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CURRENT LEGISLATION AND DECISIONS

COMMENT

Federal Aviation Act — Interworkings of Sections 403 and 404 — Military Standby Fares

I. INTRODUCTION

Agitation between surface carriers and the airlines first became noticeable about the time the airline industry was beginning to take shape as a formidable contender for the carriage of passengers, mail, and cargo that previously lay exclusively within the grasp of the surface carriers. The policies of the New Deal administration, bent on developing a domestic air transportation system, did much to establish the competitive strength of the airlines.¹ The administration's air mail legislation, particularly the Air Mail Act of 1934,² provided a fairly definite source of income at a time when it was badly needed. But air mail legislation, designed to meet the exigencies of the moment,³ proved to be an inadequate remedy for the infant industry's economic ills. It remained for the Civil Aeronautics Act of 1938,⁴ the congressional recognition that aviation had become of age, to provide the basis necessary for the sound development of a well-ordered and efficient air transportation system. Included within the breadth of this statutory directive were the principle functions of the Civil Aeronautics Board (CAB)—the regulation and promotion of air transport.⁵ Heretofore, the transportation agencies had been entrusted with the singular function of regulation.⁶ In the course of applying this dual mandate, the additional term, promotion, has led to a degree of confusion in CAB decisions, and to occasional protests on the part of the surface carriers. The outcries frequently center about the differential pricing arrangements which the Board has permitted.⁷

¹ See *Investigation of Air Mail and Ocean Mail Contracts*, 73d Cong., 2d Sess. (1934); H.R. REP. NO. 1956, 72d Cong., 2d Sess. (1933); and Address by Senator Black delivered on nationwide radio (reprinted in 78 CONG. REC. 2715, 1934).

² 48 Stat. 933 (1934). See generally *Some Implications of the Air Mail Act of 1934*, 47 YALE L.J. 465 (1934).

³ Military operation of the air mail service proved to be too costly in both lives and equipment and had to be abandoned in favor of commercial aviation. N.Y. Times, 12 March 1934, p. 16 and 18 March 1934, p. 24.

⁴ 52 Stat. 973 (1938) (now the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. §§ 1301-1542 (1964)).

⁵ Civil Aeronautics Act of 1938, § 2, 52 Stat. 980 (now the Federal Aviation Act of 1958, § 102, 72 Stat. 740, 49 U.S.C. § 1302 (1964)).

⁶ Interstate Commerce Act, 49 Stat. 546 (1935), 49 U.S.C. § 304 (1964).

⁷ See generally *Tour Basing Fares*, 14 C.A.B. 257 (1951); *Government Travel Discount Tariff*, 6 C.A.B. 825 (1946); and *Air Passenger Tariff Discount Investigation*, 3 C.A.B. 242 (1942).

II. THE PROBLEM

The recent military standby rates filed by the airlines have once again aroused the objections of surface carriers to the differential pricing arrangements of the airlines.⁸ Currently, some twenty domestic trunkline and local-service carriers offer these discounts. Their tariffs provide generally that military personnel on furlough, leave, or pass, or within seven days of discharge, may travel at reduced fares on a space-available or standby basis, subject further to removal or "bumping" at intermediate points to accommodate confirmed, regular-fare passengers. The military standby fares of the trunklines are equivalent to approximately fifty percent of the jet-coach fares, and those of the local-service carriers are equivalent to approximately fifty percent of their first-class fares.⁹

A. Rationale For Standby Fares Generally

A carrier is willing to offer reduced-rate standby fares in the hope of stimulating demand for additional units of a product which would otherwise go unused. Specifically, if a plane departs with a load factor somewhat less than capacity, the empty seats are an economic waste. The extra cost to fill these seats is *de minimus*. Only certain passenger costs (e.g., beverage and food service) on a particular flight are not fixed. If a carrier can sell these seats at a price above the variable passenger costs, it is financially better off. However, this can be a self-defeating program unless the standby service is carefully controlled. If all the standard-fare passengers were able to shift to the reduced standby fare, the carrier would suffer an economic loss at the expense of generating more traffic. Therefore, the carrier must prevent, or at least severely limit, diversion of the regular traffic to standby service, while at the same time marketing the standby service.

B. Trailways' Complaint

When these tariffs first became effective in 1963 over the objections of several air carriers,¹⁰ they had expiration dates which have since been periodically extended. In April, 1965, the expiration dates were again extended, and in some instances the expiry date was even cancelled.¹¹ It was in this context that the National Trailways Bus System, representing its forty-six independent member carriers, demanded an investigation of military standby rates. Trailways alleged that the discounts were diverting traffic from the buses and that the military standby fares were "unjustly discriminatory, unduly preferential and prejudicial, and unjust or unreasonable" and, thus, violative of Subsections 404(a) and (b) of the Federal Aviation Act of 1958.

⁸ See Proposed Military Standby Fares, CAB Docket Nos. 15845 *et al.*, CAB Order No. E-22186 (20 May 1965) [hereinafter CAB Order No. E-22186] for a consolidation of the complaints against the pricing arrangements of twenty airlines.

⁹ *Id.* at 1-2.

¹⁰ In CAB Order Nos. E-19376 (14 March 1963); E-19401 (22 March 1963); E-19535 (29 April 1963); and E-19605 (23 May 1963), the Board dismissed various air carriers' complaints against the original military standby tariffs.

¹¹ CAB Docket Nos. 15925 *et al.*, CAB Order No. E-22068 (22 April 1965), p. 1.

The CAB subsequently dismissed Trailways' demands for an investigation on the basis that the complaints were merely repetitions of complaints filed by certain air carriers two years previously and were, in effect, petitions for reconsideration of arguments which the Board had found to be without merit.¹² The Board noted that until conditions changed that would substantially alter its prior position, the original basis for denial of the complaints remained valid. Trailways has asked all eleven United States district courts of appeal for review of the CAB's refusal to investigate airline discount fares for military personnel.¹³

III. STATUTORY CONSTRUCTION

Any problem involving an airline's policy of granting price differentials to identifiable groups necessarily involves a consideration of sections 403(b), 404(a) and (b), and 416(b) of the act. This article is intended to be an examination of the legislative history, interpreted meanings, and case law having a bearing on these sections in order to arrive at an understanding of the technical interrelationship among the regulatory sections. The analysis will at all times be focused upon the military standby fares, but this same analysis can be applied to determine the validity of any of the rash of promotional fares, presently much in vogue, that have been extended to various groups.¹⁴

It is best at the outset to eliminate any confusion that might arise from section 1002(e). The sections set out in the preceeding paragraph deal with the duties of the carriers in establishing rates. To ensure compliance, section 1002(e) gives the Board the power to prescribe rates and practices of air carriers should the airlines fail to follow their statutory duties. The duties of the carriers and the power of the Board are in separate paragraphs in order to avoid confusing the considerations which the Board must take into account in making carrier rates once the carriers themselves cannot arrive at just and reasonable rates.¹⁵

Once it is clear which sections are of primary concern,¹⁶ the most satisfactory approach to an understanding of these sections is to begin with the most clear-cut and work toward the more complex. Note that the economic regulations of sections 403 and 404 relating to tariffs and rates were not discussed in Congress, possibly because the wording was adopted substantially verbatim from corresponding provisions in the Interstate Commerce Act and it was felt that the wording, in light of the Commission's experience, was sufficiently clear and unobjectionable.¹⁷ At any rate, the

¹² CAB Order No. E-22186 at 3. These complaints marked the first time a surface carrier had raised an objection to these discounts.

¹³ *Aviation Daily*, 22 July 1965, p. 121.

¹⁴ E.g., Young Adult Proposed Fares, CAB Docket No. 16826, CAB Order No. E-23138 (20 Jan. 1966); Proposed Government First-Class Fares, CAB Docket Nos. 16597 *et al.*, CAB Order No. E-22929 (24 Nov. 1965).

¹⁵ RHYNE, *CIVIL AERONAUTICS ACT ANNOTATED* 123-24 (1939).

¹⁶ Federal Aviation Act of 1958, §§ 403(b), 404, and 416(b), 72 Stat. 758-71, 49 U.S.C. §§ 1373(b), 1374, and 1386(b) (1964).

¹⁷ Markham & Blair, *The Effect of Tariff Provisions Filed Under the Civil Aeronautics Act*, 15 J. AIR L. & COM. 251 (1948).

assumption is that by adopting these sections the legislators knew and understood the interpretation of these provisions under the Interstate Commerce Act and acquiesced in these definitions.¹⁸ Therefore, to gain an insight into the purpose of these provisions, resort must be had to the judicial decisions construing the Interstate Commerce Act or, if there are no such decisions, then to the legislative history of that act.

A. Reasonableness Requirement

Early in aviation history, the suggestion that rates be fixed on a basis of fair return upon valuation of property was overruled as unworkable in the airline industry.¹⁹ Reasonable cost of adequate air transportation was set up as the measuring device for rates of return. Section 404(a), accordingly, requires carriers to charge reasonable individual and joint rates for the carriage of persons and property.²⁰ This reasonableness of rates concept applies to all fares under the act regardless of the nature of the service involved. Since this provision was taken from the Interstate Commerce Act, experience under that act is helpful in determining "reasonable rates."²¹ In addition, the CAB has developed two tests which it uses when the reasonableness of rates is in issue—the "fare-cost" test and the "profit-impact" test. These will be fully discussed later in the context of the military standby fares.

B. Dual Prohibitions Of Section 404(b)

Section 404(b) outlaws two types of discrimination.²² The first involves like and contemporaneous service, that is, offering the same service at two different prices. Should a carrier attempt to offer such duplicitous service, complaints would be leveled under the "unjust discrimination" provision of section 404(b). Note that while charging different rates for services that are essentially the same constitutes a discrimination, this is not in itself conclusively a violation since section 404(b) is only directed against *unjust* discrimination. *Summer Excursion Fares*²³ established CAB adherence to the

¹⁸ RHYNE, *op. cit. supra* at 124.

¹⁹ See *Hearings on S. 3027 Before a Subcommittee on Interstate Commerce*, 74th Cong., 1st Sess. 59-60 (1935) (Testimony of Mr. Putnam).

²⁰ Federal Aviation Act of 1958, § 404(a), 72 Stat. 760, 49 U.S.C. § 1374(a) (1964):

It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation . . . to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation. . . .

²¹ See the following cases defining "reasonable rates" under the Interstate Commerce Act: *Ann Arbor R.R. v. United States*, 281 U.S. 658 (1930); *United States v. Atchison, T. & S.F.R.R.*, 279 U.S. 768 (1929); *Chicago, R.I. & Pac. Ry. v. United States*, 274 U.S. 29 (1927); and *Western Paper Makers' Chem. Co. v. United States*, 271 U.S. 268 (1926).

²² Federal Aviation Act of 1958, § 404(b), 72 Stat. 760, 49 U.S.C. § 1374(b) (1964):

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

²³ 11 C.A.B. 218, 222-23 (1950).

traditional "rule of equality" which is a public utility concept followed by the Board in determining whether discriminations are unjust.²⁴ The "rule of equality" consists of a three-factor test:

- (1) is the service to which the proposed fares would apply like and contemporaneous with service to which standard fares apply;
- (2) are the circumstances and conditions under which the reduced-rate and standard-fare service are rendered substantially similar; and
- (3) do the services pertain to the transportation of like traffic.

If application of the "rule of equality" results in a negative answer to any one of these three factors, unjust discrimination is not present.²⁵ If application results in three affirmative responses, then the reduced rate is unjustly discriminatory per se.²⁶

However, the fact that rates offered to an identifiable group run afoul of the "rule of equality" does not necessarily disallow the reduced fare. In a few defined instances, unjustly discriminatory rates to identifiable groups are expressly permitted. Section 403(b) contains an enumeration²⁷ of those to whom the air carrier may grant free or reduced rates despite classification as unjust discrimination under the three-factor test of section 404(b). The exemptions of 403(b) apply only to unjust discrimination cases, and have no application in discrimination cases where like and

²⁴ See, e.g., Mohawk Student Fares, CAB Docket No. 15949, CAB Order No. E-21912 (16 March 1965); Caribbair Student Standby Fares, CAB Docket No. 15786, CAB Order No. E-21667 (12 Jan. 1965); Frontier Teacher Tariff, CAB Docket No. 14526, CAB Order No. E-19620 (28 May 1963); Military Tender Investigation, 28 C.A.B. 902 (1959); and Braniff Airways Excursion Fares, 12 C.A.B. 227 (1950).

²⁵ Brief for Respondent, p. 11, *The Flying Tiger Line, Inc. v. CAB*, 350 F.2d 462 (D.C. Cir. 1965), where attorneys for the CAB define unjust discrimination as existing "where the transportation is a like service, of like traffic, [and] under substantially similar circumstances and conditions."

²⁶ *Contra*, CAB Order No. E-22186 at 4. There the Board maintained that the existence of "the most compelling circumstances" may justify special fares based solely on identity even though the identifiable group is not included within section 403(b)'s list of exceptions. This view was adopted in *Military Tender Investigation*. The Board arrived at this view by relying on two Board precedents, *Tour Basing Fares*, 14 C.A.B. 257 (1951), and *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951), as indicating that the Board could look at factors outside the actual carriage of passengers for justification of an unjustly discriminatory fare. This line of cases is dealt with in the textual discussions *infra*.

²⁷ Federal Aviation Act of 1958, § 403(b), 72 Stat. 758, as amended by 74 Stat. 445, 49 U.S.C. § 1373(b) (1964):

Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space-available basis.

contemporaneous service is not involved. The CAB expressed its interpretation of sections 403(b) and 404(b) as follows:

Clearly the Act and the law generally require equality of treatment and preclude the offering of special fares or rates for special persons or shippers. It has been held, however, that special fares for certain categories of persons are not precluded merely because such persons are not listed in Section 403(b) of the Act, and that the anti-discrimination provisions of the Act are not violated when different fares or rates are offered to different persons in instances in which the conditions and circumstances of carriage are substantially dissimilar, or if such carriage is in fact not like and contemporaneous, or if there are substantial differences in the types of traffic to which the fares or rates are applicable.²⁸

As was pointed out, section 404(b) outlaws another type of discrimination. The section's provisions do not require absolute equality among passengers and shippers, but rather outlaw "unjust discrimination" and "undue preferences and prejudices." This latter prohibition is designed to meet rate differentials that relate to service that is substantially dissimilar, that is, a differential which, when juxtaposed with the "rule of equality," fails to garner affirmative answers to each of the three factors.²⁹ Where the service in question is not like and contemporaneous, the issue becomes: is it "unduly preferential or prejudicial" to offer the discount to a particular identifiable group and not to the general public. As a public utility and in return for the privilege of operating in a more limited competitive atmosphere, the air carriers assume an obligation of providing service on equally favorable terms to all who request it.³⁰

To decide this question, the Board employs the broad category of "compelling circumstances." Not amenable to exact definition, this term has been found to include promotional and competitive considerations³¹ and matters of national or public interest.³² If the airline can show, by an accumulation of factors,³³ that compelling circumstances justify the grant of a favorable rate to a specific identifiable group in preference to another group or the public in general, then the discount does not occasion an objection of undue preference or prejudice and will be allowed if it meets the reasonableness requirement of section 404(a).

²⁸ Brief for Respondent, p. 9, *The Flying Tiger Line, Inc. v. CAB*, 350 F.2d 462 (D.C. Cir. 1965).

²⁹ *Military Tender Investigation*, 28 C.A.B. 902, 923 (1959). There it was stated:

[T]he question of unjust discrimination is raised only when there are unequal fares or rates for like and contemporaneous transportation between the same points, whereas the undue preference or prejudice standard is concerned exclusively with rates for the different but related services or for similar services between different points.

³⁰ Since this provision was also taken from the Interstate Commerce Act, some early litigation involving the wording "undue preference and prejudice" is helpful. See, e.g., *Virginian Ry. v. United States*, 272 U.S. 658 (1926); *United States v. Pennsylvania R.R.*, 266 U.S. 191 (1924); and *United States v. Illinois Cent. R.R.*, 263 U.S. 551 (1924).

³¹ *Tour Basing Fares*, 14 C.A.B. 257, 258 (1951).

³² *Proposed Military Standby Fares*, CAB Docket Nos. 15925 *et al.*, CAB Order No. E-22068 (22 April 1965).

³³ See *Hawaiian Common Fares Case*, 10 C.A.B. 921, 927 (1950), to the effect that a mere increase in the carriers' revenues would not, in itself, be sufficient justification for a discriminatory fare.

C. CAB's Blanket Exemption Power

Finally, section 416(b)³⁴ contains the broad power of the Board to exempt carriers from any provision of the act or order or regulation thereunder. This section is not absolute and is intended to apply in relieving hardships in extraordinary situations. Section 416(b) requires the Board to find, first, that enforcement of the provisions which are being waived is or would be an undue burden on the carrier by reason of the limited extent of, or unusual circumstances affecting, the operations of the air carrier and, second, that enforcement is not in the public interest. The exemption power is sparingly used and on the occasions when the Board's use of 416(b) has been challenged, the reviewing courts have applied strict standards to the exercise of this power.³⁵ It is doubtful that sufficient findings could be made to exempt under 416(b) the ordinary promotional discount practices explored by this article.

