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VIOLATION OF CAB REGULATION — CEASE AND DESIST ORDER AS RES JUDICATA ON THE ISSUE OF VIOLATION

American Air Transport v. CAB,
206 F. 2d 423, 1953 US & CAvR 66 (CA DC Mar. 5, 1953).

Petitioner seeks review of a CAB order revoking its authorization to operate as an irregular air carrier. The Board had found that petitioner "conducted regular air operations in violation of Part 291 of the Regulations . . ." and the Board issued an order to cease and desist. /p. 424/

The court of appeals held that the Board's order to cease and desist was *res judicata* on the question of whether the carrier was required to comply with Part 291. Petitioner failed to invoke judicial review of the Board's order within the prescribed 60 day limit, and the district court refused to "go behind that order on this appeal." /p. 425/ A further contention that the Board's failure to schedule a hearing on the carrier's application for certification amounted to a violation of due process, "does not bear on the violation involved here, and the remedy, if any, is not available on this appeal." /p. 426/

Prettyman, J., concurring in the result: affirmed on the ground that there was ample evidence that petitioner violated the Board's order in holding "itself out to the public by its course of conduct as conducting a service with a reasonable degree of regularity." /p. 426/ The court should not, said Judge Prettyman, dispose of the case on the *res judicata* point because to make such an order, not reviewed by the court of appeals, *res judicata* as to all the issues involved, lessens the usefulness of court enforcement.

AIRLINE CRASH — ADMISSIBILITY OF SUPERINTENDENT'S STATEMENTS, AND RESULTS OF AN EXPERIMENT ON THE ISSUE OF NEGLIGENCE

Lobel v. American Airlines,
205 F. 2d 927, 1953 US & CAvR 262 (CCA 2nd July 13, 1953).

Plaintiff sustained injuries when defendant's two-engine DC-3 crashed en route from Detroit to Chicago. A verdict of $35,000 obtained on a *res ipsa* theory was reversed for errors in the charge to the jury. At the second trial, plaintiff tried to prove that defendant was negligent in maintaining and operating the plane. The jury, however, found for the defendant on this issue, and on appeal, plaintiff assigns as error the trial court's refusal to admit certain evidence.

The court of appeals found no prejudicial error in the trial court's refusal to admit statements of the defendant-airline's superintendent of line maintenance made at a CAB investigation of the accident. The statements were offered not to prove facts surrounding the accident, but as admissions of the defendant. The trial court ruled that the superintendent lacked authority to make admissions of this sort. The court of appeals rejected this ruling, but held that the error was not prejudicial since there was no "real inconsistency between the proffered testimony and that developed for the defendant at the trial. . . ." /p. 929/

At the trial plaintiff offered to prove "the results of an experiment conducted by defendant's pilots showing the effects of a piece of paper in the poppet valve in the fuel line . . ."; the court of appeals held that the question

"was properly within the trial court's discretion under the conditions of similarity, if not of perfect identity, with that of the airplane in the accident." /p. 931 citing 2 WIGMORE ON EVIDENCE §§444, 445 (3d ed. 1940)./

STATUTE PRESCRIBES COMPENSATION FOR PILOTS — ABSENCE OF SPECIFIED REMEDIES WILL NOT BAR ACTION BASED ON STATUTE

Laughlin v. Riddle Aviation Co.,
205 F. 2d 948 (CCA 5th July 24, 1953).

Plaintiff, employed as a licensed pilot, sought to recover the difference between the wages prescribed by Decision No. 83 of the NLRB, adopted by the Civil Aeronautics Act of 1938, /49 USCA §481(1)(2)/ and those actually paid to him. His suit was dismissed on the ground that there was no provision in the statute for an action of this sort.

The court of appeals held that the absence of a prescribed remedy does not defeat plaintiff's attempt to enforce a right created by statute. Furthermore, even though he may have agreed to work for less, he should recover at the prescribed rate since "contracts in derogation of statutes such as this are usually held unenforceable." /p. 949/

MAIL PAY ESTIMATED ON ANNUAL BASIS MAY REQUIRE REFUND FOR OVERPAYMENT IN PRECEDING MONTHS

Capital Airlines v. United States,
113 F. Supp. 64 (Ct. Cl. July 13, 1953).

