

1948

## Federal

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### Recommended Citation

*Federal*, 15 J. AIR L. & COM. 442 (1948)  
<https://scholar.smu.edu/jalc/vol15/iss4/7>

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# FEDERAL

Department Editor: Walter H. Wager \*

## REVIEW OF FEDERAL AVIATION ACTIVITIES

**T**HE next depression may well be the acid test, not only of the soundness of the air transport industry, but of the wisdom of the Board's administration of the Act. Unless the air transport industry can survive the next depression without the epidemic of receiverships and reorganizations which afflicted the railroad industry during the 1930's, the Board will have failed to discharge its responsibilities." So wrote the counsel of the Air Transport Association in the third quarter of 1948.<sup>1</sup>

These were months in which the key word to carriers was "costs," a period in which government and industry tried to work out some answers to the economic realities of increasing outlays for operations and a temporary levelling off of traffic.

In connection with a decision to defer action on the request of United Airlines for an increase in the temporary rate of mail pay and the application of TWA for establishment of the current temporary rate as of March 14, 1947 instead of January 1, 1948,<sup>2</sup> the CAB announced on August 10 that it had called a conference of the domestic certificated trunk lines for August 19 to discuss "various problems relative to passenger fares and airline costs."

### THE R.F.C. STUDY

Two days later on August 12, the White House stepped into the picture with a statement that the President had held a morning conference with Chairman Harley Hise of the Reconstruction Finance Corporation, Chairman Joseph J. O'Connell of the Board, and Director James V. Webb of the Bureau of the Budget to look into airline financing problems. Mr. Truman asked the R.F.C. to "study this matter for the purpose of placing before him at an early date an appraisal of the situation together with its recommendation. The President also requested the CAB and the Director of the Budget to assist the R.F.C. in this study."<sup>3</sup>

### CAB CARRIER CONFERENCE

Then on August 19, ranking executives of 16 domestic scheduled trunk operators assembled in closed session in Washington with top CAB officials

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<sup>1</sup> See A.T.A. brief filed in *Air Freight Case* on August 19, 1948.

<sup>2</sup> The CAB press release continues, "The Board indicated its unwillingness to alter, or adjust retroactively, the temporary mail rate at the present time. In announcing the deferral of these requests the Board noted the advent on September 1 of air parcel post and the generally favorable earnings for May and June. In connection with the adequacy of all temporary mail rates the Board will continue to follow the financial status of the carriers closely."

<sup>3</sup> This seemed to meet with carrier approval, and on August 17 Chief of the R.F.C. Transportation Branch Morris Levinson was designated to direct the probe with the assistance of R. M. Seabury, head of the Air-Motor-Marine Section. Selig Altschul's comments in the September 20, 1948 issue of AVIATION WEEK appear relevant: "Before the RFC can advance a loan to a certificated airline, CAB must state that such airline, 'on the basis of present and prospective earnings, may be expected to meet its fixed charges without a reduction thereof through judicial reorganization.' This requirement alone assures 'prudent' banking judgment on the part of the RFC."

"The basic criterion in sound airline financing should be the ability of the carrier to develop sustained earning power. Under such circumstances, an air carrier may be expected to experience little if any difficulty in obtaining the necessary equipment, trust financing, or such other accommodations as may be required."

for all day talks on significant economic issues. The following figures were among those released by the Board at that time as background data for the conference:

TRENDS OF OPERATING EXPENSES, TOTAL OPERATING REVENUES AND NON-MAIL AND MAIL REVENUES OF DOMESTIC TRUNK LINE CARRIERS (MILLIONS OF DOLLARS)

Year Ended	Total Operating Expenses	Total Operating Revenues	Non-Mail Revenues	Mail Revenues
June 1946 .....	\$236	\$249	\$225	\$24
September 1946 .....	278	284	262	22
December 1946 .....	317	311	292	19
March 1947 .....	343	323	303	20
June 1947 .....	359	337	316	21
September 1947 .....	366	346	323	23
December 1947 .....	373	352	329	23
March 1948 .....	378	362	338	24

INDICES OF COSTS AND REVENUES PER UNIT OF TRAFFIC—DOMESTIC TRUNK LINES

Year Ended	Operating Expenses per Revenue Ton-Mile	Passenger Revenue per Passenger Mile	Mail Revenue per Mail Ton-Mile	Deviation of Revenue Yield From Expense
June 30, 1946.....	100	100	100	0
September 30, 1946...	102	99	112	— 3
December 31, 1946....	106	98	122	— 8
March 31, 1947.....	111	98	132	—13
June 30, 1947.....	113	100	139	—13
September 30, 1947...	115	103	147	—12
December 31, 1947....	117	107	145	—10
March 31, 1948.....	120	111	151	— 9

COMPARATIVE UNIT COSTS OF AIR CARRIERS IN RELATION TO SIZE—DOMESTIC TRUNK LINES IN YEAR ENDED MARCH 31, 1948

	Revenue Ton-Miles (Millions)	Operating Expense Per Revenue Ton-Mile	Available Ton-Miles (Millions)	Operating Expense Per Available Ton-Mile
American Airlines ....	156	52.43	259	31.50
Braniff .....	21	58.16	38	32.64
Chicago & Southern... 12		62.30	24	31.41
Colonial .....	4	89.74	6	58.27
Continental .....	6	72.30	12	35.53
Delta .....	21	57.10	46	26.49
Eastern Air Lines....	106	50.04	207	25.77
Inland .....	3	71.15	5	44.63
Mid-Continent .....	9	65.80	15	38.83
National .....	15	68.00	37	26.56
Northeast .....	6	95.76	11	51.17
Northwest Airlines... 38		57.33	63	34.09
Pennsylvania - Central 33		62.57	66	31.38
Transcontinental & Western .....	104	54.46	164	34.48
United Air Lines....	139	51.10	229	30.95
Western Air Lines.... 16		62.46	29	35.35

Problems of financing and second-class air transport were omitted by mutual agreement, and most of the discussion was devoted to the advisability of increasing passenger fares 10% and its effect on total revenue receipts. In addition, plans for "promotional" tariffs and advantages of charging for in-flight meals to passengers were considered. The Board was given first-hand information from the airline presidents as to their individual financial problems and a variety of conflicting recommendations were made as to the best manner of increasing non-mail revenue. At the close of the meeting, Mr. O'Connell recommended that the "Big Five" airlines voluntarily increase all fares 10% and other carriers increase their fares to this level on competing

services. When one large carrier refused to increase fares on its premium DC-6 service, the CAB Chairman, after meeting with the representatives of the "Big Five," announced on August 29, a stalemate, and that the Board would not compel a raise in fare.