IV. MILITARY STANDBY FARES

In light of the statutory background set forth in the preceeding pages, an examination of the military discounts will be made in an attempt to reach meaningful conclusions about the validity of the military rate reductions in particular and about the validity of the CAB's current approach to promotional fares in general. The initial testing ground for all differential pricing situations is section 404(b). If a discount is to finally receive CAB approval, it must successfully negotiate the dual prohibitory provisions against "unjust discrimination" and "undue preference or prejudice."

A. *Like And Contemporaneous—Unjust Discrimination Issue*

The military standby fares, originally instituted in 1963, have now been extended indefinitely by the Board. Trailways, feeling the competitive pinch, has sought relief by filing its consolidated suit in the Fifth Circuit.³⁶ There is some question as to Trailways' "standing" to bring suit since section 404(b) exists to protect the airline's passengers and shippers,³⁷ not competing modes of transportation.³⁸ Nevertheless, it appears that

³⁴ Federal Aviation Act of 1958, § 416(b)(1), 72 Stat. 771, 49 U.S.C. § 1386 (1964):

The Board, from time to time and to the extent necessary may . . . exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

³⁵ See, e.g., *Pan Am. World Airways v. CAB*, 261 F.2d 754 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959); *American Airlines v. CAB*, 235 F.2d 845 (D.C. Cir.), *cert. denied*, 353 U.S. 905 (1956). See also *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 2-3 (1956) (on airline fares for ministers).

³⁶ *Transcontinental Bus System, Inc. v. CAB*, *appeal docketed*, No. 22791, 5th Cir., 3 March 1966.

³⁷ See, e.g., *ICC v. Baltimore & O. Ry.*, 220 U.S. 326 (1912); *ICC v. Baltimore & O. Ry.*, 145 U.S. 263, 281 (1892).

³⁸ *ICC v. New York, N.H. & H. R.R.*, 372 U.S. 744 (1913) makes it clear that neither the airlines nor the surface carriers need consider the other when establishing rates. Rather, the CAB

Trailways will have "standing" as a person aggrieved.³⁹ When the Board permitted these standby tariffs to become effective, it did so without benefit of suspension or investigation because it had no information at that time as to the propriety or reasonableness of the reduced rates.⁴⁰ Currently, the Board still has only fragmentary information due to the failure of the carriers to report the economic results achieved under their temporary 1963 permits.⁴¹

In its attempt to establish grounds for a full investigation, Trailways alleged alternatively that the military discounts violate both prohibitory provisions of section 404(b). In support of its allegation that the discounts are unjustly discriminatory, Trailways asserted that all special fares based solely on identity are unjustly discriminatory *per se* unless specifically permitted under section 403(b).⁴²

A situation on all fours with Trailways' contention is the struggle, beginning in 1949, to permit reduced-rate service to bona fide ministers of religion. United Airlines proposed a twenty-five percent discount, based solely on identity, to all clergymen. Such a price differential clearly brought into question the firmly established principle that a reduced rate must be reasonably open to all and free from any restriction based solely on identity. It was immediately obvious to the Board that the proposed reductions would be classified as unjust discrimination once it had been exposed to the "rule of equality." Consequently, the Board rejected United's proposal, holding that an amendment to the Civil Aeronautics Act was required before such reductions could be permitted.⁴³ Subsequently, legislation was introduced to amend section 403(b) to allow re-

is required to insure the sound development of the air transport industry and to permit air fares to be offered at the lowest possible level consistent with the act and the carriers' ability to do so economically. In these circumstances, surface carriers have no standing to complain on the basis of alleged financial impact on them.

³⁹ *FCC v. Sanders Radio Station*, 309 U.S. 470 (1940); *National Coal Ass'n v. FPC*, 121 F.2d 462 (D.C. Cir. 1951). See also, *Flying Tiger Line, Inc. v. CAB*, 350 F.2d 462 (D.C. Cir. 1965), where the Board admits standing in a situation similar to the military discount complaint.

⁴⁰ CAB Orders cited note 10 *supra*.

⁴¹ Brief for Petitioner before the CAB, p. 11, Consolidated Joint Complaint of National Trailways Bus System and Its Forty-Six Independent Member Carriers Requesting Suspension and Investigation (5 April 1965).

⁴² This is not, however, to say that Trailways claims that the failure to include the government in the category of persons enumerated in section 403(b) denotes a congressional intent to foreclose all rate reductions—only unjust discriminations.

⁴³ See *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 24 (1956). In *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 82nd Cong., 2d Sess. 5 (1952), the Board stated:

[I]t is the opinion of the Board that to exempt ministers of religion from the general prohibition against the granting of free or reduced-rate transportation would be a serious departure from the sound policy of the act.

In subsequent situations involving proposed discounts based on identity alone, the Board has similarly acknowledged the statutory limits upon its power to grant free or reduced transportation:

In passing the Civil Aeronautics Act, the Congress in section 403(b), which provides for free and reduced-rate transportation, substantially narrowed the categories to which such transportation could be offered

The Congress amended Section 403(b) of the Civil Aeronautics Act in 1956 to permit the granting of reduced rate transportation to ministers, but although as indicated above the Board has held that a tariff favoring students was unjustly discriminatory, the section was not broadened to include students as a favored class. (Footnotes omitted.)

Capital Groups Student Fares, 25 C.A.B. 280, 285-86 (1957).

duced rates to the clergy on a space-available or standby basis.⁴⁴ The question expressly in issue was whether the established policy should be maintained or whether it should be abandoned by permitting the airlines to freely grant rate reductions to all groups with a legitimate claim to special consideration.⁴⁵ Former Chairman James Durfee stated:

From time to time representatives of schools, women's organizations, youth organizations and others seeking to participate in national events have sought free or reduced-rate privileges. The Board has uniformly refused to issue exemption orders granting these requests, as it was believed that such action would be contrary to the established policy of Congress.⁴⁶

Cognizant of its congressional directive to promote the air transport industry,⁴⁷ the CAB's main objection to the bill as originally introduced, without the standby provision, was that it might result in frequent displacement of regular-fare passengers by ministers. The Board noted the substantial difference between the space problems of surface carriers and those of air carriers, and concluded that the airlines' relatively limited space makes it very likely that a discount traveler could displace a regular-fare passenger in the absence of a space available limitation. This concern over diversion was effectively dispelled by predicated the discount on space availability.⁴⁸ The adoption of the legislation amending section 403(b) to permit airlines, if they so desired, to grant special rate reductions on a standby basis to ministers would seem to indicate that the standby feature of a discount granted solely on the basis of identity might not by itself make the service "substantially different" so as to avoid an unjust discrimination problem.⁴⁹

A contra argument can be raised based on the size of the group to which the standby provision is to be applied. Since the clergy is a relatively small group, it is possible that the space-available restriction as to them will have no real effect. Conversely, where the group to which the standby provision applies represents a potentially large group of travelers (*i.e.*, the military), the standby restriction will prove to be a meaningful hindrance to one's ability to readily obtain passage; thus, the service available is "substantially different." This supposition would seem to be discredited by the fact that the average load factors on the majority of domestic air routes do not begin to approach capacity.⁵⁰ However, the average load

⁴⁴ S. 3149, 84th Cong., 1st Sess. (1956). The bill now appears as part of the Federal Aviation Act of 1958, 72 Stat. 758, 49 U.S.C. § 1373(b) (1964).

⁴⁵ See *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 27, 29-30 (1956).

⁴⁶ S. REP. NO. 2013, 84th Cong., 2d Sess. 7-8 (1956).

⁴⁷ Federal Aviation Act of 1958, § 102(c), 72 Stat. 740, 49 U.S.C. § 1302(c) (1964).

⁴⁸ U.S. CODE CONG. & AD. NEWS 3808 (1956).

⁴⁹ In *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481, 501 (1951), the Board notes that the standby provision has bearing in determining the unjustness of a rate discrimination. The provision

does not alter the character of the accommodations and services, it does however, appear to enter into the question whether . . . there is a measurable difference in the cost of the service or in the value of the service to the passenger. Such a difference, if it still exists, is of the type that inheres in the transportation itself, so as to differentiate such transportation from the carriage of other passengers.

⁵⁰ CAB Order No. E-22186 at 5.

factor argument ignores the fact that passengers do not travel uniformly; that is, some flights travel at capacity and some flights service far fewer passengers than the average. Thus, it is asserted that in view of this irregularity of flow, the standby passenger representing a large discount group is uncertain of obtaining passage and, thus, the service provided him is "substantially different." The fallacy in this approach is that it overlooks the fact that while traffic flow is not uniform, the flow of standby traffic can be made irregular in order to have peak standby flows coincide with the slack periods in the regular traffic flow. This timing of the standby group is especially possible with military traffic.⁵¹ The result of timing is that the standby passenger is now likely to obtain a seat.

From the above analysis, it seems reasonable to conclude that a standby provision attached to a reduced rate will not, by itself, generate a minimum of one negative answer to the three-factor test of the "rule of equality" so as to qualify the service provided as "substantially different." The size of the identifiable group under a space-available provision likewise appears immaterial.⁵² Therefore, it seems that the extension of such a reduced rate would require legislation similar to the clergy amendment before the Board would have the statutory authority to approve the rate.⁵³

All of the above discussion relating to the test of unjust discrimination as revealed by application of the "rule of equality" involves cases decided only upon factors related to carriage. Indeed, the weight of precedents indicates that only factors relating to the actual carriage are relevant when applying the "rule of equality."⁵⁴ However, the CAB maintains that in determining the answer to each of the three factors, it is not limited to a consideration of the conditions of carriage.⁵⁵ The principal decision sanctioning the CAB's position is *Military Tender Investigation*.⁵⁶ In that case the Board found that two factors of the "rule of equality" should be

⁵¹ The timing of military standby traffic has in fact been accomplished. See Proposed Military Fares, CAB Docket No. 15845, CAB Order No. E-21845 (26 Feb. 1965) p. 2. Note also that the airlines ensure a degree of timing in their "youth fares" by suspending their use during peak holiday periods.

⁵² In light of the foregoing analysis, it appears that the standby provision, instead of being a factor directed primarily at influencing the passenger, is mainly a device to assist the carrier in preventing excessive self-diversion.

⁵³ U.S. CODE CONG. & AD. NEWS 3064 (1960). Since the amendment of section 403(b) to allow the clergy to be eligible for reduced rates, other amendments have been found necessary in order to broaden the existing category of exemptions. These later amendments dealt primarily with airline personnel and relatives of those injured in airline accidents. Some of the arguments and points raised at the time serve to emphasize the necessity of a Congressional amendment when a group not previously included within section 403(b) is offered a reduced rate and the service is like and contemporaneous with regular-fare passengers. At page 3065 it is stated:

Several years ago the CAB reviewed and investigated all the practices of the regulated air carriers in the granting of free or reduced-rate transportation. This investigation disclosed that many of the air carriers were granting such transportation to persons who did not appear to qualify within the limited number of categories specified in § 403(b) . . . the Board promptly forbade the continuation of such practices.

Subsequently, the Board itself sponsored the amendments necessary to regularize and validate these industry practices.

⁵⁴ See, e.g., *Eastern Cent. Motor Carriers Ass'n v. United States*, 321 U.S. at 205-06 (1944).

⁵⁵ *Tour Basing Fares*, 14 C.A.B. 257 (1951); *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951).

⁵⁶ 28 C.A.B. 902 (1959).

answered in the affirmative; the service was like and contemporaneous, and the service was rendered to like traffic.⁵⁷ However, the cumulative effect of considerations outside the carriage itself was great enough to persuade the Board that the conditions and circumstances surrounding the carriage of military traffic were "substantially different" from those surrounding the carriage of non-military traffic.⁵⁸ A similar application to the military standby fares in the Trailways dispute enabled the Board to conclude that the rates under consideration were also offered under "substantially different" circumstances.⁵⁹

To examine the correctness of this departure from the traditional application of the "rule of equality," it is necessary to note some generalities in regard to the background of the regulatory sections which spawned the three-factor test. Sections 403(b) and 404(b) of the Federal Aviation Act were taken almost verbatim from corresponding sections of the Interstate Commerce Act.⁶⁰ In suits under the Interstate Commerce Act involving alleged unjust discrimination by one mode of surface transportation against another mode of surface carrier, the Commission has allowed factors outside actual carriage to influence the outcome of an application of the three-factor test.⁶¹ Because of the closeness between the CAB's applicable sections and the ICC's, one might expect the "rule of equality" to be applied in similar fashion by the CAB, thus justifying the Board's approach in *Military Tender Investigation*. It would seem, however, that this is not the case.

The ICC cases⁶² which form the basis for the Board's departure in *Military Tender Investigation* do not affect the pertinent CAB sections since they were founded upon considerations peculiar to surface carriers. In *Eastern-Cent. Motor Carriers Ass'n v. United States*,⁶³ the decision to allow factors outside carriage to affect the three-factor test was bottomed on the failure of the Commission to implement the National Transportation Policy as set forth in the Interstate Commerce Act.⁶⁴ This act requires the ICC to have due regard for other modes of surface transportation when setting rates so as to foster sound economic conditions among rail, motor, and water carriers. Since all surface transportation is now under one national plan, the problems of carrier pricing are commingled with planned balance. Such a uniform policy is a protectionist one in that the emphasis

⁵⁷ *Id.* at 905.

⁵⁸ The additional factors the Board considered, all clearly circumstances unrelated to the actual fact of carriage, were:

- (1) keen competition with the railroads for the military traffic;
- (2) cost savings in serving the military as compared to non-military traffic; and
- (3) the fact that the federal government was the recipient of the reduced fare. *Id.* at 906.

⁵⁹ CAB Order No. E-22186 at 3.

⁶⁰ Markham & Blair, *supra* note 17.

⁶¹ *Eastern-Cent. Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944).

⁶² In *Military Tender Investigation* the Board bases its approach on two earlier CAB decisions, *Tour Basing Fares*, 14 C.A.B. 257 (1951) and *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951). In *Tour Basing Fares*, the underlying ICC cases cited at page 258 are: *Eastern-Cent. Motor Carriers Ass'n v. United States*, 321 U.S. 194 (1944); *Barringer & Co. v. United States*, 319 U.S. 1 (1942); and *Texas & Pac. R.R. v. ICC*, 162 U.S. 197 (1895).

⁶³ 321 U.S. 194 (1944).

⁶⁴ See 49 U.S.C. preceding §§ 1, 301, 901, and 1001.

shifts from protecting the consumer (the whole purpose behind section 404(b)) to limiting price competition.⁶⁵

Therefore, at the occasion of the CAB's original break with the traditional manner of application of the "rule of equality," there was no properly applicable judicial authority for considering factors outside of carriage. This error has been carried over in the *Military Tender Investigation* and in the Board's decision upholding the military standby fares. Since the "rule of equality" is unquestionably the correct approach to unjust discrimination charges and since a standby provision alone seemingly will not transform the transportation into "substantially different" service, the probability exists that the military standby fare is outlawed as unjust discrimination in the absence of a section 403(b) exemption. However, to achieve a complete discussion of the problem of rate discrimination, it is assumed that the courts will find the military discount "substantially different," either because they adopt the CAB's method of applying the "rule of equality" or because they determine that the "bumping" provision by itself, or collectively with the standby provision, sufficiently alters the circumstances of carriage. Thus, attention is focused on the second prohibitory provision of section 404(b)—undue preference and prejudice.

B. *Undue Preference And Prejudice*

If it is assumed that the three-factor test throws the military standby fares into the "substantially different" category, attention is turned to whether the carrier may lawfully extend the standby service exclusively to the military.⁶⁶ To judge the propriety of the military discount, the CAB must consider the merits of singling out the military from all identifiable groups of travelers for the reduction. The very nature of this task involves sorting through factors which are outside the actual fact of carriage. Whenever the Board has examined conditions and circumstances surrounding the fact of carriage, it has labeled them "compelling circumstances."⁶⁷

In its order refusing to investigate Trailways' complaint against the military discount, the CAB found the compelling circumstances to include (1) considerations of national interest, and (2) competitive considerations.⁶⁸ As to the former, the Department of Defense has set forth the public interest factors supporting the continuance of the military reduction, the most substantial of which is the morale factor in permitting rapid transportation to

⁶⁵ Silberman, *Price Discrimination and the Regulation of Air Transportation*, 31 J. AIR L. & COM. 198, 212 (1965). This still remains true in a modified sense due to the 1958 amendment to section 15(a) of the Interstate Commerce Act. Now, the rates of the surface carriers will not be maintained at an artificially high level merely to keep another mode of surface transportation alive. In *Eastern Cent. Motor Carriers case*, the Court's approval of earlier cases following the traditional application of the "rule of equality" leads to the permissible inference that *Barringer & Co. v. United States*, cited in *Military Tender Investigation*, is likewise of no importance, it too having arisen after the adoption of the National Transportation Policy in 1940. The remaining case cited as support in *Military Tender Investigation*, *Texas & Pac. R.R. v. ICC*, 162 U.S. 197 (1895), seems to be effectively distinguished virtually out of existence by *ICC v. Alabama Midland Ry*, 168 U.S. 144 (1897).

⁶⁶ *Investigation of Seaboard and Western Airlines, Inc.*, 11 C.A.B. 372 (1950).

⁶⁷ E.g., *Military Tender Investigation*, 28 C.A.B. 902 (1959).

