cannot revise the contract while professing to construe it.<sup>6</sup>

In considering the construction of an insurance policy, words should be given their usual and ordinarily accepted meanings. When ascertaining the intent of the parties to an insurance contract, "courts must consider the meaning as applied to the subject matter with regard to which the language was used, and with reference to the object to be accomplished by the contracting parties."<sup>7</sup> Public policy is another guide used by the courts in construing exclusion clauses. The public policy argument appears to have been on the side of the insurance companies during the first three decades of this century. Such terms as "engaging in aeronautics" or "participating in aeronautics" were construed against the insured by the courts. Apparently, the courts were influenced by the general public opinion that anyone who ascended in an airplane, as pilot or passenger, was assuming a risk.<sup>8</sup> With the growth of air travel and its acceptance as a common mode of transportation, the general public and the courts rejected the contention that air transportation was an exceptional risk.<sup>9</sup> Life and accident policies today have common or standard exclusion clauses limiting coverage to accepted modes of air transportation. Although one will probably never find a court basing its entire decision on a public policy argument, it is often used as a basis for a finding of ambiguity where none appears to exist. This practice seems motivated by the general public feeling that large insurance companies can bear losses better than the individual.<sup>10</sup>

Since the phrase "chartered aircraft"<sup>11</sup> has been before the courts in few instances, one must look to maritime case law dealing extensively with chartered vessels to determine its meaning. In *United States v. Hvoslef*,<sup>12</sup> the Court held that there are two different methods of entering a contract of charter. A charterer can take possession and control of the vessel, or he can contract for special services to be rendered by the owner who maintains possession and control.<sup>13</sup> The former contract is one in the nature of a demise, while the latter is in the nature of a contract of affreightment.<sup>14</sup> The pertinent point to be derived from the classification of charters is that the former places possession and control in the hands of the charterer, and the latter does not. In *Curtiss-Wright Flying Serv., Inc.*

<sup>5</sup> *Express Cases*, 117 U.S. 1 (1886). See also 17 AM. JUR. 2d *Contracts* § 242 (1946).

<sup>6</sup> *Express Cases*, *supra* note 5.

<sup>7</sup> *McBride v. Prudential Life Ins. Co. of America*, 147 Ohio St. 461, 72 N.E.2d 98, 99 (1947).

<sup>8</sup> *Bew v. Travelers Ins. Co.*, 95 N.J.L. 533, 112 A. 859 (Ct. Err. & App. 1921). The policy contained an exclusion of the insurer's liability for injuries "sustained by the insured while participating in or in consequence of having participated in aeronautics." From the adopted opinion by Justice Donges of the lower court, one can sense the public and judicial distrust of air flight: "I have no doubt that the insurance company intended to provide against liability in case of injuries to persons who navigate the air, a means of transportation still regarded as extremely hazardous."

<sup>9</sup> *Massachusetts Protective Ass'n v. Bayersdorfer*, 105 F.2d 595, 597 (6th Cir. 1939). See generally Annot., 17 A.L.R.2d 1041 (1951); 25 NOTRE DAME LAW. 695 (1949).

<sup>10</sup> *Paradies v. Travelers Ins. Co.*, 183 Misc. 887, 52 N.Y.S.2d 290 (N.Y. City Ct. 1944).

<sup>11</sup> See note 3 *supra*.

<sup>12</sup> 237 U.S. 1 (1914). See also *Leary v. United States*, 81 U.S. 607 (1872).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

*v. Glose*,<sup>15</sup> the court held that one who purchased a ticket for an airplane journey, during which he was killed when the plane crashed, was not a charterer of the aircraft but was a passenger.<sup>16</sup> The decision was based on the reservation of power or control of the flight in the owner and operator of the aircraft. While the definition of a "chartered aircraft" is still nebulous, it seems that the court considers one to have chartered an aircraft when possession and control passes to him. One who merely contracts for special charter transportation by way of an airplane is a passenger under a contract of affreightment.

The phrase "scheduled passenger service"<sup>17</sup> has not been litigated to any great extent although similar phrases have received attention by the courts. In *Weisman v. Guardian Life Ins. Co.*,<sup>18</sup> the court held that a "regularly scheduled route between definitely established airports" should convey to a man of ordinary understanding, applying the rules of common sense, the idea that normal air travel would be included in the policy coverage, but unusual hazards such as private flights or barnstorming tours would be excluded.<sup>19</sup> The Ohio supreme court has held that the phrase "regularly scheduled passenger flight" meant only those flights which were open to the public, were operated at definite intervals from one definitely established airport to another.<sup>20</sup> In *Little v. Globe Indem. Co.*,<sup>21</sup> an airline company, prior to the accident, had been awarded a route by the Civil Aeronautics Authority. Although it was not an established passenger route at the time of the accident, the court held that the phrase "a scheduled trip over an established passenger route" could be reasonably construed to fit the situation, saying "the insured was accidentally killed while a passenger in an aircraft owned and operated by a common carrier for passenger service, on a scheduled trip, over an established passenger route of such carrier, and thus the facts measure up to the language and establish liability."<sup>22</sup> In view of the preceding cases, it appears that the standards used by the courts in defining "scheduled passenger service" are (1) a normal air flight considered as such by an ordinary man,<sup>23</sup> (2) a flight between two definite points,<sup>24</sup> (3) a definite interval between flights,<sup>25</sup> and (4) a commercial type of air transportation.<sup>26</sup>

In the instant case, the court considered the exclusion clause to be ambiguous with reference to the parenthetical phrase "chartered aircraft," because of the two possible connotations of the word charter. The court found that the Association, by entering into an International Charter

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<sup>15</sup> 66 F.2d 710 (3d Cir.), *cert. denied*, 290 U.S. 696 (1933).

<sup>16</sup> *Ibid.*

<sup>17</sup> See note 3 *supra*.

<sup>18</sup> 67 N.Y.S.2d 604 (Sup. Ct. 1946), *aff'd without opinion*, 273 App. Div. 761, 75 N.Y.S.2d 653 (1947).

<sup>19</sup> *Ibid.*

<sup>20</sup> *McBride v. Prudential Life Ins. Co. of America*, 147 Ohio St. 461, 72 N.E.2d 98, 99 (1947).

<sup>21</sup> 13 Life Cas. 1048, 1049 (N.D. Ga. 1949).

<sup>22</sup> *Id.*

<sup>23</sup> See note 19 *supra* and accompanying text.

<sup>24</sup> See note 20 *supra* and accompanying text.

<sup>25</sup> *Ibid.*

<sup>26</sup> See note 22 *supra* and accompanying text.

Flight Agreement<sup>27</sup> with Air France, had merely contracted for charter air transportation. It appears that the court looked more to the substance of the contract between the Association and Air France than to the form.<sup>28</sup> The district court found in the phrase "chartered aircraft" a conflict between one taking command and possession of the aircraft and one who merely contracted for charter transportation (*i.e.*, a charter for a special service to be rendered by the owner of the aircraft or more specifically a contract of affreightment). This ambiguity in the wording of the exclusion clause was construed in favor of the insured in conformity with the universal rules of insurance and contract law.<sup>29</sup>

The phrase "scheduled passenger service" appears to be the more nebulous of the two phrases under consideration. This exact phrase was being litigated for the first time, so the court used the interpretations of similar phrases in construing it. Since the flights to and from Paris were flights Air France normally offered as scheduled flights to the public, the court said that the flight could reasonably be interpreted to be a "scheduled passenger service," and that the Association had merely preempted the public sale of tickets for the particular flight.

