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RECENT ADDRESSES

PROBLEMS OF INTERNATIONAL AIR TRANSPORTATION

By WARREN LEE PIERSON

Chairman of the Board, Trans World Airlines.*

WHEN your Chairman asked me to speak before the Association on problems of international air transportation I felt this was a very appropriate subject for discussion among lawyers. I say this because when I first became associated with TWA as a member of its Board of Directors in 1945—having previously spent all of my business life in the law and banking—I found myself, to my surprise, in a familiar field.

Since I became Chairman of the Board, in 1947, my initial reaction has been confirmed. I have established to my own satisfaction that the best and most accurate definition of an airline is "a corporation whose primary purpose is to engage in the practice of law and when not pursuing this primary objective it sometimes is concerned with the transportation, by air, of persons, property and mail." Of course any large industrial organization has its share of legal problems. Even so I do not know of any other business which is so completely involved in the law in its day-to-day activities.

My own company, in common with other large airlines, has all the usual corporate and legal problems that face every industrial organization. Our public financing is subject to the Securities Act of 1933, and because our shares are listed on various Exchanges, we are also subject to the provisions of the Securities Exchange Act of 1934. Likewise we are bound by Workman's Compensation, Social Security and other Federal and State statutes of a similar nature. When we have said this I believe that the similarity to other corporations ends.

The question of qualifying to do business is always a troublesome one. Generally companies are obliged to qualify only in states in which factories or other major activities are centered. Airlines on the other hand usually have to qualify in every state through which they operate. This is clearly necessary in states in which we serve two cities, thus carrying on an intrastate business; but a by-product of air transportation is service rendered to others than our regular customers—fuel, spare parts and maintenance—which destroys the essential interstate character of our operation.

In labor relations we are governed, not by the National Labor Relations Act and the Labor Management Relations Act, but by the Railway Labor Act and are thus under the jurisdiction of the National Mediation Board. As a result the controversial Taft-Hartley Act is neither a help nor a hindrance to us. And we still have our labor disputes and our strikes notwithstanding the Railway Labor Act—which many have thought to be model labor-management legislation.

The air transport industry differs from most American enterprises in that it is a wholly regulated industry, under the Civil Aeronautics Act of 1938. By the terms of that Act almost every aspect of our economic life depends upon the decisions of the five members of the Civil Aeronautics Board. The routes which we operate are prescribed by the Board in certificates of public convenience and necessity which are issued and amended only after extensive hearings. Our charges to the public for transportation of passengers and cargo are subject to approval of the Board, and once they are

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approved we cannot deviate from them. The compensation we receive for transporting mail is fixed by the Board. Agreements affecting air transportation are subject to approval by the Board.

Any officer or director of an airline who is an officer or director of any common carrier or any other company engaged in any phase of aeronautics can serve only with the approval of the Civil Aeronautics Board. In my own case, when I first joined the TWA board of directors, the permission of the CAB was required because I was a director of the International Telephone and Telegraph Corporation which had a subsidiary manufacturing electronic devices used by some airlines. Of course mergers of airlines and acquisitions of control are likewise subject to the approval of the Board.

On the technical side of operations we are governed by Civil Air Regulations promulgated by the Civil Aeronautics Board. However, there is also a Civil Aeronautics Administrator under the Secretary of Commerce and not a part of the Civil Aeronautics Board. He and his staff are responsible for inspection and enforcement of the Civil Aeronautics Regulations. Also he has important functions which relate to the establishment and operation of civil airways and the aids to navigation throughout the country.

All of this indicates the complicated nature of our activities and the multiplicity of legal problems which result. You may be surprised, therefore, when I tell you that I regard the Civil Aeronautics Act of 1938 as an outstanding piece of legislation. Certainly it has infirmities but anyone who examines the facts must conclude that the present stature of the air transport industry of the United States is due in large part to the wise policies and procedures established by the Act.

Problems Beginning At U. S. Borders

The problems, corporate and otherwise, that I have mentioned up to now relate generally to any airline operating within the United States. For airlines like ourselves and our good friends Pan American, Braniff, Northwest and others engaged in operations abroad, the real troubles begin when we leave the borders of the United States.

