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John F. Foster

Joan T. Winn

Milton E. Douglass Jr.

John H. Germeraad

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CURRENT LEGISLATION AND DECISIONS

COMMENTS

Review of Adjustment Board Awards Under the Railway Labor Act

I. INTRODUCTION

IN 1934 Congress amended the Railway Labor Act creating a National Railroad Adjustment Board.¹ The purpose was to provide a forum to resolve minor² disputes arising in the railroad industry.³ Awards specified by the NRAB were to be final, binding, and enforceable in the federal district courts.⁴ Two years later, the coverage of the RLA was extended to the airline industry⁵ but with significant exceptions. The provisions of Section 3 of the Act were not extended to air carriers⁶ nor was a National Air Transport Adjustment Board immediately established.⁷ Instead, Congress required each carrier and union in the airline industry to organize either a system, group, or regional board of adjustment.⁸ These exceptions raised serious questions concerning the enforceability of local or system board awards.⁹

In light of the above, this paper has been designed to furnish a clearer understanding of two important considerations. First, to convey the pres-

¹ Railway Labor Act § 3 First (hereinafter RLA), 48 Stat. 1189 (1934), as amended, 45 U.S.C. § 153 First (1964).

² The terms "minor" as contrasted with "major" are used to classify types of disputes. *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723 (1945) defined major disputes as those concerned with "the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." A minor dispute, however,

contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

³ Note, *Federal Enforcement of Airline System Board Awards Under the Railway Labor Act: The Spector of Chicago River*, 72 YALE L.J. 803, 808 (1963) (Hereinafter cited as *Federal Enforcement*).

⁴ RLA § 3 First (m) & (p), 44 Stat. 578, as amended, 48 Stat. 1189, 80 Stat. 208, 45 U.S.C. § 153 (m) & (p) (1964).

⁵ RLA § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964).

⁶ *Id.*

⁷ RLA § 205, 49 Stat. 1190, 45 U.S.C. § 185 (1964).

⁸ RLA § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

⁹ *International Ass'n of Machinists v. Central Air Lines, Inc.*, 372 U.S. 682 (1963), *rev'd* 295 F.2d 209 (5th Cir. 1961).

ent status of an airline system board award. Second, to explore the enforceability of both system and NRAB awards. Or, stated another way, what areas of judicial review are available for board awards? In hopes of providing some insight to the decisions discussed, a brief review of the history preceding passage of the Railway Labor Act together with a summary of the steps generally included in a grievance procedure is presented.

II. BACKGROUND

A. Historical Review

Reflecting the strategic importance of the railroad industry in the national economy and its peculiar problems, Congress in 1926 enacted the Railway Labor Act¹⁰ in an attempt to avoid interruptions to interstate commerce resulting from unsettled labor disputes. Although the Act as passed in 1926 included proposals from representatives of both labor and management, the road leading to passage of the RLA was far from a smooth one.¹¹

As early as 1888 there were laws passed as a result of labor relations problems in the nation's railroads.¹² In 1898 an attempt was made to regulate railroad management-labor relations with the passage of the Erdman Act¹³—stressing mediation and voluntary arbitration when mediation failed. However, probably one of the most significant developments prior to 1920 was non-statutory. In 1917 the carriers and unions agreed to a means of settling disputes by submitting them to a "Commission of Eight" composed of representatives from each side. The success of the Commission encouraged the creation of railway adjustment boards soon thereafter. One of the prime contributions from the Commission of Eight and the railway boards was the idea of an adjustment agency with representatives from each side who, by understanding the subject matter, could better resolve difficulties by applying the appropriate rules.¹⁴ In 1920 came the Transportation Act, but the dissatisfaction of both unions and management with this Act led to the Railway Labor Act of 1926.¹⁵

Congress, therefore, had accumulated considerable experience in railroad labor legislation and disputes prior to the enactment of the Railway Labor Act of 1926.¹⁶ Even though the Railway Labor Act of 1926 established a Board of Mediation to provide mediation and arbitration services, submission of a controversy to arbitration was not mandatory. Instead, private boards that were bipartisan and required the consent of both parties for their existence could be established to settle grievance disputes. Certain defects which became apparent in the 1926 Act motivated the passage of several amendments in 1934.¹⁷ One of these amendments, prompted by

¹⁰ 44 Stat. 577 (1926).

¹¹ 32 NMB Ann. Rep. 2 (1965-1966).

¹² Shils, *Industrial Unrest in the Nation's Airline Industry*, 15 LAB. L.J. 153 (1964); Act of 1888.

¹³ 30 Stat. 424 (1898).

¹⁴ Kroner, *Minor Disputes Under the Railway Labor Act: A Critical Appraisal*, 37 N.Y.U.L. REV. 41, 42 (1962).

¹⁵ Shils, *supra* note 12 at 153.

¹⁶ S. MUELLER AND A. MEYERS, *LABOR LAW AND LEGISLATION* 593 (3d ed. 1962).

¹⁷ A. COX AND D. BOK, *LABOR LAW* 116 (6th ed. 1965).

the failure of the voluntary arbitration system, led to the creation of the National Railroad Adjustment Board.¹⁸ The NRAB consists of eighteen representatives selected by the carriers and the same number chosen by the employees. The Board is divided into four separate divisions, each having jurisdiction over disputes involving different occupations. If the initial private grievance procedure fails to settle a dispute, the Board's jurisdiction can be invoked by either party. The Board is required to give notice to any employees or carriers involved in a dispute being heard by them. In the event of a tie vote among the Board members, a neutral referee will be selected, either by the Board or, if they cannot agree, one will be assigned by the National Mediation Board. Awards of the Board are enforceable in the federal district courts.¹⁹

As a result of the 1934 amendments, the Railway Labor Act assumed the framework existing, with only slight changes, today.²⁰ Nevertheless, even though the basic form of the Act has not been substantially altered, its scope was dramatically broadened in 1936 when air carriers were included under its coverage by the addition of Title II.²¹

The procedures of Title I of the Act, except Section 3 pertaining to NRAB procedure, were extended to airlines engaged in interstate commerce or transporting mail for or under contract with the United States Government.²² Hence, provisions for the handling of disputes arising out of grievances or out of the interpretation or application of an existing collective bargaining agreement were made somewhat different for the airline industry.²³ Instead of creating a National Air Transport Adjustment Board at the time airlines came under the scope of the RLA, Congress left this authority to the discretion of the NMB.²⁴ Although this authority has never been exercised, Congress did require carriers and their employees to establish a board of adjustment with jurisdiction limited to one carrier, a group, or a region.²⁵ Thus far, airlines and their employees have relied on system boards to resolve grievance disputes and neither side has made an attempt to have the NMB create a national board for the industry.²⁶

B. Grievance Procedure

The RLA requires that grievances over interpretations of contracts covering existing pay rates, rules, and working conditions for both railroads and airlines be processed in the "usual manner" up through the highest company officer appointed to hear such disputes and, if necessary, on to an adjustment board.²⁷ In order to have some idea of the steps usually taken prior to a grievance reaching the adjustment board level, a typical ap-

¹⁸ 48 Stat. 1189 (1934), as amended, 45 U.S.C. § 153 (1964).

¹⁹ *Id.*; see also Kroner, *supra* note 14 at 45.

²⁰ COX AND BOK, *supra* note 17 at 117.

²¹ 49 Stat. 1189 (1936), as amended, 45 U.S.C. § 181 (1964).

²² *Id.*

²³ RLA §§ 204, 205, 49 Stat. 1189-90, 45 U.S.C. §§ 184-185 (1964).

²⁴ RLA § 205, 49 Stat. 1190, 45 U.S.C. § 185 (1964).

²⁵ RLA § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964); See also, J. BAITSELL, AIRLINE INDUSTRIAL RELATIONS: PILOTS AND FLIGHT ENGINEERS 287 (1966).

²⁶ BAITSELL, *supra* note 25 at 287.

²⁷ RLA § 3, 44 Stat. 578, as amended, 48 Stat. 1189, 80 Stat. 208, 45 U.S.C. § 153 (1964); RLA § 205, 49 Stat. 1190, 45 U.S.C. § 185 (1964).

proach used by the airlines is discussed.

Generally, the grievance procedures used by the air carriers involve four steps. First, is the initial hearing, followed by an appeal, a four man board, and finally the board with the addition of a neutral referee. It is not uncommon though, that prior to filing a grievance an employee will have an informal discussion with his supervisor.²⁸ Procedures to be followed are normally found in the collective bargaining agreements. Either the employees or the carrier can institute the required steps.²⁹ Generally, the employee initiates the process by stating his grievance in writing together with a request for a hearing before the appropriate company official. The official in turn acknowledges in writing receipt of the grievance and sets a time for a hearing which typically is of an informal nature.³⁰

The authority invested in hearing officials for the settling of grievances is not consistent from one airline to another.³¹ Usually, a written decision by the hearing officer must be rendered within a specified period of time. If the employee is dissatisfied with the decision he has a right to appeal to a more senior company official. If the employee is still not satisfied with this second decision, he then has a right to appeal to his system board of adjustment.³² Strict adherence to the rules as set out in the company-union contract is a requisite for either side to invoke the powers of the board.³³ Either with or without a neutral arbitrator, a board may review the entire record in a case, and in addition, may request any additional witnesses and evidence it deems necessary. The parties involved may be allowed additional witnesses or evidence at the discretion of the board. A majority of the system board is competent to make a decision.³⁴

III. JUDICIAL REVIEW

A. A Jurisdictional Question

It is significant to note that when Congress amended the Railway Labor Act in 1936 to extend its coverage to the airline industry, Section 3, which provides that board awards are final, binding, and enforceable in the federal courts, was not included.³⁵ Consequently, an important question had to be answered. Did Section 204³⁶ of the Act make system board awards final and binding? On its face, Section 204 does not indicate whether an award from an airline system board may be enforced by instituting legal action in a federal district court.³⁷ However, the decision of the Supreme Court in 1963 in *Int'l. Assn. of Machinists v. Central Airlines*,

²⁸ BAITSELL, *supra* note 25 at 286.

²⁹ Tsamoutales, *Grievance Settlement in the Aviation Industry*, 19 U. MIAMI L. REV. 50, 56 (1964-1965).

³⁰ BAITSELL, *supra* note 25 at 288.

³¹ *Id.* at 289.

³² Tsamoutales, *supra* note 29 at 57.

³³ *Id.* at 59; The author comments on several conflicting Board decisions determining whether they could assert jurisdiction.

³⁴ RLA § 3, 44 Stat. 578, as amended, 48 Stat. 1189, 80 Stat. 208, 45 U.S.C. § 153 (1964); RLA § 205, 49 Stat. 1190, 45 U.S.C. § 185 (1964); Tsamoutales, *supra* note 29 at 59.

³⁵ RLA § 3(m) & (p), 44 Stat. 578, 45 U.S.C. § 153(m) & (p) (1964); RLA § 201, 49 Stat. 1189, 45 U.S.C. § 181 (1964).

³⁶ RLA § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

³⁷ *Id.*

Inc.,³⁸ one of the most significant cases decided in the field of labor arbitration since *Lincoln Mills*,³⁹ appears to have rendered moot the question concerning authority for federal jurisdiction in enforcement proceedings of system board awards.

Int'l. Assn. of Machinists v. Central Airlines, Inc.,⁴⁰ involved the discharge of six employees for their refusal to attend disciplinary hearings unless a union representative was present. Grievances initiated by the union and employees over the discharges eventually reached the system board of adjustment. After the four man system board deadlocked and a neutral referee was appointed, an award for reinstatement without loss of seniority and with back pay was rendered for the employees. The airline refused to comply with the award, and suit to enforce the award was instituted by the employees in a United States district court. The district court dismissed the complaint for lack of jurisdiction, holding there was no diversity of citizenship and the case did not arise under the laws of the United States as required by 28 U.S.C. Section 1331.⁴¹ The Fifth Circuit Court of Appeals affirmed⁴² on the ground that the fact that federal law required the establishment of the system board was not by itself sufficient to confer federal question jurisdiction on a federal court in a suit to enforce awards of the board. The court also stated that "this suit is nothing more than a state-created action to construe a contract."⁴³ In affirming, the court considered their decision in *Metcalf v. National Airlines, Inc.*⁴⁴ controlling. In *Metcalf*, as in *Central*, an aggrieved employee brought suit in a federal district court to enforce an award of a system board established under the RLA. The court held that an airline employee could not sue under 45 U.S.C. Section 153 (p)

since Congressional design was to grant to those winning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a National Air Transport Adjustment Board whose award is ignored or not complied with by the carrier and then only does §153(p) become operative in the air industry.⁴⁵

³⁸ *International Ass'n of Machinists v. Central Air Lines, Inc.*, 372 U.S. 682 (1963).

³⁹ *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), concerned a collective bargaining agreement between union and company where it was stipulated that the last step in the grievance procedure would be arbitration. The Supreme Court held that § 301(a) of the Labor Management Relations Act not only provides jurisdiction for the federal district courts, but also, that the "substantive law to be applied in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."

⁴⁰ 372 U.S. at 682.

⁴¹ 28 U.S.C. § 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

⁴² 295 F.2d 209 (5th Cir. 1961), *rev'd*, 372 U.S. 682 (1963).

⁴³ 372 U.S. at 682-84.

⁴⁴ 271 F.2d 817 (5th Cir. 1959); Note the important distinction between *Metcalf* and *Central*. *Metcalf* was brought under Section 3 of the RLA which does not apply, at p. 818. Whereas, *Central* was based on federal question jurisdiction, see note 46 *infra*.

⁴⁵ 271 F.2d at 817-18.

Certiorari was granted by the Supreme Court in *Cental* to consider the important question of "whether a suit to enforce an award of an airline system board of adjustment is a suit arising under the laws of the United States under 28 U.S.C. § 1331 or a suit arising under a law regulating commerce under 28 U.S.C. § 1337."⁴⁶ The Supreme Court held that such a suit did arise under the laws of the United States, and therefore the district court had jurisdiction under 28 U.S.C. Section 1331 if the jurisdictional amount was satisfied, and, in any case, under Section 1337.⁴⁷

The Supreme Court said that the aim of Congress in 1936 in extending the Railway Labor Act to the air transportation industry was to provide air carriers and their employees the "same benefits and obligations" applicable to the railroad industry. In lieu of immediate establishment of a national board, Section 204 of the Railway Labor Act made mandatory the existence of system, group, or regional boards of adjustment by providing that⁴⁸

[i]t shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I of this Act.⁴⁹

The Court went on to say that this duty "was more than a casual suggestion to the air industry The obligation which § 204 fastened upon the carriers and their employees cannot be read in isolation."⁵⁰

Furthermore, Section 204 must be interpreted in light of the history surrounding the RLA. This includes the many attempts by Congress to devise effective procedures in order to minimize interruption in the transportation industries by strikes and labor disputes.⁵¹ The Supreme Court cited *Elgin, J. & E. Ry. v. Burley*⁵² for comments on the weaknesses of the RLA prior to the 1934 amendments. Accordingly, since adjustment boards were not necessarily formed following the 1926 Act, nor was there a means for breaking deadlocks of a board, the Act was amended in 1934.⁵³ Besides creating the National Railroad Adjustment Board⁵⁴ and providing for a neutral referee in case of deadlocks,⁵⁵ provision was also made that "the awards of the several divisions of the Adjustment Board shall be stated in writing . . . and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award

⁴⁶ 372 U.S. at 684; 28 U.S.C. § 1331; 28 U.S.C. § 1337: "The District Courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

⁴⁷ 372 U.S. at 696.

⁴⁸ *Id.* at 685-86.

⁴⁹ RLA § 204, 49 Stat. 1189, 45 U.S.C. § 184 (1964).

⁵⁰ 372 U.S. at 686.

⁵¹ *Id.* at 687.

⁵² 325 U.S. 711; The Court there said, "The contention that an award of the National Railroad Adjustment Board under the Railway Labor Act amounts to nothing more than an advisory opinion is inconsistent with the terms, purposes and legislative history of the Act and with decisions of this Court construing it."

⁵³ 48 Stat. 1189 (1934).

⁵⁴ RLA § 3, 44 Stat. 578, as amended, 48 Stat. 1189, 80 Stat. 208, 45 U.S.C. § 153 (1964).

⁵⁵ RLA § 3 First (e), 44 Stat. 578, 45 U.S.C. § 153 First (e) (1964).

...⁵⁶ In addition, provision was made for the enforcement of certain awards in the United States district courts.⁵⁷ With the above thoughts in mind the Supreme Court went on to say:

In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady Congressional intent to move toward a reliable and effective system for the settlement of grievances, we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards. Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the Boards to be organized and operated consistent with the purposes of the Act.⁵⁸

At this point the Supreme Court referred to other duties imposed on the carriers and employees by the RLA that were deemed under the jurisdiction of federal courts. The duty to bargain was discussed in *Virginia Ry. v. System Federation*,⁵⁹ and the duty to represent all members of a union without discrimination was discussed in *Steele v. Louisville & N. R.*⁶⁰ As a result, a similar view was taken by the Supreme Court of the duty to establish adjustment boards under Section 204, explaining that:⁶¹

It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of §204 and are consistent with the Act and its purposes. It is federal law which would determine whether a §204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under §204, their validity, interpretation, and enforceability cannot be left to the laws of the many states, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity . . .⁶² A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of federal law upon it . . .⁶³

The Court related the Section 204 contract to a Section 301 contract under the Labor Management Relations Act by saying that it "is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."⁶⁴ Again citing *Elgin, J. & E. R. v. Burley*,⁶⁵ the Court said: "Congress has long since abandoned the approach of the completely unenforceable award which was used in the 1920 Act."⁶⁶

The effect of the decision in *Central* has already been experienced in

⁵⁶ *Id.* at § First (m). The language "except insofar as they shall contain a money award" was deleted by the 1966 amendments discussed *infra*.

⁵⁷ RLA § 3 First (p), 44 Stat. 578, 45 U.S.C. § 153 First (p) (1964); 372 U.S. at 688.

⁵⁸ 372 U.S. at 689-90.

⁵⁹ 300 U.S. 515 (1937).

⁶⁰ 323 U.S. 192 (1944).

⁶¹ 372 U.S. at 690.

⁶² *Id.* at 691.

⁶³ *Id.* at 692; see similar reasoning in *Lincoln Mills*, *supra* note 39.

⁶⁴ 372 U.S. at 692.

⁶⁵ 325 U.S. 711 and note 52, *infra*.

⁶⁶ 372 U.S. at 694.

several subsequent cases. For example, the Fifth Circuit Court of Appeals thought the reasoning in *Central* was relevant to a specific contract for joint ownership and management of a railroad terminal approved by the Interstate Commerce Commission and authorized by federal statute.⁶⁷ A case arising under the Labor Management Relations Act that has prompted considerable legal discussion, *Republic Steel Corp. v. Maddox*,⁶⁸ also refers to the language in *Central*. The Supreme Court in *Maddox* commented on the effect of federal law by saying that it recently made it clear "that substantive federal law applies to suits on collective bargaining agreements covered by Section 204 of the Railway Labor Act . . . and by Section 301(a) of the LMRA . . ."⁶⁹ *Maddox* involved an employee who sued his employer for severance pay under a collective bargaining agreement between his union and employer. The state courts decided that state law did not require the employee to exhaust contract grievance procedures before bringing suit. Nevertheless, the United States Supreme Court held that in light of the federal policy reflected in the LMRA, "contract grievance procedures, which apply to severance as well as other types of claims, must, unless specified as nonexclusive be exhausted before direct legal redress is sought."⁷⁰ The result in *Central* should answer most questions regarding federal court jurisdiction for enforcement of system board awards. Yet, it was not made clear if the courts could also interpret company-union contracts.

B. Review Of The Award

Whether the company had to comply with the award, or whether it was impeachable, were "questions controlled by federal law and [were] to be answered with due regard for the statutory scheme and purpose."⁷¹ Several significant court decisions, along with key amendments, provide assistance in responding to such questions.

Prior to *Central* or *Lincoln Mills* there were Supreme Court decisions manifesting the exclusive position of an adjustment board under the RLA. In *Order of Ry. Conductors v. Pitney*,⁷² the Supreme Court said that the agreements between the company and union should not have been interpreted by the district court in order to settle a dispute, but instead, pursuant to the RLA, they should have allowed for the interpretation by the adjustment board.⁷³ Another case, *Slocum v. Delaware, Lackawana & W. R.R.*,⁷⁴ decided in 1950 involved a declaratory judgment action brought in

⁶⁷ *Florida East Coast Ry. Co. v. Jacksonville Terminal Co.*, 328 F.2d 720, 722 (5th Cir. 1964).

⁶⁸ 379 U.S. 650 (1965); Two articles discussing this case are, Lurie, *Introduction: Fair Representation—Current Problems and Current Questions*, 18TH N.Y.U. ANN. CONF. ON LABOR 328 (1966); Wells, *Collective Bargaining and the Interests of the Individual*, 18TH N.Y.U. ANN. CONF. ON LABOR 351 (1966).

⁶⁹ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 655 (1965).

⁷⁰ 379 U.S. 650; cases referring to *Central* include: *Northwest Airlines, Inc. v. A.L.P.A., Int'l.*, 373 F.2d 136 (8th Cir. 1967); *Flight Eng'rs Intn'l Ass'n v. Eastern Airlines, Inc.*, 359 F.2d 303 (2d Cir. 1966).

⁷¹ 372 U.S. at 695.

⁷² *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946).

⁷³ *Id.*

⁷⁴ 339 U.S. 239 (1950); for a similar case decided the same day, see *Order of Ry. Conductors v. Southern Ry.*, 339 U.S. 259 (1950).

a state court by a company instead of invoking the jurisdiction of the Adjustment Board. The state court interpreted the agreements prior to granting the declaratory judgment.⁷⁵ The Supreme Court, relying on the theory expressed in *Pitney* that uniformity of approach to rail agreements was a primary concern of the framers of the statute, stated in *Slocum* that this purpose supports "a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the adjustment board by the Railway Labor Act."⁷⁶ Therefore, the Board's jurisdiction "to adjust grievances and disputes of the type here involved is exclusive."⁷⁷

In 1957 the Supreme Court held in *Brotherhood of R. R. Trainmen v. Chicago River & Indiana R.R.*⁷⁸ that since Congress had provided an exclusive administrative remedy for the settlement of minor disputes under the RLA, a union could be enjoined from striking over a pending dispute that had been submitted by a carrier to the NRAB. In another injunction suit to bar a strike with the dispute being submitted to the NRAB, *Brotherhood of Locomotive Eng'rs. v. Missouri-Kansas-Texas R. R.*,⁷⁹ the Supreme Court upheld the granting of an injunction and also held that the district judge could attach conditions in the exercise of his equitable discretion.⁸⁰

The Supreme Court in *Chicago River* did not pass on the question of whether an injunction would be granted to stop a strike that was called for the purpose of enforcing a board award in favor of the union.⁸¹ However, this question was answered in *Brotherhood of Locomotive Eng'rs. v. Louisville & Nashville R. R.*,⁸² a case decided about two weeks after *Central*. The case arose over the interpretation of an order by the NRAB sustaining an employee's claim for reinstatement "with pay for time lost as the rule is construed on the property."⁸³ The difficulty was whether this order entitled the employee to full pay for lost time without deduction for outside income. The Board failed to clarify its award and the union set a strike deadline. Subsequently, the district court issued an injunction,⁸⁴ and the Court of Appeals for the Sixth Circuit affirmed.⁸⁵ In affirming the two lower courts the Supreme Court in effect extended the doctrine of *Chicago River* to such strikes on the ground that the judicial procedure provided in the RLA is the exclusive means for enforcing awards of the NRAB. Therefore, the union could not "legally strike for the purpose of enforcing its interpretation of the Board's money award; it must utilize instead the judicial enforcement procedure provided by § 3, First (p) of the

⁷⁵ 339 U.S. at 239; 83 N.Y.S.2d 513 (Sup. Ct. App. Div. 1948).

⁷⁶ 339 U.S. at 244.

⁷⁷ *Id.*

⁷⁸ 353 U.S. 30 (1957).

⁷⁹ 363 U.S. 528 (1960).

⁸⁰ *Id.*

⁸¹ Note, *Federal Enforcement of Airline System Board Awards Under the Railway Labor Act: The Specter of Chicago River*, 72 YALE L.J. 803, 811 (1963).

⁸² 373 U.S. 33 (1963).

⁸³ *Id.* at 34.

⁸⁴ 190 F. Supp. 829 (W.D. Ky. 1961).

⁸⁵ 297 F.2d 608 (6th Cir. 1961).

Act."⁸⁶ Again, referring to its reasoning in *Chicago River*, that Congress intended the grievance procedures of Section 3, First to be a compulsory substitute for economic self-help, not merely a voluntary alternative to it,⁸⁷ the Court decided that the Norris-LaGuardia Act did not bar injunctive relief against a strike under such circumstances.⁸⁸

An observation that can be drawn from the injunction cases is the Court's interpretation of the RLA that when an adjustment board makes an award, if compliance is not voluntary, then, in order to have the award enforced, the favored party must resort to judicial help. In other words, self-help for enforcement purposes is not allowed. This raises an important question as to what extent in enforcement proceedings may the courts go into the merits of an Adjustment Board award. The recent Supreme Court decision in *Gunther v. San Diego & Arizona Eastern Ry. Co.*,⁸⁹ provides an excellent starting point.

In *Gunther*, an employee was removed from active service shortly after reaching the age of seventy-one. The railroad based its decision on physical reports made by company physicians that the employee was not physically qualified to continue to do the work of an engineer. The employee, after having his own doctor conclude that he was qualified physically to continue, requested that the company allow a board of three doctors to re-examine him. After the company refused this request a claim for reinstatement and back pay was filed with the NRAB. The Board upheld the claim, including back pay, when a majority of a three man medical committee appointed by the Board found the employee physically qualified.⁹⁰ The district court refused to enforce the award on its conclusion that there were no provisions in the agreement between the company and union that limited what it considered to be the "absolute right of the railroad . . . to remove petitioner from active service whenever . . . plaintiff was physically disqualified from such service."⁹¹ The court of appeals, agreeing with the interpretation of the contract by the district court, affirmed. Thus, both lower courts in interpreting the contract disagreed with the Board's decision on the merits.⁹² The Supreme Court declared: "Certainly it cannot be said that the Board's interpretation was wholly baseless and completely without reason." Thereupon, in a unanimous decision, the Supreme Court held that the lower courts "went beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement."⁹³ Strikingly similar reasoning had been expounded earlier in *United Steelworkers of Am. v. Enterprise Wheel & Car*

⁸⁶ 373 U.S. 33 (1963); In an earlier case, *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen*, 290 F.2d 266 (10th Cir. 1961), the Supreme Court denied cert., 368 U.S. 873 (1961), after lower courts enjoined a strike called by the union to gain compliance with the Board award.