A question left unanswered and not dealt with by the court is the possibility of a crash between Atlanta and New York. Air France does not maintain scheduled flights between the two cities. In light of the court's rationale in construing "chartered aircraft" favorably for the insured, and in light of the reliance on *Little*<sup>30</sup> to define "scheduled passenger service," it is possible that recovery might have been allowed for a crash between Atlanta and New York. Public opinion of air travel is a strong factor enhancing this possibility. Because of the technological development of aircraft, air travel is at an all-time high as reflected by the number of passengers flying, as well as by the number of passenger air miles being flown.<sup>31</sup> A correlative feature of this seems to be the courts' liberal interpretation of aviation exclusion clauses.<sup>32</sup>

With the increase in air travel by commercial and charter flights, insurance companies must take cognizance of need for clearer and more specific statements concerning coverage and exclusions in their policies. The courts, on the other hand, must equitably and legally resolve the ambiguities in the policies when and if they appear. Since the principal case involves issues adjudicated for the first time, the decision might indicate the course of future holdings in the judicial construction of the phrases considered.

Patrick O. Waddel

<sup>27</sup> In outlining the respective contractual obligations between the parties, the term "charter" or "charterer" is used numerous times.

<sup>28</sup> *Rose v. Osborne*, 136 Me. 15, 1 A.2d 225, 226 (1938).

<sup>29</sup> See note 4 *supra* and accompanying text.

<sup>30</sup> 13 Life Cas. 1048 (N.D. Ga. 1949).

<sup>31</sup> 11-1 CAB Air Carrier Traffic Statistics 1 (Feb. 1964 - Jan. 1965). See also *The Wall Street Journal*, 24 Sept. 1965, p. 9, col. 3. The CAB recently intimated that the time may be at hand for permitting non-scheduled airlines to fly charter tours.

<sup>32</sup> *Quinones v. Life & Cas. Co.*, 209 La. 76, 24 So. 2d 270 (1945). See also Annot., 17 A.L.R.2d 1041 (1951).

## Torts — Admiralty Jurisdiction — Air Space Over the Sea

Libelants brought a suit in admiralty to recover damages for personal injuries allegedly sustained while one libelant was a passenger on respondent's aircraft during a flight over the high seas. Libelants alleged that the injuries were the direct result of respondent's negligence in failing to provide a reasonably safe passage. In a motion to dismiss, the respondent contended that the aircraft in which the accident occurred made no contact with the water and that, therefore, admiralty was not the proper forum for the action. *Held, motion denied*: The fact that the aircraft made no contact with the water is immaterial. Admiralty is the proper forum for tort injuries occurring in the air space above the high seas. *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874 (W.D. Pa. 1965).

Courts of the United States derive their admiralty jurisdiction from the Constitution, which provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime Jurisdiction."<sup>1</sup> Congress has given federal district courts original and exclusive jurisdiction in all civil admiralty and maritime cases.<sup>2</sup> It has been the function of the courts to determine the bounds and scope of the phrase "admiralty and maritime Jurisdiction." The weight of judicial authority is that the "locality test" is the basis of admiralty tort jurisdiction.<sup>3</sup> This test was originally announced in *The Plymouth* in 1865:

The [tort] jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas. . . . Every species of tort, however occurring . . . if upon the high seas or navigable waters, is of admiralty cognizance.<sup>4</sup>

Later courts questioned whether more than mere maritime locality was required to bring a tort action within the jurisdiction of the admiralty courts,<sup>5</sup> but in 1929 the Supreme Court reaffirmed the *Plymouth* doctrine.<sup>6</sup>

The locality test is also applied to determine admiralty jurisdiction under

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<sup>1</sup> U.S. CONST., art. III, § 2.

<sup>2</sup> 28 U.S.C. § 1333(1) (1964):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

<sup>3</sup> See Comment, 41 CORNELL L. Q. 243 (1958).

<sup>4</sup> 70 U.S. (3 Wall) 20, 36 (1865).

<sup>5</sup> *Atlantic Transp. Co. v. Imbroke*, 234 U.S. 52 (1914); *Campbell v. H. Hackfeld & Co.*, 125 Fed. 696 (9th Cir. 1903).

<sup>6</sup> *London Guar. & Acc. Co. v. Industrial Acc. Comm'n*, 279 U.S. 109 (1929). It seems to be still unsettled whether any tort whatever, occurring on navigable waters, is within the admiralty jurisdiction. Certainly the courts have used language broad enough. See generally GILMORE & BLACK, ADMIRALTY §§ 1-10 (1957 ed.).

the Death on the High Seas Act.<sup>7</sup> In *Noel v. Linea Aeropostal Venezolana*,<sup>8</sup> the plaintiff brought suit on the civil side of the district court, but claimed a right of action under the act since the decedent died in a crash in the Atlantic. The United States Court of Appeals for the Second Circuit held that the cause of action created by the act is cognizable only in admiralty, and dismissed.<sup>9</sup> Jurisdiction in admiralty was accepted by the United States Court of Appeals for the Ninth Circuit in *Tribey v. Transocean Airlines, Inc.*,<sup>10</sup> a suit under the act where plaintiff's decedent died in a crash in the Pacific Ocean.<sup>11</sup> In *Weinstein v. Eastern Air Lines, Inc.*,<sup>12</sup> a 1963 wrongful death action arising from a crash of an aircraft in the Boston Harbor, the United States Court of Appeals for the Third Circuit, accepting admiralty jurisdiction, said that "the weight of authority is clearly to the effect that locality alone determines whether or not a tort claim is within the admiralty jurisdiction."<sup>13</sup>

The jurisdiction of admiralty courts has been extended to fill a part of the legal vacuum created by travel into areas previously not within the jurisdiction of any particular court. Although the Death on the High Seas Act was passed to afford a uniform remedy for deaths occurring "on the high seas,"<sup>14</sup> deaths occurring in a submarine under the seas were held within its scope.<sup>15</sup> Also, in *Choy v. Pan American Co.*,<sup>16</sup> an action for recovery under the act for death as a result of a plane crash in the Atlantic Ocean, the question was raised as to whether death occurred in the air or on the sea after the crash. The district court stated that this was not a material issue because the act should apply vertically as well as horizontally, and that the expression "on the high seas is wholly and only geographic."<sup>17</sup> This suggested extension was accepted in *D'Aleman v. Pan American World Airways*<sup>18</sup> where the plaintiff's decedent had died after an allegedly negligent announcement that the plane would have to make an unsched-

<sup>7</sup> 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964):

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

<sup>8</sup> 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957).

<sup>9</sup> The court specifically refused to rule on the question of whether contact with the water was a necessary element of the locality test. *Id.* at 678.

<sup>10</sup> 255 F.2d 824 (9th Cir. 1958).

<sup>11</sup> The court did not make a finding as to whether death occurred on or above the high seas. *Id.* at 824.

<sup>12</sup> 316 F.2d 758 (3d Cir. 1963), noted J. AIR L. & COM. 372 (1963).

<sup>13</sup> *Id.* at 763. It should be noted, however, that in some admiralty cases the locality test is not the sole determining factor to which the court looks for its jurisdiction. In certain non-tortious cases, the court deals only with vessels, and airplanes have been generally held not to be vessels. See, e.g., *United States v. Cordova*, 89 F. Supp. 298 (1950); *Noakes v. Imperial Airways*, 29 F. Supp. 412 (1939). The Air Commerce Act of 1926, 44 Stat. 173 (now Federal Aviation Act of 1958, § 1109(a), 72 Stat. 799, 49 U.S.C. § 1509(a) (1964)) established this rule in connection with the navigation and shipping laws as applied to foreign commerce.

<sup>14</sup> The history of the act is treated extensively in *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 87-91 (W.D. Cal. 1954).

