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TARIFF LIMITATIONS ON AIR CARRIAGE CONTRACTS

By GEOFFREY N. PRATT†

I. INTRODUCTION

THIS article is adapted from the third chapter of the author’s thesis submitted to the Institute of Air and Space Law, McGill University, in partial fulfilment of the requirements of the degree of Master of Laws. The main aim of the thesis was to consider the validity of clauses contained in contracts of air carriage extending exclusion and limitation of liability provisions in favour of the air carrier to his servants and agents. The discussion of United States law contained in the thesis and reproduced here primarily considers whether the carrier can validly limit and exclude his own liability, first under the common law and secondly under the tariff system created by the Civil Aeronautics Act of 1938, now substantially reenacted in the Federal Aviation Act of 1958. Following the conclusions to this section, there is a consideration of whether any limitation on the carrier’s liability may be extended to his servants and agents. In considering the common law position, the discussion is confined to common carriage.†

II. THE COMMON LAW

A. Surface Carriers

The general rule in most of the United States is that a common carrier of goods and passengers can only limit and exclude its liability when that limitation or exclusion is just and reasonable. It is not just and reasonable for a common carrier to limit or exclude its responsibility for the negligence of itself or its servants. The leading case on the subject is N.Y. Central Railroad Co. v. Lockwood where a drover was negligently injured while travelling with his cattle under a general contract exempting the carrier from all responsibility. The Supreme Court held that the drover was a passenger for hire and that a common carrier cannot exempt himself from responsibility for the negligence of himself or his servants, a

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† For a discussion of whether the limitation provisions in the Warsaw Convention apply to a carrier’s servants and agents, see Pratt, Carriage by Air Act, 1952—Limitation of Air Carriers’ Liability—Whether Servants of Carrier also Protected, 1962 Can. B. Rev. 40.

† For the distinction between common and private carriers in air carriage and the degree of care required of them, see Rhyne, Aviation Accident Law 45 (Wash. 1947).

† 17 Wall 357 (1873). Cf. earlier cases of N.J. Steam Navigation Co. v. Merchants Bank, 6 Howard 344 (1848) (Agreement that goods were at all times exclusively at the risk of the shipper held not to affect carrier’s liability for the gross negligence of his servants and agents); York Mfg. Co. v. Ill. Cent. R.R. Co., 3 Wall 107 (1866) (Carrier may restrict or diminish its common law liability by contract so long as it does not attempt to cover losses by negligence or misconduct).

† Carrier may stipulate in a free railway pass that he will not be liable for the negligence of himself or his servants. See Northern Pacific R.R. Co. v. Adams, 192 U.S. 440 (1904); Boering v. Chesapeake Beach R.R. Co., 193 U.S. 442 (1904); Kansas City R.R. Co. v. Van Zant, 260 U.S. 459 (1921); Francis v. Southern Pac. Co., 333 U.S. 445 (1948). These four cases were cited in Braughton v. United Air Lines, Inc., 189 F. Supp. 137 (W.D. Kan. 1960) (Condition in deceased’s free pass relieving carrier from all liability arising out of common law negligence held valid.).
rule which the court said applied both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Two fundamental reasons were given for the principle. They were stated with clarity in *Bank of Kentucky v. Adams Express Co.* where a stipulation by the defendant that it would not be liable for the loss of goods by fire was under consideration.

The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed, extreme vigilance and caution, more probable, takes away the security of the consignors and makes common carriage more unreliable.

The reason that the courts cannot allow a condition which might result in an exercise of less care, is not convincing. It forgets that the carrier and his servants have other, perhaps more compelling reasons for exercising the greatest amount of care possible. Accidents, particularly in aviation, invariably cause grave injuries and often death to the employees of the carrier together with extensive damage to equipment. This consideration alone would make any carrier or servant think twice before taking any undue risk. Again, competition with other forms of transport ensures a high degree of care on the part of the carrier; more accidents, less public confidence and fewer passengers and consignors. The second reason, namely that the law should prevent the carrier from taking advantage of its superior bargaining position is perhaps less convincing today since rates and tariffs are now under Government supervision and a condition will not be imposed upon a defenceless passenger/shipper unless filed with and thus subject to the approval or otherwise of the competent agency. Also, that some conditions which limit liability for negligence are not unreasonable, is accepted by the Government since it has adhered to the Warsaw Convention.

However this may be, it is clear that the common law rule is still very much the law. In fact, the Supreme Court said in 1952 that, although the general rule was fashioned by the courts, more than a century’s use had conferred upon it “the force and precision of a legislative enactment.”

There is, however, one so-called exception to it. In *Hart v. Pennsylvania R.R. Co.* the plaintiff signed a contract agreeing on a valuation of horses shipped and the freight rate was based on the condition that the carrier assumed liability only to the extent of the agreed valuation even

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5 U.S. 174 (1876).
6 Cf. *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 440-41 (1889). “A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment . . . . The carrier and his customers do not stand upon a footing of equality.”
7 On September 22, 1961, the Federal Aviation Agency released a document inviting comments on the relationship of the United States to the Hague Protocol amending the Warsaw Convention. Two questions were posed: 1) whether or not the State Department should recommend that the President withdraw the request to the Senate for advice and consent to the Hague Protocol; 2) whether or not the United States should withdraw from participation in the Warsaw Convention by giving the required six months notice. Since the United States represents over 50% of the world’s air transport, such a horrendous move would be a serious blow to air transportation the world over and would seriously affect the unifying value of the Warsaw Convention.
9 112 U.S. 331 (1884).
for loss by his own negligence. In a suit brought because of injuries negligently caused to the horses, the Supreme Court refused to allow evidence that these were race horses of far greater value than that agreed upon in the contract of carriage. The court agreed with the general rule that a carrier cannot stipulate for exemption from the consequences of his own negligence or that of his servants but said:

The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater.10

There is a qualification in that the shipper must have a freedom of choice as to whether he will enter into such an agreement and some consideration such as a lower rate must be given him for so doing.11 If this condition is satisfied, then the shipper will be bound, even if there is a gross disproportion between the actual value of the goods and the value stated in the contract of carriage.12

B. Air Carriers

Despite a number of pleas that the common law rule should not be automatically applied to air carriage just because they happen to be common carriers,13 four cases concerning wrongful death applied the rule before 1938 and it is clear from two subsequent cases under the tariff system that the rule would have been applied equally to the carriage of goods and baggage.

In Allison v. Standard Air Lines, Inc.,14 a passenger had been killed in a plane crash. In an action brought by the administrator of the deceased's estate, the carrier pleaded, inter alia, a provision of the ticket which had been signed by the decedent. By it, the aircraft company was to be held liable only for proven negligence. The court said that the defendant was a common carrier and could not contract out of his liability as such. That is, a common carrier cannot, by a clause in a ticket, reduce the amount of care required of him. This is not reasonable since it has the effect of cutting down his liability for negligence.

The issuance of a ticket with provisions printed thereon such as have been placed in evidence here does not change the relations of the parties to this action.15

10 Id. at 440-1.
11 See Union Pac. R.R. Co. v. Burke, 255 U.S. 317, 321-22 (1921). "... valuation agreements have been sustained only on principles of estoppel, and in carefully restricted cases where choice of rates was given. ... This valuation rule ... is ... an exception to the common law rule of liability of common carriers and the latter rule remains in full effect as to all cases not falling within the scope of such exception." See generally 1110 Williston, Contracts (rev. ed. 1936).
12 See George N. Pierce Co. v. Wells Fargo & Co., 236 U.S. 278 (1915). (Plaintiff recovered $50 for lost automobiles whose actual value was $20,000).
Despite this, however, the jury found in favour of the defendant.

In *Law v. Transcontinental Air Transport, Inc.*\(^{16}\), the plaintiff's husband was killed in an aircraft crash while travelling on a ticket with a clause in it stating that the defendant was not a common carrier and an agreement by the passenger, exempting the defendant from any liability for injury to or death of the passenger, whether caused by the negligence of the defendant or otherwise. In his charge to the jury, Kirkpatrick, D.J. said at one point that:

No common carrier has a right to ask its passengers to relieve it of failure on its part to perform the duty of care which the law requires of it.\(^{17}\)

Nor could the carrier escape liability by calling itself a private carrier.

In *Curtiss-Wright Flying Service, Inc. v. Glose*,\(^{18}\) the clause in the ticket of the deceased passenger provided "that in the event of the death of injury of the holder due to any cause for which the Company is legally liable, the Company's liability is limited to $10,000." The court citing, *inter alia*, *Bank of Kentucky v. Adams Exp. Co.*\(^{18}\) said that:

the policy of the law is settled that common carriers, in dealing with passengers, cannot compel them to so release their legal liability for their own negligence.\(^{19}\)

The judge could see no reason "why the same principles applicable to land and water should not also be applied to air transportation."\(^{18}\)

Finally, in *Conklin v. Canadian-Colonial Airways, Inc.*\(^{20}\), the ticket of the deceased traveller contained terms and conditions signed by the passenger, limiting the liability of the carrier according to the price paid. The passenger was given no choice between full and limited liability, however, and the New York Court of Appeal held this to be fatal to its validity since while exemption or limitation provisions are allowed by the New York courts, a material element in the decisions had always been that the passenger could choose between full or limited liability. There was no question in the court's mind that the common law rule and its New York modification applied to air carriage.

The two cases which indicate that the rule would be applied to the carriage of baggage and goods by air are *Siwalk v. Pennsylvania-Central Airline Corp.*\(^{21}\) and *Randolph v. American Airlines Inc.*\(^{21}\). In the former case, the action was for damages to the baggage of an intra-state passenger caused by the breaking of a bottle of toilet water through the negligence of the defendant airline. The court held that the enumeration in the interstate tariff on file with the Civil Aeronautics Authority of articles not acceptable as baggage, did not include a reasonable amount of toilet water. In the alternative, it was held that if the intrastate passenger was

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\(^{17}\) Id. at 213.

\(^{18}\) 66 F.2d 710 (1d Cir. 1931); cert. denied, 290 U.S. 696 (1934).

\(^{19}\) See supra note 5. The clause in this carriage of goods case excluded liability altogether.

\(^{20}\) See supra note 18, at 712.

\(^{21}\) Ibid.

\(^{22}\) 266 N.Y. 244, 194 N.E. 692 (1931). Noted in 20 Cornell L.Q. 495 (1931).


not subject to the interstate tariffs, she was entitled to recover under the rule that a common carrier may not stipulate against liability for its own negligence.

In *Randolph v. American Airlines*, considered more fully below, Fess, J. referred to the general rule of law that "common carriers cannot stipulate for immunity from their own or their agents' negligence" and to the distinction made at common law "between a contract immunizing a carrier from liability for negligence and a contract limiting liability upon an agreed valuation at a higher charge or rate." It is clear that he regarded both rules as applicable to air carriers.

At common law, then, an air carrier transporting goods and passengers for hire, cannot exclude or limit his liability for the negligence of himself or of his servants and agents. In a contract for the carriage of goods or baggage, however, he can limit his liability to a fixed valuation provided the passenger or consignor has the choice of declaring a higher value and paying an additional charge. How far and to what extent this common law has been superceded or adopted in interstate carriage by the tariff system has now to be considered.