⁸⁷ 353 U.S. at 40.

⁸⁸ 373 U.S. at 42.

⁸⁹ 382 U.S. 257 (1965).

⁹⁰ *Id.* at 258-59.

⁹¹ *Id.* at 260; 198 F. Supp. 402 (S.D. Cal. 1961); 192 F. Supp. 882 (S.D. Cal. 1961). The third opinion written by the court is not reported.

⁹² 382 U.S. at 260; 336 F.2d 543 (9th Cir. 1964).

⁹³ 382 U.S. at 261.

Corp., where it was said that "The refusal of courts to review the merits of an arbitrary award is the proper approach"⁹⁴ In disagreeing with the courts below that the Board went beyond its jurisdiction in appointing the medical committee, the Supreme Court in *Gunther* said: "The Adjustment Board, of course, is not limited to common law rules of evidence in obtaining information This Court has said that the Railway Labor Act's provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."⁹⁵ The Court commented that it has emphasized many times the intent of Congress that Adjustment Board decisions in minor disputes were to be final—quoting the provision of Section 3, First (m) of the RLA that adjustment board awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."⁹⁶

In May, 1966, the Supreme Court had an opportunity to reaffirm its decision in *Gunther*. It did so by granting a writ of certiorari in the case of *Hanson v. Chesapeake & Ohio Ry. Co.*,⁹⁷ then vacating the judgment of the court of appeals⁹⁸ and remanding it to the court for reconsideration in light of its decision in *Gunther*. That case involved an award by the NRAB in favor of the employees saying that the railroad, when it transferred work from one seniority district to another without consulting the union, violated the collective bargaining agreement. The transfers resulted in an increase of new positions in one district and an abolishment of positions in another. The agreement contained a provision that established seniority districts should not be changed without mutual agreement between union and management. On remand, the court of appeals held that the NRAB was justified in its determination, and that the Board's interpretation of the contract involved was not "wholly baseless and completely without reason."⁹⁹

Up to this point, we have seen examples of the lack of authority in the courts to review a nonmonetary award by the Board. But, what about a monetary award? At the time of *Gunther* there existed an exception to

⁹⁴ 363 U.S. 593 (1960); *Enterprise* concerned the interpretation of a collective bargaining agreement by an arbitrator who had been provided for in the contract as authorized under the NLRA. The Court in *Enterprise* said: "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597. Though expressed differently, a comparison between the above quote and the "wholly baseless and completely without reason" language in *Gunther* reveals that the substantive affect could most likely be the same.

Another significant point made in the *Enterprise* decision was that it is the award that is binding and not the arbitrator's analysis of it. Thus the Court remarked it was not sufficient reason to refuse enforcement of an award merely because the accompanying opinion was slightly ambiguous. 363 U.S. at 598.

⁹⁵ 382 U.S. at 262; The Court cited its decision in *Chicago River*, 353 U.S. 30 (1959); see *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), especially at 581-82 where the Court said: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."

⁹⁶ 382 U.S. at 263; amended in 1966, discussed *infra*.

⁹⁷ 384 U.S. 211 (1966).

⁹⁸ 351 F.2d 953 (4th Cir. 1965).

⁹⁹ 367 F.2d 134 (4th Cir. 1966).

Section 3, First (m) of the RLA that Board awards were to be final and binding "except insofar as they shall contain a money award."¹⁰⁰ Recognizing this, the Supreme Court said this exception still does not allow a federal district court to review a Board's determination of the merits "merely because a part of the Board's award, growing from its determination on the merits, is a money award."¹⁰¹ However, the Court also said that the district court under the RLA had the authority to "determine the size of the money award."¹⁰² The Supreme Court in *Locomotive Eng'rs. v. Louisville & Nashville R. R.* stated that in effect Congress has "decreed a two-step grievance procedure for money awards, with the first step, the Adjustment Board order and findings, serving as the foundation for the second."¹⁰³ In addition, the Court discussed the distinction between court review of the merits of a dispute and the size of a money award. It said that the computation of a time-lost award is "an issue wholly separable from the merits of the wrongful discharge issue."¹⁰⁴

However, in 1966 Congress passed an amendment to the Railway Labor Act that directly affects what the Court called a "two-step grievance procedure."¹⁰⁵ The sections amended had been the subject of several legal articles¹⁰⁶ plus a vigorous dissent in *Locomotive Eng'rs. v. Louisville & Nashville R. R.*¹⁰⁷ Prior to the 1966 amendments, Section 3, First (m) of the RLA made awards of the NRAB final and binding to the dispute "except insofar as they shall contain a money award."¹⁰⁸ Yet, Section 3, First (p) virtually enabled the adverse party to secure a trial de novo by resisting a petitioner's suit for enforcement of the award. Before 1966, subsection (p) stated that when a carrier refuses to comply with an award, that the union could then request enforcement in a federal court, wherein, the Board's award was to serve as prima facie evidence for the union.¹⁰⁹ Consequently, even though federal jurisdiction was clearly established, this subsection also allowed a much broader scope of review than would have otherwise been available, and, therefore, would have undercut the finality provided by subsection (m) to NRAB awards.¹¹⁰

In light of the above and other reasons, Congress was prompted to make several changes to the Railway Labor Act.¹¹¹ Pertinent to our topic were the following that, in effect, further limited the scope of judicial review of awards: (1) Section 3, First (m) was amended by deleting the words "except insofar as they shall contain a money award."¹¹² (2) Section 3,

¹⁰⁰ RLA § 3 First (m), 44 Stat. 578, 45 U.S.C. § 153 First (m) (1964).

¹⁰¹ 382 U.S. at 264.

¹⁰² *Id.*

¹⁰³ 373 U.S. at 41.

¹⁰⁴ *Id.* at 40-41.

¹⁰⁵ 373 U.S. at 41.

¹⁰⁶ See Kroner, *supra* note 14, esp. at 67-71; also, *Federal Enforcement*, *supra* note 3, esp. at 809-11; and MUELLER AND MEYERS *supra* note 16 at 654-62.

¹⁰⁷ 373 U.S. at 42-48.

¹⁰⁸ RLA § 3 First (m), 44 Stat. 578, 45 U.S.C. § 153 First (m) (1964).

¹⁰⁹ *Id.* at § (p).

¹¹⁰ *Federal Enforcement*, *supra* note 3 at 810.

¹¹¹ Act of June 20, 1966 Pub. L. No. 89-456, 80 Stat. 208; for additional reasons for amendments see notes 116-121 and accompanying text.

¹¹² *Id.* at § 2(a).

First (p) was changed to read "the findings and order of the division of the Adjustment Board shall be conclusive on the parties" ¹¹³ (3) Another sentence was inserted at the end of subsection (p) which reads, "*Provided however*, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." ¹¹⁴ (4) A new paragraph, (q), was added to Section 3, First, providing any aggrieved party the right to petition a district court for review of an Adjustment Board decision, and further providing that, "On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." ¹¹⁵

A cursory review of the Public Law 89-456 reveals that it allows for the establishment of special boards in settling disputes in the railroad industry and judicial review of board orders relating to minor disputes would be available to both parties but "limited to the determination of questions traditionally involved in arbitration legislation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal." ¹¹⁶

The primary reasons for the amendment were summarized in Senate Report No. 1201, 2 June 1966. ¹¹⁷ One purpose was to eliminate the large backlog of undecided claims pending before the National Railroad Adjustment Board, inasmuch as under the then existing procedures "railroad employees who have grievances sometimes have to wait as long as 10 years or more before a decision is finally rendered on their claim." ¹¹⁸ Another reason was the fact that even though an employee had obtained an award, the carrier concerned could refuse to pay. As a result, the employee was either forced to forego the award or invoke judicial proceedings where he would be required to try his case again and face the normal delays and uncertainties associated with litigation. ¹¹⁹ In addition, the provisions of Section 3, First (m) and (p) ¹²⁰ resulted in an "incongruous situation that if an employee receives an award in his favor from the Board, the Railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor,

¹¹³ *Id.* at § 2(c); Previously, the findings and orders, instead of being conclusive were "prima facie evidence of the facts therein stated"

¹¹⁴ *Id.* at § 2(d).

¹¹⁵ *Id.* at § 2(e).

¹¹⁶ *U. S. Cong. & Admin. News*, 89th Cong., 2nd Sess. 2285 (1966).

¹¹⁷ *Id.* at 2289.

¹¹⁸ *Id.* at 2286.

¹¹⁹ *Id.*

¹²⁰ RLA § 3 First (m) & (p), 44 Stat. 578, 45 U.S.C. § 153(m) & (p) (1964). The subsection (p) provision had allowed for court enforcement of awards rendered in favor of employees.

there is no means by which judicial review might be obtained."¹²¹ This was considered unfair to employees; therefore, an equal opportunity for judicial review was provided. Additionally, because the NRAB is referred to by the courts as an arbitration tribunal, the grounds for review "should be limited to those grounds commonly provided for review of arbitration awards."¹²² Finally, it was assumed that a federal court would have the "power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power."¹²³

One of the first decisions relying on the recent 1966 amendments was in *Brotherhood of R. R. Trainmen v. Denver & Rio Grande Western R. R.*¹²⁴ The suit was for the enforcement of a NRAB money award. The court of appeals held that in light of the 1966 amendment limiting review of Board awards to matters "within scope of jurisdiction of board's division, defenses other than jurisdictional are not subject to judicial review, that board's determination of amount of award was final absent jurisdictional defect, and that measure of damages offered no jurisdictional question."¹²⁵ Another suit subsequent to the 1966 changes in the RLA was *Northwest Airlines, Inc. v. Air Line Pilots Association, Int'l.*¹²⁶ This action was brought to enforce an arbitration award reinstating two pilots. The basic issue presented on appeal was whether the trial court erred in denying the company a trial de novo. After reviewing the 1966 amendments the court of appeals held that Northwest Airlines was not entitled to a de novo review of the Board's decision, and, moreover, the award was not "arbitrary nor capricious."¹²⁷ The court cited *Gunther*¹²⁸ as to the finality of Adjustment Board awards, except for money awards that had allowed courts the opportunity to consider new evidence. The court in *Northwest Airlines, Inc.*, then went on to say that a primary aim of the 1966 amendments to the statute relating to the effect of awards of system boards is to attach finality to the money award as well as to other parts of the award.¹²⁹

The court in *Keay v. Eastern Air Lines, Inc.*,¹³⁰ held that where a system board merely determines an employee was physically disabled but did not also require that the carrier pay damages, the courts were without jurisdiction to require the carrier to make payments.¹³¹ The question of whether the statute of limitations provision contained in Section 3, First (r) was applicable to airline system boards concerned the court in *Gordon v. Eastern Air Lines, Inc.*¹³² which held that it was applicable to similar dis-

¹²¹ U.S. Cong & Admin. News, *supra* note 115 at 2287.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 370 F.2d 833 (10th Cir. 1966).

¹²⁵ *Id.* at 833; at 834 the Court cites *Gunther*, 382 U.S. 257 (1964), as to additional review authority before 1966 amendments.

¹²⁶ 373 F.2d 136 (8th Cir. 1967).

¹²⁷ *Id.* at 142.

¹²⁸ 382 U.S. at 141; also the Court quoted from *Central*, 372 U.S. at 694, "that the federal law would look with favor upon contractual provisions affording some degree of finality to system board awards."

¹²⁹ 373 F.2d at 141.

¹³⁰ 267 F. Supp. 77 (D. Mass. 1967).

¹³¹ *Id.* at 78, citing *Central*, 372 U.S. 682, and *Slocum*, 339 U.S. 239.

¹³² 268 F. Supp. 210 (W.D. Va. 1967).

putes in the airline industry. Even if it did not, the grievant in *Gordon* was not much better off since his grievance had been turned down by the system board.¹³³

C. Other Review Considerations

In late 1966, the Supreme Court pondered the problem of what duty an adjustment board has in settling the "entire dispute." In *Transportation-Communication Employees Union v. Union Pacific R. R.*,¹³⁴ the telegraphers' union complained to the railroad adjustment board that the company had assigned certain jobs, created by automation, to the clerks' union, rather than the telegraphers as required by their agreement. Automation actually had combined two functions, one previously performed by the clerks, and the other by the telegraphers. Given notice of the proceeding, the clerks' union declined to participate, but expressed their readiness to file a similar proceeding if required to protect its members' jobs. The Board decided that the telegraphers were entitled to the jobs, without considering the contract between the railroad and the clerks' union, and directed the company to pay them. Suit was filed by the telegraphers in the federal district court to enforce the award. On the ground that the clerks' union was an indispensable party, the district court dismissed,¹³⁵ and, the court of appeals affirmed.¹³⁶ The Supreme Court in a seven-to-two decision held that the adjustment board "must exercise its exclusive jurisdiction" in a single proceeding in deciding a dispute over job assignments. Both interested unions should be present, unless one defaults, and consideration has to be given to the collective bargaining agreements of both unions in order to settle the "entire dispute."¹³⁷

The Court in *Transportation-Communication* rejected the contention that it was appropriate for the adjustment board to consider only one union's contract with the employer in a dispute over work assignments, saying: "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. . . ."¹³⁸ In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.¹³⁹ The main thrust of the dis-

¹³³ *Id.* at 213; court cited *Woolery v. Eastern Air Lines, Inc.*, 250 F.2d 86, 90 (1957).

¹³⁴ 385 U.S. 157 (1966).

¹³⁵ 231 F. Supp. 33 (D. Colo. 1965).

¹³⁶ 349 F.2d 408 (10th Cir. 1965).

¹³⁷ 385 U.S. at 160 and 164-66.

¹³⁸ *Id.* at 160; the court also quoted from *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964), which in turn had quoted from *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-579 (1960):

[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

¹³⁹ 385 U.S. at 161; *cf.* *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946); also, *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); Court also in note at 167 refers to the 1966 amendment empowering district courts to remand proceedings to the Board. See Public Law 89-456, Sec. 2(e).

sent was directed at the power of an adjustment board to convert a dispute, between one union and a railroad, into a proceeding involving more parties in order to "settle the entire dispute," saying, that the statute does not "require or empower" the Boards to do it.¹⁴⁰

In connection with a discussion on the duty of an adjustment board to resolve the "entire dispute," it should be noted that Section 3, First (j) of the RLA,¹⁴¹ requires that the adjustment board "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."¹⁴² Also, the Supreme Court in 1956 denied certiorari in a case where the court of appeals refused to enforce a board's award for not giving notice to an indispensable party.¹⁴³ The Fourth Circuit Court of Appeals decided in May, 1967, that they could not properly perform their limited function of review of a board's order, directing a company to compensate affected members of a union for work they might have done, without a clear record as to "whether the Board considered the contract of a competing union."¹⁴⁴ The appeals court liberally quoted and referred to the decision in *Transportation-Communication*. On 13 November 1967 the Supreme Court refused to grant a writ of certiorari in the Fourth Circuit case.¹⁴⁵ Actually, there were two separate disputes. One involved the company contracting out work normally performed by men of the Brotherhood of Railroad Signalmen or by men of an electrical union—both contracts indicating that either of the two unions could do the kind of work involved. The company contended that the particular work needed to be accomplished within a short period of time and that neither union was available. Only the signalmen's union complained to the NRAB, who in turn, held that the company violated its contract with the signalmen. It did not appear that the electrical union had been notified of the proceeding.¹⁴⁶ The other dispute was the result of the railroad assigning maintenance of a newly installed electrical system to men of another union, other than Signalmen's. Even though the signalmen normally did that type of work, the company contended that it really was a different system from that referred to in the Signalmen's agreement. Also, since it was installed entirely within the repair shop area, it fell within the "Scope Rule" of the Shop Crafts Agreement.¹⁴⁷ The union of shop craft employees had been notified of the complaint, but decided not to appear. Thereupon, the Board decided the shop craft union was not a necessary party, and again, held for the signalmen.¹⁴⁸ Consequently, the court of appeals concluded that since the record had only a scant reference to a com-

¹⁴⁰ 385 U.S. at 169.

¹⁴¹ RLA § 3 First (j), 44 Stat. 578, 45 U.S.C. § 153 First (j) (1964).

¹⁴² *Id.*

¹⁴³ *Order of R.R. Telegraphers v. New Orleans, T. & M. R. Co.*, 229 F.2d 59 (8th Cir.), *cert. denied*, 350 U.S. 997 (1956).

¹⁴⁴ *Brotherhood of Railroad Signalmen v. Southern Ry. Co.*, 380 F.2d 59, 65 (4th Cir. 1967).

¹⁴⁵ See 389 U.S. 958 (1967); Three judges would grant certiorari based on the dissent in *Transportation-Communication*, 358 U.S. 157 (1966).

¹⁴⁶ 380 F.2d at 62.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 63-64; in note 3 of that case it was pointed out that the shopcraft employees reserved a right to institute separate proceedings if the Board's decision was adverse to them. For a discussion of this practice see *Transportation-Communication*, 385 U.S. at 159, n. 2.

peting union, and none at all to its contract, then sufficient basis to settle the "entire dispute" did not exist. In addition, the Supreme Court's view in *Transportation-Communication* was illustrated as having made known that a union's failure to complain will not be deemed sufficient reason for ignoring its contract.¹⁴⁹

If advocates for liberal judicial review of adjustment board awards thought they could at least have the protection or defense of estoppel, then they probably became dejected after the decision in *Hodges v. Atlantic Coast Line R. R.*¹⁵⁰ This was an action by a discharged employee and his union against the railroad to enforce an adjustment board award. But, before going to the adjustment board, the employee had instituted a suit in state court under the Federal Employer's Liability Act alleging total and permanent disability resulting from an injury caused by the company's negligence. A favorable verdict was rendered, and the railroad paid the judgment. Four months after the above verdict, the company removed the employee's name from the seniority list, advising him that since he had established his inability to carry out his duties, the railroad had no more employment obligation to him. Later, a doctor's report was submitted to the railroad stating that the employee was now capable of working. After receiving no subsequent satisfaction from the company, a claim for reinstatement was presented to the NRAB based on the contention that the railroad violated its contract with the union by not allowing the employee to come back to work. The railroad contended that by the employee's allegations at the trial, of his being totally and permanently disabled, he was estopped to have his union bring this claim. The Board found that the employee was wrongfully withheld from service and directed that he should be examined by three doctors. After determining that he was able to return to work, the Board ordered reinstatement with back pay from a certain date.¹⁵¹ The district court granted the railroad's motion for summary judgment.¹⁵² The court of appeals, recognizing that the question of estoppel did not appear in *Gunther*,¹⁵³ nevertheless, concluded that the similarities and rationale of *Gunther*, along with its holdings, disposed of the present issues. The Board, having found that the railroad violated a pertinent part of the collective bargaining, *i.e.*, that "a trainman will not be discharged without an investigation,"¹⁵⁴ thus favored the employee with an award. Consequently, the court of appeals held that *Gunther* prohibits any determination on the part of the disability issue, and also, "precludes the analogous estoppel argument."¹⁵⁵ The court also stated that the "Award of the NRAB must stand as the result of 'compul-

¹⁴⁹ 380 F.2d at 65; see recent district court case allowing company to amend answer in an action to enforce an order of the Railroad Adjustment Board in light of the decision in *Transportation-Communication*, System Federation No. 152, Ry. Employees v. Pennsylvania R.R. Co., 272 F. Supp. 971 (S.D.N.Y. 1967).

¹⁵⁰ 363 F.2d 534 (5th Cir. 1966); *cert. denied*, 385 U.S. 1011 (1967).

¹⁵¹ *Id.* at 535-36.

¹⁵² *Id.* at 537; 238 F. Supp. 425 (N.D. Ga. 1964).

¹⁵³ 382 U.S. 257 (1965).

¹⁵⁴ 363 F.2d at 538.

¹⁵⁵ *Id.*

sory arbitration in this limited field,' and it must be enforced."¹⁵⁶ It is submitted that the 1966 amendments to the RLA passed about three weeks prior to the decision in *Hodges*, would further support the result and might have influenced the Supreme Court in denying certiorari.¹⁵⁷

The RLA sets forth in Section 3, First (i)¹⁵⁸ that an aggrieved employee "may" take his claim to the appropriate adjustment board. The use of the word "may" instead of "shall" might possibly imply that the employee may take his claim to court. It had been considered by many that the availability of this forum was exceedingly remote because of the doctrines of "primary jurisdiction" and "exhaustion of administrative remedies," administrative procedures to be followed being found in the collective bargaining agreement.¹⁵⁹ However, the December, 1966 decision in *Walker v. Southern Ry. Co.*¹⁶⁰ has tended to obscure the effect of these doctrines.

Walker dealt with a suit brought in state court by an employee against the railroad for damages, alleging wrongful discharge in violation of the collective bargaining agreement. After the action was removed to the federal district court the company questioned the district court's jurisdiction. The district court overruled the jurisdictional challenge and found for the employee.¹⁶¹ The court of appeals, by reason of the decision in *Maddox*, reversed.¹⁶² A majority of six on the Supreme Court, relying on the 1941 decision in *Moore v. Illinois Central R. R.*,¹⁶³ decided that employees had alternative methods of pursuing such claims. They could utilize the administrative procedures set forth in the company-union contract, including the right of review before an adjustment board. Or, "if he accepts his discharge as final, [he] may bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim."¹⁶⁴ As a result, the employee was held not barred by his failure to pursue the available administrative remedies.¹⁶⁵ The majority, in distinguishing *Maddox* and *Moore*, stated that grievance procedures resulting in binding arbitration under the LMRA, or in *Maddox*, were voluntary. Contrawise, under the RLA, arbitration of minor disputes is mandatory. In addition, following a review of the purposes for the 1966 amendments,

¹⁵⁶ *Id.* at 540; precedents supporting the result in *Hodges* exist in many workmen compensation cases. See especially, another of the steelworkers trilogy, *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960), where the company refused to arbitrate an employee's claim by contending the employee was estopped from bringing such a grievance after settling a workmen's compensation claim. The court announced that the bargaining agreement required the submission of "all grievances to arbitration, not merely those the Court will deem meritorious." at 508. In note 6, at 568, the Court quotes an interesting passage from Cox, *Current Problem in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 261 (1958); of interest also is *Warrior & Gulf*, 363 U.S. 574 (1960).

¹⁵⁷ See notes 110-122 and accompanying text; *Brotherhood of R.R. Trainmen v. Denver and Rio Grande Western R.R.*, 370 F.2d at 836, underscores this by pointing out that the affirmative defenses of res judicata and collateral estoppel, even before the 1966 amendments, were doubtful subjects of judicial review—citing *Hodges*.

¹⁵⁸ RLA § First (i), 44 Stat. 578, 45 U.S.C. § First (i) (1964).

¹⁵⁹ Tsamoutales, *supra* note 29 at 52-53; see also notes 68-70 with accompanying text, and, note 74 with accompanying text.

¹⁶⁰ 385 U.S. 196 (1966).

¹⁶¹ 237 F. Supp. 278 (W.D.N.C. 1965).

¹⁶² 354 F.2d 950 (4th Cir. 1965).

¹⁶³ 312 U.S. 630 (1941).

¹⁶⁴ 385 U.S. at 196.

¹⁶⁵ *Id.* at 199.

the majority declared: "Of course the new procedures were not available to petitioner, and his case is governed by *Moore*, *Slocum* and *Koppal*."¹⁶⁶ This statement may prove significant in similar cases in the future.

In a forceful dissent, the minority asserted that the result in *Maddox* overruled the decision in *Moore*. The dissent explained that even though at the time of *Moore* state law was applicable to employment contracts under the RLA, subsequent decisions have held "labor contracts governed by the Labor-Management Relations Act and the Railway Labor Act are subject to federal substantive law, not state law."¹⁶⁷ The minority believed that the distinction between contractual arbitration under the LMRA and arbitration compelled by the RLA, indicated even more, the intent of Congress that adjustment board jurisdiction under the RLA was to be exclusive.¹⁶⁸ To support this view, portions of the opinion in both *Gunther* and *Transportation-Communication* were quoted.¹⁶⁹

At least two courts of appeal have had an opportunity to reflect upon the recent decision in *Walker*. In *Pacilio v. Pennsylvania R. R.*,¹⁷⁰ the Second Circuit Court of Appeals interpreted *Walker* as limiting the rule in *Maddox* of requiring the "attempted exhaustion of administrative remedies prior to the institution of legal proceedings, to cases arising under the Labor Management Relations Act of 1947"¹⁷¹ The Seventh Circuit Court of Appeals in *Stumo v. United Air Lines, Inc.*,¹⁷² did not construe *Walker* as allowing a discharged employee to pursue a court action for "damages for wrongful discharge and at the same time seek to maintain his status as an employee."¹⁷³ Furthermore, it appeared to the court that the decision in *Walker* would have been different if the 1966 amendments had been available to the employee.¹⁷⁴

The equity powers of a district court, insofar as they exist for the issuance of injunctions based on contract interpretation, seem to have been sharply limited by the result in *Aaxico Air Lines, Inc. v. Air Line Pilots*

¹⁶⁶ *Id.* at 197-98; *Moore*, 354 F.2d 950 (4th Cir. 1965); *Slocum*, 339 U.S. 239 (1950); *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1963). To this writer the *Walker* decision is surprising. The result exhibits an amazing disregard for the development of federal substantive law as proclaimed in *Lincoln Mills* and *Central*. The opinion suggests that the majority dwelled upon and limited almost entirely their analysis to the procedural question of exhaustion of remedies. Consequently, inadequate consideration was given to the growth of substantive federal labor law subsequent to the decisions in *Moore*, *Slocum* and *Transcontinental*. Additionally, the majority seemed to slight the experience and decisions under the NLRA, as demonstrated by their treatment of *Maddox*. Also, very little was said to support the decision. The effect of the distinction raised by the majority between *Maddox* and *Walker*, arbitration being voluntary versus mandatory, appears to be misplaced. As connoted by the minority, if there is any effect of such a distinction, shouldn't it be the other way around? In a future "*Walker*" situation it will not be unexpected to see an outcome more in line with the reasoning of the dissent. To do so, the court, instead of completely overruling *Walker*, will probably seize on the opening left by the majority pertaining to the 1966 amendments.