⁶⁸ CAB Order No. E-22186 at 4.

be available to servicemen at a price within their reach.⁶⁹ For all its appeal, the public interest argument is weakened somewhat by the fact that in some instances⁷⁰ airlines do not offer the military reduction on routes where there is no surface competition. In order to discredit this argument, the airlines must prove that offering the standbys in noncompetitive markets would be financially deleterious and, hence, contrary to their statutory directive to offer reasonable rates.⁷¹

Until the airlines submit data proving the discount is financially deleterious, competitive considerations would seem to form a more solid foundation upon which to establish the existence of the compelling circumstances sufficient to justify offering the standby discounts solely to the military. The airlines point out that both the railroads and the buses offer regular reduced fares to military personnel on furlough.⁷² They argue that if air carriers are prohibited from offering the military standby fare they will be at a competitive disadvantage with surface carriers in the transportation of military personnel.⁷³

Trailways, however, asserts that its military rates have a negligible effect on the airlines due to the air carriers' inherent advantage of time saving. Moreover, Trailways cites several instances where its members have suffered severe financial setbacks when forced into head-to-head competition with the airlines' military standby fares.⁷⁴ The results of the *Military Tender Investigation* showed that the economy of the surface carriers attracted the majority of the short-haul passengers but that on the long haul, where the inherent time advantage of air carriers is most apparent, the airlines captured most of the military travelers. Therefore, it would appear that competition through rate reductions, especially in short-haul markets, is prima facie a compelling circumstance justifying the airlines' military standbys. But the figures are not current and, therefore, not conclusive. Perhaps the standby discount is so low as to have a diversionary effect upon the airlines' net revenue. Such a result would clearly violate section 102, which applies to all proceedings under Title IV,⁷⁵ and could not be justified by promotional considerations alone.⁷⁶ In view of the fact that the airlines have failed to supply the CAB with information on the economic impact of the military discount, it appears that the only way to resolve the question is to conduct an investigation.

⁶⁹ These public interest factors have been developed at greater length by the Department of Defense in the record of the New Bern and Jacksonville—Camp Lejeune Service Case, CAB Docket No. 14560, CAB Order No. E-22427 (9 July 1965).

⁷⁰ Brief for Petitioner before the CAB, pp. 33-34, Consolidated Joint Complaint of National Trailways Bus System and Its Forty-Six Independent Member Carriers Requesting Suspension and Investigation (5 April 1965).

⁷¹ Section 404(a), set out in note 20 *supra*. A rate is unreasonable if it does not satisfy the full cost or profit-impact tests set out in text accompanying note 78.

⁷² Interstate Commerce Act, § 22(1), 54 Stat. 899 (1944), 49 U.S.C. § 22(1) (1964).

⁷³ Cost savings inherent in the carriage of military as opposed to non-military traffic and the fact that the federal government is the recipient of the discount were also found by the Board in *Military Tender Investigation* to be compelling circumstances. 28 C.A.B. at 909-10 (1959).

⁷⁴ Brief for Petitioner before the CAB, p. 10, Consolidated Joint Complaint of National Trailways Bus System and Its Forty-Six Independent Member Carriers Requesting Suspension and Investigation (5 April 1965).

⁷⁵ Title IV—Air Carrier Economic Regulation, 2 AV. L. REP. (9 AV. CAS.) § 15,107.

⁷⁶ *Hawaiian Common Fares Case*, 10 C.A.B. at 929 (1949).

C. Reasonableness Of The Military Discount

Section 404(a)'s requirement that all rates be reasonable applies to all tariffs filed with the CAB by domestic carriers.

The question whether a fare or rate is just or reasonable turns primarily on the relationship between the revenue produced and the cost incurred by the carrier in providing the service, not on the relative effects of the fare or rate on different passengers, shippers, or places.⁷⁷

1. Standards Employed to Test the Reasonableness of a Tariff

The Board has traditionally adopted two standards to ascertain the reasonableness of a tariff: (1) the fare-cost test, and (2) the profit-impact test.

a. *Fare-Cost Test*—This standard involves a comparison of the fare level with the fully-allocated costs of service. Since this test requires each fare offered to at least equal its proportionate cost of the flight, it is used only in those rare instances in which the airline's capacity is geared to the reduced-rate traffic.⁷⁸ Since indications from the airlines are that the military standby traffic represents only five percent of the total traffic,⁷⁹ it is doubtful that the reasonableness of the instant rates should be measured by the fare-cost test.

In the past, several carriers have attempted to show the reasonableness of their price differential by suggesting an added-cost or top-off standard.⁸⁰ This theory assumes that most of the costs of a flight are fixed, so that, if the carrier can sell an otherwise empty seat at a price above the variable passenger costs, the carrier is financially better off than if the seats remained empty; thus, any price covering the minimal variable costs is reasonable. Such an approach was expressly rejected in the *Summer Fares Excursion Case*.⁸¹ In *Free and Reduced-Rate Transportation Case*,⁸² the Board considered the added-cost theory and stated:

This argument is unsound from an accounting and legal standpoint; the cost of transporting the agent includes all the expenses that enter into the provision of identical service and accommodations for a full-fare passenger. The carrier's direct-flight expense, its maintenance expense, and all its other operating costs are as fully assignable to the travel agent . . . as they are to any full-fare passenger who might occupy the same seat.⁸³

b. *Profit-Impact Test*—This is the standard customarily applied to fares for services offered on a space-available basis where the carrier's capacity is geared to the regular full-fare traffic.⁸⁴ To satisfy the profit-impact test a rate reduction must produce sufficient new traffic to offset the loss of

⁷⁷ *Free and Reduced-Rate Transportation Case*, 14 C.A.B. at 493 (1951).

⁷⁸ See, e.g., *Pittsburgh-Philadelphia No-Reservation Fare Investigation*, 34 C.A.B. 508 (1961), which held that the reasonableness of an Allegheny fare for a no-reservation service must be determined on the basis of fully-allocated costs.

⁷⁹ CAB Order No. E-22186 at 6.

⁸⁰ See, e.g., *Free and Reduced-Rate Transportation Case*, 14 C.A.B. 481 (1951); *Summer Excursion Fares Case*, 11 C.A.B. 218 (1950).

⁸¹ 11 C.A.B. 218 (1950).

⁸² 14 C.A.B. 481 (1951).

⁸³ *Id.* at 502.

⁸⁴ CAB Order No. E-22186 at 6.

revenue from self-diversion plus the added cost of carrying the additional traffic. In taking into account the diversionary effect inherent in all rate reductions, it differs from the top-off approach which merely requires the airline to cover the minimal passenger costs of the additional traffic.

The Board indulges in the assumption that, in spite of the failure of the airlines to supply information of self-diversion and generation, the industry would not urge the continuance of the military discounts unless it were to their economic advantage to do so.⁸⁵ Such an assumption appears unfounded. It is entirely possible that the carriers, failing to create the required generation under the profit-impact test, are following an added-cost or top-off standard of their own on the theory that the promotional advantages to be gained by exposing additional military personnel to air travel are preferable to empty seats with no decrease in revenue. If the carriers are engaging in such a procedure, they are allowing a manifestly unreasonable discount.⁸⁶ The failure of the airlines to provide enlightening information in this area suggests the necessity of an investigation of military standby fares.

V. CONCLUSION

The article has focused primarily upon sections 404 and 403 in order to clarify the framework within which Congress intended the Board to operate in the exercise of its economic regulatory powers. Correct application of sections 404 and 403 will enable the CAB to comply with the congressional intent and to move away from its *ad hoc* decisions of late.⁸⁷ The Board is without power to liberalize the Federal Aviation Act to suit transitory policies but, rather, is responsible for enforcement of the act in accord with congressional intent.

Public sentiment is quite naturally with the servicemen, but it was likewise with the clergy. Nevertheless, in the latter case the CAB enforced the act as written and the result was an amendment to section 403(b) permitting the clergy rate reductions. Therefore, it is submitted that Congress should authorize an amendment permitting military discounts on a standby basis in order to prevent the Board from compromising its statute in favor of public sentiment and promotion.⁸⁸

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⁸⁵ *Ibid.*

⁸⁶ See accompanying note 80 *supra*.

⁸⁷ *E.g.*, Frontier's Standby Fares, CAB Docket No. 16873, CAB Order No. E-23128 (18 Jan. 1966).

⁸⁸ In Summer Excursion Fares Case, 11 C.A.B. 218 (1950), the Board rejected the argument that its function of promotion is paramount. It found that fares of a promotional character must be reasonable and not unjustly discriminatory.

NOTES

Procedure — Forum Non Conveniens — Foreign Corporations

Scottish Air International, Inc. [hereinafter Scottish] is a New York corporation formed to syndicate the United States capital contributed to the formation of Caledonian Airways/Prestwick, Ltd. [hereinafter Caledonian] a United Kingdom corporation.¹ Caledonian maintains an office in New York City and derives substantial revenues from its flights to and from New York. Scottish commenced a stockholder's derivative action in the New York state courts against Caledonian and some of its directors for alleged fraudulent transactions, and the defendants removed to the federal courts. The defendants then moved to dismiss the action brought by Scottish on the ground of forum non conveniens. Caledonian argued that all material witnesses were in the United Kingdom, that United Kingdom law applied to all relevant issues, and that plaintiffs had a convenient forum in the United Kingdom. The presiding judge denied the motion to dismiss, and the defendants petitioned the court of appeals for a writ of prohibition or mandamus, or both, against the presiding judge in the district court. *Held*: A refusal to dismiss a stockholder's derivative suit against a United Kingdom air carrier on the basis of forum non conveniens was not an abuse of discretion on the part of the district court judge. The court based its decision upon a finding that there were substantial New York facets of the business, and also that Caledonian came here to obtain the capital on which Scottish's claims are based. *Thomson v. Palmieri*, 355 F.2d 64 (2d Cir. 1966).

The doctrine of forum non conveniens originated in Scotland as a rule of refusal to hear cases when the ends of justice would be best served by trial in another forum.² The courts of the United States adopted the term forum non conveniens as requiring "the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else."³ When the change of venue section, 1404(a), of the Federal Rules of Civil Procedure was enacted,⁴ it was mistakenly construed by some courts to be a codification of

¹ There are over twenty-five stockholders in Scottish, and Scottish's investment in Caledonian was approximately \$45,000. Scottish held only non-voting stock, and originally it held approximately thirty-five percent of the total stock of Caledonian, but at the time of the derivative action its equity had been reduced to approximately twelve percent.

² *Loftus v. Lee*, 308 S.W.2d 654, 658 (Mo. 1958). See 24 GEO. WASH. L. REV. 208-09 (1955) and 56 YALE L.J. 1234 (1946) for historical development of forum non conveniens.

³ *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952). The Supreme Court approved this definition in *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955).

⁴ FED. R. CIV. P., § 1404(a), 62 Stat. 937 (1948), 28 U.S.C. § 1404(a) (1964):

For the convenience of parties and witnesses, in the interest of justice, a district

the forum non conveniens doctrine.⁵ If section 1404(a) had effectively eliminated forum non conveniens as a separate doctrine, the courts would be deprived of the inherent power to refuse jurisdiction in cases which should have been brought in a foreign jurisdiction, since 1404(a) requires that the case be transferred to some other federal venue.⁶ The United States Supreme Court clarified the misconception in *Norwood v. Kirkpatrick* by citing with approval from the court of appeals decision in *All States Freight, Inc. v. Modarelli*.⁷

The forum non conveniens doctrine is quite different from Section 1404 (a) It is quite naturally subject to careful limitations for it not only denies the plaintiff the generally accorded privilege of bringing the action where he chooses, but makes it possible for him to lose out completely through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404 (a) avoids this latter danger. Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.⁸

Before the enactment of 1404(a), the Supreme Court set out the basic considerations in determining when to apply the doctrine of forum non conveniens: (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling witnesses, (3) possibility of a view of premises if a view would be appropriate to the action, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.⁹ The burden of establishing that the action should be transferred is on the moving party under both 1404(a) and forum non conveniens.¹⁰ In both instances the decision whether to transfer or to dismiss is in the discretion of the district court to be exercised in the light of all the circumstances of the case.¹¹ The ultimate concern of the court under the forum non conveniens doctrine is whether litigation

court may transfer any civil action to any other district or division where it might have been brought.

⁵ *Collins v. American Auto. Ins. Co.*, 230 F.2d 416 (2d Cir. 1956), *petition for cert. dismissed per stipulation*, 352 U.S. 802 (1956).

⁶ *FED. R. Civ. P.*, § 1404(a), 62 Stat. 937 (1948), 28 U.S.C. § 1404(a) (1964). See *DeSairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950). The Court of Appeals for the Second Circuit stated that § 1404(a) did not limit the application of forum non conveniens to cases which would be capable of being transferred from one federal district to another, and this decision was followed in *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D.N.Y. 1950). This case involved a Brazilian corporation engaged in manufacturing exclusively for South American trade. The corporation made no sales and delivered no goods in the United States. The corporation did, however, purchase equipment and materials in the United States through a purchasing agent in New York and maintained a drawing account in a New York bank. The defendant terminated the contract and the plaintiff sued for breach in New York. The defendant moved for the court to dismiss on the ground of forum non conveniens, and the court refused even though: the defendant had no office in New York; plaintiff was a citizen of Georgia; all of defendant's witnesses lived in Brazil; and the witnesses spoke only Portuguese.

⁷ 196 F.2d 1010 (3d Cir. 1952).

⁸ 349 U.S. 29, 31 (1955). See also *United States v. E.I. duPont deNemours & Co.*, 87 F. Supp. 962 (N.D. Ill. 1950), holding that the courts may refuse to exercise jurisdiction under § 1404(a) for less impelling reasons than under the former doctrine of forum non conveniens, since under § 1404(a) the court merely transfers the case, whereas under forum non conveniens the court dismisses the action or refuses to exercise its jurisdiction.

⁹ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

¹⁰ *United States v. E.I. duPont deNemours & Co.*, 87 F. Supp. 962 (N.D. Ill. 1950).

¹¹ *Christopher v. American News Co.*, 176 F.2d 11 (7th Cir. 1949).

in the forum will best serve the convenience of parties and the ends of justice.¹²

Prior to section 1404(a), the federal courts seem to have been less demanding in the requisites necessary to refuse jurisdiction on the ground of forum non conveniens when the suits involved American citizens from different states than the courts are today in suits where the only other proper forum is in a foreign country.¹³ This is because the courts are reluctant to require an American citizen and plaintiff to bring his suit in a foreign jurisdiction.¹⁴

Another factor which the courts consider in determining whether to dismiss a cause because of forum non conveniens is the waning internal affairs rule. The following two cases, dealing with the internal affairs rule, involve corporate defendants domiciled in a state other than the one in which the suit was brought. The treatment by these courts pointing out the decline of the internal affairs rule as it bears upon the forum non conveniens doctrine is also applicable to the situation in which the corporate defendant is domiciled in a foreign country. In both situations, if the court refuses to dismiss, it is exercising its jurisdiction over a defendant corporation domiciled outside its jurisdiction.

The Supreme Court in *Williams v. Green Bay & W.R.R.*¹⁵ established that there is little basis in federal law for the dismissal of an action merely because it involves the internal affairs of a foreign corporation. The plaintiffs in *Williams*, who were residents of New York, brought suit in New York against a Wisconsin corporation to recover amounts alleged to be due and payable on its debentures. Application of Wisconsin law was necessary in order to obtain a proper interpretation of the corporation's debenture covenant. The Supreme Court reversed a prior dismissal by the trial court based on forum non conveniens and remanded the case to be tried on its merits. Mr. Justice Douglas, writing for a unanimous court, indicated that forum non conveniens would justify the dismissal of a case involving the internal affairs of a foreign corporation in only two instances: (1) where the relief sought is so extensive or would require such detailed and continuing supervision that the federal court would be seriously handicapped in providing an effective remedy, and (2) where trial in the federal district court would be oppressive or vexatious to the defendant.

The year following its decision in *Williams*, the Supreme Court decided *Koster v. (American) Lumbermen's Mut. Cas. Co.*¹⁶ That case involved a derivative action brought in the federal district court in New York by a New York policyholder against an Illinois mutual insurance company and

¹² *Koster v. (American) Lumbermen's Mut. Cas. Co.*, 330 U.S. 518 (1947).

¹³ Compare *Williams v. Green Bay & W.R.R.*, 326 U.S. 549 (1946) with *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D.N.Y. 1950).

¹⁴ *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir.), cert. denied, 349 U.S. 922 (1955) (both parties were American citizens); *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956); and *The Saudades*, 67 F. Supp. 820 (E.D. Pa. 1946).

¹⁵ 326 U.S. 549 (1946).

¹⁶ 330 U.S. 518 (1947).

an allegedly unfaithful officer domiciled in Illinois. Although this was not an internal affairs case, the court declared:

There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.¹⁷

From the foregoing it may be concluded that the internal affairs rule is an important consideration only when there is doubt as to whether the court can give an effective remedy within its jurisdictional limits and powers.