### III. The Tariff System

#### A. The Civil Aeronautics Act, 1938\(^{25}\) As Reenacted In The Federal Aviation Act, 1958\(^{26}\) And The Economic Regulations Of The Civil Aeronautics Board

The Civil Aeronautics Act was passed for substantially the same reasons as the Interstate Commerce Act, 1887.\(^{27}\) It is influenced considerably by the experience obtained under that Act which, with its subsequent amendments, will accordingly be referred to from time to time for comparative purposes. The 1887 Act regulated interstate railroad commerce and set up the Interstate Commerce Commission to supervise this regulation. Subsequently, shipping\(^{28}\) and road\(^{29}\) transportation were added to the Commission's field of jurisdiction. Congress thought, however, that a separate agency was required to supervise the regulation of air commerce and so it established the Civil Aeronautics Board (CAB)\(^{30}\) by passing the Civil Aeronautics Act in 1938. The main purposes of this legislation were to prevent discrimination and to ensure uniformity in the treatment of passengers and shippers, thus putting them more on a footing of equality with the carriers whose superior bargaining power had hitherto been imperfectly controlled by common law rules and statutes which varied from state to state. The tariff system was to be the means by which these purposes were to be effected.

The principal requirement of the Act is the filing, posting and publishing of tariffs. These tariffs are to be filed with the Civil Aeronautics Board and are to show all rates, fares, and charges for air transportation

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\(^{26}\) Public Law 726, 85th Cong., 2d Sess.


\(^{30}\) A complete statement of CAB's organization and functions may be found in Public Notice No. 10 of the CAB issued January 1, 1956. Printed in full in Speiser, Preparation Manual for Aviation Negligence Cases (New York, 1958) ch. 4.
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and, to the extent required by regulations, practices and services in connection with such air transportation.\(^{31}\) Strict observance of its tariffs is required of the carrier,\(^{32}\) and departure from the filed tariffs is made a criminal offence.\(^{33}\) The tariffs may be changed only after thirty days notice although the Board in the public interest, may allow a change upon shorter notice.\(^{34}\) It is the carrier’s duty to establish just and reasonable tariffs\(^{35}\) and discrimination resulting from their application is prohibited.\(^{36}\) The Board is given limited judicial powers. It can suspend a new tariff provision from going into effect if it believes the provision departs from the requirements of the Act. This power is not applicable to initial tariffs, however.\(^{37}\) Once a tariff provision has gone into effect, the Board can, upon complaint or upon its own initiative, determine whether it is or will be unjust, unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, or it can prescribe a lawful provision to take its place if need be.\(^{38}\) The Board can also conduct investigations

\(^{31}\) § 403 (a). “Every carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void . . . .”

\(^{32}\) § 403 (b). “No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or lesser different compensation for air transportation or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein . . . .”

\(^{33}\) § 902 (a), (d).

\(^{34}\) § 403 (c).

\(^{35}\) § 404 (a). “It shall be the duty of every carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.”

\(^{36}\) § 404 (b). “No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

\(^{37}\) § 1002 (g). “Whenever any air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers) rate, fare, or charge for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or formal pleading by the air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; . . . after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Board may make such order with reference thereto as would be proper in a proceeding instituted after such rate, fare, charge, classification, rule, regulation, or practice had become effective . . . . Provided, that this subsection shall not apply to any initial tariff filed by any air carrier.”

\(^{38}\) § 1002 (d). “Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly
upon complaint or upon its own initiative, into any suspected violation of the Act and can compel any offender to comply therewith. One other important and relevant section is section 1006 which accounts for some of the confusion concerning the legal effect of the Act:

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies.

The CAB has made many regulations pursuant to the Act and those which concern tariffs are contained in Parts 221-227 of the Economic Regulations. Tariffs are to apply to persons or property but not to both, and the only contents allowed in tariffs are those prescribed by Parts 221.33-221.41. Part 221.38 (a) prescribes the contents of the rules tariffs.

It will be noticed that the provisions allowed are not defined specifically but they must affect the rates, fares or charges for air transportation or govern the terminal services or other services which the carrier performs in connection with air transportation. As will be seen, the ambiguity inherent in this part has given rise to conflicting court decisions. However in the sphere of personal liability, there can be no ambiguity since Part 221.38 (h), provides that tariff rules limiting or conditioning the carrier's liability for personal injury or death will not be accepted from March 2, 1954. Later in that year, the CAB issued an order requiring carriers to cancel from their tariffs on or before January 1, 1955, all rules, regulations or provisions stating any limitation on, or condition relating to, carrier liability for personal injury or death.

Thus, a filed limitation of liability provision to be valid must first be statutorily authorized. To satisfy this requirement, it must be a rule in connection with air transportation and its filing must be required by the Board's regulations. To satisfy these regulations, it must be a rule which affects rates, fares or charges or which governs terminal services or other services provided by the carrier. Limitation of liability for personal in-

preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare or charge (or the maximum or minimum, or the maximum and minimum thereof), thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation or practice thereafter to be made effective . . . .”

§ 1002 (a), (b).

§ 1002 (c).

Part 221.21(i).

“Rules & regulations: (a) Contents. Except as otherwise provided in this part, the rules and regulations of each tariff shall contain:

(1) Such explanatory statements regarding the fares, rates, rules or other provisions contained in the tariffs as may be necessary to remove doubt as to their application,

(2) All the terms, conditions or other provisions which affect the rates, fares or charges for air transportation named in the tariff,

(3) All of the rates or charges for and the provisions governing terminal services and all other services which the carrier undertakes or holds out to perform on, for, or in connection with air transportation,

(4) All other provisions and charges which in any way increase or decrease the amount to be paid on any shipment or by any passenger or by any charterer or which in any way increase or decrease the value of the services rendered to the shipment or passenger or charterer.”

“Personal liability rules. No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on or 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 this rule of construction except to the extent that such regulation shall do so in express terms.”

juries or death is expressly disallowed. If it can be shown that a limitation provision is statutorily authorized, it then has to face the test of reasonableness. Several problems arise when the validity of a tariff is being tested in this way but, before considering them, the legal effect of properly filed tariffs will be briefly stated.

B. The Effect Of Properly Filed Tariffs

Valid tariffs become a part of the contract of carriage and, as such, are binding on all parties irrespective of actual knowledge. Any contractual provisions or agreements inconsistent with them, are void. These principles were established by the Supreme Court when called upon to construe the effect of tariffs filed, posted and published pursuant to the Interstate Commerce Act. They have been applied without dissent as the effect of tariffs on file with the CAB, most reliance being placed upon the Supreme Court decisions in Boston & M.R. Co. v. Hooker and Western Union Telegraph Co. v. Esteve Bros. & Co.

In the former case, the tariff in question contained a limitation as to baggage liability based upon the requirement to declare its value when more than $100 and pay an excess charge. The passenger had no actual notice of the tariff and no inquiry was made as to the value of his baggage upon acceptance. Nevertheless, the Supreme Court held him bound by it, a Massachusetts common law rule to the contrary, not withstanding.

... the effect of filing schedules and rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act, to have but one rate, open to all alike and from which there could be no departure.

The reasons why the defendant is bound by the tariff, whether or not he had knowledge of it, were clearly stated in the Esteve case where a tariff limited the telegraph company's liability for mistake in the transmission of unrepeated cablegrams to the amount of the company's share of the tolls collected. The tariff offered alternative rates for repeated and unrepeated cable messages. It was said:

The rule does not rest upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in § 3 of the Interstate Commerce Act. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not.

For the same reasons, any agreement which is inconsistent with the tariffs, is void. Thus, in one case, a lower rate than that filed with the Interstate Commerce Commission was quoted to a consignor who shipped...
goods under that lower rate. The Supreme Court held that the consignor must pay the full rate as stated in the tariffs. Similarly, it was held that a shipper could not recover damages for the breach of an agreement by which the carrier had agreed to expedite a shipment of horses over its own lines so that it would reach the point of connection with the next carrier in time to be carried by a special, fast, stock train the next morning. This was an undue and unreasonable preference forbidden by the Interstate Commerce Act since the shipper was only charged the regular established joint through rates, which made no provision for such service. The shipper did not know this.

The courts have found no difficulty in applying these rules to tariffs filed under the Civil Aeronautics Act. In Jones v. Northwest Airlines, the applicable tariff permitted the carrier to cancel any flight at any time it deemed necessary and declared the carrier not responsible for failure of the aircraft to depart or arrive on the scheduled time. The plaintiff contended that he had a special contract with the carrier in which the limited time he had for making the trip, was provided for. The Washington Supreme Court held, inter alia, that his ticket was sold subject to tariff regulations with which he was charged with notice and that since the alleged specific contract was inconsistent with the terms of the tariff schedules, it was void.

In buying this ticket, the appellant bought it subject to the regulations. The respondent could not sell it on any other basis without violating the law, for § 403 of the Civil Aeronautics Act requires the filing of these rules and regulations and forbids a carrier from departing therefrom.

This case together with the district court decision in Mack v. Eastern Air Lines where it was held, inter alia, that the plaintiff was bound by the conditions specified in a similar tariff whose rules had become a part of the contract between the carrier and the passenger, has been followed on numerous occasions as indicating the legal effect of tariffs properly filed with the Civil Aeronautics Board.

\[\text{See also Davis v. Cornwall, 264 U.S. 560 (1924).} \]
\[\text{22 Wash. 2d 863, 117 P.2d 728 (1945).} \]
\[\text{22 Wash. 2d 863, 864, 117 P.2d 728, 729 (1945).} \]
\[\text{87 F. Supp. 113 (W.D. Wash. 1949).} \]
\[\text{Cf. So. R.R. Co. v. Prescott, 240 U.S. 632 (1916).} \]
\[\text{Lichten v. Eastern Air Lines, Inc., 189 F.2d 939 (2d Cir. 1951).} \]
\[\text{("To the extent that these rules are valid, they become a part of the contract under which the appellant and her baggage were carried." Judges Chase and Frank, who dissented, did not disagree with this proposition);} \]
C. The Validity Of Tariffs

It is intended to discuss many of the cases which have had something to say about a tariff's validity. These cases will be grouped according to the tariff rule under consideration. To prevent confusion, however, it is proposed to declare now instead of in conclusion, the method by which it is thought a tariff's validity is to be tested by the courts. Any modifications to or deviations from this method will be noted in the course of the discussion.

There are two questions to be kept in mind. First, who has jurisdiction to determine the validity of a tariff on file with the Civil Aeronautics Board? Second, what law applies to determine the validity of a tariff on file with the CAB?

It is clear that the courts of law have jurisdiction to decide whether a filed tariff is authorized or required to be filed by the Civil Aeronautics Act and the CAB regulations and whether that tariff has been violated. A more difficult question is whether the courts have jurisdiction to declare a tariff invalid if it is statutorily authorized. Despite some judicial and juristic opinion to the contrary, it will be submitted that the primary jurisdiction doctrine as explained below and as interpreted by the majority judicial opinion to date, gives primary jurisdiction to the Civil Aeronautics Board to decide whether or not a tariff has been, is, or will be unreasonable, unjust, unjustly discriminatory, unduly preferential or unduly prejudicial and that these are the only grounds upon which the validity of a tariff may be attacked once it is shown to be statutorily authorized. Until the CAB has declared a tariff invalid on one of the above grounds, its approval of the tariff is presumed.

Federal law, that is, the Civil Aeronautics Act and regulations made pursuant thereto by the CAB, has been applied by the courts to determine the validity of a tariff. If the Act or the CAB regulations do not require the filing of a particular tariff, state law applies.

These are the conclusions. There now follows a discussion of the authorities from which these conclusions are drawn.

