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FEDERAL

Department Editor: Louis E. Black, Jr.*

ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION'S COMMITTEE ON AERONAUTICAL LAW

PRESIDENT Carl B. Rix gave this committee specific instructions to revitalize the work of the Association in the field of aviation law. The committee was instructed to plan a nationwide educational program for lawyers on the principles of aviation law. This program was in addition to the usual functions of the committee of reporting to the Association on legal developments in this field. The result . . . was the presentation to the House of Delegates at its Mid-winter Meeting in February, 1947, of a report entitled "Current Status of Aviation Law."¹ This report surveyed the current legal and legislative status of the development of aviation law in the international, federal, state, and local fields. Aviation law as developed by court decisions on insurance exclusion clauses, air space rights, taxation and other subjects was also covered in summary form. . . .

On April 25, 1947, your committee, in cooperation with the Milwaukee Bar Association, carried out the first Aviation Law Institute sponsored by the American Bar Association. Your committee was successful in securing the participation in the program of some of the best known aviation lawyers in the United States.

On May 27, 1947, your committee, in cooperation with the Aero Club of Washington, conducted a panel forum on aviation legal problems. . . . This panel conducted a most informative and interesting discussion of the following topics: Conflicts between property owners and adjacent airport operators; Manufacturers liability for inherent defects; Bailee-users liability for negligent injury to aircraft; Aviation accident liabilities; Insurance and aviation exclusion clauses; and The Civil Aeronautics Act.

INTERNATIONAL AVIATION

In the international field, the coming into being of ICAO is the outstanding development of the year. L. Welch Pogue, a member of your committee, was one of the seven official delegates to the First General Assembly of ICAO from the United States. The permanent Convention signed at the International Civil Aviation Conference held in Chicago from November 1 to December 7, 1944, was ratified by more than the requisite number of 26 nations and came into effect in the spring of 1947. PICAQ was thus replaced by the permanent ICAO. Montreal, Canada, is the permanent headquarters of ICAO.

ICAO is affiliated with, though not a constituent part of, the United Nations Organization. To achieve this relationship, it was necessary for the First Assembly of ICAO, held in May, 1947 in Montreal, to expel Spain from membership in ICAO. This was done as a matter of high policy pursuant to action taken by the United Nations in December, 1946, requiring the expulsion of Spain from any international organization as a condition to affiliation with the United Nations. This will not interfere with bilateral or other air transportation agreements with Spain which are not covered by the ICAO Convention.

At the First Assembly of ICAO, final action was taken liquidating the Committee of International Legal Experts, usually referred to as "CITEJA" (from the initials of its name in the French translation). In its place, ICAO has created within the framework of its organization a Legal Section

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¹ See, 14 JOURNAL OF AIR LAW AND COMMERCE, 217 (1947).

whose function it is to carry on the work formerly done by "CITEJA." It will thus have the responsibility of developing conventions for international acceptance on legal matters such as those formerly falling within the jurisdiction of "CITEJA," *i.e.*, the Warsaw Convention, Rome Convention, Convention on the Recording of Rights in Rem in Aircraft, Convention on Legal Status of the Aircraft Commander, and the like. International Conventions on legal matters currently under consideration by this ICAO Section are:

A. *Warsaw Convention.* No action has been taken changing this Convention; although its possible modification is one of the matters for study by the new ICAO Legal Section, as many changes to bring this 1929 Convention up to date were before "CITEJA" when it turned its work over to ICAO. Your committee is advised that the views of this Association on this matter should be presented to this Section. The particular subject which seems to be of the most interest to members of the Association is this Convention's liability limitations. As indicated in "Current Status of Aviation Law," the Warsaw Convention establishes a presumption of liability for death or injury in international air transportation and limits recovery for such death or injury to 125,000 gold francs, or \$8,291.87 in U. S. currency, unless the claimant can prove "willful misconduct." The Convention also limits the amount of damages recoverable for property damage. With proof of the cause of aircraft accidents almost impossible, the affirmative proof of either negligence, on the one hand, or of "willful misconduct," on the other, is a burden which is difficult if not impossible to meet in most cases. Many members of the Association have discussed this Convention with your committee and have expressed a feeling that the limitations on damages imposed by this Convention should be greatly increased. The recommendation set forth at the beginning of this report is directed to this subject. Because of the fact that the liability limitations, though low for our country, are deemed high in other nations who are parties to the Convention, the committee does not feel that its recommendation should go further at this time than the suggested consideration of this subject mentioned in the recommendation set forth above.

