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CURRENT LEGISLATION AND DECISIONS

NOTES

Securities Exchange Act Section 16(b) — Conversions as Purchases — Strict v. Ad Hoc Approach

The appellants, Petteys and Reavis, were both noncontrolling[1] directors of Northwest Airlines' thirteen member Board of Directors which voted unanimously to redeem all the outstanding convertible preferred stock of the corporation. Prior to the redemption date the two directors converted their preferred stock and obtained a proportionate amount of common stock.[2] When they converted the preferred into common, the market value of the common was greater than the redemption price of the preferred. Both appellants had held their preferred stock for six months prior to the conversion. However, within six months after the conversion each director sold a portion of his newly acquired common stock at a price *above* the market value of the common stock at the time of conversion.[3] The directors, Petteys and Reavis, brought a declaratory judgment action against the corporation seeking to establish that the transaction involved did not come within the liability for short swing profits of Section 16(b) of the Securities Exchange Act of 1934.[4] Northwest answered that it

[1] Neither Petteys nor Reavis individually or collectively held a majority of the outstanding stock of Northwest Airlines.

[2] The conversion ratio was .9615 shares of common per share of preferred.

[3] Price ranges of the common stock during the period in question.

a. Redemption price of the preferred—$26.00 per share.

b. Price at the time Petteys:

(1) Converted—$35.00 per share

(2) Sold— $51.00 to $55.50 per share

c. Price at the time Reavis:

(1) Converted—$38.00 per share

(2) Sold— $53.25 to $53.37 per share.

[4] 15 U.S.C. § 78p(b) (1964):

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, *any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer* (other than an exempted security) *within any period of less than six months*, unless such security was acquired in good faith in connection with a debt previously contracted, *shall inure to and be recoverable by the issuer*, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within the sixty days after request or shall fail diligently to prosecute the same thereafter;

would not prosecute an action against the directors, but, two minority shareholders, Butler and Blau, instituted a derivative action, seeking a judgment on behalf of the corporation. The district court, on the basis of a mechanical application of the statute, found the directors had made a "purchase" by their conversion and were liable to the corporation for short swing profits under Section 16(b). The directors appealed from this judgment, contending the conversions were "forced"[5] and therefore were not "purchases." The Securities and Exchange Commission (hereinafter SEC or Commission) filed an *amicus curiae* brief urging the appellate court to hold to the strict application of the statute. *Held, Reversed and Rendered:* The strict mechanical test is not to be applied to insiders where the facts of the situation show there is no chance for abusing inside information to the detriment of the outside shareholders. The questioned transaction could not lead to the abuse that Section 16(b) was enacted to halt. Therefore, being outside the purpose of the statute, the conversion was not a purchase within the meaning of the statute, and the directors were not liable for short swing profits. *Petteys v. Butler*, 367 F.2d 528 (8th Cir. 1966), *cert. denied, Blau v. Petteys*, 385 U.S. 1006 (1967).

Before enactment of the Securities Exchange Act of 1934,[6] one of the foremost problems in securities trading was the misuse of inside information by a corporation's officers, directors, or major shareholders in dealing in their own corporation's stock for personal profit at the expense of the outside shareholders. By abusing their fiduciary responsibility, these insiders, using advance information, could buy at a low price, wait until the stock's market value rose, and then sell the stock at a profit. Conversely, the insider could sell high, cause the market value to drop, and then repurchase at a lower price, thereby retaining the same equity interest in the corporation while also securing a profit for himself. To discourage this activity, Congress included Section 16(b) in the Securities Exchange Act of 1934.[7] This section does not prohibit either of the above described transactions, but it does provide that, if the purchase and sale (or sale and purchase) occurs within six months of each other, then a suit may be brought by the corporation, or by a shareholder in a derivative action, to recover the profit of the transaction for the corporation. The purpose of the section is to deter an insider's short term trading in stocks of his own

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but no such suit shall be brought more than two years after the date such profit was realized. *This subsection shall not be construed to cover any transaction* where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions *which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection* [Emphasis added.].

[5] With the redemption price set at $26.00 per share and the preferred selling at $34.00 per share the directors had three alternatives: (1) Allow the redemption, (2) sell the preferred in the market, or (3) convert the preferred. (1) Allowing the redemption would have caused a loss of $8.00 per share; (2) selling the preferred would have forced the directors to forfeit their equity ownership in the corporation; (3) therefore a conversion of the preferred was the only reasonable choice. The result of the redemption call was that 99.98% of all the preferred shares were converted; the court stated it would not take judicial notice of the seventy shares that were not converted.

[6] 15 U.S.C. § 78 (1964).

[7] Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) (1964).

corporation by depriving him of any profit made from the transaction.[8] Section 3 of the Act defines "purchase" to "include any contract to buy, purchase, or otherwise acquire."[9] During the legislative hearings, prior to the passage of the act, the administration spokesmen urged that the provisions of Section 16(b) be applied strictly to all transactions of this kind, regardless of good faith, because they foresaw the difficulty of proving the insider's intent to engage in short swing trading. These witnesses acknowledged that some persons might have a hardship worked upon them by this strict "rule of thumb" test, but that this was the price to be paid for effective regulation.[10] Possibly because of this hardship, the Commission was granted the power to exempt transactions that were not contemplated to come within the comprehension of Section 16(b). The SEC subsequently exercised this exemptive power by amending Rule 16B-9,[11] which is discussed *infra.*

The Commission's power to exempt is a valid delegation of legislative power[12] as long as the exemptions are within the standards delineated by the examples Congress enumerated in the statute. Consequently, this exemptive power is reviewable by the courts, *viz.* to determine if the regulation is contra to the intent of the statute.[13] With this power[14] the SEC has a great deal of flexibility in the administration of the statute.

In considering the exemption of conversions of equity securities,[15] courts

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[8] Professor Manne of George Washington University has recently attacked this basic premise, arguing that a completely free market (one free of insider trading restrictions), would still result in correct stock prices, and would properly reward those who were responsible for the stock's increased value. H. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966).

[9] Securities Exchange Act of 1934, § 3(a)(13), 15 U.S.C. § 78c(a)(13) (1964).

[10] The operation of section 16(b) was explained by one of its draftsmen, Thomas G. Corcoran, in hearings on the bill as:

> That is to prevent directors receiving the benefits of short-term speculative swings on the securities of their own companies, because of inside information. The profit on such transaction under the bill would go to the corporation. You hold the director, irrespective of any intention or expectation to sell the security within six months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude *rule of thumb,* because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing [Emphasis added.].

Hearings on S. 56 and 57 (Stock Exchange Practices) Before the Senate Comm. on Banking and Currency, 73d Cong., 2d Sess., part 15, at 6557 (1934).

[11] Rule 16B-9, *infra* note 29.

[12] Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943), *cert. denied,* 320 U.S. 751 (1945).

[13] This was the situation concerning Rule X-16B-3 which exempted restrictive stock option plans. In Green v. Dietz, 247 F.2d 689, 692 (2d Cir. 1957), the court stated the exemption was not solely within the expertise of the Commission but was within the scope of judicial review. Subsequently, in Perlman v. Timberlake, 172 F. Supp. 246, 258 (S.D.N.Y. 1959), a district court held that the rule was in conflict with the expressed purpose of the statute and therefore invalid. The Commission later amended this rule to delete the section objectionable to the courts. In neither of the cases was the insider held liable, for he relied upon the rule in good faith and therefore came under the prohibition of such liability in section 23(a).

[14] The exemptive power is drawn from § 23(a) of the act, Securities Exchange Act of 1934, § 23(a), 15 U.S.C. § 78w(a) (1964):

> (a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this chapter. . . .

[15] Section 16(b) applies only to equity securities. Securities Exchange Act of 1934, § 3(a)(11), 15 U.S.C. § 78c(a)(11) (1964):

> (11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any

have taken two different approaches.[16] The strict, literal application of the statute, declares *all* conversions to be "purchases." This "strict" test is applied mechanically by some courts, while others use an "ad hoc" approach to the problem and therefore develop a more flexible test.

First to consider whether an insider's conversion was a purchase was the decision of the Second Circuit in *Park & Tilford, Inc. v. Schulte*[17] in 1947. Here the insider, after a redemption call for preferred stock, converted his preferred stock into common and then sold the common stock within six months. The preferred stock was not protected from dilution,[18] was not readily marketable, and the insider was the controlling shareholder. Judge Clark applied the statute strictly and found the conversion to be a "purchase" because it fell within the "or otherwise acquire" provision of the definition of a "purchase." The court's conclusion as to the insider's liability in this case has not been criticized by the commentators, but, they have attacked the execessively broad application of the definition of "purchase."[19] Then, in the 1965 case of *Heli-Coil Corp. v. Webster,*[20] the Third Circuit found the conversion of debentures into common stock and the subsequent sale of the stock within six months to be within the purview of Section 16(b) *via* an application of the "strict" test as enunciated in *Park & Tilford.* The court concluded that Congress had precluded the courts from exercising their equitable powers to exempt transactions from the provisions of Section 16(b) by granting the power of exemption solely to the Commission.[21] The SEC has always favored the strict construction enunciated by these courts. The Commission reasoned that with the exemptive power resting solely in the regulatory body, the strict application eliminates the needless litigation encouraged by an analysis of each factual situation.

In contrast to the "strict" test is the "ad hoc" approach formulated by the Sixth Circuit in *Ferraiolo v. Newman.*[22] The fact situation in *Ferraiolo*

warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other [*Sic*] security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

[16] Much has been written on these two different approaches. Illustrative of these are: Comment, *The Scope of "Purchase and Sale" under Section 16(b) of the Exchange Act,* 59 YALE L.J. 510, 524 (1950); Comment, *Conversion to Avert Redemption is Not a "Short-Swing" Purchase,* 11 STAN. L. REV. 358 (1959); Meeker & Cooney, *The Problem of Definition in Determining Insider Liabilities under Section 16(b),* 45 VA. L. REV. 949 (1959), (authored by General Counsel of the SEC); Comment, *Convertible Securities and Section 16(b): The Persistent Problem of Purchase, Sale, and Debts Previously Contracted,* 64 MICH. L. REV. 474 (1966); and the most exhaustive work on conversions as purchases, Hamilton, *Convertible Securities and Section 16(b): The End of an Era,* 44 TEXAS L. REV. 1447 (1966).

[17] 160 F.2d 984 (2d Cir. 1947), *cert. denied,* 332 U.S. 761 (1947), *noted in* 59 HARV. L. REV. 998 (1948).

[18] To prevent dilution of the shareholder's equity ownership his stock must have pre-emptive rights in any subsequent issue.

[19] 2 L. LOSS, SECURITIES REGULATION 1067 (1961).

[20] 352 F.2d 156 (3d Cir. 1965), *noted in* 44 TEXAS L. REV. 555 (1966). The purchase of the debentures and sale of the converted stock were separated by eight months with the conversion taking place in the interim.

[21] The power to exempt is drawn from the Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) (1964) and § 23(a), 15 U.S.C. § 78w(a) (1964).

[22] 259 F.2d 342 (6th Cir. 1958), *cert. denied,* 359 U.S. 927 (1959), *noted in* 72 HARV. L. REV. 1392 (1959).

was very similar to the present case, *viz.* the director converted his preferred stock to avert a loss since the market value of the common stock was in excess of the redemption price. His sale, within six months, of some of the common stock acquired from this conversion precipitated a derivative suit by one of the corporation's shareholders. Judge [now Justice] Potter Stewart, speaking for the court, reasoned that if there is a possibility that inside information could be abused to the detriment of the outside shareholders, then Section 16(b) should be applied and the profit from the transaction given to the corporation. However, if there is no chance of abuse, then the transaction does not come within the purpose of Section 16(b) and there is no reason to apply it to the transaction. This "ad hoc" approach considers the facts of each case and determines whether there is a possibility of disadvantaging outside shareholders through misuse of inside information. Stewart did not denounce *Park & Tilford* but distinguished *Ferraiolo* on its facts; the preferred stock was protected against dilution, the director was noncontrolling, the conversion was "forced" to prevent a loss, both preferred and common stocks were traded on a national exchange and were *economic equivalents*[23] of each other, and there was no greater chance of speculation after the conversion than existed when the director held the preferred.

