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of regulation, as could be contended in the *Western* case, but rather one of competitive equality and public service; and on the basis of national economic and public policy, its action was perfectly tenable.

The remaining problem is to determine how this policy may be given effect. In light of the Court's decision, it is extremely improbable that the statute may be reinterpreted. The proper remedy, as the Court pointed out,[39] would seem to be in Congress. It is well within the power of Congress to grant the Board a measure of discretion under which it could balance the absolute "need" of the carrier with the purpose and policy of the Act.[40] The needed discretion could be supplied through an amendment to the present Act. Such a discretionary grant would, however, involve many problems. The most fundamental problem would probably arise in wording the amendment so that the Board could exercise discretion in suitable instances, and yet not have the power to regulate completely the industry. One of the fundamental tenets of both the Act and the Board is that the industry should advance through competition. With this fact before Congress it would seem possible to amend the subsidy provision so that the desire for competitive equality could be balanced with the carrier's need, in determining the subsidy rate. The advisability of such action is apparent from an examination of the factors which influenced the Board's interpretation.

DIGEST OF RECENT CASES

MUNICIPAL REGULATION — COUNTERCLAIM By "RELATED" DEFENDANTS

All American Airways, Inc. v. Eldred

209 F. 2d 247 (2d Cir. Jan. 4, 1954)

Plaintiff airlines previously brought an action against the Village of Cedarhurst, New Jersey, its Mayor, and certain other individuals, to declare illegal and enjoin, an ordinance which prohibits low flying over the Village. The defendants, both as individuals and on behalf of all the property owners, asserted the validity of the ordinance, and sought an injunction against low flying and the operation of a runway by the plaintiffs. The plaintiffs have succeeded in having the counterclaim dismissed as to "related" defendants, thus removing all connotations of a spurious class suit which stands as an invitation to others to join, even though not binding upon them if they do not join. In the opinion of the court, such a motion could not be appealed, and that the effect would not deprive persons not a party to the suit of their possible rights. The court expressed the feeling that in attempting to settle all the questions of the litigation, all claims would be heard, whenever presented to the court, and that this action would not deprive them of this right.

ADMINISTRATIVE LAW — CAB — INTERLOCKING DIRECTORSHIPS

Lehman v. Civil Aeronautics Board
Pan American World Airways v. Civil Aeronautics Board

209 F. 2d 289 (D. C. Cir. Aug. 6, 1953)

The plaintiffs have made application for CAB approval of certain interlocking directionships under section 409 (a) of the CAA. The first applica-

[39] 347 U.S. 67, 80 (1954).

[40] This was done for example in the Emergency Price Control Act of 1942, 56 STAT. 24, 50 U.S.C. APP. 902(e) (1942), which authorized the Administrator "... to make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof ..."

tion concerns the position of Robert Lehman on the Board of Directors of Pan American Airways, and also on the Board of the United Fruit Company. Since these two companies serve the tourist trade in the Caribbean area, the CAB considered them to be in competition. This was done despite the difference between the "fast" air service as compared to the "leisurely" steamship service. The court agreed that there was an "opposition of interest" between the two carriers, and that it had not been shown that the public interest would not be affected by such an interlocking directorship.

The second application concerns members of the Lehman Brothers Investment Banking firm taking positions as directors of Pan American, National Airlines, American Export Lines, Continental Airlines, and Consolidated Vultee Aircraft, all companies operating in the aeronautical field. The CAB disapproved the positions on the ground that a partner of Lehman Brothers is a "representative of another partner who is a director of another company in the aeronautical area." The court of appeals in affirming the action of the CAB, held that the mere fact the "community of interest" exists in the partnership does not mean that the relation must be rejected. Rather the decision must be reached in light of all the surrounding circumstances. The deciding factor in the Lehman situation appears to be that the banking firm has an interest in the underwriting of securities and the negotiation of mergers within the airline industry.

Judge Prettyman dissented as to the first application on the ground that no competition existed between the two carriers; and as to the second application, on the ground that the word "representative" should not be construed as broadly as the Board and the court did in this case.

TORTS — CAUSE OF ACTION — ASSIGNMENT OF RIGHT TO SUE

Komlos v. Compagnie Nationale Air France

209 F. 2d 436 (2d Cir. Dec. 30, 1953)

A passenger on one of the defendant's aircraft was killed in a crash in Azores, a territory of Portugal. Plaintiff, acting as next to kin, filed a claim under the New York Workmen's Compensation Act, and received thereunder an award. Subsequently, the estate of the deceased commenced an action against the airline for wrongful death, claiming "moral damages" under the law of Portugal. The defendant airline sought to have the suit dismissed on the ground that under the New York compensation act, where a dependent elects to receive an award, and does not sue the tort-feasor within six months after the award, the insurance carrier for the Compensation Board is given a statutory assignment of the right to sue. Under the facts the suit by the estate was brought two months after the expiration of the six month period. Subsequently the insurance carrier sued also, and the defendant moved to dismiss the suit of the estate on the ground that the action belonged to the insurance company, which motion was granted.