Then it was announced that load factors for the 16 domestic trunk operators had declined from 67.4% in the first half of 1947 to 59.7% during the initial 6 months of 1948, with the loss being attributed to a slight fall in passenger traffic and the addition of 398,000,000 seat miles offered on new aircraft. Reports filed with the Board registered a scant 1% decrease in the number of persons moved.

#### BOARD FIGURES ON FINANCING

Meanwhile the R.F.C. study went ahead quietly,<sup>4</sup> being aided somewhat by the publication in mid-August of the CAB Analyses Division's useful report on "Comparative Costs of Air Carrier Capital." Revised through December 31, 1947, this standard reference work supplied the following data:

##### EQUIPMENT MORTGAGE LOANS TO DOMESTIC AIR CARRIERS

Year	Number of loans	Amount	Average rate of interest*
1935	1	\$3,136,664	4.00%
1936	2	1,299,600	5.05
1937	6	1,090,968	5.08
1938	4	132,263	4.90
1939	12	1,912,190	4.01
1940	20	4,985,670	3.03
1941	17	2,854,400	3.09
1942	2	253,812	2.81
1944	1	170,627	2.50
1945	6	2,987,478	2.26
1946	10	7,408,735	2.44
1947	4	7,190,480	3.11

\* Weighted by amount of loans.

##### PROCEEDS AND COST OF FLOTATION FOR PREFERRED STOCK ISSUES OF DOMESTIC AIR CARRIERS

Year	Number of issues	Gross proceeds	Avg. Flotation cost—% gross proceeds size of issue	Und'writers spread	Other expenses	Total
Total*	8	\$78,103,510	\$ 9,762,939	2.92	0.59	3.51
1936	1	350,000	350,000	14.93	5.41	20.34
1938	1	98,010	98,010	18.38	5.07	23.45
1940	1	5,250,000	5,250,000	2.86	0.61	3.47
1941	1	1,875,000	1,875,000	9.00	1.50	10.50
1943	1	10,503,200	10,503,200	2.16	0.95	3.11
1946	1	40,800,000	40,800,000	1.96	0.26	2.22
1947	2	19,227,300	9,613,650	4.51	0.88	5.39

\* Excludes preferred stock issue of Continental Air Lines, Inc., which was privately sold to the Phillips Petroleum Company.

<sup>4</sup> On September 9, some idea of the scope of the RFC analysis was revealed when the CAB released the text of a comprehensive questionnaire which had been circulated among the carriers asking them to set forth their equipment financing problems for the next 18 months. A day later the Directors of the A.T.A. authorized general distribution of comparative financial and operating statistics, material previously available only to ATA and IATA members. (These figures may be procured from the Airline Finance and Accounting Conference, 1107—16th St., N. W., Washington 6, D. C., for \$300 a year.)

PROCEEDS AND COST OF FLOTATION FOR COMMON STOCK ISSUES OF DOMESTIC AIR CARRIERS

Year	Number of issues	Gross proceeds	Avg. Flotation cost—% gross proceeds			Total
			size of issue	Und'writers spread	Other expenses	
Total*	25	\$48,816,297	\$1,952,652	7.86	1.46	9.82
1936	2	6,848,407	3,424,204	3.61	2.77	6.38
1938	1	98,956	98,956	15.20	2.69	17.89
1940	7	7,094,088	1,013,441	9.90	1.72	11.62
1941	2	1,155,327	577,664	16.62	2.52	19.14
1943	3	7,250,000	2,416,667	10.99	0.98	11.98
1944	3	3,802,063	1,267,354	9.33	1.90	11.24
1945	2	6,421,976	3,210,988	6.02	0.75	6.77
1946	3	12,332,980	4,110,993	5.68	1.02	6.70
1947	2	3,812,500	1,906,250	11.54	1.42	12.97

\* Excludes stock offerings which, by virtue of special circumstances attending the offering, are not comparable on a cost basis. These had gross proceeds of \$9,320,112, of which an average of 4.25% was cost of flotation.

### ACC DEVELOPMENTS

On August 24 Executive Order 9990 named the Treasury Department to membership on the Air Coordinating Committee. Treasury interest is connected with the ICAO joint support program as well as the Coast Guard operation of North Atlantic weather ships.

### THE FLORIDA FEEDER DECISION

September 1 saw the CAB deny applications of Florida Airways, Inc., to extend its route to 15 additional cities in Florida and its existing temporary certificate which expires March 28, 1949 for another 5 years.<sup>5</sup> The cost factor appears to have been decisive. The Board analyzed the applicant's operations from January 10, 1947 to May 31, 1948 and found that the total cost to the government in the form of mail pay will exceed \$707,000 or \$58.81 per passenger, as compared with an average cost to travelers of \$7.10.<sup>6</sup> Concluded the CAB:

"We fully realize that this decision places the applicant in an unenviable position and we do not mean to imply herein that the apparent failure of the experiment is due to want of diligence on its part. Nor do we lack faith in the function of local and feeder air service when established in an area characterized by terrain and geographical conditions which impede efficient surface transportation between communities of substantial size and consequently create a need for air service. We were willing to associate with the airline in a joint venture to test the efficacy of local and feeder air service in Florida with full recognition of the limited possibilities of success. As we approach the expiration date of our commitment and view the fruits thereof, we are obliged to face the realities. In our judgment, the dictates of a sound development of air transportation militate against continued experimentation with public funds in

<sup>5</sup> *Additional Service to Florida Case*, 8 CAB — (Serial E-1902, September 1, 1948.)

