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Current Legislation and Decisions

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NOTES

CAB — Administrative Law — Official Notice

In 1965 the Civil Aeronautics Board (CAB) granted Northeast Airlines a temporary permit authorizing flights from New York to Florida for five years.[1] However, Northeast was unable to capture a substantial share of the total air traffic and as a result suffered tremendous losses. Subsequently, the Board refused Northeast's application for a permanent certificate. Upon review, the First Circuit Court of Appeals remanded the case for a more explicit statement.[2] The Board affirmed its original decision, concluding that the old record, corroborated by more recent evidence, did not warrant a reopening of the case. Northeast petitioned for review of the Board's affirmation and for an order directing the Board to consider further evidence. *Held, remanded:* When the Board elected to look at matters outside the record, it necessarily had to give Northeast the opportunity to rebut not only those matters considered, but also any inferences which were sought to be drawn therefrom.[3] Due process could permit no less.[4] *Northeast Airlines, Inc. v. CAB,* 345 F.2d 484 (1st Cir.), *cert. denied,* 382 U.S. 845 (1965). Subsequently, on 26 April 1965 the Board revoked its two preceding decisions, stating that it wished to "reopen the proceeding for a complete review of the issues." Accordingly, it requested the court to remand for that purpose, and on 11 May 1965 the court remanded the case to the Board and relinquished its jurisdiction.[5]

The increase in importance of administrative agencies has been brought about as Congress and the state legislatures have found themselves lacking in both time and expertise to prescribe all the detailed rules and regulations necessary to deal effectively with the complex and highly technical fields of the "jet age." Legislatures have resorted to the enactment of

[1] New York-Florida Case, 24 C.A.B. 94 (1956).

[2] Northeast Airlines, Inc. v. CAB, 331 F.2d 579 (1st Cir. 1964).

[3] The court relied on Section 7(d) of the Administrative Procedure Act, 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1964), which states:

> The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision. . . . Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

[4] The court was remanding the Board's affirmation of its original decision on Northeast's application for a permanent certificate. After reviewing the Board's original order, the First Circuit found that the reasons given by the Board for denying renewal of Northeast's permit were either irrelevant or inadequately developed and remanded for further study. On 1 December 1964, the Board affirmed its original decision, again denying Northeast's application.

[5] Northeast Airlines, Inc. v. CAB, 345 F.2d 488 (1st Cir.), *cert. denied,* 382 U.S. 845 (1965).

broad general statutes which state the overall objectives intended by the legislature, the methods by which these objectives are to be achieved, and certain standards to serve as guides for the exercise of the powers given to the agencies. It is left to the agencies themselves to promulgate the various detailed policies and rules by which it carries out the legislative purpose. The power to investigate any matter within an agency's jurisdiction is usually conferred by statute. The agencies have used various investigatory procedures such as subpoenas,[6] examination of books and records,[7] inspection of premises,[8] and requirement of reports.[9] The courts will uphold the use of these means if (1) the investigation was authorized by the agency's statute, (2) Congress or the state legislature had the power to authorize the investigation, (3) the information sought was relevant, and (4) the scope of the investigating powers was not too broad.[10]

Another procedure for obtaining information used in making agency decisions is official notice. An agency can take official notice not only of factors which are of common knowledge and notoriety, but also of any factual matter of a general nature which its experience has shown to be true.[11] However, official notice has no effect other than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence.[12] This practice is allowed because it facilitates administrative proceedings. For example, in *Railroad Comm'n v. McDonald*[13] the court stated that where the issuance of a license to operate a common or contract carrier depends on whether public convenience requires service between two cities, the Commission should be able to rely on conclusions reached in a recent hearing on a similar application concerning the same route. The Commission should not be required to put into the record again all the facts it had learned a few weeks before.[14] However, the courts have placed various limitations on the exercise of this power. When an agency proposes to take official notice of certain facts, adequate notice to all parties is required,[15] and the parties must be given a chance to rebut or explain any fact or inference derived therefrom.[16] A failure to comply with these two requirements constitutes a denial of due process. In *ICC v. Louisville & N.R.R.*,[17] the Court stated that all parties should be fully appraised of any evidence outside the record which the Commission chose to utilize in making its decision. The parties, in defense of their positions, should be

[6] Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir. 1940).
[7] FTC v. National Biscuit Co., 18 F. Supp. 667 (S.D.N.Y. 1937).
[8] Farmer's Elevator Co. v. Chicago, R.I. & Pac. Ry., 226 Ill. 567, 107 N.E. 841 (1915).
[9] United States v. Morton Salt Co., 338 U.S. 632 (1950).
[10] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).
[11] Cooper, *Official Notice by Administrative Agencies as Substitute for Evidence*, 29 Mich. S.B.J. No. 1, p. 25 (1950). Examples of the expansion of official notice of a wide variety of facts deemed readily susceptible to objective ascertainment are: the height of the tallest man in history; that dynamic radio completely superseded the magnetic; that pneumatic tires were more damaging to highways than hard rubber tires. See Comment, 36 Mich. L. Rev. 610 (1938).
[12] Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937).
[13] 90 S.W.2d 581 (Tex. Civ. App. 1936).
[14] Railroad Comm'n v. McDonald, 90 S.W.2d 581 (Tex. Civ. App. 1936); Pennsylvania R.R. v. United States, 40 F.2d 921 (W.D. Pa. 1930).
[15] United States v. Abilene & So. Ry., 265 U.S. 274 (1924).
[16] West Ohio Gas Co. v. Public Util. Comm'n, 42 F.2d 899 (N.D. Ohio 1928).
[17] 227 U.S. 88 (1913).

given the opportunity to cross-examine the witnesses, to inspect any documents relied upon, and to offer evidence in explanation or rebuttal of the evidence officially noticed. In one case, Mr. Justice Cordozo stated that to deny these rights to the parties would constitute "a condemnation without trial."[18]

A further objectionable feature of official notice is that a court on review may be left without any basis for determining the evidence upon which the agency reached its decision. Mr. Justice Cordozo said in *West Ohio Gas Co. v. Public Util. Comm'n*[19] that for judicial review of the administrative agency's decision to be of any consequence, "the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the commission had drawn upon undisclosed sources of information, unavailable to others."[20]

In the initial *Northeast* decision[21] the CAB, considering Northeast's application for a permanent certificate, concluded that "the unsuccessful nature of Northeast's operations to date, the lack of any substantial evidence that it will become successful in the future, the failure of the expected East Coast-Florida traffic growth to materialize, the fact that Eastern and National can meet the present needs of the market . . . persuades us that the public convenience and necessity do not require the present authorization of a third New York-Florida carrier . . . ."[22] Upon review, the court held that the reasons given by the Board for denial of Northeast Airlines' request were either irrelevant or inadequately developed. The case was remanded for "further study" and a more explicit statement of its initial decision. The Board, on remand, after receiving various briefs from the parties but without reopening the evidence, rendered a new and what it termed "complete recast" of its initial decision. The Board found that the existing record was a sufficient basis for its decision. However, the Board stated that before reaching a final conclusion on the matter, it had deemed it appropriate to look to "more recent operating results and traffic statistics in order to determine whether a different result was required or, at least, whether the proceeding should be reopened for further explanation on the question of Northeast's prospects for economic operations."[23] The Board concluded that this new evidence was used solely to substantiate its initial decision and was not sufficient to warrant a reopening or reversal of its prior decision. It relied on *Market St. Ry. v. Railroad Comm'n*[24] in which the Supreme Court held that there was no denial of a fair hearing when the agency "in making its predictive findings went out-

[18] Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 300 (1937).
[19] 294 U.S. 63 (1935).
[20] *Id.* at 69.
[21] 331 F.2d 579 (1st Cir. 1964).
[22] New York-Florida Renewal Case, CAB Docket No. 12285, CAB Order No. E-19910 (15 Aug. 1963), *affirmed on reconsideration,* CAB Order No. E-20073 (8 Oct. 1963).
[23] New York-Florida Renewal Case, CAB Docket No. 12285, CAB Order No. E-21550 (1 Dec. 1964).
[24] 324 U.S. 548 (1945).

side the record to verify its judgment by reference to actual traffic figures that became available only after the hearings closed."[25] The primary assertion in Northeast's petition for review was that the Board, in considering further evidentiary matters on which it based its decision, chose some factors and disregarded others and afforded Northeast no opportunity to rebut or explain the matters introduced. Northeast relied upon Section 7(d) of the Administrative Procedure Act[26] and certain new evidence which it wished to present before the court to rebut the adverse conclusions which the Board had made.[27] The First Circuit declared that section 7(d) did not require a hearing "to decide whether a hearing is warranted,"[28] for this was within the Board's discretion, and it could choose to look outside the record in making its determination.[29] However, once the Board decided to go outside the record, "it could not pick and choose, at least to the extent of denying an objecting party the rights guaranteed, but by no means created, by section 7(d) to rebut not only those matters it looked to, but also the inferences which were sought to be drawn therefrom."[30] The court distinguished *Market St. Ry.*[31] from the instant case because in that case no prejudice was shown to have resulted from the Railroad Commission's official notice of certain reports that it had compiled.[32] Having decided that the Board violated due process of law by not affording Northeast the opportunity to rebut or explain the evidence officially noticed, the court remanded the case for further proceedings consistent with its opinion.[33] After this decision came down, the Board entered a new order revoking all its outstanding decisions, both with respect to Northeast and in regard to whether there should be three permanently certified carriers on the New York-Florida route. The Board then requested the First Circuit to relinquish jurisdiction and to remand so that "a complete review of the issues . . . in the light of the most recent data"[34] could be commenced.[35] The court, granting the Board's request, reasoned that the pendency of a petition for judicial review of an administrative order does not preclude an agency from taking further action with respect to the matter under review, including reopening of the proceedings. More-

[25] *Accord,* Braniff Airways, Inc. v. CAB, 277 F.2d 334 (D.C. Cir. 1960).