¹⁶⁷ 385 U.S. at 199.

¹⁶⁸ *Id.* at 201.

¹⁶⁹ *Id.* at 202; The dissent quoted from *Gunther*, 382 U.S. at 261-62, "This court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board."

¹⁷⁰ 381 F.2d 570 (2d Cir. 1967).

¹⁷¹ *Id.*

¹⁷² 382 F.2d 781 (7th Cir. 1967), *cert. denied*, 88 Sup. Ct. 779; The issue involved in this case was similar to the one in *Union Pacific v. Price*, 360 U.S. 601 (1959).

¹⁷³ *Id.* at 785.

¹⁷⁴ *Id.*

*Association, Intn'l.*¹⁷⁵ A primary issue was whether the agreement between Aaxico and ALPA had terminated. ALPA contended that it was still in effect; the airline argued that it was not. The district court, after finding that the agreement was still in effect, granted the injunctive relief requested by the Pilots' Association for enforcement of certain rights under the contract.¹⁷⁶ However, the court of appeals determined that the controversy could only be resolved by interpreting the agreement, thus making it a minor dispute. Consequently, the holding was that the trial court did not have jurisdiction to determine this dispute of whether the contract had terminated, since it was in the class that must be submitted to the grievance procedures where final decision may lie with the system board of adjustment. The court of appeals did add, though, that the lower court would have authority to require the company to utilize the grievance procedures if it was found that they were impeding the association's use of such procedures.¹⁷⁷ Subsequent to this decision, the Supreme Court denied a petition for certiorari.¹⁷⁸ Two years later this case was again at the court of appeals. This time it was held that the trial court could make a "preliminary interpretation of the contract in order to determine . . . whether there has been a waiver or estoppel of rights;" but, finding "no waiver, abandonment, acquiescence, or estoppel" it must order the dispute involving the contract submitted to the Board.¹⁷⁹

It has been held, in *Union Pacific R. R. v. Price*,¹⁸⁰ that an employee can not resort to a common law action for wrongful discharge after the same claim has been rejected on the merits in a proceeding before the adjustment board. The decision in that case was based upon the conclusion that, when revoked, the remedies provided for in Section 3, First were intended by Congress to be the complete and final means for settling minor disputes.¹⁸¹

The provisions of the RLA have been held valid.¹⁸² It has also been held that the Constitutional right to a jury trial guaranteed by the Seventh Amendment may be waived, which is the result when parties under the RLA provide for final determination of minor disputes by a system

¹⁷⁵ 331 F.2d 433 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964).

¹⁷⁶ *Id.* at 435-36.

¹⁷⁷ *Id.* at 437; Although the requirement for a system board is mandatory, it is possible not to have a collective bargaining contract. Quære: What function would a board perform if there is no contract to interpret?

¹⁷⁸ See 382 F.2d 781 (7th Cir. 1967); also, *St. Louis, San Francisco and Texas Ry. v. Railroad Yardmasters of America*, 328 F.2d 749 (5th Cir. 1964).

¹⁷⁹ 358 F.2d 744 (5th Cir. 1966); The System Board, with Harry Platt as the neutral referee, finally having the opportunity to hear the issues involved in this controversy, incorporated into one portion of its award some of the language of the Fifth Circuit, 47 Lab. Arb. 289, at 316 (1966); only a few months earlier the Fifth Circuit, although a different panel of judges, delivered their opinion in *United Indus. Workers of Seafarers Int'l. Union v. Board of Trustees of the Galveston Wharves*, 351 F.2d 183 (1965); *Brotherhood of Locomotive Eng'rs v. M-K-T R.R.*, 363 U.S. 528 (1960), has said that courts in equity jurisdiction may require some contract examination and to do whatever is necessary to protect the jurisdiction of the Adjustment Board, thus conditions could be imposed.

¹⁸⁰ 360 U.S. 601 (1959); in this case the Court said at 611, n.10, that under the rationale of *Chicago River*, a strike against an adjustment board award denying a grievant's money claim could be enjoined.

¹⁸¹ *Id.* at 608.

¹⁸² See, *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177 (1938); *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941), *aff'd* 319 U.S. 732 (1942).

board.¹⁸³ Nevertheless, even though board awards are to be "final and binding," it is accepted that a court may look at the administrative proceedings to see if "due process rights have been violated."¹⁸⁴ Needless to say, in this area of compulsory arbitration, the courts have "laid down a rather strict test . . . to apply in making such a limited review."¹⁸⁵ For example, *Guntther* states that a district court should not set aside a decision of a board unless it is "wholly baseless and without reason."¹⁸⁶ And, in *Edwards v. St. Louis-San Francisco R. R.*,¹⁸⁷ an employee was denied the right to collaterally attack the board award, alleging his Constitutional rights were violated because of less than due process, when the only possible failure of due process came at the initial hearing stage. At the initial hearing, the dispute is between private parties, procedurally being governed by the contract between them.¹⁸⁸ The court in *Edwards* also held that an employee could not complain that a board award was "based on insufficient evidence or that the Board incorrectly interpreted or wrongfully applied a provision of a collective bargaining agreement."¹⁸⁹

IV. CONCLUSION

The ostensible purposes of the Railway Labor Act, promoting the collective bargaining relationships of the parties while at the same time avoiding interruptions of commerce, were bolstered by the outcome in *Central*. The Supreme Court expressed the view in *Central* that federal law gives life to the collective bargaining contract. Inasmuch as having been decided sufficiently after *Lincoln Mills*, wherein it was determined that federal courts had the responsibility of developing a federal common law of collective bargaining,¹⁹⁰ the court had little difficulty in reaching this viewpoint or arriving at its decision. Thus, the courts have utilized, once again, the experience gained under one set of national labor laws to resolve a question under another.¹⁹¹ Furthermore, the fact that Section 204 requires the parties to agree to a substitute for a national board and is not discretionary in any sense, makes it a violation of the RLA itself if a substitute is not agreed upon. Consequently, the availability of a tribunal to enforce system board awards has been clearly established.

On the other hand, authoritative criteria explicitly outlining the extent judicial review of the award is permitted, is not so definitive. To be sure,

¹⁸³ 373 F.2d at 142.

¹⁸⁴ Gordon, 268 F. Supp. 210 (1967).

¹⁸⁵ *Id.*

¹⁸⁶ 382 U.S. at 261.

¹⁸⁷ 361 F.2d 946 (7th Cir. 1966).

¹⁸⁸ *Id.* at 947.

¹⁸⁹ *Id.* at 952, cases cited at 953 of that case may be of assistance in determining if some act of a Board invests a court with jurisdiction to review the award because of denial of due process.

¹⁹⁰ 353 U.S. at 456-57.

¹⁹¹ See, *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), a case arising under the NLRA but relying in part on *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), cases controlled by the RLA; or, the RLA case of *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347 (1944), where the Court refers to the applicability of the opinion in *J. I. Case v. National Labor Relations Board*, 320 U.S. 64 (1944).

Gunther, Chicago River, Union Pacific, Northwest Airlines, Inc., and the 1966 amendments denote the conclusiveness of a board's award. However, there are also decisions that allow some degree of review, albeit limited. *Transportation-Communication* and *M-K-T R. R.* are examples where courts explored the merits of the controversy. And, of course, the decision in *Walker* seems to make it possible for some disputes to bypass entirely the authority of a board. In addition, limited review would be available to insure that the statutory requirements are obeyed. This includes the preservation of due process rights and the protection against fraud or corruption by members of a board.

Nevertheless, the purposes of the Act and the trend of subsequent amendments supplying additional supremacy to board awards manifests an unequivocal mandate by Congress that review of board awards be rigidly confined.

*John F. Foster**

* Mr. Foster, a 1968 degree candidate at Southern Methodist University School of Law, was awarded a J.D. degree posthumously after his tragic death in the crash of the Braniff airliner on which he was co-pilot on 3 May 1968. Professor Charles Morris, for whose course this outstanding paper was prepared, brought it to the attention of the Board of Editors who are pleased to present it for our readers at this time. A memorial scholarship named for Mr. Foster is being established at the School of Law.

Air Traffic Control: Hidden Danger in the Clear Blue Skies

I. INTRODUCTION

The room [air traffic control center] is dark, there's much chatter back and forth and supervisors are constantly looking over his [controller] shoulder giving advice and making criticisms. He's working 15 to 25 airplanes in the sure knowledge that another 15 or 25 are descending on him from out there someplace.

At least eight of them are novice pilots who will ask for a repeat of every instruction. One is not where he says he is, another doesn't know where he is. The controller thinks one is letting down at 500 fpm, but he's on the step at 50 fpm, and the guy approaching at 160 knots just cut his speed to 80 knots to get his gear down. There's a guy low on fuel, one who turned to two nine zero instead of two one zero, and heaven knows how many sneaking through not on a flight plan.

As frosting on the frost, a 172 has just told him his max approach speed is 130 knots and the following DC-8 captain says he can't reduce below 180. The chances of mistake are ever present; the consequences of mistake are growing ever more catastrophic.¹

Air Traffic Control (ATC) is a highly sophisticated system of terminal and route control provided by the Federal Government for the avowed purpose of ensuring safety in the utilization of the nation's airways. There are presently 21 en route Air Traffic Control Centers scattered about the United States, but the declared objective is to so centralize the system that in the near future all pertinent navigational information may be directed throughout the country from regional complexes. When the en route and terminal systems are completed there will be an interconnected nationwide system, the first phase of which should be operational in the early 1970's. By the late 1970's, the system should be automated to the extent that an aircraft entering a terminal area will be electronically interrogated, positioned by priority and automatically steered into the approach pattern. The use of such integrated equipment will permit the optimum degree of spacing and speed, utilizing the system to its full extent relatively independent of sophisticated inplane instrumentation.²

Although such attempts are presently being made by the Federal Government to ensure the realization of an adequate system for the future, the control of aircraft remains as one of the paramount problems which has historically confronted aviation planners. There are those who would suggest that present and even future plans are inadequate. In 1966 a respected authority predicted, "The nation's vital airport system is headed for a breakdown of catastrophic proportions."³ How is it possible that

¹ FLYING, Jan. 1968, at J-4.

² International Air Transport Association, *IATA in the 1970s: A Symposium on the Future of World Air Transport* (Dec. 1967).

³ AMERICAN AVIATION, Aug. 1966, at 18.

this could be said of an industry in which, in 1966, the scheduled airline segment carried 109,387,000 passengers 79,889,245,000 miles at a net profit of \$427,572,000?⁴

Air safety is a term which has been applied to the myriad problems of aviation's tremendous growth in a limiting environment. Although many of its manifested aspects have long been most familiar to those intimately associated with aviation, the term now finds itself on the lips of increasing numbers. In the summer of 1967 air traffic control and air safety first began to gain wide-spread public attention when, only a few days after 82 persons were killed in a mid-air collision between a Piedmont Airlines 727 and a Cessna 310 under ATC guidance, the House Interstate and Foreign Commerce Committee held lengthy public hearings on the question of safety in the operation of the nation's airways. It is now apparent that there is some question as to whether the present rate of supporting facility development has the capacity to keep from being outdistanced by the growth of private and commercial aviation.

While the concept of air safety encompasses such vitally important areas as airport planning and financing, ground transportation and aircraft systems development, at the very center of the controversy exists the most troublesome problem: Air Traffic Control. Because of the vastness of the larger and more general question of air safety, it is necessary to restrict the scope of this study to the effect of ATC on the system as a whole.

In the early 1930's, when serious commercial aviation began, airlines recognized the problem which continues to plague ATC today. Because all airlines desired to utilize the best routing schedules, they found that their flights were arriving at airports at the same times, creating the problem of air control and the serious possibility of mid-air collision. Although many terminals were equipped with towers, no adequate form of area control or coordination was present. In an attempt to alleviate frustrating conditions, several carriers (American, Eastern, TWA, and United) formed a corporation aptly named Air Traffic Control, Inc. After selecting controllers from dispatchers, radio operators and copilots, each participating carrier secured \$60,000 of insurance and the first ATC system went into operation. In 1936, the Government acquired the private corporation and placed it under the control of the Department of Commerce, along with other regulatory aspects of aviation. ATC did not function adequately under the aegis of the Department of Commerce for the same reasons that aviation, generally, found its growth stagnated: lack of organizational leadership and insufficient funds.

The potential problems inherent in ATC first aroused concern when in 1956 two airliners collided in mid-air over the Grand Canyon while under ATC guidance. Ensuing Congressional hearings resulted in the creation of the Airways Modernization Board; and shortly thereafter the Federal Aviation Act of 1958 removed aviation and ATC from the "basement" of the Department of Commerce and established them in an independent

⁴ Air Transport Association of America, *Air Transport Facts & Figures* (1967).

agency (FAA).

ATC as originally conceived provided assistance only during periods of inclement or marginal weather; but demand for the service grew in direct proportion to the tremendous growth of aviation. Today the greatest "inadequacy" of the system is its seeming inability to handle safely the increasing demands on its service. Reflective of this increasing demand is the growing investment which is annually made by the airline industry in new equipment. That investment has risen from \$3 billion in 1960 to nearly \$9 billion by 1966. Committed orders will increase this figure to \$13 billion by 1970.⁵ Perhaps most indicative of the present and future growth of the industry's reliance upon ATC is the increasing flow of IFR (Instrument Flight Rules) traffic. Last year, IFR traffic reached approximately 14 million operations; FAA forecasts a figure of 22 million by 1971, increasing to 31 million by 1977. But the most troublesome problem represented by these figures is that while commercial aviation makes a general practice of using IFR, regardless of weather conditions, particularly in mixed-traffic or high density areas, general aviation, the fastest growing segment of the industry, does not. A Senate Committee has recommended, "General aviation must get prepared to follow the airline practice. The areas in which wandering aircraft can be tolerated are disappearing."⁶

Closely akin to IFR-related problems is Positive Air Control, the control of those areas from which uncontrolled aircraft are restricted. With the increased use of jet aircraft, particularly in high density areas, the use of the old "see-and-avoid" procedures alone for collision avoidance is unrealistic. Positive Air Control is presently provided by the FAA between 24,000 feet and 60,000 feet over all of the contiguous 48 states.⁷ Stuart G. Tipton, President, Air Transport Association of America (ATA), has offered certain recommendations for the extension of this service into areas previously not served.

- a. Positive control service be extended down to and including 18,000 feet over the entire 48 contiguous states by January, 1968.
- b. Positive control service be extended further by lowering it to 10,000 feet within the "Golden Triangle" area (New York, Washington and Chicago) by January, 1969.
- c. Positive control service be lowered down to and including 10,000 feet along the West Coast between San Francisco and Los Angeles (to encompass all routes used by traffic operating between these two cities) by January, 1970.
- d. Positive control service be extended from 10,000 feet down to the ground in certain critical high density terminals. Terminals which should receive initial consideration are New York, Chicago, Los Angeles, the San Francisco Bay Area and Washington, D.C. Action to obtain positive control service should be started immediately with implementation dates no later than July, 1970.⁸

⁵ *Hearings on H.R. 11456 Before the Subcomm. of the Senate Comm. on Appropriations, 90th Cong., 1st Sess., at 652 (1968).*

⁶ *Id.*

⁷ *Id.* at 658.

⁸ *Id.*

The need to expand positive air control has been recognized for many years. As early as 1952 it was recommended that:

10. *Maintain positive air traffic control.* Certain air traffic control zones in areas of high air traffic density should be made the subject of special regulations to insure that all aircraft within the zone are under positive air traffic control at all times regardless of weather.⁹

While similar recommendations have continually been made for the intervening fifteen years, some continue to oppose extension of the present positive air control system, and their arguments are often of considerable merit. Representing the interests of general aviation, Frank K. Smith, Executive Director, National Aviation Trade Association (NATA), recently commented on ATA's new recommendations regarding positive air control.

I do not know of anyone in representing general aviation who is not interested in solving the problem [safety] in a spirit of cooperation with the airlines and airline pilots. It is most difficult for us to create this atmosphere when we are faced with demands by ATA/ALPA that controlled VFR be eliminated, that VFR minimums be raised to 1500 feet and five miles, that positive control be lowered to 10,000 feet in all parts of the country and down to the ground in terminal areas, particularly when "positive control" includes the requirement for an instrument rating and transponder equipped aircraft. We believe that such requirements and recommendations are impractical, unfeasible and, in many areas, technically impossible.¹⁰

The economic contribution made by general aviation to the industry cannot be denied but, as it continues to be the fastest growing arm of the industry, it must be recognized that the problems it has brought to the forefront are some of the most serious.¹¹

Certain inadequacies in today's ATC system have manifested themselves due to the increased demands made of it. Often, the practical result of the inadequacies or fallibility of the system has been liability. *Eastern Airlines, Inc. v. Union Trust Co.*,¹² established early that the Government is responsible for the negligent acts or omissions of its tower controller employees, as provided by the Federal Tort Claims Act. It is the purpose

⁹ D. BILLYOU, AIR LAW 43 (2d ed. 1964).

¹⁰ AIRLINE MANAGEMENT & MARKETING, Dec. 1967, at 13.

¹¹ FLYING, Jan. 1968, at J-10.

The system is from the World War II era. It's based on 1945 ideas, technology and hardware. But here's what's happened over the years:

* * *

Air carrier growth is the smaller part of it. In 1945 there were 37,358 general aviation aircraft; today more than 100,000.

* * *

In 1946 the number of miles flown by general aviation was 874,740,000; by 1965 that had increased to 2,562,380,000.

* * *

But we ain't seen nothing yet. According to FAA forecasters . . . the number of general aviation aircraft will grow to 180,000 in the next ten years.

* * *

To put all these numbers in meaningful perspective, in the five years from 1962 to 1967 general aviation flying increased 40 percent causing a 75 percent increase in ATC workloads. If this trend continues, by 1977 the pressure on ATC will be 450 percent greater than it is today.

¹² 221 F.2d 62 (D.C. Cir. 1955), cert. denied, 350 U.S. 911 (1957).

of this study to investigate the growing liability of the Government, as a result of its ATC operations.

II. DEFENSES GENERALLY

The courts of the United States have, as the volume of ATC operations has increased, enunciated certain rules which have served to increase Governmental liability as a result of the actions of tower operators. Such defenses include the discretionary function exception of the Federal Tort Claims Act,¹³ the defenses of no duty, misrepresentation, primary responsibility of the pilot, and finally a defense on the facts.¹⁴

The Federal Tort Claims Act does provide an exception to Government liability when an employee performs at a discretionary level, but air traffic controllers handle operational details; therefore, the Government is liable for their negligence. That this bald statement is the law was decided in *Eastern Air Lines v. Union Trust Co.*,¹⁵ and this decision stands fast despite subsequent Government efforts to overturn it.

When an accident occurs where the controller has performed his functions in the manner set out in the Air Traffic Control Procedures Manual¹⁶ or when an accident occurs because the controller did nothing and the Manual was silent on the point, the standard complaint is failure to warn, and the standard defense is no duty. For example, in *United States v. Weiner*¹⁷ the Government contended that tower personnel were under no legal duty to warn or inform a United Airlines aircraft of the hazards created by Air Force navigation maneuvers along the carrier's intended flight path. The same defense was urged in *Ingham v. United States*¹⁸ where the Government contended that the tower personnel had no duty to report weather changes to aircraft within the control zone and traffic pattern.

The defense of no duty has not been accepted by the courts and understandably so in light of the well-known "Good Samaritan" doctrine of tort law. The doctrine was held to apply to the Government in *Fair v. United States*¹⁹ where it was stated, "[I]f the Government undertakes to perform certain acts or functions thus engendering reliance thereon, it must perform them with due care; that obligation of due care extends to the public and the individuals who compose it. . . ."²⁰

In both *Weiner* and *Ingham* the Government, in raising the defense of no duty, was met with the "Good Samaritan" doctrine. In *Weiner* the Government went on to contend that not only was there no duty but that there was no undertaking upon which to predicate application of the "Good Samaritan" rule. The *Weiner* court agreed that there was no under-

¹³ 62 Stat. 984 (1946), 28 U.S.C. § 2680(a) (1964).

¹⁴ The present viability of these several defenses will be subsequently considered in the detailed treatment of mid-air, weather and turbulent air-related crash cases.

¹⁵ *Supra* note 12.

¹⁶ Air Traffic Control Procedures Manual (12 Nov. 1964).

¹⁷ 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964).

¹⁸ 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 36 U.S.L.W. 3190 (U.S. 7 Nov. 1967).

¹⁹ 234 F.2d 288 (5th Cir. 1956).

²⁰ *Id.* at 294.

taking such as in earlier cases where the doctrine had been applied to the Government,²¹ but went on to state:

We cannot accept the government's assertion that the CAA deliberately adopted the policy of *refusing* to give out information concerning known hazards likely to be encountered by commercial passenger flights in order not to dilute Air Traffic Rules requiring pilot vigilance during flight in VFR conditions. We are directed to no evidence which even suggests that the CAA operated under such a policy and we do not agree that the rule requiring pilot vigilance "*logically and necessarily* negated and precluded any and all alternative rules, practices or customs for the reason that any such alternative would detract from the effectiveness of the rule."²²

In the *Ingham* case, the Government claimed that since its initial decision to provide weather information was a gratuitous one, it was not liable for the negligent providing of such information. This argument was not accepted by the *Ingham* court which replied:

Assuming, *arguendo*, that in the absence of FAA regulations approach controllers would not have to advise incoming aircraft of weather conditions, the decision to provide such information would lead carriers and their pilots normally to rely on the government's performance of this service.²³

Closely allied to the defense of no duty is that of "primary responsibility of the pilot." The Government typically contends that, even if it has some duty, ATC only gives "suggestions" and, therefore, the primary control of the aircraft is with the pilot. This argument has been raised in cases involving mid-air collisions, wake turbulence, and accidents caused by weather—wherever the pilot was in a position to make any decision about the operation of his aircraft.

The courts originally accepted this defense. In *Smerdon v. United States*,²⁴ the pilot, having been told by the tower that he could not be given a ground controlled approach, professed ability to see the airport from his position and requested clearance for a VFR landing. The tower granted the clearance and the plane crashed. The plaintiff charged the tower operator with a breach of his duty to provide advice and information for a safe landing. Absolving the controller of negligence because the pilot had been warned of weather conditions, the court enunciated a general principle that Controllers' duties are limited to maintaining control of the airways to prevent collisions between aircraft within the control area and to prevent danger arising from obstacles on the movement area.²⁵

In cases where the pilots were flying under VFR conditions, the courts have been receptive to the Government's argument that at the time of an accident the pilot was primarily responsible for his plane and, therefore, the tower should be absolved of liability. A case involving the primary

²¹ See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *United States v. Rayonier, Inc.*, 352 U.S. 315 (1957); *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951); *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962).

²² 335 F.2d at 397.

²³ 373 F.2d at 236.

²⁴ 135 F. Supp. 929 (D. Mass. 1955).

²⁵ *Id.* at 932.

responsibility argument in a VFR situation is *Tilley v. United States*.²⁶ The plaintiff-passenger brought an action against the United States for injuries sustained when a Delta aircraft came to a sudden and jolting stop when the pilot attempted to immediately clear the runway. The Delta pilot had been given clearance by the local controller to proceed into take off position on the runway in question, at which time he observed a Sabina jet in the process of landing on the same runway and an Air France 707 on final. The Delta pilot, having been directed into take off position, could no longer see Air France continuing its final approach. The Sabina jet continued its roll down the runway but did not exit from the runway at either of the first three available taxiway turnoffs. As a result, the spacing between the Delta and Air France aircraft was then rapidly decreasing. A local controller, with a tone of emergency in his voice, directed Delta to immediately clear the runway to the left. In his attempt to do so, the Delta pilot ran the nosewheel of his plane off the runway causing the plaintiff's injuries. At all pertinent times the Sabina, the Air France, and the Delta aircraft were under the "control" of the tower.

The trial court entered judgment against the United States in accordance with its finding that the acts of the controller amounted to negligent performance of his duties in light of the following regulations which were in effect on the date of the accident:

[Civil Air Regulations] Section 60.190—No person shall operate an aircraft contrary to AIR TRAFFIC CONTROL INSTRUCTIONS in areas where AIR TRAFFIC CONTROL is exercised.

[ATC Procedure Manual] Section 419.3—Because of possible restrictions to the pilot's field of vision while taxiing aircraft, AIR TRAFFIC CONTROLLERS shall be alert to provide information which, in their judgment, will assist the pilot in taxiing.

[ATC Procedures Manual] Section 421.1—Separation shall be effected by establishing the sequence of arriving and departing aircraft and advising the pilot thereof to make such adjustments in flight or ground operations as are necessary to accomplish the desired spacing between aircraft. . . .²⁷

The Fourth Circuit reversed the judgment against the United States in light of case decisions to the effect that a pilot has *primary responsibility* for the control of his aircraft and Section 91.3 (a) of the Civil Air Regulations,²⁸ which describes the duties of a pilot in command of the aircraft and invests him with final authority as to operation of the same. The court determined that the plaintiff's injury was not attributable to any negligence of the controller or to any breach of a duty owed by the Govern-

²⁶ 375 F.2d 678 (4th Cir. 1967).

²⁷ The section which was previously 60.190 is now § 91.75(b) and now reads: Except in an emergency, no person may, in an area where air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

ATC Procedures Manual § 419.3 is presently an unused section of the Manual.

ATC Procedures Manual § 421.1 now reads: Separate a departing aircraft from other aircraft using the same runway by ensuring that it does not begin take-off run until one of the following conditions exists * * *

²⁸ The section quoted in the opinion, 60.2, is now § 91.3(a) and reads: The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

ment to the plaintiff.²⁹ The implication of the court's decision is apparently that Section 91.3 (a) overrides the regulations relied upon by the district court.