This "ad hoc" approach, which exempts harmless insider trading, has been adopted by the Ninth Circuit in *Blau v. Max Factor & Co.*[24] There the controlling shareholders, the Factor family, converted one type of common into another and sold the latter within six months. The purpose of the conversion was to enhance the market value of the stock. The court found the insiders not liable because the two common stocks were equivalent investment risks and the conversion was not the kind of "purchase" comprehended by the drafters of Section 16(b). The "ad hoc" approach was also adopted by the Second Circuit in *Blau v. Lamb*,[25] which weakens the "strict" test announced by the same court in *Park & Tilford*. In *Blau* the "ad hoc" approach was applied to a conversion alleged to be a sale, and the court found that there was not "any possibility of abuse" and therefore did not apply Section 16(b). Thus, with the declaration of the "ad hoc" approach by the Eighth Circuit in the present case, a majority of the circuits now apply this approach to conversions.

As noted *supra*, the SEC has constantly favored a strict application of Section 16(b); it has always cited the Second Circuit's decision in *Park & Tilford* as the correct application of the definition of "purchase." Consistent with this policy, the Commission filed an *amicus curiae* brief in this litigation urging the Eighth Circuit to adopt this mechanical approach.

[23] When the price of the common stock rises above the redemption price, then the preferred will sell at a price proportionate to the common's price. This price is determined by the conversion ratio. In this instance the ratio is .9615 and the stocks were selling on the national exchange at $34.00 for the preferred and $36.00 for the common. *Therefore the stocks were economic equivalents.*

[24] 342 F.2d 304 (9th Cir. 1965), *cert. denied*, 382 U.S. 892 (1965), *noted in* 26 U. PITT. L. REV. 870 (1966).

[25] 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), *noted in* 35 FORD. L. REV. 143 (1966).

However, even the Second Circuit, since announcing that view in *Park & Tilford,* has not applied the definition of "purchase" to such an all-encompassing degree. In the case of stock purchase warrants, this same court found an abuse could not occur[26] and, Judge Clark, who first implemented the "strict" test, recognized, in another instance, that some cases were not within the intent of the statute. He ruled a reclassification of stock was not a "purchase" under Section 16(b).[27] In reaching this conclusion he commented, "we are not inclined at this juncture to attempt enunciation of a black letter rubric."[28] Because of the refusal by the circuits to follow the strict approach the SEC amended Rule 16B-9 on 17 February 1966,[29] so that it now exempts *all* conversion transactions from the application of Section 16(b) *unless* the purchase, conversion, and sale all take place within six months. The Commission applied the exemption only prospectively[30] (retrospective application would have remedied this instant situation), and, as mentioned above, filed an *amicus curiae* brief in the present litigation attempting to obtain a "strict" application of *Park & Tilford.*

In considering the present case the Eighth Circuit found the "strict" test too harsh on the directors, reasoning that the "ad hoc" approach was more appropriate. The court felt no restraint in exercising its equitable power to exempt the conversion, unlike the Third Circuit in *Heli-Coil.* Here, *Park & Tilford,* as in *Ferraiolo,* was distinguished on the facts. The preferred was protected against dilution, the preferred and common were economic equivalents[31] selling at proportionate prices on the national exchange, the directors were noncontrolling, and the conversion was

[26] Shaw v. Dreyfus, 172 F.2d 140 (2d Cir. 1949), *cert. denied,* 337 U.S. 907 (1949).

[27] Roberts v. Eaton, 212 F.2d 82 (2d Cir. 1954), *cert. denied,* 348 U.S. 827 (1954).

[28] *Id.* at 85.

[29] Exemption from Section 16(b) of Transactions Involving the Conversion of Equity Securities. 17 C.F.R. § 240.16B-9 (1967):

> (a) Any acquisition or disposition of an equity security involved in the conversion of an equity security which, by its terms or pursuant to the terms of the corporate charter or other governing instruments, is convertible immediately or after a stated period of time into another equity security of the same issuer, shall be exempt from the operation of Section 16(b) of the Act; *Provided, however,* That this rule shall not apply to the extent that there shall have been either (i) a purchase of any equity security of the class convertible (including any acquisition of or change in a conversion privilege) and a sale of any equity security of the class issuable upon conversion, or (ii) a sale of any equity security of the class convertible and any purchase of any equity security issuable upon conversion, (otherwise than in a transaction involved in such conversion or in a transaction exempted by any other rule under Section 16(b)) within a period of less than six months which includes the date of conversion.
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> (b) For the purpose of this rule, an equity security shall not be deemed to be acquired or disposed of upon conversion of an equity security if the terms of the equity security converted require the payment or entail the receipt, in connection with such conversion, of cash or other property (other than equity securities involved in the conversion) equal in value at the time of conversion to more than 15% of the value of the equity security issued upon conversion.
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> (c) For the purpose of this rule, an equity security shall be deemed convertible if it is convertible at the option of the holder or of some other person or by operation of the terms of the security or the governing instruments.

[30] As originally formulated new Rule 16B-9 would have applied retrospectively. Securities Exchange Act Release No. 7750 (1965).

[31] Economic equivalents, *supra* note 23.

"forced"[32] to prevent a loss caused by a lower redemption price. In deciding this conversion was not a "purchase," the court reasoned that (1) in this instance an application of "black letter rubric" would be unfair to the directors, (2) the *purpose* and *literal demands* of Section 16(b) are equal in value and the latter will not be applied if the former is not met, and (3) there was full disclosure and no opportunity for the insiders to profit at the expense of the outside shareholders.[33] Though the court discussed amended Rule 16B-9, it was not applied, for an application of the "ad hoc" approach was sufficient in itself to exempt this conversion. The court did note that Rule 16B-9 set forth the correct approach, because, if the insider held the convertible securities longer than six months, a conversion would add no opportunity for profit that was not previously existing.

It is submitted that the "ad hoc" approach, as formulated in *Ferraiolo*, is the better method of applying Section 16(b) to conversion transactions. The "strict" test as set out in *Park & Tilford*, with but one execption,[34] has lost credence ever since it was first espoused. When a court employs the "ad hoc" approach, the insider must prove there is no violation of Section 16(b).[35] If the insider is successful in proving the absence of detriment to outsiders, even though his actions would, if taken at face value, meet the literal demands of the statute, then the inequity of the "strict" approach will be avoided. Some commentators have suggested that Section 16(b) should be applied only to actual trading situations, but this approach overlooks the broad definition of purchase (which includes the phrase "or otherwise acquire").[36] The mechanical application of Section 16(b) would have caused the insiders to suffer a loss of any profits made from sales within six months of the conversion, while an outside shareholder would have been able to sell at anytime and keep his profit. Thus, the Eighth Circuit's adoption of the "ad hoc" approach was appropriate because it prevented inequitable treatment of insiders who made full disclosures. The prospect of further litigation of the *strict v. ad hoc* application of Section 16(b) is unlikely unless the validity of the Commission's amended Rule 16B-9 is challenged.[37]

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[32] Forced conversion, *supra* note 5.

[33] Here 99.98% of the holders of convertible preferred converted. The court, in reasoning whether to apply 16(b) where there is no chance for abuse, said, "*Cessante ratione legis, cessat et ipsa lex.*" (When the reason of law ceases, law itself ceases to operate).

[34] The exception is the third circuit's decision in Heli-Coil Corp. v. Webster, *supra* note 20.

[35] It has been suggested that Congress, by enacting a strict statute, sought to shift the burden of proving a short term speculative intent on the part of the insider away from the prosecuting shareholder. Comment, 64 MICH. L. REV. 474 (1966), *supra* note 16.

[36] Definition of Purchase, *supra* note 9.

[37] The blanket exemption for conversion as adopted by the Commission in Rule 16B-9 may have gone too far in the opposite direction of the original strict rule of thumb test. Under the present regulation even transactions such as the one in *Park & Tilford* will be exempted from attack by a derivative suit under section 16(b). Perhaps this approach is justified because of the reduction in litigation on the question of purchase that will follow. However, the rule will have to be amended further if it allows abuse to occur as Rule X-16B-3 did in the Greene v. Dietz and Perlman v. Timberlake cases, *supra* note 13.

Warsaw Convention — Limited Liability — Avoidance

A wrongful death action was instituted against Eastern Air Lines, Inc. for death resulting from the fatal crash of an Eastern Air Lines Constellation in Florida on December 21, 1955. Eastern alleged that its liability was limited under the Warsaw Convention.[1] The plaintiff, attempting to recover damages *in excess* of the Warsaw limitation,[2] alleged in the alternative that (1) the carrier was guilty of wilful misconduct or, (2) that the carrier failed to make sufficient delivery of a ticket[3] under the Convention. In the lower court Eastern conceded that it could not maintain its burden of proof to show that it was without fault.[4] However, the court found that Eastern was neither negligent nor guilty of wilful misconduct. But the trial[5] without jury resulted in an award to plaintiff of the $8300.00 limitation. *Held: Affirmed.* The issues of wilful misconduct and negligence were *bound together* in this case and the *burden of proving both* rested with the plaintiff; as plaintiff had not carried his burden of proof, consideration of plaintiff's contentions regarding delivery of the ticket was unnecessary. *Berguido v. Eastern Air Lines, Inc.*, 369 F.2d 874 (3rd Cir. 1966), *petition for cert. filed*, 36 U.S.L.W. 3107 (Aug. 22, 1967) (No. 528).

Without the Warsaw Convention, there would be numerous conflicts of law problems in action involving international flights.

> The Convention of Warsaw consists of a code which lays down certain conditions of contract for international carriage. It defines and limits the rights of passengers and owners of cargo in such carriage, and the corres-

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000 (1929), T.S. 876 (1934). The Hague Protocol, to which the United States is not a party, was adopted in 1955; it was a partial revision of the Convention, *e.g.*, it increased the limit of liability from $8300 to $16,600. The United States Supplemental Agreement which went into effect May 1966 is another attempt to increase the limit of liability. It is based on agreements between carriers, which limit liability to $75,000.00 in some instances and $58,000 in others.

[2] Article 22(1) of the Convention provides: "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . ." ($8921.87).

[3] Article 3(1) of the Convention provides: "In respect to the carriage of passengers a ticket shall be delivered containing: (c) a notice to the effect that . . . the Warsaw Convention may be applicable. . . ." Article 3(2) provides: "The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with consent of the carrier, the passenger embarks without a passenger ticket having been delivered . . . the carrier shall not be entitled to avail himself of the provisions of Article 22."

[4] Article 20(1) of the Convention provides: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures."

[5] The trial upon which this appeal is based was the fifth trial of this case at the district court level. The first two, with juries, ended in mistrials. The third trial ended with a jury finding of wilful misconduct on the part of the carrier but was reversed by the appellate court on evidentiary grounds. The fourth trial before a jury ended with a verdict for the plaintiff, without a finding of wilful misconduct, but with a recovery not to exceed the Convention limitation. However, the District Court, upon plaintiff's motion, vacated its judgment and granted a new trial.

> ponding liabilities of the carrier. [I]t imposes upon the carrier a limited liability in most cases of accident . . . and an unlimited liability in some.[6]

In addition to providing uniformity of laws applicable to international air carriage, the Warsaw Convention provides in Article 22 for the limitation of the financial liability of the carrier to $8291.87 [hereinafter $8300]. Realizing that the cause of an aircraft accident might never be ascertained, the drafters also set out that a carrier would be presumptively liable when an accident occured[7] but could rebut the presumption and avoid liability.[8] Additionally, exceptions were drafted into the Convention which provide for *unlimited* carrier liability in cases of either failure to deliver a passenger ticket[9] or wilful misconduct.[10] Thus, a plaintiff who will be satisfied with an $8300 recovery may simply allege injury,[11] but a plaintiff who desires to recover *more* than $8300 must do one of three things: (1) successfully invoke Article I(1),[12] which will make the Convention irrelevant to the litigation (thus, the laws of the country in which the action is brought would determine the amount to be recovered), (2) plead wilful misconduct, or (3) plead the carrier's failure to deliver to the passenger a ticket with an adequate notice of liability.[13]

As to the last point, English authorities hold that a carrier failing to deliver a sufficient ticket remains prima facie liable; it is not entitled to the benefits of the Convention but is subject to its liabilities.[14] American

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[6] 1 C. SHAWCROSS & K. BEAUMONT, INTERNATIONAL LAW, 43 (2d ed. 1966).