[26] 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1964).

[27] In general this consisted of more recent traffic figures, expert testimony, and testimony concerning the effect of the renewal proceedings on Northeast's air traffic in 1963 and 1964. Northeast Airlines, Inc. v. CAB, 345 F.2d 484, 486 (1st Cir.), *cert. denied,* 382 U.S. 845 (1965).

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] 324 U.S. 548 (1945).

[32] The court stated: "Due process, of course, requires that commissions proceed upon matters in evidence to the test of cross-examination and rebuttal. But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of the parties." *Id.* at 562.

[33] At this time both Eastern Airlines and National Airlines filed motions to intervene on the ground that the court was without the power to remand the case for further action. These motions were denied. It was the court's position that so long as these carriers were precisely aligned with the Board, formal intervention was inappropriate. National Airlines, Inc. v. Northeast Airlines, Inc., Civil No. 63693, S.D. Fla., 10 Jan. 1964.

[34] Northeast Airlines, Inc. v. CAB, 345 F.2d 488, 489 (1st Cir.), *cert. denied,* 382 U.S. 845 (1965).

[35] See Anchor Line Ltd. v. FMC, 299 F.2d 124 (D.C. Cir. 1962).

over, when an agency seeks to take such action, it should move for appropriate disposition of the review proceedings pending the further action.[36] In considering the Board's request that it relinquish its jurisdiction, the court declared that it was not the court's function to supervise the manner in which the Board conducts its proceedings. The retention of jurisdiction upon the original remand was distinguished because at that time the order to remand was for the purpose of enforcing Northeast's rights under section 7(d). The court found that after the second remand, neither the necessity nor the rationale for retaining jurisdiction was present.[37]

Considering *Northeast Airlines, Inc. v. CAB*[38] in light of previous Supreme Court decisions, the question arises as to when an administrative agency may properly go beyond the record for a material fact. Two factors are deemed relevant in deciding this question: (1) the procedural fairness to be afforded the parties, and (2) the need for free use of all agency expertise. Agencies have used the device of official notice as an expedient for drawing upon this expertise. The prime purpose for allowing an agency to officially notice certain material facts is to give the agency the advantage of all pertinent available information as a basis upon which to make its decision. When an administrative agency officially notices established propositions of law, or its own previous decisions, or makes determinations on questions of law or policy, these material facts need not be incorporated into the record. The agency should have absolute discretion in determining whether fairness requires notification of the parties when this evidence is officially noticed. These are facts of a legislative nature and do not go directly to the center of the controversy; they are "legislative facts." However, when an agency takes official notice of facts which pertain directly to the parties and are, thus, vital to the controversy, certain limitations must be invoked. The agency must advise the parties of these assumed facts and give them an opportunity to rebut or explain this evidence or inferences derived therefrom, for these are "adjudicatory facts." It is only through these limitations that procedural fairness can be properly balanced with the agency's use of official notice.

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[36] In each of the following unreported cases the Board vacated its orders under review by the courts and then applied to the reviewing court for appropriate disposition of the review proceedings: National Airlines v. CAB, Civil No. 11383, D.C. Cir., 30 July 1952; Aaxico Airlines v. CAB, Civil No. 18055, D.C. Cir., 17 Dec. 1963; National Motor Freight Traffic Ass'n v. CAB, Civil No. 19188, D.C. Cir., 14 April 1965.

[37] See note 33 *supra*. The court held that where the Board revoked its decisions, both with respect to Northeast and as to whether the market would support three permanently certified carriers on the New York-Florida route, and requested the court to remand for complete review of issues in the light of the most recent data, alignment terminated and other carriers were accordingly permitted to respond to the Board's request. Eastern, feeling that its position was being jeopardized by the CAB's reopening of the case, petitioned for writ of certiorari to the United States Supreme Court and sought to enjoin the Board by court order from further proceedings until this writ could be considered. The court of appeals refused to grant an injunction, stating that Eastern would have to apply first to the Board and next to the Supreme Court (or a Justice thereof) in order to obtain a stay. The court stated that it should be left to the Board's discretion to decide whether the public interest warrants further delay in these proceedings. The Supreme Court denied certiorari. Eastern Airlines v. Northeast Airlines, 382 U.S. 845 (1965).

[38] 345 F.2d 488 (1st Cir.), *cert. denied*, 382 U.S. 845 (1965).

Flight Insurance — Policy Interpretation — Extent of Coverage

Salvatore Messina, a civilian employee of the Department of the Army, purchased flight insurance before embarking upon a trip from Tachikawa Air Force Base, Japan, to Washington, D.C., pursuant to government travel orders. The policy provided coverage for "loss of life, limb or sight and other specified losses resulting from accidental bodily injuries received while a passenger on scheduled airlines and other specified conveyances or while on the premises of an airport to the extent herein provided."[1] Another clause further enumerated the flights which were specifically covered. This provision indicated that in addition to flights of scheduled airlines, the only other flights covered were those which were "by, or contracted for by, the Military Air Transport Service [MATS] of the United States."[2] After purchasing the policy, Messina was transported from Tachikawa to Travis Air Force Base, California, by a commercial airliner arranged and paid for by MATS. Upon arrival at Travis, Messina obtained a travel authorization from the United States Transportation Officer for a one-way flight from the International Airport at San Francisco to Washington, D.C., via United Air Lines. Using his own funds, Messina then purchased a ticket from Travis Transportation Company for an air taxi flight from Travis to San Francisco International, a distance of sixty-seven miles. The air taxi company was a nonscheduled airline whose authority to use base facilities derived from a "Revocable Permit" issued by the military commander of Travis Air Force Base. The air taxi crashed and Messina was killed. The district court concluded that ambiguities[3] in the policy could have produced Messina's reasonable belief

[1] A reproduction of the policy appears in Mutual Benefit Health & Acc. Ass'n v. Messina, 350 F.2d 458, 460 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

[2] *Ibid.*

[3] Messina v. Mutual Benefit Health & Acc. Ass'n, 228 F. Supp. 865 (D.D.C. 1964), *aff'd per curiam*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966). The court found two types of ambiguities:

(1) Ambiguity of language:
   (a) The provision superimposed upon the text of the policy limiting coverage to scheduled airlines was difficult to read.
   (b) There was a conflict between the provision limiting coverage to scheduled flights and the provision extending coverage to all MATS flights whether scheduled or not.
   (c) The ordinary reader would be unlikely to distinguish between the technical terms "scheduled" and "nonscheduled."
   (d) The point of departure and the destination were listed in a "Schedule" in the policy and references in the policy to the "Schedule" would have led the ordinary person in Messina's position to believe that the entire trip was covered.
   (e) There was no provision in the policy expressly excluding *intermediate air taxi flights* from coverage. (And even if there had been such a provision, it too would have been ambiguous in view of the other ambiguities.)

(2) Ambiguity of situation produced by the fact that the policy was physically designed for mailing. Having mailed the policy to his wife, Messina could not con-

that the policy did not exclude nonscheduled air taxi flights, and judgment was accordingly entered for the plaintiff. In addition, the court found that Messina could have reasonably relied on the "Revocable Permit" issued to Travis Transportation Company by the base commander as being a contract between the transportation company and MATS because the base commander was an officer in MATS. Consequently, the fatal flight was covered by the specific clause covering flights contracted for by MATS. Defendant, Mutual Benefit Health and Accident Association, appealed. *Held: Aff'd, per curiam. Mutual Benefit Health & Acc. Ass'n v. Messina,* 350 F.2d 458 (D.C. Cir. 1965).