The "primary responsibility" defense has, however, been unsuccessful in some cases. One court conceded that the pilot has a high duty of care, but then noted that a reciprocal duty devolves upon other persons, such as the controllers of the Traffic Control Center. "Negligence of two or more persons may concur in causing an accident, and in that event each is liable for the result."³⁰

A district court opinion in *Hochbrein v. United States*³¹ treated the "primary responsibility" defense as one that only arises after the controller has wholly fulfilled his duty to warn. In a mid-air collision case, after agreeing that the deceased pilot was primarily responsible for the safety of his aircraft even after receiving his clearance to land, the court went on to hold that, nevertheless, the controller failed in his obligation to pass on information which was necessary for the pilot to discharge his responsibility for his own safety.³²

The defense that the primary responsibility for the control of his plane rests with the pilot is perhaps not a valid one. Sec. 91.3 (a) of the Civil Air Regulations does state that the pilot is primarily in control of his aircraft, but when this regulation is juxtaposed to the regulations delineating controller responsibility and specifically to the regulation which provides: "Except in an emergency, no person may, in an area where air traffic control is exercised, operate an aircraft contrary to an ATC instruction,"³³ the primary responsibility argument appears strained. Rare indeed would be the pilot, who, acting on the Government's contentions that tower directions are meant only for guidance, would determine that primary responsibility for the aircraft was his and would proceed to operate his plane in accordance with his own personal desires, particularly in one of the all-too-busy terminal areas. Not only would the Government view his acts with disfavor,³⁴ but there would be risks involved in an attempt to survive his errant excursion.

When the defenses of "no duty" and "primary responsibility of the pilot" have been raised to no avail, the Government has occasionally raised the defense of misrepresentation—an additional exception to Governmental liability under the Federal Tort Claims Act.³⁵ Specifically, this defense has been raised in relation to ATC liability in cases where controllers have given inaccurate information to pilots. *Weiner* and *Ingham* were two such cases.

In *Weiner*, the Government claimed misrepresentation because the flight had received approval of its IFR plan from ATC, which implied that the

²⁹ 375 F.2d at 684.

³⁰ *State of Maryland v. United States*, 257 F. Supp. 678, 773 (D.D.C. 1966).

³¹ 283 F. Supp. 317 (E.D.Pa. 1965).

³² This position was also taken in *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968).

³³ *Supra* note 35; 14 C.F.R. § 91.75 (b) (1967).

³⁴ See 14 C.F.R. § 91.75 (a) (1967). "When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency"

³⁵ 62 Stat. 984 (1946), 28 U.S.C. § 2680 (h) (1964).

airway was clear and in fact it was not. Misrepresentation was claimed in *Ingham* because the wrong visibility information was given by ATC before the tower lapsed into silence for twelve minutes. The defense was unsuccessful in both cases. The point was answered in the *Weiner* case when the court stated:

The government's reliance upon 28 U.S.C. § 2680(h) relating to exemption from the Tort Claims Act of causes of action predicated upon misrepresentation is misplaced. This section applies to claims arising out of misrepresentation. . . . Here, the gravamen of the action is not misrepresentation but the negligent performance of operational tasks, although such negligence consisted partly of a failure of a duty to warn.³⁶

The point made by the *Weiner* court is well taken. Were the question to have been resolved in any other way, the decision in *Eastern* and every other decision where the Government has been held liable for ATC negligence would stand for naught.

The Government often contends that on the facts of the case that the controller discharged his duty as set out in the Procedures Manual. In *Furumizo v. United States*³⁷ the court decided that a "simple slavish purported" following of the book was not enough³⁸ because the regulations themselves required the exercise of judgment. It seems that even though the Manual prescribes certain procedures, a controller must use his judgment to determine the amount of care that is necessarily dictated by the risks and hazards of each situation.

III. CASES—MORE SPECIFICALLY

A. *Mid-Air Collisions*

As defined by the bench, the bar, and the law schools, negligence is the breach of a duty owed to another that results in his damage, and actions are adjudged negligent when they fall short of the standard set by the "reasonably prudent man" test. One doubts that a reasonably prudent man would be an air traffic controller.³⁹

Whatever may be the standard, in 1955 it was used to adjudge the actions of ATC negligent in *Eastern Air Lines, Inc. v. Union Trust Co.*,⁴⁰ where there was a collision between a DC-4 passenger plane and a P-38 military aircraft. The court held that ATC, having had in mind the respective positions of the planes in relation to each other, and their speed of approach and descent, failed to issue a timely warning to the Eastern plane concerning the P-38 on final approach, failed to warn the P-38 that the DC-4 was on final approach, cleared both planes on the same runway at approximately the same time, and failed to keep both planes advised of the activities of the other.⁴¹ Even though the evidence was meager on the trial court's finding that the tower cleared both planes for the same

³⁶ 335 F.2d at 398.

³⁷ 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967).

³⁸ 245 F. Supp. at 992.

³⁹ *Supra* note 1.

⁴⁰ *Supra* note 12.

⁴¹ 221 F.2d at 79.

runway at the same time, the finding was sustained by the appellate court.⁴³ The major defense in *Eastern* was that of the discretionary function exception.

Following *Eastern*, in the early case of *United States v. Schultetus*,⁴³ the Government succeeded on an argument of primary responsibility. In *Schultetus*, a Cessna 170 and a Cessna 140, owned and operated by two flying schools, collided over an airfield at Fort Worth, Texas. The trial court found that the tower operators negligently failed to warn the Cessna 170 to alter its course so as to avoid the collision and negligently failed to direct the Cessna 140 to give way. The Cessna 170 had been warned of the Cessna 140's presence; it was a day on which the sun was shining, and the Cessna 170 had acknowledged the presence of the 140.

The appellate court reversed and held that the warning given to the Cessna 170 of "Traffic, Cessna crossing in front of you" was in full discharge of the responsibility of the tower's duty to give information for preventing collisions between aircraft. The court reasoned, "The theory followed by the district court would place upon the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations, having the force of law, have assigned this responsibility to the operators of aircraft."⁴⁴ The facts that the day was clear and the planes were flying under VFR conditions were decisive factors in the court's decision that the *primary responsibility* for the operation of aircraft at the field lay with the pilots. The court recognized that under IFR conditions there might be a greater duty and responsibility upon the control tower and a lesser responsibility placed upon the pilot. The distinction between visual and instrument flight rules responsibility was at one time expressly set out in the Manual,⁴⁵ but now appears in less straightforward terms.⁴⁶

In 1964 the Ninth Circuit decided *United States v. Weiner*⁴⁷ and found both parties negligent on the ground that ATC breached its duty to warn and that the pilot was primarily responsible for his aircraft. An Air Force jet fighter and a United Airlines commercial carrier collided while the jet fighter was executing an instrument navigation maneuver. The United carrier was flying in a regular route for commercial traffic after having

⁴³ *Id.*

⁴³ 277 F.2d 322 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1960).

⁴⁴ 277 F.2d at 327.

⁴⁵ At one time the language of 14 C.F.R. § 60.2 (1967) was:

When flying in visual flight rule weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft. Under such conditions, the information and clearances issued by the control tower are intended to aid pilots in avoiding collisions.

The revised second edition of the Air Traffic Control Procedures Manual § 3.011 read:

When flying in instrument flight rules weather conditions it is obviously impossible for the pilot to assume the responsibility of avoiding collision with other aircraft except as directed by the ground control agency. Therefore, it is of the utmost importance that all clearances issued by a control tower to pilots of aircraft under its jurisdiction be adequate, concise and definite inasmuch as the pilot has no other means of ascertaining the proximity of other aircraft.

⁴⁶ See, e.g., ATC Procedures Manual §§ 431.5A, 442.1, 523.1, and 834.9 (12 Nov. 1964).

⁴⁷ *Supra* note 17..

received an IFR clearance from the control center at Los Angeles to proceed to Denver in accordance with the proposed flight plan. A copy of the flight plan was teletyped by the Los Angeles Center to the center at Salt Lake City, Utah. These two centers subsequently received a report from United's radio communicating facility that the carrier had estimated its time of arrival over the airfield at Las Vegas at 8:31. The planes collided near Las Vegas at about 8:30 at an altitude of approximately 21,000 feet, within the confines of the commercial route, and while the skies were clear with visibility of thirty-five miles.

The appellate court affirmed the district court's finding of ATC negligence on the ground that the controller failed to give notice to United of the simulated instrument penetration procedure being practiced under visual flight rules in the Las Vegas area, though giving United a clearance under instrument flight rules through the area.⁴⁸ Relying on *Schultetus* and *United States v. Miller*,⁴⁹ the court also sustained the trial court's finding that United was negligent. "The legal obligation of the DC-7's crew was to see and avoid the jet, and under the optimum visibility conditions . . . responsibility for the separation of two aircraft flying in visual flight rule weather, regardless of the type flight plan or air traffic clearance, rests directly upon the operating personnel of the respective aircraft."⁵⁰

In *Weiner* the primary responsibility argument had sufficed to sustain the finding of pilot negligence, but did not absolve the Government of its duty to warn. The end result of the court's findings of ATC negligence, Air Force negligence, and United negligence was an award of indemnity over against the Government in favor of United in the non-Government employee cases on a theory that the Government's negligent acts occurred from start to finish of the incident.⁵¹

The *Miller* case, cited by *Weiner* to find the United pilot negligent, was a mid-air collision of privately owned aircraft flying in VFR weather. There the court in support of the contention of primary responsibility held, "The focal point of ultimate responsibility for the safe operation of aircraft under VFR conditions rests with the pilot. Under such conditions he is obligated to avoid traffic, even if he is flying with a traffic clearance. The function of tower personnel is merely to assist the pilot in the performance of the duties imposed, not relieve him of those duties."⁵²

*State of Maryland v. United States*⁵³ and *Stanley v. United States*⁵⁴ are cases at the district court level. *State of Maryland*, a case brought by the state for the use of Mary Jane Myer, resulted in a judgment against the Government in spite of its contention of pilot primary responsibility. *Stanley*, on the same issue, reached the opposite result. *Stanley* absolved the Government of any liability by holding that in VFR weather the function

⁴⁸ 335 F.2d at 397.

⁴⁹ 303 F.2d 703 (9th Cir. 1962), cert. denied, 371 U.S. 995 (1962).

⁵⁰ 335 F.2d at 389.

⁵¹ *Id.* at 402.

⁵² 303 F.2d at 710.

⁵³ *Supra* note 30.

⁵⁴ 239 F. Supp. 973 (N.D. Ohio 1965).

of the control tower operator is advisory, and the primary responsibility for avoiding mid-air collisions is upon the pilots.⁵⁵

State of Maryland involved facts which were similar to those in *Weiner*. The *State of Maryland* court based its opinion upon a reciprocal duty theory. A commercial airliner was flying under an IFR flight plan in a regular controlled airway when a T-33, being flown in the the same direction under VFR rules, overtook the airliner and a collision occurred. The planes were within radar contact of the control tower. In speaking to the Government's argument that the primary duty for the safety of his aircraft lay with the pilot, the court made the statement that the obligation of the pilot to use a high degree of care and vigilance in navigating his airplane, does not detract from the reciprocal duty devolved on other persons, such as the controllers of the Traffic Control Center.⁵⁶ The failure to warn allegation is a continuous thread which runs through the cases where ATC negligence is alleged and is consistently overcoming the primary responsibility defense.

The factor which has been the pivotal point for determining liability in all cases was apparently "control," with some courts holding fast to the position that the pilot is ultimately responsible for the control of his aircraft. An interesting case on this point is *Stratmore v. United States*.⁵⁷ In that case, a pilot was attempting to land after having radioed ATC that one of his engines was out. ATC cleared runways for the pilot and proceeded to monitor his descent. In observing the plane, ATC noticed that the plane's landing gear was not down. This information was radioed to the pilot. As the plane came in closer this information was again radioed to the pilot along with the advice that he had better "go around." In the meantime, the pilot had been furiously "pumping" his landing gear down, and all of the instruments inside his plane indicated that the landing gear was working properly. The evidence was confused on the point of whether or not ATC had, subsequent to its warning of "go around," radioed the pilot that the landing gear could at that time be seen gradually coming down. The evidence was clearer that ATC had, after its initial advice to go around, radioed the pilot that if he wished to go around all runways were clear. The court held that a pilot in an emergency is in absolute control of his plane; that even if ATC had advised him to go around, at that point in time the plane was so far over the runway that it was committed to a landing; that had the pilot used his own judgment he could have executed a safe landing; that the pilot should have used his own judgment; that his failure to do so was negligence and was the sole proximate cause of the crash; and that none of the actions of ATC were negligent nor were they a proximate cause of the accident.⁵⁸ The pilot's argu-

⁵⁵ *Id.* at 679.

⁵⁶ *Supra* note 38.

⁵⁷ 206 F. Supp. 665 (D.N.J. 1962).

⁵⁸ *Id.* at 672, 675. A rather strange argument was advanced by the Government in the "near miss" collision case of *Cattaro v. Northwest Airlines, Inc.*, 236 F. Supp. 889 (E.D.Va. 1964), on the point of no duty, primary responsibility, and "control." The argument becomes readily discernible to the reader when the courts answer to the argument is seen:

The Government undertook such duty whether it had it or not and in so doing

ment that ATC had created the emergency with its advice and "control" was to no avail.

When either one of the planes involved in a mid-air collision is flying under Instrument Flight Rules, ATC is controlling the plane and will be liable for any damage caused by its negligence in so controlling. The split in the court opinions arises when the planes are flying under VFR rules. In *Schultetus*, *Miller* and *Stanley* both planes involved in the respective collisions were flying under visual flight rules. The courts have spoken of "primary responsibility of the pilots" in this type of situation, but the rule that has evolved seems to be that if ATC in fact assumes control or should have reasonably assumed control of a plane (duty to warn), then any negligent performance or failure to perform relevant operations will result in Government liability. The VFR distinction, with nothing more, seems to be valid only in those instances where the planes, having made no contact with the tower, have an accident before ATC can, acting with due diligence, react.

B. Weather

"It is common knowledge that bad weather, rain and thunderstorms, fog, snow and windstorms account for a large percentage of airplane accidents."⁵⁹ A true statement or not, plaintiffs would rather allege that it is not the weather but the failure of ATC to warn of the weather conditions which accounts for such accidents.

This was the plaintiff's theory in *Ingham v. United States*⁶⁰ and in *Stork v. United States*⁶¹ where the plaintiff did recover against the Government; this was the plaintiff's theory in *DeVere v. True-Flight, Inc.*⁶² where the plaintiff was denied recovery against the Government. ATC failed to report weather information to the Eastern crew for a period of twelve minutes in the *Ingham* case. During this time, visibility had fallen from one mile to three-quarters of a mile. The landing minimum of the Eastern aircraft was one-half mile and in its attempt to land, the plane crashed. The court held that the failure of ATC to report weather conditions for twelve minutes in view of the rapidly declining visibility was negligence and a proximate cause of the accident.⁶³ ATC had last advised the Eastern crew that visibility was one mile in spite of the fact that a minute previous to this announcement it had been verbally announced to the controllers that visibility had fallen to three-quarters of a mile.

The duty of ATC to report weather conditions was held by the district court to be determined by the Air Traffic Control Procedures Manual, which provided:

became chargeable with the negligence of its employees in the premises.

A Government Air Traffic Controller cannot authorize an airplane to fly a collision course with another airplane then being monitored by another Government controller and escape liability by claiming neither controller had a duty to separate them.

⁵⁹ *DeVere v. True-Flight, Inc.*, 268 F. Supp. 226, 229 (E.D.N.C. 1967).

⁶⁰ *Supra* note 17.

⁶¹ *Mem. opinion* (S.D. Cal. 1967).

⁶² *Supra* note 59.

⁶³ 373 F.2d 227, 236 (2d Cir. 1967), *cert. denied*, 36 U.S.L.W. 3190 (U.S. 7 Nov. 1967).

At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as being at or below the highest "circling minima" established for the airport concerned, a report of current weather conditions, and subsequent changes as necessary, shall be transmitted as follows:

* * *

B. By approach control facilities, to all aircraft at the time of the first radio contact or as soon as possible thereafter. . . .⁶⁴

The Government contended that the above regulation required the approach controller to advise pilots of changed conditions only when the controlling visibility fell below the aircraft's minimum landing requirement. The court, in refusing to accept the Government's contention, referring to the view as inordinately narrow and determined that the words "as necessary" should reasonably be interpreted to require the controller to report those subsequent changes which, under all circumstances, the airliner crew would have considered important both in determining whether to attempt a landing, and in preparing for the weather conditions most likely to be encountered near the runway under the facts of the case.⁶⁵

The pilot in *DeVere* had obtained clearance from the control tower to take off and was told that VFR conditions existed. Several minutes after take off the aircraft flew into thick clouds and, in the attempt to re-establish visual contact with the ground, the pilot and his one passenger crashed in a swamp. The plaintiff, the passenger, alleged that the tower was negligent because it failed to give accurate information to the pilot when he asked if the flying conditions were VFR and because the tower did not initiate search and rescue operations when the aircraft failed to return.

In absolving the controller of negligence, the court found that the latest information available had been given to the pilot, that this information did indicate that VFR conditions existed, and that though the tower operator called the weather bureau to confirm that VFR conditions existed but could get no answer, this latter fact was of no importance because the meteorologist testified that had she been reached she would have told him that VFR conditions existed.⁶⁶

The *Stork* case involved facts similar to *DeVere*. Allegedly, the pilot of the aircraft was given information regarding weather conditions by ATC which was misleading or erroneous. As a result, the pilot lost his bearings upon take off, lifted prematurely, and the aircraft crashed to the ground. The plaintiffs complained of erroneous information given regarding lights on the runway, the controller's failure to prevent take off, and the failure to warn the crew of lack of visibility and other deteriorating conditions. The Government contended that the controller, at the time of the crash, had no right, power, or duty under the then existing regulations to deny take off clearance, and under the regulations there was no provision re-

⁶⁴ ATC Procedure Manual § 262.8 (12 Nov. 1964). This current section has been slightly reworded but without substantial change.

⁶⁵ 373 F.2d at 235.

⁶⁶ 268 F. Supp. 226, 228 (E.D.N.C. 1967).

quiring or authorizing tower personnel to warn pilots not to take off because of weather. The Government went on to admit that in the interest of safety to the aircraft, the controller should have advised the pilot of the decrease in visibility, but contended that this omission could not be said to have been a proximate cause of the crash inasmuch as the pilot was in a position to make the same observation as the controller. This latter position brings us back full circle to the primary responsibility argument which can be met by the reciprocal duty argument or by the theory that only when the pilot has been fully informed can he discharge his responsibility. The court held that a review of the evidence under the regulations compelled the conclusion that the controllers were negligent in failing to deny clearance, and in failing to warn the pilot not to take off and that if he did, he would be breaking the law.⁶⁷

Obviously, on the facts *Ingham* and *DeVere* can be distinguished. Contrary to *Ingham*, in *DeVere* the latest information was given and there was not the time gap in relaying information existent in *DeVere* which was present in *Ingham*. In *Stork*, though the information given to the pilot by the controller was apparently the latest at the controller's disposal, it was misleading and with due diligence the controller could have availed himself of more correct information. The *Stork* opinion on duty to warn is not startling but the holding of the court on the point of refusal to allow take off is. Although the court's opinion is couched in language of "failure to warn the pilot not to take off," the implication of that statement would appear to be that the controller should have absolutely refused the pilot permission to take off. If this is true, who has the ultimate and/or primary responsibility for these planes?

A fair statement of the present law relative to aircraft accidents, weather, and ATC thus would seem to be: When the latest correct information is reported accurately and as necessary, ATC will not be liable for accidents occurring because of the weather because it will have fulfilled its duty to warn. "As necessary" can be taken to mean, if a general rule can be gleaned from *Ingham*, a reporting of changes in the weather which, under all the circumstances of a given case, an airline crew would consider important in making decisions necessary to the safe operation of a flight. This duty to warn may even include a duty to give the pilot the controller's opinion about the feasibility of a landing or take off under then existing weather conditions. ATC could then feasibly be liable for giving a bad opinion if the pilot relied on it or was bound to do so.

C. Turbulent Air

1. Technical Description

Many accidents and near accidents have been caused by light planes encountering the wakes [turbulent air] of large airplanes during landing and take-off even though normal separation times were observed. The two typical difficulties generally reported by the pilots of the light planes were: a sudden violent roll (in either direction) accompanied by a sudden large "apparent"

⁶⁷ *Stork*, mem. opinion at 7.

loss of lift characterized by rapid loss of altitude. These accidents have been generally attributed in some way to the prop wash from and/or to the turbulence created by the large airplane.⁶⁸

The increasing demand upon existing facilities and available airspace creates a new hazard, long recognized though only recently understood, for the pilot—particularly the general aviation pilot. When the solid mass of an aircraft passes through surrounding airspace, turbulent air is left in its wake. If another aircraft, particularly a lighter aircraft, encounters this turbulent air before it has an opportunity to dissipate or decay, complete loss of control is likely to occur. Because of the increasing number of aircraft accidents which have occurred, at least in part, as a result of encountering turbulent air, the phenomenon is important in all of its aspects: its technical nature, its effect upon aircraft generally, and its relationship to Air Traffic Control and to the larger question of air safety.

The wake of turbulent air produced behind an aircraft in flight is caused by a number of phenomena, including: the skin friction and interference, the propulsion system, and (most significant) the production of lift on the wing and tail surfaces. The turbulence created by the lifting surfaces of an aircraft may be characterized by a sheet of air originating in and flowing from the vicinity of the trailing edge of the wing, which then trails aft and downward. As a result of the distribution of lift along the wing surface and the instability of the vortex sheet, the edges of the airstream tend to roll up, in a counter-rotating manner, in the vicinity of the wing tips and to form trailing spirals, often referred to as "horizontal tornadoes." "A transfer of vorticity from the sheet to the spiral accompanies this rollup. A short distance aft of the wing, essentially all of the vorticity contained in the sheet is transferred to the two trailing vortices and the sheet no longer exists. Beyond this distance, the effect of the wake can be considered due only to the two trailing vortices."⁶⁹ This phenomenon may be best understood by considering that any lifting surface, in producing lift, creates low pressures above it and higher pressures below it. Because of the tendency of air to flow from high pressure to low—outward below the wing, around the tip, and inward above the wing—a rotational motion is initiated and, ultimately, the vortices.

In recent years, a number of highly technical studies of the nature of air turbulence have been completed⁷⁰ but for the purposes here a few

⁶⁸ Z. Bleviss, *Theoretical Analysis of Light Plane Landing and Take-off Accidents Due to Encountering the Wakes of Large Airplanes*, Douglas Aircraft Rep. No. SM-18647 (1954) at 1.

⁶⁹ Boeing, *State-of-the-art Survey for Minimum Approach, Landing, and Takeoff Intervals as Dictated by Wakes, Vortices, and Weather Phenomena*, Re. No. RD-64-4 (Jan. 1964) at 2.

⁷⁰ Andrews, *A Flight Investigation of the Wake Behind a Meteor Aircraft, With Some Theoretical Analysis*, Aeronautical Research Council Technical Report C.P. No. 282 (1956); Beech Aircraft Corp., *Safety Suggestions No. 8* (1952); Z. Bleviss, *Theoretical Analysis of Light Plane Landing and Takeoff Accidents Due to Encountering the Wakes of Large Planes*, Douglas Rep. No. SM-18647 (Dec. 1954); C.A.B. Aircraft Accident Report, Piper Model PA-22, N2945P, Near Dover, Delaware, 23 Sept. 1948, File No. 2-0124, adopted 5 Oct. 1959, released 10 Oct. 1959; J. Campbell, *Ground Proximity Effects Associated With V/STOL Aircraft*, Eighth Anglo-American Aeronautical Conference (1961); W. Castles, H. Durham, & J. Kevorkian, *Normal Component of Induced Velocity for Entire Field of a Uniformly Loaded Lifting Rotor with Highly Swept Wake as Determined by Electromagnetic Analog*, NASA TR-41 (1959); J. DeYoung & W. Barling, *Prediction of Downwash Behind Swept-Wing Airplanes at Subsonic Speed*, NACA

general descriptive comments will suffice. In general terms, the twin vortices tend to settle downward and, as they near the ground, to move outward or laterally. "The intensity of the air disturbance created by the trailing vortices, *i.e.*, the magnitude of the air velocities induced at given radial distances from the centers [of the vortices], is proportional to the weight of the airplane and inversely proportional to the span, the air density, and the forward speed, other things being equal."⁷¹ Large, heavily loaded aircraft tend to produce more intense disturbances than smaller, lightly loaded aircraft. Also, disturbance will be most severe at lower speeds—that is, in take off and landing. Studies have indicated that the rolling up process is essentially completed when the aircraft has traveled one or two span lengths from the point of generation and that at the point of generation the lateral separation of the pair of vortices is roughly 80 percent of the span of the aircraft. The composition of each trailing vortex may be described as a cylindrical core rotating in the manner of a solid body, but in a counterrotating relationship with the other vortex. Hence, between the pair of trailing vortices there is a downward flow of

Tech. Note 3346 (Jan. 1955); J. DeYoung, *Theoretical Symmetric Span Loading Due to Flap Deflection for Wings of Arbitrary Plan Form at Subsonic Speeds*, NACA Rep. 1071 (1952); D. Dosanjh, E. Gasparek, & S. Eskinazi, *Decay of a Viscous Trailing Vortex*, 13 *The Aeronautical Quarterly* pt. 2 (May 1962); R. Djorup, *Proposal for Vehicle Attitude and Velocity Instrumentation*, Basic Devices Incorp. (Sept. 1963); D. Ekstedt, *Laboratory and Flight Test of Chemical Tracking Aids Performed for Project 6785*, AFMDC TR 58-2, AD 123736, Project 6785, Sys. 590R, Air Force Missile Development Center, ARDC USAF, Holloman AFB, N.M. (July 1958); A. Gessow, *Review of Information on Induced Flow of a Lifting Rotor*, NACA Tech. Note 3238 (Aug. 1954); R. Gray, *Experimental Smoke and Electromagnetic Analog Study of Induced Flow About a Model Rotor in Steady Flight Within Ground Effect*, NASA Tech. Note D-458 (Aug. 1960); E. Hahn & J. Rogers, *The Development and Digital Programming of a Subsonic and Supersonic Elastic Airload Solution*, The Boeing Co., Airplane Div., Doc. D6-3393 (Oct. 1960); R. Head & W. Byrd, *Report of Project NR AVN 2656 Effect of Wing Tip Vortices and Sonic Shock on Army Aircraft in Flight*, U.S. Army Aviation Bd., Ft. Rucker, Ala. (May 1957); H. Heyson, *Preliminary Results From Flow Field Measurements Around Single and Tandem Rotors in the Langley Full Scale Tunnel*, NACA Tech. Note 3242 (Nov. 1954); H. Heyson & S. Katzoff, *Induced Velocities Near a Lifting Rotor with Nonuniform Disk Loading*, NACA Rep. 1319 (1957); R. Jordinson, *Flow in a Jet Directed Normal to the Wing*, Brit. R&M No. 3074 (Oct. 1956); H. Kaden, *Aufwicklung einer Unstabilen Unstetigkeitsfläche*, Ing. Archiv, II Band, at 140-68 (1931); T. Kerr, *A Flight Investigation into the Persistence of Trailing Vortices Behind Large Aircraft*, Royal Aircraft Establ. Tech. Note No. AERO 2649 (Sept. 1959); C. Kraft, *Flight Measurements of the Velocity Distribution and Persistence of the Trailing Vortices of an Airplane*, NACA Tech. Note 3377 (March 1955); R. Kuhn, *An Investigation to Determine Conditions Under Which Downwash From VTOL Aircraft Will Start Surface Erosion From Various Types of Terrain*, NASA Tech. Note D-56 (Sept. 1959); H. Lamb, *Hydrodynamics* (6th ed. 1945); W. McGowan, *Calculated Normal Load Factors on Light Airplanes Traversing the Trailing Vortices of Heavy Transport Airplanes*, NASA Tech. Note D-829 (May 1961); R. Monical, *A Survey of Helicopter Wake Information and Extension of the Vortex Ring Wake Representation*, The Boeing Co., Airplane Div., Doc. D6-6612TN (1963); H. Panofsky & V. Rao, *Structure of Atmospheric Turbulence Close to the Surface Over Smooth Terrain*, Final Rep. Cont. AF 19(604)-2252, U.S. Dep't of Commerce, OTS, Washington, D.C. (1958); P. Payne, *Helicopter Dynamics and Aerodynamics*, The MacMillan Co. (1959); J. Sanders, *Thrust-Control Problems in a Turbojet Engine*, NACA Conf. on Some Problems of Aircraft Operation, Tech. Papers presented at the NACA Conf. (Nov. 1954); R. Scorer, *Natural Aerodynamics* 149 (1958); P. Smith & R. Fetter, *Remote Measurement of Wind Velocity by the Electromagnetic-Acoustic Probe*, Proceedings of the 5th Military Electronic Conf., Washington, D.C. (1961); H. Squire, *The Growth of a Vortex in Turbulent Flow*, Fluid Motion Sub-Comm. Aeronautical Research Coun. (1954); J. Spreiter & A. Sacks, *The Rolling Up of the Trailing Vortex Sheet and Its Effect on the Downwash Behind Wings*, J. AEROSPACE SC. 21-32, 72 (Jan. 1951); *The Supersonic Transport—Industry Accepts a Challenge*, AMERICAN AVIATION, Oct. 1963, at 18.