[7] Article 17 of the Convention provides: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

[8] Article 20(1) of the Convention quoted in part, *supra* note 4. Under the United States Supplemental Agreement of 1966 the carrier is *absolutely* liable, with a financial liability limit of $75,000, and is not allowed to rebut this presumption of liability. For a discussion of the history which gave rise to this supplemental agreement see *infra* note 27.

[9] *See* Article 3(2), *supra* note 3. For a discussion of the history of the drafting of Article 3(2) see, H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 266-72 (1954).

[10] Article 25(1) of the Convention provides: "The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct."

[11] The Second Circuit applied the Convention in Grey v. American Airlines, Inc. In stating that the carrier was absolutely liable under the Convention and recognizing that liability may be avoided through Article 20, the court said,

> As to this it is plain that the burden of proof is on the carrier. And in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be insurmountable.

Grey v. American Airlines, Inc., 227 F.2d 282, 285 (2d Cir. 1955) *cert. denied*, 350 U.S. 989 (1956).

[12] Article I(1) of the Convention provides: "This Convention applies to *all international* carriage of persons, luggage, or goods performed by aircraft for reward. . . ." The reference to "all international carriage" impliedly excludes carriage which is not international in nature.

[13] Delivery of a ticket which fails to give adequate notice of liability results in an insufficient delivery of the ticket.

[14] Westminster Bank, Ltd. v. Imperial Airways, Ltd., [1936] 2 All E.R. 890. This case involved a failure to deliver an air consignment note that listed all the particulars required by the Convention, rather than an inadequate delivery of a passenger ticket, but the statements that outline limited liability and avoidance of liability apply equally to a failure to comply with the ticket requirements and the air consignment note requirements. In giving judgment for the plaintiff the court held that under the Warsaw Convention the carrier is prima facie liable for injuries that occur during the course of transport, that the carrier can avoid this liability through Article 20, *but* that it is ab-

cases are unequivocal in holding that without delivery of a sufficient ticket the carrier is *absolutely* liable for the full amount of any damages proven by the plaintiff.[15] In *Lisi v. Alitalia-Linee*,[16] the carrier argued that its liability was limited because it had delivered a ticket, but the court found that the ticket delivery was insufficient because the size of the print made the notice of liability inadequate, and consequently the carrier could not limit its liability nor avail itself of any defense provided by the Convention.[17] Both *Lisi* and *Mertens v. Flying Tiger Airlines, Inc.*[18] discussed delivery of a passenger ticket with adequate notice of liability. In *Mertens* the carrier argued that Article 3(2) merely requires delivery of a passenger ticket,[19] but the court said that Article 3(2) requires a delivery of a ticket that will afford the passenger a reasonable opportunity to take some self-protective measures.[20] The court reasoned that otherwise there would have been no reason for the Convention (1) to require that the ticket state the limited liability of the carrier, (2) to require that the ticket be delivered to the passenger, and (3) then further to provide for a higher limit of liability if the carrier and passenger so agree.[21]

Once a court determines that Article 25 or Article 3(2) applies, the burden of proving inadequate delivery of a ticket or wilful misconduct then becomes crucial. Some writers think that the "quid pro quo" for the Convention's absolute but limited recovery is the shift of the burden of proof to the carrier.[22] Thus, if the plaintiff seeks an amount *above* the Convention limit, the burden lies with him to establish the necessary ele-

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solutely and unlimitedly liable if it fails to deliver an adequate air consignment note. *See also* Philippson v. Imperial Airways, Ltd., [1939] 63 Lloyd's List L.R. 119.

Shawcross and Beaumont note that "When a carrier has failed to deliver a ticket he will be absolutely liable for the full amount of any damages arising under Articles 17 or 19 . . . , and since the carrier is not entitled to avail himself of the provisions of Article 20(1) and probably Article 21 which exclude this liability, nor of those which limit it, he remains subject to his full prima facie liability." 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 441.

[15] Lisi v. Alitalia-Linee, 370 F.2d 508 (2d Cir. 1966), *cert. granted*, 26 U.S.L.W. 3185 (U.S. Nov. 7, 1967) (No. 70); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 830, *reh. denied*, 382 U.S. 933 (1965).

[16] 370 F.2d 508 (2d Cir. 1966).

[17] *Id.* at 514. In *Mertens* the notice of the carrier's limited liability "was so printed in such manner as to virtually be unnoticeable and unreadable." 341 F.2d at 857. In criticizing the "Lilliputian print" of the ticket the court held at the same page that "as a matter of law" the delivery of the ticket was inadequate. *But see* Seth v. British Overseas Airways Corp., 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964). *Lisi* quoted the *Mertens* decision with approval and reasoned that a condition precedent to the carrier's defense of limited liability is delivery to the passenger of a ticket which gives him notice that his recovery is limited in the event of a crash. 370 F.2d at 513.

[18] 341 F.2d 851 and 370 F.2d 508.

[19] The carrier maintained that the Article 3(2) requirements are less than those of Article 4(4), which requires that a luggage ticket state all the particulars of the article. This interpretation of the distinction between the articles had been upheld in the *Grey* litigation where the court stated: "Art. 3(2) merely requires that the ticket be delivered to the passengers and thus clearly differs from Articles 4(4) and 9. I must conclude that this omission or difference is most significant." Grey v. American Airlines, 95 F. Supp. 756, 758 (S.D.N.Y. 1950). The *Lisi* court distinguished the *Grey* rule that mere ticket delivery is sufficient by saying that the ticket issued in *Grey* involved the failure of the carrier to list a stopping place. "As the failure to list such a stopping place did not change the international character of the flight, the passenger was not deprived of a reasonable opportunity to take self-protective measures." Therefore, the ticket had been delivered. 370 F.2d at 513.

[20] 341 F.2d at 856.

[21] *Id.* at 857.

[22] *See* H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, 12, 18-26 (1954).

ments of Articles 25 or Article 3(2). If wilful misconduct is at issue the plaintiff must bear the burden of proof.[23] If the plaintiff alleges inadequate ticket delivery, the *Mertens* court said, indirectly, that the plaintiff must prove non-delivery of a ticket or delivery of an insufficient ticket: "The jury decided that plaintiff had failed to prove . . . that no ticket was ever delivered to the decedent."[24] A plaintiff, then, has the burden of proving inadequate ticket delivery just as he must prove wilful misconduct. The rationale is that when a plaintiff seeks more than the $8300 limitation of liability, he must bear the burden of proving his cause for avoiding the limitation. It is clear that when a plaintiff alleges inadequate ticket delivery, even in conjunction with wilful misconduct, he is required to prove *only one* of these two allegations.[25]

Under the Convention, unless the carrier proves the contrary, it is presumed to be negligent. Hence the unusual decision in *Berguido*, the first case to adjudge a carrier non-negligent without the carrier's proving that it was without fault. Indeed, in *Berguido*, the carrier *admitted* that it could not prove its lack of negligence. The court then went further and *placed the burden of proving negligence on the plaintiff* because he sought to recover on the ground of inadequate ticket delivery as well as wilful misconduct.[26] In this the court erred because the plaintiff always has available the presumption of liability set out in Article 17: if the plaintiff pleads wilful misconduct and fails to prove it, he should be entitled to have judgment entered in his favor on the negligence issue unless the carrier rebuts the presumption of fault.

Mertens is in stark contrast to *Berguido* on this issue because in *Mertens* the issues of wilful misconduct and inadequate ticket delivery were raised and, although the plaintiff failed to prove wilful misconduct, the ticket was inadequate and he was allowed a new trial on the issue of damages alone. *Mertens* clearly implies that negligence and wilful misconduct *are not* bound together and that the plaintiff should *never* have to prove negligence under the Convention. Stated another way, the plaintiff only has to prove facts that will *increase* liability.

In conclusion, an award of *any* amount with a specific finding that the carrier was without fault is inconsistent and impossible under the Warsaw Convention. Unless the carrier affirmatively shows that it was without fault, the plaintiff is entitled to the limited award with an unlimited award

[23] Grey v. American Airlines, Inc., 227 F.2d 282, 285 (2d Cir. 1955). Shawcross and Beaumont, in their discussion of the loss of the carrier's protection due to wilful misconduct suggest that, "The burden of proving that the carrier has lost its protection is presumably on the plaintiff." 1 C. SHAWCROSS & K. BEAUMONT, *supra* note 6 at 456.

[24] 341 F.2d at 856. Notwithstanding this jury finding, the court found the ticket inadequate as a matter of law.

[25] The ticket problem was ruled out as an issue during the pre-trial hearing. For this reason, the plaintiff, even though he had a valid point, was foreclosed from ever raising the issue again. Also, the plaintiff himself assumed that without a valid ticket the Convention rule of presumed negligence did not apply, that the litigation was outside he Convention, and that he had to prove negligence. It was only on petition for re-hearing that the plaintiff first recognized his mistake. Article 3(2) plainly states that even with an inadequate ticket delivery the contract of carriage is still under the rules of the Convention.

[26] The court apparently reached its decision on the theory that the scheme of the Convention does not support unlimited liability.

always an existing possibility. The articles of the Convention are of equal weight; hence, the articles providing for absolute but limited liability cannot be interpreted so as to exclude or overrule the article providing for unlimited recovery.

As an aside to the *Berguido* issues, one can predict that the *Lisi* decision holding that a ticket must effectively warn the passenger that his recovery is limited in order to be validly delivered is, in all probability, going to be a bitter pill for the airlines. Either the carriers will have to show in boldface print the limitation of liability (with all its attendant psychological effects) or the courts are going to take this perfect avenue to avoid a limitation that has become the source of extreme discontent within the United States.[27]

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[27] On 15 November 1965 the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months. On 14 May 1966 the United States withdrew this notice. For a discussion of the subject see *The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation*, 32 J. Air L. & Com. 243 (1966).

Procedure — Service on Foreign Aircraft Corporation — Distributors

Plaintiff, B.B.P. Association, an Idaho corporation, purchased an aircraft from defendant Idaho Aviation Center, Inc., (hereinafter Center), also an Idaho corporation. Center was engaged in the business of retailing, servicing, and repairing aircraft manufactured by an additional defendant, Cessna Aircraft Company, a Kansas corporation. Two months after the purchase of the aircraft, plaintiff discovered that it was mechanically defective. After examination of the defective engine, Cessna and Center agreed to furnish and install a new engine. Plaintiff subsequently discovred that the malfunction had not been corrected, and that, as a result, the aircraft was not safe to fly. Plaintiff brought an action against Cessna in the Idaho District Court for breach of warranty and fraudulent misrepresentation. Cessna specially appeared and moved to quash the complaint on the grounds that it was not doing business in the State of Idaho. Motion was granted and the plaintiff appealed to the Idaho Supreme Court. *Held, Reversed:* Where "minimum contacts" necessary for extraterritorial jurisdiction have been established, a foreign corporation's actions constitute "doing business" within that forum. *B.B.P. Ass'n, Inc. v. Cessna Aircraft Co.*, 420 P.2d 134 (Idaho 1966).

The question of whether a foreign corporation is subject to jurisdiction[1] in the courts of a state other than that in which it is incorporated arose early in the 19th Century. At that time it was believed that a corporation could engage in activities outside its state of incorporation only with the permission of the state in whose jurisdiction it sought to operate.[2] Following this concept, the Supreme Court held in *Pennoyer v. Neff*[3] that a judgment against a nonresident defendant was void unless the defendant appeared or was served personally in the forum state. As the advantages of the corporate form of business became more apparent and corporations became "the common method of carrying on economic activity,"[4] the development of procedures by which corporate entities could be sued in a foreign state became even more imperative. This result was accomplished by extending to corporations the concepts used to obtain personal jurisdiction over individuals. The first theory to evolve was "consent," express or implied, by a corporation to be sued in a foreign state. Next, the courts

[1] The instant note is concerned solely with the question of *in personam* jurisdiction over a foreign corporation as distinguished from *in personam* jurisdiction over a domestic corporation or individual.