<sup>15</sup> *In re Ocean S.S. Co.*, 48 F.2d 333 (S.D.N.Y. 1930).

<sup>16</sup> 1941 Am. Mar. Cas. 483 (S.D.N.Y.).

<sup>17</sup> *Id.* at 484.

<sup>18</sup> 259 F.2d 493 (2d Cir. 1958).

uled stop. There was no contact with the sea. The Second Circuit held that Death on the High Seas Act granted a right of action in admiralty for such a death. The court reasoned:

The Act was designed to create a [uniform] cause of action in an area not theretofore under the jurisdiction of any court . . . . The statutory expression "on the high seas" should be capable of expansion to, under, or, over, as scientific advances change the methods of travel.<sup>19</sup>

Congress has further extended the jurisdiction of the admiralty courts to place any United States aircraft or aircraft owned by a United States citizen or corporation in flight over the high seas, within their jurisdiction for criminal actions.<sup>20</sup> Until the principal case, however, the question of which court had jurisdiction over a tort occurring over the high seas had not been decided.

The respondent in *Notarian* did not deny the validity of the locality test, but, relying upon *Noel*,<sup>21</sup> *Trihey*,<sup>22</sup> and *Weinstein*,<sup>23</sup> argued that contact with the water was a necessary prerequisite to its applicability. The district court disposed of these cases stating, "none of these cases hold that contact with the water is indispensable to an admiralty tort."<sup>24</sup> In support of its decision to extend admiralty jurisdiction to tortious injuries occurring over the high seas, the court analogized the common law doctrine of *cujus est solum ejus usque ad coelum*<sup>25</sup> to this extension, questioning "are we not logically compelled to adopt the perpendicular plane theory as a jurisdictional guide?"<sup>26</sup> Judge Rosenberg further relied on the *D'Aleman*<sup>27</sup> case, reasoning that if the Death on the High Seas Act could be extended to give a remedy in admiralty for death over the high seas, then the general constitutional admiralty jurisdiction should also be extended to afford a uniform remedy for tort injury occurring over the high seas.

The legal jurisdictional vacuum created by the advent of air travel has required either that new legislation be enacted or that the existing rules of jurisdiction be extended to this area. Logically, the same need for uniformity which prompted Congress and the courts to extend statutory admiralty jurisdiction to encompass criminal acts and tortious deaths occurring over the high seas was present in the principal case, particularly since there was a need to interpret common law tort rules rather than specific statutory language. The decision in *Notarian* is the logical result based on sound legal reasoning and should be an accepted precedent in admiralty law.

Allen C. Rudy, Jr.

<sup>19</sup> *Id.* at 495.

<sup>20</sup> 18 U.S.C. § 7(5) (1964).

<sup>21</sup> *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

<sup>22</sup> *Trihey v. Transocean Airlines, Inc.*, 255 F.2d 824 (9th Cir. 1958).

<sup>23</sup> *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963).

<sup>24</sup> *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874, 875 (W.D. Pa. 1965).

<sup>25</sup> This maxim may be paraphrased: He who owns the soil or surface of the ground owns, or has exclusive right to, everything which is upon or above it to an indefinite height.

<sup>26</sup> 244 F. Supp. at 876. This theory has been applied to torts committed by airplanes while in flight over land. See, e.g., *Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

<sup>27</sup> *D'Aleman v. Pan American World Airways*, 259 F.2d 493 (2d Cir. 1958).

## Warsaw Convention — Choice of Forum — Article 28

Plaintiff Eck, a resident of California, made arrangements for a trip to Europe and the Near East through the Scandinavian Airlines System (SAS) office in California. During the leg of the trip from Jerusalem, Israel, to Cairo, Egypt, a United Arab Airlines (UAA) passenger plane crashed in a sandstorm in Wadi Halfa, Sudan, Africa, and plaintiff suffered paralyzing injuries. Alleging negligence on the part of UAA, an air carrier domiciled in Egypt with its principal place of business in Cairo, plaintiff instituted suit in a New York state court. Since this was an international flight and both the United States and Egypt are signatories, the plaintiff chose to bring suit under the terms of the Warsaw Convention.<sup>1</sup> UAA was served at its only United States office—a ticket office in New York City.<sup>2</sup> Apparently no agency relationship existed between SAS and UAA. The defendant moved to dismiss on the ground that under Article 28(1), New York was not where UAA “has a place of business through which the contract has been made. . . .”<sup>3</sup> The motion was denied without opinion, and the defendant appealed to the Appellate Division which unanimously reversed.<sup>4</sup> The plaintiff filed an appeal in the New York Court of Appeals. *Held, remanded for trial*: The provisions of Article 28(1) do not require a literal interpretation. When a ticket for passage on a foreign carrier engaged in international flight has been purchased in the United States, the Warsaw Convention is satisfied if suit is brought in a State where the airline has an office, notwithstanding the office took no part in the processing of the ticket. *Eck v. United Arab Airlines, Inc.*, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1965).

<sup>1</sup> 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).

<sup>2</sup> This office took no part in the processing of claimant's ticket.

<sup>3</sup> Warsaw Convention, art. 28:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or *where he has a place of business through which the contract has been made*, or before the court at the place of destination. (Emphasis added.)
2. Questions of procedure shall be governed by the law of the court to which the case is submitted.

<sup>4</sup> *Eck v. United Arab Airlines, Inc.*, 20 App. Div. 2d 454, 247 N.Y.S.2d 820 (1964). The plaintiff in the meantime had instituted suit in the United States District Court for the Southern District of New York on 10 March 1964, apparently fearing the lapse of the statute of limitations of the Convention (art. 29), and possible reversal by the Appellate Division. The defendant again moved to dismiss on the same grounds asserted in the state court. The district court granted this motion, reasoning that since the UAA sales ticket office had not processed the ticket and SAS had not acted as agent, the Southern District of New York was not “where [the defendant] has a place of business through which the contract has been made.” *Eck v. United Arab Airlines, S.A.A.*, 247 F. Supp. 804 (S.D.N.Y. 1965). This case is presently on appeal to the United States Court of Appeals for the Second Circuit.

# I. WARSAW CONVENTION—INTENT OF DRAFTERS AND PROVISIONS OF ARTICLE 28(1)

The Warsaw Convention, a multilateral, legislative treaty,<sup>5</sup> was ratified in 1928 and was immediately recognized as an important legal advancement.<sup>6</sup> The Convention gives a claimant a cause of action for injuries sustained on an international flight<sup>7</sup> with liability being based upon the contract of carriage—either the ticket if a passenger suffers injury, or the air waybill if goods are partially or totally destroyed.<sup>8</sup> The drafters sought "to effect uniformity of procedures and remedies,"<sup>9</sup> thereby increasing the chances of an injured claimant's being able to recover damages.<sup>10</sup> One way they chose to effect uniformity was by limiting the places in which suit might be brought. Under Article 28(1) a carrier can only be sued at maximum in one of four national territories.<sup>11</sup> A plaintiff is

<sup>5</sup> This modern classification is contrasted with the older type of "treaty having the character of a contract." The primary distinction is that in the contractual type of treaty (*Vertrag*), the parties have separate interests such as the buyer and seller in a commercial contract. But the legislative treaty (*Vereinbarung*) is "the agreement which serves the purpose of identical aims." See McNAIR, *LAW OF TREATIES* 739-54 (1961). The Warsaw Convention would seem to fit in this latter category, since it is a treaty for "The Unification of Certain Rules Relating to International Transportation by Air" which is equally binding on all signatory nations.

<sup>6</sup> BILLYOU, *AIR LAW* 124 (2d ed. 1964).