Though the principle of *forum non conveniens* is applicable to cases in which the alternative forum is in a foreign country, the added circumstance that an American plaintiff will be deprived of an American forum is given considerable weight by the courts in deciding whether to apply the doctrine. In *Burt v. Isthmus Dev. Co.*¹⁸ both parties were American citizens, but all of the defendant's witnesses were in Mexico, and Mexican law applied. When the federal district court dismissed on the basis of *forum non conveniens*, the appellate court reversed, stating that it had found no case where a resident citizen suing in his own right had been sent to a foreign court. The court felt that it would be inconsistent with the purpose and function of the federal courts to hold that a court could decline to hear a case and in effect force a citizen to go to a foreign country to find redress for an alleged wrong. Courts should require evidence of unusually extreme circumstances and must be thoroughly convinced that material injustice is present before exercising any discretion to deny a citizen access to United States courts. Another district court stated that mere inconvenience to the foreign defendant is not a sufficient basis for refusing jurisdiction,¹⁹ and the Supreme Court has stated that it is necessary to show that plaintiff's choice of forum was prompted by an intent to vex or harass defendant²⁰ in order to acquire a dismissal on the ground of *forum non conveniens*.²¹ Moreover, Judge Learned Hand stated

¹⁷ *Id.* at 527. See also RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(e), comment (d) (Tent. Draft No. 4, 1957), p. 69:

At one time, it was customary for the courts to evince strong reluctance to interfere with the "internal affairs" of a corporation that had been incorporated in another state. . . . This doctrine enjoys less force at the present time. The fact that the suit involves the internal affairs of a foreign corporation is held by the courts today to be but one of the factors to be considered in determining whether the forum selected is an appropriate one for the suit. This factor moreover will rarely be of crucial significance unless the nature of the relief demanded would require the court to exercise detailed and continued supervision over the corporation's affairs.

¹⁸ 218 F.2d 353 (5th Cir.), cert. denied, 349 U.S. 922 (1955).

¹⁹ *The Saudades*, 67 F. Supp. 820 (E.D. Pa. 1946).

²⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Wheeler v. Societe Nationale Des Chemins DeFer Francias* (French Nat'l R.R.s), 108 F. Supp. 652 (S.D.N.Y. 1952).

²¹ In *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir. 1956), the court stated: "Whether jurisdiction should be declined is determined by balancing conveniences, but the plaintiff's choice of forum will not be disturbed unless the balance is strongly in favor of the defendant." See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504-09 (1947).

as dicta in *United States Merchants and Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*²² that a citizen's right of access to a federal court is conclusive against remission to a foreign jurisdiction under the doctrine of forum non conveniens when he sues in his own right. This attitude on the part of the judiciary is often justified on the basis that a refusal to exercise jurisdiction might adversely affect the plaintiff's substantive rights, and a change of forum should not alter the rights of the parties.²³ However, it has been stated by several courts that an American citizen does not have an absolute right to sue in an American court.²⁴

*Stewart v. Godoy-Sayan*²⁵ is one of the few cases in which the judiciary has dismissed an action by an American citizen against a defendant domiciled in a foreign country. In that case residents of New York brought suit in a New York federal district court for damages allegedly resulting from defendant's looting of a Cuban corporation of which plaintiffs were stockholders. The plaintiffs had purchased their stock in Cuba. All witnesses and documents necessary for trial were in Cuba, and American law was not involved. The only connection between the suit and any jurisdiction other than Cuba was that the plaintiffs, as stockholders, lived in the United States. The court held that the mere fact that the plaintiffs were local residents did not require the court to entertain jurisdiction because suit was brought on behalf of the corporation and not in the plaintiffs' own right. The Supreme Court in *DeSairigne v. Gould*²⁶ refused to review a dismissal on the ground of forum non conveniens in a derivative action. The dismissal was based upon the following factors: the internal affairs of a foreign corporation were involved; all relevant books and records were located in the foreign domicile; and only foreign law was applicable.

In the instant case, Caledonian had a full-time office and staff in New York City to handle its many charter flights between New York and the United Kingdom. The officers and directors of Caledonian frequently came to the United States on business, and the corporation retained a Washington attorney to represent it before the Civil Aeronautics Board and in other matters in the United States. The individual defendants, F. Hope and A. Thomson, were officers and directors of Caledonian and were charged by Scottish with alleged fraudulent transactions involving Caledonian. The individual defendants were personally served in New York while on one of their business trips to the United States.

In refusing to dismiss under forum non conveniens, the Court of Appeals for the Second Circuit placed considerable emphasis upon Caledonian's numerous contacts with the forum. Even though the suit in-

²² 65 F.2d 392 (2d Cir. 1933).

²³ *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S.2d 532 (1943); 50 COLUM. L. REV. 236 (1950).

²⁴ *United States Merchants and Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, 65 F.2d 392 (2d Cir. 1933); *DeSairigne v. Gould*, 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950).

²⁵ 153 F. Supp. 544 (S.D.N.Y. 1957).

²⁶ 83 F. Supp. 270 (S.D.N.Y. 1949), *aff'd*, 177 F.2d 515 (2d Cir. 1949), *cert. denied*, 339 U.S. 912 (1950).

volved the internal affairs of a foreign corporation, the court had power to grant effective relief since it could exercise its power over that portion of the defendant's business carried out within the forum. The court in *Thomson* distinguished *DeSairigne* on the basis that, in the latter case, the defendant had only minimal contacts with the forum state while in *Thomson* Calendonia had actively engaged in business in the forum state and had sought capital there. The *Stewart* case is, a fortiori, distinguishable from *Thomson* in that there was no connection at all between the defendant and the United States in *Stewart* since it did no business in the United States, and the stock was purchased in Cuba.

Thus, the courts today seem to place emphasis upon balancing the inconvenience to the defendant who is domiciled in another country against the inherent fear that depriving a resident plaintiff of a local forum and forcing him into a foreign jurisdiction will result in a loss of some of his substantive rights.²⁷ In light of this principle the courts consider the following factors: (1) whether it is the intent of the plaintiff to vex or harass the defendant by his choice of forum, (2) in derivative actions, whether plaintiff's interest is substantial, (3) whether the defendant has sufficient contacts with the forum, and (4) whether the court can effect an adequate remedy if it accepts jurisdiction. Once the trial judge has balanced the interests of the parties and the other factors to be considered and made his decision, it is unlikely that any appellate court will reverse that decision, since it is discretionary in nature.²⁸ However, it does appear that an appellate court would be more likely to reverse a court's refusal to exercise jurisdiction on the ground of forum non conveniens than a court's refusal to dismiss simply because the scales seem to tip more heavily in favor of an American plaintiff whose rights may be infringed.

William C. Strock

²⁷ *Shulman v. Compagnie Generale Transatlantique*, 152 F. Supp. 833 (S.D.N.Y. 1957).

²⁸ RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(e), comment (b) (Tent. Draft No. 4, 1957), p. 67.

Patent Law — NASA Contracts — Commissioner's Discretion

The National Aeronautics and Space Act of 1958¹ forbids the issuance of a patent to any applicant other than the Administrator of the National Aeronautics and Space Administration [hereinafter Administrator and NASA] if the Commissioner of Patents [hereinafter Commissioner] determines that the invention has possible utility in the conduct of aeronautical and space activities unless such applicant files a two-part statement with the Commissioner within thirty days after formal request of such statement.² This statement must contain a description of the circumstances surrounding the invention and its relationship to any work done under contract with NASA. The Commissioner advised appellant on 15 March 1963 that his patent application had been found allowable,³ but since the invention appeared to have utility to NASA, the applicant was required to file a statement as required by Section 2457(c) of the National Aeronautics and Space Act of 1958.⁴ On 25 April the appellant filed two statements⁵ which read identically, "At the time I conceived and reduced to practice the invention which is the subject matter of said application I was not performing any work under any contract with the National Aeronautics and Space Administration." The Patent Office notified appellant on 31 May that the statements were unacceptable because the full facts concerning the circumstances under which the invention was made were not set forth.⁶ Having received no reply to his informal request, the Commissioner on 30 September issued a formal request. On 12 December 1963 the appellant was notified that the thirty-day statutory period had run and that no patent could be issued on his application. After unsuccessfully attempting to have the Commissioner revive the application, the appellant instituted suit in the United States District Court for the

¹ 72 Stat. 426 (1958), 42 U.S.C. §§ 2451-76 (1964).

² 72 Stat. 435 (1958), 42 U.S.C. § 2457(c) (1964):

No patent may be issued to any applicant other than the Administrator [NASA Administrator] for any invention which appears to the Commissioner of Patents to have significant utility in the conduct of aeronautical and space activities unless the applicant files with the Commissioner, with the application or within thirty days after request therefor by the Commissioner, a written statement executed under oath setting forth the full facts concerning the circumstances under which such invention was made and stating the relationship (if any) of such invention to the performance of any work under any contract of the Administration. Copies of each such statement and application to which it relates shall be transmitted forthwith by the Commissioner to the Administrator.

³ This was a determination by the Patent Examiner that the subject matter of the application was patentable under the Patent Act of 1952. 66 Stat. 797 (1952), 35 U.S.C. § 100 (1964).

⁴ This notification was not a "formal notice" which would have started the statutory thirty day time limit. However, it advised appellant that if such a formal notice were sent there was no provision in § 2457 for the extension of the time limit.

⁵ Two statements were submitted since there were co-inventors. Appellant had acquired the rights of the inventors by assignment.

⁶ This correspondence also informed appellant that a formal request would be issued unless supplemental statements correcting the defects were filed within thirty days.

District of Columbia to compel the Commissioner to restore the application to pendency. He asserted that the Commissioner had acted *ultra vires* in ruling on the sufficiency of the statements. The court granted the government's motion for summary judgment, holding that "when a statute provides that a statement be composed of two parts, and the statements actually filed include only one of those two parts, those statements are clearly insufficient as a matter of law."⁷ *Held, affirmed*: The Commissioner's duty under section 2457(c) is not merely ministerial, but requires that he pass on the sufficiency of statements filed pursuant to that section. *Cadillac Gage Co. v. Brenner*, 363 F.2d 690 (D.C. Cir. 1966).

The purpose of Section 2457 of the National Aeronautics and Space Act of 1958 is to grant the federal government an exclusive property interest in any invention made in the performance of work under a contract with NASA⁸ and, further, to assure the Administrator the opportunity to assert this interest.⁹ Pursuant to this statutory purpose, all contracts entered into with NASA must contain a provision obligating the other party to submit to the Administrator a written report concerning any inventions or improvements made in connection with the contract. As a secondary protection, the Commissioner of Patents is directed not to issue a patent for an invention which appears to be of utility to NASA unless: (1) the applicant has filed within thirty days of request a statement describing the circumstances under which the invention was made and the relationship (if any) of the invention to work done under contract with NASA, and (2) the Administrator has failed to request that the patent issue to him within ninety days after receipt of the application and statement from the Commissioner.¹⁰ Thus, within the scheme of the act the Commissioner represents merely a conduit through which the Administrator is assured an opportunity to assert the government's property interest in an invention conceived pursuant to a NASA contract.

Upon examination of the limited duty imposed by this act on the Commissioner, it is evident that it is within his discretion to categorize a particular invention as having utility to the NASA program; however, it seems less evident whether his function of requesting a statement from an applicant and transmitting that statement along with the patent application to the Administrator is discretionary or ministerial in nature. The Supreme Court has declared that "the word discretion as used in statutory . . . grants of authority means that the recipient must exercise his authority according to his own understanding and conscience."¹¹ In contrast, a grant of ministerial power is understood to impose an absolute duty to perform a certain act under conditions specified, not being dependent upon

⁷ *Cadillac Gage Co. v. Brenner*, 247 F. Supp. 62, 64 (D.D.C. 1965).

⁸ 72 Stat. 435 (1958), 42 U.S.C. § 2457 (a), (b), & (c) (1964).

⁹ 72 Stat. 435 (1958), 42 U.S.C. § 2457 (b) & (c) (1964).

¹⁰ The statute, in addition, provides for protection of the interests of the private inventor. Subsection (d) of § 2457 grants a right to the applicant to have any controversy with respect to the validity of the Administrator's claim of title to his invention settled by the Board of Patent Interferences, and the Board's determination is expressly subject to judicial review.

¹¹ *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

the officer's judgment or discretion.¹² Thus, the Commissioner's specified, regimented statutory duty of requesting a statement from an applicant and transmitting that statement and the patent application to the Administrator is apparently ministerial rather than discretionary.

The statutory scheme, however, seems to require the Commissioner to determine whether the statement is *prima facie* adequate before transmittal to the Administrator. Nevertheless, it is generally accepted that the mere fact that it is necessary to exercise a degree of discretion to determine if the facts or conditions exist which require an administrator to act does not convert a ministerial act into one of discretion.¹³ In *Youngblood v. United States*¹⁴ a state statute required that notice of a federal tax lien describe the land on which the lien was claimed, and the court held that the county registrar of deeds (a ministerial official) was not required to record a notice which did not *prima facie* have such a description.¹⁵ By analogy, though the Commissioner's duty in transmitting the statement to the Administrator is ministerial in nature, it is still proper for the Commissioner to exercise his discretion to the extent of determining whether the statement submitted by an applicant is *prima facie* a proper statement.

In the instant case the statements submitted by the applicant were clearly insufficient because they revealed nothing about the circumstances surrounding the invention. Accordingly, the district court dispensed with appellant's claim on the ground that the statements as a matter of law did not comply with the requirements of the statute. Thus, the district court held that the Commissioner has the right to refuse to transmit a statement which *prima facie* fails to comply with the statute. In affirming, the court of appeals stated, "[T]he Commissioner's duty under § 2457(c) was not merely ministerial, but requires that he pass on the sufficiency of the statements."¹⁶ The court's language is broad enough to allow the Commissioner the discretion in each case to determine whether a statement contains an adequate description of the "full facts."¹⁷ It is submitted

¹² 1 AM. JUR. 2d *Administrative Law* § 83 at 878 (1962).

¹³ *Independent School Dist. of Danbury v. Christiansen*, 49 N.W.2d 263 (1951). See generally 1 AM. JUR. 2d *Administrative Law* § 84 at 879 (1962).

¹⁴ 141 F.2d 912 (6th Cir. 1944).

¹⁵ To the same effect see *State v. Shaver*, 173 N.E.2d 758 (1961), where the court said that a ministerial officer "may exercise some discretion and is not absolutely required to accept, record, and index every instrument presented to him." *Id.* at 760. *Accord*, *Luther v. Banks*, 111 Ga. 374, 36 S.E. 826 (1900) and *United States v. Bell*, 127 Fed. 1002 (1904).

¹⁶ *Cadillac Gage Co. v. Brenner*, 363 F.2d 690 (D.C. Cir. 1966). Note that the court also stated that if the duty were not interpreted as discretionary the Commissioner would be required to transmit *all* statements to the Administrator. This is clearly a misinterpretation of the scope of ministerial duties.

¹⁷ The statute requires that each statement set forth the "full facts" concerning the circumstances under which such invention was made. If it were within the Commissioner's discretion to determine whether a statement, in addition to being *prima facie* sufficient, sets forth the full facts of a particular case, he would conceivably have the power to refuse a patent because in his judgment the statement either failed to set forth complete facts or stated untrue facts. This would mean that an applicant could be permanently denied a patent on an otherwise patentable invention without the right to have the Commissioner's discretionary determination reviewed, except as to an abuse of that discretion. In contrast, § 2457(d) provides for review of any further action on the patent once the patent and the statement have been submitted to the Administrator. Further, the Commissioner should not have the final authority to determine, beyond *prima facie* adequacy, whether additional facts are necessary for the Administrator to make a determination.

that the statute confers no authority upon the Commissioner except that of acting as a conduit through which the Administrator is afforded the opportunity to assert the government's property interest in devices invented in connection with a NASA contract. Thus, while the summary judgment in the instant case was proper because the statement was insufficient as a matter of law, the language of the appellate court is broad enough to support an action by the Commissioner which is outside the scope of his statutory authority.

Allen C. Rudy, Jr.

Sonic Booms — Ground Damage — Theories Of Recovery

I. INTRODUCTION

Although the detrimental side effects caused by sonic booms have not presented serious problems for land owners to date, as supersonic transport aircraft come into widespread commercial use, substantial litigation over ground damage caused by these booms will probably arise. Recovery for damages resulting solely from the noise accompanying the boom does not seem to require theories of liability different from those which have already developed in litigation over subsonic jet aircraft noise. More difficult problems are presented when the attempt is made to devise a theory of recovery for actual physical damage to property.

Apparently, widespread use of supersonic commercial aircraft is just around the corner, as production schedules for these aircraft continue to be met. The Concorde program, a joint venture sponsored by the French and British governments for the development and production of a supersonic transport aircraft, has been in operation since 1961. By late-October, 1965, the producers had received fifty-two orders for the Concorde, seventeen of them from United States airlines.¹ At the same time they reported that they were on schedule for the first flight to take place in March, 1968, certification to occur early in 1971, and airline service to start later that year.² Twelve Concorde were scheduled for delivery to airlines in 1971, with further production to continue at the rate of three planes per month.³

The Federal Aviation Agency, as coordinator of a similar American program, has received bids for production of a supersonic transport from Boeing and Lockheed and is expected to let a contract by about 1 January, 1967.⁴ By late-October, 1965, there had been ninety-five deposits of \$100,000, each made in connection with an order for one of the proposed American aircraft, forty-four of which were placed by domestic airlines.⁵ The present schedule for the American program calls for the first prototype flight in 1970, followed by delivery in 1974.⁶

II. DAMAGING EFFECTS OF SONIC BOOMS

In order to establish that a particular sonic boom was the proximate

¹ *Delay Hampers U.S. Mach 2.7 Transport*, Aviation Week & Space Technology, 25 Oct. 1965, pp. 135, 139.