[2] Chief Justice Taney expressed this requirement in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839). "[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

[3] 95 U.S. 714 (1877).

[4] Kurland, *The Supreme Court, the Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 578 (1958).

used the term "presence within the state" to supplement the first theory. Finally, the concept of "doing business' unfolded to rectify the shortcomings of the two prior fictions.[5]

The "consent" theory found its origin in the power of a sovereign to exercise its discretion in the determination of who should be allowed to transact business within its boundaries. This concept was approved by the Supreme Court in 1855 when it was stated, "A corporation created by [one state] can transact business in [another state] only with the consent, express or implied, of the latter State."[6] As a result, a state could require a foreign corporation to appoint expressly an agent or representative to receive process within that state.[7] If no agent was so appointed, the courts would construe such inaction as a waiver of the right to choose a specific agent, the right then passing to the state itself. Confusion arose as to when this theory applied. There were questions as to whether the doctrine was limited to transactions arising within the state,[8] whether the concept would interfere with interstate commerce,[9] and whether the state's power extended to the regulation of a foreign corporation's conduct within the state.[10] Despite these ambiguities, some courts continued to rely on the "consent" theory. Finally, in order to assure due process, in the application of the theory, the Supreme Court restricted state discrimination against foreign corporations in order to limit findings of consent when completely unwarranted.[11]

Because of the limitations imposed on the "consent" theory, courts gradually began to place more emphasis on the idea of a foreign corporation being "present" within its jurisdiction. This "presence" theory became a supplement, extension, and finally a substitute for "consent."[12] As

[5] The study of the history of *in personam* jurisdiction is usually divided into three theories: consent, presence, and doing business. The first two theories are mere fictions in that consent and presence within the state is inferred from the activities of the corporation. These theories overlapped each other in development and, therefore, no boundaries of beginning or ending exist. For a detailed history of the development of *in personam* jurisdiction over foreign corporations see: Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Comment, *Personal Jurisdiction over Nonresidents—The Louisiana "Long Arm" Statute*, 40 TUL. L. REV. 366 (1966).

[6] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

[7] *See, e.g.*, Louisville & Nashville R.R. v. Chatters, 279 U.S. 320 (1929); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).

[8] *See* St. Clair v. Cox, 106 U.S. 350, 356 (1882). *See also* Pennsylvania Lumbermen's Ins. Co. v. Meyer, 197 U.S. 407 (1905); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[9] *See, e.g.*, International Harvester v. Kentucky, 234 U.S. 579 (1914); International Textbook Co. v. Pigg, 217 U.S. 91 (1910); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1877).

[10] *See* New York, Lake Erie & W. R.R. v. Pennsylvania, 153 U.S. 628 (1894), which held that a state could not regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company had tracks and did business in the state making the attempt.

[11] *See* Fidelity and Deposit Co. v. Tafoya, 270 U.S. 426 (1926), which held that "a state cannot use its power to exclude a foreign corporation from local business as a means of accomplishing that which is forbidden to the state, such as the regulation of conduct in another jurisdiction."

[12] International Harvester v. Kentucky, 234 U.S. 579, 589 (1914) was a harbinger of subsequent total reliance on presence. There the Supreme Court held that "[t]he presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State. . . ." *See generally* Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907).

the Supreme Court stated in *Philadelphia Reading Ry. v. McKibbin*, "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."[13] In applying the test, courts looked for transactions within the state of the forum which were sufficiently extensive and continuous as to reasonably justify trial away from home.[14] The vagueness of the test left the courts with a need to interpret exactly what or which activities constituted "presence." The situation predictably resulted in conflicting decisions, thus making the search for a more definitive theory inevitable.

As a consequence, the courts attempted to eliminate inconsistencies by merging the two older fictions into what is now known as the "doing business" concept. Various committees[15] and courts[16] struggled with the principles of "doing business" in the attempt to determine under what circumstances a foreign corporation might find itself subject to jurisdiction. The Supreme Court took the opportunity in *International Shoe Co. v. Washington*[17] to reconcile prior definitions[18] of "doing business" and to establish a workable definition for future litigation. There it was stated:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' [Emphasis added.].[19]

The court qualified its "minimum contacts" test by stating that "whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[20]

Sufficient minimum contacts with the forum are readily satisfied when the activity is substantial, systematic, and continuous.[21] However, in other situations the question of sufficiency is not as clear. Considering whether

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[13] 243 U.S. 264, 265 (1917).

[14] *See* Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930).

[15] RESTATEMENT OF CONFLICTS OF LAWS, § 167, comment a at 244 (1934): "Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or doing a single act for such purpose with the intention of thereby initiating a series of such acts."

[16] *See, e.g.*, Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

[17] 326 U.S. 310 (1945).

[18] *See, e.g.*, Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Frene v. Louisville Cement Co., 134 F.2d 511 (D.C. Cir. 1943); Tauza v. Susquerhanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

[19] 326 U.S. 310, 316 (1945). It should be noted at this point that the terminology as used in *International Shoe* is: sufficient "minimum contacts" to constitute "doing business." However, most courts use the phrases "minimum contacts" and "doing business" interchangeably.

[20] 326 U.S. 310, 319 (1945).

[21] The activities of a corporation may be so continuous and substantial as to justify suit on a cause of action arising from dealings entirely distinct from those activities. Missouri, K. & T. Ry. v. Reynolds, 255 U.S. 565 (1921), *aff'd per curiam;* Tauza v. Susquehanna Coal Co. 220 N.Y. 259, 115 N.E. 915 (1917). However, a corporation's activities may be continuous in nature and yet not be sufficient to support service on an unrelated activity. Old Wayne Mutual Life Ass'n v. McDonough, 204 U.S. 8 (1907); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907). *See generally* Ruff v. Manhattan Oil Co., 172 Minn. 585, 216 N.W. 331 (1927); Tomson v. Iowa State Traveling Men's Ass'n, 88 Neb. 399, 129 N.W. 529 (1911).

an isolated, single transaction or contract would constitute sufficient minimum contacts, the Supreme Court in *McGee v. International Life Ins. Co.*[22] held that, "[I]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."[23] The *McGee* case seems to foster unpredictable results through its extension of the doctrine of minimum contacts by establishing a trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents."[24] However, *Hanson v. Denckla*[25] closed the door to any possible notion of broadening this trend. The restrictions on the personal jurisdiction of state courts are considered not a mere guarantee of immunity from inconvenience but a result of territorial limitations. Moreover, a defendant could not be called upon to defend himself in a foreign state "unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[26] *Hanson* went further than merely limiting *McGee* to its fact situation, *i.e.*, a single insurance contract solicited via United States mail. Although the quality and nature of a defendant's activity will vary, the court deemed it essential that there be some act by which the defendant purposefully avails himself of the privileges of conducting activities within the state, thus "invoking the benefits and protections of its laws."[27] Although the court in *Hanson* seemed to favor a limited application, the trend has been toward a relaxation of limitations on personal jurisdiction.[28] For instance, the courts have said that if a foreign corporation's business activities in a state are sufficiently extensive, it is amenable to suit in that state "*even* upon a cause of action arising outside of the state."[29]

Although there can be no precise legal formula for the determination of when a corporation is "doing business," *i.e.*, when it has "minimal contacts" within a state, past cases illustrate fact situations which have been held to amount to "doing business." Indeed, what constitutes "doing business" so as to subject a foreign corporation to *in personam* jurisdiction is determined from the facts of each case.[30] For instance, though occasional and isolated acts may not be sufficient to require a corporation to apply for a license to do business in the forum state, such acts may support service of process.[31] Maintaining an office[32] or an agent to solicit busi-

[22] 355 U.S. 220 (1957).
[23] *Id.* at 223.
[24] *Id.* at 222.
[25] 357 U.S. 235 (1958).
[26] *Id.* at 251.
[27] *Id.* at 253.
[28] In Jennings v. McCall Corp., 320 F.2d 64, 67 (8th Cir. 1963) it was stated that "[t]he more recent federal cases have greatly relaxed the due process limitations on personal jurisdiction."
[29] *Id.* at 67.
[30] *See, e.g.*, Roack v. American Distilling Co., 97 F.2d 297 (8th Cir. 1938); Real Silk Hosiery Mills, Inc. v. Philadelphia Knitting Mills Co., 46 F.2d 25 (3d Cir. 1930); Cornegie Office Appliance Co. v. Thomas A. Edison, Inc., 28 F.2d 626 (D.N.C. 1928); Maverick Mills v. Davis, 294 F. 404 (D. Mass. 1923); Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117 (S.D. Ind. 1962); Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942).
[31] People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918).
[32] *See, e.g.*, Elgin Laboratories, Inc. v. Utility Mfg. Co., 26 F. Supp. 918 (N.D. Ill. 1939); International Shoe Co. v. Lovejoy, 219 Iowa 204, 257 N.W. 576 (1934); Hartstein v. Siedenbach's Inc., 221 A.D. 798, 223 N.Y.S. 872 (1927). *Contra,* Costello v. Lee, 43 F. Supp. 947 (S.D.N.Y. 1941).

ness,[33] or making contracts are all viewed as evidence of "doing business." All such evidence is considered but no single factor is necessarily conclusive. Although stated some thirteen years prior to *International Shoe*, Justice L. Hand's analysis of "doing business" might well be applicable today. "It is quite impossible to establish any rule from the decided cases, we must step from tuft to tuft and across the morass."[34]

Whether Cessna was subject to the jurisdiction of Idaho must be determined by an examination of the degree of activities, if any, engaged in by Center on behalf of Cessna. To satisfy the *International Shoe* test of "doing business," the activities of Center had to be of such a "quality and nature" that "certain minimum contacts" were established which do not offend "traditional notions of fair play and substantial justice." Superficially, the marketing system of Cessna gave the appearance that no control was maintained over its dealer. However, Cessna did exercise some control over the dealer, as evidenced by the power of Cessna to sell in the dealer's territory. Cessna's advertising program, the use of a uniform accounting method, maintenance of Cessna parts, participation in an identification program and the sending of repairmen to adjust malfunctioning engines were all further evidence of the exercise of control over the dealer. Most of the noted programs or activities were "optional" or "recommended" by Cessna. But the fact that the programs were optional was merely evidence, and not conclusive of the lack of an existing relationship between the parties. Moreover, the conclusion as to the legal relationship between Cessna and Center was affected by consideration of similar affiliations.[35]

The relationship of an agent, independent contractor, dealer, or representative with a foreign corporation is as dependent on specific fact situations as are other elements of "doing business." Courts have been guided by the power which is vested in the representative to act in behalf or bind the principal,[36] and by the power of the principal to control (directly or

[33] International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

[34] Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930). L. Hand, J., in defining "doing business" stated:

> Possibly the maintenance of a regular agency for the solicitation of business will serve without more. The answer made in Green v. C., B. & Q. RR. Co., 205 U.S. 530 . . . and People's Tob. Co. v. Amer. Tobacco Co., 246 U.S. 79 . . . perhaps becomes somewhat doubtful in the light of International Harvester Co. v. Ky., 234 U.S. 579 . . . and, if it still remains true, it readily yields to slight additions. In Tauza v. Susquehanna Coal Co. . . there was no more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough (Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 . . .) nor are the activities of subsidiary corporations (Peterson v. Chicago, R. I. & P. Ry. Co., 205 U.S. 364 . . . Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 . . .), or of connecting carriers (Philadelphia & Read. Co. v. McKibbin, 243 U.S. 264 . . .). The maintenance of an office, though always a make-weight, and enough, when accompanied by continuous negotiation, to settle claims (St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 . . .), is not of much significance (Davega, Inc. v. Lincoln Furniture Co., 29 F.2d 164 (C.C.A. 2). It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft and across the morass." Hutchinson v. Chase & Gilbert, *supra* at 141-42.