In construing flight insurance policies the courts have utilized the general rules of contract law with appropriate modifications.[4] The words of the policy are to be interpreted "according to their plain, ordinary, and accepted sense in the common speech of men, unless it affirmatively appears from the policy that a different meaning was intended."[5] The court in the instant case gave much weight to the principle that ambiguities should be construed against the drafter of the instrument.[6] The principle of liberal construction in favor of the insured must be confined, however, to the terms which are ambiguous, and the principle is not to be extended to provisions which are, taken by themselves, clear and unequivocal.[7] In determining whether a particular passage is ambiguous, the courts have stated that words of a policy do not become ambiguous simply because there is a dispute as to their meaning, even though the construction of the words becomes a subject matter of litigation.[8] However, once the court concludes that a particular passage is ambiguous, the insurer cannot escape liability merely because the insurer's interpretation appears to be a more likely interpretation of the intent of the parties than the interpretation asserted by the beneficiary. In order to recover, the beneficiary must merely show that his interpretation is one which is itself not unreasonable.[9]

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sult it during his trip to determine the scope of coverage. Although there was no evidence to that effect, the court ruled that insurer had not given Messina a duplicate to be used for reference purposes. The facts were exclusively within insurer's knowledge, and the insurer did not prove that it had provided a duplicate.

[4] See generally 44 C.J.S. *Insurance* §§ 289-336 (1945); Annot., 17 A.L.R.2d 1041 (1951), supplementing Annot., 155 A.L.R. 1026 (1945) dealing with construction and application of aviation risk exclusion clauses in life and accident policies.

[5] New York Life Ins. Co. v. Atkinson, 241 F.2d 674, 676 (10th Cir. 1957); 44 C.J.S. *Insurance* § 296 (1945).

[6] 44 C.J.S. *Insurance* § 297 (1945); 29 AM. JUR. *Insurance* § 258 (1960).

[7] 29 AM. JUR. *Insurance* § 260 (1960); 44 C.J.S. *Insurance* § 297(c) (1945):

> The rule of strict construction against insurer does not mean that every doubt must be resolved against insurer, and does not prevent or interfere with the parties' manifest object and intent, as expressed in the plain and ordinary language of the contract. The rule cannot be availed of under the guise of construction, to import a nonexistent ambiguity or doubt into the policy or contract in order to resolve it against the insurer. Accordingly, notwithstanding the rule of strict construction against the insured . . . the court cannot . . . disregard the plain meaning and intent of the language employed, or pervert it or exercise inventive powers with respect thereto, or give a strained, refined, or unnatural interpretation to the language, beyond its plain and ordinary meaning, and thereby make a new contract. . . .

[8] Thomas v. Continental Cas. Co., 225 F.2d 798, 801 (10th Cir. 1955).

[9] *Id.* at 801; Continental Cas. Co. v. Warren, 152 Tex. 164, 254 S.W.2d 762, 763 (1953).

The courts have been rather strict in the interpretation of clear and explicit words in an insurance policy in most instances[10] and have refused to allow the rule of liberal construction in favor of the insured to become an authorization to deny the right of the insurer to effectually limit the scope of coverage—even where ambiguous words were present.[11] However, there has been a departure from a strict construction in cases in which the intent of the parties or the nature of their relationship required a more liberal construction.[12] In two such cases the courts refused to give effect to express limitations of policy coverage because the circumstances surrounding the relationship between insurer and insured made the entire policy ambiguous. In both cases the insured purchased the flight insurance from vending machines located at the airport. In the first of these cases, *Lachs v. Fidelity & Cas. Co.*,[13] a small placard on the vending machine expressly limited coverage to "any scheduled airline." The policy itself contained a similar limitation. Despite these explicit provisions, the court refused to give any effect to the insurer's patent attempt to limit the scope of coverage because an ambiguity of situation had been produced by the fact that the vending machine was situated near the ticket counter of the nonscheduled airline from which the insured bought her ticket.

In the second vending machine case,[14] the court held that a nonscheduled air taxi flight was covered by a policy purchased from a vending machine even though the top portion of the policy explicitly limited coverage to scheduled air carriers. The nature of the relationship between insured and insurer created "special and unique circumstances" which formed the basis of the court's decision: (1) the insured could not consult with the insurer to determine the scope of coverage before he purchased the policy, (2)

[10] Thompson v. Fidelity & Cas. Co., 16 Ill. App. 2d 159, 148 N.E.2d 9, *cert. denied*, 358 U.S. 837 (1958). The insured was killed as the result of the crash of an irregular air carrier maintaining no schedule of flights between designated points. His death was not covered by a policy insuring the life of a passenger killed while on an aircraft operated by a "scheduled air carrier." "The rule of liberal construction of insurance policies in favor of the insured must yield to rules of reasonable construction, and the rule construing ambiguous provisions against the insurer will not permit perversion of the plain language to create an ambiguity where none in fact exists." *Id.* at 13. In Thomas v. Continental Cas. Co., 225 F.2d 798 (10th Cir. 1955), the beneficiary of an airtrip policy was not permitted to recover where the insured, who had departed for San Salvador on a round-trip ticket with an open-end return, died in San Salvador while he was a passenger on a private aircraft which collided in flight with a regularly scheduled commercial carrier.

[11] In New York Life Ins. Co. v. Atkinson, 241 F.2d 674 (10th Cir. 1957), the court ruled that the word "crew" was ambiguous; however, the court refused to adopt the interpretation suggested by the plaintiff. It held that the geologist whose employment required that he run a scintillometer (an attachment to a telescope by which the image of a star is made to revolve to measure the intensity of light emitted by the star) on an airplane was not a member of the crew of the airplane because he had nothing to do with its operation.

[12] Fidelity & Cas. Co. v. Smith, 189 F.2d 315 (10th Cir. 1951). The court was confronted with an insurance policy which provided for coverage of a substitute flight *if* the insured exchanged the ticket originally purchased for another one covering all or any portion of the trip specified in the original ticket. After obtaining the insurance policy, the insured purchased a ticket covering substantially the same route as the ticket originally purchased, but he did not "exchange" tickets. In deciding for the plaintiff, the court held that a basic purpose of the policy was to give coverage for a substitute flight and that, consequently, the provision requiring exchange of the tickets should not be given effect. The court, in effect, rewrote the express language of the policy in order to effectuate an intent, as inferred by the court, to provide coverage for all substitute flights. This case is noted in 36 MARQ. L. REV. 109 (1952), and in Annot., 25 A.L.R.2d 1029 (1952).

[13] 306 N.Y. 357, 118 N.E.2d 555 (1954).

[14] Steven v. Fidelity & Cas. Co., 27 Cal. 172, 38 Cal. App. 2d 862, 377 P.2d 284 (1963).

the words in the policy limiting its coverage to scheduled flights were apparently excluded from his view before purchase, and (3) a proviso in the policy instructed insured to mail the policy to his beneficiary. Consequently, the insured must have been unaware of any limitation of policy coverage before he bought the policy, and there was no opportunity for him to consult the policy while he was en route since he had already mailed the policy home.[15] The court ruled for the plaintiff, then, on the ground that an ambiguity of circumstance had deprived the insured of effective notice that a substitute flight, *i.e.*, a nonscheduled air taxi flight, might not come within the terms of the policy.

The instant case is apparently distinguishable on the facts from all previous cases dealing with policies of flight insurance. In fact, the court stated that "differences between the language of the insurance policy in the present case and policies in other cases, cited by both plaintiff and defendant, make the other cases not persuasive on the issues presented in the present case."[16] Even more important, there is a clear distinction between the vending machine cases and the instant case in the nature of the relationship between insurer and insured. Whereas in the vending machine cases the insured was faced with a take-it-or-leave-it situation in which he may very well not have been able to determine the scope of coverage before purchase, the insured in the instant case could have read the policy and discussed its coverage with the insurance company's agent before he bought the policy. Thus, no strict analogies can be drawn between previously decided cases and the instant case. The sole relevance of these prior cases lies in delineating the manner in which air flight insurance policies have been analyzed and in formulating the principles upon which the courts have relied.

In the instant case the court reached the conclusion that the flight in question was covered on the basis of two theories: (1) in view of the fact that the policy was ambiguous,[17] the air taxi flight was covered because there was no specific clause expressly excluding air taxi flights from coverage, and (2) the fatal flight was one which was contracted for by MATS, and the policy explicitly provided for coverage of such flights. Moreover, even if the flight was not "contracted for by MATS," the plaintiff could have reasonably relied on the so-called "Revocable Permit" issued by the base commander, an officer in MATS, as being such a contract. The ambiguities deemed present by the court came from a supposed conflict in the policy language and from the fact that the policy was physically designed for mailing so that the insured could not refer to the policy during the trip to refresh his memory as to the scope of coverage unless a duplicate had been furnished by the insurer.[18]

[15] *Id.* at 298.