<sup>6</sup> The other feeder certificates have the following expiration dates: Air Commuting (nonoperative), Nov. 7, 1950; Arizona Airways (nonoperative), June 29, 1951; Central Airlines (nonoperative), May 14, 1950; Challenger Airlines, March 31, 1949; Chesapeake Airways, Oct. 1, 1948; Empire Air Lines, Sept. 28, 1949; Iowa Airplane Co. (nonoperative), June 29, 1951; Island Air Ferries (nonoperative), Aug. 15, 1951; Los Angeles Airways, Oct. 1, 1950; Monarch Air Lines, March 31, 1949; Parks Air Lines (nonoperative), March 31, 1951; Piedmont Airlines, Dec. 12, 1950; Pioneer Air Lines, Nov. 14, 1949; Robinson Aviation (nonoperative), June 28, 1951; Southwest Airways, Nov. 22, 1949; Trans-Texas Airways, May 14, 1950; Roscoe Turner Aeronautical Corp. (nonoperative), Feb. 6, 1951; West Coast Airlines, Nov. 22, 1949; E. W. Wiggins Airways (nonoperative), Dec. 13, 1949; Wisconsin Central, Oct. 3, 1950; Yellow Cab Co. of Cleveland (nonoperative), March 3, 1951.

this area without more positive assurance that the proposed service would be responsive to a vigorous public need and that it could eventually be operated at a reasonable cost to the Government commensurate with the service used."

This decision was hardly encouraging to some of the other feeder <sup>7</sup> operators having difficulty in developing good load factors, and trunk line representatives in Washington anticipated increased efforts to organize popular and political support for the Board to continue its "experiment" in local services.

#### THE FREIGHT FORWARDER DECISION

Prospects for increased revenues from the penetration of the cargo market by the scheduled carriers were somewhat confused by the Board's September 8 opinion letting forwarders into the field of air transport under a 5 year exemption order authorizing letters of registration. This 3-1 decision <sup>8</sup> in the *Air Freight Forwarder Case* had a cool reception from the scheduled airlines who remained unconvinced that it would have a favorable economic impact, despite the CAB view that this "sort of diversion will take nothing from the industry as a whole and its possibility will be a compelling incentive for each carrier to render service fully adequate to the needs of this shipping public."

Some 54 freight forwarders were initially approved, but on October 25 attorneys representing 15 domestic airlines filed petition in the Seventh Circuit Court of Appeals in Chicago for judicial stay of the decision. It was alleged that (1) forwarders will ship via carriers having rate spreads, and the airlines, which generally have no spreads, would be forced to provide them or lose business; (2) inauguration of forwarder operations would cause a large reduction in airline revenues which could not be recouped if the Court reverses the Board; (3) non-certificated cargo lines would be in a position to cater to forwarders; (4) consolidation of shipments would cost the airlines freight revenue; (5) consolidation of shipments would waste space and load capacity, intensify congestion which now exists at the close of business days, and would require scheduling of additional aircraft and employment of additional personnel over what would be required if consolidation is not permitted; (6) operation of a number of middlemen would impair carrier-shipper relationships built up at great expense in time and effort; (7) diversion of business from contract cartage operators by forwarders would raise airline handling costs; and (8) failure to stay may encourage public investment in businesses which may later be lost through economic reasons or by legal action if the decision is reversed.

#### THE NATIONAL DISMEMBERMENT

An unprecedented action on September 28 saw the CAB institute a proceeding <sup>9</sup> to consider the dismemberment of National Airlines and the parceling out of that carrier's major routes and equipment to Pan American, Eastern, Delta, and/or other appropriate operators. It was announced that a pre-hearing conference would take place on December 1.

The order cited as authority the entire Civil Aeronautics Act of 1938 and particularly sections 205(a) and 1002(b). Since then, the Board has stated

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<sup>7</sup> Legal means are probably open to Florida Airways to prolong the life of its certificate somewhat. It may be that Section 9(b) of the Administrative Procedure Act, which provides for continuance of a temporary certificate, will be utilized.

<sup>8</sup> *Air Freight Forwarder Case*, CAB Docket 681 *et al.*

<sup>9</sup> CAB Docket 3500, Order E-2025.

it did not claim that it has the power to transfer the certificates and property involved but merely that it is in the public interest to investigate the question. The possible impact of such action upon air carrier securities has been analyzed by top executives of a number of lines, and the industry has not committed itself on the overall merits of this proceeding.

#### AIRLINE EFFORTS

Concerned lest the rising rates diminish passenger traffic, ATA Executive Vice President Robert Ramspeck called a meeting in Washington of transportation leaders during the 3rd week of September to plan for pressure to repeal the irksome 15% tax on passengers and 3% levy on carriage of property. The elimination of this war excise, which brought the U.S. Treasury \$519,000,000 in 1947, would more than compensate the public for the increases and also decrease carrier accounting expense.

Both the Board and the industry continued to show the keenest interest in every possibility of reducing costs. Eastern Air Lines' semi-annual staff conference to assure the most efficient operation was held in Miami starting September 20, with 3 CAB members and 7 high staff advisors attending at Captain E. V. Rickenbacker's suggestion. He told the 300 Eastern executives and the special guests that the purpose was to improve "the efficiency and economy of our operations, plan for better performance, and aim at increased revenues and the lowering of our costs."

