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JUDICIAL AND REGULATORY DECISIONS

CIVIL AERONAUTICS BOARD AMENDMENT ON TIME LIMITATIONS: STATUTORY AUTHORITY FOR REGULATIONS AT ISSUE

A RECENT amendment to a Civil Aeronautics Board regulation¹ and the latest developments in case law have curbed attempts by air carriers to limit liability for death and injury claims through tariff provisions. Previously, provisions concerning time limitations for giving notice of death or injury claims and for initiating action thereon had been included within the tariffs filed by the airlines with the CAB.² Since the passenger was notified on his ticket that it was "sold subject to tariff regulations," the airlines claimed relief from liability when the time limitation provisions were not complied with by the injured party or his representatives.³

Although the Civil Aeronautics Act of 1938⁴ does not expressly require the filing of time limitation provisions within an airline's tariff, the CAB had accepted the air carriers' time limitations as part of the filed tariff. However, the Board's recent amendment to its Economic Regulations states that tariff rules limiting or conditioning the carrier's liability for personal injury or death will not be accepted.⁵ In effect this Amendment indicates that those parts of tariff provisions relating to personal injury and death claims formerly filed with the CAB will no longer receive the indirect sanction⁶ of the Board.

Since no express provision concerning time limitations appears in the Civil Aeronautics Act of 1938, it is questionable whether the Board ever had statutory authority to accept them as a part of the air carrier's tariff. The Board feels that it has Congressional authority to regulate time limitation provisions, relying upon Section 403(a) of the Civil Aeronautics Act,⁷ which requires that "(e)very air carrier . . . shall file with the Board, and print, and keep open to public inspection, *tariffs* showing . . . to the extent required by regulations of the Board, all classifications, rules, regulations,

¹ 14 Code Fed. Regs. §221.4(g) (Rev. Ed. 1952). The regulation had stated that tariffs would contain "(g)eneral rules which govern the tariff, i.e. state conditions in the tariff, or the service under such rates."

² An example of this particular rule filed with the CAB reads as follows: C.A.B. no. 27, Tariff Rule, General Rules, Paragraph 17, Claims, (A) Personal Injury—Time limitations

"No action shall be maintained for any injury to or the death of any passenger unless notice of the claim is presented in writing to the general office of the participating carrier alleged to be responsible within ninety days after the alleged occurrence of the events giving rise to the claim and unless the action is commenced within one year after the alleged occurrence."

³ Cf: *Wilhelmy v. Northwest Airlines*, 86 F. Supp. 565 (W.D. Wash. 1949).

⁴ 52 Stat. 973, 49 U.S.C. §401 *et. seq.* (1952).

⁵ Civil Aeronautics Board Economic Regulation 221.4(g) 19 Federal Register 509 (1954). The amendment states:

"No provision of the Board's Regulation issued under this part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify the rules of construction except to the extent that such regulation shall do so in express terms."

⁶ Although the Civil Aeronautics Act never expressly provided for time limitations, airlines had filed these provisions with the Board as a part of their tariff regulations. Since airlines were required by statute to file their tariffs with the Board, and the Board accepted time limitations as a tariff provision, it can be assumed that the CAB gave their implied approval to time limitations.

⁷ 52 Stat. 992, 49 U.S.C. §483 (a) (1952).

practices, and services in connection with such air transportation. . . ." This section further provides that the tariff "shall contain such information, as the Board shall by regulation prescribe. . . ." Therefore, if the provisions for *time limitations* can be considered a *tariff* matter involving classifications, rules, regulations, practices, or services of the airline, the Board would have authority to regulate the airline's time limitations.⁸

Courts have upheld the validity of time limitations on a contract basis.⁹ These cases, however, do not discuss the statutory question and, therefore, cannot be relied upon as authority that the CAB has regulatory power. Recovery was contingent solely on whether the passenger had made a binding agreement with the airline when he purchased a ticket which, for example, stipulated that it was "sold subject to tariff regulations."¹⁰

Since early 1952, case law has invalidated time limitations for death and injury claims on the basis of a lack of statutory authority. *Shortley v. Northwest Airlines*,¹¹ foremost in this line of cases, held that there was no statutory authority for these provisions since nothing in the Civil Aeronautics Act authorizes or requires time limitations to be included in a tariff.