B. *Convention on the Recording of Rights in Rem in Aircraft.* Despite earnest efforts by "CITEJA" over a long period of years, and more recently by PICAQ, to reach agreement on the important subject of protecting recorded titles, liens, and the like affecting rights in aircraft, it was found impossible to complete a convention on these matters at the First Assembly of ICAO in Montreal in May, 1947. It is expected that ICAO's Legal Section will take this matter up as one of its first assignments, possibly late in 1947.

C. *Convention on Legal Status of the Aircraft Commander.* Although this Convention was on the agenda for action at ICAO's First Assembly in May, 1947, it was not reached for discussion. Accordingly, it was put over to the Legal Section and is now one of the matters before it.

Although it is being considered by ICAO itself, rather than the Legal Section, the "Multilateral Convention on Commercial Rights" is of interest to lawyers. Both PICAQ's First Interim Assembly in May-June, 1946 and ICAO's First Assembly held in May, 1947 tried to reach agreement on a multilateral convention effecting the establishment of international air routes (not covered by the ICAO Convention, although discussed at the 1944 Chicago Conference), and their operation, but no such agreement was achieved. It is expected that these matters will be under consideration again at a conference which may be held in Rio de Janeiro in October, 1947.

These Conventions are of great importance to the development of aviation law and your committee believes that it could render a real service by cooperation with the ICAO Legal Section.

TRAVEL RESTRICTIONS

The committee has followed up on the work approved by the Association last year on elimination of travel restrictions which are hampering international air travel. The 15% tax on travel to foreign continents has been removed and a very important Senate study under S. 111, involving public hearings, is under way. These efforts to facilitate visitor travel are of great interest to American business as a means of increasing the chief invisible factors in our foreign trade balance sheet. A Subcommittee of the Federal Air Coordinating Committee has been established to cooperate in this work. ICAO has also developed important travel facilitation recommendations. The federal officials who are working on this subject have been contacted and assistance rendered on various problems in this field.

AVIATION ACCIDENT LIABILITIES

In its progress report to the House of Delegates at the meeting in Chicago on February 24-26, 1947, the committee briefly outlined the status of the law applying to aviation accident liabilities, and suggested that the committee was giving consideration to the recommendations in the study made for the Civil Aeronautics Board which was completed in 1941.² The committee has made considerable progress with its survey and has concluded that the time has arrived for a comprehensive revision of some phases of the existing law.

The Uniform State Law for Aeronautics contains a provision stating the rule of absolute liability for damage by aircraft to persons or property on land or water. The sole method of avoiding liability under the statute is to show contributory negligence of the person on the ground, a situation which rarely occurs. The American Law Institute, in its Restatement of the Law of Torts, states that under existing law there is now recognized a strict or absolute liability with respect to engaging voluntarily in an ultra-hazardous activity, and aviation is singled out as a typical modern activity that may be properly classed as ultra-hazardous.³

In the light of the appalling automobile accident record of the past two years, and of the resurgence of serious railroad wrecks, the committee can find no justification for a rule of law which singles out aviation as the sole transportation medium which yet remains an ultra-hazardous activity. It is true that during the past few years there have been fatal aviation accidents, but there had been only three crashes involving large property damage or extensive loss of life.⁴ During the past year, there has been a series of accidents, involving principally Army C-54's converted into airline passenger aircraft. Notwithstanding these spectacular accidents which have resulted in hearings before Congressional Committees and the appointment by the President of a Special Board of Inquiry on Air Safety, aviation has reached a point where it can no longer be said that flight in aircraft of standard types is an ultra-hazardous undertaking.