⁷¹ J. Wetmore, *Aircraft Trailing Vortices—A Hazard to Operations*, ASTRONAUTICS & AERONAUTICS 45 (Dec. 1964).

air, and outside the vortices, an upward flow.⁷²

As the twin vortices settle downward and closer to the ground, the interaction of the turbulent air and the ground causes the vorticity fields to begin to move laterally or parallel to the ground. The effect of the ground and its relationship to the vorticity fields, then, play a large part in the understanding of the nature of wake turbulence. As the vortices settle to a point two to three span lengths above the ground, their initial vertical velocity first begins to slow and normally ceases all vertical movement approximately one-half span above the ground. At this point of zero motion the twin fields of turbulence begin to further separate and to move laterally along the ground. Accelerating from the point of zero motion, the vortex centers move laterally and soon attain a speed of the same value as the initial settling velocity.⁷³ When the vortices are generated closer to the ground, their initial vertical velocity is less, they settle to a level somewhat closer to the ground, and spread apart more rapidly: about 350 feet per minute for a heavy transport and about 150 feet per minute for a light transport or light personal aircraft.⁷⁴

Although a field of turbulent air may continue as a hazard for a period in excess of three minutes in still air, certain factors affect the field of turbulence so as to hasten its normal decay or to decrease its danger. The natural decay of these trailing vortices is a result of the internal development of tangential shear forces which cause the core to grow and its velocity to decrease; but atmospheric turbulence due to wind or convective effects, friction between the ground and the vortex airflow when the vortices are near the ground, and irregular span loading hasten the decay process and ultimate dissipation of the vortices.⁷⁵ Because the fields of turbulent air generated in the wake of an aircraft in flight are enveloped by surrounding air, the movement of the turbulent air mass is affected by existing atmospheric conditions. That is, if a cross-wind is present on a runway at the time the wake vortices are generated, they will tend to be carried with the cross-wind eventually off of the landing and take off area. In order for a vortex system to be carried off a runway in as little as thirty seconds, a normal wind component of approximately ten miles per hour would be necessary.⁷⁶ However, a light cross-wind component could also *increase* the chances of an aircraft encountering wake turbulence because each half of the vortex system spreads outward and away from the center-line point of generation symmetrically; and if the cross-wind is equal and opposite to the lateral spread rate of one of the vortices, this vortex may maintain a fixed position above the runway until it dissipates.⁷⁷ In fact, so great is the effect of surrounding atmospheric conditions that if the lateral travel of a vortex system is reinforced by a cross-wind, the

⁷² *Id.*

⁷³ *Supra* note 69, at 20.

⁷⁴ J. Wetmore & J. Reeder, *Aircraft Vortex Wakes in Relation to Terminal Operations*, NASA Tech. Note D-1777, at 5.

⁷⁵ *Id.*

⁷⁶ *Supra* note 68, at 34.

⁷⁷ *Supra* note 74, at 12.

field of turbulence may even cross to a parallel runway with sufficient strength to constitute a hazard. The closer together the adjacent runways lie, the greater the chance there is of an aircraft encountering a strong transient vortex.⁷⁸

Although wake turbulence offers the greatest threat to light aircraft, other forms of turbulence add to the complete aircraft wake. The primary influence of the velocity field created as a result of the propulsion system of a jet aircraft occurs at low altitudes, low airspeed, and high engine thrust—during take off. However, studies have revealed that at distances greater than 400 feet aft of the engines, the turbulent effect is negligible.⁷⁹ Insofar as propeller or ducted fan systems are concerned, one study has found that "for distances in excess of 500 feet behind a typical current transport aircraft's propellers, the propulsive velocity field has decayed to 15 knots or less and can be ignored as a hazard to nearby aircraft."⁸⁰ Vortex configurations are also produced by VTOL, STOL and rotar aircraft of varying intensity according to hovering flight, vertical ascent and descent, low-speed or transitional flight and high-speed forward flight.

There are, basically, three situations in which wake turbulence may be encountered and each has a different effect upon the penetrating aircraft:

Cross-Track: The penetrating aircraft crosses the wake transversely. The effect on it is felt as pitching and vertical motion with load factors going from positive to negative and then positive again in a matter of one second or less, depending on aircraft size and speed.

* * *

Along-Track, Outside Core: The penetrating aircraft experiences a downdraft between the cores and an updraft outside the cores with associated rolling. This normally does not induce appreciable loss of altitude.

* * *

Along-Track, Through Core: The result of penetrating the core in flight parallel to it is a violent rolling action. This rapid rolling could result in the aircraft becoming uncontrollable with an appreciable loss of altitude.⁸¹

The vortex encounters with the greatest possibilities of serious consequences are those which occur during the landing and take off phases of operation, for during this period departing and arriving aircraft are constrained to flight paths in essentially the same vertical plane. The hazard of an encounter during this period is increased by high traffic density, low airspeed margins, and low altitudes. Should an encounter occur during this period of a flight, the pilot could experience a rapid loss of lift and settling or a violent rolling motion of such magnitude as to prevent correction by available control surfaces at an altitude at which control probably could not be regained.⁸²

As a result of the studies that have been done, certain observations can be made: (1) since the vortex trails are invisible no appropriate evasive action

⁷⁸ *Supra* note 69, at 29-32.

⁷⁹ *Supra* note 69, at 24.

⁸⁰ *Id.*

⁸¹ *Supra* note 69, at 29-32.

⁸² *Supra* note 74, at 12.

can be taken by the pilot except to be alert on calm days in high-density traffic areas whether or not another airplane is in sight, (2) reducing speed or flying either above or below the path of an airplane should reduce the magnitude of the load factors, (3) either entering perpendicular to or quartering the vortex trails will result in approximately the same magnitude of load factors . . . and (4) the effect of elevator motion on the load factors could either be cancelling or aggravating, depending upon the phasing of the elevator motion with the impulses from the vortices.⁸³

Proper spacing is the only precaution which can eliminate the hazard posed to pilots by wake turbulence. Accordingly, and for other reasons, FAA regulations stipulate minimum separation standards.⁸⁴ However, present spacing provisions have not always proved adequate and certain "rules of thumb" have evolved concerning the avoidance of an encounter with wake turbulence, *viz.*, pilots are advised to take off short and to land long and at slightly excessive speeds so as to retain the aircraft's stability should an encounter occur.

2. Turbulent Air-Related Cases

*Franklin v. United States*⁸⁵ is a decision illustrative of the importance of the use of expert witnesses and the technical aspect of turbulent air-related crash cases. Plaintiff, an experienced pilot, purchased a new Beach Bonanza and the next day flew it to Meigs Field, Chicago. While on final approach and some three-quarters of a mile from the runway threshold, according to air traffic control's estimation, a helicopter was cleared to land and was permitted to pass across plaintiff's intended flight path. The light aircraft crashed during landing, allegedly as a result of encountering wake turbulence generated by the rotorcraft. Judgment was entered for the plaintiff by the trial court in his action against the Government, alleging negligent acts on the part of ATC proximately resulting in the crash. The appellate court reversed and remanded as against the Government. Both plaintiff's and defendant's experts conceded that turbulent air reacts in a predictable manner: it has a tendency to settle downward from the point of generation and to move with any existing atmospheric winds. The parties stipulated that at the time of the crash there was a cross-wind of eight knots, resulting in a lateral movement component of 13.5 feet per second. If Air Traffic Control was correct in its estimation that plaintiff was three-quarters of a mile from the runway threshold at the time the turbulence was generated, twenty to twenty-four seconds would have elapsed before plaintiff's aircraft could have reached the point in question, and the field of turbulent air would have been moved completely off of the runway by the cross-wind. The court therefore concluded that the crash was a result of a low-speed stall, *i.e.*, pilot error.

Although the Government has a number of complex legal defenses available in the trial of a turbulent air-related crash case, a defense on

⁸³ W. McGowan, *Calculated Normal Load Factors on Light Airplanes Traversing the Trailing Vortices of Heavy Transport Airplanes*, NASA Tech. Note D-829 (May 1961), at 2.

⁸⁴ *Supra* note 27.

⁸⁵ 342 F.2d 581 (7th Cir. 1965).

the facts will be made if at all possible. For example, if the Government can establish that there was no encounter, *i.e.*, that plaintiff's aircraft passed *above* the point of generation or that atmospheric conditions *moved* the turbulent air from the plaintiff's flight path, then other defenses are unnecessary.

A basic theory of recovery against the Government in the performance of ATC functions for turbulence-related accidents is the failure to establish adequate separation between aircraft, so that turbulent air may have an opportunity to dissipate with the passage of time or the effect of atmospheric conditions. Minimum standards of separation are outlined in the Air Traffic Control Procedures Manual:⁸⁶

422.2—

Between departing aircraft, sufficient separation [shall be effected] so that: The preceding aircraft has either crossed the opposite end of the runway or turned away from the projected path of the succeeding aircraft before the latter begins take-off run.

* * *

423.1—

Separate an arriving aircraft from another aircraft using the same runway by insuring that the arriving aircraft does not cross the approach end of the runway until one of the following conditions exists:

A. A preceding, arriving aircraft has taxied off the runway.

B. A preceding, departing aircraft has crossed the opposite end of the runway. * * *⁸⁷

Another theory upon which recovery has been predicated is the failure to discharge a duty to warn of the possible presence of turbulent air.⁸⁸ Unlike the separation theory of recovery, duty to warn is not based on an examination of the phenomenon itself, but rather an examination of the obligations of the air traffic controller. The Federal Air Regulations and the Air Traffic Control Procedures Manual provide:

437—PHRASEOLOGY

Phraseology shall be employed as set forth below.

* * *

439.18—To issue cautionary information regarding possible rotocraft downwash, thrust stream turbulence, and/or wing tip vortices: CAUTION, TURBULENCE (traffic information).

EXAMPLE: CAUTION, TURBULENCE, DEPARTING AMERICAN ELECTRA.⁸⁹

This quoted section does not, in and of itself, imply the existence of a *duty* to warn, but only outlines the language to be used should a warning be given.

One of the least complex of turbulent air cases is the relatively early case of *Wenninger v. United States*.⁹⁰ In that case an action was brought

⁸⁶ ATC Procedures Manual (12 Nov. 1964).

⁸⁷ *Id.* at 4-7, 4-8.

⁸⁸ *Hartz v. United States*, 249 F. Supp. 119 (N.D.Ga. 1965), *rev'd*, 387 F.2d 870 (5th Cir. 1968).

⁸⁹ *Supra* note 102, at 4-2 [now sections 410.6-412.1].

⁹⁰ 234 F. Supp. 499 (D. Del. 1964).

under the Federal Tort Claims Act for the death of a pilot whose aircraft encountered vortex turbulence generated by an Air Force aircraft in close vicinity to a navigational aid, used extensively for practice by Air Force personnel from a nearby base. Plaintiff alleged that both the commander of the base and the Civil Aeronautics Authority were negligent in failing to warn civilian fliers of such activities, either by the issuance of a NOTAM ("Notice to Airmen"), or by some other appropriate means. The action was dismissed because plaintiff failed in his burden to establish that the defendant's negligence, if any, was a proximate cause of the crash in question, and more specifically, because plaintiff failed to show that in all likelihood the accident would *not* have happened had the CAA or the commander issued such warnings. While the holding of *Wenninger* does not shed a great deal of light upon the consideration of ATC's involvement in similar cases, the case is important for what it does *not* say. That is, the case does *not* involve an attempt on the part of the Government to assert the primary responsibility or other more involved defenses, available and predictably present in other cases. *Wenninger*, like *Franklin*, demonstrates the obvious fact that the Government will rely upon common negligence or fact defenses before turning to more involved defenses.

The primary responsibility defense in early decisions seemed to become almost *absolute* in nature. However, more recent decisions, particularly those involving turbulent air-related crashes, indicate that the success of this defense has been greatly limited. The evolution of the no duty defense has followed a similar path—first one of expansion and then limitation.

*Johnson v. United States*⁹¹ was a relatively early wake turbulence case in which many of the issues regarding Governmental defenses, only recently resolved, were first considered in depth. In that case, the pilot of a light Cessna aircraft followed an Air Force B-47, which was executing an instrument low approach, into the landing pattern at Omaha Municipal Airport, encountered wake turbulence and crashed. An action was brought against the Government pursuant to the F.T.C.A. alleging negligent acts on the part of controllers in their failure to take the wake turbulence hazard into consideration when issuing clearances. The Government answered that "to impose such a duty upon the control tower would impede the flow of traffic . . . [and] that such duty [determination of safe separation] rests solely with the pilot of the following plane."⁹² In ruling against the Government the court concluded:

The same delay in traffic would result whether the duty is imposed upon the control tower or the pilot of the plane. In any event, the safety of those using air lanes is not to be sacrificed to traffic expediency. I therefore hold that control tower employees, in the exercise of reasonable care, do have a duty to take into consideration turbulence hazards when giving clearance to land.⁹³

⁹¹ 183 F. Supp. 489 (E.D. Mich. 1960), *aff'd*, 295 F.2d 509 (6th Cir. 1961).

⁹² *Id.* at 493.

⁹³ 183 F. Supp. at 493.

*Furumizo v. United States*⁹⁴ was the first turbulent air-related crash case to go against the Government in such a manner as to seriously question the present viability of defenses previously relied upon by the Government with a great measure of success. On 19 June 1961, at Honolulu International Airport, plaintiff's decedent, a student pilot, was practicing take off and landing when he was denied take off clearance by ATC because of the imminence of the take off of a Japan Air Lines DC-8 on an intersecting runway. Furumizo came to a stop on the runway intersecting the one being used by the commercial jet and, shortly after the jet aircraft cleared the intersection, Furumizo's aircraft was given clearance in the following manner:

Piper Nine Nine Zulu Caution Turbulence Departing DC-8 Cleared For Take-off.⁹⁵

The Piper immediately began its take off run and was observed lifting-off in an apparently normal manner; but its right wing suddenly dropped to a perpendicular attitude as it crossed above the intersection of the runways. The aircraft crashed and burst into flames, killing both plaintiff's decedent and his instructor. It was determined that the Piper encountered the left wing vortex of the departing DC-8 and that the turbulence was "so violent that the little Piper once caught in it had no chance of avoiding a crash—in other words, that the strength of the turbulence was so great as to overcome any ability of the Piper to overcome it."⁹⁶ In an action brought against the Government pursuant to the F.T.C.A. alleging negligent acts on the part of ATC in failing to prevent the take off of decedent's aircraft into a known hazard, or one which should have been known, by the tower controller, the Government answered with the defenses of primary responsibility and lack of duty, *i.e.*, having followed the Air Traffic Control Procedures Manual, the controllers owed no additional duty to decedent.

A lengthy and detailed trial followed with a district court decision against the Government. The primary responsibility defense was initially overcome by plaintiff on the ground that decedent's instructor was in actual control of the aircraft and that decedent, who had yet to solo, could not be found cognizable of the hazards of wake turbulence.⁹⁷ The Government's defense regarding lack of duty was not as easily overcome. The Government urged that, having given the turbulence warning, as required by procedures prescribed by the Administrator of the FAA, no further duty was owed. The *Furumizo* court noted that the earlier decision in *Johnson*, holding that:

The fact that variables prevent the fixing of limits with certainty does not absolve the control tower from a duty to take the turbulence hazard into consideration, but this is merely one factor that may be considered in de-

⁹⁴ 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967).

⁹⁵ *Id.* at 988.

⁹⁶ 245 F. Supp. at 990.

⁹⁷ 245 F. Supp. at 991.

termining whether under a given set of facts the employees of the control tower did meet the standard of reasonable care.⁹⁸

In agreeing with *Johnson*, the *Furumizo* court observed "that control tower employees in the exercise of reasonable care do have a duty to take into consideration turbulence hazards when giving clearance to take off, as well as to land."⁹⁹ Countering the Government's argument that it owed no duty to decedent in addition to that set out in the Procedure Manual, the court reviewed all existing air regulations and the Procedure Manual, and in so doing clarified the Government's duty. It was determined that at the time of the accident certain Federal Air Regulations¹⁰⁰ were in force, adopted in accordance with the Administrative Procedure Act,¹⁰¹ and that the Administrator had also issued Air Traffic Control Procedures *not* adopted in accordance with the Administrative Procedure Act for the use of its employees, the controllers.¹⁰² Although the court found that the Procedures *do not have the force and effect of law*, as do the regulations, the Government contended that the duty of its controllers is *limited* by the former. After a detailed consideration of the provisions of the Procedural Manual, such as:

Section 100.7 . . .

* * *

Therefore, when situations arise which are not provided herein, *personnel are expected to use their best judgment*, both as to the procedure employed and the phraseology in which it is expressed [Emphasis added.].¹⁰³

the court determined that the regulations and directives in question did not leave the tower controllers devoid of any duty to exercise *judgment* in the interest of safety. The court observed:

that these regulations did contemplate, permit and authorize the exercise of discretion and judgment on the part of tower control operators to lengthen separation if the danger of air turbulence appeared eminent . . .¹⁰⁴

The plaintiff contended that the Government had previously acknowledged its special obligation, by publications and directives made available to its tower personnel, to alert pilots of the possible hazards of wake turbulence and to give warning information coupled with lengthened separation wherever advisable. However, the plaintiff went on, pursuant to a circular letter of 29 December 1959, the Government had attempted to shift the obligation to the pilot. After considering the circular in question, the court concluded:

Thus, for the first time, possibly due to previous lawsuits against the government claiming negligence on the part of tower control operators, the

⁹⁸ 245 F. Supp. at 998.

⁹⁹ *Id.*

¹⁰⁰ Part 60 Civil Air Regulations, which were in effect on the date of the accident.

¹⁰¹ 60 Stat. 237, 5 U.S.C. § 10.01 (1964).

¹⁰² 245 F. Supp. at 999.

¹⁰³ Section 60 of the ATC Procedure Manual in effect at the time of the crash in question, cited at 1000.

¹⁰⁴ 245 F. Supp. at 1002.

aviation authorities appear to attempt to protect controllers from negligence as to the obligatory safety factor, by disavowing any responsibility whatsoever, except for possible cautionary warning, without additional action such as longer separation, etc., even when the same might be certainly or well calculated to prevent reasonably anticipatable disaster to small planes from trailing vortices, as in this case. It is to be noted that *all this is done with no changes in the basic provisions of the statutes and regulations having the force of law, that existed when the previous directives and instructions were issued acknowledging some power and responsibility on the part of tower controllers to protect life and property by more action than the minima prescribed or directed by the Administrator.*¹⁰⁵

The court found that the Government's agent was guilty of "a complete and callous disregard of any duty to exercise judgment whatsoever," and that "no judgment was exercised"—that "[t]here was simply a slavish purported following of the 'book,' with no attempt to exercise a judgment, which under the circumstances it was the duty and within the power of the controller to exercise, and which would and could have avoided this accident."¹⁰⁶

On appeal *Furumizo* was affirmed¹⁰⁷ but the "follow the book" theory urged by the Government in the trial court was neither accepted nor rejected by the appellate court. The court declined to pass upon this question, basing the affirmance on the single ground that when it became apparent that previous turbulence warnings had been disregarded by plaintiff's decedent, it became the duty of the controller to take additional measures to attempt to avoid the encounter, *i.e.*, the Government was required to *fully discharge* its duty. Failing to take such additional measures, the Government was found negligent, such negligence amounting to a proximate cause of the resulting crash.

It is submitted that it is doubtful the Government's "follow the book" theory will be successfully asserted again. Although the appellate court did not pass on the question, had a less complex means of affirmance not been available it seems apparent that this approach would have been taken. The theory of this case is but another example of the Government's increasing liability for its ATC functions, as a result of the application of common negligence principles to determine the existence and breach of a duty owed to the flying public.

*Hartz v. United States*¹⁰⁸ is the most recent, and certainly the most important, wake turbulence case to have progressed as far as the appellate courts. The case serves to re-define and extend much of what had previously been considered ATC's responsibility, and it is, therefore, one of the landmark decisions of aviation law. Plaintiff's decedent, pilot of a Beach Bonanza, taxied into position and requested take off clearance from a point just short of the intersection of an approach and runway at Atlanta Municipal Airport. While Hartz awaited clearance, an Eastern Air Lines

¹⁰⁵ 245 F. Supp. at 1007.

¹⁰⁶ 245 F. Supp. at 992.

¹⁰⁷ 381 F.2d 965 (9th Cir. 1965).

¹⁰⁸ 249 F. Supp. 119 (N.D. Ga. 1965), *rev'd*, 387 F.2d 870 (5th Cir. 1968).

DC-7 was cleared and took off on the intersecting runway, passing directly in front of decedent's aircraft. Approximately thirty seconds after the DC-7 acknowledged its take off clearance, the controller gave Hartz the following warning: "November 96 Delta cleared for take-off, watch for prop wash."¹⁰⁹ Shortly after Hartz turned onto the intersecting runway and took off, witnesses saw the lights of the Bonanza apparently wobble at a height of 50 to 75 feet; the aircraft violently crashed to the runway in an inverted attitude, skidded and came to rest. Both pilot and passenger were killed. An action was brought against the Government under the F.T.C.A. alleging negligence on the part of the controller for failure to allow sufficient separation and for breach of common law duty. The district court¹¹⁰ found, as the United States contended, that the controller had no legal duty, statutory or otherwise, to do anything more than maintain separation between the aircraft sufficient to avoid a collision. The court also found that although *no duty* was owed to Hartz to warn of turbulence, the warning which was given was sufficient to apprise him of any possible danger: "once having knowledge of the possibility of the existence of turbulence, it became the responsibility of the pilot to conduct the take-off in the safest possible manner."¹¹¹ While the evidence indicated that the turbulence which the Bonanza encountered was a trailing vortex, shed by the right wing of the departing DC-7, the court held that the controller breached no duty owed to plaintiff's decedent and that the crash proximately resulted from the negligence of Hartz.¹¹² The trial court accepted without question that the Air Traffic Control Procedures Manual has the force and effect of law (contrary to the finding in *Furumizo*) and, in setting forth the responsibilities of a controller, is the standard against which his acts should be compared. No violations were found. Also, it was determined that the controller owed Hartz no common law or independent duty of care, for the State of Georgia had enacted all federal civil air procedures as its own;¹¹³ there was no other body of law to look to for an additional duty. The controller discharged the whole of his responsibility and owed no further obligation to Hartz who, the court believed,¹¹⁴ committed an act of negligence when he requested an "intersectional" take off, such request contributing to a substantial shortening of the runway distance between himself and the departing aircraft. However, it is apparent that the district court primarily based its decision upon the Government's primary responsibility defense:

The ultimate responsibility for the take-off at that or any other time rests with the pilots; the pilot, not the controller, was in the position to delay his take-off if he felt it would be to his benefit to do so. The main responsibility for the safe conduct of an aircraft in the control zone under Visual Flight Rule conditions rests with the pilot of each aircraft.

¹⁰⁹ *Id.* at 121.

¹¹⁰ *Supra* note 108. The trial court accepted the Government's "follow the book" defense prior to the *Furumizo* appellate decision.

¹¹¹ 249 F. Supp. at 126.

¹¹² *Id.*

¹¹³ 249 F. Supp. at 124.

¹¹⁴ *Supra* note 111.