<sup>7</sup> This presupposes that a locus of Article 28(1) is present in a signatory nation, since by international law a non-Warsaw country is not bound by the Convention terms. See McKENRY, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 219-21 (1963).

<sup>8</sup> This idea is reflected in the comments by Mr. Clarke, the British delegate to the 1928 Convention, concerning the deletion of the place of accident from the provisions of Article 28. He stated, in part:

[T]he first point to be brought out is that the place of accident has absolutely *no connection with the contract* or with the place to which the parties are considered to have given jurisdiction. Ordinarily contract law assigns jurisdiction to the place where the contract was made, but the place where the accident occurs may have absolutely no relation to the contract. Warsaw Convention Documents 77-79 (1928).

<sup>9</sup> Orr, *The Warsaw Convention*, 31 VA. L. REV. 423, 425-26 (1945).

<sup>10</sup> There are many reasons for inability to recover including an underdeveloped or primitive legal system in the locus of the accident or inability to obtain jurisdiction over a carrier due to variations in legal systems from country to country.

<sup>11</sup> See note 3 *supra*. K. N. Beaumont, speaking of proposed changes in Article 28(1) which should take into consideration, stated:

[I]n order to lessen the possibility of actions arising from the same accident being tried in several different States, it is desirable to *limit jurisdiction as much as possible*, while preserving to the claimant all reasonable latitude. (Emphasis added.)

Beaumont, *Warsaw Convention—Comparison of 1929 Text With Proposed Beaumont Revision (Draft of December 1946)*, 14 J. AIR L. & COM. 87, 106 (1947). This post-World War II view still recognized a need for the limitation of jurisdiction to aid the carrier. Thus, the original intent of the drafters has been accorded approval even to recent times. Of course a claimant can bring suit outside the Convention by suing in a non-signatory country. He would not, of course, be guaranteed the benefit of the Convention's favorable provisions. (The signatory nations are designated in the Convention as "High Contracting Parties.")

It is not the purpose of this note to discuss the controversy as to whether the provisions of Article 28(1) are "venue" or a concept resembling "jurisdiction over the subject matter." Compare *Mason v. British Overseas Airways Corp.*, 1961 U.S. & Can. Av. 617 (S.D.N.Y. 1956), treating Article 28(1) as relating to "venue," with *Nudo v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191 (E.D. Pa. 1962) and *Martino v. Trans World Airlines, Inc.*, 1961 U.S. & Can. Av. 651 (N.D. Ill. 1961), treating Article 28(1) as relating to "jurisdiction." In its full scope, the provision is probably neither, but the confusion arises as to when Article 28(1) is met and when Article 28(2), concerning local law, becomes applicable under a dual state and federal court system such as exists in the United States. Presumably, in considering *Eck*, the Second Circuit will continue to treat Article 28(1) as applicable only to national territories and not to "areas within a particular High Contracting Party." E.g., *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965). See also *Berner v. United Airlines*, 3 App. Div. 2d 9, 157 N.Y.S.2d 884 (1956); McKENRY, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963); Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 MCGILL L.J. 352 (1963).

also benefited by having four guaranteed locations where a court will have the power to hear the suit, assuming any or all of the four places are found within the territory of a signatory nation. The provisions of Article 28(1) seem to be terse, explicit statements completely free from ambiguity, with the possible exception of the provisions relating to "the domicile of the carrier."<sup>12</sup> This possible ambiguity has been the subject of much consideration.<sup>13</sup> Also, conflict has arisen in the past concerning the second provisions of Article 28(1)—the "carrier's principal place of business." In *Windsor v. United Airlines, Inc.*,<sup>14</sup> the court interpreted this provision to mean in effect "a principal place of business." However, five years later, another court emphatically denounced this interpretation, stating that there could be only one principal place of business.<sup>15</sup> Obviously, this latter interpretation gives effect to the literal meaning of Article 28(1). Although benefit accrues to both parties under the Convention's terms, the drafters apparently intended that the Convention primarily benefit the then infant airlines.<sup>16</sup>

The drafters further intended that the Warsaw Convention be systematically revised to reflect new developments and changes, recognizing that rarely can a treaty be drafted which will not become obsolete, and that recurring problems will generally result from an attempt to unify the laws of as many nations as the Convention encompasses. They manifested such intent by including revision clauses in the Convention.<sup>17</sup>

## II. THE INTERPRETATION OF TREATIES UNDER UNITED STATES LAW

Constitutional and substantive limitations are also applied by United States courts when treaty provisions and interpretations are involved in a suit. The United States Constitution gives treaty law the status of supreme law of the land.<sup>18</sup> A treaty has been defined as a bargain<sup>19</sup> which creates obligations based on the good faith of the parties.<sup>20</sup> To determine

<sup>12</sup> See note 3 *supra*.

<sup>13</sup> See GOEDHUIS, NATIONAL AIRLEGISLATION AND THE WARSAW CONVENTION 292, 293 (1937); Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. 1, 46 (1936).

<sup>14</sup> 153 F. Supp. 244 (E.D.N.Y. 1957).

<sup>15</sup> *Nudo v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne*, 207 F. Supp. 191, 192 (E.D. Pa. 1962).

<sup>16</sup> Kuhn, *The Warsaw Convention on International Transportation by Air*, 24 AM. J. INT'L L. 746, 748 (1930):

[the Warsaw Convention's] . . . provisions seem to some to be *unduly favorable to the carrier*; but when the insurance companies have a somewhat better basis for calculating their actuarial risks, insurance will be generally resorted to in protecting against losses. It is true, that the Convention is designed to encourage the extension of air transportation and its provisions *must* be viewed in that light. (Emphasis added.)

<sup>17</sup> See Article 39 (concerning denunciation of the Convention by a High Contracting Party), Article 40 (concerning denunciation in whole or in part, or changing the original scope of the Convention as applicable to a territory of a High Contracting Party), and Article 41 (concerning future conventions for the improvement of the treaty provisions). See also BILLYOU, *op. cit. supra* note 6, at 580-84.

<sup>18</sup> U.S. CONST. art. IV.

<sup>19</sup> Jay, *The Federalist Papers*, No. LXIV 421 (Modern Library ed.).

<sup>20</sup> Hamilton, *The Federalist*, No. LXXV 486 (Modern Library ed.). See also *Ware v. Hylton*, 1 U.S. (3 Dall.) 164, 181 (1796), for the United States Supreme Court's classic position toward treaties.

the exact nature of these obligations, it seems necessary to look to the intent of the parties. The courts give a treaty a reasonable and sensible interpretation<sup>21</sup> by examining the treaty as a whole,<sup>22</sup> and thereby give effects to the apparent intent and purposes of the parties to the treaty.<sup>23</sup> Courts recognize that they may not modify, alter, or amend a treaty,<sup>24</sup> but must enforce the treaty as written if the terms are clear and unambiguous,<sup>25</sup> regardless of the resultant inconvenience to the parties.<sup>26</sup> The courts must construe statutes as they find them and may not sit in review of the discretion of the legislature.<sup>27</sup> The same is true, by analogy, as to treaties.

### III. ECK v. UNITED AIR LINES, INC.

The New York Court of Appeals said that the Appellate Division erred in reaching "its conclusion by applying mechanically the *literal* translation of a phrase without analysis of the treaty."<sup>28</sup> The court felt that such a literal translation "might not have done violence to the over-all scheme and design of the Convention under existing conditions when the treaty was drafted,"<sup>29</sup> but that changes and advancements in booking passage on airlines since 1928 must be taken into consideration. The majority of the court felt that the Convention should be examined as a whole<sup>30</sup> and that "what is to be applied are . . . [the Convention's] principles if its purposes are to be observed presently as in the past."<sup>31</sup> The court reasoned that when UAA opened its New York office, it anticipated being amenable to suits in the United States as a result of having an office in this country even though the office had not processed or had any dealings with plaintiff's ticket.<sup>32</sup> The court considered that "chance circumstances of where the plaintiff made her purchase of the ticket within the territory of a high contracting party should not relieve the airline of the burden of litigation here. . . ."<sup>33</sup> Taking this liberal view, the court felt that under Article

<sup>21</sup> Collins v. O'Neil, 214 U.S. 113 (1909).