The *Shortley* decision found precedent in a case¹² involving a comparable situation under the Shipping Act.¹³ At the time, the Shipping Act required all water carriers to file tariffs with the Shipping Board without any express provision permitting a time limitation to be included in the carrier's tariff. A carrier filed a time limitation as part of its tariff. When an injured passenger did not comply with the time limitation, the water carrier maintained that it was relieved of liability. The court found no statutory authority for the inclusion of time limitations and added that they could not be considered part of the tariff since a tariff relates only to rates and charges.¹⁴

⁸ Crowell v. Eastern Air Lines, 81 S.E. 2d 178, 183 (N.C. 1954).

⁹ See *Gooch v. Oregon Short Line R. Co.*, 258 U.S. 22 (1922) (an agreement for consideration as to claim and commencement of action held to be binding); *Wilhelmy v. Northwest Airlines*, 86 F. Supp. 565 (W.D. Wash. 1949) (flight ticket "sold subject to tariff regulations" was held a binding agreement between passenger and airline); *Herman v. Capitol Airlines*, 104 F. Supp. 955 (S.D. N.Y. 1951) (a time limitation provision became part of contract between parties; statutory question not raised); *Jones v. Northwest Airlines*, 22 Wash. 2d 863, 157 P. 2d 728 (1945) (airline relieved from liability for flight cancellations; statutory authority for the particular tariff rule not discussed); *Sheldon v. Pan American Airways*, 272 App. Div. 1000, 74 N.Y.S. 2d 578 (1947) (time limitation for presenting claims expressly stated in ticket held contractually binding). See note 27, *infra*.

¹⁰ *Wilhelmy v. Northwest Airlines*, *supra* note 9.

¹¹ 104 F. Supp. 152, 155 (D.D.C. 1952): "Nowhere, however, in the Act of Congress, or in the regulations promulgated by the Board, is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitations upon notice of claims or upon the time for commencement of action thereon. . . . Where a tariff provision is gratuitously inserted with respect to a matter other than that contemplated or required by the Act of Congress or the regulations made pursuant thereto, a passenger or shipper is not chargeable with notice as a matter of law with respect thereto."

¹² *Pacific S.S. Co. v. Cachette*, 8 F. 2d 259 (9th Cir. 1925).

¹³ 39 Stat. 735 (1916), 46 U.S.C. §817 (1952).

¹⁴ Soon after the *Shortley* case was decided, two other courts invalidated time limitation provisions on statutory grounds. In *Thomas v. American Airlines*, 104 F. Supp. 650 (E.D. Ark. 1952), the court said that "[the] Civil Aeronautics Act of 1938, 49 U.S.C.A. §401 *et. seq.* sets forth the provisions relating to the filing of tariffs and does not require or authorize by implication the filing of tariffs limiting in any way the liability of the carrier for its own negligence for personal injury to its passengers."

The court felt in *Toman v. Mid-Continent Airlines*, 107 F. Supp. 345 (W.D. Mo. 1952) that since Congress has expressly provided for Water carrier time limitations, it follows that express authorization is necessary in the airline field. The court added that the rule of the *Wilhelmy* case had not been followed and in fact a contrary ruling had been developed in the *Shortley* case.

The viewpoint of the *Shortley* case has been followed by two recent decisions. *Bernard v. U.S. Aircoach* held that the CAB lacked statutory authority to accept time limitations as a tariff provision.¹⁵ The court interpreted a "tariff" to be a schedule of rules "for service to be rendered by the airplane and not one for compensation for the torts committed by it." As illustrated by the *Bernard* case, Congress has granted the CAB regulatory power over tariff provisions only.¹⁶ A "tariff" has generally been interpreted to be a system of rates and charges.¹⁷

Time limitations have not been considered to be provisions relating to rates or charges. Consequently, statutory authority would not exist for the acceptance of time limitations as a valid tariff provision.¹⁸

On the other hand, the CAB claims statutory authority for time limitation provisions within an airline tariff. The contention is that time limitations were "clearly carrier rules, regulations, and practices in connection with air transportation and, as such could be required by the Board to be filed under section 403(a)" of the Civil Aeronautics Act.¹⁹ The Board feels that in not accepting time limitations it is exercising the power Congress gave it over these provisions.

In a second case, however, the highest court of North Carolina held that the Civil Aeronautics Act neither requires nor authorizes the filing of time limitations pertaining to notice of claims and commencement of suit.²⁰ The court concluded that since Congress has not sought to occupy the field of air carrier's liability the state statute of limitations is applicable.