Your committee is continuing its study of all phases of aviation accident liability problems and it will soon bring before the Association some very concrete recommendations. This study is being carried out in a most thorough manner as the committee does not want to bring this subject before

² Sweeney, Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation, 1941 (Printed by C.A.B.)

³ Vol. III, Restatement of the Law of Torts, Sec. 520.

⁴ Crash of B-25 into gas holder in Chicago, May 20, 1945, causing damage amounting to \$1,260,000 (38 Natl. Fire Prevention Ass'n Qu. 15); Crash of C-60 into hangar at full speed killing 8 men, and injuring 9 others, and causing property damage of \$3,00,000 (March 6, 1945). 40 Natl. Fire Prevention Ass'n. Qu. 232; and crash in July, 1945, of an Army B-25 bomber into the Empire State Building.

the Association until all the many difficult problems involved in this field have been fully explored. The absolute liability rule for injury to persons or property on land is merely used here as an illustration of the problems revealed by the work of this committee, and such illustrative use is not to be taken as a recommendation of material change in the present rule of liability. It is suggested here, and this whole subject will be developed in future reports of the committee, that the owner of an airplane should be held absolutely liable only where the aircraft is being used with his permission at the time of the alleged injury or damage, and that certain defenses available to all persons should not be denied to an airplane operator. No reason is perceived why the owner should be liable for the consequences where an aircraft is being used without the permission of the owner or by a thief. Under the present law the owner is liable if the plane crashes by reason of fortuitous circumstances entirely beyond his control, such as gunfire from an antagonist, fugitive projectiles or act of God. Such defenses are available to all other common carriers and should not be denied to airplane operators. Liability also exists because of bombs or other articles thrown out by passengers, and in the extreme case because of the impact of the body of a passenger who commits suicide by leaping from the aircraft. It is certain that the existing legal rule unfairly discriminates against the aviation industry and the committee is studying corrective measures directed to elimination of this inequity in the law.

FEDERAL LEGISLATION

Many bills relating to aviation are pending before the 80th Congress, but so far none of any consequence has been enacted into law. Senator McCarran's comprehensive bill (S.1) which rewrites the Civil Aeronautics Act so as to regulate contract carriers and bring the Act up to date in other respects is still pending before the Senate Committee on Interstate and Foreign Commerce. H.R. 1699, which is similar to S. 1 is pending before the House Committee on Interstate and Foreign Commerce. Senator McCarran's S. 269 and its companion bill in the House (H.R. 1540), creating an Independent Air Safety Board have been the subject of hearings but no action reporting either bill has yet been taken, although preliminary reports have been made by the committees on air safety in general. The legislation designed to prevent multiple taxation of air carriers remains as reported in "Current Status of Aviation Law." Bills are pending before both the House and Senate dealing with the subjects of consolidation of air carriers in international air transportation and surface carrier participation in air transportation, *i.e.*, the so-called "chosen instrument" and "surface carrier" bills. In the Senate they are known as S. 197 and S. 987; and in the House as H.R. 1698, H.R. 1699, H.R. 2827, H.R. 2828, H.R. 2829, and H.R. 2830. Hearings have been held by both the House and Senate Committees. As of this writing, no report has been made to either the House or the Senate. The battle is not only between those carriers who believe in regulated competition in foreign air transportation and those who believe in the "chosen instrument," but also between the surface carriers and the air carriers.

AIRPORTS AND INTERFERENCE TO ADJACENT PROPERTY OWNERS

The decision of the Supreme Court of the United States in *Causby v. United States*, 328 U.S. 256 (1946) has caused considerable discussion of the legal problems involved in the conflicting interests and rights of airport owners and those of adjacent property owners. In the *Causby* case the Supreme Court held that while there is no general ownership in airspace, "the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." In that case, the Federal

Government was required to pay for an easement over certain property adjacent to an Army airport when it was found that Army planes flew so low over this property as to interfere with its use.