<sup>22</sup> United States *ex rel.* Cook v. Karnuth, 24 F.2d 649 (2d Cir. 1928), *rev'd on other grounds*, 279 U.S. 231 (1929).

<sup>23</sup> Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936); American Trust Co. v. Smyth, 247 F.2d 149 (9th Cir. 1957); Aerovias Interamericanas De Panama, S.A. v. Board of County Comm'rs, 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd on other grounds*, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963).

<sup>24</sup> Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

<sup>25</sup> See, e.g., Maximov v. United States, 373 U.S. 49 (1963); Hidalgo County Water Control & Imp. Dist. No. 7 v. Hedrick, 226 F.2d 1 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956); Savelis v. Vlachos, 137 F. Supp. 389 (E.D. Va. 1955), *aff'd*, 248 F.2d 729 (4th Cir. 1957).

<sup>26</sup> *In re Zalewski's Estate*, 177 Misc. 384, 30 N.Y.S.2d 658 (Surr. Ct. 1941).

<sup>27</sup> See, e.g., People v. Friedman, 302 N.Y. 75, 79, 96 N.E.2d 184, 185 (1950), *appeal dismissed*, 341 U.S. 907 (1951); Russo v. Valentine, 294 N.Y. 338, 62 N.E.2d 221 (1945); Lawrence Constr. Corp. v. State, 293 N.Y. 634, 639, 59 N.E.2d 630, 632 (1944).

<sup>28</sup> 15 N.Y.2d 53, 59, 255 N.Y.S.2d 249, 251, 203 N.E.2d 640, 641.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Id.* at 59, 255 N.Y.S.2d at 252, 203 N.E.2d at 642.

<sup>31</sup> *Id.* at 59, 255 N.Y.S.2d at 251, 203 N.E.2d at 641. (All italicized in original.)

<sup>32</sup> *Id.* at 58, 255 N.Y.S.2d at 250, 203 N.E.2d at 641. The Court also noted the fact that had the plaintiff purchased her ticket through the New York office, "the defendant would have to concede jurisdiction to our courts."

<sup>33</sup> *Id.* at 58, 255 N.Y.S.2d at 251, 203 N.E.2d at 641.

28(1), suit could properly be maintained in New York.<sup>34</sup>

It is important to note that the court placed no reliance on any finding of ambiguity in the third locus of Article 28(1). This would seem to be the correct view.<sup>35</sup> However, the court should have given effect to the intent of the drafters to provide for uniformity of procedures by limiting places where suit may be brought. In effect, the decision broadened and revised a provision intended to be restrictive. Such revision in a multi-lateral treaty should be done through protocol as provided in the Convention, and until the Convention is revised it should remain binding on the parties subject to the original limitations and purposes of the drafters.<sup>36</sup>

As has been noted, the loci of Article 28(1) are based on the contract between the carrier and a claimant.<sup>37</sup> The emphasis of the Convention is therefore on the personal relationship of the parties within the framework of their contract of carriage and not on liability of the carrier to passengers in general. UAA could not have anticipated being amenable to suit in the United States because its New York office in fact had no dealings whatsoever with the contract between Eck and UAA.<sup>38</sup> From a practical standpoint, the proceeds of the ticket sales of the New York office and those from sales to passengers like Eck will become a part of the same financial statements of the airline, and "sale" necessary to bring the tickets of Eck and like passengers within the bounds of the third locus might only be the mechanical stamping or recording of the ticket by a clerk in that office. However, the Convention made no provision for any deviation from the four loci enumerated in Article 28(1).<sup>39</sup>

Of course, if Article 28(1) had been given a literal interpretation, Eck would have been unable to bring suit in the United States. However illogical this may be from a pragmatic point of view, it may be justified by the intent and purposes sought to be achieved by the drafters of the Convention and also by the fact that another forum is generally available. In the words of Mr. Justice Cardozo (then the Chief Judge of the New York Court of Appeals) the court's function is

not of declaring justice between man and man, but of settling the law. The court exists, not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue.<sup>40</sup>

This idea is especially pertinent when one considers that in attempting to

<sup>34</sup> The dissent felt that such a liberal interpretation of Article 28(1) was not authorized by the Convention and apparently concluded that to come within Article 28(1), the sale must have been processed through the sole United States office of UAA. *Id.* at 63-64, 255 N.Y.S.2d at 255-56, 203 N.E.2d at 644-45.

<sup>35</sup> See notes 12-15 *supra* and accompanying text.

<sup>36</sup> See generally McNAIR, *LAW OF TREATIES* 739-54 (1961), especially at 747. See also note 17 *supra*.

<sup>37</sup> See note 8 *supra* and accompanying text.

<sup>38</sup> It is difficult to see how the question of anticipated amenability of a carrier can be a point of concern in a case such as *Eck*, since this fact can depend on varying local laws of the several High Contracting Parties. To consider this question would defeat the very purpose of the Convention—"uniformity of procedure and remedies." See notes 7-11 *supra* and accompanying text.

<sup>39</sup> McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 217 (1963).

<sup>40</sup> CARDOZO, *THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK* 11-12 (2d ed. 1909).

draft a treaty with the scope of the Warsaw Convention, the drafters must necessarily take a similar attitude to insure proper effectiveness of the terms of the treaty.

#### IV. CONCLUSION

It is submitted that Article 28(1) must be literally interpreted. This may be justified primarily on two grounds. First, the drafters intended that any inadequacies of the treaty should be revised and modified by the signatories, and the Convention itself includes provisions for such revision.<sup>41</sup> The fact that revision has not occurred with the intended frequency probably desired does not change the purpose and intent embodied within the original draft. Secondly, there is an advantage per se to the claimant under the Convention terms. That is, the claimant does have four guaranteed locations in which suit may be brought, notwithstanding that the Convention does not, by any means, guarantee that all of the provisions of Article 28(1) will be met in each suit.<sup>42</sup> Indeed, if none of the loci are met within a High Contracting Party, then a claimant will have no acceptable forum under the Convention. However, this is more than a claimant would be assured of if the Convention, even in its present form, were not in existence, and greatly overshadows any inconvenience to him. An interpretation other than a "mechanically literal" one destroys the intent and purpose of uniformity which the Convention drafters apparently sought to attain. One can see little difference in the interpretation given Article 28(1) by the New York Court of Appeals, and a deviation from the Convention by allowing suit at the place of accident when that country has a well developed system of law. This was clearly not the intention of the drafters.<sup>43</sup>

There should be a two-step approach to solving the problem raised in cases like *Eck*. First, if an agency arrangement can be determined between the issuing carrier and the claimant, then, according to one author,<sup>44</sup> the third locus of Article 28(1) would be met within the boundaries of the High Contracting Party where the ticket was sold.<sup>45</sup> Second, if there is no agency relationship, then the third locus must finally be ruled out, and the claimant must seek a forum under the remaining three.<sup>46</sup>

It is doubtful that all inconvenience in the Warsaw Convention can be eliminated by future modifications. It is hoped, however, that clarification of the provisions of Article 28 in relation to the dual court system in the United States will be made in order to eliminate much of the confusion which has developed.