* * *

The theory asserted by plaintiff's counsel would place upon the operators of control towers the primary responsibility for the operation of aircraft at the field. Governmental regulations having the force of law, have assigned this responsibility to the operators of the aircraft.¹¹⁵

Although the trial court's opinion, in most respects, seemed to predictably follow existing case law, the Fifth Circuit reversed and remanded.¹¹⁶ The controlling issues upon appeal were the following:

- (1) Did the controller have a duty to give Hartz a warning which would include possible danger from wing tip vortex?
- (2) If the controller did owe Hartz such a duty, was the warning which he gave Hartz sufficient to discharge that duty?¹¹⁷

In its attempt to determine whether there was a duty to warn of wing tip vortices, the appellate court recognized that Governmental regulations have placed primary responsibility for the movement of an aircraft in the pilot but stated, "Nonetheless, before a pilot can be held legally responsible for the movement of his aircraft *he must know, or be held to know, those facts which were then material to the safe operation of his aircraft* [Emphasis added.]."¹¹⁸ The significance of this statement may prove to be tremendous, for by introducing such a question of fact as a material consideration, the effectiveness of the primary responsibility defense may be completely lost. That this was the intent of the court seems apparent from its further statement that:

Hartz was down below . . . studying his cockpit instrument panel and awaiting take-off directions. . . . Clearly, the controller was one better qualified by training, experience and vantage position to estimate time and distance and it was his duty to direct and guide the Bonanza. . . .¹¹⁹

Though dictum, this statement is irreconcilable with what had previously been the defense of primary responsibility, and it clearly represents an extension of the responsibility of the air traffic controller. Although previously stated in *Schultetus*,¹²⁰ *Tilley* may be thought of as standing for the proposition that "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"¹²¹ but the appellate court in *Hartz* apparently found to the contrary, relying on the reasoning of *Ingham*.¹²² In so doing the Fifth

¹¹⁵ 249 F. Supp. at 125.

¹¹⁶ 387 F.2d 870 (5th Cir. 1968).

¹¹⁷ *Id.* at 872.

¹¹⁸ 387 F.2d at 873.

¹¹⁹ *Id.*

¹²⁰ 277 F.2d 322 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1960).

¹²¹ 375 F.2d 678, 684 (4th Cir. 1967).

¹²² 373 F.2d 227, 236 (2d Cir. 1967).

While air travel in this jet age has become commonplace, we know too well that there is always lurking the possibility of tragic accidents capable of snuffing out the lives of hundreds in a mere matter of seconds. Much of the success in preventing such disasters can be attributed to the federal government's assumption of the supervision of commercial flying; and public confidence in air travel has been fostered in large measure by knowledge that our government, recognizing the high stakes involved, is constantly overseeing the carrier's operations in order to promote safety.

Circuit followed reasoning also similar to that in *Furumizo* and used language which must be viewed as an extension of ATC's duty:

[T]he controller gave Hartz a warning which was neither sufficient under the manual nor adequate to caution Hartz of the possible danger which was then known to the controller. The failure of the controller to properly caution Hartz of the possible danger of wing tip vortex *imposed upon the controller an additional duty to delay take-off clearance for the Bonanza for such a period as was reasonably necessary to permit such turbulence . . . to dissipate*. The controller's breach of duty clearly was a proximate cause of the crash of the Bonanza [Emphasis added.].¹²³

The Fifth Circuit in *Hartz* concluded by determining that the warning which was given was insufficient. The Manual provides the precise phraseology which should be used by a controller when communicating with a pilot requesting take off clearance.¹²⁴ Instead of following the phraseology required by the Manual, the controller warned Hartz of "prop wash;" the court was of the opinion that, prop wash being less severe than wake turbulence, Hartz might have been misled to believe he would encounter only minimal disturbance. The trial court had found the warning which was given to be satisfactory on the ground that it was sufficient to warn the pilot of all forms of turbulence.

Although Controller . . . warned only of prop wash, information concerning various type turbulences . . . had been well tabulated in the publications available to Hartz . . . and this warning . . . should have made the Bonanza pilot cognizant of all types of turbulence.¹²⁵

Although *Hartz* did not cite *Franklin* in support of this proposition, it is interesting to note the language which appears in this latter case regarding knowledge of the phenomenon.

While information had been issued in 1959 by the CAA, and by the manufacturer . . . which warned pilots of the effect of turbulence generated by "large, multi-engined or jet aircraft" there was no such information available concerning the effects of turbulence generated by helicopters.¹²⁶

The question immediately arises whether the appellate *Hartz* language that "he must know, *or be held to know*, those facts which are then material to the safe operation of his aircraft," coupled with the *Franklin* implication that knowledge of conventional aircraft wake turbulence may be imputed, may bring about another defense—contributory negligence—to replace defenses now challenged. The general availability of information concerning the phenomenon, *i.e.*, FAA, manufacturers, special interest groups, cannot be questioned.¹²⁷ It should be recognized, however, that cognizance of the phenomenon would surely be imputed to a pilot involved in an encounter today. The rationale of *Furumizo* and *Hartz* must be

¹²³ *Supra* note 118.

¹²⁴ 387 F.2d at 874.

¹²⁵ 249 F. Supp. at 126.

¹²⁶ 342 F.2d 581, 585 (7th Cir. 1965).

¹²⁷ See, *e.g.*, *Furumizo v. United States*, 245 F. Supp. 981, 1002-008 (D. Hawaii 1965) for a survey of such material.

viewed as reflective of the state of art in the early 1960s when both crashes occurred.

The question still remains whether the Procedures Manual has the force and effect of law. *Furumizo* reasoned that it does not, but the *Hartz* court accepted without question that it does. However, by requiring ATC to provide a pilot with information "material to the safe operation of his aircraft" before he can be held solely responsible for its operation, the *Hartz* court eliminated the importance of the distinction. That is, even if the Procedures Manual has the force and effect of law, ATC cannot discharge the whole of its duty simply by "following the book."

IV. A SURVEY OF RECOMMENDATIONS

An examination of the extent of Government ATC liability, although a necessary element of any consideration of the larger question of air safety, serves only to reflect the "exposed" inadequacies of the system. Having demonstrated that complex defenses have failed to stem the growing tide of expanding liability, the authors suggest that this trend toward some ultimate form of absolute liability can be reversed only by a detailed modification of the entire system of air safety in general and ATC in particular. Numerous suggestions of varying value have covered the entire spectrum from optimism to pessimism. Department of Transportation Secretary Alan S. Boyd said, "I can assure you that we will act, and act in time to solve airport congestion."¹²⁸ At the other extreme is Walter Binaghi, International Civil Aviation Organization Counsel President, who has to deal with the world-wide problems of aviation. After recalling that airport-aircraft coordination had not been very well handled when jet transports were first introduced, he commented to the International Aviation Club of Washington, "It is too late to try to do it with respect to the jumbo jets and the SST."¹²⁹ While such exchanges were once important only to the aviation community, general public interest is now being generated by way of mass media, such as a recent newspaper opinion survey of the commercial pilot view of air safety.¹³⁰ The survey reflected three main trends in opinion: the need for the immediate development of modern support facilities, the development of a collision avoidance system, and the alleviation of the congestion problem:

Closely linked with the collision problem is the mixing of commercial and general aviation planes.

While the pilots respected or were even boosters of general aviation, they seemed to prefer some separation of the large and fast commercial liners from the smaller, lighter, slower private planes.¹³¹

A trade magazine recently proposed what must be the broadest of all recommendations for a "clean sweep."¹³² In addition to urging the development and adoption of a great many sophisticated and expensive in-

¹²⁸ AMERICAN AVIATION, Aug. 1967, at 22.

¹²⁹ *Id.*

¹³⁰ Dallas Morning News, 4 Feb. 1968, at 12A, col. 1.

¹³¹ *Id.*

¹³² FLYING, Feb. 1968, at F-1.

ternal navigation systems, the editors proposed that:

(1) Aircraft to ATC communication be simplified through the development of a computerized data link system, eliminating the problems inherent in voice communications;

(2) Consideration be given to certification and widespread adoption of commercial "automatic" (computerized) landing systems;

(3) The entire air control system under 24,000 feet be revised by adopting a dual system of corridors or "flyways," off limits to uncontrolled aircraft, one at an upper level above 8,000 feet connecting major terminal areas, and another for the high-density airport security zone, shaped similar to a "mushroom" whose base extends 10 nm from the airport up to 2,000 feet where it extends outward to 20 nm and up to the "moon," leaving unrestricted all other areas and

(4) A nationally-coordinated scheduling system be developed in order to reduce existing congestion problems, to be controlled by an agency similar to the CAB.

While there seems to be general agreement that the present Airways system is inadequate as a result of its complexity and that some new system is vitally needed, certain aspects of the proposal failed to take overall system needs into consideration. It was proposed by the trade magazine that with the implementation of "automatic" landing systems and a common landing speed for all approaching aircraft, present separation minimums could be reduced, thus increasing the number of aircraft using a runway during peak traffic periods:

Takeoffs from a departure runway should be at the pilot's *discretion*. In any event they need not be more than 30 seconds apart, for we shall also have a departure speed, which, along with the scatter headings, will make *conflicts* much less likely than they are now [Emphasis added.].¹³³

These recommendations would lessen the possibility of mid-air collisions, but this is not the only hazard present in terminal areas; the wake turbulence phenomenon may remain as a threat to the safety of encountering aircraft for as long as several minutes. If light aircraft are to continue to share the same runways with larger aircraft, separation minimums must be maintained. The danger of turbulent air encounters at significantly lower landing speeds, resulting in more difficult separation, argues for the restriction of light, slow general aviation aircraft from terminal areas.

The deficiencies of the present system must receive priority in any modification of ATC. A nationally coordinated scheduling system, at this point, seems to be the most reasonable solution. The majority of travelers today prefer to travel at the beginning and end of the business day, and most airliners are therefore scheduled to arrive at or depart from terminal areas at peak demand times. The system has become one of "first come—first serve" with late arrivals left hanging in holding patterns, while increasing numbers of passengers and faster aircraft can do nothing other than increase present scheduling polarization. The present extent of polari-

¹³³ FLYING, Feb. 1968, at F-15.

zation and delays exists at a time when the scheduled airline industry is operating at a 50% load factor; but if trends continue, at 90% of the theoretical system capacity, delays will be as much as *nine times as great* as those presently experienced.¹³⁴

Recently, Congress has considered the problem of airline scheduling practices. Recognizing the preference of airlines to schedule for peak demand periods, the Committee observed that, "A balance must be struck between the convenience of passengers and the massive cost to State, local, and Federal Governments to provide terminal area facilities adequate to cope with the sudden surges of traffic at peak hours."¹³⁵ The hope was expressed that airlines will voluntarily effect changes in scheduling practices for the good of the entire system, as well as their own financial welfare. However, the Committee concluded by suggesting that the CAB should consider whether it should have specific statutory authority over scheduling practices of airlines, and that future hearings will be held on this matter. The authors suggest that a national scheduling system will surely become a reality, and urge that some means must also be found by which the general aviation fleet can also operate within the system—perhaps by way of confirmed flight plans. No longer should an aircraft be permitted to depart without it first being determined that its arrival will be expected and provided for.

The development of a workable and relatively inexpensive collision-avoidance system (CAS) is something almost all elements of the aviation industry favor. The trade magazine proposal recommends the development of an internal (inplane) system which would function independently of ATC supervision:

Any new air traffic control system should have as one of its primary goals to reduce the pilot's dependence on the controller as the source of all truth. The controller should become more a monitor, back stopping the pilot's skills and alerting him to any deviation from the programmed flight, or any unforeseen hazard.¹³⁶

It was further proposed that aircraft be equipped with a television receiver to reproduce ATC's central radar scope so that, each aircraft being equipped with a transponder, a pilot could serve as his own controller: "[W]e will have relegated the controller to the role of observer. Pilots could simply fly along the paths, keeping their own spacing from the plane ahead, looking out for conflicting traffic and in general minding their own business."¹³⁷ This suggestion seems *most* inconsistent with other aspects of the proposal. If data link, automatic landing, flyways corridors, national scheduling and other highly coordinated systems are to be recommended, it seems unwise and illogical to place such a degree of control in the pilot.

A noted systems authority recently pointed out that such a degree of

¹³⁴ *ASTRONAUTICS & AERONAUTICS*, Sept. 1967, at 13.

¹³⁵ *Hearings on the National Airport System Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 90th Cong., 2d Sess. 9 (1968).

¹³⁶ *Supra* note 132, at F-13.

¹³⁷ *Id.*

self-contained control is both unworkable and unwise.¹³⁸ In observing that one of the principle problems facing air safety in general and ATC in particular is the lack of a modernized electronic system, it was suggested that one of the reasons for the existence of a gap between available aircraft and an adequate accompanying support system is "self-contained vs. cooperative air-ground electronics."

Whenever possible the desire to "go it alone" with airborne "self-contained" electronics devices acquired by the operator rather than "cooperative" devices requiring cooperative, matching ground installations installed by others seems to prevail.

* * *

However, the complexities of purposely bringing aircraft into the proximity of one another, to achieve maximum use of the airspace is an effective ATC system, may not be fully achieved by this concept since centralized ground authority is challenged by air-derived authority.

* * *

Adoption of air-to-air collision-avoidance equipment would in essence place the burden of safe air traffic operations on the back of the individual aircraft.¹³⁹

In any reorganization of the present ATC system, one of the basic objectives must be increased coordination rather than continued independence. Not only must planners become concerned for the development of a domestic coordinated system, for the overall benefit of air safety, but consideration must also be given to the creation of a system which will intermesh and cooperate with the ATC systems of foreign nations. The International Civil Aviation Organization (ICAO) and other international representatives of aviation have suggested the adoption of bilateral arrangements leading to the creation of such coordinated systems.¹⁴⁰

Before any modification of ATC may be undertaken, general aviation's impact on the system must be considered. Although both segments are essential to the continued growth of the industry, the relationship between general aviation and the scheduled airlines seems to be one of antagonism. ATA's proposals for an improved ATC system carry with them the "understanding" that general aviation's use of terminal areas should be greatly restricted;¹⁴¹ and general aviation's reaction is understandably to the contrary.¹⁴² General aviation interests contend that, because of the scheduled airline's powerful lobbying groups, the public as well as the nation's legis-

¹³⁸ *Supra* note 134, at 8.

¹³⁹ *Supra* note 134, at 8-12.

¹⁴⁰ First Report of the ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, ICAO LC/SC/LATC No. 19, at 16 (1946); Larsen, *Air Traffic Control: A Recommendation for a Proof of Fault System Without a Limitation on Liability*, 32 J. AIR L. & COM. 3 (1966). The International Air Transport Association (IATA) is another representative of international aviation and has also recognized (at 15) that the development of a coordinated domestic system is at the very heart of any international system:

Up to the present there appears no reasonable possibility of developing a successful, self-sufficient and non-cooperative system. Such a system, if developed, would provide complete protection for all aircraft equipped with it, even against unequipped aircraft. Therefore, work is directed towards developing a cooperative system in which all aircraft would have to carry at least a minimum amount of equipment, such as a transponder which would be light and cheap enough for the bulk of general aviation.

¹⁴¹ *Supra* note 8.

¹⁴² *Supra* note 10.

lators have been misled to believe air safety's present unfortunate condition is wholly a result of general aviation. The Aircraft Owners and Pilot's Association (AOPA), in its policy statement regarding recent proposals to bar or restrict general aviation's use of terminal area airports, has made the attempt to place some of the many considerations into proper perspective.¹⁴³ At the very heart of the controversy is the question of who is entitled to use an airport. There are nearly 10,000 airports in the United States, but the scheduled airlines operate out of only 525 with more than 68 percent of their business at only 22 airports. Yet, AOPA contends, the implication seems widespread that general aviation has overrun airports that were built for the airlines. "Major metropolitan public airports can be reasonably compared with public highways in that both were built with tax dollars, both are owned by the public, and both are intended for the transportation needs of all who desire to use them."¹⁴⁴ The federal tax dollar contributed to the development of the airport system now approximates \$70,000,000 annually. "General aviation interests have provided more than 6,400 privately owned airports to serve general aviation. The airlines own no airports and depend entirely on the public airport system to meet the needs of their profit-making operations."¹⁴⁵ In addition, AOPA suggests that the 110,000 general aviation aircraft provide service between the airports, comprising 95% of the whole, *not* served by the scheduled airlines 2,300 aircraft.

While AOPA makes a logical argument regarding general aviation's *right* to unrestricted use of all public airports, the organization's position regarding ATC seems incorrect. In the policy statement it was observed:

[O]ur traffic control system was designed primarily to keep aircraft separated only in bad weather when pilots were not able to see each other.

* * *

The airline's insistence on using the air traffic control system even when weather does not require it is an attempt to shift some of the responsibility for avoiding other traffic to the Federal controllers.¹⁴⁶

In the early 1930's, during the existence of Air Traffic Control, Inc. and shortly thereafter, such was the primary objective of ATC¹⁴⁷ but to suggest that today's system should be so limited seems most questionable. The authority of ATC and the requirements it imposes on aircraft in its traffic can only increase as a result of any extension of the system, particularly if added coordination is to be considered a basic objective. No longer can "see-and-be-seen" traffic avoidance be permitted in our terminal areas, and it follows that use of these areas will require additional instrumentation by much of the general aviation fleet. In addition, when all factors are weighed, it is likely that general aviation's free access to all airports may be severely limited for the benefit of the entire system.

The plight of general aviation has not gone unrecognized by Congress;

¹⁴³ Aircraft Owners & Pilots Association, *The Truth About General Aviation* (Feb. 1968).

¹⁴⁴ *Id.* at 9.

¹⁴⁵ *Supra* note 143, at 11.

¹⁴⁶ *Supra* note 143, at 14.

¹⁴⁷ *Supra* text at 3.

recent hearings of the Aviation Subcommittee to the Senate Committee on Commerce have considered in detail the problems raised by representatives of general aviation. While the Committee recognized that general aviation has criticized extensively and unfairly that mass media has often placed responsibility for system shortcomings upon general aviation and that general aviation has often been treated as the "black sheep" of the industry without regard to its importance or right to utilize the system, it was agreed that a large degree of the severe congestion which presently exists is a result of the increasing use of small, general aviation aircraft. The Committee urged that, "The ideal and ultimate solution is the provision of separate and equal airport facilities for general aviation in major hub areas."¹⁴⁸ In 1961, the Federal Airport Act was extended to this end by providing for \$7-million annually for reliever airport construction. However, this proposal offers only a long-term solution to the problem which plagues the system today. The Committee concluded by observing:

There can and must be achieved a better utilization of the existing airport system even though it may require a break with past traditions or philosophies about the free and unlimited access to airports. The cost of an airport development program based on free and unlimited access to all airports by all segments of aviation would far exceed the price that State, local, and Federal Governments can or will pay. Better utilization of existing airports and construction of separate and equal general aviation airports at substantially smaller cost is a more reasonable and desirable course.¹⁴⁹

With very few exceptions, controllers are highly trained, highly skilled and most concerned about ATC's ability or inability to handle present and future demands, for to speak of Government liability is, in many cases, to speak in terms of the human errors of controllers, often a result of factors they cannot wholly control. The National Association of Government Employees (NAGE), which represents the interests of FAA controllers, has recently appealed to Congress for a complete revision of present policies.¹⁵⁰ "The general position of the National Association of Government Employees is that the Federal Aviation Agency is seriously under-equipped, under-manned, under-compensated and under-administered—all to a point of public peril."¹⁵¹ Observing that what ATC in the United States needs today is the kind of jolt Ralph Nader gave automotive safety, NAGE went on to point out many of the deficiencies that presently exist in the FAA regarding manpower, particularly as such deficiencies play a part in the shortcomings of the system already discussed. Illustrative of the exploding growth of aviation, in terms of increasing workloads and decreasing numbers of controllers, is the traffic load growth experienced at the Los Angeles ATC Center over the last several years: In the month of September, 1965, 47,066 operations and a staff of 285; and in September, 1966, 56,594 operations and a staff of 285.¹⁵² In the absence of great

¹⁴⁸ *Supra* note 135, at 8.

¹⁴⁹ *Supra* note 159, at 9.

¹⁵⁰ National Association of Government Employees, *Statement to Congress Relative to the Critical Need to Improve Facilities and Add Personnel to the Federal Aviation Agency* (1967).

¹⁵¹ *Id.* at 1.

¹⁵² *Supra* note 150, at 9.

technological advancements, there is nothing to suggest that this trend will *not continue*. NAGE suggested that technological advancements have been limited, to a great extent, as a result of the FAA's present "cost-cutting, penny-squeezing policies," as evidenced by the recent widely publicized letter from President Johnson to the FAA Administrator:

I have noted with satisfaction the excellent work which you and your associates at the Federal Aviation Agency have been doing in reducing costs and manpower while absorbing additional workload and improving service to the public.

I have taken particular note of your cost reduction program under which you saved \$47 million during the 1966 fiscal year. These savings have been accompanied by a reduction in Agency employment of more than 3,500 employees—eight percent since 1963.¹⁵³

NAGE believes that this policy lies behind the fact that while demand on the system has increased 30% to 50% in the last few years, the number of controllers has decreased by 25% to 40%. Private industry is understandably a more attractive employer for prospective controllers, as a result of increasing workloads, lack of time-off, low pay and the mental strain that accompanies the \$100,000,000 plus in damages presently being sought against the Government for ATC-related crash cases. NAGE concluded its appeal by urging that, as a further result of present fiscal policies, the FAA is following an arbitrary budgetary constriction permitting of just so much safety and no more.¹⁵⁴

V. CONCLUSION

Over the last several years hundreds of studies have been made concerning the many complex aspects of air safety; and the viewpoints presented have varied from complete support to complete condemnation. None of the articles and viewpoints surveyed here were intended to represent any "correct" approach. Rather, they serve to reflect some of the most recent thinking on the subject by diverse elements of the aviation industry. Certain recommendations have been made which will surely play an important role in any reorganization of ATC:

1. "Flyways" systems of positive air control.

¹⁵³ *Id.*

¹⁵⁴ *Supra* note 150, at 11. At 16 NAGE concluded by urging that Congress consider the following:

1. The immediate enactment of legislation authorizing a 20% increase of Controller staffing at all Air Traffic Control Centers, Air Traffic Control Towers, Flight Service Stations.
2. The enactment of legislation authorizing a 20% increase in the electronic and technician field as it related to Airway Facility Branch activities.
3. An immediate cessation of the arbitrary "phase out" of vital electronic devices at Air Traffic Control Stations.
4. Congress enact legislation implementing an "ad hoc" standing committee comprised of active journeymen Air Traffic Control specialists who will be assigned a continuing role of submitting recommendations concerning air traffic control procedures to Congress yearly.
5. We recommend that legislation be enacted whereby all air traffic electronic computers, control systems, and their allied equipment will be inspected and maintained on a continual "preventative maintenance" system rather than the present system which requires equipment failure prior to maintenance being performed.
6. Congress approve additional funds for the updating and purchase of modern Radar and Electronic equipment for all types of Air Traffic Control.

2. Improvement of air-ground communication through the development of a data link system.
3. Development and use of commercial "automatic" landing systems.
4. Creation of a nationally-coordinated scheduling system.
5. Development of a ground-coordinated collision avoidance system.
6. Added coordination at all levels of system development.
7. Construction of separate but fully equipped general aviation airports.
8. Reconsideration of FAA employment policies.

The FAA is presently working to improve the system as quickly as possible, but a lack of funds presents the largest single obstacle to any modification of the present system. A modification as vast as here described could cost in excess of \$100,000,000, and such funds are simply not available from present Department of Transportation appropriations. Vying for the available Government transportation dollar, the aviation lobby must compete with other groups seeking improved highways or shipping programs. How, then, can the needed funds for such a modification be acquired? If the necessary funds are not available from the Federal Government, consideration next turns to the users of the system. The availability of this source of funds has been recognized:

When the Administration's air safety proposals go to Congress next month, they will have price tags attached. The price of en-route safety, as well as of better terminal area safety, will be spelled out in a supplemental appropriations request for the FAA.

The price will also be spelled out in terms of new and increased user charges. These may take the form of a raise in the 5 percent ticket tax, and a similar increase in the fuel tax for general aviation aircraft.

A federal head tax is not likely to be part of the financing package. It is possible, however, for local airport authorities—with federal encouragement—to pay for needed improvements that cannot be financed through the Federal Aid to Airports Program.¹⁵⁵

While such a proposal is certainly a step in the right direction, the authors suggest that more should be done. If adopted, general aviation will bear more of the growing costs of the system through increased fuel taxes, and passengers will be required to share in the costs through additional ticket taxes; but the scheduled airlines would not be required to participate. Unless the scheduled airlines are prevented from passing on some of the costs directly to passengers by limiting profit margins, a valuable and ready source of funds will be lost. Furthermore, the authors suggest that funds should be acquired through the implementation of some form of ATC use fee, not unlike present airport landing fees. The growing mobility of the citizens of the United States calls for the placing of a new emphasis on the transportation industry. A vital element of that system is ATC, which will surely undergo a great modification in the next several years. Its users should be required to bear a large portion of the costs.

Joan T. Winn & Milton E. Douglass, Jr.

¹⁵⁵ AIRLINE MARKETING & MANAGEMENT, Mar. 1968, at 95.

NOTES

Bankruptcy — Equitable Liens — Notice

On 27 August 1961, a Navy jet crashed into a business establishment known as Bargain City, U. S. A., Inc. Bargain City brought a claim against Arkwright Insurance Co. (under a policy insuring the rental value of its buildings, including damages suffered by impact of aircraft), which Arkwright held in abeyance while Bargain City sought recovery against the United States Government under the Military Claims Act.¹ Bargain City and the Navy reached agreement, but, because the total was over \$5,000, a Congressional appropriation was needed. In March 1962, Bargain City requested and received a \$100,000 "advance" from Arkwright, which was to be repaid with part of the fund appropriated by Congress for the settlement of the Bargain City claim.

Seven months later, on 19 November 1962, Bargain City filed a debtor's petition under Chapter XI of the Bankruptcy Act. Arkwright's advance of \$100,000 was placed on Schedule A-3,² while the claim against the Government was placed on Schedule B-3.³ On Schedule A-3 was a notation that the \$100,000 was an advance on the claim against the United States Navy. (Though creditors are to be notified within ten days after the filing of the petition, Arkwright did not receive notice until 23 January 1963, two months later. Arkwright made neither formal appearance nor claim during the remainder of the proceedings.) After Congress appropriated the money for the claim, Arkwright asserted its claim in district court and sought a temporary restraining order to prevent Bargain City from distributing the funds.

The district court found that although it had advanced \$100,000 to the insured in anticipation of reimbursement from funds obtained by a claim against the Government, Arkwright obtained no assignment; it also failed to perfect its claimed lien under state law. The case was appealed; the asserted error was failure to find an equitable lien. *Held, affirmed*: Assuming *arguendo* that there was an equitable lien, Arkwright's inaction during the remainder of the Chapter XI proceedings changed both the equities and the legal result in the case, *i.e., even if* there had been an equitable lien, it would have been extinguished by Arkwright's inaction. *Arkwright Mut. Ins. Co. v. Bargain City, U. S. A., Inc.*, 373 F.2d 701 (3rd Cir. 1967).