Since the *Causby* decision, two courts of original jurisdiction have issued injunctions restraining the development of private airports. One of these cases was that of *Antonik v. Chamberlin*, 235 C.C.H. §2310, in which the Ohio Court of Common Pleas for Summit County on December 2, 1946, restrained the development of an airport near Akron, Ohio, on the ground that it would materially impair the value of adjacent property and cause repeated and continuing acts of trespass and nuisance. The other case is *Crew v. Gallagher*, 235 C.C.H. §2311, where the Pennsylvania Common Pleas Court for Chester County on December 23, 1946, on similar facts held that the airport would constitute a private nuisance. Your committee understands both of these cases have been appealed, but they amply demonstrate that there will be an active area of litigation for many years as the rights of landowners and airport owners are adjudicated by the courts.

AVIATION EXCLUSION CLAUSES IN INSURANCE POLICIES

The summary statement of the law on this subject in "Current Status of Aviation Law" remains unchanged by the recent decisions on this subject.

WORKMEN'S COMPENSATION

During the past year three very interesting cases involving workmen's compensation for injury to persons engaged in aviation occupations have been reported. In *United Airlines v. Industrial Commission*, 175 P. (2d) 751, an airline stewardess employed in California was killed in a crash in Utah. The Supreme Court of Utah on December 18, 1946, held she was not covered by the Utah compensation act. In *Fliteways, Inc. v. Industrial Commission*, 24 N.W. (2d) 900, the Supreme Court of Wisconsin on November 26, 1946, held that the Industrial Commission's finding of fact that a flight instructor was not engaged in acrobatic flying at the time of his death and therefore acting outside the scope of his employment, was binding on the court. The decision was based in part on the fact that there was no showing as to whether the instructor or the student was flying the dual-controlled plane at the time of the crash. In *Duskin v. Pennsylvania-Central Airline* (March 18, 1947), a federal district court in Tennessee recently held that where a pilot was killed in a crash in Alabama the workmen's compensation act of Pennsylvania governs rather than the law of Alabama, because the contract of employment specifically provided that the Pennsylvania compensation act was to govern.

The three cases just reviewed indicate some of the problems which can arise in the workmen's compensation field. The workmen's compensation statutes of many states seem to be inadequate so far as coverage of various phases of aviation is concerned and your committee is giving attention to possible remedies of this situation.

Respectfully submitted,

CHARLES S. RHYNE, *Chairman*
SUEL O. ARNOLD
WILLIAM P. MACCRACKEN, JR.
W. PERCY McDONALD
L. WELCH POGUE

Recommendations submitted by the Aeronautical Committee to and approved by the Annual Meeting of the American Bar Association at Cleveland in September, 1947:

Resolved, That the American Bar Association urges the International Civil Aviation Organization to consider an increase in the

present presumptive liability limitation of \$8,291.87 on damages for death or personal injury in international air transportation imposed by the Warsaw Convention.

Resolved, That the Committee on Aeronautical Law be and it hereby is authorized to cooperate with and furnish pertinent information to the Legal Section of the International Civil Aviation Organization International conventions and agreements under consideration by that Section.

