

1953

## Report of Aeronautical Law Committee of American Bar Association

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### Recommended Citation

Charles S. Rhyne et al., *Report of Aeronautical Law Committee of American Bar Association*, 20 J. AIR L. & COM. 476 (1953)

<https://scholar.smu.edu/jalc/vol20/iss4/7>

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# FEDERAL REVIEW

## REPORT OF AERONAUTICAL LAW COMMITTEE OF AMERICAN BAR ASSOCIATION

**Y**OUR Committee on Aeronautical Law herewith presents its Annual Report for 1953, a year which marks the 50th Anniversary of power flight:

### INTERNATIONAL CONVENTIONS

The current and widespread anxiety emanating from many quarters over the growing tendency toward disregarding the distinction between domestic and international matters in the exercise of the treaty-making powers of the United States is reflected in recent resolutions of the American Bar Association and the so-called Bricker Amendment to the Constitution, now under consideration in the United States Senate. These proposals to limit the presently established treaty-making power are of great interest to your committee, coming as they do at a time when major treaties in the field of aeronautical law affecting private rights of United States citizens are presently under consideration. We refer to the Warsaw Convention of 1929 governing the liability of air carriers to American citizens for injury or death in international air travel and the proposed Rome Convention governing the liability of international air carriers to American citizens for surface damage caused by aircraft of other nations. Each of these treaties is now under consideration by the government of the United States, the Warsaw Convention for proposed changes, and the Rome Convention for original adherence.

In January, 1952, a subcommittee of the Legal Division of the International Civil Aviation Organization met in Paris and produced a draft revision of the Warsaw Convention. This Convention which originated in 1929 and was adhered to by the United States in 1934, governs the liability of air carriers with respect to passengers killed or injured in international air transportation. The January, 1952, draft revision of this treaty is now being considered by the United States Government so that it may present its position with respect to proposed changes in the treaty when the Legal Committee of the International Civil Aviation Organization again meets in August, 1953, at Rio de Janeiro. The Legal Committee may at that session conclude its study and adopt a draft for submission to the ICAO Council with the recommendation that it be submitted to the ICAO Assembly or to an international conference for finalization.

Your committee is following this matter closely and will report fully when ICAO takes final action.

A diplomatic conference convened under the auspices of the International Civil Aviation Organization in Rome, Italy, in September and October, 1952, at the invitation of the Italian Government, completed work on, adopted and opened for signature and ratification or adherence a new Convention on Damage Caused by Foreign Aircraft to Third Persons on the Surface. Thirty-two nations, including three which were represented by observers, participated in the work of the conference. Fifteen nations signed the resulting Convention at Rome, October 7, 1952, and three more nations have signed it in the intervening period. No nation has yet ratified it. It will become effective as between the nations which have ratified it on the ninetieth day after the instrument of ratification of the fifth nation is deposited with the International Civil Aviation Organization. The Convention remains

open for signature by any nation until it becomes effective and for adherence without signature at any time thereafter.

This revised Convention has as its purpose the provision of uniform rules and limit of liability applicable to the operator of an aircraft for damages caused to persons or property on the surface in a nation other than that in which the aircraft is registered. It also contains provisions governing the manner in which the nation overflown may assure itself that the operator of the overflying aircraft has insurance or other security for any liability which may eventuate under the Convention. The Convention has no application whatsoever to domestic aircraft.

The United States did not sign the Convention at Rome and has not done so since. Although it possessed the appropriate powers to sign a convention the United States Delegation considered that the Convention, as adopted, contained provisions which depart so substantially from the United States views and posed such important problems of law and policy as to require further careful consideration and analysis. Among the major problems presented which it was felt warranted further consideration are:

(1) The inclusion of the principle of absolute liability of the operator for any damage caused by his aircraft, regardless of the existence of fault. The United States sought a convention predicated on a rebuttable presumption of fault.

(2) The relatively low limits of liability provided, particularly with respect to large transport aircraft. The Convention contains a scale of limits starting at approximately \$33,000 and increasing according to weight, but with the rate of increase becoming progressively lower as the weight increases. Under this scale, the maximum liability for the largest plane in commercial operation today would be approximately \$800,000. The United States sought substantially higher limits.