[35] *See* Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117, 129 n. 16 (S.D. Ind. 1962).

[36] Sullivan v. Canadian Pac. Ry., 22 F. Supp. 95 (D. Mass. 1938); Mas v. Owens-Ill. Glass Co., 34 F. Supp. 415 (E.D. Va. 1940). (Doing business depended on the "extent of authority delegated to, and duties performed by" the representative.).

indirectly) the activities of its agent.[37] A principal has been held to be "doing business" when its agent or representative has entered a state to service engines[38] or solicit business while making collections and supervising dealers.[39] A local representative may be held to be "doing business" for a principal by merely undertaking to act or represent the corporation.[40] "Independent" automobile dealers may be viewed as having made minimum contacts for the manufacturer if the corporation "reserves the right to sell to other dealers,"[41] or to ship automobiles into the state[42] or if the dealer settles claims for the corporation.[43] Participating in an advertising and identification program[44] or using a standardized franchise[45] has also been held to constitute "doing business" in the forum state for the benefit of the principal. Generally, the principal must exercise *some measure of control* over the business entrusted to the representative or the agent must serve in a representative capacity.[46]

Obviously an infinite number of combinations of activities could constitute "minimal contacts" within a forum; moreover, courts look not to form but to the substance of the relationship. For instance, even the actions of an independent contractor may be construed as "doing business" for a principal.[47] Because a wide variety of fact situations have been adjudicated, almost any relationship could be well qualified by case law. Whether the activities which Center performed for Cessna amounted to "doing business" is a matter of interpretation; and the court's determination in the instant case was guided, although without specific recognition, by previously established criteria.[48] The court considered the nature and character of the business,[49] the nature and type of activities within the

[37] *See, e.g.*, Focht v. Southwestern Skyways, 220 F. Supp. 441, 443 (D. Colo. 1963) where it was stated that it is "not merely a matter of the frequency of contacts, it is also the extent of control that a corporation exerts in a state by means of devices such as the distributor agreement. . . ." *See generally* Irons v. Rogers, 166 F. 781 (S.D.N.Y. 1908).

[38] *See, e.g.*, Milbank v. Standard Motor Const. Co., 132 C.A. 67, 22 P.2d 271 (1933).

[39] *See, e.g.*, La Porte Heinekamp Motor Co. v. Ford Motor Co., 24 F.2d 861 (D. Md. 1928).

[40] *See, e.g.*, St. Louis Southwestern Ry. of Tex. v. Alexander, 227 U.S. 218 (1913).

[41] *See, e.g.*, Thompson v. Ford Motor Co., 200 S.C. 393, 21 S.E.2d 34 (1942); Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co., 304 F.2d 915 (1st Cir. 1962); Abel v. Albina Engine & Mach. Works, 284 F.2d 510 (10th Cir. 1960).

[42] *See, e.g.*, Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961).

[43] *See, e.g.*, Snyder v. Eastern Auto. Distributors, Inc., 357 F.2d 552 (4th Cir. 1965); Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959); Eclipse Fuel Engineering Co. v. Superior Ct., 148 Cal. App. 2d 736, 307 P.2d 739 (1957); Jones v. General Motors Corp., 197 S.C. 129, 14 S.E.2d 628 (1941).

[44] *See* Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., 332 F.2d 135 (5th Cir. 1964).

[45] *See* Volkswagen Interamericana v. Rohlsen, 360 F.2d 437 (1st Cir. 1966). *See also* Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957).

[46] *See, e.g.*, Green v. Robertshaw-Fulton Controls Co., 204 F. Supp. 117 (S.D. Ind. 1962); Jones v. General Motors Corp., 197 S.C. 129, 14 S.E.2d 628 (1941).

[47] *See* Fielding v. Superior Court, 111 Cal. App. 2d 490, 244 P.2d 968 (1952).

[48] Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90, 99 (S.D. Tex. 1963). Even though recognized as the *Hearne criteria*, it is interesting to note that the criteria set forth by *Hearne* were first laid down by Judge Ingraham in Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48, 56 (S.D. Tex. 1960), *rev'd on other grds.*, 288 F.2d 69 (5th Cir. 1961).

[49] "[C]essna enjoyed practically the same advantages and benefits to its business from sales of its products in this state, as it would have done through officers or agents directly representing it in this state." B.B.P. Ass'n, Inc. v. Cessna Aircraft Co., 420 P.2d at 142.

forum,[50] the relative convenience of the parties,[51] whether the forum had some special interest in granting relief,[52] and whether the cause of action arose out of activities conducted within the state.[53]

If one is looking for a precise statement of the circumstances in which a corporation is subject to *in personam jurisdiction,* he will not find it. The doctrine of *International Shoe* has led to problems of interpretation, application and consistency. However, the test of "certain minimum contacts" which do not offend "traditional notions of fair play and substantial justice" is probably the best of the several standards. Another, slightly different, test for interpreting fact situations was set forth in *Sun-X International Co. v. Witt*[54] where it was stated that:

> there are three basic factors which should coincide if jurisdiction over a non-resident defendant is to be entertained, to wit: (1) The non-resident defendant or foreign corporation must *purposefully do some act or consummate some transaction* in the forum State; (2) the cause of action must arise from, or be connected with, such an act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation[55] [Emphasis added.].

The result of the instant case is not startling. Nevertheless, this decision serves as a reminder to other aircraft manufacturers which have similar marketing systems. As corporations increase their interstate activities, the courts have more readily extended their extra-territorial jurisdiction. It appears that courts are likely to subject foreign corporations to their jurisdiction unless the forum has been completely avoided. Corporations would be well advised, therefore, to qualify to "do business" within the forum rather than incurring the risk and expense of attempting to avoid jurisdiction. It is not unreasonable that a foreign corporation should pay for the right of doing business by subjecting itself to the jurisdiction.

Robert E. Wilson

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[50] *Supra* note 35 and accompanying text.

[51] "It is consonant with equity and fair dealing to require Cessna to come to this state to defend against such claims." B.B.P. Ass'n v. Cessna Aircraft Co., 420 P.2d at 142.

[52] "The purpose of the [Idaho long-arm statute] was to furnish, so far as possible, a local forum to residents of this state who have a grievance against a nonqualifying foreign corporation, growing out of its business activities here." *Id.* at 139.

[53] The action was for breach of warranty and fraudulent misrepresentation which grew out of the sales contract.

[54] 413 S.W.2d 761 (Tex. Civ. App. 1967).

[55] Sun-X Int'l Co. v. Witt, 413 S.W.2d 761, 764 (Tex. Civ. App. 1967). The court in *Sun-X* incorporated the two doctrines of O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. S. Ct. 1966) and Tyee Constr. Co. v. Dulien Steel Products, Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963) into one.

Administrative Law — Aircraft Accident Investigation Records — Freedom of Information Act

In answer to a growing clamor for greater disclosure of information held by the executive branch of the Federal Government, Congress has recently passed an amendment,[1] popularly known as the Freedom of Information Act, to Section 3 of the Administrative Procedure Act.[2] It is the purpose of this note to analyze the Freedom of Information Act in relation to government records concerning the investigation of aircraft accidents and the availability of those records to private citizens, especially litigants in private suits arising from such accidents.

Before proceeding with the discussion of the Freedom of Information Act, two points must be clarified. First, all accident investigation and safety functions of the Civil Aeronautics Board[3] (CAB) have been transferred to the National Transportation Safety Board (NTSB) of the Department of Transportation.[4] Therefore, past practices, regulations, and court decisions concerning access to investigation records will be discussed in relation to the CAB, whereas the future effects of the Freedom of Information Act will be related to NTSB regulations. Second, the Freedom of Information Act will not, and was not intended to, change the rules governing the admissibility of investigation records as *evidence* in court proceedings. Its sole purpose is to make governmental records more readily available to the public. Therefore, this note will discuss evidence only insofar as it relates to the access of records held by the government.

The CAB, and now the NTSB, through the Bureau of Safety,[5] carry on extensive investigations to ascertain the facts and to determine the probable cause of aircraft accidents. The facts found and the conclusions drawn from those facts are contained in numerous documents and reports now in the possession of the NTSB. Private litigants involved in suits arising from aircraft accidents seldom are able to perform such exhaustive and expensive investigation (for example, the Board investigators immediately isolate an aircraft crash site and only investigative personnel are al-

[1] Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966), *formerly* Pub. L. No. 89-487, 80 Stat. 250 (1966). The Freedom of Information Act under discussion was passed in order to codify the Act of July 4, 1966. The citations to Congressional reports and to other material is largely based on the original Act, but remains relevant, since no substantial changes were made.

[2] Administrative Procedure Act § 3, 5 U.S.C. § 552 (Supp. 1966), *formerly* 5 U.S.C. § 1002 (1964).

[3] Federal Aviation Act of 1958, § 701, 72 Stat. 781, *as amended* 76 Stat. 921 (1962), 49 U.S.C. § 1441 (1964).

[4] Department of Transportation Act, § 6(d), 80 Stat. 938, 49 U.S.C. § 1655(d) (Supp. 1966). For a discussion of the background of the formation of the NTSB and related problems see, Comment, *A Critical Analysis of the Department of Transportation*, 33 J. AIR L. & COM. 314 (1967).

[5] The Bureau of Safety was the primary investigative arm of the CAB. Its delegated functions were set out in 14 C.F.R. § 386.2 (1967). The Bureau was transferred to the NTSB as a unit and retains all of its investigative responsibilities.

lowed in the area). Therefore, the information contained in such records and reports is particularly important as it is the most thorough and relevant in existence.

In the past, the release of any of this material for use in litigation, or for any other purpose, by private parties was almost entirely at the discretion of the CAB officials; and, as will be seen, circumstances virtually eliminated effective judicial review of such decisions.[6] However, litigants, or any private citizens, who are denied access to investigative records may now seek aid based on the Freedom of Information Act, which will eliminate many of the problems previously encountered in the attempt to obtain such records.[7]

CAB regulations reserved to the Director of the Bureau of Safety[8] or his designee discretion as to the release of documents or information held by the CAB.[9] The regulations further stated that no CAB employee was to release any documents or other information in answer to a subpoena without authorization from the CAB's General Counsel or the Director of the Bureau of Safety.[10] Rather, a CAB employee was to appear in response to any subpoena from a court ordering release of CAB records and decline to produce them on the ground that such production was barred by CAB regulations.[11] The courts have consistently upheld such regulations,[12] and have protected the employee from judicial sanction for failure to comply with court orders.[13]

The immunity of CAB and other agency employees from judicial sanction was based on the Federal "Housekeeping" statute,[14] first enacted by

[6] Generally, there has been little trouble in obtaining limited statements of *observed* facts resulting from aircraft accident investigations. However, the practice was not to release any report or record which contained an opinion of any kind, even though it also contained observed facts. 14 C.F.R. § 311.2 (1967) set out certain information which was to be released upon request, but limited information to be released to factual material only. All requests for releases were required to be based on a showing of good cause.

This note will not discuss release of CAB/NTSB records in those cases in which the Federal Government is a party to the litigation, since the courts have ruled that non-privileged records are discoverable as against any private party in such actions. *See, e.g.*, Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Cresmer v. United States, 9 F.R.D. 203 (E.D. N.Y. 1949).

[7] While other avenues of discovery are open to litigants in private suits, such as depositions and interrogatories, it must be recognized that nothing can fully replace an expert, first-hand investigation of an accident scene.

[8] 14 C.F.R. § 386.2 (1967).

[9] *Id.* § 311.2.

[10] *Id.* § 311.3(e). Upon receiving a subpoena, the employee was to notify the Director of the Bureau of Safety, who would in turn either give the employee permission to release the requested records or have the CAB's General Counsel have the employee excused by the court. Procedure for the NTSB is much the same, with the Executive Director of the NTSB having initial authority as to the release of documents and records. 10 Av. Cas. ¶¶ 13,970-13,995 (1967), 14 C.F.R. § 401, 38 Fed. Reg. 9963 (1967).

