Transfer and Recovation of Certificates of Convenience and Necessity under the C.A.A. of 1938

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THE Civil Aeronautics Board on September 28, 1948 issued an order instituting an investigation to determine whether the transfer of the routes, equipment and other property of National Airlines, Inc. (NAL), upon just and reasonable terms and conditions, would be in the public interest as defined in Section 2 of the Civil Aeronautics Act of 1938. The terms of the order in effect provided that the investigation contemplated the dissolution of NAL as a corporate entity through the transfer of its certificates of convenience and necessity, its equipment and other property to other carriers. However, finding it necessary to clarify its position, the CAB stated in a subsequent opinion that it makes no contention that it definitely has the authority to order transfers, that such issue is not a part of the Hearing.

1 Matter of the investigation of the Transfers of the Routes and Property of National Airlines, Order, Doc. 3500, Serial E-2025, Sept. 28, 1948. The investigation was begun to determine whether it is in the public interest:

(1) For Pan American to acquire NAL's New York/Newark-Miami Route 31 and the temporary terminal point Key West, Florida, except for the intermediate points between Jacksonville and Miami, plus the properties and equipment used and useful in its operation.

(2) For Delta Air Lines to acquire the New Orleans-Jacksonville and New Orleans-Miami Route 39 of National, including equipment and properties.

(3) For Eastern Air Lines or Delta Air Lines to acquire National's routes between the co-terminal points Tampa, Fla., and Miami, Fla., the intermediate point Key West, Fla., and the terminal point Havana, Cuba, together with equipment and property.

(4) For an appropriate air carrier to acquire National's local authorization Jacksonville and Miami in Florida.

In an Order Amending the Order Instituting Investigation, Doc. 3500, Serial E-2275, Dec. 8, 1948, the CAB clarified its intention concerning the consideration of prospective transferees of National's routes by stating that each carrier signifying a desire to be considered as a prospective transferee of one or more of National's routes will be considered on an equal basis with every other carrier and that the CAB in Order Serial E-2025 did not intend to prejudice the question of which carriers were in the public interest.

2 52 Stat. 973, 49 U.S.C.A. §402 (1938) (Supp. 1946). The CAB also cites as authority §§205(a) and 1002(b) — the former containing a general delegation of authority from Congress to the CAB, the latter covering the CAB's right to institute and pursue investigations on its own authority and initiative. The CAB cites as its mandate the encouragement and development of an air transportation system properly adapted to the present and future needs of United States Commerce, the Postal Service, and National Defense.

Pursuant to recommendations of the President's Air Policy Commission and the Congressional Aviation Policy Board, the CAB is engaged in an exhaustive study of the existing route pattern necessitated by the substantial growth of the nation's route pattern since the close of the war, involving an increasing amount of carrier competition over the principal route segments. Besides the investigations of NAL, the CAB contemplates investigations concerning Northeast Airlines and Western Airlines. See the CAB's Economic Program for 1949, Feb. 21, 1949.

3 National Route Investigation, Order denying NAL's motion to dismiss proceedings, Doc. 3500, Serial E-2349, Jan. 5, 1949.

4 The investigations were described as being "in furtherance of the Board's study of the air transportation system and are consistent with recommendations made earlier by the President's Air Policy Commission and the Congressional
While the Board declined to discuss its motives in any but the most general terms, it is felt by some that the strong recommendation made by the President's Air Policy Commission and the Congressional Aviation Policy Board urging revision of the domestic route pattern, as intimated by the CAB, was the mainspring of the action, that other similar proposals may be forthcoming touching other carriers, and that National was selected as the first only because a start had to be made somewhere.  

Several other factors may have entered into consideration, among them: (1) the Air Line Pilots Association strike against NAL of February 3, 1948; (2) NAL's financial position as indicated by reported losses of over $2,000,000 for the 12 months ending March 31, 1948 and by recent petitions for increased mail pay; (3) unfavorable load factors experienced by National; and (4) a proceeding brought against NAL by ALPA before the CAB seeking revocation of the carrier's certificate for alleged Railway Labor Act violations.

On March 30, 1949 “Dismemberment” Hearings were indefinitely adjourned by the CAB pending the signing of an agreement between NAL, PAA, Panagra, and the W. R. Grace Co.: (1) to interchange equipment between NAL, PAA, Panagra at Miami, and (2) to provide for stock participation in NAL by PAA at 30% and by Grace at 18%, and its filing with the CAB for approval. Though it had not been made clear up to this time that the main objective of the CAB's activity was to strengthen NAL's economy in the public interest, the adjournment order of the Board pending the completion of the interchange agreement leads strongly to this conclusion.

