

1947

Frontiers of Aviation Law

Pat McCarran

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Pat McCarran, *Frontiers of Aviation Law*, 14 J. AIR L. & COM. 344 (1947)
<https://scholar.smu.edu/jalc/vol14/iss3/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FRONTIERS OF AVIATION LAW

By PAT McCARRAN

Senior United States Senator from Nevada, ranking minority member and former Chairman of the Senate Judiciary Committee. Co-author of the Civil Aeronautics Act of 1938, Federal Airport Act of 1946, and other federal aviation legislation. Member of the Bars of Nevada, California, Utah, and Arizona. *Formerly*, Chief Justice, Supreme Court of Nevada; President, Nevada State Bar Association; and Vice-President, American Bar Association.

MOST of you who are present have participated throughout the day in an Aviation Law Institute which has dealt with existing law and legislation in this field. Tonight I want to take you with me a little beyond the existing picture for a look at the Frontiers of Aviation Law.

Because aviation is relatively a new art and a new industry, the great body of aviation law still is statutory. It has been the duty of the Congress, and it still is the duty of the Congress, to probe beyond the present to chart the future path of civil aviation in this country. When I first came to the Senate the nearest thing we had to a basic law for civil aviation was the Air Commerce Act of 1926.¹ The development of civil aviation during my 14 years of service in the United States Senate has far exceeded our fondest dreams. It has been my privilege to have participated in the drafting, sponsorship and formulation of the federal legislation which made this development possible.

Aviation law is indeed a quicksilver field. Yesterday we may have thought we had charted its frontiers; that we had platted a map to enable us to say that aviation law is concerned with this and that; that these are its problems; that it encompasses such and such concepts; that it goes here, but stops there. And then aviation engineers solved new problems, and new horizons were ours to conquer. The useful range of aircraft was extended from a few hundred miles to the entire length and breadth of the globe. Today every spot on earth is within 60 hours of Milwaukee by air carrier. Our whole thinking in the field of aviation law has been forced to change quickly, as the great technical achievements of World War II advanced aviation to undreamed-of accomplishments.

You to whom I speak have witnessed the change of precedent after precedent, in the legal field, as aviation developed. I cite merely one example—the insurance field. There the courts in the early years of aviation held that every person who took a flight as a passenger in an airplane was “participating” in aviation, so recovery for death or injury

¹ Act of May 20, 1926, 44 Stat. 568, 49 USCA. § 171-84 (Supp. 1946).

to such a passenger was barred under a standard clause in insurance policies excluding coverage of persons "participating" in aviation. Today, in state after state, such precedents have been overruled as the courts hold this same language does not exclude passengers, the courts reasoning properly that only the pilot actually participates in aviation under present day circumstances. As one court has aptly said:

"In adapting the general principles to the newest mode of transportation, it is not altogether 'putting new wine in old bottles.' Although the same principles must obtain and be applied, the law of aeronautics cannot be completely synchronized with the law pertaining to other agencies, for it must be modified to meet the traffic problems of the novel method."

So we have had changes in both technical and legal fields which have greatly affected aviation law. My purpose tonight is to sketch a few of the fields in which I believe the frontiers of law must be extended to meet the present and future needs of civil aviation.

The Civil Aeronautics Act of 1938² has been on the statute books less than ten years, but already it is outmoded in many respects, and inadequate in others. That is true in spite of the fact that, when it passed the Congress, it was the best law we could get at the time.³ We knew then that air transportation was to become a major force in our nation, both in time of war and in times of peace; but we did not foresee by any means all of the problems which would develop in such a few short years. My concern tonight is not with the existing legislation so much as with the frontiers to which it should be pushed, to pattern an act for the proper regulation and development of the future of civil aviation. The urgent need for amendment of the Civil Aeronautics Act of 1938 has been apparent for several years. On March 20, 1944, I presented a bill (S. 1790 of the 78th Congress) to completely rewrite all federal legislation for civil aviation; to codify and bring up-to-date existing aviation legislation; to bring into one act those unrepealed provisions of the air commerce act of 1926 which many people do not realize are still the law of the land; and to write into law the necessary legislative provisions which experience has indicated will be necessary for the future development of aviation in this country. This bill, with some refinements of language, was re-introduced as S. 1 in the present Congress.