[16] Messina v. Mutual Benefit Health & Acc. Ass'n, 228 F. Supp. 865, 871 n.7 (D.D.C. 1964), *aff'd per curiam*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

[17] Ambiguities deemed present by the court are set out note 3 *supra*.

[18] There was no proof that a duplicate had or had not been furnished, but the court ruled that none had been furnished since the facts were peculiarly within the knowledge of the defendant. Messina v. Mutual Benefit Health & Acc. Ass'n, 228 F. Supp. 865, 869 n.4 (D.D.C. 1964), *aff'd per curiam*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

The policy was deemed ambiguous in its exclusion from coverage of nonscheduled flights even though an express warning, superimposed upon the face of the policy, stated unequivocally that coverage was to be limited to flights of scheduled airlines.[19] The warning was circumvented by the court on the grounds that it was difficult to read and that it conflicted with a further provision extending coverage to all flights "contracted by MATS." The insuring clause set out explicitly the flights covered by the policy, and every flight included therein was limited to scheduled airlines except those contracted for by MATS. Nevertheless, the court refused to give any effect whatsoever to the express limitations because the distinction between "scheduled" and "nonscheduled" airlines was supposedly too difficult for the reader to grasp. Apparently, a new standard was adopted, the standard of the "casual reader."[20] The court indicated that since the reader may not have read the policy carefully before he bought it, may not have questioned insurer's agent as to the scope of coverage, and may have sent the policy to his beneficiary without fully understanding its terms, the provisions expressly and explicitly limiting coverage to scheduled airlines should be given no effect whatsoever.

In light of the fact that the policy was deemed ambiguous, the court proceeded to a determination of whether the fatal flight was included within the express provision extending coverage to "air flights contracted for by MATS." The base comander (who was an officer in MATS) had issued a "Revocable Permit" to the Travis Transportation Company upon certain specified conditions.[21] Neither party could revoke the agreement at will, except upon thirty days notice. The agreement appears on its face to be a binding contract supported by sufficient consideration. At any rate, this seems to be the best argument enunciated by the court, and the court's holding that the air taxi flight was covered would certainly seem more logical if it had been based solely upon the clause extending coverage to flights contracted for by MATS.

However, even assuming that there was a contract between the air taxi service and the base commander, the conclusion does not necessarily follow that there was a contract with MATS under the terms of the insurance policy. The military officer who signed the agreement had dual responsibilities: (1) as commander of the base, and (2) as an officer in MATS. The policy provided for coverage of flights "contracted for by *MATS*," yet MATS was not mentioned anywhere in the agreement. MATS itself was not in control of the base. In fact, a few months before the permit was signed, an officer in the Strategic Air Command (SAC) had been the base commander. If the contract had been signed during the

[19] *Id.* at 867: "Read carefully this policy is limited to aircraft accidents on scheduled airlines." This provision was superimposed in green print upon the body of the provision specifying the extent of coverage.

[20] *Id.* at 867: "A casual reader would be likely to fail to read the green type at all."

[21] Travis Transportation Company was to be allowed to use the base facilities in return for granting seating priority to military personnel, charging no more than maximum fare for passengers, making a flight within two hours after securing its first passenger, and following a detailed set of safety regulations.

command of the SAC officer, would it have been a contract with SAC or merely a contract with the military authorities? Assuming arguendo that the "Revocable Permit" was a contract, is it not more reasonable to conclude that it was a contract with the base commander solely in his capacity as a military representative rather than in his capacity as an officer in MATS? The court left this question unanswered without even considering it, and concluded that the insured could have reasonably relied on the "Revocable Permit" as being a contract with MATS whether it was or not.[22]

The primary objection to the decision reached in *Messina* lies in the approach taken by the court in interpreting the terms of the policy. During the course of its analysis of the supposed ambiguities, the court blandly interjected, "It is hornbook law that ambiguities in a standard-form contract are generally to be resolved against the party who drafted the instrument." The court somehow failed to delve past the black letter headings, however, for it neglected to note that the rule of liberal construction should apply only in construing particular words that are ambiguous and should not be extended to apply in interpreting a policy in its entirety.[23] Rather than construing particular words in the policy, the court simply refused to give effect to language which appears perfectly clear.[24] No provision in the policy could have conceivably been construed so as to extend coverage to nonscheduled flights except the clause covering flights "contracted for by MATS." The court could have found a conflict between the clause which covered all flights by MATS and the warning clause which limited policy coverage to flights of scheduled airlines. Upon such a finding, the court should have applied the rule of liberal construction to this ambiguity and interpreted the policy to cover nonscheduled airlines if they had been contracted for by MATS. In view of the fact that the air taxi flight was nonscheduled, the proper focal issue of the case was whether there was, in fact, a contract between MATS and the Travis Transportation Company. However, instead of limiting the application of the rule of liberal construction to the ambiguous provisions alone, the court deemed the rule relevant in interpreting the entire policy and, in effect, held that all flights of all airlines were covered by the policy.

It is submitted that the insurance company in the present case clearly intended to limit air flight coverage to scheduled airlines and airlines

[22] Even if the court had been correct in applying a rule of reasonable reliance to the words "contracted for by MATS," it is difficult to see how Messina could have reasonably relied upon a purely private document issued by the base commander as being a MATS contract. As dissenting Judge Burger stated in the court of appeals, "he (Messina) simply would not have known of such arrangements." Thus, "the first part of the District Court's opinion—that dealing with Messina's possibly being misled by ambiguities—cannot come to the aid of the second part—the agonizingly strained interpretation which construes the revocable permit into a MATS contract. . . ." Mutual Benefit Health & Acc. Ass'n v. Messina, 350 F.2d 458, 460 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

[23] See authorities, cited note 7 *supra*.

[24] In the words of Judge Burger, "if those provisions are ambiguous, there are no unambiguous insurance policies." Mutual Benefit Health & Acc. Ass'n v. Messina, 350 F.2d 458, 460 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

contracted for by MATS and that the insured had effective notice of that intention. Yet the court twisted the language of the policy to the point that all airline flights were covered thereunder. The finding of supposed ambiguities and the liberal interpretation of the entire policy amounted to an effective rewriting of the policy and a misapplication of heretofore clearly-defined legal principles. Not only is this a derogation of the intent of the parties, but it also breathes uncertainty into the legal principles which are to be applied in construing flight insurance policies.

Michael M. Wade

Exculpatory Clauses — Policy Interpretation — Validity

The United States leased an airfield[1] on Shemya Island, now a part of the State of Alaska, to Northwest Airlines pursuant to the authority granted the Administrator of the Civil Aeronautics Administration.[2] The lease required the lessee to maintain public air navigation facilities.[3] Northwest executed a contract with Alaska Airlines [hereinafter Alaska] by which Alaska acquired the right to use the Shemya airport and its facilities. According to a clause in this contract, Alaska was to "hold harmless and indemnify Northwest . . . from all claims and liabilities . . . which may . . . arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement."[4] Subsequently, one of Alaska's aircraft crashed, killing six members of the crew. Alaska sued for damage to its aircraft on the ground that Northwest's negligence was the sole proximate cause of the disaster. Six other damage suits were brought against Northwest for deaths of the crewmen. Northwest then instituted the present suit seeking a judicial declaration that it was exempted from liability by the exculpatory clause of the contract and that the indemnity clause required Alaska to defend the six death actions. *Held:* The exculpatory-indemnity provision is free of any ambiguity, but it is against public policy and, thus, invalid and unenforceable. *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965).

In general, the principle of contractual freedom does not prevent invalidation of contracts which exempt a party from liability for his own negligence.[5] An exemption clause is usually void if it contravenes a statutory provision or an overriding consideration of public policy.[6] The public policy prohibition against contractual exemption from liability for acts of negligence has been applied in cases in which there is a duty of public

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[1] On 30 September 1955, the United States, acting through the Administrator of the Civil Aeronautics Administration, leased the facility to Northwest. At that time the United States was the owner of, and had jurisdiction over, the Island of Shemya. Alaska Airlines, Inc. v. Northwest Airlines, Inc., 228 F. Supp. 322, 323 (D. Alaska 1964), *aff'd*, 351 F.2d 253 (9th Cir. 1965).

[2] International Aviation Facilities Act § 473, 62 Stat. 450 (1948), 49 U.S.C. § 1159 (1964). This section provides, in part, that "the Administrator is empowered . . . (3) to lease under such conditions as he may deem proper. . . ."