This raises the important question of whether the CAB, in carrying out the basic policies of the Act and in performing its duties thereunder, is authorized to initiate proceedings looking to the forced transfer of certificates of convenience and necessity on the ground that such would be in the public interest.

TRANSFER OF CERTIFICATES

Section 401(i) of the Civil Aeronautics Act provides that “No certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest.” On its face this grants a limited power to the Board to disallow a proposed agreement between two or more carriers for the transfer by the one to the other of its certificate of convenience and necessity. Though this appears to be a control measure rather than an initiating measure, it cannot validly be assumed, on this alone, that the Board will limit itself to such a construction, or that Congress intended that it be so limited. An examination of the opinions of the Board reveals no case in which this precise issue has arisen. The extent of its

Air Policy Board.” This presumably referred to suggestions of those bodies that the domestic air transport map required realignment in the light of modern conditions. See Presidential Temporary Air Policy Commission, 14 J. Air L. & C. 364-377 (1948).

Ralph Damon, president of TWA, stated he did not believe dismemberment as such, was the intent of the CAB from which the Board could choose those it felt would be in the public interest. 61 Am. Av. Daily, March 11, 1949, p. 69.

“Interchange,” as defined in transportation parlance, implies some arrangement, to which carriers are parties, for the through transportation of freight or passengers as one joint transaction which does not require intervention of the shipper and a new contract of carriage at the connecting point. Motor Haulaway-Contract Carrier Application, 27 MCC 19, 24 (1940).

This corroborates the view taken by Damon in note 5 supra.

opinions has been limited to the scope of those words of the subsection: “consistent with public interest.” Generally in proceedings involving transfers of certificates or of assets under Sections 401(i) and 408(a) respectively, it was concerned with the overall reasonableness of an agreement or arrangement initiated by the carriers themselves, approval or disapproval being determined upon the basis of their findings with respect to the effect of such arrangement on air transportation.10

A review of the legislative history of the Act does not give too much assistance. All of the bills which came before Congress in the nearly four years preceding the Act of 1938 to regulate various phases of the aviation industry contained provisions concerning the transfer of certificates.11 A significant feature is their literal reference to only voluntary transfers, as is the case under the counterparts in the Interstate Commerce Act. Hence, if any construction of them is made to include a forced transfer on the CAB's own initiative, it must be entirely by implication.12

During the Congressional hearings on the many bills looking to regulation of civil air transportation,13 preceding the Civil Aeronautics Act, only twice was mention made of the section involving transfers of certificates.14 The first was in the Hearings on H.R. 5234,15 where Mr. Jacobson, then Commissioner of the I.C.C. referred to the ambiguous wording of Section 305(i)16 as containing "the usual provisions with respect to transfers." This seems to be a reference to the existing provisions of the Interstate Commerce Act since H.R. 5234 provided that the administration of the proposed Act was to fall to the I.C.C. While this application over such a long period of time is by no means controlling, it may have a tendency to show a circumscription of power.

Despite the changes in subsequent draft bills the substance of the relevant provisions remained the same. What changes there were only set forth

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9 That Section of the Civil Aeronautics Act dealing with Consolidations, Mergers, and Acquisitions of Control.
11 For a brief and concise history of many of the legislative proposals leading up to the Civil Aeronautics Act of 1938, see RHINE, CIVIL AERONAUTICS ACT ANNOTATED (With the Legislative History Which Procured It and the Precedents Upon Which It is Based) (1939). Chapter 8 and 9.
12 It is important to note that the Supreme Court, though speaking of the I.C.C. has held that Commissions are agencies of limited powers and authority; that while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the Act by implication but should be conferred in clear and unmistakable terms. Thompson v. U.S., 246 U.S. 547; U.S. v. Pa. Ry. Co., 242 U.S. 208; I.C.C. v. Cincinnati, N.O. & T.P. Ry. Co., 167 U.S. 479.
13 Though the bills introduced in the 75th Congress, 3rd Session, were in certain respects radically different from those of the preceding three years the provisions on transfers is essentially similar. To that extent the construction given them in the hearings may be significant in interpreting the Civil Aeronautics Act. Particularly is this shown to be true when Congress demonstrated the ease with which changes were made and inserted into a provision of a bill to show a change in meaning and intent over its predecessors. See Hearings before the Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess. (1938) 41.
14 Though it is arguable that this indicates a lack of appreciation of the problem it is also probable that they considered the meaning generally too well understood to give extended time to it in their debates. As evidence of this see quotation of Mr. Jacobson in text immediately following note 16 infra.
15 Hearings before the Committee on Interstate and Foreign Commerce on H.R. 5234, 75th Cong., 1st Sess. (1938).
16 Id. §305(i) provided that: "any ... certificate ... to engage as an air carrier in interstate air transportation ... may be transferred pursuant to such rules and regulations as the Commission may prescribe."
more clearly the administrator's duty to protect the public interest in authorizing a transfer. This is borne out by the only reference to this provision in the Hearings. During the Hearings on H.R. 9738, Mr. C. M. Hester stated that "(Previous bills) provide that a certificate may be transferred under rules and regulations to be prescribed by the Interstate Commerce Commission. The present bill, on the other hand, provides that a certificate may be transferred only upon approval of the Authority. The provision in H.R. 7273 does not appear to be sufficient to authorize the Interstate Commerce Commission to prohibit the transfer of a certificate in the event that the transfer would be adverse to the public interest. Since, in many cases, the issuance of a certificate may depend upon the ability and integrity of the persons receiving it, it was considered advisable to include a provision which would clearly empower the Authority to prevent an undesirable transfer."18