(3) The provision of an individual limit of liability for injury or death of any one person of \$33,000. The United States opposed any individual limit and particularly one limiting liability for personal injury.

(4) The provision whereby absolute liability without any limit in the amount thereof is imposed in cases of deliberate acts done with the intent to cause damage, including cases where such acts were those of a servant or agent acting in the course of his employment and within the scope of his authority. The United States contended that, having adopted the principle of absolute liability, the limits provided by the Convention should be removed only in the most extreme circumstances involving intentional wrong doing amounting in effect to criminal intent, and that in cases of acts of servants or agents, such unlimited liability should be imposed on the operator only when the act is done pursuant to express authority.

(5) The provisions governing security for the operator's liability which incorporate the principle that the nation being overflown, while entitled to require insurance or other security for an operator's liability, is compelled to accept as sufficient evidence of the final responsibility of an insurer the certificate of the nation of registry of the aircraft or of the nation of the domicile of the insurer as to such financial responsibility. This approach also required elaborate provisions for the administration of this system of certificates. The United States urged that the country overflown should be entitled to satisfy itself as to any reasonable doubts in respect of financial responsibility of the insurer.

(6) Inclusion in the Convention of the so-called "single forum" solution of the problem of jurisdiction, under which actions for damages under the Convention can be brought only in the courts of the states where the damage occurred, except in certain limited circumstances where the parties agree upon a different forum, requiring that judgments rendered in the single forum be executed in other states, subject to specified exceptions. The United

States urged provisions which have permitted considerably more flexibility in the choice of forum while at the same time assuring the defendant an opportunity to preserve the limits of liability.

As stated, the proposed Rome Convention would limit the recovery by American citizens for damages on the surface caused by aircraft of other nations to amounts ranging from \$33,000 to \$800,000, depending upon the weight of the aircraft causing the damage. Your committee is making a careful study of this Convention and will report its recommendations to the House of Delegates upon completion of that study.

#### AIRPORTS

In its Annual Report for 1952<sup>1</sup> your committee briefly reviewed "The Airport and its Neighbors," the report of the so-called Doolittle Commission established by President Truman to examine the problem of airport location and use. It will be recalled that the Commission was appointed to study this problem following a series of aircraft accidents in congested areas near airports in early 1952. The Department of Commerce was designated to seek ways to implement the recommendations contained in the Doolittle Commission Report and in December, 1952, the Department released its proposed program to carry the recommendations into effect.

One recommendation of the Doolittle Commission requires that the dominant runways of new airport projects should be protected by cleared extensions at each end at least one half mile in length and one thousand feet wide. This area would be completely free from housing or any other form of obstructions and would be considered an integral part of the airport. A further recommendation requires a fan-shaped zone, beyond the half-mile cleared extension at least two miles long and six thousand feet wide at its outer limits to be established at new airports by zoning law, air easement or land purchase at each end of dominant runways. In this area the height of buildings and the use of land would be controlled to eliminate the erection of places of public assembly, churches, hospitals and schools and to restrict residences to the more distant locations within the zone.

The Department of Commerce approves of these recommendations and as part of its program of implementation urges the amendment of the sponsor's assurance agreements made in connection with the expenditure of federal funds under the Federal Airport Act of 1946 to include covenants not to permit any structures in any cleared runway extensions owned or controlled by the sponsor and not to use the approach zones for sponsored places of public assembly or other land uses resulting in concentrations of people, such as schools and hospitals.

The Doolittle Commission recommended that the authority of the federal, state and municipal governments with respect to the regulation of the use of airspace should be clarified to avoid conflicting regulations and laws. The Department of Commerce concurred in this recommendation. See page 4, *infra*, for a discussion of pending litigation in the United States District Court for the Eastern District of New York over the rights of a municipality to prohibit the flight of aircraft over its territory at an altitude of less than one thousand feet.