[3] Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253, 255 (9th Cir. 1965). The lease required that the airfield be public in nature. "Whereas, it is considered to be in the public interest that said air navigation facilities at Shemya be available to the aeronautical public on a non-discriminatory basis. . . ."

[4] *Ibid.* The contract provided as follows:

> 4. Alaska agrees to hold harmless and indemnify Northwest, its officers, agents, contractors, servants and employees from all claims and liabilities for damage to, loss of, or destruction of any property of Alaska, its officers, agents, servants and employees, and the property of any other person or persons, and for injuries to or death of any person or persons which may now or hereafter arise out of or be in any way connected with the service and facilities furnished to Alaska under this agreement.

[5] Checkley v. Illinois Cent. R.R., 257 Ill. App. 491, 100 N.E. 942 (1913).

[6] Shafer v. Reo Motors, Inc., 205 F.2d 685 (3rd Cir. 1953). See also, Annot., 175 A.L.R. 8 (1948).

service or where a public interest is involved.[7] Moreover, the social relationship of the parties may require that the legal rights of the parties not be changed by an exculpatory clause regardless of the intent manifested by the contractual agreement.[8]

Contractual exemption from liability for negligence is rarely allowed where the contracting parties are not on roughly equal bargaining terms.[9] This rule is operative in situations in which groups requiring public or semi-public services need protection from monopolistic groups supplying such services.[10] Since contractual provisions which seek to relieve a contracting party from liability for his own negligence tend to induce want of care, it is a judicial rule that the exemption clause will be strictly construed against the party relying on it.[11] General words alone do not necessarily impart an intent to hold an indemnitor liable to an indemnitee for damages resulting from the sole negligence of the latter.[12] Because the obligation imposed is so extraordinary and harsh, the courts will not allow a presumption that the parties intended to exculpate or indemnify the other.[13] In order to be given effect, such an intention must be expressed in clear and unequivocal terms.[14]

The contract in the present case provided that Alaska would "hold harmless and indemnify Northwest . . . from all claims and liabilities" arising out of the services or facilities furnished by Northwest.[15] The district court[16] concluded that these words were not sufficiently definite to exonerate Northwest from liability for its sole negligence. The Ninth Circuit Court of Appeals reversed the lower court and concluded that the words were clear and unequivocal and contained no ambiguity in exempting Northwest from liability for its own negligence.[17]

Though the exculpatory-indemnity clause was ruled unambiguous, the Ninth Circuit, nevertheless, held that it was against public policy and, thus, invalid and unenforceable. The court relied on a similar case, *Air Transport Ass'n v. United States*,[18] in which an aircraft crashed into a truck negligently parked on a runway. In *Air Transport* the exculpatory provision was held invalid because the airport was "engaged in a public or quasi-public service or enterprise."[19] Moreover, the instant decision was based upon the general law governing this type of agreement as set out in the Restatement of Contracts:

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[7] Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964).

[8] *Cf.* Kenney v. Wong Len, 81 N.H. 427, 128 Atl. 343 (1925).

[9] Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964).

[10] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963). These monopolistic groups naturally occupy the dominant bargaining position.

[11] Owen v. Vic Tanny's Enterprises, 48 Ill. App.2d 344, 199 N.E.2d 280 (1964); see, *e.g.*, Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

[12] United States v. Wallace, 18 F.2d 20 (9th Cir. 1927).

[13] Perry v. Payne, 217 Pa. 252, 66 Atl. 553 (1907).

[14] Kinkaide v. Liebowitz, 20 App. Div.2d 812, 248 N.Y.S.2d 685 (1964).

[15] Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253, 255 (9th Cir. 1965).

[16] Alaska Airlines, Inc. v. Northwest Airlines, Inc., 228 F. Supp. 322 (D. Alaska 1964), *aff'd*, 351 F.2d 253 (9th Cir. 1965).

[17] Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253, 256 (9th Cir. 1965).

[18] Air Transport Ass'n v. United States, 221 F.2d 467 (9th Cir. 1955).

[19] *Id.* at 472.

> A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if . . . (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.[20]

In addition, the court in the present case analogized the instant facts to those found in other cases involving a public service or enterprise such as *Bisso v. Inland Waterways Corp.*[21] The problem in that case was whether the owners of a tugboat could contract away their liability for negligence. The *Bisso* Court, in ruling that such a contract was against public policy, held that the purpose of the creation and application of such a rule was "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[22] Thus, the holdings of *Air Transport*[23] and *Bisso*[24] establish a rule that all contract provisions exculpating a party engaged in a public service or enterprise will categorically be declared invalid.

Northwest based its principal contention on *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*[25] In that case the Court was confronted with an exculpatory clause in a tariff contract which was "subject to the pervasive regulatory authority of an expert administrative body."[26] The Court decided that the clause was not void as a matter of law and that the Interstate Commerce Commission (ICC) should determine its validity. Courts frequently rely on the specialized knowledge of administrative agencies as a means of gathering pertinent information used to resolve legal questions.[27] The tariff contract in *River Terminals* contained rate differentials which provided the basis for including or excluding the exculpatory clause. This method of rate-setting relieved "the towboat owner of the expense of insuring itself against liability for damage."[28] The Court intimated that public policy might demand that the

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[20] RESTATEMENT, CONTRACTS § 575(1) (1932).

[21] 349 U.S. 85 (1955).

[22] *Id.* at 91.

[23] See text accompanying notes 18 and 19 *supra.*

[24] See text accompanying note 22 *supra.*

[25] 360 U.S. 411 (1959).

[26] *Id.* at 417.

[27] Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). The Court set out the rule of judicial deference to the expertise of an administrative agency.

> [A] principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

[28] 360 U.S. 411, 418 (1959). If the rate charged was high, the owner was financially able to acquire insurance; if low rates prevailed, the exculpatory clause became operative and provided an equal amount of protection.

party seeking River Terminals' services should not receive the benefit of the lower tariff rate and, at the same time, be exempt from the exculpatory provision in the contract.[29] The Court concluded that the regulatory control of the ICC could effectively restrain the tugboat from extracting high tariff rates while at the same time exempting itself from liability for its own negligence.[30] Realizing the need for an understanding of the economics of the problem, the Court deferred to the expertise of the ICC for resolution of the question.

Basing its argument on *River Terminals,* Northwest contended that the exculpatory-indemnity provision should be upheld because the contract containing the provision had been approved by the CAB. However, the court refused to hold that the CAB had placed beyond judicial scrutiny a clause which the court considered detrimental to the public interest. Apparently, the court concluded that the rule enunciated in *River Terminals* was inapplicable to the present facts because the agency control in *River Terminals* was much more pervasive than was that of the CAB in the present case.[31]

Despite the fact that the instant case is distinguishable on the facts from *River Terminals* in the degree of control actually exercised by the respective regulatory bodies, apparently there was no finding that the CAB does not possess the capacity to make the same sort of determination as that made by the ICC in *River Terminals.* The court's holding seems, rather, to be that since the CAB failed to review sufficiently the clause in question, the court would do so itself in light of public policy considerations.

Certainly the CAB has expertise in the field of economic regulation, and the courts would be expected to allow the Board to apply that expertise in much the same manner as did the ICC in *River Terminals.* Thus, an exculpatory clause might be upheld if it has been found by the CAB to be economically feasible and free of economic coercion. In the instant case Northwest, by virtue of its lease from the Government, had control of all air facilities on Shemya Island. Alaska sorely needed these facilities for landing and refueling its planes. Thus, as was noted by the court,[32] Northwest was in the much stronger, and even coercive, bargaining position. Yet the CAB apparently did not consider this factor in approving the contract and its exculpatory-indemnity provision.

Should the CAB initiate a practice of closely scrutinizing all exculpatory-indemnity clauses before granting approval of each contract, it is conceivable that a contract containing such a clause might not be struck down by the judiciary. The clause must be a true representation of the economic realities of the relationship between the contracting parties and, consequently, must be free of economic coercion. However, it is submitted that the public policy of placing the responsibility for damage where the

[29] *Ibid.*
[30] *Ibid.*
[31] Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F.2d 253, 257 (9th Cir. 1965).
[32] *Id.* at 257-58, n.2.

fault lies is properly a strong consideration, especially in the area of public services. Thus, it is difficult to visualize circumstances, economic or otherwise, which would justify CAB ratification of an exculpatory-indemnity clause in a contract similar to the one in the present case.