AVIATION LAW MEETING AT 1947 ANNUAL CONVENTION OF THE AMERICAN BAR ASSOCIATION

On September 24, 1947 the Committee on Aeronautical Law of the American Bar Association held an aviation law meeting in Cleveland in conjunction with the Annual Convention of the Association. Under the direction of Charles S. Rhyne, Chairman of the Aeronautical Law Committee, there was presented a distinguished panel of aviation legal experts which devoted its attention to several of the current problems in the field of aviation law.¹ As an indication of the growing interest now being experienced by practicing lawyers in the problems of aeronautical law and the realization on their part of the increasing importance of this field in the general practice of the law, attorneys from all parts of the Nation attended the three-hour meeting, many of them coming to the American Bar Association Convention to attend this aviation law meeting. All present listened with great interest to the opening statement of the meeting, in which the Honorable Pat McCarran, Senator from Nevada and the leading Congressional authority on legislation affecting aviation, declared his belief in the necessity for changes in presently existing Federal aviation legislation. The Senator observed that the Civil Aeronautics Act of 1938, which he authored and successfully sponsored, is not now adequate in all respects to meet the conditions which have resulted from the recent unprecedented development of civil aviation and expressed the hope that remedial legislation would be forthcoming in the near future but declined to predict the form such legislation would ultimately be given by Congress.

Mr. Oswald Ryan, Vice Chairman of CAB, outlined the principles developed by a majority of the Board in recent cases to govern decisions on acquisition, merger or consolidation of air carrier routes and properties. He emphasized that the price factor had caused the most difficulty. He pointed out that in the recent United Airlines acquisition of Western Air Lines' Denver-Los Angeles route the parties negotiated at arms' length a price of \$3,750,000 and that this price was considered by the Board to exceed by approximately \$2,000,000 the original cost, less accrued depreciation, of the tangible property to be transferred. Mr. Ryan said in part:

"The Board, after disposing of other pertinent issues favorable to the acquisition, found that the purchase price would not be inconsistent with the public interest if the excess over the depreciated original cost of the physical properties were to be amortized out of the carrier's income over

¹ The panel members and their topics were: Oswald Ryan, Vice-Chairman of the CAB, "Regulatory Principles Governing Approval of Acquisition, Merger and Consolidation in the Air Carrier Field"; L. Welch Pogue, former Chairman and General Counsel of the CAB "International Aviation Conventions"; Robert P. Boyle, Assistant General Counsel of the C.A.A., "Conflicting Interests Between Airport Owners and Adjacent Property Owners"; Howard C. Westwood, Counsel, American Airlines, "The Irregular Air Carrier"; William P. MacCracken, "Status of Federal Aviation Legislation"; Henry G. Hotchkiss, "Aircraft Manufacturer's Liability for Inherent Defects"; and Suel O. Arnold, "Aviation Accident Liability Problems."

a five-year period. This indicated a disposition of the excess which would insure that the carrier's rates would not bear the cost of the excess. The Board thus required as a condition to its approval an accounting treatment by the carrier which was in harmony with its purpose, clearly stated in its opinion, to prevent that part of the price in excess of the depreciated original cost of the physical properties from ever entering into the rate base or in any manner burdening the users of the public service. The result of the Board's policy thus laid down is, in effect, to assess the stockholders rather than the public users of the service for the amount of the price in excess of the investment value of the properties for rate-making purposes and to leave the prospect of additional earnings from the expanded operation under fair and reasonable rates as the only asset accruing to the stockholders."

Mr. Ryan then referred to the dissent in this case by Chairman Landis of the Board, wherein the latter took the position that the acquisition should be disapproved unless the parties agreed to reduce the price to an amount representing Western Air Lines' investment for rate-making purposes in the physical properties being transferred. In pointing out that the dissent presented a new and interesting concept in support of its position, Mr. Ryan said:

"It asserted that in spite of the Board's condition to its approval the intangible elements in the purchase price will nevertheless work their way into United Air Lines' rates. The reason for this is, according to the dissenting opinion, that any attempt by the Board to exclude the intangible from the investment rate base would reduce United's rate of return below a level necessary for the attraction of capital and to a level which would impair the carrier's credit. The Board would therefore be compelled, regardless of its desire, to allow a return on the intangible part of the purchase price, either by including the intangibles in the rate base or increasing the carrier's rate of return upon its previously existing investment."

Mr. Ryan said that the majority of the Board thought that Mr. Landis' view was highly theoretical and based upon the assumption that the rate making process is a machine of perfection which produces a mathematically precise and reasonable return to each air carrier, and stated that the majority based its views upon the fact that United would recoup the cost of the excess by managerial effort rather than increased rates.