One recommendation of the Doolittle Committee in which the Department of Commerce did not concur is that the Civil Aeronautics Act of 1938 be amended to require certification of airports necessary for interstate commerce and to specify the terms and conditions under which airports so certified shall be operated. Certificates would be revoked if minimum standards for safety were not maintained. The Department of Commerce is of the position that no such amendment of the Civil Aeronautics Act is necessary

<sup>1</sup> 77 A.B.A. REP. 122, 163 (1952).

as there already exists adequate control over airports use in the Civil Aeronautics Administration operating authorization to scheduled and large irregular air carriers. With respect to the arbitrary closing or abandoning of major airports the Department of Commerce observed that the assurances made by the sponsors of projects under the Federal Airport Act require continued operation of those airports improved with federal funds, which includes virtually every major airport.

#### CONFLICT BETWEEN LOCAL AND FEDERAL REGULATION

One development which may have far-reaching consequences is the litigation now pending in the United States District Court for the Eastern District of New York, *All American Airways, Inc., et al. v. Village of Cedarhurst, et al.*

The Village of Cedarhurst, which lies off the end of one of the principal runways of the New York International Airport (Idlewild), adopted an ordinance which would have prohibited the operation of aircraft over the village at an altitude of less than 1,000 feet. Because of the effect of the ordinance upon operations at the airport, the New York Port Authority, which operates the airport, certain airlines using the airport, and the Air Line Pilots Association brought an action to enjoin enforcement of the Cedarhurst ordinance. The Civil Aeronautics Board and the Civil Aeronautics Administration intervened as plaintiffs.

On motion of the plaintiffs, the district court granted restraining orders and a preliminary injunction. In his order granting the temporary injunction (106 F. Supp. 21 (E.D.N.Y. 1952)), Judge L. F. Rayfiel found that the ordinance conflicted with the Civil Air Regulations and, for that and other reasons, was unconstitutional.

On appeal from the preliminary injunction, the order was affirmed but the Court of Appeals for the Second Circuit avoided any expression of opinion on the validity of the ordinance.

In their answer, the defendants have questioned the validity of the Civil Air Regulations involved and have counterclaimed, introducing theories of trespass, nuisance, and unlawful taking of property without compensation.

The matter is now awaiting trial on the merits.

#### SUSPENSION OF POINTS

Extensive litigation during the past year has apparently sustained the Civil Aeronautics Board's power to suspend the authority of an air carrier to serve designated points. As a part of the Board's efforts to promote the development of the local-service airline system, it ordered Western Air Lines and United Air Lines, in separate proceedings, to suspend their operations at certain points, and authorized certain local service operators to serve those points. Both carriers appealed these orders to the appropriate Circuit Court of Appeals. The carriers argued that the Board's order amounted to a partial revocation of their certificates of convenience and necessity, and thus was invalid. The Board, on the other hand, contended that the order amounted to a temporary suspension which they were able to order whenever they determined that the public convenience and necessity so required. The courts of both the Ninth Circuit and the Seventh Circuit upheld the Board's orders. In both instances the courts stressed the temporary nature of the suspension action; and, while indicating that the Board, pursuant to its statutory authority to alter, amend, or modify certificates, probably had some authority to make permanent route realignments among air carriers if such realignments did not change the essential character of air carriers' operations, the courts reserved their opinions on that issue as applied to

these cases. *Western Airlines, Inc. v. Civil Aeronautics Board*, 196 F. (2d) 933, cert. den. — U.S. —, 97 L. Ed. (Adv. p. 58); *United Air Lines, Inc. v. Civil Aeronautics Board*, 198 F. (2d) 100.

#### AIR MAIL SUBSIDY SEPARATION

The effort to secure legislation which would provide for the separate identification of air mail compensation and subsidy continued during the past year, with extensive hearings being held before the House Interstate and Foreign Commerce Committee. The bill before the committee had previously been passed by the Senate. The House Committee reported the Senate bill with very substantial amendments, but it was not possible to secure the enactment of the legislation prior to the adjournment of the 82nd Congress. Consequently, this legislation is again on the docket of both the Senate and House Committees on Interstate and Foreign Commerce.