Patrick O. Waddel

transportation statutes, Congress intended to give the agencies considerable discretionary authority in most instances to draw their conclusions solely on the basis of the relevant facts present in each case.[8] However, Section 102 of the Federal Aviation Act[9] limits the wide discretion of the Board somewhat and adds a degree of content to section 401(g) by providing several factors to be considered "in the public interest, and in accordance with the public convenience and necessity." Section 102 directs the Board to consider the encouragement and development of an air-transportation system properly adapted to the present and future needs of commerce; the fostering of sound economic conditions; and the promotion, encouragement, and development of civil aeronautics.[10] The problem faced by the Board, then, is not merely how to make air-transportation readily available to the greatest number of people, but rather how to do so in accordance with sound economic conditions in the air transportation industry.[11]

The New England Regional Airport Investigation,[12] instituted on 23 March 1962, was the first in a series of investigations following issuance of the previously mentioned joint press release. The Board's order instituting the investigation adopted a set of goals and standards to be considered in the Board's decisional process. In general, these guidelines concern traffic, airport accessibility, airport capabilities, and cost.[13]

Traffic experience, in many instances, determines the weight to be given all these guidelines, and is thus a very important consideration.[14] The term accessibility encompasses such matters as travel time between the airport and the locale being served, availability of public and private transportation, weather, geography, and road conditions.[15] Airport capability includes such matters as an airport's present condition, its ability to be transformed into an acceptable regional airport, and the practicality of building a new regional airport.[16] Finally, the most salient area of inquiry is the cost to all concerned—the communities, the carriers, and the general

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[8] See, *e.g.*, United States v. Detroit & Cleveland Nav. Co., 326 U.S. 236, 241 (1945); ICC v. Parker, 326 U.S. 60, 65 (1945).

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

[10] *Ibid.*

[11] See, *e.g.*, ICC v. J-T Transp. Co., 368 U.S. 81 (1961); Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957); Michigan Consol. Gas Co. v. FPC, 283 F.2d 204 (D.C. Cir. 1960); Pacific Far E. Line, Inc. v. FMB, 275 F.2d 184 (D.C. Cir. 1960); Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956); Democratic Printing Co. v. FCC, 202 F.2d 298 (D.C. Cir. 1952); and Commercial Transp., Inc. v. United States, 173 F. Supp. 524 (E.D. Ill. 1959).

[12] CAB Docket No. 13494, CAB Order No. E-18146 (23 March 1962).

[13] The guidelines set forth have been reaffirmed in subsequent orders. See, *e.g.*, Eastern N.C. Area Airline Serv. Investigation, CAB Docket No. 13728, CAB Order No. E-18727 (21 Aug. 1962). The guidelines are more explicitly delineated in the second Board order instituting a regional airport investigation. North Cent. Area Airline Serv. Airport Investigation, CAB Docket No. 13743, CAB Order No. E-18533 (29 June 1962).

[14] *Ibid.* Another aspect of traffic is frequency of service. When this can be improved, "a factor favorable to the institution of an area airport exists." Furthermore, considerable weight is given to the air traffic pattern of points to be served through area airports. Regional airports should be located so as to avoid a situation where the passenger must "backhaul" a substantial distance to the airport to fly to his destination.

[15] North Cent. Area Airline Serv. Airport Investigation, CAB Docket No. 13743, CAB Order No. E-18533 (29 June 1962).

[16] *Ibid.*

public.[17] However, these factors are mere guidelines and are not necessarily determinative. They are to be carefully weighed in each proceeding, but the final Board decision is to be made "on the record."[18]

Another important factor the Board considers is the "use it or lose it" policy,[19] which stipulates that a city cannot expect to continue receiving subsidized local air service unless it achieves and maintains an average of at least five enplaned passengers per day. Despite the fact that every commercial airport must comply with the five passenger minimum, mere compliance therewith does not guarantee service.[20] Consequently, this policy does not establish a catagorical rule upon which regional airport decisions will be based. Nevertheless, it does provide a significant Board consideration.

In addition, the Board has adopted a policy of suspending or deleting trunkline service in favor of local-service carriers. Correspondingly, a proclivity has been evinced in recent Board decisions to permit trunkline carriers to withdraw from short-haul markets where significant benefits are to be attained and where the withdrawal can be accomplished without an undue adverse effect upon the traveling public.[21] Technological developments have compelled trunkline carriers to convert to jet equipment which allows them to provide better service in long-haul, high density markets but which also makes the servicing of short-haul traffic very expensive. The deletion of trunkline services, with a corresponding consolidation at regional airports, results in a diminution in the need for local-service carrier subsidy requirements and in an enhanced ability of local-service carriers to provide better service, with greater economy, than was possible during trunkline competition.[22]

III. Judicial Review

Section 1006 of the Federal Aviation Act[23] provides the right to appeal a Board order to any person disclosing a substantial interest. When judicial jurisdiction has been invoked, the court has exclusive authority to affirm, modify, or set aside the Board's order and require further proceedings.[24]

[17] *Ibid.* Community cost relates to such items as the availability of ground transportation and the need for new facilities. Carrier costs include the system and local station expenses and those costs created by changes in equipment which might be used at the regional airport. Public costs include subsidies and the funds expended in airport facility or public highway construction.

[18] *Ibid.*

[19] The policy was first enunciated in Seven States Area Investigation, 28 C.A.B. 680, 755-57 (1958). For a judicial description of the policy, see Nebraska Dep't of Aeronautics v. CAB, 298 F.2d 286 (8th Cir. 1962).

[20] 14 C.F.R. § 399.11 (1965). The statement is negative in form and tells who will not receive air service rather than who will.

[21] Such a situation might arise where trunklines and local carriers service the same route. See, *e.g.*, American Airlines Serv. to Akron, CAB Docket No. 12438, CAB Order No. E-19259 (31 Jan. 1963); Southwestern Area Local Serv. Case, CAB Docket No. 10758, CAB Order No. E-19254 (30 Jan. 1963); Service at Peoria and Springfield, Ill., CAB Docket No. 11482, CAB Order No. E-18446 (13 June 1962); and Roanoke Serv. by American, CAB Docket No. 11801, CAB Order No. E-18124 (19 March 1962).

[22] See City of Lawrence v. CAB, 343 F.2d 583, 589 (1st Cir. 1965).

[23] Federal Aviation Act of 1958, § 1006(a), 72 Stat. 795, as amended, 49 U.S.C. § 1486(a) (1964).

[24] Federal Aviation Act of 1958, § 1006(d), 72 Stat. 795, as amended, 49 U.S.C. § 1486(d) (1964).

However, findings of fact, if supported by substantial evidence, are conclusive, and in no instance will an objection to an order be considered unless the same was urged before the Board or unless failure to do so was based upon reasonable grounds.[25] Section 10 of the Administrative Procedure Act[26] states that the reviewing court shall decide all relevant questions of law. Furthermore, the court must set aside agency action, findings, and conclusions which it finds to be unsupported by substantial evidence, determined without observance of proper legal procedure, arbitrary, capricious, or otherwise not in accordance with law.[27]

When reviewing Board determinations, courts have frequently rejected allegations of inconsistencies between the action under review and prior decisions because the variety of circumstances to which the agency must apply the general statutory criteria render prior cases generally inapplicable.[28] Exceptions have been made in two sets of circumstances: (1) when an agency fails to explain intelligibly the relationship between the facts found and the result reached, and (2) when a prior case has announced a definite standard which is apparently applicable and which the agency, without explanation, neglects to follow.[29]

An intelligible statement by the Board is necessary to enable a reviewing court to determine if the findings are supported by substantial evidence.[30] This requirement forms the essence of Section 8(b) of the Administrative Procedure Act,[31] which requires the Board to set forth its findings and conclusions as well as its reasons or bases therefor.[32] A bare assertion of administrative expertise cannot fill the vacuum of inadequate findings.[33] In *M & M Transp. Co. v. United States*,[34] Judge Magruder

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[25] Federal Aviation Act of 1958, § 1006(e), 72 Stat. 795, as amended, 49 U.S.C. § 1486(e) (1964).

[26] Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

[27] *Ibid.*

[28] See, *e.g.*, FCC v. WOKO, Inc., 329 U.S. 223 (1946); North Cent. Airlines, Inc. v. CAB, 265 F.2d 581 (DC.. Cir.), *cert. denied*, 360 U.S. 903 (1959); State Airlines, Inc. v. CAB, 174 F.2d 510 (D.C. Cir. 1949), *rev'd on other grounds*, 338 U.S. 572 (1950); and M & M Transp. Co. v. United States, 128 F. Supp. 296 (D. Mass.), *aff'd*, 350 U.S. 857 (1955). As stated in Virginia Ry. Co. v. United States, 272 U.S. 658, 665 (1926), the courts have "no concern with alleged inconsistency with [administrative] findings made in other proceedings."

