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FEDERAL REVIEWS

MID-WINTER REPORT OF THE COMMITTEE ON AERONAUTICAL LAW OF THE AMERICAN BAR ASSOCIATION

FEDERAL LEGISLATION

The most noteworthy development in the field of Federal legislation relating to aviation is the introduction of S. 2647 by Senator McCarran on January 11, 1954. That bill is a comprehensive rewriting of the Civil Aeronautics Act of 1938, and other statutory provisions relating to Civil Aviation, into a proposed Act to be known as "Civil Aeronautics Act of 1954." The new bill is based upon the experience under this existing Federal legislation and is intended to supply provisions this experience indicates are needed because of the great growth and expansion of the aviation industry since 1938. The Senate Committee on Interstate and Foreign Commerce is undertaking a thorough-going study of this bill. And it would appear that most of the bill is non-controversial and constructive in character.

Your Committee is making a thorough study of S. 2647 and expects to be able to present concrete recommendations based upon this study to the House of Delegates at its meeting in August of this year.

FEDERAL COURT DECISIONS

Several decisions in the Federal courts during recent months were of interest to aviation lawyers.

Other revenues of airlines as offsets to subsidy payments. Where a carrier conducts both domestic and international service, should the profits from domestic operations be used to offset the mail pay requirements of the international operations? Should profits from the sale of a route be used to reduce mail pay? The Civil Aeronautics Board answered these in the negative (*C & S, Latin American Operations, Mail Rate Case* (Order No. E-5793)) and *Braniff Airways, Inc.-Mail Rates-Domestic Operations*, (Order Serial No. E-7904, November 19, 1953). But the Supreme Court in two cases decided on February 1, 1954, reversed the Board and answered the questions in the affirmative. (*C.A.B. and Delta vs. Summerfield*, 22 L. W. 4092; *C.A.B. vs. Summerfield, Western vs. C.A.B.*, 22 L. W. 4094.) The Board had decided that domestic profits should not be offset against international mail pay requirements so as to promote maximum operating efficiency on domestic routes. Similarly, the Board did not want to reduce mail pay by the profits from route sales in order to encourage transactions of this sort which the Board could not compel. The Supreme Court regarded these as policy considerations for the Congress to decide. The present rate formula, it held, is based on "the need" of the carrier after taking into account all of the revenues of its entire operation. According to the Court, the Board had failed to find that the carrier concerned "needed" the mail compensation granted, as well as the funds derived from the route sale in the one case and the domestic earnings in the other.

Interlocking relationships. In a case arising under Section 409 of the Civil Aeronautics Act, which declares certain interlocking relationships unlawful unless approved by the Civil Aeronautics Board, the Board last year held that potential restraint on competition may exist where different partners in an investment banking firm hold directorships in different common carriers. In such a case, one partner is the representative of another (*Lehman Brothers Interlocking Relationships Case*, Order Serial No. E-6447,

May 21, 1952). That decision was affirmed this year by the U. S. Court of Appeals for the District of Columbia (August 6, 1953) in *Lehman, et al. vs. Civil Aeronautics Board*.

State statute imposing absolute liability for damage on the surface. The first case to consider the constitutionality of that provision of the Uniform State Law for Aeronautics, promulgated in 1922, which imposes absolute liability for damage on the surface, arose as a result of the three crashes at Newark in December, 1951 and January, 1952. In *Prentiss, et al. vs. National Airlines* and *Gizzi, et al. vs. American Airlines, Inc.*, the U. S. District Court for the District of New Jersey, on May 13, 1953, held the statute to be constitutional. (See 20 JRL. OF AIR LAW & COM. 371.) Liability without fault under proper circumstances, reasoned the court, is due process of law. Since aviation is ultra hazardous, it falls into the "category of blasting, of the storage of dynamite, of drilling for oil," each of which subjects the persons engaged therein to absolute liability at common law. If limited absolute liability is valid as to aviation by common law, such liability is valid when imposed by statute. The court dismissed the claim that the statute was an unreasonable burden on interstate commerce in that the provisions do not affect the actual movement of airplanes in interstate commerce; they do not affect the average airplane even financially, as would a tax. They affect an airplane owner only financially when there is an accident, and the benefits of the statute do not go to anyone who participates in air travel, such as passengers.

Federal or state jurisdiction over operations between points in the same state. A three judge district court in the Northern District of California had entered a declaratory judgment that the C.A.B. had exclusive control over airline operations between points in California and the Catalina Islands, (*UAL vs. Calif. Pub. Utilities Commission*, 109 F. Supp. 13; see 20 JRL. OF AIR LAW & COM. 116). The judgment was reversed by the Supreme Court on November 30, 1953 on the basis of *Public Service Commission vs. Wycoff*, 344 U. S. 237, in which it was held that the Federal courts should not render a declaratory judgment that certain transportation performed over intrastate routes is in interstate commerce when this issue has not been passed upon by the state administrative agency against which the declaratory judgment is sought. The dissenters in the United case, Justices Douglas and Reed, argued that the declaratory judgment should not be used in this case to save long drawn out administrative hearings and trial to get an adjudication of the basic question which is clear now, namely, is the operation within state or federal jurisdiction?