It is now questionable whether these committees will undertake consideration of the legislation, in view of their busy schedules, since the Civil Aeronautics Board has, in effect, accomplished the purpose of the legislation administratively. The Board has issued three reports which identify the air mail compensation and subsidy by carrier, and in all mail rate decisions involving a granting of subsidy the Board identifies that portion of the total amount to be paid which is air mail compensation and subsidy.

#### PRIVILEGED GOVERNMENT DOCUMENTS

A recent decision of the United States Supreme Court in *United States v. Reynolds, et al.*, decided March 9, 1953, arising out of an aircraft accident, is of extreme importance in the field of privileged documents. A B-29 aircraft crashed in Georgia while testing secret electronic equipment for the Air Force. Six of the nine crew members and three of four civilian observers were killed in the crash. In a suit by the representatives of the deceased civilians against the United States under the Federal Tort Claims Act, the plaintiffs moved under Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force's official accident investigation report. Following the submission for the Air Force of a formal claim of privilege on the grounds that the aircraft was engaged in a highly secret mission of the Air Force, the district court ordered the Government to produce the documents so that it might determine whether they contained privileged matter. The Government declined to do so and the court entered an order that the facts on the issue of negligence would be taken as established in the plaintiff's favor. After a hearing to determine damages, judgment was awarded the plaintiffs. The court of appeals affirmed. The Supreme Court reversed, holding that under the circumstances the district court should have accepted the Government's claim of privilege. The court also indicated that the plaintiffs should have accepted an alternative Government offer to produce for examination the surviving crew members without cost to the plaintiffs. It remains to be seen how great an effect this decision will have upon claims against the United States arising out of accidents involving Government aircraft. It is to be hoped that the decision will not be abused and that in such cases vital information necessary to the plaintiffs' claims will not be withheld on the ground of privilege unless absolutely necessary to the public interest.

#### LEGAL STATUS OF HELICOPTERS

The tremendous impetus given to helicopter development, production, and use by the Korean experience has greatly advanced the manufacturing art and production facilities. By the end of 1952 the backlog of orders

exceeded \$500,000,000. The overwhelming bulk of this was military, but commercial deliveries are increasing and will probably grow rapidly. Federally certified operations are established in the Los Angeles, Chicago, and New York Metropolitan Areas. Contract helicopter companies are conducting extensive operations. This means that the laws and regulations of the Federal Government, of the states, and of municipalities which are applicable to helicopters will become increasingly important.

The unfortunate legal status of the helicopter at the moment is that it is misclassified. Because it navigates through the air, it is automatically included in the broad definition of "aircraft." All of the vast body of federal, state, and local laws, regulations, and decisions built up over many years for application to fixed-wing airplanes, is applicable to helicopters, unless exceptions are made because such laws, regulations, and decisions have always been made applicable to "aircraft." The helicopter, however, which can rise vertically or at any angle, can stand still or proceed at any rate in any direction from zero to maximum speed, which has no forward stalling speed, and which needs no airport but only a small space in which to land, is in a class by itself.

The Federal Government has recognized this in certain of its regulations. Parts 60.17 and 60.30 of the Civil Air Regulations except helicopters from certain altitude and flight visibility minimums applicable to fixed-wing airplanes. An extremely limited number of states have done likewise.

The National Association of State Aviation Officials (NASAO) has recently established a Special Helicopter Committee. One of that committee's functions is to aid in the re-examination of state laws with a view to making appropriate exemptions or exceptions for the helicopter from aircraft laws and regulations which should be inapplicable to helicopters. One typical illustration of this need is that in many states no "aircraft" can land on or take off from anything but an "airport" which must be duly licensed by State authorities. Sometimes minimum standards for airports (such as the minimum length of runways) are prescribed in the law. Obviously, these provisions should not be automatically applicable to helicopters. A small "heliport" several times the diameter of the helicopter's rotor system, quite inexpensive, and located in the areas where people come from and go to, *i.e.*, congested areas, is a far different matter than an expensive, outlying airport.

Laws, rules, regulations, and airport programs designed for applicability to fixed-wing airplanes should be re-examined for nonapplicability to the helicopter.

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