[29] Boston & Me. R.R. v. United States, 202 F. Supp. 830 (D. Mass. 1962), *aff'd per curiam, sub nom.*, Baltimore & O. R.R. v. Boston & Me. R.R., 373 U.S. 372 (1963).

[30] In United States v. Chicago, M., St. P. & Pa. R.R., 294 U.S. 499, 511 (1935), Justice Cardozo stated: "[W]e must know what a decision means before the duty becomes ours to say whether it is right or wrong."

[31] Administrative Procedure Act § 8(b), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1964).

[32] See, *e.g.*, Secretary of Agriculture v. United States, 347 U.S. 645 (1954); City of Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965); and Northeast Airlines, Inc. v. CAB, 331 F.2d 579 (1st Cir. 1964).

[33] See ICC v. J-T Transp. Co., 368 U.S. 81, 93 (1961); Public Serv. Comm'n v. United States, 356 U.S. 421, 427 (1958). On the other hand, a Board decision on public convenience and necessity requires the exercise of that sort of judgment about future events in which the much discussed expertise of administrative agencies finds its greatest value. This is where a rationally determined conclusion has its greatest applicability despite differences of opinion. See, *e.g.*, Airport Comm'n v. CAB, 300 F.2d 185, 186 (4th Cir. 1962). In North Cent. Airlines, Inc. v. CAB, 265 F.2d 581, 584 (D.C. Cir.), *cert. denied*, 360 U.S. 903 (1959), the court, dealing with airline mergers, declared that problems of public convenience and necessity "cannot be solved by mathematical computations. Judgment necessarily enters into each one, and the Congress has given the agency power to exercise that judgment." See also American Airlines, Inc. v. CAB, 192 F.2d 417, 420 (D.C. Cir. 1951).

[34] 128 F. Supp. 296, 301 (D. Mass.), *aff'd*, 350 U.S. 857 (1955).

noted that the issue is the adequacy of the agency's findings in the particular factual context to satisfy the statutory test, not its relation to other agency determinations in other facual contexts. Judge Magruder distinguished *Secretary of Agriculture v. United States*,[35] where an order was vacated primarily for inadequacy of the Commission's findings. The Court in that case was unable to determine what the Commission intended by its order, and when the Court looked at prior decisions, it found them inconsistent with the administrative decision under consideration. The Court in *Secretary of Agriculture*, then, considered prior cases because the agency failed to comply with section 8(b); that is, it did not properly set forth its findings, conclusions, and intelligible reasons or bases therefor.

IV. Recent Decisions

Two significant recent decisions from the First and Seventh Circuits help to delineate the steps which must be taken by the Board in order to meet judicial approval. As of late 1964, home airport service by local-service carriers had been terminated by the Board at nearly 230 locations.[36] *City of Lawrence v. CAB*[37] was the first case to judicially reverse such administrative action. There the court struck down an order consolidating service in one regional airport largely for failure of the Board to meet the requirements of section 8(b) in that there was an inexplicable inconsistency between the Board's findings and its conclusions. As a consequence, the court considered an earlier Board decision, *Northeastern States Area Investigation*,[38] which involved essentially the same question. This decision enunciated a definite rule which was apparently contra to the result reached in *Lawrence*. Accordingly, the case was remanded for further consideration in compliance with section 8(b), that is, for an intelligible statement of the factors considered, issues decided, and reasons supporting the conclusion.[39]

A more recent decision, *Outagamie County v. CAB*,[40] exemplifies proper Board application of the regional airport policy. In *Outagamie* the Board complied with the statutory criteria and guidelines laid down in the investigation order. The requirements of section 8(b) were satisfied, and there were no prior, unexplained cases establishing a decisional rule on essentially the same point. The court concluded[41] that the Board did sufficiently "narrow, clarify, and explain" the "general directive" of public convenience and necessity "to the point of affording a fair degree of predictability of decision in the great majority of cases, and of intelligiblity in all."

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[35] 347 U.S. 645 (1954).

[36] Brief for Respondent, p. 29, Outagamie County v. CAB, 355 F.2d 900 (7th Cir. 1966).

[37] 343 F.2d 583 (1st Cir. 1965).

[38] 30 C.A.B. 606 (1959).

[39] City of Lawrence v. CAB, 343 F.2d 583, 588 (1st Cir. 1965). The Board's decision was based in part on the policy of permitting trunkline carriers to withdraw from short-haul markets in favor of local-service carriers. The First Circuit, however, distinguished proper application of this policy from the erroneous application in *Northeastern*.

[40] 355 F.2d 900 (7th Cir. 1966).

[41] *Id.* at 908 (quoting from City of Lawrence v. CAB, 343 F.2d 583, 587 (1st Cir. 1965)).

V. Conclusion

A comparison of the press release statement with the statutory criteria which Congress laid down for the Board's operations indicates that the regional airport policy originally emerged as hardly more than a statement of the Board's intention to discharge its statutory obligations by serving the public interest. Though the Board has been vested with wide discretion, the regional airport policy does evince a recognition of the need for modification of prior existing policies in light of technical changes taking place in the airline industry.[42] Reasonably broad statutory standards in initial legislative grants to administrative agencies are proper when dealing with a novel field.[43] Mr. Justice Jackson has stated that there is a "malaise in the administrative scheme" when Congress grants authority under a broad and undefined standard such as "public convenience and necessity."[44] When the initial standard is vague, it is the agency's duty to define and clarify it, "to canalize the broad stream into a number of narrower ones" so as to afford predictability.[45]

It is apparent that, in the application of the regional airport policy, considerable discretion will continue to be exercised by the Board with judicial approval, but this should not be the finis. The Board should advance a policy statement when sufficient experience has been accumulated for a proper formulation. Though the Board has singled out factors which enter into the decisional process, it has not been able to generalize as to relationships between those factors. Of course, standards and specific decisional rules are desirable when they represent a distillation of the Board's expert knowledge in this area, but the process must be allowed to take its course.[46] In the meantime, the Board must continue its present approach of balancing all material factors relevant to the "public convenience and necessity" without categorical rules to regiment the decision-making process.

Edward S. Koppman

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[42] See Airport Comm'n v. CAB, 300 F.2d 185, 187 (4th Cir. 1962).

[43] Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 14 (1962).

[44] See FTC v. Ruberoid Co., 343 U.S. 470, 482 (1952); Friendly, *op. cit. supra* note 43.

[45] Friendly, *op. cit. supra* note 43.

[46] In *Lawrence,* the First Circuit was critical of the Board's failure to evince and follow sufficiently definite standards in the exercise of its discretion, but the court also explicitly stated that it did not intend to criticize the Board's policy. Moreover, this defect in the proceedings was not considered a basis for reversal. A permissible interpretation of the First Circuit's criticism of the Board for failure to develop standards is that such failure is not error *per se* but is merely conducive to the improper application of the regional airport policy.

RECENT DECISIONS

CHATTEL MORTGAGES — FEDERAL AVIATION ACT — FEDERAL RECORDATION

State Securities Company (hereinafter referred to as lender) provided an aircraft dealer with short-term financing of customer aircraft purchases secured by chattel mortgages. It was the practice of the dealer to sell an aircraft, repay the loan, and then obtain a release of the chattel mortgage. In the instant case, the lender, although aware of this practice and consenting to it, failed to register the chattel mortgages here involved with the FAA in accordance with Section 503 of the Federal Aviation Act of 1958.[1] The dealer sold a plane to Owens Metal Company (hereinafter referred to as purchaser), but did not, as was the customary practice, apply the purchase money against the debt secured by the chattel mortgage. When the dealer defaulted on the note, the lender brought suit on the chattel mortgage which allegedly encumbered the plane now in the hands of the purchaser. *Held:* The purchaser is a good faith purchaser for value in the ordinary course of business, and the lender waived its lien on the chattel mortgage by failing to record it with the FAA. *State Securities Co. v. Aviation Enterprises, Inc.*, 355 F.2d 225 (10th Cir. 1966).

The result was seemingly based primarily on the doctrine of estoppel. The court found that the purchaser had no knowledge of the mortgage since it was not recorded with the FAA and that there were not sufficient facts to put him on inquiry since he bought the aircraft in the ordinary course of business. The lender had allowed the dealer to conduct its affairs in such a manner so as to present to its customers an illusion of ownership upon which its customers could, and did, rely. Thus, the court concluded that the lender, by its conduct, was estopped to assert its lien against the purchaser. The decision appears to indicate that registration of liens with the FAA, being constructive notice to all of the existence of the lien, is the simplest application of preventive medicine to cure the disease of an inoperative lien.

D.L.P.

