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FEDERAL REVIEW

OPINION OF THE GENERAL COUNSEL OF THE CIVIL AERONAUTICS BOARD AS TO WHETHER MEMBERS AND STAFF ARE REQUIRED TO TESTIFY CONCERNING STATEMENTS MADE DURING DELIBERATIONS BY ANOTHER BOARD MEMBER

MY OPINION has been requested concerning the above matter, and particularly as it relates to the questions addressed to Mr. Adams by the Chairman of the Anti-Trust Subcommittee of the House Committee on the Judiciary concerning Mr. Adams' recollection of a statement made by Mr. Denny during deliberations in the Board room relative to a conversation between Mr. Denny and Mr. Tipton, then General Counsel of the ATA. I conclude for the reasons hereinafter stated that the statement is privileged, and that Mr. Adams is not legally required to testify concerning the matter.

It is my opinion that the statement concerning which information is sought is a part of the decisional process of the Board. It is generally recognized that administrative agencies are privileged against inquiry into their deliberations and manner of reaching decision, including statements made during deliberations, and that administrative officers in this respect occupy a status analogous to that of a judge or jury. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 593 (1907); *National Labor Relations Board v. Botany Worsted Mills*, 106 F. 2d 263 (C.A. 3, 1939). Indeed, the Court of Appeals in the *Botany* case held that freedom from inquiry into statements made during deliberation is perhaps even more important to administrative tribunals than it is to the Courts because of the varying functions performed by them. The reasons for the privilege are succinctly stated in *Botany* as follows (106 F. 2d at p. 267):

> "The essence of the discussion of a common cause and the judgment ensuing upon that discussion must lie in freedom of expression. If those present during the discussion are aware that their sentiments, either tentative or final, may be revealed by their fellow participants, it is clear that caution or worse would remove all candor from their minds and tongues. The logic of this position requires the preservation from questioning of each member of the general body."

See, also, *McDonald v. Pless*, 238 U.S. 264, 268 (1915), wherein the Court held that inquiry into the deliberation of a jury would be "to the destruction of all frankness and freedom of discussion and conference."

The judicial decisions relied upon relate of course to demands for information made by private persons. However, there is no logical reason why the same privilege should not extend to inquiries by Congressional Committees. From a practical standpoint, there is just as much public policy behind the privilege in the one case as the other since the impact upon deliberation is the same irrespective of whether the disclosure of Members' statements comes at the instance of Congressional Committees or private persons. Indeed, because of the broad scope of the matters which the Congress investigates from time to time, it can perhaps be anticipated that there would be even more inquiry into such statements than presently is attempted by private parties asserting a right to access to the internal decisional process. In this connection, it should be noted that the Attorney General has ruled,[1] in a case involving the appearance of the Securities and Exchange Commission before a Committee of the Congress, that

[1] The ruling in the form of a letter to the Securities and Exchange Commission dated July 12, 1955, has been transmitted by the Commission to the Special

> "Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the Agency."

My basis for belief that the Board and its staff are privileged against revealing statements made during deliberation in a case in which the inquiry is made by a Congressional Committee does not rest entirely, or in this case at all, upon any claim of privilege of the Executive Branch of the Government. Some of the Board's functions, and particularly those involving foreign and overseas transportation embraced by Sections 801 and 802 of the Civil Aeronautics Act, 49 U.S.C. 601, 602, are believed to be "executive" in character. In the performance of its quasi-legislative and quasi-judicial functions not falling within the ambit of Section 801, however, I believe the Board to be independent of the Executive, and also independent of the Congress in making its decisions. As stated in relation to the Federal Trade Commission in *Humphrey's Executor v. U.S.*, 295 U.S. 602, 625, 626 (1935), the Congress in establishing regulatory agencies and vesting quasi-legislative and quasi-judicial functions in them intended to create

> "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official *or any department of the government.*" (Latter emphasis mine.)

This view, as it relates to the Board, is strengthened by the reference to the *Humphrey's* decision in *C. & S. Airlines v. Waterman Corp.*, 333 U.S. 103, 108, 109, wherein the Court distinguished between the Board's functions in relation to Section 801 matters and those not requiring approval by the President.

My position is based on the grounds that, as an independent deliberative body created by the Congress, the Board is entitled to the same privacy and freedom from inquiry into statements made during the deliberations as is accorded to judicial tribunals. In short, when the Congress creates an independent tribunal required to deliberate and act as a body, it is my opinion that the grant of authority and duty to so act carries with it the right to privacy in deliberations. Such a right, including freedom from testifying as to statements made during deliberations, is essential to the effective functioning of the tribunal. There is nothing in the Civil Aeronautics Act which serves to deny the Board this right.[2] Further, I find no basis for any distinction in the privilege against disclosing deliberative statements based on whether the partcular action involved is "quasi-judicial" or "quasi-legislative," or whether it is "pending" or "closed." Rather, in my opinion the test is whether the action is one required to be taken after deliberation and judgment.[3] The matter here involved is such an action. Accordingly, I conclude that Mr. Denny's statement was privileged, unless the fact that the statement was made in a non-public "regular session" attended only by the Board and staff members serves to destroy its otherwise privileged character, or unless a waiver occurred because of Mr. Denny's own testimony.

Subcommittee on Government Information of the House Committee on Government Operations (See p. 436 of Committee Print of "Replies," dated November 1, 1955).

[2] The Congress obviously could have phrased the Act in such fashion as to have denied the Board this privilege. My task, however, is to render an opinion on the basis of the statute as I find it.

[3] In this connection, it should be noted that the *Morgan* case involved a rate matter, and yet the administrative proceeding was said to have "a quality resembling that of a judicial proceeding." See 313 U.S. at p. 422.