1. Cancellation of Flights

In Adler v. Chicago & Southern Air Lines, the plaintiff sought to recover damages suffered by him as a result of the defendant's cancellation of a flight and for its failure to make other arrangements for his transportation to St. Louis. The defendant moved to dismiss the action on the ground that the plaintiff had not exhausted all of his remedies before the CAB. The court briefly discussed the primary jurisdiction doctrine as it had been applied under the Interstate Commerce Act and the Shipping Act, 1916 and finding that the Civil Aeronautics Act was not dissimilar in its purpose and scope from these two Acts, applied the doctrine to the case before them. Since it was apparent that the practice of cancelling scheduled flights was a 'practice' within the meaning of the Act, regulations in evidence held fatal to passengers' claim, since it precluded a determination by the court of the terms and conditions of the contract of carriage of which they formed a part; Slick Airways, Inc. v. U.S., 292 F.2d 515 (U.S. Ct. Cl. 1961) (Air carrier was entitled to an increased rate after it had filed a new tariff and although it continued to receive the old rate due to a clerical error in billing); Rosen Chein v. Trans World Airlines, Inc., 349 S.W.2d 483 (Mo. Ct. App. 1961).

it following that the reasonableness or lawfulness of such practice could only be determined by the CAB and,

this court is without jurisdiction to grant any relief to the plaintiff in the absence of a finding by that Board that the practice complained of is unlawful or unreasonable, and until the plaintiff is able to allege in a complaint that he has exhausted all of his remedies before that Board.\(^\text{67}\)

The application of the primary jurisdiction doctrine to the tariff system under the Civil Aeronautics Act was severely criticized at the time,\(^\text{68}\) but although this criticism has been approved judicially once or twice, it has had little effect in practice. The doctrine\(^\text{69}\) was first enunciated by the Supreme Court in \textit{Texas & P.R. Co. v. Abilene Cotton Oil Co.}\(^\text{70}\) where the plaintiff was attempting to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment. The Court held that no relief could be obtained without reference to any previous action by the Interstate Commerce Commission. A major factor in the decision was the power granted to the Commission by the Interstate Commerce Act to hear legal complaints of and award reparations to individuals for wrongs unlawfully suffered from the past application of an unreasonable rate. The continued existence of a similar power in the courts would be absolutely inconsistent with these provisions of the statute, notwithstanding article 22 which provides that nothing contained in the Act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of the Act are in addition to such remedies.\(^\text{71}\)

The court also argued that

if without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that . . . a uniform standard of rates in the future would be impossible.\(^\text{72}\)

Later the Supreme Court held in \textit{Robinson v. Baltimore & O.R. Co.}\(^\text{73}\) that the doctrine applied to cases involving rates attacked for being unjustly discriminatory. If the courts were to take jurisdiction in the absence of an investigation and order by the ICC, this

would be in derogation of the power expressly delegated to the Commission and would be destructive of the uniformity and equality which the act was designed to secure.\(^\text{74}\)

\textbf{In \textit{Northern P. R. Co. v. Solum}\(^\text{75}\)} the doctrine was held to apply to "any practice of the carrier which gives rise to the application of a rate."\(^\text{76}\)

Impressed with the similarity between the Interstate Commerce Act

\(^{67}\text{Id. at 167.}\)
\(^{69}\text{See generally, 51 Harv. L. Rev. 1231 (1938).}\)
\(^{70}\text{204 U.S. 426 (1907).}\)
\(^{71}\text{\textit{Cf. Civil Aeronautics Act, § 1106.}\textit{}}\)
\(^{72}\text{204 U.S. at 440.}\)
\(^{73}\text{222 U.S. 506 (1912).}\)
\(^{74}\text{Id. at 510.}\)
\(^{75}\text{247 U.S. 477 (1918).}\)
\(^{76}\text{Id. at 483. See also Director General of Railroads v. Viscose Co., 214 U.S. 498 (1912).}\)
and the Shipping Act of 1916, the Supreme Court had no difficulty in applying the doctrine to the practices of steamship companies in U.S. Navigation Co. v. Cunard S.S. Co.67

The main criticism of the application of the doctrine to interstate aviation is that unlike the ICC, the CAB has no power to grant reparations for the past application of an unreasonable tariff. Indeed, it has no power to pass upon the validity of a tariff retroactively at all. It can only determine whether a tariff "is or will be unjust . . . ."68 Thus, an agency which has no jurisdiction to make retroactive declarations of validity, cannot have primary jurisdiction to do so.

Another criticism admits the application of the doctrine to aviation but attempts to limit it to rates and technical regulations with which the CAB has the know-how and competence to deal. The validity of legal regulations relating to, for example, limitations on liability, should be a question for the courts whose judges have the experience of centuries to call upon.

Following the Adler decision, the CAB held that the the tariff concerned was not unreasonable, thus clearly implying that they did have the power to make retrospective declarations of validity and on matters which might be thought peculiarly within the cognisance of the judiciary.69 The subsequent history of the doctrine and the CAB will show that, regrettable as it may seem to some writers, this is the present situation.

In the Jones case, discussed above,70 the court agreed with the Adler decision that where a party attempts to show the unreasonableness of a regulation, he must do so before the CAB, rather than before the state or federal courts, because, otherwise uniformity of practices would be impossible but, where the carrier is in breach of its contract of carriage by violating its own rates, rules, etc., on file with the CAB, it is not necessary to refer the matter to the CAB "because there is no technical fact to be determined." A state or federal court has jurisdiction in such cases.

This distinction helps to explain Schwartzman v. United Air Lines,71 where the plaintiff sued to recover alleged damages for the failure and refusal of the defendant to transport him as passenger by aircraft and to secure the return of the price paid by him for the ticket. A motion to strike the first count was filed by the defendant, the main ground being the statutory vesting of primary jurisdiction in the CAB. The district court held that the sole object of the court was the recommendation of a sum of money for breach of contract and that, since the petition did not assail or question the validity of any administrative regulation, the CAB had no primary jurisdiction over the plaintiff's claim. The decision was based on the distinction clearly expressed by the Supreme Court in Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.72

... for doing an act prohibited by the statute, the injured party must sue the carrier without preliminary action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of

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67 284 U.S. 474 (1912).
68 § 1002(d); supra note 38.
70 Supra note 32.
72 230 U.S. 247 (1914).
the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases . . . the Commission and not the courts should pass upon that administrative question.

In Mack v. Eastern Air Lines, Inc., the plaintiff was a passenger in a plane from Boston to Washington but his flight was cancelled on arrival in New York because of bad weather conditions. He based his suit on three causes of action: (1) in tort, in that the defendant had negligently failed to warn him that the flight might not be completed; (2) in tort again, in that the plaintiff negligently failed to complete the flight to Washington; and (3) in contract alleging breach of contract to fly him to Washington. The relevant tariffs declared that the carrier would not be liable for failing to operate any flight according to schedule or for changing schedule with or without notice to the passenger and also provided for no liability for the removal of a passenger by reason of weather or other conditions beyond the carrier's control. The tariff itself specified that its rules were included as terms and conditions of the contract of carriage.

The District Court of Massachusetts thought there could be "no question that these rules were within the authority conferred by the Civil Aeronautics Act 1938 and became a part of the contract between the carrier and passenger." Section 1106 of the Act was cited by the plaintiff but the court said that this section only preserved pre-existing common law remedies and not pre-existing obligations or contractual arrangements.

Contractual arrangements and obligations are governed by the Civil Aeronautics Act and not by common law or some other statute.

Then the court said that if the Schwartzman case was to the contrary, they declined to follow it. It is thought that there is no conflict between the two cases, however, since the court in Schwartzman was concerned with the question of jurisdiction whereas, in the Mack case, the court concerned itself with the problem of the law applicable. Another way of putting it is that the problem in Schwartzman was, did the court have jurisdiction to determine whether or not there had been a breach of contractual obligations? The problem in Mack was, what law is applicable to determine the effect of a breach of contractual obligations?

Schwartzman was again mentioned in Wittenberg v. Eastern Air Lines, Inc. where it was held, inter alia, that tariff rules providing that an air carrier is not liable for failure to operate a flight according to schedule are a complete bar to a passenger suing for damages for the failure of the carrier to provide flight connections. Since he alleged a tort on the part of the defendant, the plaintiff had argued that the tariffs and contract conditions were not applicable. The court thought that, on the facts, he had established no tortious conduct and distinguished Schwartzman on its facts by saying that there the plaintiff could conceivably within the scope of the petition, have adduced evidence establishing a cause of action.

This interpretation would indicate that common law is still applicable

73 Supra note 54.
74 Supra note 54, at 116.
75 Ibid.
when actions are brought which do not conflict with the Civil Aeronautics Act and the rules established by the courts to ensure the effectiveness of the tariff system as established by that Act. Thus, if a tariff does not cover the problem in issue as, for example, where tortious conduct is shown which is independent of any tariff or about which the tariff says nothing, then common law will be applied to determine it. *Mack* is not inconsistent with this principle although it was there said that section 1106 does not preserve pre-existing common law obligations. This must be understood to mean that pre-existing obligations in conflict with those established under the Act, are not preserved. If *Mack* is understood in this way, it is submitted that whichever way it is interpreted, *Schwartzman* is not out of line with either *Mack* or *Wittenberg.*

In *Trammell v. Eastern Air Lines, Inc.*, an attack was made on the validity of a tariff allowing a carrier to cancel reservations for failure on the passenger's part to reconfirm a reservation. Citing, *inter alia, Jones* and *Mack*, the district court had no difficulty in declaring it was authorized and that its reasonableness could only be raised in court after exhaustion of administrative remedies before the CAB.

These are the cases which deal with the validity of cancellation of flight and similar provisions in airline tariffs on file with the CAB. They hold that the provisions are statutorily authorized and the CAB has held them not unreasonable. They imply that the courts have jurisdiction to determine whether a tariff is statutorily authorized and whether a tariff has been violated. They hold that the CAB has primary jurisdiction as to whether or not the tariffs are reasonable. They hold that the law governing contractual arrangements to which the tariffs refer, is federal law, *i.e.*, the Civil Aeronautics Act and not the federal common law. They imply that common law applies to matters not within the scope of the Civil Aeronautics Act.

2. Time of Delivery of Freight

In *Furrow & Co. v. American Airlines, Inc.*, a cargo of flowers was damaged because of the time involved in shipment. They were damaged to such an extent as to be unmarketable at the time of delivery. The court found that the flowers had been delivered without unreasonable delay and in compliance with the contract of carriage, pointing to the carrier's freight tariffs which provided that the carrier had no obligation to commence or complete transportation within a certain time or according to schedule. "Such rules are within the authority conferred by the Civil Aeronautics Act and the tariffs involved become a part of the contract of transportation." The Court added that, under the 'primary jurisdiction' doctrine, an attack upon the alleged unreasonableness of the provisions of any tariff filed with the CAB, must be made to the Board in the first instance.

The same tariff provision was construed by the New York City court in *Goldsamt v. Slick Airways, Inc.* not to mean that the defendant was

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77 Southeastern Aviation, Inc. v. Hurd, 7 Av. Cas. 17,997 (Tenn. Ct. App. 1962). "The conclusion that the Federal Aviation Act of 1958 does not exclude consistent state law, or alter existing state remedies under state law, seems to be strengthened by the words of the savings clause of that Act . . . ." Referring to § 1106.


80 17,386 (N.Y. City Ct. 1914).
free of liability for failure to perform its contractual obligation to deliver the merchandise within a reasonable time. The court thought that the tariff did not exempt the defendant from liability for negligence since there was no specific reference made in it to non-liability for negligence.

... and the language of the tariff will not be broadened by implication to include an exemption not covered by specific stipulation.

The motions of the parties for summary judgment were denied because the question of the reasonableness of the time to make delivery was a question of fact which required investigation and evaluation of testimony. It will be noted that there is no conflict with the 'primary jurisdiction doctrine' in this case, since the court took jurisdiction to consider the scope and extent and not the reasonableness of the tariff in question.