² *Concorde Hews to Schedule for First Flight*, Aviation Week & Space Technology, 25 Oct. 1965, p. 130. In April, 1966, production of the Concorde was running ahead of schedule, with the flight of the first prototype to be made in February, 1968. Coleman, *Concorde Production Ahead of Timetable*, Aviation Week & Space Technology, 4 April 1966, pp. 40, 41.

³ Coleman, *supra* note 2, at 41.

⁴ *SST Prototype Contracts Due in January*, Aviation Week & Space Technology, 7 March 1966, p. 313.

⁵ *Delay Hampers U.S. Mach 2.7 Transport*, *supra* note 1, at 139.

⁶ *SST Prototype Contracts Due in January*, *supra* note 4, at 313.

cause of the damage in any given case, it is necessary to consider the extent of damage that a boom can cause. As late as 1962, through tests conducted by Air Force scientists, it was claimed that 70 lbs. of pressure per sq. ft. is required to damage even flimsy structures, and that the highest recorded sonic boom pressure was 33 lbs. per sq. ft., which was registered under test conditions on the top of a mountain where the aircraft was only 280 feet distant.⁷ The Air Force concluded that structural damage to property was relatively impossible where overpressures⁸ ranged from 2 to 5 lbs. per sq. ft. (the range of overpressures produced by supersonic training maneuvers), and that plaster and window damage could occur only in isolated cases where a stress was pre-existent due to a flaw in the glass or in its installation.⁹ However, the Federal Aviation Agency's Office of Plans has since reported that overpressures of 2 to 2.9 lbs. per sq. ft. cause considerable damage to glass and plaster, while overpressures of 2.9 to 4.9 lbs. per sq. ft. cause widespread window and plaster damage, as well as minor structural damage to frames and walls.¹⁰ Neither of these two positions has received wholesale acquiescence, the result being that there is still considerable disagreement as to whether sonic booms can cause structural damage.¹¹

III. RECOVERY UNDER THE FEDERAL TORT CLAIMS ACT

Until now, most of the actions involving sonic boom damages have been confined to claims against the government under the Federal Tort Claims Act and to claims based on casualty insurance policies against the claimant's insurer.¹² In most instances where government-owned military aircraft have caused sonic boom damage, the government has paid for any property damage (mostly broken windows and cracked plaster) without the necessity of the claimant's bringing any legal action. Where there have been large scale experiments¹³ or exercises,¹⁴ the government has agreed before the flights took place to pay for any sonic damage actually caused by such flights.

When the government receives a complaint, it first sends out a letter indicating its position that the possibility of boom damage in any case is extremely remote. This eliminates approximately eighty-three percent of the claims.¹⁵ If the property owner persists, a check is made to determine if a sonic boom occurred near the time and place of the alleged damage. If not, no further steps are taken. If so, investigators are sent to inspect

⁷ Rottman and Phillips, *The Sonic Boom Problem—One Judge Advocate Office Solution*, JAG Bull., March-April 1962, pp. 10, 12. These assertions are still made in form letters sent out by the Air Force in response to sonic boom complaints.

⁸ The scientific term "overpressure" is one used to denote the intensity of air pressure increase above the pressure under normal atmospheric conditions.

⁹ Rottman & Phillips, *supra* note 7, at 12.

¹⁰ McKinley, *Response of Glass in Windows to Sonic Booms*, 4 Materials Res. & Stand. 594, 595 (1964).

¹¹ Lundberg, *Supersonic Boom*, The Rotarian, Nov. 1966, p. 24.

¹² Varner, *Legal Aspects of The Sonic Boom*, 23 ALA. LAW. 342, 345 (1962).

¹³ Power, *Some Results of Oklahoma City Sonic Boom Tests*, 4 Materials Res. & Stand. 617 (1964).

¹⁴ Rottman & Phillips, *supra* note 7, at 10.

¹⁵ *Id.* at 10, 11.

the damaged property, and if all that is found is minor glass and brick-a-brac damage, the government will normally satisfy the claim. However, the government is extremely reluctant to pay for structural damage to property, and according to government experience, large plaster cracks do not ordinarily occur in the absence of accompanying glass damage. If suit is brought, the common practice is for the government to admit liability for damage caused by the boom, but to question the extent of damage proximately caused.¹⁶

If it is necessary to bring an action against the government, either of two basic approaches can be pursued. Claims brought under the Federal Tort Claims Act, 28 U.S.C. section 2672, are determined administratively, while actions brought under 28 U.S.C. section 1346 are pursued in the federal courts. Section 1346 gives the district court concurrent jurisdiction with the Court of Claims over claims for money damages for injury to or loss of property, or personal injury or death "caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."¹⁷ In filing a claim for personal injury, one should frame his pleadings on a theory of negligence or trespass, since section 2680(h) exempts the federal government from liability for assault and battery.

IV. INSURANCE COVERAGE

For the property owner to establish his insurance company's liability for damage done by a sonic boom, he generally must show that it comes under one of three clauses in the policy: "all-risk" coverage, "aircraft damage" coverage, or explosion coverage.¹⁸ "All-risk" coverage, which is contained in many builder's risk policies and in some homeowner's policies, extends to any casualty and would certainly cover damages caused by sonic booms. In seeking to recover under the other types of insurance coverage, a plaintiff must be cognizant of various well established principles of insurance law. The language of an insurance policy should be given its plain, ordinary and popular interpretation, not a narrow or technical construction.¹⁹ Furthermore, imprecise or doubtful language in an insurance contract should be construed against the insurer.²⁰ Doubtful language is also to be construed in the light of the objects intended to be accomplished thereby.²¹

¹⁶ Information obtained from officers in the claims section of the Judge Advocate General's Office, Carswell Air Force Base, Ft. Worth, Texas.

¹⁷ 36 Stat. 1093 (1911), 28 U.S.C. § 1346(a)(2)(b); Under § 2675(a) & (b), a claimant can either abandon his claim which is before a governmental agency and file under § 1346 or he can appeal the decision of such agency to either the district court or the Court of Claims.

¹⁸ Varner, *supra* note 12, at 346.

¹⁹ Ward v. State Farm Mut. Auto. Ins. Co., 241 F.2d 134 (5th Cir. 1957); Franklin Life Ins. Co. v. Lewis, 36 Ala. App. 313, 55 So. 2d 518 (1951); National Life & Acc. Ins. v. Davies, 34 Ala. App. 290, 39 So. 2d 697 (1949); and Roma Wine Co. v. Hardware Mut. Fire Ins. Co., 31 Cal. App. 2d 455, 88 P.2d 260, 262 (1939).

²⁰ 12 Alabama Digest 423-28; National Cas. Co. v. Thompson, 39 Ala. App. 199, 96 So. 2d 708 (1957).

²¹ Miller v. Robertson, 266 U.S. 243 (1924); Allied Magnet Wire Corp. v. Tuttle, 199 Ind. 166, 154 N.E. 480 (1926); McGowan Lumber & Export Co. v. Camp Lumber Co., 16 Ala. App. 283, 77 So. 433 (1917); and White v. Breen, 19 So. 59 (Ala. 1894).

A. Aircraft Damage Coverage

Most "aircraft damage" clauses restrict coverage to "direct loss resulting from actual physical contact of an aircraft with the property covered (thereunder)," and specifically cover losses caused by objects falling from aircraft.²² It does not seem that damage from a sonic boom would be covered by a contract with such language, since there is no physical contact by the aircraft with the insured property. Even if a sonic boom were construed as "falling from the aircraft," it could not be considered an "object."

Nevertheless, the rule of liberal construction in favor of the insured has been successfully utilized in at least one instance in order to gain recovery under an "aircraft damage" clause. In a 1958 Texas case, *Alexander v. Fireman's Ins. Co.*,²³ the plaintiff brought suit for the damages caused by a military jet aircraft, which, while flying at a supersonic speed at a low altitude, had unseated the girders beneath his frame and metal building, thereby capsizing and extensively damaging it. The Texas court, in construing an alternate "aircraft damage" clause which provided that "insurance provided under the extended provisions shall include direct loss by . . . aircraft" and that "loss by aircraft shall include direct loss by falling aircraft, or objects falling therefrom. . .," held that damage from a sonic boom was a direct loss by aircraft, and that other provisions of the policy did not exclude such coverage.²⁴

B. Explosion Coverage

Where an "all-risk" clause is not written into the contract, and where recovery cannot be obtained under a restricted "aircraft damage" clause, the plaintiff who seeks damages for sonic booms may contend that it resulted from a new form of explosion, and that the owner is therefore protected by the explosion clause of his policy. There have only been two reported cases to date which have considered this possibility.

The contention that a sonic boom is an explosion is strengthened by the language of the American Bar Association Journal²⁵ to the effect that a sonic boom is an explosion, and also by the fact that the Air Force dictionary refers to the sonic boom as being explosive.²⁶ The Texas court in *Alexander* rejected the contention advanced by the American Bar Association Journal that a sonic boom should be judicially noticed as an explosion;²⁷ however, it recognized the possibility that in future times our courts may take such judicial notice.²⁸

The court in *Bear Bros., Inc. v. Fidelity & Guar. Ins. Underwriters*²⁹

²² Varner, *supra* note 12, at 346.

²³ 317 S.W.2d 752 (Tex. Civ. App. 1959).

²⁴ *Id.* at 754.

²⁵ 44 A.B.A.J. 216 (1958).

²⁶ Varner, *supra* note 12, at 347.

²⁷ *Alexander v. Fireman's Ins. Co.*, 317 S.W.2d 752, 755 (Tex. Civ. App. 1959). The court said it lacked the requisite "verifiable certainty" to take judicial notice of such a fact.

²⁸ Since the court refused to take judicial notice that a sonic boom is an explosion, the plaintiff then had the burden of proving such fact if he wanted to recover on that basis. The plaintiff tendered no proof of such fact, so neither the court nor the jury made any determination.

²⁹ 6 Av. Cas. ¶ 17,497 (Ala. Cir. Ct. 1959).

apparently followed the views expressed by the defendant's experts in holding that the explosion clause did not cover damage caused by a sonic boom.³⁰ Unfortunately, however, the questions presented became moot because the plaintiff settled with the federal government pending the appeal.³¹

Determination of whether or not a sonic boom falls within the general classification of an explosion may very well depend upon the particular definition accepted by the courts. An "explosion" has been defined in some jurisdictions as simply a "violent explosion with noise, following the sudden production of great pressure,"³² and as "a violent expansion of some force, accompanied by a noise,"³³ and as "a violent expansion with noise following the production of a great pressure or sudden release of pressure."³⁴

There are two general theories as to the nature of sonic booms. One group, whose theory is more widely accepted, explains the phenomenon in terms of sound waves,³⁵ while a second group adheres to a theory based upon the movement of air particles.³⁶ There is, however, uniform agreement among both groups of experts that the sonic boom is a pressure wave accompanied by a noise.³⁷ Thus, the scientific definition of an explosion seems to coincide with the general definitions of the word "explosion." Both definitions include a violent expansion accompanied by noise which follows the sudden production of great pressure. Moreover, the varied occurrences already held to have been explosions indicate the judicial tendency against an extremely limited or rigid classification.³⁸

³⁰ Varner, *supra* note 12, at 350.

³¹ *Ibid.*

³² Hyman & Co. v. American Motorists Ins. Co., 136 F. Supp. 830, 834 (D.D.C. 1955).

³³ Sweeney v. Blue Anchor Beverage Co., 325 Pa. 216, 189 Atl. 331, 335 (1937).

³⁴ Lever Bros Co. v. Atlas Assur. Co., 131 F.2d 770 (7th Cir. 1942).

³⁵ Varner, *supra* note 12, at 342; Lyster, *The Nature of Sonic Booms*, 4 Materials Res. & Stand. 582 (1964).

³⁶ Varner, *supra* note 12, at 342.

³⁷ *Id.* at 344.

³⁸ Examples of some of the occurrences which have been so held are: the rapid expansion of air in a room, caused by fire therein, which caused the walls to be blown out, Roma Wine Co. v. Hardware Mut. Fire Ins. Co., 31 Cal. App. 2d 455, 88 P.2d 260, 262 (1939); the bursting of frozen pipes and radiators, Bower v. Aetna Ins. Co., 54 F. Supp. 897, 898 (N.D. Tex. 1944); the omission of refrigerating ammonia through packing around the valves accompanied by a hissing noise, the shooting of a cap pistol, or the blowing of a cap off of a soda pop, medicine, or vinegar bottle, Crombie & Co. v. Employer's Fire Ins. Co., 250 S.W.2d 472, 474 (Tex. Civ. App. 1959); the rupture of a cottonseed oil tank or a grain storage tank due to expansion from fermentation of other cause, Chicago & R.I.R.R. v. Aetna Ins. Co., 180 Kan. 730, 308 P.2d 119 (1957); Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 293 S.W.2d 913, 918 (Mo. 1956); and Lever Bros. Co. v. Atlas Assur. Co., 131 F.2d 770 (7th Cir. 1942). Corpus Juris Secundum discusses "explosion" in the following manner:

The word is variously used and is not one that admits of exact definition, having no fixed and definite meaning either in ordinary speech or in law; but is said to be a general term, unlimited in its application. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences. It may, and often does, vary in degree of intensity and in the vehemence of the report, and it is not always due to the presence of fire; indeed, it may result from decomposition or chemical action . . . the true meaning of the word in each particular case must be settled, not by any fixed standard, or accurate measurement, but by the common experience and notions of men in matters of the sort. It has been said that the term is to be construed in its popular sense, and as understood by ordinary men, and not by scientific men. (Emphasis added.) The word "explosion" is defined in a general way,

A controversy will probably arise as to whether expert testimony should be used to determine whether or not a sonic boom is, or should be treated the same as, an explosion. In view of the insurance principle that the language of a policy should be given its plain, ordinary and popular meaning according to the common experience of ordinary men, it seems that technical experts should not be allowed to conclude whether a sonic boom is an explosion *under the terms of an insurance policy*. Their testimony should be limited in its extent to the physical effects of a sonic boom, and the jury should be allowed to conclude whether a sonic boom, as described by the experts, comes within the general definition of an "explosion."

V. SUITS AGAINST COMMERCIAL AIRLINES

With the advent of commercial supersonic flight, substantial damage to property is likely to result, and the airlines will be confronted with the decision of whether to pay for all proximately caused damage. If the airlines decide to contest liability, the property owner will be faced with the problem of establishing a theory of liability upon which to base his claim. Three main theories can be argued: (1) negligence or fault; (2) strict liability on the ground that public policy demands that the airline should be an insurer of any injury proximately resulting from the operation of an extra-hazardous activity; and (3) strict liability based on an analogy to the blasting laws.³⁹

A. Negligence

Now that it is clearly established that sonic booms can cause physical damage to property, the reasonably prudent aviator must exercise a much higher standard of care because the extent of foreseeable harm is much broader. The negligent act itself might be the flying at too great a speed at a low altitude, the rapid execution of horizontal turns, or too rapid a descent at supersonic speeds. If the plaintiff could not ascertain the exact reason for the production of the damaging overpressures, he would probably find it beneficial to invoke the seemingly applicable doctrine of "res ipsa loquitur." Once it is proven that the damage was caused by a sonic

as meaning a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report . . ." 35 C.J.S., *Explosion* at 243-44.

For examples of scientific definitions that would seem to exclude or make very difficult inclusion of sonic booms, see Varner, *supra* note 12, at 348-49. David Bland, in his article *Pffft! Pop! Or Pow!—It's an Explosion*, 33 INS. COUNSEL J. 369 (1966), after criticizing the courts' obscure treatment of the word, offers a good discussion of various definitions proposed by some insurance experts, as well as those which have been accepted by various courts. He then proposes a definition himself, which, understandably, would be quite restrictive. He would confine the term to those occurrences caused by the build-up "of a confined, internal force or pressure which must occur accidentally and suddenly" followed by the violent and sudden failure of the confining material with the resultant violent expansion of the confined material. Since he would require the explosion to be accidental, however, his definition fails to include the common explosions planned and intentionally executed in blasting operations, where only the resulting damage is unforeseen or accidental. While such a definition would undoubtedly be a benefit to insurance companies, it appears to be too limited to be accepted by the courts.

³⁹ Whitley, *Blasting—Basis of Liability: Negligence, Trespass or Absolute Liability*, 40 N.C.L. REV. 640 (1962).

boom, the plaintiff can easily establish two elements necessary for invocation of the doctrine: (1) that the damage was caused by an agency or instrument within the exclusive control of the defendant; and (2) that it was not due to any voluntary action or contribution on the part of the plaintiff.⁴⁰ It may be more difficult to convince the court that the third necessary element is present, *i.e.*, that damaging overpressures would not ordinarily have occurred in the absence of someone's negligence. However, since every pilot should know that the overpressures from sonic booms may very well cause ground damage, and that improper flight procedures and circumstances produce excessive overpressures, it is submitted that the failure on the part of a pilot to remain subsonic during movements and maneuvers and when flying at low altitudes is ordinarily negligence. It is worthy of note that federal regulations preclude government pilots from breaking the sound barrier except in specified situations.⁴¹ Moreover, the modern trend of authority clearly sanctions the application of "res ipsa" to aircraft accidents in general.⁴² In addition, it is now established that alternative pleadings can be made in order to introduce evidence of specific acts of negligence without precluding the applicability of "res ipsa".⁴³

However, it should be noted that "res ipsa" may be of only minimal aid to the irate property owner. Except in a small minority of states, where it establishes a full-fledged presumption,⁴⁴ the principle is regarded as establishing a mere inference of negligence⁴⁵ which will not support a directed verdict.⁴⁶ The doctrine's sole utility seems to be in getting the case to the jury; however, this may be of considerable value in view of the fact that the doctrine has been successfully invoked in several ground damage cases.⁴⁷

B. Strict Liability

According to the Restatement of Torts,⁴⁸ "an activity is ultra-hazardous

⁴⁰ PROSSER, TORTS, 218 (3d ed. 1964).