On appeal the court reversed, holding that while there were two items of damage (negligence and moral), there was only a single indivisible cause of action. Since the New York law does not recognize the "moral damages" concept of the law of Portugal, the estate is the only party that can bring the action, and to permit the insurance carrier to sue, would permit the splitting of the cause of action, which should not be permitted in the opinion of the court.

REAL PROPERTY — PUBLIC USE — REVERTER

Christman v. City of Wichita, Kansas

209 F. 2d 639 (10th Cir. Jan. 27, 1954)

The United States has brought a proceeding to condemn property of the City of Wichita originally condemned by the city for use as a municipal

airport. Christman, and other intervenors, seek damages for the taking of their property on the ground the estate of the city has been forfeited, because of mis-use, and non-use, and has reverted to them. This is claimed irrespective of the fact that the city condemned the property for use as an airport in 1941. It was held under the Kansas law, that neither mis-use nor non-use will bring about a reverter of property dedicated to public use. Further the court held that by the use of the property as a gunnery range for the Air Force, a parking ramp for planes, and by fencing the area, the city had made an incidental, and not inconsistent, use of the property in line with the original public purpose.

DAMAGES — AMENDING COMPLAINT — PUNITIVE DAMAGES

Borup v. National Airlines

117 F. Supp. 475 (S.D. N. Y. Jan. 4, 1954)

Plaintiffs, in actions for death and injuries arising out of the crash of one of the defendant's aircraft in Elizabeth, New Jersey, seek to amend their original complaint so as to seek punitive damages. The defendant complains that these allegations state a new cause of action, and are barred by a one year limitation as set out in the tariff provisions filed with the CAB, which provisions were part of the contract of carriage.

The amendment was allowed under Rule 15 (c) of the Federal Rules of Civil Procedure, on the grounds that "an amendment is considered to relate back to the original complaint whenever the new claim 'arose out of the conduct, transaction, or occurance set forth . . . in the original pleading.'" The court felt that the amendment does no more than define with greater particularity the alleged negligence, and claim additional damages. The question of the defendant's ability to limit liability by the tariff provision was not reached by the court.

TORTS — FEDERAL TORTS CLAIMS ACT — EVIDENCE

Curtis v. United States

117 F. Supp. 912 (N.D. N. Y. Sept. 18, 1953)

Plaintiff, operator of a mink farm, sued the Government for damages to his young minks when two airplanes flew very low over his farm from the direction of a Government Air Base. While accepting the inference that the planes were owned by the Government, the court refuses to find that the planes were operated by government agents within the scope of their employment. Construing section 1346 (b) of the Federal Tort Claims Act very strictly the, court observes that the damage might have been caused by members of the National Guard, not in federal service, instead of military personnel.

DAMAGES — MEASURE OF — NOMINAL DAMAGES

Snyder v. United States

118 F. Supp. 585 (D. Maryland, Dec. 23, 1953)

Consolidation of seven suits against the United States for damages arising from the crash of an Air Force plane, abandoned for mechanical reasons, into a home resulting in the death of three persons and serious injuries to three others. In determining damages, the court, in a wrongful death action, allowed recovery of the amount a deceased spouse would have spent for his family, if invested at a rate of 3½% for his life expectancy, and also allowed the estate recovery for the pain and suffering of the deceased.

In another action for the wrongful death of two girls, of the ages of eight weeks, and of six years, the court rejected the contention of the gov-

ernment that the probable earnings to the father should be offset by the amounts that the father would have to expend in rearing the children. The court also took into account the possibility that the child might have contributed to the support of the parent after reaching majority, therefore awarding more than mere nominal damages.

CONTRACTS — INSURANCE — DUTIES OF PILOT

Smith v. Metropolitan Life Insurance Co.

102 A.2d 797 (Sup.Ct. N. J. Feb. 8, 1954)

Suit to recover on two policies of insurance that the defendant carried upon the life of plaintiff's husband. The deceased, a licensed pilot, had rented a plane, and took with him as a passenger a person who was not a licensed pilot. The two occupants of the plane were found in it after it had crashed into the Atlantic. The policy in question did not assume liability for death as the result of "travel or flight in any species of aircraft if the insured has any duties relating to such aircraft or flight." The court found for the defendant, rejecting the argument that since the plane had dual controls, the deceased might not have been the pilot. Since the deceased was the only person aboard the plane who had a pilot's license, he had "duties" or responsibility for performance of acts relative to the aircraft, thereby precluding liability under the policy.

TORTS — PROPRIETARY AND GOVERNMENTAL FUNCTIONS OF MUNICIPALITY

Imperial Production Corporation v. City of Sweetwater, Texas

210 F. 2d 917 (5th Cir. Feb. 23, 1954)

Owners of aircraft destroyed by fire in a municipal airport, sue the City of Sweetwater for damages, alleging that the storage of airplanes is a proprietary and not a governmental function. In affirming the court below, it was held that the intent of the statute giving municipalities power to operate airports was to exempt them from tort liability, and hence the city was here involved in a governmental operation. It was further held that the governmental immunity was not eliminated because of the activity of storage of the aircraft.