I find no suggestion of any distinction in cases relating to inquiry into the decisional process of administrative agencies between deliberative statements made in secret "executive" sessions attended only by the members of the agency, and statements made in "regular" non-public sessions attended by staff members, nor any distinction between staff and agency members in relation to the privilege. Neither, in my judgment, is there any logical basis for such a distinction. The testimony of staff employees as to what members said during their deliberations discloses internal views to precisely the same extent as testimony by members, and is equally objectionable. Further, a view that the staff can disclose, or that the privilege is destroyed when staff members are present, would mean that the Board would be required for its own protection to deliberate only in executive session without the benefit of the staff to answer questions. Such a requirement would serve to handicap agencies such as the Board, and would carry with it no public benefit.

Further, the privilege against disclosure of statements made during deliberations rests on public policy, and runs, I think, to the entire agency. As stated in the quotation from the *Botany* case, *supra*, there should be "preservation from questioning of each member of the general body." Moreover, the privilege extends to the Board as a whole, and it is well settled that the action of a single member cannot serve to bind the Board. Under these circumstances, it is concluded that no waiver of the privilege resulted from Mr. Denny's prior testimony.

FRANKLIN M. STONE

March 20, 1956

MID-YEAR REPORT OF THE STANDING COMMITTEE ON AERONAUTICAL LAW, AMERICAN BAR ASSOCIATION, FEBRUARY 1956

The CAA reports that during 1955 U. S. air traffic exceeded all previous growth records.

Passenger miles traveled on U. S. domestic and international scheduled airlines increased approximately 20% to 23,350,000,000. Business flying, estimated at 4,300,000 hours represented 10% gain over 1954, putting it even further ahead of scheduled airlines in hours flown. Pilot position reports to CAA traffic control facilities showed more than a 20% increase over 1954, almost doubling the 1953-54 rate of increase.

Significant developments in aviation law during 1955 are herewith summarized.

FEDERAL LEGISLATION

The year 1955 (84th Congress, 1st Session) was marked by the passage of highly important legislation providing for permanent certification of local service carriers. Public Law 38, approved May 19, 1955, required the Civil Aeronautics Board to issue a certificate of unlimited duration to those local service air carriers qualifying under the Act, with a proviso empowering the Board to limit the duration of the certificate as to not over one-half of the intermediate points. Local service carriers had previously been operating under temporary authorizations varying from 3 to 7 years. The effect of the legislation is to assure the permanence of the main route structure, at the same time allowing the Board some flexibility in adjusting intermediate points to changing traffic needs. Pursuant to this legislation the Board awarded during 1955 permanent certificates of public convenience and necessity to fourteen local service carriers; namely, Allegheny, Bonanza, Central, Frontier, Lake Central, Mohawk, North Central, Ozark, Piedmont,

Continental (Pioneer), Southern, Southwest, Trans-Texas, and West Coast Airlines.

One of the drawbacks to the progress of local service carriers in the past has been the lack of a plane suitable to their needs, and the limited duration of their certificates has deterred interest in developing such a plane on the part of manufacturers. It is understood that since the passage of Public Law 38, five or more domestic aircraft manufacturers have expressed interest in developing such a plane and one line has an option on six Fokker F-27's for delivery in the fall of 1956 for local service use. Another local service carrier is making arrangements to buy two and obtain an option on two more of these planes.

In addition to the progress made in the development of more suitable aircraft for local service operations, the local service carriers have realized other tangible benefits from this legislation. Not only has there been a substantial improvement in the morale of airline employees who are now assured of opportunities for continuity of employment, but the heretofore difficult problem of financing has been made easier because banking institutions are more willing to lend money to carriers who are in business on a permanent basis.

Legislation was also passed making amendments to the Federal Airport Act. Public Law 311, approved August 3, 1955. The primary purpose of this enactment was to give the Secretary of Commerce annual contract authority for the purpose of making grants under the Federal Airport Act for the years 1956, 1957, 1958 and 1959.

In regard to legislation currently pending before the 84th Congress, 2nd Session, the omnibus aviation bills, S. 308 introduced by Senator Bricker, and S. 1119 introduced by Senator Magnuson, were the subject of extensive hearings during the year 1955. These bills in effect formed the basis for continuing the study by the Senate of the need for general revision of aviation laws which was begun with the introduction of the McCarran bill, S-2647 in 1953 (83rd Congress).

Companion omnibus bills were introduced in 1955 in the House, H.R. 4648 by Mr. Priest, and H.R. 4677 by Mr. Hinshaw. Hearings on these bills were begun in January, 1956 and were still under way at the time of this writing.

These four bills, while making extensive revisions of the law, nevertheless consist entirely of amendments to the Civil Aeronautics Act and in this respect differ sharply from the McCarran bill, which would have repealed the Civil Aeronautics Act in its entirety and substituted a new Act.

Among the other pending aviation bills the following may be mentioned:

S. 779, H.R. 295, H.R. 2017, H.R. 4657. Each permits the granting of free or reduced-rate transportation to ministers of religion.

S. 1192, H.R. 232, H.R. 3125. Each exempts air freight forwarders transportation of livestock and certain other commodities from regulation under the Civil Aeronautics Act.

H.R. 6908, H.R. 7444. Each brings stewardesses and other flight attendants within the definition of "airman," thus requiring them to obtain airman's certificates as a prerequisite to employment.

S. 1379. Amends the definition of "airman" in the Civil Aeronautics Act so as to authorize the exemption of certain supervisory mechanics from the necessity of obtaining airmen's certificates.

S. 1380. Authorizes the Secretary of Commerce to impose civil penalties for violations of the Security provisions of the Civil Aeronautics Act.