To detail all the changes in language and substance which nearly ten years of operation under the Civil Aeronautics Act of 1938 has indicated are necessary would require much time. I commend the bill to your study, and I point out a few highlights: New provisions for the granting of experimental route certificates, without the present lengthy certificate hearings, so as to encourage new enterprise in developing a

² 52 Stat. 977, 49 USCA § 401 (Supp. 1946).

³ The 1938 act was four years in the making. The first draft was introduced on March 26, 1934, as S. 2187 of the 73rd Congress. Even while the legislation was "in the mill", new developments made changes necessary; and during those four years, I prepared and introduced no fewer than nine separate bills on this subject, each a complete redraft of the previous bill. The bill which finally became law was S. 3845 of the 75th Congress.

truly nation-wide air transportation service; the recreation of an independent civil aeronautics authority and an independent air safety board; new economic regulations for contract air carriers; and a new grant of authority providing control, for the first time, of the rates and fares of our air carriers when operating in foreign air transportation. You will find by a study of this bill that it contains language extending the frontiers of aviation law to hitherto uncharted fields, some of them fields in which federal officials now claim the right to pursue an unfettered path, often in conflict with the policy of the Congress.

For example, in 1946 the CAB and the State Department, in the so-called "Bermuda Agreements"⁴ stretched the language of the existing act to the point of claiming that various sections of that act authorize an executive agreement whereby important air rights of this country were bargained away to England. These primarily administrative officials went so far as to agree that the International Civil Aviation Organization⁵ could control rates of our air carriers in foreign air transportation in any case where England would not agree to the proposed rates suggested by our air carriers. If you will pause to recall that we are outvoted in the International Civil Aviation Organization by at least 42 to 1, you can see where this policy, if widely followed, would leave us, in the race for international air transportation business. At the same time, the Civil Aeronautics Board and the State Department agreed to give England certain air rights in this nation, such agreement being in direct conflict with specific provisions of the existing act.⁶ To top this both C.A.B. and the State Department then claimed these gifts of rights and controls, to throttle our civil aviation down to where England wants us to be, where an "Executive Agreement," and so not subject to review by the Congress or anyone else in authority.

It is full time to extend our aviation law frontiers to the point of preventing such bureaucratic bargaining away of our national rights. To accomplish this, I have introduced a bill (S. 11) providing that:

"No agreement with any foreign government restricting the right of the United States or its nationals to engage in air transport operations, or generally granting to any foreign government or its nationals or to any air line representing any foreign government any right or rights to operate in air transportation or air commerce other than as a foreign air carrier in accordance with the provisions of the Civil Aeronautics Act of 1938, or respecting the formation of or the participation of the United States in any international organization for regulation or control of international aviation or any phases thereof, shall be made or entered into by or on behalf of the Government of the United States except by treaty."

Much as I realize the need for changes in our basic aviation law, I am not content that those changes should be made administratively. The

⁴ *Air Services Agreement* between the United States and the United Kingdom, signed at Bermuda Feb. 11, 1946. *Treaties and Other International Acts Ser. 1507, 1946 USAVR 108.*

⁵ INTERNATIONAL CIVIL AVIATION CONFERENCE, Chicago, Nov. 1 to Dec. 7, 1944. *Final Acts and Related Documents*, Dep't. of State No. 2882, Conference Ser. 64.

⁶ Section 402; cit. note 2, *supra*.

subject is far too important to be allowed to slip away from control by the Congress, which alone has the right, and the power, to determine national policy.

The pace of the world is geared to transportation, and aviation is the instrumentality which will set the future pace in foreign trade and in the passenger field. In the fight for the air markets of the world our country must not come out second best. In our thinking, therefore, the frontiers of aviation law must be projected upon this world-wide picture, and we must, within the constitutional framework of the Government of the United States, chart a pattern which will bring us to the forefront and keep us there.

That is why, in 1944, I proposed putting the entire facilities of the air transport industry and the full weight of the Government of the United States back of a single community company to carry the flag of the United States on the airways of the world. Our national security and our future as a trading nation depends upon maintaining our leadership in international air transportation. The only way to maintain that leadership in the face of growing competition by foreign nations is by consolidating all our resources in the air to meet and surpass that competition.