In accordance with a CAB formula fixing mail pay on a yearly rate basis, plaintiff was required to refund to the government some of the pay which it had received for previous months. Plaintiff contended that the Board had no power to require the refund.

The Court of Claims held that since the Board decided to estimate mail pay on an annual basis, this "required that a balance be struck at the end of the year, crediting plaintiff with the amounts accruing in the months in which the formula produced an indebtedness in plaintiff's favor, and charging it with the amounts accruing in the months in which the formula produced amounts in the Government's favor." /p. 643/

WRONGFUL DISCHARGE ACTION: EMPLOYEE MUST EXHAUST HIS CONTRACT REMEDIES

Ringle v. TWA,
113 F. Supp. 897 (W.D. Mo. July 27, 1953).

Plaintiff, employed as a mechanic by defendant airline, was discharged after a hearing held in accordance with a collective bargaining agreement between the International Association of Machinists and the airline. Although he was not a member of the Association, plaintiff contends that he is covered by the agreement and therefore entitled to " 'a fair hearing before a designated representative of the Company . . .' " before being discharged. /p. 898/ He denies that the hearing he was given was fair, but he failed to take an appeal as required in the contract " 'if the decision is not satisfactory. . . .' " /p. 898/

The court held that whether this is a California contract (as the plaintiff contends) or a Missouri contract /see TWA v. Koppal, 345 U. S. 653 (1953)/, the law requires plaintiff to exhaust his contract remedies before suing for

a breach. Under Kansas law (the court does not decide whether or not this is a Kansas contract), plaintiff has no cause of action because in that state "a collective bargaining agreement does not give any right of action to one who is discharged, unless there is a special provision in the . . . agreement to show that the employer had agreed to be specially bound." /pp. 899-900/

PILOT'S DISPUTED DISCHARGE ARBITRATED — SCOPE OF JUDICIAL REVIEW OF ARBITRATION AWARD

Farris v. Alaska Airlines, Inc.,
113 F. Supp. 907 (W.D. Wash. July 24, 1953).

Plaintiff, a pilot, was discharged by defendant airline. He demanded that his dispute with defendant be submitted to a System Board of Adjustment, in accordance with a collective bargaining agreement between the Airline Pilots Association International and the airline. The dispute was presented as a question of "whether the defendant had 'sufficient valid justification and adequate good cause' to discharge plaintiff upon the ground that clashes of temperament between plaintiff and certain other defendant's pilots resulted in quarrels and disputes which adversely affected the morale of the pilot group." /p. 908/ The Board of Adjustment found for the defendant, and the same question was presented to the district court.

In discussing the scope of judicial review of arbitration awards, the court states that its review is confined to three questions: (1) Whether the Board's procedure and award conformed to the Railroad Labor Act and the collective bargaining agreement; (2) Whether "the award confined itself to the letter of submission," and (3) Whether "the award was arrived at without any fraud or corruption." /p. 909/ The court then proceeded to review the question of whether "personal incompatibility with his fellows" is sufficient ground for an employee's discharge, and decided this question in the defendant's favor.

Three procedural irregularities were considered by the court and disposed of as either having been waived or as not having any harmful effect. Plaintiff's claim of fraud, collusion and undue influence was also rejected on the basis of evidence presented at the Adjustment Board hearing, and further evidence brought before the district court.

INJUNCTION SOUGHT AGAINST PENDING CAB PROCEEDING — JUDICIAL REVIEW BEFORE A FINAL ORDER HAS BEEN ISSUED

Twentieth Century Airlines v. Ryan,
74 S.Ct. 8 (Sept. 24, 1953).

An irregular air carrier sought to enjoin the CAB "from taking any further steps in prosecuting an administrative proceeding . . ." on the ground "that the pendency of the Board proceeding . . . has objectionable effect on their public relations, calls for large expenditures of time and energy, and affects employee morale." /pp. 9 & 10/

The Court held that the Civil Aeronautics Act of 1938 provides for review of a *final* Board order, and the Board had not issued such a final order in this case. Furthermore, the order of the court of appeals was not final either, so that "Section 2101 of Title 28 U.S.C. (Supp. V) . . ., allowing stays does not apply."/p.10/ The injury which may result from the Board proceedings is one "of those serious but unavoidable damages that come to any regulated enterprise because of pending complaint by administrative agencies." /p. 11/ This is to be distinguished from a case where a party seeks to restrain enforcement of a final Board order or regulation.