S. 1649, H.R. 6632. Each authorizes the Civil Aeronautics Board to impose civil penalties for violations of the economic provisions of the Civil Aeronautics Act.

S. 1462, H.R. 527, H.R. 3325. Each amends the Civil Aeronautics Act so as to overcome the effect of the decision of the Supreme Court in the "offset" cases, *Western Air Lines v. CAB*, 347 U.S. 67 (1954) and *Delta Air Lines v. Summerfield*, 347 U.S. 74 (1954).

S. 1990. Requires air carriers to provide transportation for additional baggage at air freight rates.

The beginning of the current year, 1956, was marked by the introduction of numerous bills on the subject of sabotage of aircraft, and the serving of alcoholic beverages on aircraft. H.R. 7907, H.R. 7908, H.R. 7921, H.R. 7957, H.R. 7958, H.R. 8133, H.R. 8134, H.R. 8135, S. 2792, S. 2829 and S. 2972, deal in various ways with the problem of sabotage and generally authorize the imposition of the death penalty for causing damage to aircraft and death to passengers while in flight. S. 2972 (Mr. Magnuson) was passed by the Senate on February 10, 1956.

H.R. 7922, H.R. 8000, S. 2845, S. 2979 and S. 3039 are designed to prohibit the serving of alcoholic beverages aboard to airline passengers while in flight.

Legislation in the field of safety regulations:

H.R. 8889 requires the Civil Aeronautics Board to issue separate regulations concerning traffic at La Guardia, Idlewild and Newark Airports.

H.R. 8890. Authorizes the imposition of criminal penalties for safety violations.

Legislation to aid carriers in buying new equipment:

H.R. 8902, H.R. 8903. Require the Board to disregard gains and losses realized on the sale of property in determining "all other revenue" under Section 406.

Legislation to authorize the permanent certification of additional air carriers:

S. 3163. Authorizes permanent certification of certain air carriers operating in Hawaii and Alaska.

S. 3164. Authorizes permanent certification of certain air carriers operating between the United States and Alaska.

Miscellaneous:

H.R. 8891. Prohibits jet-propelled aircraft from using airports located in densely populated areas.

Amendments to the omnibus bill, S. 1119, have been introduced which contain similar provisions to S. 3163 and S. 3164.

FEDERAL COURT DECISIONS

Review of CAB Orders

The Court of Appeals for the District of Columbia in *Lee v. CAB* (CA D of C 1955) 225 F. 2d 950 held that the Administrator of Civil Aeronautics is not a person "disclosing a substantial interest" in an order of the Board and, therefore, cannot petition the Court of Appeals to review such orders. The case involved an order of the CAB dismissing the Administrator's complaint to suspend certain pilots who refused to testify at an investigation of an accident in which they were involved. In *United Air Lines, Inc. v. CAB* (CA D of C 1955) 4 Avi. 17719, the Board had denied in part a motion of United for consolidation of certain route applications. The court held the orders of the Board were interlocutory and, therefore, not appealable. The court discussed the question in some detail and decided that the Board's ruling was not an "effectual disposition of rights" but was more in the nature of a procedural ruling within the general scope of the Board's authority to regulate its own procedures.

Air Tariffs

Despite the ruling of the CAB (CAB Docket 5573, Order Serial No. E7087; 3 Avi. 21562, 1952 and Regulation ER 159 amending Section 221.40 CAB economic regulations) that air tariffs limiting the time within which suits may be filed against the airlines by persons injured in the course of air travel are controlling, there are still some cases which began before the CAB ruling and which were passed on by the courts in the last year. In *Herman v. Northwest Air Lines, Inc.* (CA 2, 1955) 222 F. 2d 326, (Cert. denied 76 S.Ct. 84, 1955) the Court of Appeals for the 2nd Circuit held a one year limit for filing suit for persons injured was valid and enforceable. The District Court for the Northern District of Illinois held a similar provision requiring notice within 90 days and suit within one year to be invalid in *Turoff v. Eastern Airlines, Inc.* (DC ND Ill. 1955) 4 Avi. 17649.

Liability of the Federal Government Arising Out of Aeronautical Operations

Probably the outstanding action decided in 1955 involving this question is *Eastern Air Lines, Inc. v. Union Trust Co., et al.* (CA D of C 1955) 221 F. 2d 62, whch involved a crash between a Bolivian fighter plane and an Eastern plane at the Washington National Airport. The Court of Appeals in this case reversed a judgment in favor of the estate of one of the passengers on the Eastern plane and remanded the case for a new trial. The court found that the jury instructions had been erroneous because they permitted the jury to find Eastern negligent if the jury found that the plane attempted to land without receiving authority to make a landing. The court found from the record that Eastern had received landing clearance and a departure from the landing pattern of the type actually made was permissible once such clearance was given. The court further held that the operation of the control tower by the United States was not a governmental function and, therefore, the United States could be held liable for errors or negligence in the conduct of its tower operators. The U. S. Supreme Court granted certiorari on December 5, 1955, 24 Law Week 3153. With respect to the suit against Eastern Airlines the Supreme Court reversed the decision of the Court of Appeals which had reversed the District Court judgment in favor of the estate of one of the passengers. However, it upheld the Court of Appeals decision that the United States could be held liable for injuries sustained through the negligence of control tower operators.

U.S. v. Compania Cubana de Aviacion S.A. et al. (CA 5, 1955) 224 F. 2d 811 was one of a series of cases arising out of the collision of an air carrier and a military plane engaged in instrument flight training. The lower court found that the operator of the instrument flight training plane was negligent in failing to give the right-of-way to the air carrier and the Court of Appeals decided that the evidence sustained the findings.