In international air transportation as in the domestic field, an American carrier can operate only under certificates of convenience and necessity issued by the Civil Aeronautics Board. But an international certificate has one additional complication. Section 801 of the Civil Aeronautics Act provides that the "issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in any certificate authorizing an air carrier to engage in overseas or foreign air transportation * * * shall be subject to the approval of the President." In other words, after the Civil Aeronautics Board arrives at its decision in an international case, following a hearing, submission of briefs and oral argument, the President has the final say in the matter.

In 1948 the Supreme Court of the United States in the case of the *Civil Aeronautics Board v. Waterman Steamship Corporation*, 333 U.S. 103, decided that the granting of a certificate for foreign air transportation is not subject to review by the courts either before or after the President has approved a certificate when the proceedings are not challenged as to regularity. Up to now we do not know how irregular the proceedings must be in order to afford an air carrier court relief from the exercise of the Presidential power under the Act as interpreted in the *Waterman* decision and, incidentally, that case was a five-to-four decision of the Court, just about as close as you can get.

A good many persons in the air transport industry feel that there have been some confusing determinations in international route cases following the *Waterman* decision. For a variety of reasons no case involving the reg-

ularity of the proceedings (to use the language of the *Waterman* case) has reached the Supreme Court. Consequently, there have been cases in which the decisions of the Civil Aeronautics Board have been modified or completely reversed by the Chief Executive. Actually, decisions once made by the President have been changed by him even after the lapse of months following his original decision, all without benefit of a reopened hearing or other orderly process. If I were to point to any part of the Civil Aeronautics Act which would warrant clarification, it is with respect to the power of the President under Section 801 interpreted by the *Waterman* case.

Being the proud possessor of a certificate of convenience and necessity, issued by the Civil Aeronautics Board with the approval of the President, does not by any means assure an air carrier that it can start operating from the United States to the foreign countries designated in its certificate. The right *actually* to commence service and *actually* to carry on operations depends upon whatever agreement may exist with respect to operating rights between the United States and the foreign countries involved. To date, operating rights have been covered by separate bi-lateral agreements, one with each country. It is the hope of many that eventually these will be replaced by a multilateral agreement which will prescribe uniform conditions applicable to all signatory countries but this, I am afraid, will be in the far distant future, if at all.

Under the bi-lateral system, however, we have been rather fortunate in achieving some uniformity as a result of the foresight and initiative of the Civil Aeronautics Board and the State Department immediately following the war, in negotiating the so-called Bermuda-type bi-lateral agreement with most of the principal countries to which Pan American and TWA operate. This type of agreement had its origin in the negotiations between the United States and the United Kingdom at Bermuda in 1946.

At the time of the Chicago Conference, there was great fear on the part of some of the Europeans, particularly the British and the French, that the American carriers would monopolize the intra-European traffic. This anxiety created an impasse which lasted almost a month, and prevented a multilateral convention covering economic matters.

The Bermuda formula was really intended to prevent American operators from dominating intra-European traffic but in practice the results have not been too satisfactory to some European operators. The agreement established, in general terms, the rights of the airlines of the two contracting governments and contains an annex describing the routes which will be served by the airlines permitted to operate to and through each country. Many countries have followed this pattern with or without certain modifications.

There have been difficult problems arising under the bi-laterals and whenever a controversy develops it always carries the risk of cancellation by one party or the other, which could result in the termination of operating rights usually upon a year's notice. Happily, we have not been faced with such a result in any controversy that has so far arisen under the bi-lateral agreements.

Keeping Seats Filled

Most of these problems have related to the *volume* of operation that can be carried on to a particular country. These issues invariably involve the so-called "fifth freedom" traffic which a foreign airline may carry. I will not burden you with the origin of the term "fifth freedom" but it simply means traffic moving between two points, both of which are outside the home country of the airline involved. In other words, a passenger on TWA originating in Paris and destined for Bombay would be a "fifth freedom" passenger.

In some countries there is a strong tendency to impose restrictions upon the handling of such traffic to the end that it is reserved—or at least a preference given—to the airlines of the country of origin or destination. On the other hand it must be obvious that long trunk-route operations such as those of TWA and Pan American need the right to compete freely for "fifth freedom" traffic if they are to function economically. For example, a TWA flight departing New York for Bombay will probably discharge some passengers in Paris, Geneva, Rome, Athens and other stations along the route. If we could not fill the vacated seats with new passengers at these points, the through traffic going all the way from New York to Bombay would rarely support the operation. Furthermore we believe that civil aviation will continue to improve only so long as the customer has the privilege of selecting his airline on a competitive basis. In the shipping field restrictions of the type I have described have never hampered international steamship operations. And we hope they will not become serious enough to curtail the progress of international air transportation.