All during this time, the scheduled operators were continuing to alter and adjust their passenger rates in efforts to increase total dollar revenues. Generally, rates went up 10 percent, but the effects of the rise were partially vitiated by special plans such as half-fares for wives and children who might accompany travelers in the early part of the week, reductions on round-trips, etc. Capitol Airlines made the most progress towards penetration of a great untapped traffic potential by initiating reduced fare night service between New York and Chicago in a coach type of operation. This was authorized by the Board despite the objections of competing lines, and it is being watched with considerable interest.

Other branches of the federal government concerned with aviation were also looking into the matter of expenditures.<sup>10</sup> Having examined the widespread and varied operations of his staff, Civil Aeronautics Administrator Delos W. Rentzel reorganized the structure of the CAA in an expected effort to eliminate duplication of effort, consolidate functions, and reduce personnel. Among the major objectives of this carefully planned program was the reduction of costs.

Despite the gravity of carrier finances, government and industry alike appeared to agree that there was little time for pessimism. Working separately and together, they painstakingly examined and reexamined the involved problem of costs as the Winter of 1948 approached.

W. H. W.

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<sup>10</sup> On September 18, the Department of the Air Force threw further light upon its work on cost control. It announced that "... when modern business management was first considered for the Air Force, the need for cost control was apparent, but the method of application was not so evident ... comparison on a functional basis is valid for the majority of Air Force Activities ... It should be stressed, however, that cost control in the Air Force is not primarily an *accounting* system, but a *reporting* system ... " This selection is from "THE AIR FORCE APPROACH TO COST CONTROL," a special report issued as Supplement No. 3 to the Air Force Day Kit distributed by USAF Public Information Office.

1948 REPORT OF AMERICAN BAR ASSOCIATION COMMITTEE ON  
AERONAUTICAL LAW

The past year has been one of unusual development in the field of aeronautical law. An accumulation of court decisions growing out of the War and the general expansion of civil aviation have been decided by the courts on many new and novel questions. New legislation and new international agreements have been drafted and adopted. The President's Air Policy Commission<sup>1</sup> and the Congressional Aviation Policy Board<sup>2</sup> have both released reports of great value and significance to the aviation industry. These reports will have a tremendous effect on the law in this field.

## TORT LIABILITY

A. *International Air Transportation.*

Your Committee has communicated to the Legal Committee of ICAO the recommendation adopted by the House of Delegates at the 1947 Convention urging consideration of an increase in the present presumptive liability limitation of \$8,291.87 on damages for death or personal injury in international air transportation. Active consideration of this amendment and various other modifications of the Warsaw Convention is now being undertaken by the Legal Committee of ICAO. The United States Representatives to this Committee are the General Counsels of the Air Transport Association, CAB, and CAA.<sup>3</sup> Your Committee believes that since the Air Transport Association is opposed to modification of the Warsaw Convention and since the CAB and CAA are both required by statute to foster the air transport industry, and likely to be too greatly influenced by the industry's views on this subject, a broader and more representative group should be chosen to represent the United States in the consideration of this important matter.

The past year witnessed the first instance in which any court has allowed a jury to determine whether the Warsaw Convention limitation of \$8,291.87 was avoided by an air carrier's "willful misconduct." The case resulted in a finding of "willful misconduct" and a verdict of \$25,000 for personal injuries occurring in a crash while the plaintiff was on a flight from Washington, D. C., to Mexico City. The case is that of *Ulen v. American Airlines*, 1948 U.S. Av. R. 161, which was submitted to a jury by Justice Bailey of the U.S. District Court for the District of Columbia, on April 20, 1948, under a charge that the jury could find willful misconduct "if the carrier, or its employees or agents, wilfully performed any act with the knowledge that performance of that act was likely to result in injury to a passenger, or they performed that act with reckless and wanton disregard of its probable consequences." The willful misconduct in this case was alleged violations of certain safety regulations prohibiting flights within 1,000 feet of obstructions, and the Court on this phase of the case charged as follows: "Now, the mere violation of these, of one or more of these rules or regulations, even if intentional, would not necessarily constitute wilful misconduct, but if the violation was intentional with knowledge that the violation was likely to cause injury to a passenger, then that would be wilful misconduct, and, likewise, if it was done with a wanton and reckless disregard of the consequences."

The case is being appealed and should result in the first authoritative interpretation of this very important convention, by an appellate court.

In an interesting ruling the New York Supreme Court of New York County on May 6, 1947, held in the case of *Sheldon v. Pan-American Air-*

<sup>1</sup> See 15 J. Air L. & C. 69 (1948).

<sup>2</sup> See 15 J. Air L. & C. 217 (1948). Summary of reports has been omitted.

<sup>3</sup> For subsequent non-governmental appointees see 15 J. Air L. & C. 323 (1948).



*ways, Inc.*, 2 Avi. 14,566, that a provision in the ticket of Pan-American Airways requiring written claim for damages within 30 days of injury was consistent with the terms of the Warsaw Convention, and would not be stricken as a defense.

The Rome Convention, dealing with liability of air carriers for damage on the surface, the Brussels Protocol dealing with insurance, and the Draft Collisions Convention are on the working program of the ICAO Legal Committee. A subcommittee has been appointed to make a study of the basic documents involved. Work is actively going forward in this subcommittee.

#### *B. Domestic Accidents.*

Your Committee has been giving consideration to the whole subject of aviation accident liability as outlined in its report of last year. Four members of your Committee attended a meeting of the Committee on Uniform Aeronautical Code of the Commissioners on Uniform State Laws held in Washington, D. C., on May 21, 1948, at which proposals for reviving the Commissioners' proposed Uniform Aeronautical Code were discussed. No conclusions have yet been announced as to the advisability of such revival.

Your Committee has not yet completed its study of this very important subject of tort liability. The investigation made so far reveals that there are many important and difficult questions involved in attempting to draft either Federal or state legislation. These proposals must be fully explored before the Committee will be in a position to make recommendations for action by the Association.