[11] 14 C.F.R. § 311.3(e) (1967).

[12] The courts have ruled that valid agency and departmental regulations have the force of law, unless openly and palpably inconsistent with law. *See, e.g.*, Boske v. Comingore, 177 U.S. 459 (1900); *Ex parte* Reed, 100 U.S. 13 (1879); Mt. Vernon Cooperative Bank v. Gleason, 250 F. Supp. 952 (D. Mass. 1966). The regulations of the NTSB concerning disclosure of information have been written in accordance with the Freedom of Information Act.

[13] *See, e.g.*, United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1961); Universal Airlines v. Eastern Airlines, 188 F.2d 993 (D.C. Cir. 1951).

[14] Federal Housekeeping Act, *as amended*, 72 Stat. 547 (1958), 5 U.S.C. § 22 (1964). The amended statute provides that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks,

Congress in 1789. The Supreme Court, in two decisions, *Boske v. Comingore*[15] and *United States ex rel Touhy v. Ragen*,[16] interpreted this statute and regulations promulgated thereunder to immunize from punitive judicial sanction those department subordinates who refuse to produce documents or records under proper regulations. The *Boske* and *Touhy* decisions gave valid regulations the force of law, and, in effect, named the various department and agency heads as the only persons who can be forced by court action to obey disclosure orders.[17]

Until 1962, any court action brought in an attempt to force release of CAB records had to be brought in the District of Columbia, as no other court had *in personam* jurisdiction over the CAB officials authorized to release such records under the regulations. Because of the time, expense, and inconvenience involved, such collateral actions seldom were resorted to by litigants.[18] In 1962, Congress liberalized this limited venue by the enactment of Section 1391(e) of the Judicial Code.[19] The purpose of the section was to allow actions to be brought against government agencies and officials in district courts outside the District of Columbia,[20] thus making it easier to reach the various agency and department heads. The Freedom of Information Act reinforces the venue provisions of Section 1391(e) of the Judicial Code by providing that:

> [T]he district court of the United States in the district in which *the complainant resides, or has his principle place of business, or in which the agency records are situated,* has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld. . . .[21] [Emphasis added.].

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the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. *This section does not authorize withholding information from the public or limiting the availability of records to the public* [Emphasis added.].

Until the 1958 amendment (italicized) was added, this statute was the basis for most of the executive department withholding regulations. For a complete discussion of the statute and the effect of the amendment, see Note, *Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 YALE L.J. 452 (1960).

[15] 177 U.S. 459 (1900). An Internal Revenue agent was imprisoned for contempt for refusal to produce agency reports and records when ordered to do so by the court below. The refusal was based on Treasury Department regulations forbidding such release of records. The Supreme Court held that the regulations were valid and had the force of law, and that the head of the Treasury Department properly reserved to himself determination of all matters as to the release of records held by the Department.

[16] 340 U.S. 462 (1951). Pursuant to Department of Justice regulations issued by the Attorney General under authority of the Federal Housekeeping Statute, a subordinate official of the Department of Justice refused, in a habeas corpus proceeding against him, to obey a subpoena duces tecum requiring him to produce papers of the Department in his possession. The Supreme Court held that the regulations were valid, and that the subordinate properly refused to release the records, and was not guilty of contempt for such refusal.

[17] *See, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953); N.L.R.B. v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961).

[18] Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477, 478 & n. 5 (1957).

[19] Judicial Code, 28 U.S.C. § 1391(e) (1964). The section provides that:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

[20] J. Moore, MOORE'S FEDERAL PRACTICE: JUDICIAL CODE PAMPHLET 581 (1966).

[21] Freedom of Information Act, § b(c)(3), Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

Even with the broader venue provisions of Section 1391(e), such disclosure actions remained slow and time consuming, and were little used by litigants seeking CAB records. The Freedom of Information Act now has reduced these problems of delay as to judicial review of the NTSB's refusal to release records. The Act provides that the disclosure action authorized will take precedence over all other cases on the court's docket, unless the court deems other cases of greater importance.[22] Litigants now have a much faster and more convenient judicial remedy in those cases in which a litigant alleges misconduct on the part of the NTSB, even though *Boske* and *Touhy* may still limit the persons against whom the action may effectively be brought. Even though disclosure actions will now be easier to bring, no substantial increase in such cases is predicted. The mere fact that effective procedure for judicial review is provided in the Act is an impetus for compliance, and court intervention doubtless will be seldom necessary.

In addition to making disclosure actions easier to bring, the Freedom of Information Act provides that the court shall have more effective power to enforce orders for release of information. The Act provides that, "[i]n the event of non-compliance with the order of the court, the district court may punish for contempt the responsible employee. . . ."[23] The express grant of contempt power is clear evidence that Congress intended that the courts shall have paramount authority as to disclosure of NTSB and other agency records. Although still open to judicial interpretation and application, this section of the Act may have the effect of overturning the *Boske* and *Touhy* decisions as they apply to the immunity of subordinate officials and employees from judicial sanction. However, the courts will probably be sparing in the application of the contempt powers since widespread application could seriously interfere with the functioning of the NTSB under its regulations. In the event of non-compliance, the contempt power would probably be applied only to those subordinate officials who have responsibility for final NTSB action on the release of records, and other subordinates will still have the duty to follow NTSB regulations and instructions of the agency head or his delegate.[24] However, the power is present and officials will certainly be aware of it when making decisions as to the release of records.[25]

One of the greatest potential effects of the Freedom of Information Act on NTSB withholding regulations and policies is on the interpretation and application of Section 701(e) of the Federal Aviation Act, which provides

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[22] *Id.*

[23] *Id.*

[24] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 28-29 (June 1967).

[25] In discussion of the application of contempt powers, mention must be made of the possibility of a plea of executive immunity from judicial sanction being raised by the responsible official of the NTSB. Presidential immunity is an unresolved constitutional question, as is the question of whether a subordinate official is protected as a representative of the President. In 1962, by letter, President Kennedy informed Congress that the President alone would invoke executive privilege, and this limitation was confirmed by President Johnson in 1965. H. R. Doc. No. 1497, 89th Cong., 2d Sess. 3 (1966). This guarantee is revokable at any time, however, and is a factor to be considered. For a full discussion of the question of executive privilege, see Bishop, *supra* note 17.

"[n]o part of any reports of the Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."[26] Section 701(e) was used by the CAB as one of the primary bases for the withholding of reports and records. This statute now applies to the NTSB,[27] and there is no reason to believe, in the absence of the Freedom of Information Act, that it would be treated in a different manner. The CAB's position, based on Section 701(e), was that if the documents were to be inadmissible as evidence, then there could be no good cause to release the records. The CAB, therfore, in applying its regulations,[28] did not release either its preliminary records or reports or the final CAB report to private parties as a matter of right.[29]

The courts, in interpreting the CAB withholding regulations in the light of Section 701(e), attempted to strike a balance between the interests of the CAB and the litigants in private suits. In *Ritts v. American Overseas Airlines, Inc.*[30] and *Tansey v. Transcontinental & Western Airlines, Inc.*[31] the courts held that only the CAB's final report was privileged under 701(e), and that preliminary information gathered during an investigation was not privileged.[32] However, the reports to which the courts were referring did not include those made by the CAB's own investigators, but only those made by outside parties involved in the accidents. In *Universal Airlines v. Eastern Airlines*[33] *and Craig v. Eastern Airlines*[34] it was held that reports made by employee investigators which contained the opinions and conclusions of a CAB employee were the private files of the CAB and, therefore, not available to the public.

The Freedom of Information Act, read literally, goes further than the court decisions and would eliminate even the withholding of final NTSB reports. The Act provides "[e]ach agency . . . shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions. . . ."[35] The courts, however, may well find that this does not apply to final NTSB reports, since the Freedom of Information Act further provides that its provisions will not apply to records specifically privileged by previous statutes.[36] On the basis of previous court decisions applied to the CAB, the courts will probably find that 701(e)

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[26] Federal Aviation Act of 1958, § 701(e), 72 Stat. 781, 49 U.S.C. § 1441(e) (1964).

[27] Although not specifically mentioned as applying to the NTSB, such application may be easily inferred since the Department of Transportation Act transferred *all* safety responsibilities of the CAB to the NTSB.

[28] There has been some question as to whether or not CAB construction of the statute (§ 701(e)) is consistent with the intent of Congress. However, there is virtually no legislative history to look to as a guide. See 25 J. AIR L. & COM. 235 (1958).

[29] 15 Fed. Reg. 6442 (1950).

[30] 97 F. Supp. 457 (S.D.N.Y. 1947).

[31] 97 F. Supp. 458 (D.D.C. 1949).

[32] The accident investigators commonly request the aid and assistance of outside parties, such as the airlines and aircraft manufacturers, involved in the accident. These parties frequently file with the CAB/NTSB reports containing vital information not otherwise available to private litigants.

[33] 188 F.2d 993 (D.C. Cir. 1951).

[34] 40 F.R.D. 508 (E.D.N.Y. 1966).

[35] Freedom of Information Act, § a(2)(A), Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

[36] *Id.* § 4(b)(3).

does extend to final NTSB reports, making them privileged, even though 701(e) deals in terms of admissibility as evidence and not in terms of general availability. Such construction will probably be deemed necessary in order to insure that accident investigation by the government will not be hampered.[37] The Freedom of Information Act will have no effect on reports made by government investigators, since these reports are considered intra-agency communications, which are specifically exempted from disclosure.[38] Further, the Act exempts investigative files compiled in connection with agency adjudicative proceedings.[39] The most important effect in this area is to make the majority of the investigative records available, or potentially available, as a matter of right, and the separation of availability to the public from the concept of admissibility as evidence.

The main purpose of the Freedom of Information Act was to turn Section 3 of the Administrative Procedure Act[40] into a true "public information" section. The original Section 3 gave the officials of executive agencies virtually unlimited power of discretion as to the release of any information. The basis for this discretion was found in such ambiguous and undefined terms as "except for good cause found [and] . . . in the public interest. . . ." Even if no good reason could be found under such terms as those mentioned, the records were to be made available only to "persons properly and directly concerned."[41]

In order to correct the abuses of the original section, the Freedom of Information Act sets out specific categories of information to be exempted from disclosure under the Act.[42] Although the exemptions in themselves are broad, the intention of Congress as to what they cover is clear, and the courts should have little trouble in properly applying the exempting provisions.

The most important change made by the Freedom of Information Act is the provision for *effective* judicial review of NTSB or other agency action. Although under the Judicial Code the courts had the power to force the CAB to reach a final decision,[43] no statute provided for proper review of that decision once it was made. The primary reason for the courts' inability to act was that the complainant usually did not know the reasons for the CAB's refusal to release the desired records, other than that the responsible officials had determined that there was "good cause" to withhold them. The inability of the complaining party to present a case ren-

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[37] For a complete discussion of the Federal Government's interests in withholding accident investigation records, see 25 J. AIR L. & COM. 235 (1958).

[38] Freedom of Information Act, § b(5), Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

[39] *Id.* § b(7).

[40] Administrative Procedure Act, § 3, 5 U.S.C. § 552 (Supp. 1966), formerly 5 U.S.C. § 1002 (1964).

[41] *Id.*

[42] Freedom of Information Act, § b, Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

[43] Judicial Code, 28 U.S.C. § 1361 (1964). This section provides that:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

dered the CAB's decision as to what would be released virtually the final authority.[44]

The Freedom of Information Act corrects the problem of review in two ways. First, the court proceedings are to be de novo, so that the court is not involved with mere judicial sanction of agency orders, but instead replaces the official's discretion with that of the courts.[45] The court is, therefore, free to exercise fully the traditional power of equity in determining whether or not the relief sought should be granted, and may properly balance the interests of all parties concerned.[46]

The second major change is a shift of the burden of proof. Under the original section, the complainant had to show that the CAB had in fact improperly withheld the material requested, even though he frequently did not know the reasons for the withholding. Now, the NTSB must prove to the court that the withholding action was proper and in accordance with the Freedom of Information Act.[47] The shift of burden will have the effect of making access to the NTSB's records a matter of right for all persons, without a showing that there is good cause for such release.