The tariff was considered again in Killian v. Frontier Airlines, Inc., where the plaintiff sued to recover the money he had expended in making alternative arrangements for the shipment of a cargo of flowers which had been off-loaded en route in order to bring the plane within prescribed weight limits. The tariff also provided that the cargo was subject to delay or embargo by reason of any governmental rules, regulations or orders or other conditions beyond the control of the carrier. The court held that the rules are within the authority conferred by the Civil Aeronautics Act and that, in view of the 'primary jurisdiction' doctrine, they are deemed to be approved by the CAB and not in conflict with any provisions of the Act. The judge also said that he was not here dealing with the common law rule that a common carrier cannot contract itself out of liability for its own negligence but with special rules authorized by Congress when it created the CAB and empowered it to issue rules, regulations and tariffs and apply them to this type of common carrier.

It is thought that the two latter cases, clearly presuppose the possibility of a valid tariff provision limiting or excluding liability for negligence.

In Riddle Airlines, Inc. v. Famous Cottons, Inc., it was held, inter alia, that an air carrier is not liable to a shipper where cargo is delayed and the carrier's tariff states that it will not be liable for loss or delay unless caused by the carrier's negligence.

A similar tariff provision was considered in Modern Wholesale Florist v. Braniff International Airways, Inc. where an action was brought for a damaged shipment of flowers. The tariff excluded the carrier's liability "for loss, damage, deterioration, destruction, theft, delay, default, mis-delivery, non-delivery or any other result not caused by the actual negligence of itself, its agent, servant or representative..." The court reversed a summary judgment in favour of the carrier and held that this tariff did not operate to prevent the plaintiff from relying upon the common law presumption that the damage was caused while the shipment was in the custody of the carrier, the burden of proof being upon him to disprove negligence. There was no conflict here between the tariff and the common law rule of adjective law which relates to the manner and method of proof.

82 4 Av. Cas. 18,049 (N.Y. Sup. Ct. 1958). See also supra note 55.
83 162 Tex. 594, 350 S.W.2d 539 (1961).
We would be loath to say that the presumption did not obtain in the absence of a clear and unequivocal statement to that effect contained in a tariff rule adopted in accordance with statutory authority.\textsuperscript{4}

Here, then, is another example of the interrelationship between the common law and the federal law, as laid down in the Civil Aeronautics Act. Where the Act or regulations made under the Act, are silent or not in conflict with the common law, common law applies.

Thus these cases hold that the tariffs therein concerned are statutorily authorized. They hold that the CAB has primary jurisdiction to consider their reasonableness which will be presumed until it does so. They hold that the courts have jurisdiction to consider the scope and extent of a tariff provision. They imply that common law applies if the Civil Aeronautics Act or regulations made thereunder are silent or are not in conflict with the common law.

3. Disclaimer of Liability for the Loss of Certain Types of Baggage

Perhaps the most important case yet decided on the question of a tariff's validity is the decision of the federal court of appeals for the second circuit in \textit{Lichten v. Eastern Air Lines, Inc.}\textsuperscript{8} The appellant had checked two pieces of baggage before boarding the aircraft which took her from Miami to Philadelphia. On arrival, one of the bags was delivered to her but the other was mistakenly carried on to Newark where it was handed to an unknown person without the surrender of a baggage check. Later the bag was returned to the carrier but, on examination by the appellant, three articles of jewelry valued at over $3,000 were found to be missing. The appellant sued. In defense, the carrier relied upon rules contained in a tariff on file with the CAB. They provided that jewelry "will be carried only at the risk of the passenger" and that the carrier will not be liable for the loss of jewelry.

It was clear to the court that "to the extent that these rules are valid, they become a part of the contract under which the appellant and her baggage were carried." The question then was one of validity. Commenting, that under the Civil Aeronautics Act and the 'primary jurisdiction' doctrine, the provisions of a tariff properly filed with the CAB and within its authority are deemed valid until rejected by it, the court said that, if the Act was to be interpreted as investing the Board with power to approve and accept the tariff in issue, the reasonableness of the rule could be raised in court only after the exhaustion of administrative remedies.

The appellant had argued that the Act should not be construed to allow the Board to modify the common law rule that a common carrier may not by contract relieve itself from liability for the consequences of its own negligence and that accordingly the common law rule still applied and invalidated these exculpatory provisions. The court could not agree. Bearing in mind the primary purpose of the Civil Aeronautics Act to assure uniformity of rates and services to all persons, the court said that the broad regulatory scheme set up by the Act and not the common law must govern the contract of the parties. The court noted that, although the Interstate Commerce Act is similar to the Civil Aeronautics Act, a later

\textsuperscript{4} 162 Tex. at 597.

\textsuperscript{8} 189 F.2d 939 (2d Cir. 1951).
amendment to it contains an express provision prohibiting exemption from liability for any loss or damage to baggage caused by the carrier. It followed, therefore, that:

The absence of a similar provision in the Civil Aeronautics Act compels the conclusion that such an exemption is not forbidden to air carriers and that the Board could properly accept the appellee's tariff.

This decision is somewhat surprising in view of the principle many times referred to and approved by the Supreme Court that

No statute is to be construed as altering the common law further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.

In fact, Judge Frank in a forceful dissenting judgment, disagreed entirely with the proposition that because the Civil Aeronautics Act did not expressly disallow tariffs excluding liability for negligence, such a tariff was authorized. Where the Act is silent, then federal common law or state law, as the case may be, applies and since the federal common law declares invalid any disclaimer of liability for negligence, the tariff in question is invalid and the Board had no authority to approve it. He cited the Supreme Court decision in Adams Express Co. v. Croninger in support of his argument.

In that case, the court considered the validity of a tariff on file with the Interstate Commerce Commission which limited the liability of the carrier for loss or damage of goods to an agreed or declared value. The defendant argued that the provisions of a Kentucky state law nullified such a condition in a contract of carriage. The court held, however, that the Carmack Amendment of 1906 which allowed a limitation of liability according to value but disallowed a complete exclusion of liability, and not the state law governed interstate commerce contracts of carriage. However, the Supreme Court pointed out that where a similar case arose in a state court after the enactment of the Interstate Commerce Act but before the Carmack Amendment, state law would be applied because there was no federal legislation on the subject of exculpatory provisions.

Prior to amendment the rule of carrier's liability for an interstate shipment of property, as enforced in both Federal and State courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, Hart v. Pennsylvania R.R. Co.; or that determined by the public policy of a particular State, Pennsylvania R.R. Co. v. Hughes; or that prescribed by statute law of a particular State, Chicago, Illinois.

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85 The Carmack Amendment, 1906. 34 Stat. 593.
86 Supra note 85, at 942.
87 Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557, 565 (1879). Cf. Texas & Pac. R.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) ("...a statute will not be construed as taking away a common law right existing at the date of its enactment unless that result is imperatively required, that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words render its provision nugatory.") See also Krawill Mach. Corp. v. Herd, 359 U.S. 297 (1959).
88 226 U.S. 491 (1913).
89 112 U.S. 331 (1884). See supra note 9.
90 191 U.S. 477 (1903). (Common law of Pennsylvania invalidating limitations of liability to an agreed value applied. This law was "an unlawful attempt to regulate interstate commerce, in the absence of Congressional action providing a different measure of liability, when contracts such as the one now before us are made in relation to interstate carriage.")
M. & St. P.R. Co. v. Solan. Neither uniformity of obligation nor of liability exemption from liability for negligence is against public policy and void. was possible until Congress should deal with the subject. But now Congress had dealt with the subject and

The exemption forbidden is . . . 'a statutory declaration that a contract of exemption from liability for negligence is against public policy and void.' This is no more than this court as well as other courts administering the same general common law, have many times declared. Judge Frank argued that the Croninger case clearly showed the purpose of the amendment to be the substitution of the general Federal common law rule for the series of State statutes and decisions on the subject. Thus even before the Carmack Amendment, the ICC could not have legalized a tariff provision exempting a carrier from liability for its own negligence. He then said the position under the Civil Aeronautics Act must be the same as the position before the enactment of the Carmack Amendment, since it is inconceivable that Congress intended, merely by remaining silent, to authorize the Board to adopt a policy flatly at odds with the hitherto uniform Federal policy.

He conceded, however, that the defendant "with the Board's acquiescence, might have provided in its tariff (a) perhaps that it would not carry jewelry at all or (b) possibly, that its liability for any and all items contained in passengers' baggage would be limited to a certain, reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation."

Since he had decided that the tariff was not statutorily authorized, and that, therefore, the Board had exceeded its statutory power by accepting it, it followed that the 'primary jurisdiction' doctrine had no application. The plaintiff could proceed directly in court. In support of this proposition he cited, inter alia, the Supreme Court case of Boston & M. R. Co. v. Piper where it was said of a tariff rule which limited liability for negligence without a corresponding choice of rates:

While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body; but not so of conditions and limitations which are, as this one, illegal, and consequently void.

He then went even further by suggesting that, even if the case involved only the reasonableness of the tariff provision, it might not be a proper...
one for advance administrative determination. For the CAB has no power to grant reparations and were the plaintiff to complain, the Board could do no more than order the defendant to discontinue the use of the exemption provision. His suggestion seemed to him particularly justified where, as in this case, no administrative skill or wisdom is needed to ascertain the reasonableness of the exculpatory provision. Also an application of the doctrine would result in the "exhaustion of litigants," a "delaying formalism" and "idle form" which is contrary to the ancient principle that every citizen ought to obtain "justice promptly and without delay."

Apart from these doubts, the basic difference between the majority and Judge Frank was as to the law applicable to determine the validity of tariffs. The majority said, as did the Court in *Mack v. Eastern Air Lines*, that obligations and arrangements arising from the contract of carriage must be governed by the broad regulatory scheme set up by the Civil Aeronautics Act. It will be noted that this is a far wider proposition than was actually necessary for the decision since it means that federal common law and state law have no place not only in actions attacking the validity of tariffs but also in any action based on a contract of interstate air carriage. In view of some of the decisions already discussed, others to be discussed, and more particularly in view of the Supreme Court decisions cited in Judge Frank's opinion, it is submitted that the principle must be narrowed to mean that the common law or state law does not govern the contract only if they are inconsistent with the rules and regulations prescribed by the provisions of the Act. The majority view can be explained, therefore, by saying that the common law rule invalidating disclaimers of liability for negligence was inconsistent with the statute, whereas Judge Frank was of an opposing opinion.

4. Requirement of Notice of Claim and Commencement of Action Within a Certain Time

Perhaps the most controversial tariff provision to date has been the one which typically provides that no action can be maintained for death, personal injury, loss of or damage to baggage or goods unless written notice of the claim is presented to the carrier within a specified period, usually from thirty to ninety days and unless an action is commenced within a certain time, usually one year, following the event giving rise to the claim and action.

Two decisions concerning the validity of similar provisions filed with the Interstate Commerce Commission have been regularly cited in the aviation cases on the subject.

In *Gooch v. Oregon Short Line R.R. Co.*, a clause in a drover's pass re-
quired a would-be claimant for personal injuries to give notice of his claim in writing to the general manager of the carrier within thirty days of the injury. The Supreme Court, by a majority had little doubt that this was valid. Although such a clause is just as effective to exclude the carrier's liability for his own negligence as a clause expressly excluding liability for negligence, the court said the two stipulations stand on a different footing, the one being 'regulation,' the other being 'exoneration.' The real issue for which they had granted the writ of certiorari was whether the Cummins Amendment of March 4, 1915 which prohibited railway carriers from fixing less than ninety days for giving notice of claims in respect of goods, had established a public policy that would invalidate the stipulation in issue.

The decisions we have cited show that the time would have been sufficient but for the statute in respect of damage to goods and the reasons are stronger to uphold it as adequate for personal injuries. A record is kept of goods yet, even as to them, reasonably prompt notice is necessary as a check upon fraud. There is no record of passengers, and the practice of fraud is too common to be ignored. Less time reasonably may be allowed for notice of claims for personal injuries than is deemed proper for goods, although very probably an exception might be implied if the accident made notice within the time impracticable.