#### LEGAL COMMITTEE OF ICAO

The Legal Committee of ICAO was organized at its first meeting held in Brussels in September, 1947. The Committee is, in effect, the successor to CITEJA (formed in 1926), which has gone out of existence. The Committee is organized within the framework of ICAO, but it is not the legal adviser of ICAO and it seems to be the plan that it shall render no legal opinions. Its principal function is to develop and, from time to time, review certain international conventions. It is not yet clear how inclusive this assignment will be. For example, there has been no disposition to ask this Committee to take jurisdiction of the development of the Multilateral Convention on International Air Transport which has met with so much difficulty. That is probably because the issues are primarily economic and political rather than legal in nature. In practice, it seems probable that the Legal Committee of ICAO will receive its assignments from the Council of ICAO and that such assignments will be made where the legal issues are not overshadowed in importance by other international issues calling for direct participation by the high policy makers of governments.

#### DRAFT CONVENTION CONCERNING THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT

In 1931 CITEJA first produced a draft convention relating to mortgages and other secured interests. Not much further progress was made until recently. With the extraordinary stimulus to international air transport operations growing out of the recent war, the matter has been reactivated. It has received much attention since 1944. It has reached a stage of development where a draft convention is on the agenda of the Second Assembly of ICAO, to be held in Geneva in June 1948, for finalization and opening for signature.<sup>4</sup>

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<sup>4</sup> This multilateral convention was accepted and signed at Geneva, June 19, 1948. For text, see 15 J. Air L. & C. 348 (1948).

This draft convention represents the culmination of an enormous amount of effort to achieve a workable convention. In effect, it provides for the protection of title to aircraft and of various liens thereon, if properly recorded under the terms of the convention, insofar as it has been possible to achieve agreement. This convention (which will of course be a treaty) will be of great value to the owners, and to those interested in the financing, of aircraft used internationally. It contains provisions designed to protect innocent third parties on the ground who suffer damage resulting from operation of such aircraft on international flights.

#### PROPOSED AMENDMENT TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

This is the Convention under which ICAO is constituted. The most interesting proposal in respect to the amendment of this Convention relates to Article 94 thereof. That Article provides that:

"(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

"(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention."

A proposal for the amendment of this Article which, while it may not have the support of the United States Government, has been advanced by some advocates as a more favorable means of amending the Convention raises interesting legal questions from the point of view of the United States Constitutional lawyer. It proposes to divide all amendments into two classes: first, those relating to procedural matters; and second, those where a new substantive burden is proposed to be added or an existing substantive benefit taken away. In the case of procedural amendments, a vote of the Assembly itself (presumably two-thirds) would be sufficient. In the case of a substantive amendment, ratification would be required. If there should be a dispute as to whether or not it is procedural or substantive, an appeal on that matter could be taken to the International Court of Justice.

At the time this report is being written, it is not clear as to whether or not this type of amendment is apt to be adopted at the forthcoming Second Convention of ICAO to be held in Geneva in June.<sup>5</sup> If it should be adopted, the question would arise as to the Constitutional power of the Senate to make future amendments to the Convention binding as a part of the treaty, even if procedural in nature only, when the specific provision will not have been ratified by the Senate. As our international position as a leading aeronautical power grows, it is important that we have a workable convention. Will principles of Constitutional law permit that result without amendment of the Constitution?

#### INTERNATIONAL AIR TRANSPORT AGREEMENTS

Beginning with the Chicago International Civil Aviation Conference held in 1944, repeated attempts were made to secure international agreement to a Convention regulating the inauguration and operation of international air

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<sup>5</sup> The Second ICAO Assembly in June 1948 resolved to take no plenary action on Article 94 at that time, and two more draft amendments were prepared at the meeting of the ICAO Legal Committee.

routes. None of these efforts to date have been successful. In the meantime, the United States has entered into bilateral agreements with foreign nations authorizing the operation by United States airlines of routes all over the world. The United States is a party to 36 bilateral agreements with foreign countries, providing for the operation of international airline operations.

The culmination of efforts to establish an international convention providing for the establishment and operation of international air routes, in lieu of the present arrangement of providing for such routes by bilateral agreements, took place at a special conference called under the auspices of ICAO and which was held in Geneva in the fall of 1947. This conference reached no agreement. In that respect, it had the same experience as the First Interim Assembly of the Provisional International Civil Aviation Organization (PICAO) held in Montreal, Canada, in the late spring of 1946 and as the First Assembly of the International Civil Aviation Organization (ICAO) held at the same place in the late spring of 1947. Although the conclusions of the Geneva Conference are being circulated to Member States for comment, it seems a safe observation that pending the accumulation of more operating experience and the passage of time during which additional perspective can be achieved, it is unlikely that additional conferences will be called to consider further a convention on this subject.

#### FACILITATION OF INTERNATIONAL TRAVEL

The United States Government in various ways has been endeavoring to facilitate travel, particularly air travel;<sup>6</sup> a special division of ICAO has submitted to Member States standards and recommended practices for the elimination of unnecessary barriers to travel; and many private organizations in the United States, including particularly The Committee for World Travel, Inc., representing various industries and travel service companies, have been active in efforts to eliminate unnecessary barriers to international travel.

Travel to and from foreign lands has been given two added incentives recently. Although they benefit all travellers from the United States, they will surely be of interest to those using air transportation. In 1947 the 15% transportation tax upon tickets sold in the United States for travel to and from any foreign continent was repealed; and in May 1948 the duty free allowance for goods purchased abroad by returning American residents which, since 1894, has been \$100, was increased by an additional \$300, although the time period within which these exemptions can be taken differ. The \$100 exemption can be taken every 30 days provided the resident in question stays out of the country for 48 hours. The \$300 additional exemption can be taken once every six months provided such resident stays out of the country 12 days.<sup>7</sup>

#### HELICOPTERS

The law, in adapting its principles to new conditions, is now beginning the process of adjustment to meet the special needs of an entirely new type of vehicle—the helicopter. The helicopter has the extraordinary ability to ascend and descend vertically; to proceed in any direction; to travel at any desired forward speed up to its maximum just as an automobile can do; to land and take off in a very small area (including roof tops, if properly stressed) without the use of runways, and to operate as a low-flying, slow-flying vehicle which need not generally be in the fixed-wing airplane traffic

<sup>6</sup> There is a very active Facilitation Subcommittee within the ACC organization, under chairmanship of Assistant-Secretary of Commerce John R. Alison.