In *U.S. v. Eastern Air Lines, Inc.* (DC ED NY 1955) 132 F. Supp. 787, an Eastern plane overran a runway and crashed into a CAA Administration Building. The court held that Eastern could not recover from the United States because the building did not constitute a hazard or nuisance and further held that the United States could not recover from Eastern because the evidence did not show that the pilot was negligent in the emergency situation that existed.

The United States was held liable for negligence in performance of an air-sea rescue operation by a coast guard helicopter in the case of *U.S. v. Lawter* (CA 5, 1955) 4 Avi. 17591. The court admitted that many coast guard operations were of an emergency type where the government could not be held responsible for negligence, but found that in the case before it, the coast guard was negligent in permitting an inexperienced man to

conduct the rescue where the services of an experienced man were readily available.

In *Williams v. U.S.* (CA 5, 1955), 218 F. 2d 473, a crash occurred during the testing of equipment alleged to be secret. The District Court found that the equipment was secret, relying on the statement of the District Attorney to that effect and on his own personal knowledge. The Court of Appeals held that the trial court exceeded permissible limits in finding exempt activity on such grounds and indicated that there would have to be much more substantial proof. The court went on to hold, however, that since plaintiff sued only on a *res ipsa loquitur* theory there was no basis for recovery and therefore the District Court was affirmed.

Liability of Aircraft Manufacturers

Northwest Airlines, Inc. v. Glenn L. Martin Co. (CA 6, 1955) 224 F. 2d 120 (certiorari denied, January 9, 1956, pending on rehearing), was a suit for damages caused by alleged negligence in the design and manufacture of Martin 202 planes. Immediately after the war, Northwest purchased ten of these planes and subsequently purchased fifteen more. On October 29, 1948, a 202 enroute from Chicago to Minneapolis crashed in a violent thunderstorm. Examination of the plane revealed a break in the left front wing spar. The plane had been flown 1,321 hours. On the same day a Northwest pilot flying another 202, which had been in the same storm, noted difficulty in handling the plane and upon landing at Minneapolis reported this to the maintenance crew. Examination of the plane revealed a break of the same spar in the same general location. Northwest immediately grounded all of its 202 planes and examination of the planes showed fatigue cracks in the wing spar in several of the planes with flying hours in the range of 500-1200. The planes should normally have a useful life of 20,000-25,000 hours. After grounding and examination, all of the 202 planes owned by Northwest were rebuilt, eliminating the difficulty. Northwest sought recovery of its expenses. The trial lasted for three months and the jury deliberated for ten days before returning a verdict in favor of Martin. Northwest appealed, contending: (1) it was entitled to a directed verdict on the question of negligence of Martin; (2) the question of assumption of risk should not have been submitted to the jury; (3) the question of contributory negligence generally should not have been submitted; (4) the question of contributory negligence on the ground that the planes were not equipped with radar should not have been submitted; (5) errors in the admission and exclusion of evidence; and (6) abuse of discretion by the trial court in failing to grant a new trial.

The Court of Appeals for the 6th Circuit decided that the question of negligence of Martin was properly submitted to the jury. The court pointed out that knowledge of stress and metal fatigue at the time the planes were built was not as well developed as it was at the time of trial. Also, the question of whether the design was proper was a very close one, and, therefore, one on which the jury was entitled to pass. The court held that it was error, however, to submit the defenses of assumption of risk and contributory negligence to the jury. Martin based its claim of assumption of risk and contributory negligence on the ground that several Northwest engineers and other personnel were at the Martin plant during the construction of the planes; that they had thoroughly examined the allegedly defective structure and that a witness for Northwest had testified that the design was defective and as such was open and obvious to any competent engineer with but a brief examination. The court compared the many thousands of engineer hours expended by Martin in designing and constructing the plane with the relatively small number of people which North-

west had at the Martin plant and also pointed out that the changes suggested by Northwest personnel were almost all concerned with minor modifications which would enable the planes to fit into Northwest's standard operating procedures. Therefore, the court said it was apparent that Northwest relied on Martin for primary safety of design and construction and there was no adequate evidence to warrant the submission of assumption of risk or contributory negligence to the jury. With regard to Northwest equipping its planes with radar, the court found that at the time of the accident it was extremely doubtful that there was any feasible radar system available for commercial planes and therefore Northwest could not be found negligent in failing to equip its planes with such facilities.

In *Smith v. Piper Aircraft Corporation* (DC MD Pa. 1955) 18 FRD 169 and *Jones v. Piper Aircraft Corporation* (DC MD Pa. 1955) 18 FRD 181, the court held that the plaintiff could amend the complaint to allege negligent testing, design and inspection of the plane even if the statute of limitations had run and even though the original complaint was based on breach of warranty and negligent manufacture because of defective material. The court also denied the plaintiff's motion to strike the affirmative defense that the accident was due to negligence of the pilot rather than to any defect in the plane. Plaintiff was required to answer request for admissions regarding an earlier suit in Alabama arising out of the same accident in which she had contended the accident was due to pilot negligence.

Unfair Competition in Use of Air Line Names

The Court of Appeals for the District of Columbia in *North American Airlines, Inc. v. CAB* (CA D of C 1955) 4 Avi. 17698 set aside an order of the CAB in which it required North American to cease using the name of North American Airlines, Inc. or any other combination of the word "American." The court held that there was no evidence that an appreciable number of prospective customers would be confused by the similarity of North American Airlines, Inc. and American Airlines, Inc. and therefore the Board had no authority to issue its order and the parties would be left to their ordinary civil remedies with regard to unfair competition. Certiorari granted by the Supreme Ct. Nov. 14, 1955, decision expected this term.[1] *North American Aircoach Systems, Inc. v. North American Aviation, Inc.* (CA 9, 1955) 4 Avi. 17801 was an action for injunction by North American Aviation, an aircraft manufacturer against an air transportation operator. The court found that North American Aviation, Inc. by use and publicity in connection with the word "North American" had given it a secondary meaning and use of the same name by the air coach operator was deceptive and confusing to the public. An injunction was therefore granted.