The entire facilities of all air carriers of this country, devoted to foreign air transportation, are valued roughly at one hundred million dollars. Not long ago England, at a time when she was so desperate for money that she was forced, so she said, to negotiate a loan of approximately four billion dollars from this country, made available to her chosen instrument in the aviation field six hundred million dollars for the sole purpose of assuring domination of the airways of the world. No single line in this country, when it must compete with other air lines on the same routes, can secure and expend so vast a sum as six hundred million dollars. The French have announced an initial subsidy of forty million dollars for Air France. The Dutch employ the simple expedient of making up, each year, the annual deficit of their national air line, KLM. Only the united strength of all factors in our national transportation industry, with the full backing of our Government, can compete on an equal footing with the other Governments of the world, each of which operates only through one nationally sponsored and financed line in the field of international air transportation.

Recent financial and other troubles of our air carriers illustrates and underlines the picture I paint. We cannot afford financial or other failures which cause our air carriers to fall behind in this race. Our future—the future of our whole nation—is too dependent on our success. The price of failure could well mean eventual extinction. What though we have never had such an air line created by law before? Is it not time that our aviation law frontiers are pushed out into hitherto uncharted fields so that we can win in this race for the air markets of the world? I for one think so, and I know that many of my colleagues in the Senate hold the same view. Senators White and Brewster have just

joined me in sponsorship of legislation to accomplish this purpose. By consolidating all of our air carriers, operating internationally, into a single community company, and giving our domestic air carriers, our steamship lines, and our railroads a stake in the success of the consolidated company, destructive rivalries between American air carriers abroad will be avoided and at the same time we will present a united front against the competition of foreign government air monopolies. We must meet the chosen instruments of Great Britain, France, Holland, Belgium, Russia, and other foreign nations, on an equal basis in the post war competitive race for air supremacy.

In the field of taxation, the frontiers of aviation law are even now the subject of intense exploration. In 1944 the Supreme Court of the United States held, in the case of *Minnesota v. Northwest Airlines*,⁷ that a Minnesota County in which the airlines' executive offices were located could tax all of the planes of that great airline, which at that time operated from Chicago to the Pacific coast. Maintenance bases were operated at that time in five states. When this case reached the courts, precedent offered two rules from which to choose—the "Ship" rule and the "Railroad" rule. Under the "Ship" rule which the court adopted, the home port may properly tax all of a carrier's planes. Under the "Railroad" rule carriers would allocate taxes among the several states through which or in which planes might operate, based on the proportionate value of the planes found to have acquired a taxable situs in each state. The airplane is, of course, vastly different from the steamship and a railroad, and it seems to me that an entirely new theory of taxation should be worked out to meet its needs.

It is true that, pursuant to a congressional resolution, a very exhaustive study and report to Congress was made by the C.A.B. as a result of the Supreme Court decision to which I have just referred.⁸ In general the report recommended creation of a federal board to prevent the states from imposing discriminatory or multiple taxes on airlines. I have refrained from acting upon the recommendations made in the report to Congress because it seemed to me that it recommended too much federal dictation to the states and too little in the way of constructive thought toward the solution of this very important problem. My final conclusions have not yet been formulated, but I am at present thinking along the line of a solution to this problem by state legislation; state legislation under which the peculiar characteristics of airplanes and air travel, and the peculiar problems which they involve in the way of state police and other assistance of various kinds, will be taken into consideration. Perhaps a formula based upon aircraft arrivals and departures, revenue tons handled, and revenues originating in each state would be a start in the right direction. Where a plane merely flies over a state for a few minutes without landing, I am not prepared as yet to say that the state should share in taxes levied on the airplane.

⁷ 322 U.S. 292, 1944 USAvR 1 (1944).

⁸ Multiple Taxation of Air Commerce (1945), House Doc. 141.

The lawyers of this country, and the members of the American Bar Association in particular, should lend their combined efforts toward a solution of this important problem. I earnestly hope that it can be solved without superimposing a complicated federal administrative board upon the states. It is important to the future welfare of our aviation industry that, in extending this particular frontier of aviation law, the evils of multiple taxation in this field should be avoided by the creation of taxation machinery specifically designed for air transportation; which will, at the same time, insure to each state its fair share of tax revenue from this source. Aviation is entitled to a fair ride, but not a "free" ride in this field of taxation.