⁴¹ General Flight Rules, AFR 60-16 (1962) (revised 1965).

⁴² *Citrola v. Eastern Air Lines, Inc.*, 264 F.2d 815 (2d Cir. 1959); *Swanson v. United States*, 229 F. Supp. 217, 222 (N.D. Cal. 1964); *Becker v. American Airlines, Inc.*, 200 F. Supp. 839 (S.D.N.Y. 1961); *Schneider v. United States*, 188 F. Supp. 911 (E.D.N.Y. 1960); *Norden v. United States*, 187 F. Supp. 594 (D.R.I. 1960); and *Rogow v. United States*, 173 F. Supp. 547 (S.D.N.Y. 1959). *Comments on Recent Important Aviation Cases*, 31 JATLA 548, 553 (1965).

⁴³ This practice has been allowed in the following aviation cases: *Citrola v. Eastern Air Lines, Inc.*, *Schneider v. United States*, *Becker v. American Airlines, Inc.*, and *Swanson v. United States* cited note 42 *supra*. See *Comments on Recent Important Aviation Cases*, *supra* note 42, at 554 for cases approving of this practice in non-aviation cases.

⁴⁴ See, *e.g.*, *Roberts v. Trans-World Airlines*, 225 Cal. 2d 344, 37 Cal. Rptr. 291 (Cal. D.C.A. 1964); See cases cited in PROSSER, *op. cit. supra* note 40, at 234.

⁴⁵ *Lobel v. American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951); *Bitner v. Hines*, 293 S.W.2d 540 (Tex. Civ. App. 1956).

⁴⁶ *Rehm v. United States*, 183 F. Supp. 157 (E.D.N.Y. 1960); *Calhoun v. Northeast Airlines, Inc.*, 180 F. Supp. 532 (S.D.N.Y. 1959).

⁴⁷ *United States v. Johnson*, 228 F.2d 40 (5th Cir. 1961); *Schneider v. United States*, 188 F. Supp. 911 (E.D.N.Y. 1960); *Norden v. United States*, 187 F. Supp. 594 (D.R.I. 1960).

⁴⁸ RESTATEMENT, TORTS § 520, comment (c) (1938). Comment (b) declares that "an activity may be ultrahazardous because of . . . the condition which it creates." Comment (a) goes on to say that the rule "is applicable to an activity which is of such utility that the risk unavoidably involved in carrying it on cannot be regarded as so unreasonable as to make it negligent to carry it on"

if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." Even if flight regulations are such as will keep overpressures within a non-damaging range, the Oklahoma City tests indicate that boom scatter or variation (due to wind velocity, temperature, terrain features, humidity, boundary layer turbulence, and other meteorological parameters)⁴⁹ causes one boom in a thousand—at every point in the boom carpet, which will be fifty to eighty miles wide—to be twice as strong as the mean strength on the flight track for a series of flights.⁵⁰ More specifically, if flights are planned so that boom-caused overpressures will be only 1.5 lbs. per sq. ft. during the flight and 2 lbs. per sq. ft. on takeoff,⁵¹ the overpressures from one flight in a thousand will be 3 to 4 lbs. per sq. ft., which, as noted previously, will cause considerable damage to glass and plaster, as well as minor structural damage to frames and walls. Therefore, the operation of supersonic transport aircraft will involve a risk of serious harm to property which cannot be eliminated by the exercise of the utmost care, and since flying supersonic is not a matter of common usage,⁵² such operations should be classified as ultrahazardous activities. In view of the general principle that operators of ultrahazardous activities are held strictly liable,⁵³ the commercial airlines should stand as insurers for all damage proximately caused by sonic booms.⁵⁴

Previously, both the courts and the law⁵⁵ looked upon aviation from the viewpoint expressed by the American Law Institute in 1938 that aviation is an ultrahazardous activity.⁵⁶ The Uniform Aeronautic Act, adopted in twenty-three states, imposed absolute liability on the owners, operators, and lessees of aircraft for any damage caused by their operation, so long as there was no contributory negligence on the part of the person harmed.⁵⁷ However, this view has been rejected since aircraft operation has become safer, and the trend of decisions has established the general rule that an airplane is not an inherently dangerous instrument when properly handled by a competent pilot exercising reasonable care, and that the ordinary rules of negligence apply.⁵⁸ However, in the case of sonic booms this point

⁴⁹ Power, *supra* note 13, at 618.

⁵⁰ Lundberg, *supra* note 11, at 55.

⁵¹ *Id.* at 27, 55.

⁵² RESTATEMENT, TORTS § 520, comment (e) (1938), states that "an activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." It goes on to say that the operation of automobiles is a matter of common usage, while blasting (including the manufacture, storage, transportation, and use of high explosives) and the drilling of oil wells are not such matters.

⁵³ In order to recover from the government, negligence will still have to be shown, as the rules of strict liability do not apply in actions brought against the government under 28 U.S.C. §§ 1346(b) or 2674 (1964). *Dalehite v. United States*, 346 U.S. 15 (1953); *Stratton v. United States*, 213 F. Supp. 556 (E.D. Tenn. 1962).

⁵⁴ Whitley, *supra* note 39, at 647.

⁵⁵ Annot., 4 A.L.R.2d 1306 (1949).

⁵⁶ RESTATEMENT, TORTS § 520, Comment (b) (1938).

⁵⁷ Annot., 4 A.L.R.2d 1306 (1949).

⁵⁸ *Ibid.*; 8 AM. JUR. 2d Aviation § 64 (1963). *United States v. Schultetus*, 277 F.2d 322 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1960); *King v. United States*, 178 F.2d 320 (5th Cir. 1949); *Johnson v. Central Aviation Corp.*, 103 Cal. App. 2d 1022, 229 P.2d 114 (1951).

has not yet been reached, but if technology and procedures should advance to the point where all damage can be eliminated by the exercise of due care, only then should the courts refuse to find strict liability for boom damage.

The analogy between "explosions" and sonic booms may be of use to the landowner in establishing strict liability, as well as in recovering under an insurance policy. Almost all American jurisdictions have held the defendant absolutely liable for injury caused by rocks and debris thrown by blasting.⁵⁹ This is true whether the injury is to persons⁶⁰ or to property.⁶¹ The majority of states also finds absolute liability for concussion damages resulting from blasting.⁶² However, a minority of states does make a distinction and require proof of negligence in concussion cases,⁶³ unless a nuisance is shown.⁶⁴ Sonic booms are very similar to concussion shock waves in that both, being shock waves, involve abnormal pressure forces emanating from outside the premises affected.

The courts have relied primarily on two grounds to impose strict liability in blasting cases. Trespass is commonly agreed to have been committed when debris or rocks are thrown onto plaintiff's property.⁶⁵ The majority of states have refused to distinguish cases in which the damage is caused by the concussion or vibration effects of blasting. Such courts find trespass in both situations.⁶⁶ While this theory is still sound, the trend has been to hold the defendant strictly liable because he is engaged in an ultra-

⁵⁹ *Burden of Proving Negligence in Non-Trespass Blasting Cases Lightened*, 30 *FORDHAM L. REV.* 544, 545 (1962). The only case to the contrary is a Washington case, *Klepsch v. Donald*, 30 *Pac.* 991 (1892), in which a rock was thrown horizontally 940-1200 feet, killing plaintiff's husband.

⁶⁰ *Welz v. Manzillo*, 113 *Conn.* 674, 155 *Atl.* 841 (1931); *Wells v. Knight*, 32 *R.I.* 432, 80 *Atl.* 16 (1911); *Sullivan v. Dunham*, 161 *N.Y.* 290, 55 *N.E.* 923 (1900).

⁶¹ *Asheville Constr. Co. v. Southern Ry.*, 19 *F.2d* 32 (4th Cir. 1927); *Adams & Sullivan v. Sengel*, 177 *Ky.* 535, 197 *S.W.* 974 (1917); *Hay v. Cohoes Co.*, 2 *N.Y.* 159 (1849). *Contra*, *Bennett v. Texas-Ill. Gas Pipeline Co.*, 113 *F. Supp.* 788 (E.D. Ark. 1953) (requiring proof of negligence).

⁶² *Burden of Proving Negligence in Non-Trespass Blasting Cases Lightened*, *supra* note 59, at 545.

⁶³ Proof of negligence is required because of the early common law distinction between trespass and case which considered the injury to be consequential, *i.e.*, less than a physical invasion of plaintiff's premises. *PROSSER, SELECTED TOPICS ON THE LAW OF TORTS*, at 161 n. 175 (1953), cites cases from Alabama, Kansas, Kentucky, Massachusetts, Maine, New Jersey, and Texas as so holding. It should be noted that New York, formerly the leading advocate of the minority position, has recently lightened the burden of proving negligence in blasting cases by holding in *Schlansky v. Augustus V. Reigal, Inc.*, 9 *N.Y.2d* 493, 174 *N.E.2d* 730, 215 *N.Y.S.2d* 52 (1961), that a *prima facie* case of negligence is established "by a showing of injury to plaintiff's property, and the testimony of an expert, who had visited the scene, that excessive explosives had been used." By analogy, the argument, in the case of damage by a sonic boom, could be that *prima facie* negligence is established where it is shown that the aircraft was going too fast considering the altitude at which it was flying or the maneuvers in which it engaged. This could be determined by the amount of overpressure produced. The result of the New York decision is that the burden of going forward is shifted to the defendant. Chief Justice Desmond's comments seem to indicate that if the question of strict liability had been presented in *Schlansky*, the court would have dropped the requirement that negligence be proved in concussion cases and conformed to the almost universally approved doctrine that a blaster is absolutely liable for any damage he causes, with or without trespass.

⁶⁴ *Dixon v. New York Trap Rock Corp.*, 293 *N.Y.* 509, 58 *N.E.2d* 517 (1944).

⁶⁵ *Asheville Constr. Co. v. Southern Ry.*, 19 *F.2d* 32 (4th Cir. 1927); *Hakkila v. Old Colony Broken Stone & Concrete Co.*, 162 *N.E.* 895 (S.J.C. Mass. 1928); *Burden of Proving Negligence in Non-Trespass Blasting Cases Lightened*, *supra* note 59, at 545; *Whitley*, *supra* note 39, at 641.

⁶⁶ *Ibid.*; *Exner v. Sherman Power Constr. Co.*, 54 *F.2d* 510 (2d Cir. 1931); *Britton v. Harrison Const. Co.*, 87 *F. Supp.* 405 (S.D. W.Va. 1948); *Johnson v. Kansas City Terminal R.R.*, 182 *Mo. App.* 349, 170 *S.W.* 456 (1914).

hazardous activity.⁶⁷ Regardless of the theory applied, though, in most jurisdictions the defendant is held strictly liable for all damages caused by his blasting operations.⁶⁸

It is therefore submitted that strict liability should be found applicable against the airlines in the case of damaging sonic booms for two reasons. First, the operation of supersonic aircraft will cause some damage which cannot be eliminated by the exercise of the utmost care, and it therefore should be treated as an ultrahazardous activity. Secondly, sonic booms involve the same phenomena and effects as do concussions from blasting; therefore, the blasting laws should apply.

VI. SUGGESTED LEGISLATION

It is generally recognized that supersonic transport aircraft will have to fly at higher altitudes than those at which present commercial aircraft fly in order to minimize the overpressures which they will create. Commercial flights at sustained altitudes of 60,000 feet or more will also contribute to efficiency of operation once the altitude is attained. In fact, mandatory flight procedures, in the manner of corridors and permissible Mach numbers as functions of altitude and climb angle, and the requirement of subsonic take-offs and descents will probably have to be established. Such regulations should serve to minimize all harmful effects of the supersonic fleet's operations.

If such procedures are established, when damaging overpressures are created, the plaintiff could possibly establish negligence per se by showing that the airline violated the applicable regulations.⁶⁹ If negligence were the basis used in seeking recovery, however, the fact that an aircraft had been operated in accordance with the statutory requirements would not preclude a finding of negligence.⁷⁰ "The statutory standard is no more than a minimum, and does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions."⁷¹

VII. CONCLUSION

Most of the legal questions raised in this area have not yet been answered, but the American legal system is rich in principles which are

⁶⁷ See, e.g., *Exner v. Sherman Constr. Co.*, *supra* note 66; *Fairfax Inn, Inc. v. Sunnyhill Mining Co.*, 97 F. Supp. 991 (N.D. W.Va. 1951).

⁶⁸ *Burden of Proving Negligence in Non-Trespass Blasting Cases Lightened*, *supra* note 59, at 545; Whitley, *supra* note 39, at 641.

⁶⁹ Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. . . . This usually is expressed by saying that the unexcused violation is negligence "per se" or in itself. PROSSER, *op. cit. supra* note 40, at 202.

See also the RESTATEMENT, TORTS § 286 (3d ed. 1964).

⁷⁰ *Grand Truck Ry. v. Ives*, 144 U.S. 408 (1892); *McGettigan v. New York Cent. Ry.*, 268 N.Y. 66, 196 N.E. 745 (1935); *Chicago, B. & Q. R.R. v. Perkins*, 125 Ill. 127, 17 N.E. 1 (1888).

⁷¹ PROSSER, *op. cit. supra* note 40, at 205.

adaptable to the new problems which will be encountered. Legislative regulations can minimize the damage by rigid control of flight plans and operations, but some damage is inevitable. This unavoidable damage may be covered by the "all-risk," "aircraft damage," or explosion coverages of present insurance policies, or the Federal Tort Claims Act in cases involving military aircraft. Under federal regulation, deviation from the prescribed rules will go far toward establishing negligence if proof of negligence becomes necessary. "Res ipsa loquitur" will also be useful if strict liability is rejected. However, it appears that the wholly innocent landowner should be allowed to recover from the airlines, which should be held strictly liable on public policy grounds. Since supersonic transports will cause certain inevitable damage, the airlines should be required to pay their own way. Since the traveling public is demanding supersonic aircraft, it should bear the ultimate cost for the actual physical damage to property, which inevitably follows, through the increased fares which the airlines will be forced to charge on supersonic flights.

H. Lloyd Kelley III

Intrastate Carrier — Competitive Impact — Pacific Southwest Airlines

I. INTRODUCTION

The air transport industry in the United States is heavily regulated by the Civil Aeronautics Board (CAB). The Board's duties include maintaining strict control over the number of participating carriers in the various city-pair markets of the United States, and over the fares which they charge. Nevertheless, the CAB's power is not unlimited; it has no authority to control operations of carriers which do not operate in interstate commerce. Until recently, this restriction has been almost an academic one, simply because no large intrastate carriers existed. But within the last five years, one such airline, Pacific Southwest Airlines (PSA), has grown to become the leading carrier over one of the principle air routes in the United States. Flying solely within the state of California, PSA escapes federal control, and it has used this freedom to advantage in competing with several federally-controlled carriers in the Los Angeles-San Francisco market. The intrastate carrier now flies forty percent of the traffic over this busy route and has impressive profit records as well.

This article will examine the growth of PSA in the Los Angeles-San Francisco market and the effect this growth has had on fares and traffic over the route. In addition, a brief comparison will be made of the New York-Washington market. Two significant facts emerge from this study: first, that a small carrier concentrating in a single market can compete successfully in this market with much larger carriers having national route systems; and second, that this competition can result in greatly improved service to the traveling public in the form of lower fares, improved equipment, and more convenient scheduling. It would be well to bear in mind these results when attempting to formulate proposals to improve the nation's air transport system.

II. THE FERTILE MARKET

The Los Angeles-San Francisco market is presently flying more passengers than any other city-pair in the world, and it is currently the only major domestic intrastate route.¹ The growth rate in this market has been a source of wonder to industry observers. Origin-destination passengers increased two hundred and fifty percent between 1957 and 1964, whereas nationwide trunk traffic rose only seventy percent over the same period. A recent CAB report predicted that 1965 Los Angeles-San Francisco

¹ As of 1962, Buffalo-New York City was the second largest intrastate market, with 273,000 annual passengers. CAB, 1963 HANDBOOK OF AIRLINE STATISTICS 494 (1964).

traffic would approach 2.7 million, but recent figures indicate that 3.1 million actually made the trip, a jump of forty percent in one year.³

A. *The Intruder*

The growth of this market is largely the result of the vigorous competition that has existed on this route, attributable primarily to the impetus of Pacific Southwest Airlines. Starting with a single rented DC-3 sixteen years ago, PSA now initiates a flight from one of the two cities at an average interval of fifteen minutes. Included in its fleet are five new jets. The carrier is still small by industry trunk standards; its current revenues are less than half those of Northeast, one-twentieth of United's.