The specific area of concern is equitable liens, their nature, development, and the part they play in arrangement proceedings. Numerous amendments to the Bankruptcy Act, originally passed in 1898,⁴ deal with this problem in the context of Section 60(a) of the Act.⁵

¹ Military Claims Act of 1956, as amended, 1958, 10 U.S.C. § 2733 (1964). Bargain City could also have proceeded under the Federal Torts Claims Act, 28 U.S.C. § 1346 (1964).

² "Creditors Whose Claims Are Unsecured" is the title of Schedule A-3.

³ "Choses in Action" is the title of Schedule B-3.

⁴ Bankruptcy Act of 1898 (also called the Nelson Act) 30 Stat. 544, Title 11 U.S.C.

⁵ Bankruptcy Act § 60(a), 64 Stat. 24, 11 U.S.C. § 96(a) (1964).

I. THE NATURE OF AN EQUITABLE LIEN

An equitable lien arises generally in two ways. First, it may arise from an express written executory agreement often called an equitable assignment. There may be an assignment of a chose in action or of future acquisitions, but to be an effective "equitable assignment" there must be an absolute appropriation of the debt or fund sought to be assigned by the assignor (debtor). The equitable lien upon the specific property enables the assignee (creditor) to obtain satisfaction of his debt by resorting to the debtor's property over which he has established a charge, *i.e.*, it gives the creditor a security interest. Second, the equitable lien may be implied by a court of equity out of general considerations of right and justice as applied to relations of the parties and circumstances of their dealings.⁶ The equitable lien differs from the common law lien in two significant characteristics: (1) in the former possession remains with the debtor or the person holding the proprietary interest, while in the latter possession is with the creditor; and (2) in the former no notice is required for validity, while in the latter some manner of recording is necessary for its validity.

The two indispensable elements of an equitable lien are (1) the *intent* of the parties to give and take security and (2) the *identification* of property.⁷ In establishing intent the time at which the security is established must be distinguished from the time at which the goods upon which there is an equitable lien come into existence. Thus, an agreement that takes the form of one to give security in the future may fail because the idea of future action destroys the evidence of present intent. However, if the property to be charged by the equitable lien is a fund to come into existence in the future, or a crop yet to be harvested, this future action does not destroy an equitable lien *if* there is a present intent to establish security. Yet in every case, there is the question: What facts will give the creditor a claim upon the property still in the control of the debtor?⁸ Obviously, the shaky nature of equitable liens rests upon a delicate appraisal of the facts.

Because the obligation in equity is ethical rather than jural, *i.e.*, the good conscience considers *all* things, the equitable lien has an amorphous nature. Thus, it is not extraordinary that the existence of an equitable lien has often been determined by its economic justification.⁹ Many times the creditor (lienor) is willing to risk that the goods on which he has a lien may be sold to an innocent purchaser; he may even authorize such a sale. He holds his equitable lien for the sole reason of protection in case

⁶ BLACK'S LAW DICTIONARY 632-33 (4th ed. 1951).

⁷ Britton, *Equitable Liens—A Tentative Analysis of the Problem*, 8 N. C. L. REV. 388, 389 (1930).

⁸ *Id.* at 393.

⁹ *Id.* at 399-400. "It is a question of the development of an economic justification for a series of situations where security interests not based in possession or record are enforced against third parties and the reconciliation of these results with a policy which clashes fundamentally with it—the policy of enforcing security interests against third parties when based on possession or record. No amount of legalistic refinement can obscure the fact that we are presuming contradictory policies."

the debtor becomes insolvent. While the debtor remains solvent the collision of economic interests is not evident; the catalyst is insolvency.

II. HISTORY AND DEVELOPMENT

Of importance is the Uniform Commercial Code and its relation to the Bankruptcy Act. Article 9 of the Code consolidates into one security device, known as a "security agreement," all prior conventional forms of security instruments.¹⁰ The approach of the Bankruptcy Act, passed two years earlier, is to determine whether creditors are secured or unsecured, and if unsecured, whether they are entitled to a priority. In doing this, the traditional terms of equitable lien, legal lien, or phrases covering such things as chattel mortgages are used. The different approaches of the Code and the Bankruptcy Act provide some anxiety when Section 60 of the Bankruptcy Act is mated with Article 9 of the Code.

The original Bankruptcy Act of 1898 had subsequent revisions in 1903,¹¹ 1910,¹² and 1926,¹³ all of which sought to strike down so-called "secret transfers," which were transfers executed but undisclosed by recording or change of possession until immediately before bankruptcy.¹⁴ In conflict with this anti-secret transfer policy of the Bankruptcy Act is the "equitable lien doctrine" which holds that equity will give effect to an agreement that purports to create a charge on or interest in the property, but which agreement lacks some act or is not otherwise sufficient to create a legal charge thereon. The case law never resolved the dilemma—never accomplished both the Congressional intent to strike down secret transfers and yet satisfy the commercial necessity for an unimpeded flow of credit partly through the use of equitable liens.

Equitable liens normally become involved in bankruptcy proceedings through an agreement to pledge certain property as security for a loan without actual delivery of possession to the creditor. Local law determines whether an immediate right was created by such an agreement. If a right were not created, no equitable lien existed, and completion of the pledge by delivery within four months before the filing of the petition amounts to a preference that may be avoided by the trustee. But, if the agreement fixed an *immediate* right as to *specific* property then there was an equitable lien. Next, it must be decided whether this was a "good" or a "bad" equitable lien.¹⁵ If "good," the lien may be completed by a transfer of possession even within four months, because actual taking of possession is merely the exercise of a right which existed from the time of the agreement

¹⁰ The security agreement is not enforceable against the debtor or third parties unless signed by the debtor and it contains a description of collateral. Uniform Commercial Code § 9-203(1).

¹¹ Bankruptcy Act of 1903, 32 Stat. 797-801.

¹² Bankruptcy Act of 1910, 36 Stat. 838-42.

¹³ Bankruptcy Act of 1926, 44 Stat. 662-68.

¹⁴ Usually, the creditor with the incumbrance perfected it as far as possible shortly before bankruptcy.

¹⁵ An examination of § 60(a)(6) will show that there are two classes of equitable liens, both "good" and "bad." Only those where available means of perfecting *legal* liens have *not* been employed are "bad," *i.e.*, will be invalidated. See 2 E. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 45.7 (1965).

when actual transfer of the "interest" took place. As long as the *agreement* created a *present* charge or interest in the property involved (more than four months before), it is not necessary that the property be in existence at the time of the agreement.¹⁶ The most important considerations are Sections 60(a)(2) and 60(a)(6). It must be determined: (1) whether there is a legal lien or (2) whether there is an equitable lien that with some overt action could have become a legal lien.

If the transfer gives rise to a "legal" lien as in the case of the ordinary chattel mortgage, it is governed by 60(a)(2),¹⁷ and its preferential nature is to be judged as of the time it was perfected against subsequent lien creditors.¹⁸

Under 60(a)(6)¹⁹ a transfer that creates an equitable lien is not perfected, *i.e.*, is a "bad" equitable lien, if the creditor fails to take some overt action—recording or delivery of possession—as required by state law that could have qualified it as a legal lien.²⁰ Thus, of the two categories of equitable liens delineated in 60(a)(6)—"good" and "bad"—only the latter are invalidated. In the case of after-acquired property (similar to the situation in the present case²¹), there *usually* is a means of perfecting

¹⁶ The distinction has been drawn, some feel with great difficulty, between agreements that give rise to a *present* charge and those that merely constitute a *promise* to later execute a lien or create a charge on the property, regardless of the specificity of identification. In the instant case, careful examination of the language of the agreement allows such a distinction to be drawn. *Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc.*, 251 F. Supp. 221, 224-26 (1966). Some trouble has been caused by the confusion of the liened property coming into existence in the future with whether the present charge or security comes into existence in the future at the same time. The security may exist before the property on which there is a charge, *i.e.*, before the chose of action is converted into a money judgment.

¹⁷ Section 60(a)(2) of the Bankruptcy Act provides: For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not perfected against a bona fide purchase, or if any transfer of other property not so perfected against such liens by legal or equitable proceedings under this Act, it shall be deemed to have been made immediately before the filing of the petition.

¹⁸ 3 W. COLLIER, ON BANKRUPTCY § 60.50 (14th ed. 1967).

¹⁹ Section 60(a)(6) of the Bankruptcy Act provides: The recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraph (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract: *Provided, however*, That where the debtor's own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: *And provided further*, That nothing in paragraph (6) shall be construed to be contrary to the provisions of paragraph (7).

²⁰ What must be watched carefully is when in sections 60(a)(2) and 60(a)(6) a lien—legal or equitable—must be good against only subsequent lien creditors and when it must be good against bona fide purchasers other than trade customers, *i.e.*, full validity against any third person other than a buyer in the ordinary course of trade. Each must be satisfied so as not to be ruled a preference which may be avoided by the trustee.

²¹ With Arkwright Insurance, the new account came into existence *after* Bargain City's bankruptcy.

a legal lien, e.g., the execution of a supplemental assignment or chattel mortgage when the new accounts, new crops, or after-acquired merchandise comes into existence or into the debtor's ownership.²² If something remains to be done that could have made the equitable lien a legal lien (i.e., a "bad" equitable lien) it will be invalid, just as the legal lien that falls short of its prerequisites is invalid.

III. ANALYSIS OF THE DECISION

The district court was correct in concluding that no equitable lien existed in favor of Arkwright, but was incorrect when it assumed that if there were an equitable lien it was a "bad" equitable lien under the Pennsylvania Uniform Commercial Code. Though the Code would require that a financing statement be filed before a security interest could be perfected,²³ the Code would exclude the Arkwright case from its coverage because it was an insurance case and a tort action.²⁴ There being no way to perfect a legal lien (security interest) under the local law, the Arkwright lien could have been a "good" equitable lien if it had met the basic requirements of present intent and specific property.

The court of appeals recognized this mistake of the district court, and yet sidestepped the primary question—the existence of an equitable lien—which, if confronted, should have been answered in the negative. Although there was proper identification of the property supposedly charged—the Congressional appropriation—it is submitted that the agreement did *not* give rise to a *present* charge on the property. It merely set forth a *promise* to execute or create such a lien in the future.²⁵

But assuming *arguendo*, as the circuit court did, that there was an equitable lien, the court erred when it found the lien ineffective to give secured creditor status to Arkwright and required notice for its effectiveness. First, *unsecured* creditors are those who have extended credit to the bankrupt on open account but secured creditors, in the bankruptcy sense, have an interest in the property of the bankrupt. Either a legal lien or an equitable

²² 3 W. COLLIER, ON BANKRUPTCY ¶ 60.50 (14th ed. 1967). In practice this means that unless an equitable lien, that could have been perfected into a legal lien, has full validity under state law as against all the world except trade customers, the preferential character of the transfer will be determined as of the time it was perfected as a legal lien, without "relation back," or if not so perfected into a legal lien before bankruptcy, as if the transfer had been made contemporaneously with the filing of the petition, and thus avoided by the trustee.

The application of 60(a)(6) is also subject to possible variance depending upon the effect of a state's recording acts. If recording of an equitable lien that is supposed to cover after-acquired property does not give constructive notice against both lien creditors and bona fide purchasers other than buyers in the course of trade, subsequent perfection of the supposed lien, would be termed preferential if the requisite elements (of a voidable preference) were then present. Another possibility is that if an assignment of future accounts of future funds creates under state law an equitable lien, invalid against bona fide purchasers but which later becomes a legal lien, the transfer will be considered a voidable preference if all elements were later present. It is now generally thought that equitable liens are for the most part, but not completely, eliminated in bankruptcy by various provisions of the present act. If section 60 does not void the equitable lien, it still may be dispensed with under sections 67, 70(c) and (e).

²³ Uniform Commercial Code § 9-302.

²⁴ Uniform Commercial Code §§ 9-104(g) and (k).

²⁵ It is not the future creation of the property charged but the lack of intent in the words of the agreement to show Arkwright had a present interest in the fund to be acquired. *Supra*, note 16.

lien (if recognized by 60(a)(2) or 60(a)(6) respectively) gives an interest in the property of the bankrupt to the creditor. Therefore, only *unsecured* creditors must file and prove their claims, and secured creditors with valid liens on a debtor's property are *not* so affected by the confirmation of the arrangement as to lose their rights to recover their liened property, *unless* actively participating and accepting a plan modifying their rights.²⁶

Second, Arkwright's equitable lien could have remained unaffected by the arrangement proceedings for the additional reason that since the 1958 amendments to the Bankruptcy Act,²⁷ a debtor *can* alter arrangement proceedings after confirmation if he will be unable to pay the consideration called for—which is the case if Arkwright removes \$100,000 from the distributable assets by its equitable lien—if there is a retention of the jurisdiction by the court—which is necessary here with the Congressional appropriation following the arrangement proceedings. Thus, notice to the trustee during the proceedings seems unnecessary to the maintenance of an equitable lien.

The Third Circuit seemingly departed from previous decisions in declaring that actual notice is required for an equitable lien and that this notice is to be given during arrangement proceedings. Because an equitable lien can be implied by a court of equity from general considerations of right and justice as applied to particular parties and their relations, the court most likely felt that they should for the same considerations deny effectiveness to such a lien in absence of notice during the proceedings. But Arkwright thought it was a secured creditor, and felt no need to participate in the proceedings. Therefore, to require actual notice of an equitable lien holder who occupies the position of a secured creditor and not to require the same from a legal lien holder does not seem to contribute to clarification of the doctrine of equitable liens.²⁸

It is submitted that the court should have found that there was no equitable lien at all, *i.e.*, that the instruments conveyed upon the advancement of the \$100,000 to Bargain City did not create a *present* right in

²⁶ *J. T. Sinclair v. Baker Coal*, 249 N.W. 13 (Sup. Ct. of Mich. 1933). Also see C. NADLER, *THE LAW OF BANKRUPTCY*, §§ 563-66 (2d ed. 1965). The secured creditor has three choices: (1) he may disregard the bankruptcy proceeding entirely and decline to file a claim, relying on his security; (2) he may surrender or waive his security entirely and prove his claim as an unsecured creditor; or (3) he may avail himself of his security and share in the general assets as to the unsecured balance. To follow the second alternative the secured creditor must give up to the trustee the entire security and prove his claim entirely as an unsecured creditor. This is what Arkwright probably meant to avoid because of the limited resources available to be dispersed and thus decided to follow the first alternative, the third not being applicable to the situation. Besides, who would ever take less than the full amount if they could have all by retaining his equitable lien by not entering the arrangement proceedings?

²⁷ Bankruptcy Act, §§ 363, 368, and 387, 72 Stat. 820-22, 11 U.S.C. §§ 763, 768, and 787 (1964).

²⁸ The time of notice in a legal lien is at the time of the creation of the lien, usually by recording or change of possession, in most cases under Article 9 of the Uniform Commercial Code. Under the reasoning of the Third Circuit, the time of notice (actual and not constructive as would be allowed in legal liens) for equitable liens would be during the arrangement proceedings. Yet, in the past, notice has been considered an element that distinguished legal from equitable liens, with only legal liens requiring notice. Therefore, requiring actual notice for continued existence of equitable liens shatters this well-worn distinction.

Arkwright, in the form of an equitable lien on the future Congressional appropriation, but constituted merely a *promise* to execute or create such a lien in the future. Hence, Arkwright's "lien" did *not* fail because the property was to come into being in the future, *nor* because of a lack of notice, but simply because the agreement did not manifest an intention to create a *present* security. Even today, the clarity that noted authorities have called for since the 1930's does not exist though there have been major changes in the Bankruptcy Act and subsequent case law. Perhaps the stumbling block today is that the semantics and conceptual approach of Article 9 of the UCC on security interests cannot be reconciled with the Bankruptcy Act passed in 1950.²⁹ In attempting this reconciliation, the Third Circuit has thought it wise to require notice of equitable liens to be given during the course of arrangement proceedings.

John H. Germeraad

²⁹ See 2 E. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, § 45.7 (1965).

Air Freight Forwarder — Civil Aeronautics Board — Authorization

A petition was brought by eight scheduled airlines including the six largest domestic carriers, by all-cargo carriers, by air freight forwarders and by industry representatives seeking review of the CAB's authorization for four long-haul motor carriers to enter into the air freight forwarding market. The authorization for an experimental period of five years was a result of the January, 1966 Motor Carrier—Air Freight Forwarder Investigation in which the Examiner observed that, "the applicants, by providing sophisticated management, personnel, and equipment and devoting their well-financed experienced organization to the generation and transportation of cargo by air, will contribute a substantial benefit to the public."¹ The findings of the Examiner were subsequently adopted by the Board, which concluded that authorization of such long-haul carriers to act as air freight forwarders "should increase the intermodal carriage of freight by air and truck;" it regarded its decision "a real breakthrough in opening up the most hopeful avenue for increasing intermodal transportation of freight by surface and air." The Board also thought that, "The participation . . . of motor carriers like the applicants may well be necessary to achieve the full promise of air cargo."² In the instant petition for review, the question was raised "whether the Board has established a policy of entry for all truckers who want to act as air freight forwarders or has merely granted the four applications that were before it"³ *Held, order vacated and cause remanded for further proceedings*: "Reading the opinion [of the Board] as a commitment to grant authorizations to all comers, we find it wanting in careful investigation, the substantial evidence and the rational explication that are demanded before an expert agency may lawfully embark on a new course apparently so fraught with danger to the industry Congress has confided to its regulation and seemingly so opposed to the general policy Congress has long decreed." *ABC Air Freight Co., Inc. v. C.A.B.*, 36 U.S.L.W. 2577, 10 Av. Cas. 17,775 (2d Cir. 1968).

In order to understand the significance of this decision and the CAB attitude it seemingly reflects, it is necessary to consider in detail the nature of an air freight forwarder, as well as the previous Board policy regarding authorizations.

Air freight forwarders, like their surface counterparts, are common carriers who consolidate individual shipments into bulk lots for transportation. In addition, they perform certain other services, such as picking up freight at the point of origin, delivering it to its ultimate destination from air terminals,

¹ *ABC Air Freight Co. v. CAB*, 10 Av. Cas. 17,775, 17,776 (2d Cir. 1968).

² 10 Av. Cas. at 17,777.

³ *Id.*

and planning the routing of shipments. Forwarders do not themselves perform the basic transportation; this is done by an underlying air or surface carrier.⁴

Air freight forwarders occupy a unique status when compared to other forms of carriage. Pursuant to Sec. 296.11⁵ of the Civil Aeronautics Board's Economic Regulations they are exempted from the certificate provisions of Sec. 401⁶ of the Federal Aviation Act of 1958, but must obtain letters of registration or authorization. Although they operate no aircraft, air freight forwarders are classified as *indirect air carriers* by Sec. 101(3) of the Act, which defines as an air carrier anyone who undertakes, directly or indirectly, to engage in air transportation and further provides that the CAB may exempt air carriers "not directly engaged in the operation of aircraft in air transportation from such provisions of the Act as it finds to be in the public interest." No certificate of public convenience and necessity has been required and the Board has followed a policy of purported "free entry" by all desirous comers, leaving to competitive factors the narrowing of the market and the establishment of rates.

At the same time that the air freight forwarder escapes the regulation of the CAB, it also remains unregulated by the Interstate Commerce Commission (ICC). Normally, all movement of property in interstate commerce by motor vehicles is regulated by the ICC, but authority over air cargo pickup and delivery is limited by Sec. 203(b)(7a) of the Interstate Commerce Act. This section exempts from economic regulation all motor vehicle transportation "incidental to transportation by aircraft." The Commission continues to maintain the position that motor transportation is "incidental" to air transportation when that motor transportation "is limited to a bona fide collection, delivery, or transfer service within the reasonable terminal area of the air carrier."⁸ Such exempted service has generally been limited to strictly inter-city service within a twenty-five mile radius of the air terminal.⁹ Without ICC certification, motor vehicle transportation normally within the purview of the Commission's regulatory powers is prohibited beyond this point, either by the air freight forwarder or in conjunction with another motor carrier. However, it has been suggested that the twenty-five mile limitation has an unfair and detrimental competitive effect upon the air freight forwarder industry and serves only to benefit the certificated motor carrier.¹⁰

A cursory survey of applicable statutory materials would indicate that entry into the air freight forwarder industry is almost wholly unrestricted.

⁴ National Air Freight Forwarding Corp. v. CAB, 197 F.2d 384 (D.C. Cir. 1952).

⁵ CAB, Economic Regulations § 296.11 (1967).

⁶ 72 Stat. 754, as amended, 76 Stat. 143, 49 U.S.C. § 1371 (1964).

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

⁷ Comment, *Intermodal Transportation and the Freight Forwarder*, 76 YALE L.J. 1360, 1369 (1967).

⁸ Note, *Regulation of Air Freight, Pickup and Delivery*, 76 YALE L.J. 405 (1966).

⁹ Note, *Administrative Law—Indirect Air Carriers—Interagency Conflict*, 32 J. AIR L. & COM. 273 (1966).

¹⁰ Snow, *Air Freight Forwarding: A Legal and Economic Analysis*, 32 J. AIR L. & COM. 485, 492 (1966).

If this were the case, it is apparent that the instant decision of the Board would not be subject to question. However, an examination of various authorization proceedings before the Board clearly indicates that entry into the market is not such a simple matter as one might assume and that a very great limitation exists (or has existed). The present viability of this limitation is the principle matter here under consideration.

It has long been the practice of the Board to deny authorization for entry into the air freight forwarder market by applicants controlled by interests significantly competing with air carriers. This limitation to "free entry" serves as the very formidable "stumbling block" which any applicant must overcome and is evidenced by both Board determinations and decisional law in review of same. In the *Airfreight Forwarder Investigation*¹¹ a number of authorizations were granted on the ground that "the introduction into airfreight forwarding of organizations having extensive experience and facilities in the field of surface freight or practices or techniques which contribute to the attractiveness of the service or the efficiency with which it can be rendered . . . is consistent with our policy which will stimulate the growth of airfreight and its utility to the public."¹² However, in passing upon the applications of other parties to the Investigation, the limitation above described played an important role.

We agree with the examiner's disapproval of the application of Air Cargo, Inc. (ACI), for airfreight forwarder authorization We do not find it necessary to reach the question, posed by the examiner, whether such an authorization would involve the 23 airlines who own ACI in violation of section 404 of the act. We agree with the examiner that this application should be denied as not in the public interest because of the tendency to lessen competition among the airlines which its approval would involve. In addition, denial will avoid placing ACI in a position of special advantage over independent forwarders, which ACI as a forwarder would occupy as a result of its various agency functions for the airlines, and will avoid the probable adverse effect of such an authorization upon the certificated all-cargo carriers who are not shareholders in ACI.¹³

Another example of Board investigations involving the limitation is the *Air Freight Forwarding Case*,¹⁴ in which seven direct motor carriers, all applicants being common carriers of household goods, applied for domestic and international air freight forwarder authority. The Examiner determined that "the conduct of such operations by the applicants will not be inconsistent with or adverse to the public interest, and will not result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party hereto"¹⁵ The finding of the Examiner was adopted by the Board principally due to the fact that it was recognized that very little household goods are carried by air; hence, there would be no diversion from air carriers. In reaching his determination, the Examiner recognized that:

¹¹ 21 C.A.B. 536 (1955).

¹² *Id.*

¹³ 21 C.A.B. at 546.

¹⁴ CAB Docket No. 12193, CAB Order No. E-21056 (10 July 1964).

¹⁵ *Id.*

The Board has prohibited entry by surface carriers into the airfreight forwarder field where it appeared that such conflicts of interest would arise between air and surface operations as to result in material diversion of traffic from air to surface transportation and deprive the applicants of sufficient incentive to conscientiously promote and develop airfreight forwarding.¹⁶

The policy of the Board has been repeatedly recognized and followed by courts reviewing Board decisions. In *American Airlines, Inc. v. CAB*¹⁷ it was observed that "the board [has] refused to approve the control of air freight forwarders by railroads because of the dominant position such air forwarders would thus secure in relation to independent air forwarders."¹⁸ In *National Air Freight Forwarding Corp. v. CAB*¹⁹ the decision was against petitioners who sought review of a Board finding "that (1) Air Freight would have a competitive advantage over air freight forwarders resulting from its railroad connections and (2) because Air Freight was controlled by powerful railroads, an incentive to divert potential air freight traffic to the railroads would exist."²⁰ Perhaps most reflective of the Board's policy regarding air freight forwarder authorization is the position it has repeatedly taken on the numerous applications of Railway Express Agency, Inc. In *Railway Express Agency, Inc.—Application to Operate as International Air Freight Forwarder*²¹ it was stated:

As the largest nongovernment carrier of small package traffic, the Railway Express Agency's entry into international air freight forwarding might provide a useful service. However, this factor is insufficient to override the probable adverse impact upon the existing international air freight forwarders and the potential effect upon air freight transportation arising from control of REA as an international air freight forwarder by the railroad industry.²²

In light of the avowed and long-standing policy of the Board to restrict authorization where an applicant's entry into the market would have adverse competitive effects, the reaction of the court in the instant matter is not surprising. Although the Board stated that, "Our purpose in instituting this investigation was to determine whether our traditional restrictions on surface carriers have become outmoded for motor carriers like applicants,"²³ the court believed that the agency almost completely failed to examine the effect that entry of large numbers of motor carriers would have upon the structure of the air forwarding industry. The Board discounted any possible adverse effect on the grounds that (1) the "independent freight forwarders" are in an "impregnable" competitive position at the present time and that (2) "the demise of some of the weaker air freight forwarders may be hastened by the competition provided by applicants." The court questioned the final impact upon the air freight forwarding industry if the Board readily admitted that the entry of only

¹⁶ *Id.* at 4.

¹⁷ 178 F.2d 903 (7th Cir. 1949).

¹⁸ 178 F.2d at 909-10.

¹⁹ *Supra* note 4.

²⁰ *Supra* note 4, at 387.

²¹ 27 C.A.B. 500 (1958).