Stephen F. Hefner

<sup>41</sup> See note 6 *supra*.

<sup>42</sup> See note 7 *supra*.

<sup>43</sup> See note 8 *supra*.

<sup>44</sup> McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 210-15 (1963).

<sup>45</sup> See *Eck v. United Arab Airlines, S.A.A.*, *supra* note 4, at 807, where the federal district judge found merely an *ad hoc* agency relationship existed between SAS and UAA, which if correct, does not bring the *Eck* case within this alternative.

<sup>46</sup> In *Eck*, Switzerland, the place of destination for the trip, and Egypt, the domicile and principal place of business of UAA, remain as choices of forum. The *Eck* court stated that it could find no venue based upon the agency theory as there was "no close relationship between the airlines offices." 241 F. Supp. at 807.

## Warsaw Convention — Article 25 — "Wilful Misconduct"

On 29 October 1953, a commercial airliner enroute from Sydney, Australia, to San Francisco, crashed into a California mountain leaving no survivors. There were no reports of aircraft malfunctioning and no evidence of any malfunctioning was found upon examination of the wreckage. Several times during the flight, the crew had received and acknowledged orders to remain 500 feet above the clouds until passing over the ILS outer marker.<sup>1</sup> The pilot did not pass over the ILS outer marker and the aircraft was under the prescribed altitude when it crashed. Plaintiff brought suit for wrongful death of one of the passengers. In an effort to avoid the damage limitation of the Warsaw Convention,<sup>2</sup> "wilful misconduct" by the carrier was alleged. After the jury returned a verdict for the defendant, the trial court directed judgment non obstante veredicto in favor of the plaintiff, holding the defendant guilty of "wilful misconduct" as a matter of law.<sup>3</sup> *Held, reversed*: The jury verdict was not against the weight of the evidence. The trial judge erred in charging that actual knowledge of the consequences is not a necessary element in finding "wilful misconduct" under the Warsaw Convention. *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

When the Warsaw Convention was enacted, the airline industry was in its infancy and the argument was made that it needed a great deal of protection and pampering to survive and grow. The Warsaw Conference formulated this protection, in part, through limitation on a carrier's liability for personal injuries to its passengers on international flights.<sup>4</sup> Article 25 provides for the removal of protection through limited liability where there is "wilful misconduct" or by such default on a carrier's part as is considered, in accordance with the law of the court to which the case is submitted, to be equivalent to "wilful misconduct."<sup>5</sup>

The Conference delegates adopted the French terms *dol* and *faute lourde* as descriptive of the requisite misconduct claimants must show in order to avoid the limited liability under Article 25.<sup>6</sup> After considerable dis-

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<sup>1</sup> The ILS outer marker situated on the shore of San Francisco Bay is the key to the Instrument Landing System (ILS) at San Francisco International Airport. The marker consists of two transmitters, one which covers a large area and another which radiates its signal over a very small, precise area.

<sup>2</sup> 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).

<sup>3</sup> *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 219 F. Supp. 289 (S.D.N.Y. 1963).

<sup>4</sup> Warsaw Convention, arts. 17, 20, 22. Article 17 imposes absolute liability upon the air carrier for all personal injuries regardless of fault while Article 22 provides a limit of 125,000 French gold francs or approximately \$8,300. Article 20 excuses this liability if the carrier proves that it has taken all necessary steps to avoid the damage, or that it was impossible for it to take them.

<sup>5</sup> Warsaw Convention, art. 25(1).

<sup>6</sup> *Ibid.* (official French version).

cussion as to the translation of these terms into English, one of the British delegates declared:

We have in our law the expression wilful misconduct. I believe that it comprehends all that you want to say: it includes not only acts wilfully performed, but also acts of carelessness with disregard of the consequences. . . . We have in order to translate those words into English the expression "wilful misconduct" which is well known and well defined in our law.<sup>7</sup>

This concept of "wilful misconduct" was accepted as the official English translation of *dol* and *faute lourde*.<sup>8</sup> It seems the British delegate to the conference was in error when he said the term "wilful misconduct" was well defined. In 1915, in *Norris v. Great Cent. Ry.*, an English court had defined "wilful misconduct" as:

misconduct to which the will is a party as contradistinguished from accident, and is far beyond any negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do a particular thing, and yet intentionally does it . . . regardless of the consequences.<sup>9</sup>

The court's interpretation included only acts willfully performed with knowledge of the consequences. On the other hand, the British delegate's interpretation covered not only acts willfully performed, but also acts of carelessness with disregard of the consequences. In 1953, an English court was again confronted with a problem of "wilful misconduct" but this time under the Warsaw Convention. The court followed the interpretation given by the British delegate at Warsaw by instructing that:

To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully or he is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be.<sup>10</sup>

This is a much broader definition than that stated in *Norris*. Indeed, the *Norris* definition is only the first of two alternative requisites found in the later case. Shawcross and Beaumont have concluded that English courts today interpret "wilful misconduct" under the Warsaw Convention as an intentional act or failure to act (1) where the person knows it is a breach of his duty under the circumstances, or (2) "knows he is likely to cause injury to third parties," or (3) "with reckless indifference does not know or care whether it is or is not a breach of his duty or is likely to cause damage."<sup>11</sup>

American cases manifest no consistent trend or pattern in the interpretation of "wilful misconduct" under the Warsaw Convention. In *Ameri-*

<sup>7</sup> The official minutes were recorded in French. For a translation of the British delegate's remarks, see GUERRERI, *AMERICAN JURISPRUDENCE ON THE WARSAW CONVENTION* 12 (1960). See also Guerreri, *Wilful Misconduct in the Warsaw Convention: A Stumbling Block?* 6 MCGILL L.J. 267 (1960).

<sup>8</sup> Warsaw Convention, art. 25.

<sup>9</sup> 85 L.J.K.B. (n.s.) 285 (1916).

<sup>10</sup> *Horabin v. British Overseas Airways Corp.*, [1952] 2 All E.R. 1016 (Q.B.).

<sup>11</sup> SHAWCROSS & BEAUMONT, *AIR LAW* 345 (2d ed. 1951).

*can Airlines, Inc. v. Ulen* the court approved a charge stating that it would be "wilful misconduct" if the act was intentional with knowledge that injury would likely result, "and likewise, if it was done with a wanton and reckless disregard of the consequences."<sup>12</sup> Such a charge, following the prevalent English interpretation, is the liberal definition. Later, a federal district court in New York gave a similarly liberal interpretation in a jury charge<sup>13</sup> and the Second Circuit seemed to adopt the *Ulen* view in *Pekelis v. Transcontinental & Western Air, Inc.*<sup>14</sup> However, that same year a jury in a New York state court refused to find "wilful misconduct" when instructed that under Article 25 it meant "a realization of the probability of injury from the conduct and a disregard of the probable consequences."<sup>15</sup> The same restrictive view was taken in *Froman v. Pan Am. Airways, Inc.*, where the court charged that "the actor must have intended the result that came about" or must have conducted himself "with knowledge of what the consequences would be and have gone ahead recklessly despite his knowledge of those conditions."<sup>16</sup> In 1955, one court retreated from the liberal definition applied in earlier cases and applied a strict definition similar to that in *Froman*.<sup>17</sup> Subsequently, the Second Circuit approved a charge in *Grey v. American Airlines*<sup>18</sup> encompassing a strict interpretation of "wilful misconduct" while affirming a judgment for the defendant carrier. More recently, the District of Columbia Circuit retained its liberal interpretation of "wilful misconduct" in its decision in *Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines Holland v. Tuller*.<sup>19</sup>

This less-than-uniform approach to defining "wilful misconduct" illustrates the problem raised by international agreements when the drafters seek to incorporate a legal term which may include different elements in the various legal systems. Notwithstanding that the term used is a recognized legal concept in American jurisdictions, the elements intended by the drafters should be controlling in suits arising under the Warsaw Convention. The British delegate to the Conference raised the term as a legal concept corresponding to the French concept of *dol*, and this was accepted by the delegates. It would appear, then, that his interpretation should be controlling. It is evident, therefore, that the drafters meant to include within the term not only acts done with knowledge of the consequences but also acts done in reckless disregard of the consequences. The requirement of knowledge is only necessary when showing acts performed within the former. Such a conclusion is reinforced when viewed in the light of the language drafted in The Hague Protocol. Article 25 of the Warsaw Convention was amended to read:

<sup>12</sup> 186 F.2d 529, 533 (D.C. Cir. 1949).