<sup>7</sup> 19 USCA §1201, par. 1798.

pattern. Because of these operating characteristics, entirely new in experience, the law is called upon to adjust itself to the requirements of this remarkable vehicle. In the early period of this adjustment, the indicated need is to free the helicopter from certain laws and regulations designed for application to conventional fixed-wing type aircraft but not to helicopters.

On October 8, 1947, the Federal Government recognized this requirement when amendments to the Air Traffic Rules of the Civil Air Regulations, promulgated by the CAB with the approval of the Administration of Civil Aeronautics, became effective. Sections 60.107 and 60.201 of these rules except helicopters from certain minimum altitude and visibility requirements.

Alert states and municipalities are re-examining their laws and regulations with a similar view to opening the field of operations to helicopters where some existing legal limitation prevents that result.

The helicopter, being adaptable to mass production methods, promises to be one of the most serviceable vehicles ever invented. It presents, therefore, in such regulation as experience shows to be required, both the need for widespread general uniformity and the need for ready adjustment in some detailed respects to special state and local conditions. This will call for a high level of workable cooperation between the federal-state-municipal legal systems.

#### USE OF CAB INFORMATION IN ACCIDENT CASES

On September 26, 1947, Judge Vincent L. Leibell of the U.S. District Court for the Southern District of New York in the case of *Ritts v. American Overseas Airlines*, made a ruling which will be of interest to all lawyers engaged in trial of aviation accident cases. The ruling was that the prohibition contained in Section 701(e) of the Civil Aeronautics Act of 1938 against admission in evidence of reports of the Civil Aeronautics Board relating to any accident does not bar the use of the testimony of a witness examined by the Board on cross-examination to impeach the witness.

#### PROPELLER ACCIDENT

In *Cape Charles Flying Service v. Nottingham*, 2 Avi. 14,625, the Virginia Supreme Court on April 26, 1948, affirmed a judgment on a \$20,000 verdict for personal injuries sustained when plaintiff was struck by the propeller of an airplane. The Court found that all questions of negligence and contributory negligence had been proper matters for submission to the jury, and refused to disturb the award of damages.

#### AVIATION EXCLUSION CLAUSES

In *Faron v. Penn Mutual Life Insurance Company*, 2 Avi. 14,622, the U.S. District Court for the Western District of Pennsylvania on April 21, 1948, held that where insured was killed in the crash of a regularly scheduled aircraft while travelling as a fare paying passenger that a policy excluding double indemnity if death resulted from "aeronautic casualty" did not prevent recovery of such indemnity by the beneficiary. In the same case another policy excluding double indemnity if death resulted from "service, travel or flight in or contact with any species of aircraft" was held to prevent such recovery.

In the case of *Onstead v. State Mutual Life Insurance Company*, 2 Avi. 14,610, an aviation exclusion rider limiting liability to the amount of the reserve where death resulted "from being in or on, or operating or handling, whether as a passenger or otherwise, any kind of aircraft," was held void.

The Supreme Court of Minnesota on April 9, 1948, said that Minnesota statutes rendered such a clause unenforceable.

In *Provident Life and Accident Insurance Co. v. Anderson*, 2 Avi. 14,578, the U.S. Circuit Court of Appeals for the Fourth Circuit on March 8, 1948, held that the beneficiary of a pilot killed in the crash of a private airplane could not recover where the exclusion clause in his insurance policy excepted death as a result of "operating or riding in any kind of aircraft, except as a fare-paying passenger." The Court held the language of the exclusion clause to be unambiguous.

In *King v. Order of United Commercial Travellers of America*, 2 Avi. 14,557, the Supreme Court of the United States on March 8, 1948, affirmed a decision of the Fourth Circuit Court of Appeals that a clause excluding death from "participation . . . in aviation" barred recovery for the death of a flight observer in a Civil Air Patrol plane who drowned after the plane made an emergency landing in the ocean off the North Carolina coast after the observer had left the plane and was attempting to stay afloat by use of a life jacket.

In the case of *Conway v. Life Insurance Company of Virginia*, 2 Avi. 14,497, the Ohio Supreme Court on December 10, 1947, held that the beneficiary of an insured who was killed while serving as a bomber pilot during the war when his plane crashed into the sea could recover the full amount of the policy although there was an aviation exclusion clause excepting civil aviation risks. The Court ruled that the exemption applicable to civil aviation risks would not be construed to include military aviation risk in time of war unless clearly so expressed. The Supreme Court of Kansas on June 6, 1947, in the case of *Knouse v. Equitable Life Insurance Company of Iowa*, 2 Avi. 14,484, rendered a decision which is directly contrary to the *Conway* decision.

#### AIR CARRIER DOING BUSINESS IN STATE

In *Barr v. Eastern Airlines*, 2 Avi. 14,621, the United States District Court for the Western District of Pennsylvania on April 15, 1948, held that an air carrier which maintains an office to solicit the sale of tickets in a principal city of a state, is listed in the telephone directory and has employees at the airport near that city who assist in operating 20 flights per day from the airport is doing business in the state insofar as questions of venue and service of process are concerned.

#### RES IPSA LOQUITUR

On April 14, 1948, the U.S. District Court for the District of Columbia, in *Smith v. Pennsylvania Central Airlines, Inc.*, 2 Avi. 14,618, held that the doctrine of *res ipsa loquitur* applies to an action to recover damages for the wrongful death of passengers killed in the wreck of a transport airplane operated as a common carrier.