PSA has succeeded in this market by continually undercutting the fares of its trunk competitors, while keeping equipment competitive. In early 1958 PSA was charging \$10.99 for coach service on the 347 mile route, whereas the trunks were charging \$26.35 for first-class and \$16.56 for coach. However, PSA passengers were accommodated in outmoded DC-4s, while the trunks were using DC-6s, making their flights some ten minutes shorter. This flight equipment inferiority left PSA with only fifteen percent of the total market, or one-third of the coach market. With the introduction of turboprop Electras in 1960, PSA obtained an equipment advantage over United and Western, its two main trunk competitors. (TWA also flies the route but does not offer turn-around service and makes only a few flights a week.) United introduced jets the next year, but the nature of the flight gave the new planes no time advantage over the Electras. The route is too short for jets to take advantage of their higher cruising speed; moreover, the CAB requires the trunks to fly over the ocean on the route, adding twenty miles in flight length, while PSA flies overland. Jets are, however, more comfortable than piston or turboprop aircraft and have higher passenger appeal. By the end of 1960 PSA was charging \$12.99, compared with trunk fares of \$18.10 to \$30.31, depending on service and type of aircraft. PSA's passenger level increased by almost one hundred percent in 1960, whereas the trunks' net figure showed an actual decline.

The fortunes of the trunks reached a low in 1962. A nationwide fare increase in February of that year put United's first-class jet fare at \$31.30 and jet coach at \$26.07. Western and United were both providing nonjet first-class at \$28.99 and nonjet coach at \$18.65. PSA, offering 153 flights a week, was charging the single fare of \$14.18. PSA became the top carrier in the market for the first time in the first quarter of 1962, carrying 159,000 passengers to second-place United's 138,000. In the second quarter, PSA planes bore 177,000 passengers, more than United and Western *combined*.

³ Figures here and for much of this article were taken from two sources: 4 CAB STAFF RESEARCH REP., TRAFFIC, FARES, AND COMPETITION: LOS ANGELES-SAN FRANCISCO AIR TRAVEL CORRIDOR (1965); and Morgan, *West Coast Dogfight*, The Wall Street Journal, 11 Feb. 1966, p. 24, col. 1.

B. Trunklines Meet The Advance

At that point the trunks began to retaliate. In June of 1962, Western introduced its "Thriftair" service, using DC-6Bs at a fare of \$13.58, sixty cents below PSA's Electra service. In February of 1963, Western's fare was reduced even further—to \$12.00. However, Western's flight time was thirty-five minutes longer than the other carriers. Nevertheless, the attraction of a lower fare increased Western's market share, and in mid-1963 it passed United as PSA's chief competitor. Passenger figures for the third quarter of 1963 were 238,000 for PSA, 183,000 for Western, and 79,000 for United.

In October, 1964, United introduced low-cost "Jet Commuter" service, charging \$15.23 for a fifty-five minute flight on Boeing 727s. The new service was an immediate success (reflecting the appeal of jets) and only \$1.05 more than PSA's Electra flights and \$3.23 more than Western's ninety minute DC-6B flights. United originally started with 138 jet flights a week, but by December it had increased to 196 weekly. Between the third and fourth quarters of 1964, United's passengers increased from 61,000 to 180,000, while PSA's fell from 312,000 to 218,000 and Western's from 214,000 to 175,000. TWA added a jet commuter service in February of 1965, but it still had few flights. By March, 1965, United had regained first place in the market, flying thirty-eight percent of the total passengers. PSA was a close second with thirty-three percent; Western had nineteen percent and TWA had moved up to eleven percent.

PSA soon regained the lead by adding its own new 727 jet in a "commuter" service. The fare for this flight was the same as that for Electra service, \$14.18, and flight time was down to forty-five minutes. United and TWA cut their jet fares by \$1.05 to meet the PSA price. Western discontinued its "Thriftair" service and added a jet service at the same fare as PSA, United, and TWA. PSA responded by cutting the fare of its Electra service to \$12.00, the lowest fare available for the trip. In June, 1965, PSA flew a record 402 flights between the two cities in one week. By the close of the year, it had clearly recaptured the lead in the market, flying forty percent of the traffic. United was second with thirty-six percent, Western had twenty percent, and TWA had fallen to four percent.

Thus PSA, through vigorous competition in fares, equipment, and scheduling, has been able to succeed in this important market. The trunks have recently met the competition, and the advantages to the consumer are evident. Averaged weighted fares for the route have declined from \$20.25 in 1961 to \$16.14 in 1964, a drop of over four dollars. The figure for 1965 will show a further drop, reflecting PSA's new \$12.00 fare for Electra service. This \$12.00 fare represents the nation's lowest per-mile rate, and even its \$14.18 jet fare is well below the national average.

TABLE 1

PASSENGER TRAFFIC AND FARES IN THE LOS ANGELES-SAN FRANCISCO
AIR TRAVEL MARKET, 1955-1965
Passengers (in hundred's)

Year	Trunks	PSA	Total	Average Fares
1955	723	NA	NA	NA
1956	725	NA	NA	NA
1957	817	124	941	\$18.21
1958	851	157	1,007	19.19
1959	948	206	1,155	19.70
1960	874	385	1,259	19.09
1961	856	473	1,329	20.25
1962	773	732	1,504	19.64
1963	912	925	1,837	17.49
1964	1,154	1,072	2,226	16.14
1965	1,850	1,250	3,100	NA

SOURCES: Passengers 1955-1964 from 4 CAB STAFF RESEARCH REP., TRAFFIC, FARES, AND COMPETITION: LOS ANGELES-SAN FRANCISCO AIR TRAVEL CORRIDOR, p. 25 (1965); 1965 passenger figures from Morgan, *West Coast Dogfight*, The Wall Street Journal, 11 Feb. 1966, p. 24, col. 1.

III. PSA'S IMPACT—ADJUSTMENT IN THE EAST

Recently, the Los Angeles-San Francisco fares have been cited by critics of Eastern's New York-Washington "shuttle." This major city-pair ranked second in passenger volume in the nation in 1962. Since 1960, Eastern's position in the market has grown markedly. In that year American and Eastern each had roughly a third of the traffic, with Northeast holding about a fifth. In the spring of 1961, Eastern inaugurated its shuttle service, featuring a no-reservation, guaranteed-seat policy. According to this policy, if there is a shortage of seats to accommodate all the passengers on a single flight, a second plane must be rolled out to carry the extra customer or customers. Eastern started with the shuttle fare at \$12.73 without tax, but eight months later it was raised to \$13.64. At this juncture, Eastern had thirty-five percent of the market. In January, 1963, with Eastern controlling fifty percent of the traffic, the fare was increased to \$14.29. In January, 1964, with Eastern holding seventy-seven percent of the traffic, the CAB granted another raise to \$15.24. Eastern claims not to have made a profit on the operation until 1964. Although Eastern was already in the black, the Board granted another fare increase in January, 1965, making the fare \$18.00.³ Eastern, until recently, had been using relatively inferior equipment (Constellations and DC-7Bs). More recently, Electras were introduced on the shuttle, with the older planes as back-up equipment. In April, Eastern introduced purejets to the route.

Until a few months ago Eastern's \$18.00 fare was, for all practical purposes, the lowest available fare on the New York-Washington route. American offered a \$16.12 coach service, but on only a few flights per day. The bulk of American's service was first-class, costing \$18.85. Con-

³ The last of these fare increases passed by only a 3 to 2 vote. Primary source for this discussion is Ridgeway, *Eastern's Shuttle Service*, The New Republic, 15 Jan. 1966, pp. 8-9.

sidering that one received a reasonably good meal for \$.85, this was, perhaps, the more desirable flight. But, again, flights were infrequent.

In the summer of 1965, Senator Edward Kennedy attacked the Board for allowing Eastern to gain a solid monopoly in this market and then granting four fare increases in five years. He cited the Los Angeles-San Francisco route as evidence that service was poor in the East. A comparison of fares in PSA markets with those in markets of comparable length on the East Coast is revealing:

TABLE 2
East Coast Fares

<i>City-pair</i>	<i>Fare</i>	<i>Mileage</i>	<i>Yield (cents per mile)</i>
Boston-New York	\$15.24	184	8.28
Boston-Washington	25.71	399	6.44
New York-Washington	17.14	215	7.97
West Coast Fares			
Los Angeles-San Francisco	11.43	347	3.29
Los Angeles-San Diego	6.35	109	5.83
San Francisco-San Diego	19.85	449	4.42

SOURCE: Aviation Week, 18 Jan. 1965, p. 37. (Fares are before tax.)

Eastern has argued that poorer weather conditions in the East, higher airport landing fees (\$36.00 in the East compared to \$18.00 in the West), and the high cost of back-up service have prevented any excess profits on the route. If it were not obligated to guarantee a seat, Eastern has claimed it would need only fourteen shuttle planes rather than the present thirty-nine. While actual levels of profitability are kept secret (and the CAB has yet to investigate them, despite its willingness to allow fare increases), one representative of Eastern reported that the carrier hoped to reach a ten percent return on its investment in the route in 1965.⁴

While Eastern's first two arguments about higher costs (weather and airport fees) are valid, the third is not. Customers are interested in convenient service and reasonable fares, not in the prospect of possibly having the opportunity to ride alone in a back-up airplane. High frequency of flights, along with an efficient reservation system, have ensured passengers on the Los Angeles-San Francisco route a seat. Eastern's system of twenty-five stand-by crews and planes to back-up the fourteen regular shuttle planes is unquestionably an inefficient system. A vigorous competitor, concentrating in this market, could undoubtedly find a less expensive way to transport people between New York and Washington.

There are, however, signs of improvement in the East. United has sought permission to offer a \$14.00 jet coach service in the New York-Washington city-pair. Moreover, this past April, Eastern introduced certain off-peak fare cuts amounting to roughly three dollars a ticket. But in light of airline history, one feels justified in not having great expectations about the likelihood of vigorous trunkline fare competition.

Compared with those of the East, West Coast profits have been high.

⁴ N.Y. Times, 23 Jan. 1966, § 5, p. 18, col. 5.

PSA's return on investment was 21.49 percent in 1963 and 24.90 percent in 1964. Profits fell somewhat from \$2.9 million in 1964 to \$2.0 million in 1965, due primarily to the purchase of five new jets. Traffic for the first month of 1966 was up thirty-five percent over January, 1965, however, and the company forecasts record earnings this year. By retaining earnings, the stockholder equity has risen from \$917,081 at the beginning of 1959 to \$11.5 million in 1966. It must be remembered that these figures are for PSA's total system, not just for the Los Angeles-San Francisco market. This market does constitute, however, seventy percent of the carrier's annual passenger total. It would be very difficult to determine the extent to which this market is more or less profitable than the carrier's other intra-California operations; yields (fare per mile) on the other segments are higher but traffic is lighter. PSA is free to drop any route it chooses, and so it presumably does not fly any unprofitable ones. Information on the profitability of the trunks is, of course, not available.

PSA's profits on the Los Angeles-San Francisco market have resulted from a combination of low fares and high load factors. The Board estimated PSA's load factors for the years 1961 to 1964 at seventy-one, seventy-seven, seventy-seven, and seventy-nine percent respectively. United, likewise, reported load factors on its "jet commuter" flights to be close to eighty percent. Thus, it appears that the combination of high load factors and low fares can be just as profitable as low load factors and high fares, the only difference being that the first provides much better service to the public. Another important lesson provided by experience in this market is that a small, limited-market carrier can be highly efficient and compete effectively with trunks. PSA's small size has clearly been no hindrance to its effective utilization of the most expensive equipment in the industry.

IV. CAN PSA'S SUCCESS BE DUPLICATED ELSEWHERE?

There are arguments which suggest that competition's success story in California may be an exception and that one should not expect similar results in other markets. One such argument is that PSA has an unusual cost advantage over the trunks in that it is allowed to make a direct flight between the two cities rather than the circuitous over-the-water route. One would not expect a limited-market carrier to have a similar cost advantage elsewhere. This factor is relatively unimportant, however, for it makes at best a \$.35 differential per seat per flight.⁵ It is also pointed out that PSA uses slightly irregular ticketing practices which the CAB would not permit of a certificated carrier. For instance, PSA pays an eight percent commission to travel agents, rather than the industry-wide five percent. In this instance, regulation of the trunks gives the intrastate carrier a competitive advantage because it does not have to meet industry standards.

⁵ Computed from FAA, *DIRECT OPERATING COSTS AND OTHER PERFORMANCE CHARACTERISTICS OF TRANSPORT AIRCRAFT IN AIRLINE SERVICE, 1963 (1964)*.

Another argument, which upon first exposure seems plausible, is that the sharp competition on this route was possible only because of the extremely fast growth of the market; had the market grown at a more normal rate, the frequent scheduling of the carriers and the low yields over the route would have resulted in financial ruin. The flaw in this argument, however, is that it appears that the fast growth in the market was, to a large degree, *caused* by the competition. Low prices and convenience of scheduling have persuaded many people to fly the route who otherwise would have taken other means of transportation or would not have made the trip. Train and bus service between the two cities has declined markedly in recent years.⁶ The CAB Staff Research Report determined, by extrapolating traffic figures from the period of stable prices (pre-1962) over the period of falling average fares (post-1962), that 1964 traffic was 35.5 percent higher than it would have been had fares not declined 25.4 percent since 1962. This gave the market a fare elasticity of 1.3, despite a high percentage of business travel over the market (seventy percent compared to the national average of roughly sixty percent).⁷ Business passengers, being on expense accounts, are generally considered a less price elastic group than other passengers. Moreover, the CAB considered this 1.3 figure to be low, for it felt that the market had not yet had a chance to respond to the lower fares, and that longer-term figures would show the market's elasticity to be somewhat higher. The unexpected surge of traffic in 1965 shows this to be true.

Industry observers have long felt that air transport is a price elastic industry and that the airlines have failed to capitalize on this factor. As a result, both the carriers and the potential passenger have suffered. The introduction of coach service in the late 1940's sharply increased the traffic in the nation. Two CAB surveys of coach passengers in 1949 showed that only thirty-six percent would have used regular first-class air service had the coach service not been available. The other sixty-four percent would either not have made the trip or would have used other modes of transportation.⁸ Richmond feels that lower fares and economy-class service on long-haul routes would have "a strong effect on traffic generation."⁹ Cherington concludes that although demand seems inelastic for fare decreases of less than ten percent, larger decreases, as experienced with coach service has shown, generally result in higher total revenues.¹⁰ Barber, pointing out that eighty percent of the American people have never traveled by airplane, charges that airlines have concentrated their efforts on luxury

⁶ In early 1966 Southern Pacific dropped its night-train service between the two cities, for which coach fare had been \$12.50. Traffic in 1965 for this service was 68,000 passengers, down from a figure of 250,000 ten years before. Bus lines, which charge \$9.65 for the trip, claim that lower air fares have eliminated the 10% annual growth which they had been experiencing until two years ago. Morgan, *supra* note 2, at 24.

⁷ 4 CAB STAFF RESEARCH REP., *op. cit. supra* note 2, at 21. William Gregory criticizes the conclusions of the report, saying that they did not consider the improved economic situation of the two cities during the period of passenger growth. Gregory, *Refined Fare Elasticity Measure Sought*, *Aviation Week & Space Technology*, 17 Jan. 1966, pp. 40-43.

⁸ CHERINGTON, *AIRLINE PRICE POLICY* 38 (1958).

⁹ RICHMOND, *REGULATION AND COMPETITION IN AIR TRANSPORTATION* 47 (1961).

¹⁰ CHERINGTON, *op. cit. supra* note 8, at 437, 439.

business travel, designing their services for only a "very small segment of the potential market."¹¹ Hence, there is every indication that growth rates similar to those of the Los Angeles-San Francisco market can be generated elsewhere.

Another factor of the Los Angeles-San Francisco market that, it is argued, cannot be easily duplicated is PSA's unusual imagination and managerial talent. PSA has displayed, in the words of the *Wall Street Journal*, a certain "show-biz flair."¹² Pilots have humorous intercom routines to replace the more conventional welcomes. Alert stewardesses remember regular passengers' names and throw surprise cake-and-champagne birthday parties in flight. Each year the company gives its five most-traveled passengers free use of a plane and crew for one hour. But imaginative thinking like this is that which one might expect from a local, limited-market carrier, rather than from a transcontinental giant. As stated by the CAB, smaller lines are more likely to display "greater effort and exercise of managerial ingenuity."¹³

Although PSA's uncertificated position has been advantageous in some instances, the carrier has had to overcome certain drawbacks which accompany this position. Out-of-state visitors to California have most likely never heard of PSA, while United is a familiar name. Moreover, PSA is the only carrier flying the Los Angeles-San Francisco route that is not receiving government mail revenues. In spite of these drawbacks, perhaps the best indication that limited-market carriers can operate successfully in sectors of the country other than California is practical experience. For a short period, at least, Lone Star Airlines, another intrastate carrier, flew high-frequency service between Dallas and Houston at a fare of \$10.80, compared to \$14.50 offered by the certificated carriers.¹⁴ Trans-Texas Airways, a local-service carrier, recently offered to fly the Houston, Dallas, Austin triangle for fares thirty-five percent below those offered by Braniff.¹⁵ Two nonskeds, Viking Airlines and Standard Airlines, made profits on low-fare, dense-seating flights between New York-Chicago and New York-Los Angeles, offering fares as much as \$50.00 below those of the trunks. The CAB halted these flights in 1950. Later, under a different name, these carriers tried the same type of operation in the Miami-New York market, managing to offer fairly regular service by "artful shuffling of schedules." But the CAB, in the words of Bendiner, "killed" this operation in 1955.¹⁶ When the CAB reopened the *New York-Florida Renewal Case* last year, Panagra, a small international carrier owning only eight aircraft, applied to service New York-Miami with high density seating for a fare of \$28.00.