Once authority has been obtained from a foreign country to operate under the effective bi-lateral agreements, the airline operator must familiarize himself with the pertinent laws of the countries to be served. These laws he will quickly discover have remarkably little in common. In most countries, of course, we must obtain permits to employ Americans or other foreigners in our offices and at the airports. Many countries require that we observe a minimum ratio of nationals to foreigners. For instance in Egypt we must have at least nine Egyptians for every foreigner on our payroll.

In the United States we are accustomed to paying social security taxes to the government and the government takes care of the payment of benefits to the employee. However, under Italian law the employer must pay the social security benefits directly to the employee. Payments are based upon length of service and they cover all types of benefits. They are particularly heavy on the termination of employment whether by death or any other reason. The only exception to the requirement of termination payments is proof of a criminal act on the part of an employee. In Italy, also, benefits are payable when women employees marry and again when they become pregnant.

In Greece an employer must keep on paying his employee while he is in the Army. Egypt makes life difficult for the airlines as well as for people like our accountants by requiring that books be kept in Arabic as well as in English.

In addition to the legal problems which are involved in all of the activities that I have mentioned there are also some very practical ones which add to the difficulties of operating in foreign lands. We like to proceed on the principle that the customer is always right, particularly in matters relating to food on the airplanes. Many religious sects throughout the world have varying dietary requirements which they adhere to rigorously. This is particularly true in the Near East and our commissary people must understand the requirements and be prepared to meet them.

International Controls

In international air transportation there is no single body like the Civil Aeronautics Board with authority to regulate the economic and technical phases of airline operations. The nearest approach to this is the International Civil Aeronautics Organization known as ICAO with headquarters at Montreal. This organization came into being in Chicago in 1944 as a result of the International Civil Aviation Conference held at the invitation of President Roosevelt for the purpose of formulating an international convention governing appropriate phases of air transportation. There are now 57 contracting states. It is administered by a Council consisting of 21 nations elected an-

nually and a permanent Secretariat. The Council has been in almost continuous session since its organization. The main objective of ICAO is to establish uniform operating procedures throughout the world and in a more limited sense to provide uniformity in certain phases of the economics of air transportation. In the latter field its authority is rather limited and its efforts have not been very effectual.

Success in this phase of international air transportation has been achieved to a greater extent by another organization known as the International Air Transport Organization. This is made up of most of the international airlines of the world, as distinguished from their governments, and is therefore actually a trade organization. It enjoys a unique position throughout the world because it supplies uniformity particularly in the business side of air transportation which would not be possible under any form of government organization such as ICAO or otherwise. Agreements relating to passenger fares and cargo charges, the conditions and form of tickets and way bills, rules relating to free transportation, baggage limitations and other problems are all subject to agreement among the IATA members.

A real accomplishment of IATA has been the setting up of a clearing house for members. This organization has had extraordinary success in expediting and simplifying inter-company settlements.

There is a continual debate in IATA conferences as to the type of baggage which a passenger may carry free of charge. This is ordinarily determined on the basis of what might be considered essential articles of travel. Unfortunately, views on this subject vary with the nationality of the airline and the habits of their principal passengers. To an Englishman it is essential that he be permitted to carry an umbrella free of charge. To most United States tourists a camera is a "must" item. The residents of the Near East, however, have an entirely different idea and feel that a prayer rug is an essential article of travel. Thus the list of free baggage multiplies so that all may be satisfied. Umbrellas, cameras and prayer rugs are all considered *essential* but the original description of a prayer rug in IATA tariff regulations turned out to be faulty, and the well-known "rug dealer" was afforded a very cheap method of transporting his wares until the slow process of amending a tariff caught up with him.

As a result of the Civil Aeronautics Act, however, the American carriers, like TWA and Pan American, are not free to agree on matters of this kind with our foreign airline members. Under Section 412 of the Civil Aeronautics Act every American air carrier must file with the Board a copy of every agreement affecting air transportation with any other carrier and the Board has power to approve or disapprove any such agreement. Consequently, when uniform policy is adopted in IATA among all of the airlines of the world, with respect to fares or conditions of transportation or the form of tickets and way bills or free transportation or any other phase of operation, before an American carrier can be bound by it the agreement must be submitted to and acted upon by the Civil Aeronautics Board. Not only is this true because of the specific provision of the Civil Aeronautics Act but also because of the United States anti-trust laws.