Service of Process

While the question of service of process is not limited to aviation law, the far-flung nature of aeronautical operations is such that the problems appear frequently in aviation cases. In *Scholnik v. National Airlines, Inc.* (CA 6, 1955) 219 F. 2d 115 (Cert. denied 349 U.S. 956, 1955) the plaintiff, an Ohio citizen, filed suit in Ohio against National Airlines, a Florida corporation, for injuries incurred in an accident on a National plane enroute from Havana, Cuba to Miami, Florida. Actually National operated no flights northwest of Washington, D. C. It did, however, have an equipment inter-change leasing agreement with Capital and Capital operated flights in and had offices in Ohio. Under some circumstances equipment and crews

[1] (See *American Airlines, Inc. v. North American Airlines, Inc.*, Docket No. 410.)

were exchanged so that through service could be provided between Cleveland, Ohio and Miami, Florida. The court held that this constituted sufficient relation of National's operation to the State of Ohio to permit service upon National by means of service upon Capital in Ohio. The Court of Appeals pointed out that a motion for transfer under Section 1404A was still available if trial in Ohio constituted an undue burden to National.

In *Kenny v. Alaska Airlines, Inc.* (DC SD Cal. 1955) 132 F. Supp. 839, plaintiff was a stockholder of Alaska and sued it in California. He had process served upon the Secretary of State under a statute permitting such service where a corporation operated within the state and did not have an agent for service. It appeared that Alaska did not conduct any flights in California but it was possible to purchase tickets on Alaskan flights through air carriers operating in California or through various ticket agencies operating in California. The court held that these facts did not constitute doing business in California by Alaska Airlines and therefore the attempted service of process in California was invalid.

FEDERAL ADMINISTRATIVE DECISIONS

Local and Trunkline Services

The CAB made provision for an unusually large amount of new air transportation services, many of which will be competitive, in a series of decisions which were rendered, or which became effective, during 1955. In fact, these decisions taken in the aggregate, seem to represent the most significant shift in CAB policy in the direction of authorizing new competition since the passage of the Civil Aeronautics Act in 1938.

In April 1955, the President approved the Board's decision in the *New York-Balboa Through Service Proceeding,* Orders E-9109 and E-9110. In that decision, the Board and the President authorized the extension of Braniff Airways' Latin American route northward from Havana to Miami for the purpose of making possible interchange flights with Eastern Air Lines on Eastern's New York-Miami route. Such an interchange of equipment at Miami will result in through one-plane service from New York, and other points on Eastern's New York-Miami route to Havana, Cuba; Balboa, Canal Zone, Panama; and other points in South America on Braniff's route, which has southern terminals at Rio de Janeiro, Brazil, and Buenos Aires, Argentina. The Board also indicated that it would approve, until 1960, a through flight agreement between Pan American World Airways and Pan American Grace Airways, providing through service over Pan American's route between Miami and Balboa, and thence south on Panagra's routes to points on the west coast of South America, subject to the condition that all such flights shall be through flights to and from New York City, the Miami-New York portion of the flights to proceed over the routes of National Airlines.

In July and August 1955, the Board, in Orders E-9395 and E-9506, approved agreements between Braniff and Eastern which provide for an interchange operation between those carriers as contemplated by the Board's decision in the Balboa case. In August it also approved, subject to certain conditions, agreements between National, Pan American and Panagra providing for the interchange operation between those carriers.

In June 1955 the President approved the Board's decision in the *Transatlantic Cargo Case,* Order E-9311. In that decision, the Board and the President granted Seaboard & Western Airlines (formerly a non-scheduled air carrier operating under exemption authority) a temporary certificate of public convenience and necessity authorizing scheduled service across the North Atlantic carrying air cargo only. The certificate, which is limited

to a duration of five years, authorizes air freight service between the co-terminals New York City, Philadelphia, and Baltimore, via intermediate points in Newfoundland, Canada and Ireland, and (a) beyond Ireland via intermediate points in the United Kingdom, Netherlands, Belgium and Western Germany to a terminal point in Western Germany; and (b) beyond Ireland via intermediate points in France and Switzerland to a terminal point in Switzerland.

In September 1955, the Board decided the *New York-Chicago Service Case* (Order E-9537, subsequently amended by Orders E-9692, E-9737 and E-9886). In this decision, the Board authorized additional and improved service in the New York-Chicago area. Specifically, the Board provided for the following certificate amendments: (1) Capital Airlines was authorized to provide unrestricted service between New York, on the one hand, and Detroit, Pittsburgh, Chicago and Toledo on the other hand; (2) Philadelphia was added to Capital's Routes 14 and 55, providing for new competitive service between Philadelphia and Cleveland, Detroit and other Michigan cities; (3) Buffalo and Rochester were added to Capital's Route 14 as intermediate points between Detroit and New York; (4) A previously existing restriction on United's services was removed so as to allow United to operate turnaround service between Philadelphia and Detroit; (5) Another previously existing restriction on United's services which prohibited service to Fort Wayne, Indiana, on flights serving Detroit or Toledo was removed; (6) United was also authorized to serve Pittsburgh on its Route No. 1 subject to certain long-haul restrictions, and temporarily to provide local air transportation between Chicago and Pittsburgh; (7) Detroit was added to TWA's transcontinental route as an intermediate point between New York and Chicago, subject to certain long-haul restrictions; (8) Northwest Airlines was authorized to operate unrestricted service between New York and Detroit, and Chicago was added as an intermediate point on its New York-Seattle transcontinental route, subject to a long-haul restriction; and (9) Eastern was given temporary additional operating rights between Pittsburgh and Akron, Cleveland and Detroit, subject to a long-haul restriction.