The statute could not be taken to indicate a different view. On the contrary, the court said, Congress must have thought of claims for personal injuries and, as it passed them by, "we must suppose that it was satisfied to leave them to the Interstate Commerce Commission and the common law."

It is of interest to compare this Supreme Court decision with Pacific S.S. Co. v. Cackett where the Court of Appeal for the Ninth Circuit held that a passenger was not bound by a provision in a tariff, published under the Shipping Act, requiring passenger's claims for loss or damage during voyage to be filed within ten days of completion of the voyage. The plaintiff had been assaulted by an employee of the defendants while travelling as a passenger on one of the defendants' ships. She had signed a ticket which was given up immediately upon her embarkation and which contained a clause stating that it was sold subject to the conditions of the carrier's lawfully published tariff. The plaintiff did not file a claim within ten days and had no knowledge of the tariff provision requiring her to do this.

The court, citing Boston & M. R. Co. v. Hooker conceded that every passenger is chargeable with notice of everything contained in a lawfully published tariff and that its provisions become a part of the contract of transportation. But:

The clear purport of the decision is that a passenger or shipper is not chargeable with notice of any regulation filed and published which is not contemplated or required by the Interstate Commerce Act or amendments thereto.

104 38 Stat. 1196.
105 218 U.S. at 25.
106 8 F.2d 219 (9th Cir. 1921); cert. denied 269 U.S. 586 (1925).
107 See supra note 46.
108 8 F.2d at 261 (1921).
The court then held that the Act did not require or contemplate the filing of tariffs which relate to rights of action against carriers for damage or injuries from negligence or assault, notice of claims for such damages having no perceptible relation to rates and charges for transportation. It followed that since the plaintiff had no knowledge of the notice requirement, she was not bound by it, following the common law principle as stated in *The Majestic.*

... when a company desires to impose special and most stringent terms upon its customers in exoneration of its liability, there is nothing unreasonable in requiring that these terms should be distinctly declared and deliberately accepted.169

The court added that while this was conclusive of the problem, it should be noted that such a limitation of time for presentation of a claim for injury to a passenger, had been held void as unreasonable although printed upon the face of the ticket. Other decisions have held longer periods valid as reasonable, including, of course, the *Gooch* case.110 There is no conflict with the primary jurisdiction doctrine in either case, however, because both courts must have considered that the common law applied to determine the validity of the tariff, Congress not having chosen to deal with notice of claims for personal injuries.

The first case to deal specifically with the validity of notice of claim provisions in tariffs on file with the CAB was *Wilhelmy v. Northwest Airlines, Inc.*,111 where the plaintiff brought an action against the defendant air carrier alleging that because of the negligent operation of the aircraft on which she was travelling as a passenger, the aircraft had descended at a too rapid rate resulting in injury to her inner ear and throat. The defendant pleaded that her ticket contained the statement 'Sold subject to tariff regulations' and its tariff provided that no action should be maintained for personal injury unless written notice of claim had been presented within thirty days after the injury was sustained and unless action had been commenced within one year of the injury. No notice had been given and the action was not timely. The plaintiff naturally contended that the tariff provisions were invalid.

The district court held that the provisions were both reasonable and valid. Beginning by pointing out that 30 day notice of claim requirements had been valid in airplane passenger and other transportation,112 the court went on to say it was governed by the rule in *Jones v. Northwest Airlines, Inc.* The ticket was sold subject to tariff regulations with which the

169 166 U.S. 373, 386 (1897).
112 See supra note 110 and the Gooch case, supra note 103.
113 See supra note 52.
plaintiff was charged with notice. The court then held that the tariff had been effectively filed and must be presumed to have been and remained in effect at all times material to the action. The Cackette case was avoided by the statement that the ten day notice of claim was, in accordance with other decided cases, unreasonable and invalid. The court was anxious to point out that all contract time limits for giving notice of claim or for commencement of suit are not to be regarded as valid merely because they are stated in the contract of transportation. The test of reasonableness had to be met. Here the court held that the thirty day notice of claim and one year commencement of suit requirements were reasonable and valid.

The court must have assumed that, contrary to the Interstate Commerce Act, the Civil Aeronautics Act required the filing of the provisions, otherwise the decision is clearly contrary to the Cackette case which decided much more than the court was prepared to concede. It held that passengers are not charged as a matter of law, with notice of tariffs which are not required to be filed with the relevant agency and the courts’ remarks with respect to the reasonableness of the tariff were obiter.

If the court in the Wilhelmy case, did make the assumption that the provisions were statutorily authorized, it is difficult to see why they thought it necessary to determine the provision’s reasonableness in view of the primary jurisdiction doctrine. It is interesting to compare the case with Goldsamt v. Slick Airways, Inc., where, it will be remembered, a tariff provision concerning non-liability for delay was construed not to mean that the defendant was free of liability for failure to deliver the merchandise within a reasonable time. Here, the court was defining the limits of the tariff and was not determining its reasonableness. In the Wilhelmy case, on the other hand, the court did determine the reasonableness of the tariff and this would appear to be inconsistent with both the Adler and Jones cases which introduced the primary jurisdiction doctrine into the field of aviation.

In Meredith v. United Air Lines, the district court allowed a motion to dismiss an action for personal injuries on the ground that written notice of the claim for the injury had not been presented in writing to the general offices of the defendant within 90 days of the alleged injury as required by the carrier’s tariffs. The court gave one reason. It was following the Jones, Wilhelmy and Lichten cases!

There followed a series of district court decisions which refused to follow the Wilhelmy case and declared the tariff invalid.

In Glenn v. Compania Cubana De Aviacion, the court considered, inter alia, whether a person could maintain an action for injuries against a carrier where he had not given the thirty days notice of the claim as required by the tariffs. The fact that the requirement was not set out on the face of the passenger ticket served, in the opinion of the court to distinguish the case from Gooch and other cases where the requirement had been held binding upon the passenger. Even had there been adequate notice, the court would have held, contrary to the clear holding in the

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114 See supra note 80.
115 See supra notes 16 and 52.
118 See supra note 110.
Gooch case,\textsuperscript{119} that since the defendants had actual notice of the occurrence, they were not prejudiced by failure to give such notice and the defence as to failure to give notice would not be good under such circumstances.

The only way to reconcile this case with the authorities dealing with the legal effect of a properly filed tariff is to assume either that this particular tariff provision requires an exception to the general rule of constructive notice or that the court felt the tariff was not properly filed under the Civil Aeronautics Act. In view of the next few cases to be discussed, the latter explanation would appear to be the correct one.

In \textit{Shortley v. Northwestern Airlines, Inc.},\textsuperscript{120} the plaintiff who was suing for personal injuries, had failed to give notice of his claim within ninety days of the accident as required by the carrier's tariff on file with the CAB. He had no actual knowledge of the tariff requirement. The defendant pleaded that his failure to give notice constituted a bar to the action. The court held that nowhere in the Civil Aeronautics Act or the regulations of the CAB

... is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitation upon notice of claim or upon the time for commencement of actions thereon.\textsuperscript{121}

Then, citing the \textit{Cackette} case, the court said that where a tariff provision was gratuitously inserted with respect to a matter other than that required by an Act of Congress, a passenger or shipper is not chargeable as a matter of law with notice of it. The reference to filed tariffs on the ticket was not sufficient notice of the requirements at common law which required them to be 'distinctly declared' and 'deliberately accepted' and, therefore, the defence did not succeed.

A similar result was arrived at in \textit{Thomas v. American Air Lines, Inc.},\textsuperscript{122} and \textit{Toman v. Mid-Continent Airlines, Inc.}\textsuperscript{123} Both held that the Civil Aeronautics Act does not require or authorize by implication the filing of tariffs limiting the period for giving notice of and bringing actions for personal injuries. In the latter case, the court also questioned whether the CAB had the power to approve such a provision unless specifically authorized to do so by statute.\textsuperscript{124} The judgments in the last three cases were quoted extensively in \textit{Bernard v. U. S. Aircoach}\textsuperscript{125} where it was accordingly held that a tariff provision containing a ninety day notice of claim requirement was not statutorily authorized and thus the plaintiff was not bound by it as a matter of law.

In the same year as the latter case, 1953, the CAB itself had occasion to determine the validity of a tariff rule which barred claims and suits for personal injury to, or death of passengers unless written notice of the complaint was presented to the carrier within thirty days after the alleged

\textsuperscript{119} 258 U.S. at 24. "Of course, too, actual knowledge on the part of employees of the company was not an excuse for omitting the notice in writing."
\textsuperscript{120} 104 F. Supp. 112 (DC Cir. 1952).
\textsuperscript{121} 104 F. Supp. at 135.
\textsuperscript{122} 104 F. Supp. 630 (E.D. Ark. 1952).
\textsuperscript{123} 107 F. Supp. 345 (W.D. Mo. 1952).
\textsuperscript{124} See supra note 97.
\textsuperscript{125} 117 F. Supp. 134 (S.D. Cal. 1953).
occurrence of the event giving rise to the claim and unless suit was com-
menced within one year.\textsuperscript{126}

Under the doctrine of 'primary jurisdiction,' a district court of Florida had postponed hearings in an action for personal injuries, to give the plaintiffs an opportunity of seeking a finding from the Board as to the lawfulness of the rule, thus implying, contrary to the last four cited district court cases, that the Civil Aeronautics Act authorized the filing of the rules.

The Board felt that there were two issues involved: "(1) whether the rule in question was properly included in the respondent's tariff as required or authorized by section 403 of the Act and the Board's regulations thereunder; and (2) if so, was the rule reasonable?" In view of the conclusion they reached with regard to the reasonableness of the rule, the Board thought it unnecessary to determine the first issue.

They held that the rule "is and always has been unjust and unreasonable and therefore unlawful"\textsuperscript{127} because of the general absence of such notice rules from the tariffs of carriers in other forms of transportation, the fact that it is inconceivable that an air carrier would not know of a major accident to one of its planes, the presence of stewardesses and their duty and practice of noting all injuries making it probable that the carrier would have actual notice of even minor injuries, the maintenance of passenger lists by all air carriers and because the rule had been used to trap litigants and defeat the normal liability of a common carrier.

The complainants, however, had challenged the Board's authority to find that the rule was unlawful in the past, section 1002 (d) and (e) of the Civil Aeronautics Act contemplating decisions rendering such rules inoperative in the future only. The Board was satisfied that it did have the requisite authority to make a finding of past unlawfulness. It gave two reasons for its satisfaction: section 404 (a) requires the carrier to establish just and reasonable tariffs. Section 1002 (c) requires the Board to issue an appropriate order if it finds that any person has failed to comply with the Act. This section does not limit the Board's corrective action to the future. Holding as it did that the tariff rule had always been unreasonable, it followed that the carrier had 'failed to comply' with section 404 (a) and any order, to have an effect in this case, had to contain a finding of past unlawfulness.

The second and subsidiary reason was the existence of the primary jurisdiction doctrine. The issue in the Court to which the doctrine applies is whether the tariff rule in question was reasonable at the time of the plane crash. Were the Board to decide only whether or not the rule was reason-
able as to the present time or as to the future, that would be avoiding the very issue which had been deferred to it for its jurisdiction and consideration. In support of this reasoning, the Board noted that its staff was not of sufficient size to examine each and every rule when filed, that the result at which they had arrived was implicit in the earlier Adler case\textsuperscript{128} where they had decided that the tariff in issue "was not unjust or unreasonable" and that the Interstate Commerce Commission had for many years inter-

\textsuperscript{126} Continental Charters, Inc., Complaint of Mary Battista, et. al., 16 CAB 772 (1953). See also 17 CAB 292 (1953).
\textsuperscript{127} 16 CAB at 774.
\textsuperscript{128} 4 CAB 113 (1943). See supra note 69.
preted the Motor Carrier Act as empowering them to make findings of past unlawfulness although they had no power to award reparations as they did have under the Interstate Commerce Act.