Mr. L. Welch Pogue reviewed the international conventions which are currently under consideration by the Legal Section of the Permanent International Civil Aviation Organization. He outlined the status of the convention on international civil aviation which was signed in 1944 in Chicago and which came into effect early in 1947. He then discussed the proposed multilateral convention on air transportation and the proposed convention on the recognition of rights in aircraft. He covered the current developments on revision of the Warsaw Convention and the status of the proposed convention on the legal status of aircraft commanders.

One effect of the post-war increase in commercial air operations upon the scope of the existing provisions of the Civil Aeronautics Act was described to the attorneys present by Howard C. Westwood in his discussion on the so-called irregular air carriers. It is well known, Mr. Westwood observed, that all aircraft operators are subject to the provisions of the Act with respect to the safety and operational phases of their activities, but that the economic phases of the operations of certain non-scheduled operators are also subject to a large extent to Federal regulation is not so generally realized. Soon after the Act was adopted in 1938 the CAB acted to exempt non-scheduled carriers from nearly all of its economic provisions and the

resulting status of such carriers continued until quite recently. With the appearance of a great number of "irregular" air carriers following the termination of the war the Board, in June, 1947, issued a complete revision of its previous regulations dealing with these carriers so as to subject them in important particulars to the economic regulation of the Act. According to the Board's regulations, "No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation" from one place to another. It is provided that the irregular common carrier must secure a letter of Registration from the Board in order to operate. Regulation of the small aircraft operator, defined as one not utilizing any single aircraft with a gross take-off weight exceeding 10,000 pounds, or three or more aircraft of at least 6,000 pounds gross take-off weight having an aggregate gross take-off weight exceeding 25,000 pounds, is less comprehensive than of those operating the larger aircraft. It was stated that the latest figures indicated 1142 applications for Letters of Registration had been received from the small aircraft operators, to whom 1076 Letters have been issued, and 103 applications received from the large aircraft operators, to whom 92 Letters have been issued. Mr. Westwood observed that the operators of the larger aircraft already constitute an important business factor and concluded that as their operations expand many lawyers will have to become acquainted with a new field of Federal regulation.

The problem of the conflict between airport operators and adjacent property owners was discussed by Robert P. Boyle, Assistant General Counsel of CAA. Mr. Boyle analyzed the problem from the viewpoint of the discretion which a court may exercise in determining whether the acts sought to be enjoined by the adjacent property owner present, in fact, a nuisance, and in determining whether, assuming the existence of a nuisance, an injunction should issue. With respect to the latter point it was stated that, as against the traditional view that the adjacent property owner is entitled to an injunction preventing further operation of the airport as a matter of right once the nuisance and damages were proven, there is a growing weight of authority to the effect that the Court may balance the conflicting public interests and exercise its discretion as to whether a final injunction should issue. Where the airport is privately owned and privately used, Mr. Boyle continued, it may be difficult to say that the public interest demands its continued operation, but it would be most difficult to envision a situation in which a publicly owned and publicly operated airport should be enjoined from continued operation where the court is allowed discretion in the balancing of conflicting interests.

At the conclusion of the panel discussion the Chairman invited questions from those present, to be directed at individual members of the panel. During this most interesting phase of the meeting Mr. Ryan was afforded the opportunity, in response to numerous questions, of elaborating upon the position of the CAB as presented in some of that body's most recent decisions dealing with new route applications and other matters concerning the scheduled air carriers. Much interest was evidenced at the meeting in the application of the Warsaw Convention of 1929 to air transportation which is international in character. It is no doubt true that this interest reflects a realization on the part of lawyers generally that the field of international air transportation will prove to be of increasing importance in the everyday practice of the law. Precisely what is "international transportation" under the terms of the Convention was one of several aspects of the Convention which was developed in answer to questions from those attending.

CHARLES S. RHYNE