CARRIER — FEDERAL AVIATION ACT — LEASING OF AIRCRAFT

Defendant corporation was engaged in the business of leasing airplanes. The leased aircraft were subject to the exclusive use of the lessees, although, in approximately ninety per cent of the leases, defendant furnished the pilot and facilities. The United States sued to impose civil penalties and to enjoin defendant from operating without certification from the Federal Aviation Agency, contending that he was a carrier of persons and property

[1] 72 Stat. 772, as amended, 49 U.S.C. § 1403 (1964).

for hire.[1] *Held:* The purpose of the certification is to provide safe air travel. Since the defendant normally provides his own pilots and facilities, he is a carrier within the meaning of the agency regulation. *United States v. Bradley*, 252 F. Supp. 804 (S.D. Tex. 1966).

Defendant asserted that it was the lessee of the airplane—not the lessor—who was the carrier. The court agreed that this might be the case if the lessee furnished its own pilot, crew, and facilities. However, the court reasoned that when these additional services were furnished by the lessor, he became a carrier. The holding is strengthened by two factors. First, the Federal Aviation Act provides that "any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control" is deemed to be engaged in the operation of aircraft and subject to the act.[2] Applied literally, the extent of services provided by the lessor would seem immaterial. Second, although either or both the lessee and lessor of aircraft could be required to comply with the certification requirements, simplicity is served in the instant case. Public policy would seem to support the certainty which can be achieved by having the single lessor meet and set safety procedures, rather than many separate lessees.

J.K.M.

NEGLIGENCE — AIRWORTHINESS — FEDERAL AVIATION AGENCY

Upon attaining a height of some 200 feet and retracting its landing gear, a Beechcraft 9360 belonging to South Central Airlines stalled and crashed shortly after take-off from the airport at Gainesville, Florida. The retraction of the landing gear caused the center of gravity, which was already too far to the rear, to be moved past the safety point so that the plane could no longer stay airborne. Plaintiffs contended that the FAA should be held liable because the agency inspectors were negligent in approving, certifying, and licensing the plane's airworthiness after alterations and modifications had been made. *Held:* The FAA was negligent in failing to properly inspect the airplane and in certifying its airworthiness. However, according to the evidence, the plane was airworthy, and any doubt as to this conclusion was dispelled by the fact that the plane had flown the previous day. The sole proximate cause of the accident was the pilot's error in overloading the craft and in positioning its load too far to the rear when he had sufficient information from which he could have determined the plane's center of gravity. *Gibbs v. United States*, 251 F. Supp. 391 (E.D. Tenn. 1965).

The Administrator of the FAA is charged with the duty to promote flight safety of civil aircraft by prescribing certain minimum standards

[1] 14 C.F.R. § 121.3(f) (1966).

[2] Federal Aviation Act of 1958, § 101, 72 Stat. 737, as amended, 76 Stat. 143 (1963), 49 U.S.C. § 1301(26) (1966).

governing the design and performance of aircraft and aircraft engines.[1] A registered owner of an aircraft may file an application with the Administrator for an airworthiness certificate. If the Administrator finds that the aircraft is in safe operating condition, he shall issue the certificate.[2] It is unlawful for any person to operate a civil aircraft without such a certificate.[3] The Federal Aviation Act establishes standards of care to be followed by the Administrator in certifying air carriers to engage in air transportation.[4] Pursuant to the act, "the Administrator shall exercise and perform his duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrance of, accidents in air transportation . . . ."[5] The import of the instant decision is that even if the Administrator is negligent in granting a defective airplane a certificate to operate, that negligence is not the proximate cause of a subsequent crash if the pilot could have avoided the crash through the exercise of proper care.

M.M.W.

DECLARATORY JUDGMENT — DISMISSAL — EXERCISE OF DISCRETION

Plaintiff brought a declaratory judgment suit in federal court seeking to have the Warsaw Convention[1] declared unconstitutional and a judgment denying the defendant, Pan American World Airways, the right to use the Convention as a defense in a contemplated wrongful death action arising out of a crash of defendant's Boeing 707 in December 1963. This latter state court action was not instituted until after Pan American had moved to have the declaratory judgment suit dismissed.[2] *Held, motion granted, suit dismissed:* "This court, as a matter of discretion, declines to exercise its jurisdiction." *Rieger v. Pan Am. World Airways, Inc.*, 3 Av. L. Rep. (9 Av. Cas.) ¶ 18,093 (S.D.N.Y. 1966).

The court based its exercise of discretion on two theories. First, it felt that to grant the relief sought, which would deny Pan American a major facet of its defense, would be violative of the policy embodied in 28 U.S.C. § 2283,[3] which prohibits a federal court from enjoining state court actions except in the aid of its jurisdiction, or to protect or effectuate its judgment, or unless otherwise provided for by Congress. This statute has

[1] Federal Aviation Act of 1958, § 601, 72 Stat. 775, 49 U.S.C. § 1421 (1964).
[2] Federal Aviation Act of 1958, § 603(c), 72 Stat. 776, 49 U.S.C. § 1423(c) (1964).
[3] Federal Aviation Act of 1958, § 610(a), 72 Stat. 780, 49 U.S.C. § 1430(a) (1964).
[4] Federal Aviation Act of 1958, § 601, 72 Stat. 775, 49 U.S.C. § 1421 (1964).
[5] *Ibid.*

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air (The Warsaw Convention), 12 Oct. 1929, 49 Stat. 3000, T.S. 876 (1934).
[2] Suit was instituted on the wrongful death action in the New York Supreme Court, and Pan American filed its answer on 27 Jan. 1966, pleading the Warsaw Convention as a complete and partial affirmative defense.
[3] 62 Stat. 968 (1948), 28 U.S.C. § 2283 (1964).

generally been regarded as codifying a matter of comity between the federal and state courts and as a means of preventing potential conflicts between the two court systems. The exceptions to these policies, whereby an injunction is allowed, have been narrowly construed. While the statute itself may be open to question as a basis for dismissing a declaratory judgment suit (because the court would not be enjoining a state court action but merely foreclosing a matter of defense as to Pan American), the policy behind the statute seems to be an adequate basis for dismissal. Second, the court placed its exercise of discretion on the sounder ground of avoiding fragmentized and disruptive litigation. Since the action in state court could adjudicate all the rights and liabilities of the parties, whereas the federal court suit could not, to allow the plaintiff to proceed would be to fragment and disrupt the litigation. It would seem that the court soundly exercised its discretion, either as a matter of comity and as a means of preventing potential conflict, or on the policy basis that litigation between parties should not be fragmatized and drawn out in several different courts where one forum is available to adjudicate all the issues.

A.J.H. II

CAB — ADMINISTRATIVE LAW — VENUE TRANSFER

The CAB issued an order for a complete reopening of proceedings on an application by an air carrier for renewal of its temporary certificate.[1] The agency's order was subsequently appealed by the plaintiff, a competing airline.[2] The Board then made a motion to dismiss the appeal or, in the alternative, to transfer the petition for review to the First Circuit Court of Appeals. *Held, motion granted, suit transferred:* If proceedings have been instituted in two or more appellate courts with respect to the same order, the Board shall file the record in the court in which the proceeding with respect to said order was first instituted. *Eastern Air Lines, Inc. v. CAB,* 354 F.2d 507 (D.C. Cir. 1965).

The court based its decision both on its inherent discretionary powers and on a broad interpretation of 28 U.S.C. § 2112(a). The court stated that without regard to the authority provided by statute, a court of appeals having venue may exercise an inherent discretionary power to transfer the proceeding to another circuit "in the interest of justice and sound judicial administration."[3] However, the court's inherent authority, when not expanded by statute, permits transfer over objection only to a court having proper jurisdiction and venue.[4] Although the petitioner does not have its domicile or principal place of business in the First Circuit,

[1] Northeast Airlines, Inc. v. CAB, 345 F.2d 484 (1st Cir. 1965).
[2] New York - Florida Renewal Case, CAB Docket No. 12285, CAB Order No. E-22084 (26 April 1965).
[3] Eastern Airlines, Inc. v. CAB, 354 F.2d 507, 510 (D.C. Cir. 1965).
[4] Panhandle E. Pipe Line Co. v. FPC, 343 F.2d 905, 909 (8th Cir. 1965).

the court thought that 28 U.S.C. § 2112(a) was available as authority for the transfer. The terms of the statute had been met in that "proceedings have been instituted in two or more courts of appeals with respect to the same order." Application of this statute, although not within the specific contemplation of Congress, would be consonant with the general congressional purpose of avoiding forum conflicts and forum shopping. In the instant case, the statute was liberally applied to permit review by a single court of closely related matters calling for sound judicial administration. Since the First Circuit had before it the entire record leading up to its order of 26 April 1965, it would be in the best position to decide matters in any way connected with the case.

B.J.K. III