#### RECORDING OF AIRCRAFT CONVEYANCES

In a case of first impression the U.S. District Court for the District of New Jersey on March 19, 1948, in *the Matter of Veterans' Air Express Co.*, 2 Avi. 14,602, held that the regulatory provision of recordation of aircraft conveyances of the Civil Aeronautics Act are valid and that a lien granted under such recordation is senior to any claim established under a state recordation law affecting the same aircraft.

#### WORKMEN'S COMPENSATION

A pilot employed by Pennsylvania Central Airlines was killed in Alabama while in the performance of his duties. His contract of employment pro-

vided that all rights and obligations of the parties should be governed by the Statutes of Pennsylvania, and an action for damages against the air carrier was met with a defense that it was excluded by the provisions of the Pennsylvania Workmen's Compensation Act. A lower court decision upheld this defense but on appeal this decision was reversed even though the greater portion of the pilot's flying service was over the State of Pennsylvania, and every flight required one stop in the state. The Appellate Court held that the pilot was not a "Pennsylvania employee" within the meaning of that State's workmen's compensation act. *Duskin v. Pennsylvania Central Airlines*, 2 Avi. 14,594 (C.C.A. 6th, Apr. 14, 1948).

#### AIRPORTS AS NUISANCES

The case of *Crew v. Gallagher*, which was discussed in the Report of this Committee last year, was reversed by the Supreme Court of Pennsylvania on March 25, 1948 (2 Avi. 14,587). The Court held that plaintiffs, who had obtained a permanent injunction from the lower court against the operation of the airport on the ground that it would be a nuisance, had not sustained their burden of proof in that they had not shown any actual damage to their property or its use and they had not proved any material discomfort.

In the case of *Antonik v. Chamberlin*, discussed in the report of this Committee last year, the Ohio Court of Appeals on December 23, 1947 (2 Avi. 14,500), held that the lower court was in error in granting an injunction to restrain the development of an airport near Akron, Ohio. The appellate court held that it must weigh the conflicting interests of the parties and recognize the public policy of the present generation to promote aviation and that the damages resulting from the future construction and operation of the airport would be so speculative as to be incapable of definite ascertainment because no one could know in what manner the airport would be operated and what damages, if any, would result from its operation.

In accord with the *Antonik* and *Crew* cases above, see *Oechsle v. Ruhl*, 2 Avi. 14,418 (New Jersey Chancery, August 18, 1947).

#### AIRLINE TARIFFS

In the case of *Lichten v. Eastern Air Lines*, 2 Avi. 14,585, the U.S. District Court for the Southern District of New York on March 24, 1948, held that tariffs filed with the Civil Aeronautics Board cannot be considered rules or regulations of a public board or agency so as to be included in matters appropriate for judicial notice under the Civil Practice Act of New York. In the particular case the tariff was offered as a partial defense to a claim of \$3,000 for certain jewelry missing from baggage of a passenger. The tariff limited recovery to \$100.

#### PRESIDENTIAL APPROVAL OF CAB DECISIONS

On February 9, 1948, the Supreme Court of the United States in the case of *Chicago and Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), held that an order of the CAB which had been approved by the President as required by the Civil Aeronautics Act was not judicially reversible because such an order embodies presidential discretion as to political matters beyond the competence of the courts to adjudicate.

#### FEDERAL LEGISLATION

In its February, 1948, report to the House of Delegates, your Committee reviewed in detail all proposed Federal legislation pending in the Congress. Your Committee can now report that no significant Federal legislation has

been finally adopted by the Congress. While this report is being written before the proposed adjournment of the present Congress, it is not contemplated that any aviation legislation will be finally enacted under present plans of the Congress. More than 20 bills have been introduced to implement the recommendations contained in the report of the Congressional Aviation Policy Commission.<sup>8</sup> It is not believed by your Committee that any final action will be taken on any of this legislation at this session of the Congress if the adjournment date now set is adhered to.

#### THE RECOMMENDATION

During the past two years, while the membership of your Committee has been substantially the same, there have come to it many communications from members of the Association indicating that they would like an opportunity to participate in the work of the Committee. At the Annual Convention in Cleveland, an open forum on aviation law was held, which was attended by an estimated 75-90 members of the Association. Aviation Law Institutes described in previous reports of the Committee and special aviation law meetings held by various state and local bar associations during the past year have indicated that there is a tremendous interest in the many new developments in the field of aviation law.

All of these facts indicate to your Committee that some method should be devised to give those interested in aviation law more representation than the present five-man committee can accomplish. While your Committee is not yet ready to recommend that a Section of Aeronautical Law be created, it does believe that a step toward broader participation in the aviation law work of the Association can be accomplished by the appointment by the President of an Associate and Advisory Committee for the Committee on Aeronautical Law. If authority is given by the House of Delegates for the appointment of an Associate and Advisory Committee, this will give an opportunity to further test the interest of the members of the Association in aviation law and a more sound basis for a recommendation for or against the creation of a Section to consider this important and ever-expanding field of law.<sup>9</sup>

Respectfully submitted,

SUEL O. ARNOLD  
ROBERT T. BARTON, JR.  
WILLIAM P. MACCRACKEN, JR.  
L. WELCH POGUE  
CHARLES S. RHYNE, *Chairman*

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<sup>8</sup> See bills cited in footnotes in 15 J. Air L. & C. 208-224 (1948).

<sup>9</sup> The newly elected members are: L. Welch Pogue, Chairman, Washington, D. C.; Paul M. Godehn, Chicago; Charles S. Rhyne, Washington, D. C.; Palmer Hutcheson, Jr., Houston; Frederick E. Hines, Santa Monica. Members of the *Associate and Advisory Committee* are: William S. Burton, Cleveland; William A. Gillen, Tampa; Hamilton O. Hale, New York; Ray L. Nyemaster, Jr., Des Moines; Donald B. Robertson, Denver.