The Board at the same time issued a supplemental opinion in the *United Restriction Case* which had been deferred for decision with the *New York-Chicago Case*, in which it lifted previously existing restrictions on United's service from Chicago to Seattle and Portland which had prevented non-stop service between those points. The Board also issued a supplemental opinion on deferred portions of its Docket 1789, in which it extended Segment 1 of TWA's Route 2 from Cleveland to New York, subject to certain long-haul restrictions.

In November 1955, the Board decided the *Denver Service Case* (Order E-9735, as subsequently amended by Orders E-9759 and E-9887). In that case, the Board (1) extended Western Air Lines Route No. 35 from Denver to San Francisco/Oakland via Salt Lake City and Reno, subject to long-haul restrictions; (2) added Denver as an intermediate point on TWA's transcontinental Route 2, subject to certain restrictions; (3) added Kansas City as an intermediate point on United's transcontinental Route 1, subject to restrictions; (4) added a new segment to American's Routes 7 and 25 extending from San Francisco/Oakland to Chicago, thereby authorizing non-stop operations between those points and new competitive services between the San Francisco area and various eastern and midwestern cities on American's routes; and (5) amended Continental's Route 29 by adding a new segment running between Chicago and Los Angeles via Kansas City and Denver, subject to certain long-haul restrictions.

Also in November, the Board issued its decision in the *Additional Southwest-Northeast Service Case* (Order E-9758, as subsequently amended by

Order E-9915), in which it authorized additional and competitive air services between principal cities in the southwestern and northeastern areas of the nation, and to certain cities designated as Midway Cities lying between those two areas. The certificate of Braniff Airways was amended, with certain restrictions, to permit operations over a new segment between the co-terminal points New York and Newark, and the terminal point Fort Worth, Texas, via the intermediate points Washington, D. C., Chattanooga, Nashville, and Memphis, Tenn., Tulsa and Oklahoma City, Okla., and Dallas, Texas. This certificate amendment not only will provide additional service between the named cities, but will allow Braniff to provide new services to San Antonio, Texas. The Board also amended, again with restrictions, the certificate of Delta Air Lines, so as to authorize service beyond Atlanta, Georgia, to the co-terminal points New York and Newark, via the intermediate points Charlotte, N. C., Washington, D. C., Baltimore, Maryland, and Philadelphia, Pa., all beyond Atlanta being points never previously served by Delta. At the same time, the Board added another new route segment in the southwestern area of Delta's operations authorizing service, subject to a long-haul restriction, over Route 24 west of the intermediate point New Orleans, La., to the terminal point Houston, Texas, thereby authorizing Delta to provide non-stop services between Houston and points in the Northeast including Washington, Baltimore, Philadelphia and New York, as well as services between New Orleans and Houston on through flights. These awards will also allow Delta to render one-stop services between Dallas/Fort Worth and the Northeast.

The Board, in the *Southwest-Northeast* decision, also authorized important route additions for Capital Airlines. These consisted principally of an extension of Capital's Route 51 north from Washington, D. C., to New York/Newark via Baltimore and Philadelphia, and amendment of both its Routes 51 and 55 to permit service between New Orleans, La., and Atlanta via Birmingham and Mobile, Ala., subject to a long-haul restriction. These awards will enable Capital to operate services between New Orleans and New York not only over its Route 55 (via such cities as Chattanooga, Knoxville and Pittsburgh, as heretofore, and now also via Atlanta), but also over a route via such cities as Atlanta, Washington, Baltimore and Philadelphia. The awards also increase Capital's authority to serve such cities as Chattanooga, Tenn., and Greensboro/High Point and Charlotte, N. C.

In the same decision, the Board added Tulsa and Oklahoma City, Okla., to TWA's transcontinental Route 2, with certain restrictions, and also authorized for the first time service by TWA between Washington and Baltimore, on the one hand, and Philadelphia and New York, on the other, on its flights serving Tulsa and Oklahoma City. This award will enable TWA also to provide new one-carrier service between Oklahoma cities and Pittsburgh, as well as points in the Ohio Valley such as Detroit and Cleveland.

In the *Southwest-Northeast* decision, the Board also authorized American Airlines to serve Pittsburgh on its Route 4, subject to certain restrictions, so as to provide Pittsburgh with new long-haul service to the Southwest and West, and to serve Houston, Texas, subject to restrictions, so as to provide one-carrier service between Houston and Pittsburgh. The Board also authorized American to provide service to Columbus, Ohio, on a through routing to New York City. The Board also authorized Eastern Air Lines, for the first time, to carry traffic between Pittsburgh, on the one hand, and Atlanta, Mobile, Birmingham, Ala., and New Orleans, La., on the other. Finally, the Board also authorized Capital Airlines, in an application deferred from the *New York-Chicago Case,* to carry passengers and other traffic between Philadelphia and Pittsburgh.

Large Irregular Air Carrier Investigation

The Civil Aeronautics Board in November, 1955 (Docket No. 5132 et al) culminated a general investigation instituted in 1951 to determine future policy with regard to large irregular carriers (the so-called non-skeds).