Tariff limitations on the time in which claims must be filed. Both the Federal District Court for the Southern District of California and the C.A.B. have acted on this matter in the last several months. The court, in *Bernard vs. U. S. Air Coach, et al.* (November 20, 1953) held that a limitation on the time during which a claim must be filed was not part of the tariff by statutory requirement and, therefore, not enforceable. On the same issue, in *Continental Charters, Inc.* (Docket No. 5537, Order Serial No. E-7087, issued January 16, 1953; see 20 JRL. OF AIR LAW & COM. 118), the C.A.B. held that a tariff rule, barring claims for injury to or death of passengers unless a notice of claim was presented to the carrier within 30 days of the occurrence of the event that gave rise to the claim, was unlawful as unjust and unreasonable. The C.A.B., on January 25, 1954, issued a regulation, effective March 2, 1954 (ER-195) providing that no provision of the Board's regulations shall be construed as requiring the filing of any tariff rules "stating any limitation on, or conditions relating to, the carrier's liability for personal injury or death."

DECISION BY THE CIVIL AERONAUTICS BOARD

The following administrative decisions by the Board dealt with problems of interest to aviation lawyers.

Number of seats in DC-4's used for coach service. The Board's views that 64 seats in a DC-4 provide an adequate margin of safety and comfort were restated in two Board orders in 1953. United Airlines' tariff provided that coach service would be operated by aircraft with 64 seats, but it was regularly selling only 54 of the seats. When United petitioned for exemptions from the tariff provisions of the Act to continue selling only 54 seats until it could convert its aircraft to 58, the Board denied the petition. When United filed a revised tariff rule providing coach service in 54 seated equipment until 58 seats could be installed, the Board suspended the rule pending investigation, but the investigation was dismissed when the rule was amended.

Freight Forwarders. The five year trial period, for which the freight forwarders were permitted to operate by Part 296 of the Economic Regulations, expired on October 15, 1953. To determine whether the permissive regulations should be extended and amended, the Board initiated an investigation by order Serial No. E-7141 on February 5, 1953. That investigation is now underway.

First-class mail by air. After the Comptroller General had held that surface first-class mail could be carried by air, an experiment in the transportation of such mail commenced during September of 1953. Mail rates were prescribed specially for this type of mail traffic to be effective until September 30, 1954. Unlike air mail, the first-class mail carries no priority and is transported on a space available basis. The movements authorized are between Washington and Chicago, and New York-Newark and Chicago. The local service airlines handled first-class mail during the holiday season, and their authorization has been continued by the C.A.B. to the end of this calendar year.

Financial Responsibility Regulation. In 1952, the C.A.B. circulated a proposed regulation requiring all air carriers to show financial responsibility to cover possible claims arising out of injury or damage to passengers and to persons on the ground. In June, 1953, after receiving extensive comments from air carriers, insurers and foreign governments, the C.A.B. decided not to issue such a regulation. The reason for the decision was the possible limitations of its statutory power to issue such regulations, and the facts indicated that air carriers in general now have adequate insurance coverage. The Board also did not recommend legislation "since the problem does not in light of all the facts and consideration disclosed . . . appear to require it."

Separation of subsidy from other mail pay. By Reorganization Plan No. 10 of 1953, effective October 1, 1953, the function of paying subsidy to air carriers was transferred from the Postmaster General to the Civil Aeronautics Board. The Postmaster General will continue to pay the amount payable to air carriers for the transportation of mail by aircraft and the facilities used therefor and the services connected therewith at fair and reasonable rates, fixed and determined by the Board, but the amounts in excess of those amounts will be paid by the Board.

DEVELOPMENTS IN THE LAW AFFECTING HELICOPTERS

The time when significant developments in the law will probably occur in relation to the helicopter is still mostly in the future. To date, most production of this versatile machine has been for military uses, although a significant number are in commercial use all over the world. Three inde-

pendent common carrier services by helicopter in the United States (Los Angeles, Chicago, and New York) obtained term certificates of public convenience and necessity from the Civil Aeronautics Board several years ago. During this last year the Civil Aeronautics Board granted to one of the Nation's trunk airlines (National Airlines, Inc., Order No. E-8034) an exemption for one year to experiment in the conduct of regular helicopter service within a radius of 150 miles of Miami, Florida. This followed quite intensive interest in the helicopter as a short haul transport air bus on the part of various air lines, the Air Transport Association of America, and the International Air Transport Association. Large short-haul twin-powered 30 to 40 place helicopters have now flown and should be available in the next few years for commercial use.

States and municipalities should be prepared to adapt their local laws which have been passed to regulate fixed wing aircraft so that they will permit the helicopter to serve the people by taking full advantage of the helicopter's remarkable operating characteristics. Thus, altitude minimums, visibility minimums, airport dimensions, air traffic patterns, and numerous other fixed wing airplane requirements must be modified for the helicopter. (For example, the helicopter needs no airport runways at all.) The Federal Government already has done this but many States and municipalities have not yet acted. They should do so now.

STATE LEGISLATION

The Committee is undertaking an extensive study of state aviation legislation, state court decisions, and state rules and regulations with respect to aviation. The cooperation of state and local bar associations throughout the country has been enlisted to aid the Committee in this extensive study. In the main state legislation in the aviation field relates to economic and safety regulation of aviation, airport construction by cities, airport zoning, taxation and a wide variety of other subjects. It is hoped that a report can be made upon this work at the Annual Meeting in August.

MUNICIPAL REGULATIONS

Your Committee is also undertaking a careful study on municipal regulations which affect aviation. These chiefly relate to airport zoning, low flying airplanes, broadcasting sound from airplanes, sky-writing, and acrobatic flying. Here also the Committee will not report until this work is complete and it is hoped to complete the study in time for incorporation into the Committee's Annual Report.

Respectfully submitted,

Associate and Advisory Committee

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