<sup>13</sup> *Ritts v. American Overseas Airlines*, 1949 U.S. Av. 65 (S.D.N.Y. 1949).

<sup>14</sup> 187 F.2d 122 (2d Cir. 1951).

<sup>15</sup> *Goepp v. American Overseas Airlines*, 1951 U.S. Av. 527 (N.Y. Sup. Ct. 1951), *judgment modified but court's charge approved*, 281 App. Div. 105, 117 N.Y.S.2d 276 (1952).

<sup>16</sup> 1953 U.S. & Can. Av. 1, 6 (N.Y. Sup. Ct. 1953).

<sup>17</sup> *Rashap v. American Airlines*, 1955 U.S. & Can. Av. 593 (S.D.N.Y. 1955).

<sup>18</sup> 227 F.2d 282 (2d Cir. 1955).

<sup>19</sup> 292 F.2d 775 (D.C. Cir. 1961).

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. . . .<sup>20</sup>

This amendment by a change in wording indicates a dissatisfaction with the language in the Warsaw Convention among the nations which drafted and signed The Hague Protocol. Apparently, this was due to a change in times and circumstances plus a desire to decrease the situations where a carrier may have unlimited liability. As a compromise, the maximum limited liability was doubled.<sup>21</sup> The Protocol restricts unlimited liability by replacing "wilful misconduct" with the requirement of knowledge as to both intentional damage and recklessness.

It is doubtful that a floodgate will be opened by the liberal interpretation of "wilful misconduct." In only a small number of the cases applying it has there been a finding of "wilful misconduct,"<sup>22</sup> because of the difficulty in proving "wilful misconduct" in serious mishaps by a preponderance of the evidence. Often there are no living witnesses to testify to the pilot's knowledge or actions. However, the number of decisions is not truly indicative as many cases have apparently been settled for amounts in excess of Warsaw limits because the airline felt there was a possibility of a finding of "wilful misconduct."<sup>23</sup>

In *Berner*, the court of appeals applied the strict interpretation of "wilful misconduct" to which it had returned in *Grey*. The trial judge had charged that "wilful misconduct" was the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences.<sup>24</sup> The judge had also charged that:

[T]he pilot's conduct would be in reckless disregard of the probable consequences . . . if the pilot intentionally did an act, or failed to do an act, which it was his duty to the passengers to do, knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of bodily harm to the passengers, but also involved a high degree of probability that substantial harm would result to the aircraft and the passengers by doing or failing to do that in question.<sup>25</sup>

Although the charge conformed with the principles expressed in the *Restatement of Torts*,<sup>26</sup> the court of appeals found error in its failure to require that knowledge must be coupled with recklessness. In so finding, the court said that the charge in *Ulen* conformed with its concept of "wilful misconduct" under the Warsaw Convention. However, *Ulen* required knowledge as only one of two alternative requisites. The *Berner*

<sup>20</sup> Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 Oct. 1929 (The Hague Protocol), art. XIII, ICAO Doc. 7686—LC/140 (1955), 1955 U.S. & Can. Av. 521-51.

<sup>21</sup> *Ibid.*

<sup>22</sup> See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965).

<sup>23</sup> *Id.* at 294.

<sup>24</sup> 219 F. Supp. at 360.

<sup>25</sup> *Ibid.*

<sup>26</sup> RESTATEMENT (SECOND), TORTS § 500 (1965).

court's approval of the *Ulen* charge seems irreconcilable with its statement that knowledge of the consequences must be found.

The trial court in *Berner* recognized the extreme difficulty of proving the pilot's knowledge of the consequences in a serious air disaster where there are no survivors to testify. It applied a legal concept whereby the injured party need not prove the pilot's subjective knowledge, but need only prove objective facts from which the jury may, by implication, find that the pilot should have realized the danger and, therefore, acted in reckless disregard of the consequences by intentionally performing the act. The decision was reversed because the jury verdict was not against the weight of the evidence, but the extensive treatment given by the court to the requirement of knowledge of the consequences indicates the prevailing view in the Second Circuit. That court will likely consider it reversible error for a trial court to not require knowledge of the probable consequences as a necessary requisite for a finding of "wilful misconduct" under the Warsaw Convention. The court's previous retreat from the liberal interpretation of "wilful misconduct" in *Pekelis* to the more restrictive interpretation in *Grey*<sup>27</sup> supports this conclusion. However, immediately prior to *Berner*, the court upheld a finding of "wilful misconduct" under the Warsaw Convention in *LeRoy v. Sabena Belgian World Airlines*<sup>28</sup> where the facts were similar to those in *Berner*.

In *LeRoy*, the pilot of the flight incorrectly reported his position, and on the basis of that report, the control tower authorized a descent. Since the position report was incorrect, the plane crashed into a mountain after making its descent to the prescribed altitude. The plaintiff contended that the pilot intentionally misled the control tower as to his position, and the jury found "wilful misconduct." The court did not discuss the requirement of knowledge, and its only reference to "wilful misconduct" was that:

The plaintiff does not contend that the plane was off course as a result of wilful misconduct. Rather, he contends that the Sabena crew deliberately misled the Rome controller as to their position and that the controller therefore authorized a descent which, though it would have been safe within the airway, was fatal over the mountainous country to the east, where the plane was then flying.<sup>29</sup>

A reasonable inference from this would be that if the pilot intentionally misled the controller, he would be guilty of "wilful misconduct." The pilot's intentional act of misleading in *LeRoy* would be analogous to the pilot's intentionally flying below a prescribed minimum altitude in *Berner*, and to be consistent, if the jury had found that the pilot intentionally flew below the prescribed altitude the court of appeals would have had to affirm a "wilful misconduct" verdict.

The United States has withdrawn its denunciation of the Warsaw Con-

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<sup>27</sup> 227 F.2d 282 (2d Cir. 1955).

<sup>28</sup> 344 F.2d 266 (2d Cir. 1965).

<sup>29</sup> *Id.* at 268.

vention<sup>30</sup> but newly-approved tariffs go far to mitigate the monetary limitations imposed by the Convention.<sup>31</sup> However, the problems involved in *Berner* remain in cases where an injured party wishes to sue for more than the \$75,000 allowed under the approved tariff arrangements. To avoid further problems with the *dol* and "wilful misconduct" provisions, the Warsaw Convention should be amended so that it explicitly sets out the elements necessary for unlimited liability.<sup>32</sup>

William C. Strock

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<sup>30</sup> The denunciation was withdrawn on 14 May 1966, one day prior to the effective date of the denunciation. See the official text of the withdrawal at page 248, *supra*. Concurrently, the Civil Aeronautics Board approved an agreement among United States and foreign air carriers concerning the liability of these carriers under the Warsaw Convention. Essentially, the carriers have foregone defenses they could have raised under the Convention, and have agreed to a maximum limitation of \$75,000 for provable damages. The effect of this is that the participating carriers accept the principle of absolute liability, *i.e.*, liability without fault by the airline. CAB Press Release 66-61, 13 May 1966. For events leading up to the 15 November 1965 denunciation, see Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965). See also Time, 29 Oct. 1965, p. 98; Dep't State Press Release No. 268, 15 Nov. 1965; N. Y. Times, 23 Oct. 1965, § 1, p. 30, col. 2 (city ed.).