With the constant growth of air travel and the accompanying increase in litigation involving aircraft accidents, the NTSB's investigations will take on more and more importance, both in safety regulation and in litigation. In order to obtain the fairest adjudication of his cause of action, a litigant should have free access to all material pertinent to his case, and NTSB records may well be the only source of that material. At the same time, to achieve maximum effectiveness, the NASB must have full access to all relevant facts in its investigations, and, in order to obtain this access, must be able to operate as freely as possible from the area of private litigation. The Freedom of Information Act reflects an attempt to balance these conflicting interests, and the courts will be cognizant of those interests in interpreting and applying the Act. While the future may see no great change in the type of information made available, it will now become *more readily available;* and, as intended, the interests of the private litigant will receive greater protection.

B. L. Florsheim

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[44] HOUSE GOVT. OPERATIONS COMM., GOVERNMENT INFORMATION—PUBLIC ACCESS, H.R. Doc. No. 1497, 89th Cong., 2d Sess. 9 (1966). The courts have consistently declared their authority to make the final determination as to the disclosure of executive department records. *See, e.g.,* United States v. Reynolds, 345 U.S. 1 (1953); Davis v. Braswell Motor Freight Line, Inc., 363 F.2d 600 (5th Cir. 1966); N.L.R.B. v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961). In those cases involving an issue of evidence, the courts have been able to exercise some control. But where the question is the mere release of executive records, especially investigative records, the circumstances brought out in this note have prevented effective judicial control.

[45] Freedom of Information Act, § a(3), Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

[46] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 28 (June 1967).

[47] Freedom of Information Act, § a(3), Pub. L. No. 90-23, 81 Stat. 54 (June 5, 1967), *amending* 5 U.S.C. § 552 (Supp. 1966).

RECENT DECISIONS

DOMESTIC

Air Traffic Control — Wake Turbulence Warning — Government Liability

An action was brought against the United States under the Federal Tort Claims Act[1] for the negligence of its air traffic controllers in the death of a student pilot, who was killed along with his instructor when their small aircraft encountered wake turbulence and crashed on takeoff. The local control tower cleared plaintiff's aircraft for takeoff behind a DC-8 jet airliner and warned it of the wake turbulence of the departing aircraft. In apparent disregard of this warning, plaintiff commenced his takeoff roll which the control tower personnel observed but did not attempt to prevent. The government appealed from the trial court finding of negligence on the part of the air traffic controllers. *Held, affirmed:* The tower personnel were negligent in failing to attempt to prevent plaintiff's takeoff and encounter with wake turbulence, such failure proximately resulting in the fatal crash.[2] *United States v. Furumizo,* 381 F.2d 965 (9th Cir. 1967).

The government contended that, having given the wake turbulence warning, as required and outlined in the Air Traffic Control Procedural Manual, tower personnel have no further responsibility in this regard. The trial court found the United States negligent on two theories. The first theory was that tower controllers have a duty beyond that prescribed by the Air Traffic Regulations[3] and the Air Traffic Control Procedure Manual.[4] The court stated that controllers must do more than give a warning of wake turbulence; they must withhold or delay the takeoff of an aircraft if it is possible that the aircraft will encounter wake turbulence. This "follow the book" theory was neither accepted nor rejected by the appellate court because it felt that in light of the specific facts, the second theory was sufficient ground for affirming the lower decision. The appellate court's second theory of liability was based on the failure of the tower personnel to act to prevent the accident when it became apparent that the

[1] 28 U.S.C. § 1346(b) (1964).

[2] The appellate court in the present case used the RESTATEMENT (SECOND) OF TORTS § 321 (1965) as authority for its holding. This section states that there is a duty to act when prior conduct is found to be dangerous.

[3] "Have been duly adopted in accordance with the Administrative Procedure Act, pursuant to section 1348(d). . . ." Furumizo v. United States, 245 F. Supp. 981, 999 (D. Hawaii 1965). These regulations have the force of law.

[4] These have been issued by the Federal Aviation Administrator but have not been adopted in accordance with the Administrative Procedure Act, 49 U.S.C. § 1348(d) (1964).

earlier warning had been disregarded. The appellate court stated that when it became apparent to the controllers that their earlier warning of wake turbulence had been disregarded, it became their duty to further warn the pilot of the impending danger. The main significance of the appellate court's opinion is the fact that it extends the duty of air traffic controllers when it becomes apparent that their warnings have been disregarded and an aircraft is in danger.[5]

L.R.J., Jr.

Government Liability — Air Traffic Controllers — Responsibility

Plaintiff, Gordon Tilley, joined the United States and Delta Airlines as defendants in a suit to recover for injuries sustained when the aircraft on which he was a passenger skidded off the runway after the pilot inadvertantly applied too much power while complying with instruction from the air traffic controller to clear the runway. The controller, followed the generally used practice of "one off, one on,"[1] had instructed Delta to taxi onto the runway and hold its position immediately after a Sabena aircraft had landed but before it had cleared the runway. Sabena did not exit from one of the first three available exists, and at this time the controller realized there would not be sufficient time for Delta to takeoff and for an inbound Air France, already in the landing pattern, to land. Of the two available alternative actions—1. to have Delta clear the runway or 2. to have Air France execute a missed approach—the former was chosen since it would result in a delay to Delta of only fifteen to twenty seconds whereas the latter would require Air France to fly an additional eighty miles. The action against Delta, tried before a jury, resulted in a verdict in favor of Delta. The United States was found liable on the same evidence by the court under the Federal Tort Claims Act for the negligence of its employee in failing to follow applicable regulations which were in effect at the time and have the force of law[2] and in failing to anticipate and prevent an emergency situation. The United States appealed, contending that the primary duty for the safe operation of an aircraft rests with the pilot. *Held, Reversed*: Considering all of the circumstances, the plaintiff's injury was not attributable to any negligence of the controller or to any breach

[5] In Hartz v. United States, 249 F. Supp. 119 (N.D. Ga. 1965), which had a similar fact situation, the court held that all that is required of the air traffic controller is that he follow the procedure as set out in his manual. This case is presently on appeal.

[1] The practice of permitting a departing aircraft to take a position on a runway not yet vacated by an incoming aircraft is common at major airfields during periods of peak operations.

[2] United States v. Schultetus, 277 F.2d 322, 327 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1960). Sections 400.1, 419.1, 419.3 and 422.5 of the Air Traffic Control Procedures Manual were specifically involved in this case. Tilley v. United States, 375 F.2d 678, 680-81 nn. 2 & 3, 683 (4th Cir. 1967).

of duty owed by the Government to the plaintiff. *Tilley v. United States*, 375 F.2d 678 (4th Cir. 1967).

Based upon regulations[3] and case holdings[4] the final duty for the safe operation of an aircraft, while under VFR conditions, rests with the pilot, and he may disregard instructions from the tower if he feels that compliance with such instruction will jeopardize the safety of the aircraft or passengers. The accident was not the result of the violation of applicable regulations. First, the controller was authorized to position Delta on the runway before Sabena had cleared and likewise was authorized to instruct Delta to clear the runway to allow Air France to land. The accident that followed was simply the result of the failure of the pilot to execute the required maneuver with the requisite skill. All of the instructions were proper whether an emergency situation existed or not.[5] Second, since Delta had its radio tuned to the same frequency as Air France and the tower (the Delta pilot later testified that he was sure he could execute the maneuver safely and that the controller had made the proper decisions at the time of the accident), the controller adequately complied with the regulations requiring that he provide pilots with all necessary information. Third, any violation of the regulation requiring that an arriving aircraft will not pass over or in close proximity to departing aircraft could not have been the proximate cause of the accident since Air France did not pass over Delta until after the accident had occurred, and the fact that Air France was able to safely circle the airport tends to indicate the safety of the entire operation. In conclusion, the air traffic controller is responsible only for supplying information to pilots and not for the physical control, guidance, and operation of the aircraft. This must be the rule since "the air traffic controller has a duty to all aircraft in, near and over the airport and cannot devote his undivided attention to a single aircraft."[6]

R.H.E.

Carrier — Federal Aviation Act — Certification Procedures

Petitioners, Tampa, Florida and San Antonio, Texas, requested review of certain preliminary orders issued by the Civil Aeronautics Board pursuant to its Transpacific Route Investigation proceedings. The investiga-

[3] 60.2 Civil Air Regulations: "The pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to operation of the aircraft. In emergency situations which require immediate decision and action the pilot may deviate from the rules prescribed in this part to the extent required by consideration of safety." 375 F.2d 678, 681 n. 4 (4th Cir. 1967).

[4] United States v. Miller, 303 F.2d 703, 710 (9th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), United States v. Schultetus, 277 F.2d 322, 326-327, Hartz v. United States, 249 F. Supp. 119, 125 (N.D. Ga. 1965), Wenninger v. United States, 234 F. Supp. 499, 517 (D. Del. 1964).

[5] The Delta pilot testified that he was led to believe that an emergency existed from the tone of the controller's voice in issuing the instruction to vacate the runway.

[6] Tilley v. United States, 375 F.2d 678, 684 (4th Cir. 1967).

tion concerned air carrier certification of route extensions[1] from the United States mainland to Hawaii and other areas. One of its principle objectives was examination of "the pattern of operations by United States carriers in foreign and overseas air transportation in the Pacific." Petitioners were among a total of seventy-two mainland cities making application for non-stop service to the the Pacific but were excluded from initial consideration when the number of applicants was reduced to twenty-five as a result of a consolidation order issued by the Board. Petitions for reconsideration and intervention were denied and it was from these preliminary orders that appeal was made. *Held, Affirmed:* "we find no basis for holding that the Board abused its discretion in this regard or otherwise arbitrarily discriminated against petitioners." *City of San Antonio v. C.A.B.*, 374 F.2d 326 (D.C. Cir. 1967).

In eliminating the applications of petitioners and forty-five other cities from initial consideration, "the Board used three criteria: size, traffic generating capacity, and geographical location."[2] The remaining twenty-five cities were joined in the hearings by way of a consolidation order. It was maintained by petitioners that the criteria used by the Board were either illegal *per se* or arbitrarily applied to them, and that the findings on which the consolidation order was based were inadequate in that they did not comply with legislatively established guidelines. More specifically, petitioners urged that such procedures do not comply with the requirements of the Administrative Procedure Act.[3] Taking exception to this point, the court noted that Congress intended to allow the Board free exercise of its discretion to work out application procedures.[4] It has been judicially recognized that consolidation, scope of inquiry, and similar questions are of a housekeeping nature within the discretion of the agency and, due process considerations aside, are no concern for the courts.[5] Concerning intervention, petitioner's argument seemed to be predicated upon the belief that all persons interested in a proceeding have a right to participate as fully accredited parties. Pointing out that the Act merely provides that "any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate"[6] and recognizing that the Board may permit intervention, the court emphasized that rules have been promulgated intended to accommodate all third-party interests in this respect.[7] The court was of the opinion that petitioner's interests would be adequately protected by Rule 14(b),[8] which

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

[2] City of San Antonio v. C.A.B., 374 F.2d 326, 328 (D.C. Cir. 1967).

[3] These guidelines are outlined in 5 U.S.C.A. § 557(c) (Supp. 1966), formerly Section 8(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. § 1007 (1964).

[4] City of San Antonio v. C.A.B., 374 F.2d 326, 329 (D.C. Cir. 1967). *See* 49 U.S.C. § 1481 (1964).

[5] F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

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

[7] CAB Rule 15(b), 14 C.F.R. § 302.15(b) (1967), provides that the Board may allow intervention as a matter of discretion and sets out certain guide lines.

[8] CAB Rule 14(b), 14 C.F.R. § 302.14(b) (1967).

permits interested parties to appear at hearings, present relevant evidence, cross-examine witnesses and offer written statemnets on the issues involved. This decision is useful in that it provides a clear statement of the rights of similarly situated applicants before the Civil Aeronautics Board.