¹¹ Barber, *Airline Mergers, Monopoly, and the CAB*, 28 J. AIR L. & COM. 199 (1961-1962).

¹² Morgan, *supra* note 2, at 24.

¹³ Rocky Mountain Case, 6 C.A.B. 736 (1946).

¹⁴ CAVES, AIR TRANSPORT AND ITS REGULATORS; AN INDUSTRY STUDY 88-89 (1962).

¹⁵ *Aviation Week & Space Technology*, 13 Jan. 1964, p. 34. Although these are intrastate routes, Trans-Texas is an interstate carrier, certified by the CAB as a local-service line. Thus even its intrastate operations are regulated by the Board.

¹⁶ Bendiner, *The Rise and Fall of the Nonskeds*, Reporter, 30 May 1957, p. 34.

V. CONCLUSION

The indications are, then, that limited-market air carriers can operate effectively in other markets in the United States. Not all such carriers will survive,¹⁷ but those that do will introduce healthy price competition into the heavily traveled air routes. Load factors will rise on those routes which presently have overcapacity, while excess profits on the major routes will be eliminated. Lower fares will induce more people to fly, and this in turn will lower costs, allowing fares to fall still lower. PSA's high profits indicate that price competition on the West Coast has not yet subsided. The Los Angeles-San Francisco market serves as an example to the CAB and to the public that vigorous competition on major routes can substantially improve service and that limited-market carriers are well qualified to guarantee that such competition takes place.

*James R. Atwood**

¹⁷ Two other intrastate carriers have attempted to enter the Los Angeles-San Francisco market in the last ten years but have failed. There is no reason to expect, however, that failures among the new limited-market carriers would be any more frequent than failures among the certificated carriers in past years.

* This is a portion of a paper which shared first prize honors in the Frank M. Patterson competition for the best paper at Yale in political science. The author graduated *magna cum laude* from Yale University in 1966 and is presently attending Stanford University School of Law.

RECENT DECISIONS

MUTUAL AID AGREEMENT—SUBSIDIZED CARRIER—
CAB DISAPPROVAL

American Airlines and Mohawk Airlines requested CAB approval of a mutual aid agreement.¹ The pact provided that if either party suffered a cessation of operation due to specified strikes, the other would pay to the struck party an amount equal to its increased revenues attributable to the strike less applicable added direct expenses. *Held*: The agreement is adverse to the public interest. "Mohawk is a subsidized regional carrier, and there is a substantial risk that the costs of the protection offered Mohawk under the agreement will be borne by public funds in the form of increased subsidy payments to Mohawk." *Mutual Aid Agreement Between Am. Airlines, Inc., and Mohawk Airlines, Inc.*, CAB Docket No. 13781, CAB Order No. E-24213 (23 Sept. 1966).

The Board distinguished the instant agreement from the prior approved Trunkline Mutual Aid Pact where the parties were all unsubsidized carriers. Mohawk argued: (1) that if American was struck, the payments it would make would not come from subsidy payments to Mohawk, but rather from increased revenue, and (2) that if Mohawk was struck it would receive payments from American that would decrease the subsidy payments. The CAB rejected these arguments because of Mohawk's participation in a profit-sharing plan under the class rate. This plan provided that if the subsidized carrier's annual earnings exceed a fixed percent after taxes, a percentage of the profits are refunded to the government.² Because of this the Board stated: "It can be anticipated that the carrier's earnings [Mohawk] would reach the 75 percent profit-sharing bracket in the event of a strike on American, its major trunkline competitor. Thus in the event of an American strike, payments to the latter would indirectly be underwritten by subsidy to the extent of 75 percent."³ The dissenting Board member felt that "as subsidy eligibility is dependent upon economic status which may change from time to time the same possibility exists as to the trunk carriers."⁴ Thus he saw no basis for distinguishing an agreement between trunklines and one between a trunkline and a subsidized local.

¹ Federal Aviation Act of 1958, § 412, 72 Stat. 770, 49 U.S.C. § 1382 (1966):

(a) Every air carrier shall file with the Board a true copy . . . of every contract or agreement . . . affecting air transportation. . . .

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest. . . .

² Rate of Return

(After Taxes)

0% to D*

D to 13.5%

Over 13.5%

Percentage of Profits

Refunded by Carrier

0%

50%

75%

* D represents the fair and reasonable differentiated rate of return, not to exceed a maximum of 11%, and not less than a minimum of 9%. *Mutual Aid Agreement Between Am. Airlines, Inc., and Mohawk Airlines, Inc.*, CAB Docket No. 13781, CAB Order No. E-24213 (23 Sept. 1966), p. 4, n. 5.

³ *Id.* at 4.

⁴ *Id.* at 5.

The possibility that the original pact would have benefited Mohawk and eventually the public, through decreased subsidy payments, coupled with the power of the Board to disapprove prior approved agreements, would seem to be reason enough for CAB approval in this case.

The Board, however, did not prejudice the submission of a revised agreement which would assure against any possible subsidy burden through Mohawk's participation. Such an agreement would probably require the setting of a maximum percentage which Mohawk would have to pay to American, based on Mohawk's total rate of return.

J.K.M.

SECURITIES AND EXCHANGE ACT—INSIDER'S LIABILITY— SHORT-SWING PROFITS

Petteys and Reavis, directors and stockholders of Northwest Airlines, rather than submit to a redemption of their preferred stock at a value considerably below market value,¹ exercised their conversion rights and received in exchange an equivalent amount of common stock. Both directors had held the preferred stock for more than six months. Within six months after the conversion, however, each man sold a portion of his newly-acquired common stock at a price substantially above the market value of the common stock at the time of conversion.² The directors, Petteys and Reavis, filed suit for declaratory judgment to determine whether, under Section 16(b) of the Securities and Exchange Act of 1934, they were liable to the corporation for the profits realized on these sales. At the same time, a stockholder instituted a derivative suit on behalf of the corporation against these directors to recover the profits. The two suits were combined for judicial convenience. Each party moved for summary judgment. *Held, shareholder's motion granted*: A sale of a corporate security by an insider within six months after acquisition of the security is a transaction which Section 16(b) of the Securities and Exchange Act of 1934 seeks to prevent regardless of whether such acquisition was by actual purchase or by conversion of one security for another. *Petteys & Reavis v. Northwest Airlines, Inc.*, 246 F. Supp. 526 (D. Minn. 1965).

The directors claimed that their acquisition of the common stock did not constitute a "purchase" within the statutory definition since the exchange of convertible preferred stock for common stock was involuntary.³

¹ The preferred and common stock of Northwest Airlines both had market values of \$35 per share at the time of the conversion. The redemption price of the preferred, however, was \$26 per share.

² The trial court found that at no time did the directors have "control" of the corporation.

³ The directors relied on *Ferraido v. Newman*, 259 F.2d 342 (6th Cir. 1958), which held that where insiders had no control over the corporation's decision to redeem convertible preferred stock at a value below the market value and where such preferred stock was marketably equivalent to the corporation's common stock, the insider's conversion of the preferred was involuntary and thus did not constitute a "purchase" as the word is used in Section 16(b) of Securities and Exchange Act of 1934.

The court, reasoning that it was the opportunity for insider short-swing profits which the act sought to remove, decided in light of the "recent trend"⁴ to apply the strict rule of *Park & Tilford, Inc. v. Schultz*,⁵ which concluded that the voluntariness of the conversion was unimportant since the opportunity to engage in short-swing profits existed for the insiders in any event. The court further pointed out that prior authority requires forfeiture of profits irrespective of good faith;⁶ thus, regardless of the good faith of these directors in assuming that their transaction did not come within the act, they are liable to the corporation for profits realized.⁷

A.C.R.

FAA—LICENSING STANDARDS—AUTHORITY TO DETERMINE

Petitioner was a pilot with some fifteen to twenty thousand flying hours and held the highest performance rating. After being hospitalized pursuant to a court order adjudicating him insane, the FAA revoked his medical certificate because he had a "character or behavior disorder severe enough to have repeatedly manifested itself by overt acts."⁸ After being discharged from the hospital, the petitioner applied for a review of the FAA action. The FAA's Medical Review Board affirmed the administrator. Petitioner then requested a hearing before an examiner for the CAB who determined that the petitioner did not have, and had never had, a character or behavior disorder within the meaning of the regulations. The FAA then petitioned the CAB for a discretionary review, and therein reversed the examiner's decision and affirmed the FAA's denial of the medical certificate. The petitioner then applied to the court of appeals for review in accordance with 49 U.S.C. § 1486(a), alleging that the physical fitness standard set out in the regulations was incapable of reasonable interpretation and was, therefore, unconstitutionally vague. The CAB had refused to consider the validity of the FAA regulations on the grounds that the question of validity was not within its scope of review. *Held, affirmed*: The physical fitness standard set out in the regulations does meet the constitutional test of requisite certitude. *Doe v. CAB*, 356 F.2d 699 (10th Cir. 1966).

The court first considered the question of whether it could entertain

⁴ *Booth v. Varian Associates*, 334 F.2d 1 (1st Cir. 1964); *Blaw v. Lehman*, 286 F.2d 786 (2d Cir. 1961); *Heli-Coil Corp. v. Webster*, 222 F. Supp. 831 (D.N.J. 1963). It is interesting to note that the court in the instant case refused to attempt to reconcile the *Parks* and *Perraiso* cases.

⁵ 160 F.2d 984 (2d Cir. 1947). The court held that a conversion of preferred into common stock followed by a sale within six months was a "purchase and sale" within the language of § 16(b) because the statutory definition of "purchase" is "any contract to buy, purchase or otherwise acquire."

⁶ The court based this holding on *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736 (8th Cir. 1965).

⁷ The decision has recently been reversed. *Petteys v. Butler*, 35 U.S.L. WEEK 2233 (1966).

⁸ The standards are set forth in 14 C.F.R. §§ 67.13, 67.15, 67.17 (d) (1) (i).

the issue of validity since the Board had declined to take jurisdiction over the question. The court stated that the statutes for appellate review do not specifically treat this matter and it has not been judicially determined. The principle that the FAA Administrator, and not the courts, is empowered to set the standards for the physical fitness for those who are licensed to operate aircraft in commerce was recognized by the court. The petitioner is entitled to due process, and this involves not only giving the petitioner notice and fair hearing but also informing him with reasonable certainty and explicitness of the standards by which his fitness is to be judged. The court then found that the regulation meets the constitutional test of requisite certitude, and further, that it is a question of fact whether the personality disorder has been repeatedly manifested by overt acts. In this case, the facts were sufficient to support the findings of the CAB.

W.C.S.

NEGLIGENCE—PUERTO RICO LAW—MORAL DAMAGES

Action against the carrier for breach of contract, or alternatively in tort, for failing to advise the plaintiffs that they needed visas to enter Spain, the country of final destination. As a result of this failure, the passengers were forced to return to an intermediate point, Paris, and subsequently decided to abandon their trip. The plaintiffs included a passenger who, unknown to the carrier, was suffering from cancer, and who died a year later allegedly greatly distraught over the fact that he had been deprived of his only opportunity for a trip to his homeland. From a judgment for the plaintiffs, the airline appealed contending that the inflammatory facts of the plaintiff's health and disappointment should have been excluded because these circumstances were not reasonably foreseeable. *Held, vacated*: The new trial to be conducted not inconsistent with the opinion that under Puerto Rico law, where there was evidence that the defendant, as an inducement to plaintiffs to purchase passage, held itself out as a tourist or travel agency, and had negligently failed to provide the information that plaintiffs had reasonably been led to expect, damages for negligence would include not only physical injury, but proximate, though unforeseeable, injury of any sort. Therefore, the unforeseen suffering of the plaintiffs occasioned by the carrier's failure to advise the plaintiffs that they needed visas in order to enter Spain could be compensated.¹ *Compagnie Nationale Air France v. Cesar Luis Castano*, 358 F.2d 203 (1st Cir. 1966).

Only reasonably foreseeable damages are recoverable for breach of contract. Admittedly, the plaintiff's physical and mental condition were unknown to the carrier at the time in question so that no recovery in

¹ The court, in reaching its decision, expressly noted that it was only considering Puerto Rico law, and recognized that elsewhere the decision might be different.

contract was possible. However, as to the alternative plea in tort, the Puerto Rico statute is not necessarily limited to common law torts. In particular, the concept of moral damages which is widely recognized in Puerto Rico³ is not a compensable injury at common law. At common law, recovery for either a negligent gratuitous undertaking or a negligent misrepresentation may be had for physical injury only, except where there has been "professional" negligence. Nevertheless, in view of the fact that the concept of moral damages is firmly entrenched in Puerto Rico law and the likelihood that the Puerto Rico court would expand the "professional" negligence exception to encompass proximate, though unforeseeable, injury of any sort, the court was persuaded to hold that the unforeseen suffering occasioned by the defendant's failure to perform the services that plaintiffs had reasonably been led to expect could be compensated. It remained for the new trial, however, to determine whether this damage was proximate and whether the plaintiffs reasonably attempted to mitigate the damages.

C.J.M.

NATIONAL AIRPORTS—FEDERAL/STATE JURISDICTION— TAXI SERVICE

The Washington Metropolitan Area Transit Commission was formed by a joint resolution and compact¹ between Virginia, Maryland, and the District of Columbia to regulate mass transit in the Washington, D.C. metropolitan area. The petitioner sought to review² an order of the Commission granting taxicab fare increases for transit to and from the Washington National Airport to a competitor. Four objections were raised, most significant being whether the Commission has jurisdiction to set fares for trips to and from the airport when exclusive jurisdiction over the airport has been granted to the federal government.³ *Held, affirmed*: The grant of exclusive jurisdiction over the airport to the federal government does not exclude all state jurisdiction relating to the federal area inasmuch as regulation of interstate taxi rates to and from the airport does not conflict with the internal control of the facilities. *Bartsch v. Washington Metropolitan Area Transit Comm'n*, 357 F.2d 923 (4th Cir. 1966).

In reaching the result, the court properly relied upon a Supreme Court decision from which it quoted:

³ See, e.g., *Rivera v. Rossi*, 64 P.R.R. 683 (1945); *Merced v. Government of the Capitol of Puerto Rico*, 85 P.R.R. 530 (1962); and *Infante v. Leith*, 85 P.R.R. 23 (1962).

¹ Washington Metropolitan Transit Regulation Compact Act, 74 Stat. 1031 (1960), 40 U.S.C. § 651 (note) (1964).

² Washington Metropolitan Transit Regulation Compact Act, § 17a, 74 Stat. 1031 (1960), 40 U.S.C. § 651 (note) (1964).

³ Code of Virginia, Title 7, Ch. 1, §§ 7-9 (1949). Title 7 has been repealed in its entirety by Ch. 102 of the 1966 Acts of the General Assembly, effective 1 July 1966, and has been replaced by Title 7.1.

The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.⁴

In Virginia's grant of exclusive jurisdiction to the federal government, certain rights have been expressly reserved.⁵ Going beyond such express reservations, this case illustrates the nature and extent to which the courts will allow state encroachment into areas of exclusive federal jurisdiction.

E.S.K.

MOTION TO STAY PROCEEDING—DENIAL— ABUSE OF DISCRETION

Petitioner had appealed from a trial court's verdict in a survival action resulting from the crash of a private airplane. Plaintiff in that suit, whose husband was killed in the crash, commenced an action for wrongful death and filed a motion for summary judgment naming petitioner as defendant. Plaintiff contended that the issues of proximate cause and liability had been resolved by the judgment in the survival action. Plaintiff also sought leave of court to use testimony, certain depositions, and exhibits which had been used in the survival action. Petitioner filed a motion that the wrongful death action be stayed, contending that the matters on appeal in the survival action would substantially affect the law and facts applicable to the wrongful death proceeding. The district court denied the motion and refused to enter an order granting a motion to stay. The petitioner then sought a supervisory writ from the Montana Supreme Court directing the district court to vacate its order and to enter an order staying the proceeding. *Held, writ issued*: The district court abused its discretion by not granting the motion since the wrongful death action would have been influenced by the outcome of the appeal in the survival action. *Ryder v. District Ct. of Fifteenth Judicial Dist.*, 417 P.2d 89 (Mont. 1966).

It appears that the court's decision was based on the practicalities of the situation. The parties, counsel, and issues were identical in both suits. The court stated that the situation was not one which required one plaintiff to await the determination of another plaintiff's suit. The plaintiff's counsel in the wrongful death action demonstrated the close relationship of the suits by: (1) contending that the issue of liability was the same;

⁴ *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953).

⁵ The express reservations in Virginia's grant of exclusive jurisdiction to the federal government pertain to the State's jurisdiction and power (1) to levy a tax on the sale of oil, gasoline, and other motor fuels and lubricants sold at the airport for use in over-the-road vehicles, (2) to serve criminal and civil process, and (3) to regulate the manufacture, sale, and use of alcoholic beverages.

(2) seeking to use the depositions, testimony, and exhibits from the survival action; and (3) admitting that several questions concerning the liability issues in the survival action would be presented to the court on appeal. The court, therefore, felt that it would be needless to proceed on the wrongful death action until the issues raised on appeal had been determined. Thus, the supervisory writ was issued to control the abuse of discretion by the district court.

P.O.W.