It is thought that this decision was a necessary one in view of the courts' application of the 'primary jurisdiction' doctrine to tariffs on file with the CAB and because more litigants will be encouraged to test tariffs in this way in the hope eventually of being awarded reparations by the courts. After all, it was a little too much to expect complainants to proceed with lengthy and expensive litigation which could only result in "the dubious satisfaction of seeing that no one else was aggrieved by the rule in the future."119

In other respects, the decision was unfortunate or perhaps it is the application of the primary jurisdiction doctrine which is unfortunate. As Judge Frank said in the Lichten case,120 it results in very lengthy litigation indeed since the Board itself has no power to award reparations. Another point is that a finding of past unlawfulness discriminates against the many passengers and shippers whose contracts containing the offending rule, have already been fully performed. The decision also renders almost nugatory, the provisions in the Act which give the Board power only to determine whether the tariff is or will be unreasonable, etc. But such presumably is the price of uniformity and, might one say it, justice: uniformity, because one agency has the power to declare whether tariffs have been, are, or will be reasonable and justice, because a sanction, albeit indirect, is provided against a carrier who might otherwise take advantage of his superior bargaining power to file burdensome tariffs which are not, at first, subject to review.

Following this decision of the CAB, four other court cases considered the validity of passenger tariffs containing notice of claim and commencement of action provisions.

In Crowell v. Eastern Air Lines, Inc.,121 the Supreme Court of North Carolina considered most painstakingly whether a ninety day notice of claim requirement was authorized by the Civil Aeronautics Act and the CAB regulations. The Cackette case had decided the rule was not authorized by the Interstate Commerce Act because it had no relation to rates and charges, but the CAB allows rules and regulations to be filed which govern the service provided under the rates as well. The court held that this made no difference.

The term 'service' carries with it the concept of performance and supplying some general demand. The regulation as to time limitation to file notice of claim and to commence action requires the carrier to do nothing. The burden of this regulation rests entirely upon the passenger and does not seem to be related to the transportation activities of the carrier or to the services it performs.122

Following the Cackette case and other Supreme Court decisions,123 the

119 Plunket, supra note, at 275.
121 240 N.C. 20, 81 S.E.2d 178 (1954).
122 81 S.E.2d at 184.
123 Southern Pac. Co. v. United States, 272 U.S. 441 (1926). (Government officials held not chargeable as a matter of law with knowledge of a tariff governing the transportation of military impedimenta, since it was not required to be filed); New York, N.H. & H.R. Co. v. Nothnagle, 146 U.S. 128 (1913).
court then held that the plaintiff was not chargeable as a matter of law with notice of the rule which was not authorized by the Civil Aeronautics Act or CAB regulations. Since Congress had not occupied the field of liability for personal injuries, the tariff limitation must yield to the conflicting State law which required more than constructive notice of the tariff rule for it to be binding upon the plaintiff.

An identical result was reached in Turoff v. Eastern Air Lines, Inc., where it was thought quite obvious that the statute does not authorize or require the inclusion in a tariff of any provisions relating to limitations in personal injury actions. Since the plaintiff is not chargeable with notice of such provisions, it had to be shown that he had 'deliberately accepted' the provision and that the provision had been 'distinctly declared.' A clause in the ticket stating that it was 'sold subject to tariff regulations' was held not sufficient to satisfy these two conditions.

There followed a complete volte face. The Court of Appeal for the Second Circuit in Herman v. Northwest Airlines, Inc., held that a passenger can not bring suit for personal injuries after the time limitation of one year stated in the carrier's properly filed tariff. Since the tariff was properly filed, the primary jurisdiction doctrine prevented any further consideration of the tariff's validity by the court.

The plaintiff had contended that the Board's jurisdiction only extended to regulations which had to be filed and that this one was not authorized since it did not affect the service the carrier provides under the prescribed rates and tariffs. The court said that the Board's jurisdiction was not dependent upon the carrier's duty to file the regulation with the Board and, in any event, the Civil Aeronautics Act did require the filing of the regulation in issue. As to the contention that the regulation did not affect 'the value of the service' the carrier performed under the rates and charges the court said:

A passenger's action to recover damages for personal injuries, is based upon a claim for the carrier's failure to render the agreed service, and involves 'the value of the service', a part of which is the passenger's safe delivery at the agreed destination. The measure of the recovery is the difference between the safe delivery of the passenger and the actual delivery; and a regulation that limits the time within which that claim may be asserted certainly 'affects' the value of the recovery; the substitute for the service.

Since the rule affected the service under prescribed rates, it followed that it had to be filed under the Act and the CAB regulations. The court, then, following Lichten, applied the primary jurisdiction doctrine to the case. The regulation must be deemed valid until the CAB declares otherwise. But then they added a qualification. The rule as to time of suit will only be deemed valid if the period involved is not unreasonably short, a qualification which would appear to infringe upon the primary jurisdiction doctrine as it now stands. The Civil Aeronautics Act imposes a duty upon the carrier to file just and reasonable tariffs. Thus, any unreasonable tariff is not statutorily authorized. However, in obedience to an excessive desire for uniformity, the courts have held, in effect, that the CAB has prior jurisdiction to decide whether or not a tariff has been, is, or will

122 F.2d 326 (2d Cir. 1955); cert. denied, 350 U.S. 843 (1955).
222 F.2d at 327.
be unreasonable. The appeal courts suggestion that it could declare a
time of suit limitation unreasonable is in conflict with these holdings.

The Herman case was followed in Kenney v. Northeast Airlines\(^{137}\) where
the court preferred to follow an appellate court decision to the many
contrary district court cases. The time of suit regulation was held valid
until the Board decreed otherwise.

Before the last two cases were heard, the CAB had issued an order which
provided that the filing of tariff rules stating limitations on or conditions
to a carrier’s liability for personal injury or death was no longer to be
required.\(^{138}\) Both courts held, however, that this order was irrelevant since
the cause of action in both cases had arisen prior to the ruling by the
CAB. Also, they were not affected by the Board’s decision in the Con-
tinental Charters case because, there, the CAB had passed upon the validity
of a notice of claim and not a commencement of suit requirement.

A later order of the CAB required carriers to cancel from their tariffs
all provisions stating any limitation or condition relating to carrier liability
for personal injury or death.\(^{139}\) Notice of claim and commencement of suit
provisions are still filed with respect to baggage and goods, however.

Earlier in Migoski v. Eastern Air Lines, Inc.,\(^{140}\) the Florida Supreme
Court had held that, in order to recover damages for loss of baggage, a
passenger must comply with a tariff which required that actions for loss
of baggage be commenced within one year. No attack was made on the
validity of the tariff, however. The baggage had been lost after passengers
on an aircraft had been transferred to a bus for completion of the journey
because of inclement weather and the plaintiff had argued that the trans-
portation on the bus was a completely new undertaking quite divorced
from the original contract of carriage with the terms of which he did not
have to comply as a consequence. The court held otherwise!

The validity of a notice of claim requirement in a goods tariff was
challenged in Alco-Gravure Division etc. v. American Airlines, Inc.,\(^{141}\) where
the plaintiff had shipped a large glass screen on the defendant’s
airline and twenty four days later, when the box was opened by the con-
signee, the screen was found to be in a damaged condition. The defendant’s
tariff rules required notice of claim for concealed loss or damage to be
made within fifteen days after delivery of shipment.

The district court cited section 403 of the Act and the Board’s regulations
made pursuant thereto\(^{142}\) and pointed out that the same general
subject matter had been considered, \textit{inter alia}, by the Appellate Court
of the Second Circuit in Lichten and in Herman. The principle was well
established:

The carrier is obliged by the statute and regulations to file these schedules
in the first place. The Board may at once reject them as improper or unreason-
able; but if not so rejected they continue to be valid and enforceable until
the question of their alleged invalidity for unreasonableness or otherwise is
challenged by the Board or by interested parties before the Board, and held by
the Board to be invalid. In a suit against a carrier the tariff schedules must be

\(^{138}\) See supra note 43.
\(^{139}\) See supra note 44.
\(^{140}\) 63 So. 2d 614 (1951).
\(^{142}\) See supra note 42.
accepted and applied by the courts unless and until the Board has otherwise ruled.143

The court then distinguished the Continental Charters decision on the ground that it only applied to personal injuries and death. Also, all the other contrary district court cases were decided prior to Herman and, in any event, related only to claims by passengers, none of them involving provisions as to timely notice of damage to cargo shipments. Then the court decided, following Herman, that the tariff rule was within the scope of the statute and the revised regulations of the CAB and gave judgment for the defendant.

It is thought that apart from the confusing suggestion in Herman and the decision in Wilhelmy implying that the courts could question the reasonableness of a notice of claim requirement, the decisions on the tariff rules under consideration are consistent in the methods used to determine the validity of tariffs in general. The conflict between them turned upon the question whether the Civil Aeronautics Act and the CAB regulations require and authorize the filing of notice of claim and commencement of action provisions. Now, of course, the CAB regulations expressly disallow them with respect to claims and actions for personal injuries and death.

The Cackette case may be thought inconsistent with the decisions holding that the provisions are authorized with respect to claims and actions for loss or damage to goods. It is submitted, however, that this is not so since the latter decisions take account of the difference in wording between the Interstate Commerce Act and the Civil Aeronautics Act.

Section 6(1) of the former Act requires the filing of a “schedule of rates, fares and charges” and the Cackette case held that notice of claim and time of suit provisions are not matters directly related to such rates, fares and charges.

Section 403 (a) of the Civil Aeronautics Act, on the other hand, requires in addition to the above, and to the extent required by the regulations of the Board, the filing of “all classifications, rules, regulations, practices and services in connection with such air transportation. The Ægo-Gravure and Herman cases held that notice of claim and time of suit rules are matters affecting the services in connection with air transportation, a different holding entirely from that in Cackette.

However, it is thought that the rules as to the effect of properly filed tariffs should be relaxed in the case of notice of claim and time of suit requirements. Since the burden of complying with the rules is on the shipper, the principle of constructive notice is far too prejudicial and rigid. The carrier should be made to bring the rules to the shipper’s attention. Second, the shipper may not learn of the damage until after the time for giving notice of his claim is passed. Therefore, the rule should only be given effect if he knows of the damage at the time of delivery. Finally, the rule should not be applied if the carrier is already aware of the damage to the goods. The reason for the requirements, namely the prevention of fraud, ceases to apply in that event.

5. Limitation of Liability for the Loss of or Damage to Baggage and Goods

The tariff rule now to be considered invariably provides that the liability, if any, for loss or damage to baggage (goods) or for delay in

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the delivery thereof, is limited to its value and, unless the passenger (shipper) pays an additional charge therefor, the valuation shall be conclusively deemed not to exceed a specified sum, usually $100.

It will be noted that this type of limitation is valid at common law, generally, although some States have declared it invalid. The situation that arose in the Lichten case is, therefore, unlikely to arise and there has been little conflict in the decisions as a consequence.

The first case to consider the validity of a tariff provision of this nature on file with the CAB was Harris Trust and Savings Bank v. United Air Lines, Inc. The court gave no reasons for declaring valid a tariff limiting liability for baggage to an agreed valuation.

In the Lichten case, it will be remembered, even the dissenting judge, Frank, C.J., conceded that such a tariff rule was "doubtless valid."