After reciting that the irregulars represent a significant part of the nation's air transport system and concluding that the continued existence of their fleet is of real value in terms of the national defense, the Board declared its intention to liberalize the operating authority of those carriers. At the time this order was entered all of the applicants had not been heard with regard to their qualifications. Hence a decision on the nature and form of the authority to be granted and the identity of the carriers to receive that authority was deferred until after the Hearing Examiners complete hearings on the qualifications of the applicants and render their Initial Decision on that issue. However, an interim order permits all irregular carriers whose operating authority has not been revoked for economic violations of the Civil Aeronautics Act to provide service within the scope of the enlarged authorization pending further decision by the Board. The same order styles the irregulars "supplemental air carriers" and enjoins them to provide supplemental service not unduly competitive with the operations of the certificated carriers.

Specifically the new authorization (exemptions issued pursuant to section 416 of the Act) allows large irregular carriers to conduct:

(1) Unlimited charter operations on a plane-load basis for the carriage of passengers and property in domestic overseas, and territorial (except intra-Alaska) operations, and of property only in international operations; (2) charter operations for the carriage of passengers in international operations on an individual exemption basis similar to that which is set forth in the *1955 Transatlantic Charter Policy,* E-9221, adopted May 20, 1955; and (3) individually-ticketed or individually-waybilled operations by each carrier on a scheduled basis not to exceed 10 trips per month between any two points, except as to intra-Alaska operations and except as to the carriage of passengers in international operations.

Twentieth Century Air Lines, Inc., et al. Enforcement Proceeding Docket No. 6000 (July 1, 1955)

The Civil Aeronautics Board recently issued an order revoking the economic operating authority of four large irregular air carriers (Twentieth Century Air Lines, Inc., Trans National Airlines, Trans American Airways and Jacob Freed Adelman, dba Hemisphere Air Transport) for knowing and willful violations of sections 401(a) and 408 of the Civil Aeronautics Act and Parts 241 and 291 of the Board's Economic Regulations. These carriers were found to have operated in concert with each other and with several other entities (ticket agents, aircraft holding companies and fiscal agents) as integral parts of a combine, advertising and providing scheduled air transportation not authorized by the Board. In addition, the Board ordered four individuals, individually and as partners in several of the aforesaid aeronautical enterprises, to cease and desist from violating section 401(a) and section 408 of the Act. The Board found that they had engaged "directly" in air transportation through their own instrumentalities even though they were not the ostensible legal owners of the carriers involved.

Although respondents disavowed any violations of section 408, a major portion of their defense to the 401 charges revolved around the assertion that various amendments to the applicable regulations (principally the so-called ticket agency regulation forbidding agreements or arrangements whereby the collective air transportation performed or held out by several

carriers through a common ticket agent exceeds that each such carrier is authorized to perform) were invalid because they were promulgated without an adjudicatory hearing and thus resulted in an illegal diminution or modification of their operating authority.

The Board held, among other things, that the adoption of these amendments required no such hearing since they were rule making in nature and as such constituted a valid exercise of its powers under sections 416 and 205 of the Civil Aeronautics Act.

Reopened Trans Atlantic Final Mail Rate Case
Docket No. 1706 et al., Order No. E-9441
(July 28, 1955)

In examining the domestic operations of Trans World Airlines (TWA) to determine what profits, if any, were to be offset against the subsidy requirements of its international division for a past mail rate period ending December 31, 1953, the Civil Aeronautics Board refused to recognize approximately three million dollars set aside by TWA for payment of future taxes. The carrier contended that this tax accrual was appropriate and should be recognized for rate-making in view of the provisions of Section 124(a) of the Internal Revenue Code of 1950, which permits the amortization of "emergency facilities" for tax purposes over a period of five years rather than the longer normal period of depreciation based upon their expected usefulness. This special tax treatment, known as "rapid tax write-off," was extended by Congress as an inducement for business to join in the defense effort. TWA qualified for this special treatment by obtaining a certificate of necessity from the Office of Defense Mobilization, and thereafter set aside approximately three million dollars from earnings during the years 1951, '52 and '53 for payment of taxes it would incur between the end of the five year amortization period and the seven year depreciation period determined by the Board as the useful life of the aircraft.

In rejecting TWA's claim, the Board noted the subsidy provisions of the Civil Aeronautics Act, and pointed out that for the eight year past period the carrier's actual financial requirements were being adequately underwritten with subsidy, and that for the future period commencing January 1, 1954, TWA was self-sufficient and would not require subsidization either in its domestic or international operations. The Board concluded that to recognize this tax accrual in the past period under these circumstances would amount to subsidizing a legal obligation to be incurred at a time when the carrier did not require subsidy.

INTERNATIONAL CONVENTIONS

On September 28, 1955, at The Hague, Netherlands, twenty-six nations executed a Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929. The United States has yet not ratified or signed the agreement. Pursuant to Article 22 it does not become effective until thirty signatory States have ratified it.

The Protocol amends Section 2 of the Convention to state that it does not apply to carriage of mail and postal packages. Paragraph 1 or Article 3 of the Convention is amended with respect to the issuance of a ticket and it is provided that the ticket is *prima facie* evidence of the conclusions and conditions of the contract of carriage.

Article 4 of the Convention is amended with respect to the baggage check. With respect to cargo, Article 5 of the Protocol requires that the carrier shall sign the air waybill prior to the loading of the cargo on board

the aircraft. Article 8 of the Convention listing the particulars to be contained in the air waybill is removed and replaced by a considerably shortened provision, and Article 9, relating to cargo loaded on the aircraft without an air waybill, or with an inadequate one, is also amended. The requirements that notice of the possible application of the Warsaw Convention to certain carriage be included in all traffic documents are somewhat modified in language and the amount of information required to be included in these documents is reduced.