## SPECIAL COMMITTEE ON UNIFORM AERONAUTICAL CODE, REPORT TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The Special Committee on Uniform Aeronautical Code wishes to report as follows:

Since the appointment of the Committee the 1938 draft of the Uniform Aviation Liability Act<sup>1</sup> has been mimeographed and sent to all members of the Special Committee, members of the Public Law Acts Section, members of the Committee on Aeronautical Law of the American Bar Association (A. B. A.), members of the Committee on Aviation Insurance Law of the A. B. A., and to many other individual lawyers and organizations interested in the subject, including the NASAO. Criticisms and suggestions have been received from many sources.

Inasmuch as many of the members of the Conference were not members in 1938 at the time the draft was reported, it would seem appropriate to give a short history of the work done by the Conference in connection with the draft of the proposed Act. From 1934 to 1938 the Conference Committee on Aeronautical Law, the Committee of the A. B. A. on Aeronautical Law and a Board of Advisers of the American Law Institute worked jointly on the proposed Aeronautical Code. As a result of these joint efforts the Code was presented to the Conference in Cleveland in 1938 and was adopted.

The Conference, however, at the request of the Civil Aeronautics Authority, withheld promulgation of the Code for the purpose of allowing the Civil Aeronautics Authority to make a study of the same subject, with the understanding that a federal act probably would be drafted and introduced into Congress. During 1939 and 1940 the Civil Aeronautics Authority (Board) continued to make a study and on or about June 1941 a very comprehensive report was submitted to the Board by Edward C. Sweeney, Attorney in Charge of Staff Investigation of the Civil Aeronautics Board.<sup>2</sup> In Mr. Sweeney's report he recommended that federal legislation should be adopted along the general lines of the Code passed by the Conference.

The war intervened in December 1941 and the whole subject was left dormant during the war period and the only real attempt at federal legislation was a bill introduced in Congress in January 1945, known as H. R. 532, which bill was introduced by Congressman O'Hara. The Code passed by the Conference provided for absolute, but limited, liability as to passengers and also as to persons and property on the ground. The O'Hara Bill, as introduced, provided in the case of passengers that the carrier shall be liable for bodily injury or death, unless the carrier should prove affirmatively that the injury or death did not proximately result from a failure to use the highest degree of care on the part of itself or any of its servants acting within the scope of their employment. The O'Hara Bill died in Committee and the Congressman later introduced another bill eliminating the liability so far as passengers were concerned and treating only with the liability in connection with persons and property on the ground. This bill also failed to pass either House of Congress.

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<sup>1</sup> Reprinted, 9 J. of Air L. 726 (1938), also, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS of the 48th Annual Conference (1938) 318-347.

<sup>2</sup> SWEENEY, REPORT TO THE CIVIL AERONAUTICS BOARD OF A STUDY OF PROPOSED AVIATION LIABILITY LEGISLATION, 1941 (Printed by C. A. B., now out of print).



The Special Committee held a meeting in Washington, D. C. on May 21, 1948, at which meeting representatives of the following were present:

American Bar Association Committee on Aeronautical Law  
American Bar Association Committee on Aviation Insurance Law  
Air Transport Association  
National Association of State Aviation Officials

Edward C. Sweeney, now professor at Northwestern Law School and editor of the Journal of Air Law and Commerce, as well as the author of the Sweeney Report, and L. Welch Pogue, a former chairman of the CAB and now a member of the A. B. A. Aeronautical Law Committee, also were present.

At the meeting each one of the groups present presented their views concerning the proposed state legislation. The A. B. A. Committee on Aviation Insurance Law stated that it was their opinion that the proposed act was neither necessary nor desirable, as the law in aviation accidents had developed quite satisfactorily and that aviation should not be singled out for special treatment. The A. T. A. took a somewhat similar view, except that the Transport Association felt that a federal law would be desirable, although they were opposed to absolute liability. The NASAO took the position that the law was not needed at the present time and opposed promulgation of the Code as drafted, particularly since it imposed absolute liability. The A. B. A. Committee on Aeronautical Law seemed to feel that state legislation was desirable and felt that the draft as proposed should be revised and submitted to the states for passage. The A. B. A. Aeronautical Law Committee promised to file with the Conference Committee a report from their full committee, which will be presented to the Conference later.

After the representatives of the various groups who had been invited to the meeting left the meeting, the Conference Committee went into session and had a full discussion concerning the program to be recommended to the Conference, and after full discussion the following resolution was adopted:

"BE IT RESOLVED that the Special Committee on Uniform Aeronautical Code recommend to the Conference that the committee be continued with instructions to present a revised draft of the Act by changing the theory of the present Uniform Aviation Liability Act from that of absolute liability to that of a rebuttable presumption, or to provide that the carrier must prove that its negligence was not the proximate cause of the injury or death complained of."

The Committee feels, however, that before the revision of the Act is begun that a study of the cases should be made dating from the Sweeney Report down to the present time.

It, therefore, is recommended to the Conference that the Committee be continued and that the Conference take action to either approve or disapprove the recommendation of the Committee as contained in the above resolution. It is the feeling of the Committee that any Act promulgated or submitted to the states providing for absolute liability would have little chance of adoption, as the sentiment of all the organizations interested in aviation law seemed to be unanimous in their opposition to such a theory.

The members to the ICAO Legal Committee are having a meeting in Geneva within the next few weeks to consider a new draft of the Warsaw Convention Code and the Committee felt it desirable not to have any study made until after the report from this Convention would be available.

Respectfully Submitted,  
ROBERT K. BELL, *Chairman*  
I. M. BAILEY  
JOHN H. FERTIG

JOHN CARLISLE PRYOR  
JOHN F. SIMS, JR.  
JAMES C. WILKES  
GIBSON B. WITHERSPOON