M. E. D., Jr.

Taxation — Assessment and Valuation — Short Term, No Renewal Leases (or Leasehold Interests in Airport)

Seven airlines[1] held leasehold interests in part of the St. Louis Municipal Airport. The assessed valuation was computed using a formula based on an "assumed" remaining lease term of eight years although each lease was to expire in less than three years with no right of renewal. This formula, which involved an eight-year "multiplier,"[2] enabled the Assessor to compute a valuation on each lease's fair rental value[3] that exceeded the contract rental[4] remaining to be paid. Had the Assessor based his calculations on the remaining term of each lease (using a "multiplier" of less than three years), the contract rental would have *exceeded* the fair rental value and resulted in a zero valuation for assessment purposes. The airlines jointly appealed this assessment to the State Tax Commission of Missouri,[5] who decided that the lease had *no value* as of the date of assessment because the contract rental exceeded the fair rental value. The Assessor petitioned for review of the Commission's decision. The trial court upheld the Assessor's valuation and set aside the Commission's findings. The appeals were consolidated. *Held, reversed:* The State Tax Commission's findings were affirmed because of evidence that: (1) the Airlines' leases were short-term; (2) the leases were not readily marketable; (3) the contract rental exceeded the fair rental value; and (4) the leases therefore had a zero valuation for assessment purposes. *St. Louis County v. State Tax Commission,* 406 S.W.2d 644 (Mo. 1966).

In reaching this decision, the Supreme Court of Missouri relied on *Land Clearance for Redevelopment Corp. v. Doernhoefer,* 389 S.W.2d 780, which noted, at 788, that most courts view the fair market value of a

[1] Ozark Airlines, Inc., Trans World Airlines, Inc., American Airlines, Inc., Central Air Lines, Inc., Braniff Airways, Inc., Eastern Air Lines, Inc., and Delta Air Lines, Inc.

[2] In computing assessed valuation, the Assessor used a "multiplier" of ninety-six, viz. the number of months in eight years, which he then multiplied times the average monthly rental paid by a lessee; the Assessor then reduced this amount by one-third to arrive at the assessed value. St. Louis County v. State Tax Comm'n, 406 S.W.2d 644, 648 (Mo. 1966).

[3] "Fair rental value" or "economic rental" is the fair market value of the "use and occupancy" of the leased premises at the time of appraisal. St. Louis County v. State Tax Comm'n, 406 S.W.2d 644, 650 (Mo. 1966).

[4] "Contract rental" or "contractual rental" is the amount of rent for the unexpired term of the lease.

[5] They made the joint appeal after individual appeals to the St. Louis County Board of Equalization which denied each and every appeal. St. Louis County v. State Tax Comm'n, 406 S.W.2d 644 (Mo. 1966).

leasehold interest as the difference between the fair rental value of the premises for the unexpired term and the contract rental.[6] This fair market value, sometimes called "bonus value," "leasehold savings," "rental savings," or profit does not exist if the contract rental exceeds the fair rental value. Though many factors[7] are important in determining the fair market value of a leasehold interest, the crucial one in this case was the length of the unexpired term which affected (1) the marketability of the lease (*i.e.*, the longer the unexpired term the greater the marketability); and (2) the determination of the "multiplier"[8] (the number of years or months that is multiplied times the average monthly rental to provide a fair market value of the lease for valuation purposes). Because the unexpired term of the lease was less than three years and was not renewable, the court agreed with the State Commission that (1) the lease was not marketable; and (2) that the use of the eight-year "multiplier" by the Assessor was erroneous, for when the short-term "multiplier" was used the contract rental exceeded the fair rental value and thus there was no fair market value of the leasehold interest. Although the "*short-term, no-renewal*" situation will not often be encountered, the case is significant nonetheless in emphasizing that in such a situation *the actual unexpired term, not the "assumed" term of the lease,* is the figure to be considered both in estimating marketability and in computing the "multiplier" used to figure fair rental value, then fair market value of the lease, and finally, assessed valuation.

R.N.V.

Air Charter — Agency — Carrier Liability

In 1964 Capitol Airways entered into a limited agency agreement with Nelson Travel Service (Friedman) to solicit and develop traffic for the New York State Teachers Study Group (NYSTSG) charter to Europe. Just prior to takeoff in July 1965, Capitol, having failed to receive the balance of the price from Friedman, called a special meeting with the charterer and its members, at which it was agreed to exact an additional sum from each passenger to cover the full overseas tariff price, since Friedman had embezzled the money and disappeared. *Held:* The CAB found

[6] United States v. Petty Motor Co., 327 U.S. 372 (1945); Edmund Realty Co. v. Walmer Bldg. Co., 123 F.2d 54 (8th Cir. 1941); Philadelphia, W. & P. R. Co. v. Appeal Tax Court, 50 Md. 397, 245 A.2d 926 (1956); Metropolitan Bldg. Co. v. King County, 62 Wash. 409, 113 P. 114 (1911); Annot., 3 A.L.R.2d 286.

[7] [T]he value of the leasehold should be determined from the testimony of qualified expert witnesses as that value which a buyer under no compulsion to purchase the tenancy would pay to a seller under no compulsion to sell, taking into consideration the *period of the lease yet to run, including the* unexercised right of renewal, the favorable and unfavorable factors of the leasehold estate, the location, type, and construction of the building, the business of the tenant, comparable properties in similar neighborhoods, present market conditions, and future market trends, and all other material factors that would enter into the determination of the market value of the property. Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780, 784 (Mo. 1965).

[8] *Supra,* note 2.

Friedman to be Capitol's collecting agent, notwithstanding the fact that he was president of the study group and contrary clauses appeared in the agency contract. Capitol acquiesed in Friedman's acceptance of checks from the charterer payable to himself and tolerated repeated defaults by Friedman in transmitting payments as prescribed in the contract. Therefore, Capitol violated section 403(b) of the Federal Aviation Act of 1958, collecting a greater compensation for fares than specified in its tariffs. *Capitol Airways, Inc.*, Enforcement Proceeding, CAB Docket No. 16370, CAB Order No. E-24999, 19 Dec. 1966.

The law of agency requires that when a principal acquieses in his agent's unauthorized conduct, the principal will be bound thereby.[1] The CAB examiner found unchallenged evidence that (1) it was common practice in the industry for carriers to accept charter payments in the form of checks drawn on the agent's account (2) Capitol received checks drawn by Nelson, deposited them to its own account, and credited them as partial payment on the July charter and (3) Capitol never suggested to the study group that its remittances must be payable to Capitol's own order and never communicated directly with the study group but (4) granted an extension of time based on the judgment that Friedman would pay the charter price. The CAB examiner concluded from this evidence that Capitol was Friedman's principal; that when the teachers sent their respective checks to Friedman for the trip, Capitol was constructively receiving the money.

The examiner also used language to the effect that Capitol put Friedman in a position to enable him to commit a fraud upon the study group, therefore, Capitol should be subject to liability to such third persons for the fraud.[2] As a result, Friedman's embezzlement was from Capitol and not from the study group. So subsequent collections by Capitol were in excess of its stated tariff and violative of section 403(b).[3] Once the examiner concluded that the relationship of principal and agent existed between Capitol and Friedman, the result reached by the Board was inescapable. The Board declined discretionary review of the examiner's finding.

F.J.C.

Landlord and Tenant — Indemnity Agreement — Attorney's Fees and Litigation Expenses

North Central Airlines leased airport facilities from the city of Aberdeen. In the lease, the airline agreed to indemnify the city for losses incurred from its use and occupancy of the premises, except where the loss was

[1] Bronson's Executor v. Chappell, 79 U.S. 681 (1870); Ramsey v. Miller, 202 N.Y. 72, 95 N.E. 35 (1911).
[2] Reusche v. California Pacific Title Ins. Co., 231 Cal. App. 2d 731, 42 Cal. Rptr. 262 (1965).
[3] Federal Aviation Act of 1958, § 403(b), 49 U.S.C. § 1373 (1964).

caused by negligence of the city.[1] An action was brought against the airline by a passenger who tripped on a rubber mat in North Central's terminal area. North Central impleaded the city,[2] claiming that if there was any fault it was by the city which had the duty to keep the area in repair. The city answered with a general denial and counterclaimed against the airline seeking attorney's fees, costs, and expenses under the indemnity agreement. The jury found the airline free of negligence. The district court found that there was no negligence by the city and that the injury was due solely to the passenger's negligence and awarded the city the litigation expenses and attorney's fees sought under the counterclaim. North Central appealed. *Held, affirmed:* The airline must pay by virtue of the indemnity agreement. The findings by the district judge were not clearly erroneous and therefore must stand. *North Central Airlines v. City of Aberdeen,* 370 F.2d 129 (8th Cir. 1966).

The principal question presented to the appellate court was whether the district court's findings were acceptable under Fed. R. Civ. P. 52(a).[3] In finding them acceptable, the court first disposed of the airline's contention that the city was negligent as a matter of law. Then looking to the record, the court concluded that the decision below was not clearly erroneous in findings of fact. Thus, under the standard of Rule 52(a) the decision was affirmed. The airline also argued in its appeal that because the city had insurance coverage, the obligation to indemnify no longer existed. The court rejected the argument, stating that the insurance could not exonerate the airline's duty to indemnify.[4] In essence, the appellate court related the lease provisions to the facts and conclusions of the lower court which were found acceptable. The airline assumed a liability in its lease and was correctly held to that agreement.

N.D.K.

Construction Contracts — Delay — Damages

The plaintiff, Luria Brothers, contracted to build an airplane hangar for the United States Bureau of Yards and Docks. One month after the plaintiff began work, using the plans supplied by the defendant, the defendant, doubting the sufficiency of the contract depth of the foundations, had its own architect-engineer inspect the site. The architect advised that the foundations provided for in the contract were inadequate, and the de-

[1] Article X of the lease provided: "The Lessee agrees to indemnify and hold the Lessor harmless from and against all liabilities, judgments, cost, damages and expense which may accrue against . . . Lessor . . . arising from the Lessee's use and occupancy . . . under any circumstances except when caused by the Lessor's sole negligence or by the joint negligence of Lessor and any person other than the Lessee."

[2] FED. R. CIV. P. 14(a).

[3] FED. R. CIV. P. 52(a) deals with findings by a district court, stating that findings of fact shall not be set aside unless clearly erroneous.

[4] The court relied on Safway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc., 343 F.2d 129 (10th Cir. 1965) and Lesmark, Inc. v. Pryce, 334 F.2d 942 (D.C. Cir. 1964).

fendant ordered the plaintiff to stop all work on them so that further tests could be made. More than one year later, the government sent the plaintiff a revised foundation drawing, directing that the foundation be deepened, but only one foot at a time, subject to the defendant's inspection of each foot. The trial commissioner allowed the plaintiff's claim for delay costs for idle equipment, field supervision, winter protection, rehandling materials, maintaining excavations, wage and material price increases, and additional insurance premiums. The plaintiff appealed a refusal to allow damages for excess home office overhead and loss of productivity.

Held: The changes the defendant made in the plans were so great that they did not fall within the scope of the original contract, and therefore constituted a breach of the implied promise that neither party would do anything to hinder or delay the other party in performance of the contract. Since the delay was due to the defendant's own defective plans, defendant is liable for all damages that resulted, including home office overhead and loss of productivity of his labor force. *Luria Brothers & Company v. United States*, 369 F.2d 701 (Ct. Cl. 1966).

The Court of Claims awarded home office overhead expenses because they arose out of job operating expense in the field. Such recovery was limited, however, to expenses for those days of the total overrun period which were caused by the *defendant's* delay.[1] The award for loss of productivity was based on the fact that the delay forced the plaintiff to work during the more difficult winter months and in adverse water conditions. Also, the defendant's demand for inspections at one-foot intervals necessitated constant revisions which resulted in confusion and interruptions. An injured party is entitled to recover all reasonably foreseeable damages, both direct and indirect, resulting from defendant's breach.[2]

N.A.E.

[1] The court found the defendant was responsible for only 420 days of the 518 day delay.
[2] WILLISTON, LAW OF CONTRACTS § 1344 (Rev. ed. 1938).