<sup>31</sup> The tariff provisions discussed *supra* will not eliminate the possibility of suing for provable damages in excess of \$75,000, but the provisions of the Warsaw Convention will be applicable in such a suit.

<sup>32</sup> An example of a definite clause on removal of limited liability which might be acceptable to the United States may be found in The Hague Protocol, art. XIII, 1955 U.S. & Can. Av. 521, 540.

## RECENT DECISIONS

### TARIFFS—FEDERAL AVIATION ACT—DISCRIMINATION

The Flying Tiger Line, Inc., an air freight carrier, filed a complaint with the CAB challenging a Pan American World Airways tariff which set forth special low rates limited to military stores shipped abroad under United States Government bills of lading. The complaint contended that the tariff was an impermissible classification of a shipper rather than the familiar classification of a commodity and was, therefore, discriminatory and in violation of section 404(b)<sup>1</sup> and section 403(b)<sup>2</sup> of the Federal Aviation Act. The CAB dismissed the complaint and declined to initiate a formal investigation of whether the Pan American rates applicable to military transportation were unjustly discriminatory. *Held*: The Board did not abuse its discretion. The duty imposed on the Board to investigate complaints when there is a reasonable ground for doing so is only a duty to exercise its sound discretion, and the Board may dismiss even a legally sufficient complaint. *The Flying Tiger Line, Inc. v. CAB*, 350 F.2d 462 (D.C. Cir. 1965).

Petitioner asserted that Pan American's rates violated section 404(b) of the act because the limitation to Defense Department shipments unjustly discriminated against other shippers as a matter of law. In dismissing this assertion, the Board had relied chiefly on the theory that carriage of military property for the Government involves "circumstances and conditions" justifying special rates and that military goods shipped by the Government, and comparable goods shipped by private persons, could not be classified as "like traffic." The Court of Appeals found it unnecessary to rule on the Board's reasoning, but merely stated that illegality as a matter of law was not established by petitioner within the meaning of section 404(b). The section exists to protect shippers, not carriers, and petitioner failed to allege sufficient facts to show that the rates would cause some substantial injury to shippers. The absence of the Government from the list of persons in section 403(b) who may be afforded special rates did not improve the petitioner's position. The court felt that section 403(b) was concerned only with enforcement of currently effective tariffs and prevention of rebates, rather than being directed toward prevention of unjust discrimination.

J.E.B.

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<sup>1</sup> Federal Aviation Act of 1958, § 404(b), 72 Stat. 760, 49 U.S.C. § 1374(b) (1964), provides that no air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person in air transportation, or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage.

<sup>2</sup> Federal Aviation Act of 1958, § 403(b), 72 Stat. 759, as amended, 49 U.S.C. § 1373(b) (1964), prohibits the charging of greater or less or different rates for air transportation than the currently effective tariffs, excepting certain concessions allowable to specified persons and instances.

EVIDENCE — ADMISSIBILITY OF ACCIDENT REPORTS —  
SECTION 701(e)

Defendant, while landing, damaged his aircraft which was rented from Aviation Enterprises, Inc. At the trial, the plaintiff sought to introduce a photostatic copy of the defendant pilot's accident report to the Civil Aeronautics Board. The report tended to support plaintiff's theory of negligence, and the court asked to admit the document as an admission against interest. The defendant, called as an adverse witness, admitted that the photostatic copy of the report contained a photostatic copy of his signature, and that he had made and signed such a report. The document was not admitted into evidence because it was not "best evidence." *Held, reversed and remanded*: The best evidence rule is not applicable to a photostatic copy of the accident report when offered as an admission against the defendant who had admitted that his signature appeared thereon. *Aviation Enterprises, Inc. v. Cline*, 395 S.W.2d 306 (Mo. Ct. App. 1965).

The primary reason for admissibility was that the document was offered as an admission, and the best evidence rule was not applicable. The report was also admissible as being collateral to the issue of negligence. Though not raised in the trial court, the defendant contended on appeal that Section 701(e) of the Federal Aviation Act of 1958 excluded the use of the accident report.<sup>1</sup> The statute applies, however, only to matters of evaluation, opinion, and conclusion as to the causes of airplane crashes.<sup>2</sup> At least one federal court has held that the report of the pilot of a crashed aircraft is not excluded from evidence by section 701(e).<sup>3</sup> The points decided by the Missouri court have rarely arisen, but the holding appears to be in line with those in similar cases.

C.A.T.

WARSAW CONVENTION — ARTICLE 8 — VALIDITY OF  
DUAL PURPOSE WAYBILLS

Plaintiffs' bullion was lost during an air shipment from London to Zurich. The "air consignment note" (waybill) specifically limited liability of the carrier under the Warsaw Convention<sup>1</sup> to 250 French gold francs per kilogram unless there was a higher declared value by the shipper. Plaintiffs had not declared a higher valuation, but contended that the carrier was not entitled to the liability limitation because it had not complied

<sup>1</sup> Federal Aviation Act of 1958, § 701, 72 Stat. 781, as amended, 76 Stat. 921 (1962), 49 U.S.C. 1441 (1964):

(e) No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

<sup>2</sup> *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir. 1963).

<sup>3</sup> *Tansey v. TWA*, 97 F. Supp. 458 (D.D.C. 1949).

<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000, T.S. 876 (effective 29 Oct. 1934).

with Article 8 which requires that "the air consignment note shall contain . . . a statement that the carriage is subject to . . . this Convention." The language on the waybill was that "Carriage . . . is subject to . . . the [Warsaw Convention] . . . unless such carriage is not 'international carriage' as defined by the Convention." The lower court held that the dual purpose air carriage note was useful, and moreover, that the carriage was "international carriage" and the "unless" clause was not applicable. *Held, affirmed*: A dual purpose waybill is valid under the Warsaw Convention and the Carriage by Air Act, 1932.<sup>2</sup> *Samuel Montagu & Co. v. Swiss Air Transport Co.*, [1966] 1 All E.R. 814 (C.A.).

The important question decided by the English Court of Appeals in this case was one which affects shippers and carriers throughout the world. The "unless" clause, which allows waybills to be used in both international and domestic carriage, is part of an approved International Air Transport Association (IATA) form. The court pointed out that it would be impracticable to require an unequivocal statement that the carriage was international carriage subject to the Warsaw Convention. The English court noted that in *Seth v. BOAC*,<sup>3</sup> the United States court had upheld a clause identical to that in *Montagu*. Lord Justice Salmon stated that "I should be sorry to decide that the law in England is different; it would be fantastic if the success of an action on a contract of carriage depended on whether it was brought in the Courts of the United States or in the Courts of this country." He pointed out that it was desirable that both the form of waybills, and the interpretation of the validity of them should be consistent from country to country. This decision is undoubtedly correct and is, in addition, an excellent example of the desirability of uniform interpretation of the Warsaw Convention.

C.A.T.

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<sup>2</sup> Carriage by Air Act 1932, 22 & 23 Geo. 5, c. 36.

<sup>3</sup> *Seth v. BOAC*, 216 F. Supp. 244 (D. Mass.), *aff'd*, 329 F.2d 302 (3d Cir. 1964), *cert. denied*, 379 U.S. 858.