This appears to include more than the statement that the change consisted of clarifying the conditions precedent to transfer, i.e., in the public interest, and to circumscribe the legislative purposes of the provision for transfer, namely to prevent transfers, under certain circumstances, which were initiated by the carriers themselves. What doubt may have existed concerning the somewhat ambiguous language in predecessor bills is diminished by this interpretation.

It is also significant to note the similarity between Section 401(i) concerning transfers, and Section 408 concerning Consolidations, Mergers, and Acquisitions of Control. Section 401(i) provides that "No certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest." Similarly, Section 408 makes it unlawful for any carrier to consolidate, merge, or acquire control over any other carrier "unless approved by the Board as . . . consistent with the public interest." The CAB cases concerning Section 408 thus far have required only the approval of a plan formulated and initiated by the carriers, but an elaboration by analogy can be shown in the construction given to counterparts in the Interstate Commerce Act, upon which Section 408 was modeled in principle.20

In the only known case to come before the Commission in which this question was considered, it stated broadly that the provisions of the Interstate Commerce Act do not provide for compulsory consolidation. The idea was considered by Congress and rejected, the provisions of the Interstate

17 C. M. Hester reporting on changes made in H.R. 9738 over the previous bill reported by this same Committee. Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 9738, 75th Cong., 3rd Sess. (1938) 41.

18 These views are particularly significant in view of his being the first administrator of the Act, and chairman of the Drafting Subcommittee of the Interdepartmental Committee which drafted H.R. 9738 and which is imputed to be indirectly responsible for the wording of §401 of the Act.

19 It is submitted that §401(i) is merely another phase of §408, both being closely related in principle as well as in phraseology.

20 Rhyne, CIVIL AERONAUTICS ACT ANNOTATED (1939), at p. 99; See Acquisition of Marquette by TWA, 2 CAB 409, 412: "The reports of the Congressional Committee hearings held prior to the enactment of the Civil Aeronautics Act likewise indicate an intent to provide the same general type of regulation for Air Carriers as was provided for Railroads and Motor Carriers and it was desirable to pattern the Civil Aeronautics Act upon such prior legislation in order to avoid confusion of interpretation since that legislation was not new or untried but embraced definite policies built up over a period of years." See also the Caribbean Area Case, 9 CAB 554 (Serial E-1981, Doc. 2246 (1948), p. 21).
Commerce Act regarding consolidation and mergers having purpose without such construction.  

In view of the restrictive nature of the language and the interpretation thus given to it by the Congress, it is difficult to understand how the Board can construe a different legislative intent from the broader policy provisions. This of course need not preclude argument that the overall policies of the Act as set forth in Section 2 could not be wholly effected or implemented unless the regulatory agency possess such authority.

REVOCATION

Though the Transfer Sections of the Act may not clearly give the Board the authority to transfer a certificate on its own initiative, it is submitted that a forced transfer is in effect a termination or revocation and a reissuance. Assuming that to be true, what limiting effect, if any, would that have on the Board's action in the present case? Section 401(h) of the Act provides that a certificate may be revoked by the Board in whole or in part, for intentional failure to comply with any provision of the Act, or order, rule, or regulation issued thereunder or any term, condition, or limitation of such certificate. The issue then arises whether this was meant to be a limiting provision or merely to provide another reason for cancellation of the carrier's authorization, since at no place in the legislative history is Section 401(h) specifically discussed nor has any case arisen wherein the Board has been called upon to exert its revocation power under this Section. In the only revocation case to come before the Board Section 401(g) rather than Section 401(h) was applied.