The Protocol also amends Article 22 of the Convention raising the limitation of liability of the carrier to the sum of two hundred and fifty thousand gold francs ($16,600), but allows for a higher limit where negotiated by special contract between the carrier and the passenger. A provision is also included to authorize the awarding of attorney's fees and other legal expenses in addition to the 250,000 gold francs limitation. According to the terms of Article 13 of the Protocol, the limits of liability specified shall not apply if it is proved that damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would result, provided that the employee was acting within the scope of his employment.

The Protocol also provides an extension of the time limitation within which a person must give notice of damage to the carrier, the time varying depending on whether the claimed damage is to baggage or cargo.

The Protocol contains other amendments to the Convention and of course there are procedural provisions in the Protocol providing for denunciation and ratification.

The position of the United States delegates has not been revealed although we are informed that their report has been written. It is expected that the view of the United States will be expressed in the near future.

According to the Department of State there has been one significant development during the past year in the status of bilateral agreements with Western European countries. On July 7, 1955 the State Department announced that it had signed an air transport agreement between the Federal Republic of Germany and the United States providing for the basic principles to govern air transport relations between the two countries and setting forth routes to be operated by their airlines. The agreement contains the fundamental principles relating to air transport operations which have been standard in air transport agreements negotiated by the United States and the United Kingdom in Bermuda in February 1946. Approximately 40 agreements have been concluded by the United States containing these principles.

Since the completion of negotiations, the subject of the agreement has been discussed by the airlines, the Civil Aeronautics Board and the Department of State at hearings before the Senate Committee on Interstate and Foreign Commerce. Subsequent to these discussions, the United States signed the agreement and tendered the agreement to the Federal Republic of Germany which has not formally ratified the agreement. It is expected that the Republic of Germany will take action in the near future.

STATE LEGISLATION

At the 1955 Annual Meeting of the American Bar Association in Philadelphia, August 22-26, 1955, the House of Delegates authorized the Standing Committee on Aeronautical Law to continue to study proposals from interested public and private groups regarding the need to revise existing State aeronautical statutes and regulations in order to recognize and permit the effective utilization of non fixed-wing aircraft.

In this connection, the members of both the Standing and Advisory Committees on Aeronautical Law have been supplied with copies of a memorandum prepared for the Helicopter Council of the Aircraft Industries Association of America, which has been distributed by the National Association of State Aviation Officials to all of its member state regulatory bodies. This memorandum discusses the major types of problems faced by helicopter operators in the majority of our States under existing statutes which were designed for the regulation of fixed-wing, not rotary-wing aircraft. It also suggests various ways in which those statutes may be revised in order to eliminate or alleviate these problems, without at the same time depriving helicopters and their operators of the promotional and developmental features of existing state laws.

MUNICIPAL REGULATIONS

Matters Relating to Local Jurisdiction Over Flight of Aircraft

The outstanding development in the field of municipal regulations since our last report was the decision in *Allegheny Airlines, Inc., et al. v. Village of Cedarhurst* (DC ED NY) on June 27, 1955 (132 F. Supp. 871), declaring unconstitutional and void the Cedarhurst (NY) ordinance prohibiting flights below 1,000 feet (coming into and leaving Idlewild Airport), and permanently enjoining defendants from enforcing it. In a well written opinion the court declares the basic issue to be whether Congress has pre-empted the field of regulation and control of the flight of aircraft, including the fixing of minimum safe altitudes for take-offs and landings. The court holds that Congress has pre-empted the field of regualtion of air traffic in the navigable air space, under the commerce clause of the Constitution. While the exercise of Congressional power in the field does not prevent the states from exercising their inherent powers outside the fields pre-empted by Congress, it does preclude the states from regulating those phases of national commerce, which, because of a need for national uniformity, demand that their regulation, if any, be prescribed by a single authority, and federal control of traffic in the navigable airspace includes the airspace through which aircraft necessarily fly for take-offs and landings at public airports. The court rejected defendants' claim that Congress unlawfully delegated its authority to the CAB to adopt a rule fixing the minimum safe altitudes of flight of aircraft.

In *Gardner v. Allegheny County*, 382 Pa. 88, 114 A 2d. 491 (1955) the Supreme Court of Pennsylvania held that the lower court was correct in dismissing defendants' preliminary objections to plaintiffs' bill in equity asking that repeated flights 15 to 30 feet above plaintiffs' houses in take-offs and landings be enjoined, citing Pennsylvania cases and *U.S. v. Causby*, 328 U.S. 256 (1946) which held that flights so low and so frequent as to be a direct and immediate interference with the usefulness of the land do constitute a "taking," and the fact that the path of glide by planes was approved by the CAB does not change the result.

Municipal Condemnation of Land Below Glide Path

In the same case, *Gardner v. Allegheny County*, 382 Pa. 88, 114 A 2d 491 (1955), the Supreme Court of Pennsylvania held that under Pennsylvania law the lower court erred in dismissing defendants' preliminary objections to plaintiffs' claim in a bill in equity for a "taking" of their property and for an award of the fair market value of the property taken because damages for such taking must be fixed under proceedings for the condemnation of land.

The Legislature of Pennsylvania on June 28, 1955 amended the law of that state to provide that an airport approach area includes all the area of a commercially licensed airport, extending 1,000 feet at a ratio of one foot of height for each 20 feet of distance, and 300 feet wide. It also imposed a fine of $100, or 30 days in prison, for erecting or maintaining any smokestack, flag pole, tank, radio station, tower, antenna, building, structure or obstruction extending above that inclined plane; each day's continuation to be deemed a separate offense.

WILLIAM S. BURTON, *Chairman*

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