The Civil Aeronautics Act, however, does recognize the necessity for agreements among airlines, both in domestic and in international operations, which ordinarily would come within the proscriptions of the anti-trust laws. Accordingly, under Section 414 of the Act whenever the Board approves, by order, an agreement among airlines or an interlocking relationship among directors and officers, or approves a merger or other acquisition of control, the air carriers or persons involved are relieved from the penalties of the anti-trust laws to the extent necessary to enable them to do the things that are permitted by the order of approval. But for this provision it would be

impossible for the airlines legally to provide any substantial degree of uniformity in service, operations and charges.

Incidentally, some of you may remember that it was necessary only a few years ago to pass the "Bullwinkle" amendment to the Interstate Commerce Act so that the railroads in the United States could establish joint rates and through rates without being harrassed by the Department of Justice.

The subject of liability for injury and damage to persons and property is always of interest to the legal profession. In the domestic field there is nothing which distinguishes those problems in airline operation from any other common carrier. In the international field the situation is quite different. I have been told that over the years the Committee on Aeronautics of this Association has taken a very active interest in two international treaties or conventions dealing with this subject.

The first of these is the Warsaw Convention which was concluded on October 12, 1929 and to which the United States became a party in 1934. This convention regulates the liability of airlines for injury to passengers and damage to their baggage in international air transportation. In effect, it establishes a presumption of liability and in return therefore it limits the liability of the carrier for each passenger to 125,000 gold French francs—which in present-day U.S. Currency is approximately \$8,300. Liability for damage to checked baggage is limited to 250 gold francs per kilogram and for articles carried by the passenger to 5,000 gold francs.

To enjoy the benefits of the Warsaw Convention the airline passenger ticket and the way bill covering property must be in the form prescribed in the convention. Under the convention the parties may contract for a higher limit of liability. Moreover, the monetary limits of liability are not binding if the injury to persons or damage to property is caused by circumstances considered to be the equivalent of wilful misconduct.

The Warsaw Convention has had its supporters and opponents over the years. Among the airlines the opponents usually object to the provisions which amount to absolute liability, while others object to what they consider to be too low limits of monetary liability. I believe that these controversies will continue to occupy the interest of airlines, Bar Associations and other groups for a long time to come.

After many years of discussion the so-called Rome Convention was signed on October 7, 1952 and at present there are approximately 20 signatories. While the United States has participated in the discussions over the years and was represented at the conference in Rome it did not sign the convention. The Rome Convention deals with the liability of air carriers for damage to persons and property on the ground caused by "aircraft in flight or by any person or thing falling therefrom." This convention also establishes absolute liability and prescribes maximum limits of recovery based upon the gold French franc. In the case of loss of life or personal injury the maximum recovery is 500,000 francs, thus demonstrating the higher value placed on human life in the year 1952 as distinguished from the Warsaw Convention concluded in 1929. The Rome Convention also established overall limits of liability resulting from any one accident depending upon the weight of the aircraft involved. The United States failed to sign the Rome Convention mainly because of the objection of the American delegates to the principle of absolute liability and to what they considered to be low limits prescribed in the convention.

Another international convention which could be of considerable benefit in the financing of the purchase of aircraft engaged in international operations is the so-called "Convention on the International Recognition of Rights

in Aircraft" also known as the Geneva Convention. This was signed at Geneva in June, 1948. It provides a method of international recording of title to, and mortgages on aircraft, thus affording a protection to banks and other lending institutions and individuals who have provided financing for the purchase of aircraft engaged in international operations.

This has been a very general discourse on some of the problems that we are faced with, both in this country and abroad, in operating an airline. The air transport business, I think you will agree, is beset with problems not only for counsel but for everyone connected with its management. New situations, usually troublesome, arise every day at home and abroad. Those associated with the industry have little time to call their own, during the day or at night. But with all the difficulties which we in air transportation face it remains a fascinating and challenging business. And while we may seem to grow old faster than the industry, one thing is true, we never get bored with our work!