It must be noted that in comparable statutes regulating other common carriers, Congress has expressly provided for time limitations. A Shipping Act amendment²¹ and the Interstate Commerce Act²² expressly provide for time limitations for filing claims and bringing suit. Since no such provision appears in the Civil Aeronautics Act it was argued that Congress has not intended to occupy this field.

In addition to the statutory question, time limitations have also been attacked on other grounds. It was contended that Congress in passing the Civil Aeronautics Act had provided for uniformity in all rates, practices, and services through the supervision of the Civil Aeronautics Board.²³ Consequently, state statutes of limitations which grant longer periods for giving notice of claim and commencing action thereon would not be controlling on litigants and would have to give way to time limitation provisions filed with the Board. Nevertheless the CAB stated in its recent amendment that it was not requiring such filing because the public has demonstrated an approval of a local jurisdiction governing the claim.²⁴

As a practical matter, the carriers felt that tariff provisions for time limitations would prevent fraudulent claims from being brought subsequent to the period in which a satisfactory investigation could be undertaken.²⁵ It was believed that reference to the tariff provisions could be best achieved by a statement on the ticket that it was "sold subject to tariff regulations"

¹⁵ 117 F. Supp. 134 (S.D. Cal. 1953).

¹⁶ *Id.* at 133.

¹⁷ *Pacific S.S. Co. v. Cachette*, 8 F. 2d 259, 261 (9th Cir. 1925).

¹⁸ *Ibid.*

¹⁹ 19 Fed. Reg. 509 (1954).

²⁰ *Cromwell v. Eastern Airlines*, 81 S.E. 2d 178 (N.C. 1954).

²¹ 49 Stat. 960 (1935), 46 U.S.C. §183(b) (1952). The Shipping Act prohibits time limitations of less than six months for death and injury claims and of less than one year for institution of suits thereon.

²² 46 Stat. 252 (1930), 49 U.S.C. §20(11) (1952). The Interstate Commerce Act prohibits time limitations of less than nine months for property damage claims and of less than two years for the institution of suits thereon.

²³ *Lichten v. Eastern Air Lines*, 189 F. 2d 939, 941 (2d Cir. 1951).

²⁴ 19 Fed. Reg. 509 (1954).

²⁵ *Murray v. Cunard S.S. Co.*, 235 N.Y. 162, 165, 139 N.E. 226, 228 (1923).

since the tariff provisions were too intricate, complex, and lengthy for the general public to read and understand.²⁶ Notwithstanding this position, mere reference to such provisions could conceivably be used as a method for relieving a carrier from liability.²⁷ On the other hand, it is questioned whether the great majority of passengers ever have actual notice of the tariff provisions.²⁸

Since current case law and the recent amendment of the CAB both adversely affect the airline's attempt to limit its liability, the validity of time limitations may at first glance appear to have been settled. Yet the conflict between case law and the CAB statutory authority for regulation of time limitations may lead to future inconsistent court decisions.

For example, the recent amendment relates only to the "carrier's liability for personal injury or death." It does not regulate the carrier's liability for *property* damage or loss. Therefore, if a court followed the CAB's contention that statutory authority exists for regulating time limitation provisions, it would probably validate a provision regarding property damage or loss. However, a court that follows the *Shortley* case would deny the CAB authority over time limitations on claims for property damage or loss.

Further, the possibility remains that the CAB may reverse its present position and require time limitations to be filed as a provision of the airline's tariff since the Board claims statutory authority. Thus, if a court should adopt this position, the Board's present viewpoint may in the future benefit the air carriers. But a court following the *Shortley* decision would reject any Board regulation regarding this matter unless Congress expressly authorized such regulatory power over time limitations.

If the CAB's position is to be accepted by case law, a judicial departure from the present decisions is necessary. It is not likely that this circumstance will occur. Therefore, even though the CAB and case law do not agree on the statutory question, future court decisions can be predicted with a fair degree of certainty.

²⁶ *Wilhelmy v. Northwest Airlines*, 86 F. Supp. 565 (W.D. Wash. 1949) *Koontz v. South Suburban Safeway Lines*, 332 Ill. App. 14, 16, 73 N.E. 2d 919, 920 (1947).

²⁷ *Shortley v. Northwest Airlines*, 104 F. Supp. 152 (D.D.C. 1952) pointed out that a *contract* may be made imposing a reasonable time limit for making claims and filing suits if the contract terms are distinctly declared and deliberately accepted by the passenger; however, referring passengers to unauthorized provisions included in a filed tariff will not accomplish the condition needed for imposition of time limitation by contract.

²⁸ 19 Fed. Reg. 509 (1954).