In Radinsky v. Western Air Lines, Inc., a travelling bag and its contents which included valuable jewelry and business documents, were lost after transportation had taken place but while still in the possession of the defendant air carrier. There was no dispute that the tariff both limited liability to $100, no greater value having been declared, and provided that jewelry and business documents were carried at the owner's risk.

When plaintiff's baggage was transported from Salt Lake City to Los Angeles it was carried subject to these tariff regulations, and defendants' limited liability for loss of, or damage to plaintiff's property thus transported.

The court went on to say that on arrival at Los Angeles, the carrier became a bailee for the accommodation of the plaintiff and in the absence of a special contract, assumed no greater liability for loss of the baggage than it had assumed when it transported the baggage. While not actually saying so, the court must have assumed that the tariff rules were properly filed with the CAB and therefore valid.

In Wadel v. American Airlines, Inc., a provision in a tariff limiting the carrier's liability for loss or destruction of baggage in the absence of an excess value declaration was held applicable to personal property such as jewels and furs whether or not checked as baggage. The plaintiff had argued that the tariff, even if applicable, was invalid because it was an attempt to limit liability for negligence. The court held that it was valid.

As this case involves the interstate transportation of property, federal law, not state law and policies, must govern our decision as to the validity of tariffs or contracts limiting the carrier's liability for its negligence.

While federal law did not allow a carrier to exempt itself from liability for its own negligence, it did allow a carrier to limit its loss to an amount not greater than a fixed valuation as a factor in determining the transportation rate which increases as the amount of the property risk increases. The unusual part about this was that the court relied on the Carmack

144 See supra note 9.
145 See supra note 91.
146 See supra note 85.
149 242 P.2d at 816.
151 269 S.W.2d at 857.
Amendment as a declaration of the federal law generally and not just a declaration of the federal law as applicable to railroads. As such, of course, the case is in conflict with *Lichten* where the majority held that a carrier could exclude its liability for negligence under the Civil Aeronautics Act. *Lichten* was expressly followed in *Wilkes v. Braniff Airways, Inc.*, where it was held that the defendant was only liable for the loss of a passenger's baggage in the amount declared in its tariffs properly on file with the CAB unless a declaration of higher value had been made and an additional charge paid. The court cited numerous cases holding valid similar tariffs on file with the Interstate Commerce Commission. The court further held, citing *Lichten*, that "the CAB has exclusive authority to pass upon tariff rules filed by Interstate Carriers by Air," a statement which is a little too wide as a description of the primary jurisdiction doctrine. It is clear, however, that the court understood that it could declare whether or not the tariff was authorized to be filed by the Civil Aeronautics Act.

In *S. Toepfer, Inc. v. Braniff Airways, Inc.*, two cases of sample jewelry were lost while in possession of the defendant airline. Since the plaintiff had declared no value, the court held he could recover no more than the $100 provided in the tariff and added that this "... would be true even if the loss of the cases were occasioned by the negligence of the carrier."

In all the above cases, the validity of the tariff in question was either assumed or not considered by the courts. The Ohio Court of Appeal in *Randolph v. American Airlines, Inc.*, was the first court to fully consider whether a tariff limiting liability on baggage to $100 unless excess value had been declared and an extra charge paid, was authorized to be filed under the provisions of the Civil Aeronautics Act and the regulations of the CAB. Following an extensive review of the position at common law and under the Interstate Commerce Act, the court concluded:

... the right to so limit liability arises at common law independent of federal statute, except as provision is made requiring the filing of tariff rates and schedules, which, if reasonable, become binding alike upon the carrier and its patron.

The court agreed that there must be statutory authority for filing a particular clause in a tariff before persons are charged with notice of it or bound by its terms. It then held that this tariff was so authorized. In considering the *Lichten* case, the court said it could well go along with the vigorous dissenting opinion of Judge Frank but the clause there involved was entirely different from the limitation clause in the instant case and even Judge Frank had recognized the distinction between such a clause and the one exempting the carrier from all liability. Thus, this tariff rule was to be deemed valid until the CAB declared otherwise.

A similar rule in a cargo tariff was held valid in *Rosch v. United Air Lines, Inc.* A valuable greyhound dog was shipped by air to a certain point and then transferred to surface transportation because of an embargo.
on air cargo shipments due to a pilots' strike. It became sick and died as a result of the delay. The plaintiff recovered $50 instead of the actual value of the dog which was $2,000.

It was briefly held in Tannenbaum v. National Airlines, Inc.,197 that provisions in air carrier tariffs which limit liability for loss of baggage are valid when such tariffs are filed with the CAB pursuant to the Civil Aeronautics Act and that it is not necessary that a passenger's attention be called to excess valuation provisions appearing in the ticket.

In Mustard v. Eastern Air Lines, Inc.,198 a fur coat was lost from a coat rack on a plane. A tariff provision limiting liability for the loss of baggage to $100 was held valid and applicable to personal property kept in the custody of the passenger. The court, in accordance with many authorities, had said that the tariff rules became a part of the contract of carriage, that their validity must be determined by federal law and that they were binding on the passenger regardless of her lack of knowledge or of assent to the regulation. Then the court said that there remained the question whether the passenger had had "a fair opportunity to choose between higher and lower liability by paying a correspondingly greater or lesser charge" so that the carrier could lawfully limit recovery to an amount less than the actual loss sustained. The court held that she had had that opportunity. It will be noted that this requirement of fair opportunity appears to be in conflict with the rule of constructive notice of tariff provisions earlier referred to by the court. The court cited New York, N. H. & H. R. Co. v. Nothnagle199 in support of the requirement. This case is thought not to be applicable since it turned upon a construction of the Carmack Amendment which has no application to air commerce. The Supreme Court had decided that the tariff provision limiting liability to an agreed amount was statutorily authorized. But, under the Carmack Amendment, the amount to which liability is to be limited, must be declared in writing by the shipper and agreed upon in writing as the released value of the property. On the facts, these conditions had not been complied with and, of course, compliance with the conditions necessarily required a knowledge of the tariff rules on the part of the plaintiff. This explains the following remarks of the Supreme Court and distinguishes it from the Hooker and Esteve decisions,200 which were not controlled by the Carmack Amendment.

But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge, can a carrier lawfully limit recovery to an amount less than the actual loss sustained. Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts.201

In Melnick v. National Air Lines,202 a passenger had failed to declare a higher valuation on his baggage and pay an excess charge. In an action

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199 346 U.S. 128 (1913).
200 See supra notes 46, 47 and 49.
201 146 U.S. at 115-16.
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for loss of the baggage, the passenger argued that the tariff which limited the carrier's liability to $100, had no effect because the loss here was the result of the carrier's negligence. The court cited the Lichten case as holding that the common law rule that a common carrier may not by contract relieve itself from liability for the consequences of its own negligence was no longer good law and that the CAB had primary responsibility for supervising rates and services.

Accordingly, this broad regulatory scheme and not the common law must govern the contract of the parties.\textsuperscript{163}

The court therefore held the tariff valid, one of the reasons being that the common law did not apply and yet at common law, such limitations upon liability are valid, not being considered as clauses limiting the carrier's liability for his own negligence.

The District Court of Michigan in Milhizer v. Riddle Airlines\textsuperscript{164} considered whether a shipment of human remains fell into the same category as the shipment of any other cargo or whether the negligence law as applied to personal injuries or death applied. The corpse had been mutilated in a plane crash. The court granted a motion for summary judgment in favour of the air carrier deciding that the law with respect to loss of or damage to freight applied. This law was federal law and under it, pursuant to the relevant sections of the Federal Aviation Act, air carriers may limit their liability for negligence.

In Rosenchein v. Trans World Airlines, Inc.,\textsuperscript{165} the court had no difficulty in finding that a tariff provision limiting liability for the loss of baggage to $250 was valid and binding upon the passenger. Since this was an action involving an interstate shipment of baggage, the rights and liabilities of the parties are determined by federal law, namely the Federal Aviation Act. Such provisions had many times been held a part of the contract of carriage and valid and binding regardless of the passenger's lack of knowledge or assent thereto and although the loss occurs through the negligence of the carrier. Finally, the court said that the cases draw a distinction between a contract immunizing a carrier from negligence and a contract limiting liability upon an agreed valuation, the latter not offending the policy of law forbidding one from contracting against his own negligence. Such a remark would seem quite irrelevant since the Lichten case held that under the Civil Aeronautics Act, a carrier can limit his liability for negligence. Still it is quite clear that the last word has not been said on the subject in view of the many judicial comments casting doubt upon the Lichten case.

In Vogelsang v. Delta Air Lines, Inc.,\textsuperscript{166} however, the court denied a request by the plaintiff to reject Lichten, "this controlling decision, since reiterated by the court of appeal for this circuit" in Herman v. Northwest Airlines.\textsuperscript{167} The passenger's baggage containing valuable sample jewelry was lost while in the possession of the carrier. The court allowed the passenger to recover $100 only since he had not declared a higher value and paid for such in accordance with the carrier's tariff provisions.

\textsuperscript{163} Id. at 568.
\textsuperscript{165} 349 S.W.2d 483 (Mo. App. 1961).
\textsuperscript{166} 193 F. Supp. 613 (S.D.N.Y. 1961).
\textsuperscript{167} Supra note 135.
The carrier had attempted to exclude his liability altogether on the ground that its tariff also provided that it would only accept "as baggage such personal property as is necessary or appropriate for the wear, use, comfort or convenience of the passenger." Since the plaintiff was a jewelry salesman, the court held that the jewelry he was carrying was 'necessary' and 'appropriate.'

Thus, the above cases decide that the tariff rule under discussion is authorized by the Federal Aviation Act, formerly the Civil Aeronautics Aviation Act, that it must be presumed valid until the CAB declares otherwise and that federal law applies to determine its validity. In addition a number of cases differ as to the majority ruling in the Lichten case, many of them casting doubt upon it.

6. Disclaimer of Liability for the Negligence of Connecting Carriers

In Weeks v. The Flying Tiger Line, Inc., a dog was transported from Burbank to Chicago by the defendant air line and then transferred to a railway express agency for completion of the shipment to Miami. The dog died of heat prostration suffered as a result of the negligence of the express agency. The air carrier's tariff provided that it would not be liable for the negligence of any other carrier or transportation organization. The court cited numerous authorities which established the validity of regulations adopted pursuant to the Civil Aeronautics Act and held the provision valid.

This case concludes the consideration of the validity of tariff provisions excluding or limiting the liability of air carriers. The conclusions stated at the beginning of this section as to the methods used to determine the validity of tariffs are thought to have been substantiated. It is only necessary to point out, therefore, that, according to the decided cases, a carrier can exclude his liability for the cancellation of flights, for changing schedules, for delay in the delivery of freight and for the loss of certain types of baggage even where he has been negligent. He may also disclaim any liability he may have with respect to goods and baggage if notice of claim and time of suit requirements have not been complied with by the plaintiff. Finally a carrier can exclude his liability for the negligence of connecting carriers and limit his liability to a fixed sum for the loss of or damage to goods or baggage unless a higher valuation is declared and an additional charge paid. It seems from the Lichten case that the common law forbidding a common carrier to exempt himself from or to limit his liability for his own negligence has no place in actions attacking the validity of tariffs on file with the CAB unless it is shown that the tariff is not required to be filed by the Federal Aviation Act or the CAB regulations made pursuant thereto.

It is now necessary to discuss whether the carrier by a valid tariff provision, can apply these tariff rules limiting and excluding his liability, to his servants and agents.

IV. Tariffs and the Liability of Servants and Agents

Two typical tariff provisions which purport to affect the liability of servants and agents and which are on file with the CAB provide as follows:

Whenever the liability of Carrier is excluded or limited under these conditions, such exclusion or limitation shall apply to agents, servants or representatives of the Carrier and also any Carrier whose aircraft is used for carriage and its agents, or representatives.\textsuperscript{169}

and again:

The Airbill and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consigne and the carriers by whom transportation is undertaken between the origin and destination on reconsignment or return of the shipment; and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up, delivery or ground services in connection with the shipment.\textsuperscript{170}

Similar tariffs pertaining to air transportation have been the subject of litigation on three occasions.