²² *Id.*

²³ *Supra* note 2.

the four applicants would bring about "the demise of some of the weaker air freight forwarders." In 1965, of the 120 air freight forwarders the ten largest accounted for 72.8 percent of total revenue and earned \$7.2 million in pre-tax profits; the remaining 110 suffered a net operating deficit of \$1.1 million. Emery Air Freight has consistently been the leader, earning \$5.2 million and capturing 30 percent of the market, but when compared to the long-haul motor carrier market, even Emery seems infant. During the same period there were 50 truckers with gross revenues exceeding \$25 million and 20 with gross revenues of some \$40 million or more. "It is obvious as anything can be that the effect on the existing air freight forwarders will be very different if the permission here accorded is utilized by all long-haul carriers, almost all, many, or only four."²⁴

While the court recognized that the Board is free to change its policy regarding economic regulation, the court concluded that the Board's decision does not measure up to the standards of clarity required by Sec. 8(b) of the Administrative Procedure Act.²⁵ As a result of insufficient and incomplete findings what was done here was not modest expansion of the existing limitation on authorizations but a total and unexplained reversal of policy.

If the decision of the Civil Aeronautics Board in this authorization investigation truly reflects the Board's opinion that "traditional restrictions on surface carriers have become outmoded," it must follow that it has been determined that the present air freight forwarder industry is sufficiently strong to withstand any competition long-haul truckers can offer. However, this does not seem to be the case when the financial backgrounds of the two are compared. Consolidated Freightways, one of the four applicants, is one of the most powerful long-haul carriers in the nation and has amassed revenues more than three times as large as the air freight forwarder industry leader—Emery. If the Board is ready to permit direct competition of this magnitude then it must follow that a reexamination is needed of other segments of the transportation industry—notably of the railroad dominated REA, which has long and unsuccessfully sought authorization. It would not seem to do harm to what has been proposed here to suggest that the air freight forwarder industry is also strong enough to withstand the competitive impact of the railroad industry. Obviously, these are matters of great importance, the determination of which requires detailed and well-considered deliberations. If the Board does desire to reverse its policy, the entire future of the air freight forwarder industry will be deeply affected. The reviewing court was correct in requiring more of the Board than its initial deliberations reflect, and it is suggested that a

²⁴ 10 Av. Cas. at 17,778.

²⁵ 60 Stat. 236, 5 U.S.C. § 1001 (1964), as recently construed in *Northeast Airlines, Inc. v. CAB*, 331 F.2d 579, 586 (1st Cir. 1964).

Courts ought not have to speculate as to the basis of an administrative agency's conclusion. Indeed, to prevent just such speculation § 8(b) of the Administrative Procedure Act . . . provides that all agency decisions shall include not only the appropriate rule, order, sanction, relief or denial thereof, but also findings and conclusions "as well as the reasons or *basis* (emphasis added) therefor, upon all the material issues of fact, law, or discretion presented on the record."

detailed analysis will reveal the air freight forwarder industry's present inability to withstand free and complete competition from all segments of the transportation industry.

Milton E. Douglass, Jr.

Judgments — Collateral Estoppel — Non-Mutuality of Parties

Plaintiff's decedents were passengers on a commercial airliner that collided with a National Guard jet in Maryland in 1958. Other passengers instituted actions against the United States in the District of Columbia, where they received a favorable judgment in 1966. On the basis of this earlier judgment against the United States, the plaintiffs moved for summary judgment; they asserted that the United States was collaterally estopped to deny the alleged negligence of its employees. The United States replied that the doctrine of collateral estoppel could not be invoked because the plaintiffs were not parties to the District of Columbia litigation. *Held, motion stayed*: until completion of appellate disposition of the District of Columbia cases. However, as to collateral estoppel, the court stated that mutuality of parties was unnecessary when the party against whom the plea was asserted had a fair and complete opportunity to be heard on the issue. *State of Maryland for the Use of Gliedman v. Capital Airlines, Inc. & United States*, 267 F. Supp. 298 (D. Md. 1967).

"Collateral estoppel" means that a judgment in one action operates, in a subsequent suit on a different cause of action, to establish conclusively all issues litigated and determined in the first action.¹ It is based on the public policy consideration of putting an end to controversies² and protecting private litigants against the necessity of litigating the same cause of action or issue more than once.³

Historically, collateral estoppel has required a mutuality of parties, *i.e.*, that the parties in the second litigation *be the same or in privity* with the parties to the earlier litigation. This requirement of mutuality of parties has long been criticized as a rule without reason. In 1922, Justice Cardozo stated, "The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle."⁴ Then, in 1942, the "widest breach in the citadel of mutuality was rammed"⁵ by the Supreme Court of California in *Bernhard v. Bank of America*.⁶ There the administratrix first sued the qualified executor for an accounting and then later sued the Bank of America to recover a deposit on the grounds of an unauthorized withdrawal. After finding the controlling issue in both cases to be the same, the administratrix-plaintiff was held to be collaterally estopped, even though the defendant was not a party to the first suit for an accounting. The court found no compelling reason why the bank should have to be in privity to

¹ *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

² Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

³ 1B J. MOORE, FEDERAL PRACTICE § 0.412[1] (2d ed. 1965).

⁴ *Epstein v. Gluckin*, 233 N.Y. 490, 494, 135 N.E. 861, 862 (1922).

⁵ *Zdanok v. Glidden Co.*, 327 F.2d 944, 954 (2d Cir. 1964).

⁶ *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942).

plead the doctrine; instead it set out three tests for the application of collateral estoppel: (1) "Was the issue decided in the prior adjudication identical with the one presented in the action in question?" (2) "Was there a final judgment on the merits?" (3) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"⁷

A growing number of states⁸ and federal⁹ courts have agreed with *Bernhard* and hence do not require mutuality of parties. They reason that "one fair day" in court is enough to satisfy the constitutional requirement of due process¹⁰ and thus "the requirement of mutuality must yield to public policy."¹¹ This policy is especially important in view of today's crowded dockets.¹² Also, it prevents the anomalous results that occur when a party is submitted to conflicting determinations on the same point. For example, an indemnitor who has received a favorable judgment could still be liable on his duty of indemnification if the indemnitee cannot collaterally estop a plaintiff-creditor in a second action because of a requirement of mutuality of parties.¹³

However, *Bernhard*'s elimination of mutuality has not been entirely accepted, e.g., its language has been criticized as too broad and permissive. One critic feels that *Bernhard* should be limited to its facts and plead only defensively,¹⁴ because he foresaw absurd results if the *Bernhard* theory were plead offensively in multiple-claimant situations. To illustrate, suppose fifty passengers are injured in an airplane mishap, and all file separate injury suits in a variety of state and federal courts. Suppose further that, in the first twenty-five actions, the airline prevails, but that passenger number twenty-six wins his action. Does this mean that the remaining twenty-four passengers can plead plaintiff number twenty-six's judgment as conclusively establishing the airline's negligence, but that the airline cannot plead its favorable results in the first twenty-five cases?¹⁵ The critic says no and suggests that mutuality of parties be required when the

⁷ *Id.* at 809, 122 P.2d at 894-5.

⁸ *United States v. United Air Lines, Inc.*, 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom.*, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964); *Gorski v. Commercial Ins. Co.*, 206 F. Supp. 11 (E.D. Wis. 1962); *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *People v. Ohio Cas. Ins. Co.*, 232 F.2d 474 (10th Cir. 1956); *United Banana Co., Inc. v. United Fruit Co.*, 172 F. Supp. 580 (D. Conn. 1959); *Barbour v. Great Atl. & Pac. Tea Co.*, 143 F. Supp. 506 (E.D. Ill. 1956); *Woodcock v. Udell*, 97 A.2d 878 (Del. Super. Ct. 1953); *Gammel v. Ernst & Ernst*, 245 Minn. 249, 72 N.W.2d 364 (1955); *De Polo v. Greig*, 338 Mich. 703, 62 N.W.2d 441 (1954); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956); *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E.2d 655 (1958); *Harding v. Carr*, 79 R.I. 32, 83 A.2d 79 (1951).

⁹ *Graves v. Associated Transport, Inc.*, 344 F.2d 894 (4th Cir. 1965); *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964); *Haddad v. Border Express, Inc.*, 300 F.2d 885 (1st Cir. 1962); *Davis v. McKinnon & Mooney*, 266 F.2d 870 (6th Cir. 1959); *People of State of Colo. v. Ohio Cas. Ins. Co.*, 232 F.2d 474 (10th Cir. 1956); *Gibson v. United States*, 211 F.2d 425 (3d Cir. 1954); *Hurley v. Southern Calif. Edison Co.*, 183 F.2d 125 (9th Cir. 1950).

¹⁰ *Graves v. Associated Transport, Inc.*, 344 F.2d 894 (4th Cir. 1965); *But see* 1B J. MOORE, *FEDERAL PRACTICE* § 0.412[1] 1809 (2d ed. 1965).

¹¹ *Coca Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 63 (1934).

¹² *Glidman v. Capital Airlines, Inc.*, 267 F. Supp. 298 (D. Md. 1967).

¹³ Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

¹⁴ *Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 28 (1957).

¹⁵ *Id.*

plea is asserted against a party who did not have the initiative in the prior action.

Some jurisdictions have adopted this view,¹⁶ but others have instead looked to the reason for the rule, *i.e.*, basic fairness in each individual case.¹⁷

The courts have not justified this pessimistic view of their duty and function; instead they have willingly inquired into the circumstances of the actual case, and time and again they have allowed the plea against a party not having the initiative in the former action whenever they have been satisfied that the party against whom the former judgment was invoked *in fact had a realistically full and fair opportunity to litigate* the issues in the former action [Emphasis added].¹⁸

Fairness can arise in different forms, *e.g.*, the danger that a sympathetic jury might bring in a verdict against a wealthy corporate defendant without realizing its effect on later valid claims,¹⁹ or the possibility of a small compromise verdict that would force a defendant to appeal. Thus, non-mutuality of parties could create *more*, instead of less litigation.²⁰ If collateral estoppel is applied to inherently unfair conditions, the result will likely constitute a violation of due process under the Constitution of the United States.²¹

In order to ascertain whether parties have had their full and fair day in court, all of the circumstances of the case must be considered. In *United States v. United Air Lines*,²² a case almost identical with the present one, the survivors filed suits in eleven jurisdictions. Twenty-four actions brought in the Southern District of California were consolidated for trial and resulted in a jury verdict for the plaintiffs on the issue of negligence. Then, in another district court, other plaintiffs moved for a summary judgment on the ground that the California judgment was determinative. The court followed *Bernhard* and rejected the requirement of mutuality because,

[N]o constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and actually did litigate it* [Emphasis by the Court].²³

United States v. United Air Lines was followed by *Zdanok v. Glidden Co.*²⁴ where the court approved *Bernhard* and then considered whether there was fundamental fairness. It found that, "While the Alexander plaintiffs were not parties to the *Zdanok* action, it is clear that *everyone*

¹⁶ Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 302 (1961).

¹⁷ Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).

¹⁸ *Graves v. Associated Transp., Inc.*, 344 F.2d 894, 900 (4th Cir. 1965).

¹⁹ *Moschzisker, Res Judicata*, 38 YALE L.J. 299 (1928).

²⁰ *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1965).

²¹ Vestal, *The Constitution and Preclusion—Res Judicata*, 62 MICH. L. REV. 33 (1963).

²² 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom.*, *United Airlines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *petition for cert. dismissed*, 379 U.S. 951 (1964).

²³ *Id.* at 725-26.

²⁴ 327 F.2d 944 (2d Cir. 1964).

expected their rights to be governed by the court's interpretation of the [labor] contract in that test case [Emphasis added.]."²⁵

Courts subscribing to *Bernhard* require mutuality when the first litigation is not fair and complete. In *Berner v. British Commonwealth Pac. Airlines, Ltd.*,²⁶ the plaintiffs argued that the defendant, BCPA, was collaterally estopped from relitigating the question of liability for "wilful misconduct" under a Warsaw ticket because of a prior judgment involving a different passenger killed in the same crash. The court held for the defendant because of a lack of mutuality and stated, "We think it would be unfair in this case to use the result of the second Holmes trial to the disadvantage of BCPA."²⁷ In the previous litigation, BCPA won the first trial, but upon retrial it suffered a relatively small judgment. The court reasoned that BCPA did not appeal from the small judgment because of the possibility of suffering a much larger judgment. Thus, the first litigation was taken as a settlement by BCPA, and it was surely not intended as full and complete litigation on the issue of liability. Similarly, in *Technograph Printed Circuits, Ltd. v. United States*,²⁸ the court decided that collateral estoppel should not apply to patent litigation because of the lack of compelling public policy and the possibility of unfairness, viz. (1) a person who was a stranger to prior litigation is neither harassed, put to additional expense, nor compelled to relitigate an issue, (2) due to the intrinsic nature of the subject, previous litigation can be incomplete or wrong, and (3) patent litigation raises issues that are significant to the public as well as to the parties. The court approved of *Bernhard* when fairness is present, but decided "no more than one day in court" should not dominate the principle of collateral estoppel.

In the present case the court followed *United States v. United Air Lines*: "There seem to be no compelling reasons for requiring that the party asserting the plea of collateral estoppel, even affirmatively as in this case, must have been a party, or in privity with a party, to the earlier litigation."²⁹ The court then stated that *four questions* must be answered affirmatively before collateral estoppel can be applied. The first three questions are the tests set down by *Bernard* and followed in *United States v. United Air Lines* and *Zdanok v. Glidden Co.* The fourth question goes to fairness, i.e., "Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?"³⁰ The court's conclusion was that the issue of negligence was fully and completely litigated in the previous action.

Thus, the court made "a fair opportunity to be heard on the issue" a specific prerequisite to ascertainment of whether mutuality of parties can be eliminated. Past courts have either (1) disregarded fairness, (2) used it as a basis for upholding the requirement of mutuality, or (3) considered it as a question of due process. Making fairness to be heard a definite test

²⁵ *Id.* at 953.

²⁶ 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1965).

²⁷ *Id.* at 540.

²⁸ 372 F.2d 969 (Ct. Cl. 1967).

²⁹ 267 F. Supp. at 303.

³⁰ *Id.* at 304.

will increase other courts' awareness of the requirement, which should in turn affect a precise and thorough inspection of the previous litigation. Thus, the solidification of the requirement will better safeguard the parties from the possible dangers of non-mutuality until joinder and class action rules are broadened to permit complete litigation in a single action, and simultaneously assist fulfillment of the policy behind non-mutuality.

James Lee Irish, III

RECENT DECISIONS

Wrongful Death—Conflict of Laws— Significant Contacts vs. Lex Loci

On 3 November 1964, four passengers were killed when their chartered airplane crashed into a mesa near Kim, Colorado. A wrongful death action was brought in Texas, and the district court held for defendant air charter service on the issue limiting recoverable damages. On the appeal, which affirmed the lower court decision, appellant argued that the Texas law allowing unlimited recoverable damages should apply because Texas was the state of the most significant contacts with the action. The appellate court felt, however, that it was bound by *stare decisis* in construing the relevant Texas conflicts statute and accordingly applied the theory of *lex loci delicti*, the law of the place of the forum, limiting recoverable damages in accordance with the applicable Colorado statute. Error was granted to the Texas Supreme Court. *Held, affirmed*: the law of Colorado, the place of the accident, shall be followed and applied. *Marmon v. Mustang Aviation, Inc.*, 10 Av. Cas. 17,896 (Tex. Sup. Ct. 1968).

Petitioner argued that this action was a Texas controversy, that Colorado had little concern with the accident because the passengers were returning to Texas on a business trip in behalf of a Texas based commercial activity, and that respondent was a Texas corporation whose negligent pilot was also a Texas resident. The Texas courts have repeatedly held that Article 4671¹ does not have extraterritorial effect, and the subsequent enactment² of Article 4678 does not purport to give this force to the Texas wrongful death statute. "Its purpose was simply to provide that a right of action

¹ TEX. REV. CIV. STAT. ANN., art. 4671 (1952) provides, in part:

An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:

1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person, association of persons, joint stock company, corporation . . . his, its or their agents or servants, such persons . . . shall be liable in damages for the injuries causing such death. . . .

2. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of the proprietor, owner, charterer or hirer of any industrial or public utility plant, or any railroad, street railway, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, wrongful act, neglect, carelessness, unskillfulness or default of his, their or its servants or agents, such proprietor, owner, charterer or hirer shall be liable in damages for the injuries causing such death. . . .

² TEX. REV. CIV. STAT. ANN., art. 4678 (1952) provides:

Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. The law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure.

arising under the laws of a foreign state or country for the wrongful death of a Texas citizen could be enforced in the Texas court."³

In *Richards v. United States*⁴ the United States Supreme Court said:

Where more than one State has sufficiently substantial contact in the activity in question, the forum State, by analysis of the interest possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.⁵

Petitioner argued that a state *can* adopt a statute having an extraterritorial effect; however, *Richards* is not a mandate to the state courts. The instant cause of action was created wholly by statute and was thus outside the court's common law domain. In the area of statutory construction, the doctrine of *stare decisis* has its greatest force. Changes in remedies are to be brought about by the process of legislative amendment, and the legislature's non-action does not authorize judicial action in legislative matters.

W.O.W., III

Insurance—Exclusionary Phrase—Civil Air Patrol Observer

An insured was killed while participating as an observer on a simulated search and rescue mission of the Civil Air Patrol. The group accident policy in question contained the following exclusionary language:

This policy does not cover any loss, fatal or non-fatal, caused by or resulting from:

* * *

(4) accident occurring while the Insured Person is operating, or learning to operate, or performing duties as *a member of the crew of any aircraft*. . . [Emphasis added.].

The Civil Air Patrol manual refers to the pilot and observer as making up the "air crew." However, the observer's principle function is visual observation, and he has nothing to do with the aircraft's operation. The insured contended that the court erred in its instruction in confining a "member of a crew" to one taking part in the operation, maintenance, or upkeep of the aircraft. *Held, affirmed*: The trial court did not err in its instruction. Further, there was no error in the trial court's refusal to give the instruction requested by the insurer that a member of the crew "shall be taken to mean any person present in the aircraft for the performance of some specific task, assignment or duty connected with the purpose of the particular flight." *American Casualty Company of Reading, Pennsylvania v. Mitchell*, 10 Av. Cas. 17,854 (8th Cir. 1968).

The court decided that the word "crew" referred to the crew of an aircraft rather than the two-man crew engaged in a Civil Air Patrol mission.

³ 10 Av. Cas. 17,896 (Tex. Sup. Ct. 1968).

⁴ 369 U.S. 1 (1962).

⁵ *Id.* at 15.

Thus, if the insurer feels that it must have the protection of a broader exclusion, it must use language such as "any duties whatsoever aboard such aircraft while in flight" which would clearly provide the desired result.

J.L.I. III

Erie Doctrine — Lex Fori — Inter-Spousal Immunity

A pilot and his wife, both residents of Pennsylvania, were killed in a Virginia airplane crash. The plaintiff, administrator of the wife's estate and also a Pennsylvania resident, filed a wrongful death complaint against Beech Aircraft Corporation in the United States District Court of Delaware. The plaintiff alleged that the accident was caused by the negligence of defendant's agents, and resulted from a breach of warranty by defendant to the husband, who had purchased the plane from defendant. Jurisdiction in the federal court existed by diversity of citizenship.

The defendant, Beech, filed a third-party complaint against Continental Bank and Trust Company, administrator of the husband's estate. The complaint alleged that the crash was proximately caused by negligence in maintaining or flying the aircraft. Continental moved to dismiss the third-party complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. *Held, third-party complaint dismissed*: The *Erie* doctrine requires that the appropriate Delaware law be applied. The administrator for the deceased pilot was immune to the third-party claim asserted against it by Beech, even though both administrators and spouses were citizens of Pennsylvania, where inter-spousal immunity is not recognized. *Dunn v. Beech Aircraft Corp.*, 271 F. Supp. 662 (D. Del. 1967).

Beech, using the argument that the domiciliary state has primary concern for its residents' marital relations, urged that the law of the domicile of the spouses would be the proper law to apply. This would be Pennsylvania law, which does not recognize the inter-spousal immunity rule.¹ The court rejected Beech's argument by applying the *Erie* doctrine²—that a federal court, in a diversity suit, must follow the substantive law of the state in which the court sits.

The Superior Court of Delaware held in *Perez v. Short Line, Inc.*³ that the *lex fori* (law of the forum) determined whether a defendant could maintain a cross-action for contribution against the spouse of the plaintiff. In *Perez*, the cross-action for contribution was deemed to be remedial and not substantive. The district court in *Dunn*, however, held that in applying *Erie* it was not bound by the state court's determination of whether a mat-

¹ *Smith v. Prudential Ins. Co.*, 300 S.W.2d 435 (Mo. Sup. Ct. 1957).

² *Puller v. Puller*, 380 Pa. 219, 110 A.2d 175 (1955).

³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴ *Perez v. Short Line, Inc.*, 231 A.2d 642 (Del. Super. Ct. 1967).

ter is procedural or substantive. If the law to be applied substantially affects the outcome of the decision, it will be termed "substantive."⁴ The federal court must determine if the state law is outcome-determinative. Therefore, even though Delaware has characterized the right to contribution as remedial,⁵ the federal court was not bound to accept that characterization. Because the applicability or non-applicability of the inter-spousal immunity rule to Beech's cross-claim for contribution was outcome-determinative, *Erie* required the federal court to follow Delaware law. Since Delaware recognizes inter-spousal immunity,⁶ Continental was immune to the third-party claim asserted by Beech.

J.T.W.

Administrative Law—Show Cause Order— Aircraft Accident Report

George Farrell, complainant, represented the widow and children of a United States Marine Corps Reserve officer who died in the crash of a jet plane while on active duty for training. Farrell requested that the Department of the Navy, pursuant to the Public Information Section of the Administrative Procedure Act,¹ furnish him with a copy of the complete aircraft accident report. The Navy furnished some information, but refused to furnish the entire report. After unsuccessfully appealing the refusal to provide the entire report, the complainant obtained an order requiring the Secretary to show cause why he should not be ordered to produce a complete copy of the aircraft accident report.² *Held*: The order to show cause was vacated and the proceeding dismissed. *Farrell v. Ignatius*, 10 Av. Cas. 17,834 (S.D.N.Y. 1968).

The respondent, Secretary of the Navy, cross-moved to dismiss the action for lack of jurisdiction. He contended that no complaint had been filed in the district court under the Federal Rules of Civil Procedure,³ and

⁴ *Sampson v. Channell*, 110 F.2d 754, 758 (1st Cir. 1940), *cert. denied*, 310 U.S. 650.

⁵ 231 A.2d 642.

⁶ *Saunders v. Hill*, 202 A.2d 807 (Del. 1964); *Ferguson v. Davis*, 48 Del. 299, 102 A.2d 707 (Del. Super. Ct. 1954).

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). Except under certain exceptions,

[E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. *On complaint*, the district court of the United States in the district in which the complainant resides, or has his principal 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 from the complainant. In such a case the court shall determine the matter *de novo* and the burden is on the agency to sustain its action . . . [Emphasis added.].

For a discussion of this amended Act, see 33 J. AIR L. & COM. 490 (1967).

² *Id.*

³ FED. R. CIV. P. 3.

since there was no action commenced or pending in the court, it had no jurisdiction. Complainant argued that the judicial review proceedings under Section 552 of the Administrative Procedure Act intended some form of special summary proceeding merely by the show cause order, and compliance with the requirements of the Federal Rules of Civil Procedure is not needed. In reaching its decision, the court noted that Section 552 expressly provides that the district court shall have jurisdiction *on complaint*.⁴ The court further stated that *on complaint* meant the filing of an action, and an action does not start by securing an order to show cause.⁵ The Federal Rules provide the manner for commencing an action, and there was neither "justification nor authority for carving out an exception to the uniform and regular civil procedure laid down by the Federal Rules in this case."⁶

C.F.P.

Eminent Domain—Inverse Condemnation—Jet Noise

The city of Los Angeles, California initiated condemnation proceedings to acquire property for the expansion of existing airport facilities. The defendants, residents of an ocean side community to the north and west of the airport, counterclaimed, alleging that the noise of takeoffs and "warm-ups" had interfered with the use and enjoyment of their property and had caused an incident depreciation in property values. They sought to demonstrate that, by this jet noise, the city had acquired air easements to the property and had thus taken or damaged the property for public use.¹ At the trial it was shown that no aircraft passed over parcels belonging to defendants either on takeoff or landing and that property values had increased at a rate approximating the appreciation in comparable areas in the county. *Held*: the defendants' claims were not compensable because there was no depreciation in value. *City of Los Angeles v. Mattson*, 10 Av. Cas. 17,632 (Cal. Super. Ct. 1967).

While careful to explain that it was not "intending to infer that such noise . . . was pleasant or to be desired," the court held that the noise to which the defendants were subjected was not "of a substantial nature"; the noise was not bad enough to constitute a taking or damaging in the constitutional sense. The test applied in federal courts for a "taking" is whether there have been frequent, low-level overflights amounting to a direct in-

⁴ 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).

⁵ *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406-08 (1959); *Warren v. Arz*, 18 F.R.D. 11 (S.D.N.Y. 1955); *In re Market Basket, Inc.*, 122 F. Supp. 321 (W.D. Mo. 1954).

⁶ *Farrell v. Ignatius*, 10 Av. Cas. 17, 835 (S.D.N.Y. 1968).

¹ CAL. CONST. art. I, § 14 provides in part, "Private property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner. . . ." [Emphasis added.]. There is a similar provision in the United States Constitution in the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, but allowing compensation only for a taking. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

vasion of airspace over the property; yet in some state jurisdictions, jet noise which causes a depreciation in property value has been considered to be a constitutional taking or damaging.² There was no indication towards which test the court here leaned; in fact, the issue was left undecided. Since there had been an actual appreciation in property values, the court did not feel constrained to decide whether depreciation caused by aircraft noise amounted to a taking or damaging for which compensation could be given. In the decision there was considerable discussion of a study conducted by an independent research company in which it was shown that the "Perceived Noise Level" near an airport, measured in PNdb (the average person's subjective response to aircraft noise), becomes intolerable above 100 PNdb; the noise level at the property in question was below 95 PNdb. Although it appeared that the court might be relying on a new test, based on a PNdb measurement, to determine whether compensation in inverse condemnation could be given for jet noise, this position was never enunciated. The opinion closed with a guarded explanation of the public policy reasons which might preclude recovery in any event, noting that the airplane, in becoming an integral part of modern life, required of the city dweller a certain toleration of unpleasantness and that until the inconvenience severely outweighed the utility, there could be no recovery.

B.L.A.

² For a more extensive discussion of the problems and decisions in this area, see 63 MICH. L. REV. 1373 (1965).