While arguing for more complete coverage of airport problems in the bill (S.3845) which became the Civil Aeronautics Act of 1938, I had occasion to say to the United States Senate on May 11 of that year:

"We look at an airplane in the air and we say what a wonderful thing it is. We see it passing overhead and think that is all there is to it, a magnificent structure, a great piece of technical mechanism. But that plane must go up from some point and it must come down, and the landing fields from which it rises and to which it goes are just as important as is the mechanism itself which goes through the air. The landing field is as much a part of the aviation industry and as much a part of the science as is the mechanism which passes from one landing field to another. Indeed, there is nothing more essential, from the standpoint of safety in the air, than safe and adequate places on which to land and from which to take off."

The airport is indeed the keystone of all aviation development. The glamour of the technical and mechanical phases of airplanes has far overshadowed the role of an airplane's first requisite—an airport. Without airports aviation is nothing. I compromised, in the Civil Aeronautics Act of 1938, on a provision for a study and report on the airport problem, in lieu of the more comprehensive provisions I wanted; and it took nine years after that to get basic federal airport legislation. Last year the Congress passed and the President approved a Federal Airport Act.⁹ We now have a national airport plan, provided for by federal law, with five hundred million dollars in federal funds authorized for expenditure on this plan, in cooperation with states and cities.

But the Federal Airport Act, though an important aid to the growth of civil aviation in this country, has not extended the airport law frontier as far as it must go in this direction. If we are to be an airborne nation, in the same sense that we are now sometimes referred to, because of our development and use of the automobile, as a "Nation on Wheels", we must have thousands of new airports; we have, in truth, barely scratched the surface of our airport problem. Just think of how few our airports are, in comparison with our paved roads. Undoubtedly new legislation will be needed, to keep our development in this field abreast of technical achievements.

In another respect, also, the Federal Airport Act may need amendment. A few months ago I found it necessary to protest the action of

⁹ 60 Stat. 170, 49 USCA § 1101 (Supp. 1946).

the Administrator of Civil Aeronautics in attempting to write into the Federal Airport Act, by bureaucratic decree, in the nature of regulations, virtually every power denied him by the Congress in the Act. Instead of waiting for the Congress to move the frontiers of the Act for him, he sought to lift himself by his own boot straps. Others protested, as I did, and the result retraction, by the Administrator, of his more extreme proposals. But the need for more adequate and definite control of such attempts, in the future, prompts me to make a mental note that if and when a revised Federal Airport Act is drafted, it must contain specific language to prevent such an abuse of discretion. I should like to hear from you, as lawyers, with regard to any ideas you may have for improvement of the Federal Airport Act. As a life-long member of the legal profession, I know from experience that it is when actual cases arise that defects and needed improvements in legislation become most apparent. Let me know of any defects or needed improvements which your experience reveals, as I would welcome your cooperation.

I mentioned contract air carriers; what of the non-scheduled problem in general? There one finds a whole multitude of problems which the C.A.B. is attempting to cover by economic regulation, in a manner contrary to the intent of the Congress when it adopted the Civil Aeronautics Act of 1938. As lawyers you are familiar with statements such as a recent one from the United States Supreme Court that the "intention of the lawmaker constitutes the law." Yet on this frontier the C.A.B. is perverting general language to a specific unintended result. The bill to revise and restate the civil aviation law of this country (S. 1 of the present Congress), attempts to further define the respective jurisdictions of the federal and state governments in the field of civil aviation. The overlapping of these jurisdictions should be avoided, so far as possible, to prevent duplication and waste of effort. This is a problem that is crying out for solution. States, in the field of aviation, often have laws which are in many instances a crazy-quilt patchwork of statutes rather than well-rounded and up-to-date legislation for the aviation field. There is need for vision; for order; and for logic in this delicate field of intergovernmental relationships. It is up to the lawyers of America to chart the frontiers of aviation law in this, as yet, uncharted field.

We in America find ourselves with airplanes operating all over the world. Both domestically and in international air transportation, our airplanes are second to none. The technical frontiers of aviation have been or are being conquered. It is up to us, the lawyers of America, to conquer the legal frontiers of the aviation field. Man-made laws will govern the future of aviation—it depends upon those laws, and those laws depend upon us. I feel certain that the lawyers of America will rally to this task and see to it that the frontiers of aviation law are adapted to the air age in which we now live.