In \textit{New York and Honduras Rosario Mining Co. v. Riddle Airlines, Inc.},\textsuperscript{171} a shipment of twelve bars of dore bullion, a mixture of gold and silver produced at the plaintiff's mines in Central America, was delivered to T.A.N., a foreign carrier, in San Salvador, Honduras. T.A.N., the initial carrier, transported the bullion to Miami where the defendant connecting and terminal carrier picked it up for transportation to New York. Somewhere between Miami and New York half the shipment was lost. In its contract with the initial carrier, the plaintiff had declared the value of the whole shipment to be $100 instead of its actual value of $15,000. According to the terms of the contract also, its provisions inured to the benefit of the defendant as connecting and terminal air carrier. The defendant's tariffs, however, declared that dore bullion "will be accepted only if the actual value is declared on the airway bill at the time of acceptance." The trial court declared this to be irrelevant since the defendant was acting as agent of the initial carrier whose contract with the plaintiff governed.

The controlling factor ... was the contract with the initial carrier, T.A.N., that its provisions covered Riddle, as connecting carrier, and that a carrier may effectively limit its liability on the basis of a reduced rate although the shipper could have secured full protection by paying a higher rate.\textsuperscript{172}

On appeal, this decision was reversed and judgment entered for the plaintiff in the full amount.\textsuperscript{173} It was said that, while the trial court had properly found that the defendant deviated from its tariff provision which provided that dore bullion would not be accepted unless its actual value was declared and a corresponding rate paid, it erred when it went on to find that, notwithstanding this fact, the released value fixed in the airway bill inured to the benefit of the defendant as an agent of the original carrier or as a connecting carrier. The main reason was that


\textsuperscript{170} Official Air Freight Rules Tariff, No. 1-A, rule no. 3.1 issued by B. H. Smith, Agent: March 2, 1961. Cf. International Airfreight Rate Tariff No. 1-D, rule no. 40(4) issued by James J. McNulty: August 31, 1961: "Whenever the liability of Forwarder is excluded or limited under these conditions, such exclusions or limitation shall apply to agents, servants, or representatives of the Forwarder."

\textsuperscript{171} 152 N.Y.S.2d 773 (N.Y. Sup. Ct. 1956).

\textsuperscript{172} Id. at 775.

Riddle was prohibited by section 403 (b) of the Civil Aeronautics Act from accepting a lower rate than that specified in its currently effective tariffs. The court added that T.A.N.'s tariff could inure to Riddle only if an interline agreement, properly filed with the CAB under section 412 (a) of the Act, was in existence between the two carriers.

It is clear from this case, however, that it is possible for the conditions and limitations in a contract with one carrier to inure to the benefit of connecting carriers. This is no more than the Supreme Court has itself decided on several occasions and it is evident from Cleveland, C.C. & St. L.R. Co. v. Dettlebach why it has been so decided.

Goods were lost after their transportation by the connecting carrier but while in his possession as warehouseman. The problem was whether the limitation of liability to an agreed value in the contract with the initial carrier inured to the benefit of the defendant as warehouseman, not as connecting carrier. The state court had decided in the negative since there was no consideration supplied for the limitation of liability in the way of reduced charges for storage of the goods. In its capacity as connecting carrier, there was consideration since the transportation rates had been reduced. The Supreme Court regarded this reason as cogent thus indicating that there is a contractual relationship between connecting carrier and shipper. Nevertheless, the court said the question was federal in nature and that Congress in the Interstate Commerce Act and especially in the amendment of June 29, 1906, had made it clear that the term "transportation" was to include a variety of services that, according to the common law, were separable from carrier's service as carrier. Thus the services provided by the carrier as warehouseman were subject to the same conditions and limitations in his contract of carriage with the shipper, as the services provided by him as carrier, and the valuation placed upon the property applied to his responsibility as warehouseman.

It is evident that the theory upon which a connecting carrier is allowed to take the benefit of conditions and limitations in the shippers' contract with the initial carrier is that the initial carrier is contracting on behalf of all connecting carriers who are, as a consequence, parties to the contract of carriage. Thus, in the Honduras case, the carrier was forbidden to enter into the contract because the Civil Aeronautics Act declares unlawful any agreement which is inconsistent with filed tariffs. There was no question of agency. In fact the appeal court said that the trial court had erred in suggesting that Riddle was an agent of T.A.N. Similarly, in the Dettlebach case, the state court had held that the carrier as warehouseman could not be considered a party to the contract which limited his liability since he had supplied no consideration in return for such limitation. The Supreme Court held, on the other hand, that the services provided by carrier were to be considered among the services he contracted to provide in the contract of transportation for which there was consideration. This result was necessitated by the policy of Congress.

In Twentieth Century Delivery Service, Inc. v. St. Paul Fire & Marine Insurance, Co., a delivery service was held entitled to the benefits of the

175 The Hepburn Act, 34 Stat. 584.
176 242 F.2d 292 (9th Cir. 1957); mod., 242 F.2d 302 (9th Cir. 1957).
TARIFF LIMITATIONS

limitation of liability expressly extended to it in the tariffs and, therefore, in the contract of carriage between the shipper and air carrier. A coffee machine was negligently damaged by the appellants while delivering it pursuant to a transportation contract between Trans World Airlines and the insured consignor. The airway bill contained a provision declaring that the shipment was subject to governing classifications and tariffs filed in accordance with law. One tariff provision provided for a limitation of liability to an assumed value unless a higher value was declared and applicable charges paid thereon. Another declared that these tariff provisions inured to the benefit of, or applied to "any other person performing for the carrier, such pick-up, delivery or ground service in connection with the shipment." The appellants argued that this provision enabled them to take advantage of the limitation of liability since they had a contract with T.W.A. whereby they undertook to perform the ground delivery services referred to in the tariff.

Citing section 403 (a) of the Civil Aeronautics Act, the court said that the extension of the tariff to persons performing delivery services "is an exercise of the authority thus granted to classify and regulate 'services in connection with such air transportation.'" Also the CAB regulations required the filing of all "provisions governing terminal services and all other services . . . in connection with air transportation." It followed that these tariffs were statutorily authorized:

... the Board was expressly authorized by Congress to permit and approve the filing of such tariffs.

And the primary jurisdiction doctrine prevented any further consideration of the validity of the tariffs, since properly filed tariffs are deemed valid until rejected by the CAB.

The court was encouraged by the fact that analogous situations had arisen in respect to other carriers and similar results had been reached. It quoted extensively from Collins & Co. v. Panama R. Co. and United States v. The South Star, both of which have since been overruled by the Supreme Court in Krawill Machinery Corp. v. Herd. However, this case can be distinguished on the ground that the bills of lading, unlike the airway bill and the tariffs in the present case, did not expressly extend to the defendants, the benefit of the limitation of liability upon which they were attempting to rely. That this was considered a relevant and important fact by the Supreme Court can be seen from many passages in the judgment.

More in point was Northern Fur Co. v. Minneapolis, St. Paul & S.S. M.R. Co., where furs were delivered to a railway express company for delivery to New York. The receipt contained an express provision that its terms should inure to the benefit of "all carriers handling the shipment." One of its terms limited recovery for loss to the value declared.

177 See supra note 31.
178 242 F.2d at 296.
179 See supra note 42.
180 242 F.2d at 297.
181 197 F.2d 893 (5th Cir. 1952).
182 210 F.2d 44 (2d Cir. 1954).
183 319 U.S. 297 (1943).
184 Ibid.
185 224 F.2d 181 (7th Cir. 1955).
The furs were lost as a result of the negligence of the defendant railway company over whose lines the shipment was passing under an arrangement between the defendants and the Express Company. The court held that the defendant railway company was entitled to the benefit of the limitation of liability clause notwithstanding that it had no direct dealings with the shipper. The court also decided that it made no difference whether the company was an independent contractor or an agent of the Express Company. The following passage in the judgment of the Twentieth Century case includes a verification of this fact:

The body of law governing all liabilities arising out of the arrangement represented by this air-bill, and the shipment there called for, was within the power of Congress to enact. Here the legislative scheme has provided through statute and the regulations there authorized the extent of Twentieth Century's liability. Hence, here, . . . it does not matter that Twentieth Century is not a formal party to the bill of lading. For this reason, it is of no importance whether as between Trans World and Twentieth Century the latter was an independent contractor, an agent, or an employee of Trans World . . . the whole matter is beside the point for the reason that the tariff rules and regulations expressly applied to Twentieth Century, whatever its capacity may have been.186

This is probably the most important passage in the judgment and indicates that, under federal law, servants and agents can rely on tariff provisions which extend to them the benefits of all conditions and limitations on the carrier's liability.

In Globe & Rutgers Fire Insurance Co. v. Airborne Flower & Freight Traffic, Inc.,187 a California court held that a similar intrastate tariff provision did not apply to an independent contractor. A shipment of furs, valued in the airbill at $50, was shipped by United Air Lines from Los Angeles to San Francisco. The defendant trucking firm then collected the furs for delivery to the insured consignee. One carton of furs valued at $11,755 was then lost by them. The sole issue was whether the defendant could rely on the provisions of the airbill limiting liability to the declared value of $50 and providing that this limitation inured to the benefit of any other person performing for the carrier delivery service in connection with the shipment. These rules were contained in United Air Lines Intrastate Tariffs on file with the California Public Utilities Commission. The court thought that to "bring itself within the terms of the tariff, the defendant must show that it performed the delivery service for United." They then held that, on the evidence, the defendant was not an agent of United and was handling the shipment as carrier for hire on its own account as an independent contractor. The case was to be distinguished from the Twentieth Century decision, said the court, but it is not clear why. Perhaps the difference lies in the fact that, in the Twentieth Century case,

the airbill executed between the shipper and the carrier included charges for the delivery of the shipment and the tariff was construed to include the defendant within its coverage188

186 242 F.2d at 299.
188 314 P.2d at 743.
No delivery charges were stated on the airbill in the present case and the defendant billed the shipper directly for its services. In other words, there was a distinct contract between the shipper and defendant which was quite unconnected with the air transportation and in which no limitation of liability according to declared value, was provided for. This is all very reminiscent of the State court decision, subsequently reversed by the Supreme Court, in the *Dettlebach* case. The case was, of course, governed by California law and largely turned upon a question of fact: was the delivery service performed for the carrier? In any event, had the defendant been an agent or servant of United, it is clear that the court would have held that the limitation of liability inured to its benefit.

Thus, it can be concluded that the tariffs on file with the CAB are statutorily authorized and any conditions and limitations on liability therein inure to the benefit of the servants and agents of the carrier.

**V. CONCLUSION**

There is Federal Court of Appeal authority for the proposition that tariffs extending the benefit of conditions and limitations on the carrier’s liability to his servants and agents are statutorily authorized and as such valid until the CAB declares otherwise. The only consideration necessary then is whether any given tariff limiting or conditioning the liability of the carrier is valid. Since rules affecting the liability of carriers for personal injury or death are disallowed, limitations on liability are only found with respect to the carriage of baggage and goods. A careful reading of domestic tariffs will show that none of them expressly limits or excludes liability for negligence. However, a few, such as the notice of claim and commencement of action provisions, have the effect of doing so. Until and unless the *Lichten* and *Herman* cases are overruled, there is Federal Court of Appeal authority for the proposition that such tariffs are statutorily authorized and therefore valid, any common or State law rule to the contrary notwithstanding.

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189 See supra note 174.