21 Operation of Lines and Issue of Capital Stock by the N. Y., Chi. & St. Louis R.R. Co., 79 I.C.C. 581 (1923) : the Commission does not specify where the record of this Congressional consideration may be found. See also 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 254 (1931) : "It should be noted that consolidation under the act was to be voluntary. Carriers could not be compelled to combine ... but with certain exceptions they could be prevented from combining in ways that were contrary to . . . (the plan of the Commission)." Accord, LOCKLIN, ECONOMICS OF TRANSPORTATION 246 (3rd Edition, 1947).

22 §401(h) provides: "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any term, condition, or limitation of such certificate; Provided, that no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than the order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." 52 Stat. 987 (1938), 49 U.S.C.A. §481(h) (Supp. 1946).

23 Since settlement of the Pilots Strike, no such violation has been charged to NAL.

24 See Note 11, supra.

25 Tri-State Aviation, Revocation of Certificate, 4 CAB 100, (1943). In this case Tri-State had been issued a grandfather certificate, and thereafter had failed to commence operations within the 90 day period required by §401(g). Steps short of revocation have thus far proved sufficient remedies. See O’Connell, Legal Problems in Revising Air Route Pattern, 15 J. Air L. & C. 397, 405 (1948).

26 §401(g) provides: "Each certificate shall be effective from the date specified therein and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, . . . : Provided, that if any service authorized by a certificate is not inaugurated within such period, not less than ninety days after the date of authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service." 52 Stat. 987 (1938) 49 U.S.C.A. §481(g) (Supp. 1946).
One basic purpose of the Act was to encourage sound development of civil aeronautics. It was early recognized that major consideration was to be given to fostering the economic stability of carriers. Thus the air carriers were to "be assured," through the issuance of certificates of convenience and necessity, "of permanence of operation." This the air industry enthusiastically endorsed. The feature of permanence is of great significance. Indeed it would be difficult to appreciate the benefits of a permanent certificate if the Board could revoke a certificate on a mere finding of public interest as defined in Section 2.

The need for or purpose to be served by temporary certificates would appear to vanish when it is considered that the purpose of issuing a temporary certificate is that the public interest would not be served by the issuance of a permanent certificate. Argument might be made that the real reason for issuing temporary certificates was to alleviate the time consumed by decertification proceedings, but this is somewhat negated since some temporary certification orders have not stated definite time limits.

Though the word "permanent" is used many times by the Board and by authoritative writers, nowhere do they define the extent of its meaning.

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27 See note 2 supra.
29 Edgar S. Gorrell, of the Air Transport Association of America, in sum-
marizing the economic problems of the air carrier industry, stated that economic
regulation was needed to solve the existing chaotic conditions of the air industry,
that the industry was highly in favor of the certification in order to give their
business "a measure of stability and the promise of a financially sound future."
That these are still the objectives, see CAB's Economic Program for 1949, Feb.
30 The question concerning the element of permanency when the carrier is no
longer willing or able to continue service, is covered in §401(g): "or until the
authority shall certify that operation has ceased..." It has not been decided fully
what is needed to constitute a cessation. However, without the aid of such words
the M.C.C. has treated cessation for any reason as a wilful violation. See note
51 infra.
31 Use of the word "mere" is not meant to belittle the value in the necessity
of such a finding in certain instances, but is meant to emphasize that part of the
Act which more than any other seems to stress the element of permanence: "Each
certificate shall be effective from the date specified therein, and shall continue in
effect until suspended or revoked as hereinafter provided..." (§401(g)).
32 Upon a request to the Board for a permanent certificate by Northeast
Airlines, the Board allowed only a temporary certificate stating: "It is not pos-
sible at this time to predict the volume of traffic to Europe, the duration and
extent of operating rights through European countries; or the whole course of
International air transportation. These considerations demand that the plan of
operations by United States carriers should be subject to review and change
which may be dictated by shifting elements. Conclusion requires that the certifi-
cates issued... should not be of a fixed and inflexible nature, but should be of
such a nature as to permit necessary revisions and at the same time provide a
framework which will allow a proper development of American... air transpor-
tation...", Northeast Airlines, Inc., North Atlantic Route Case, 6 CAB 319
(1945); Pan American Airways, Inc., 4 CAB 161 (1943); national defense being
another feature of Public Convenience and Necessity; National Airlines, Inc.,
Miami Key West Service, 4 CAB 546, 548 (1944); accord, Pan American Airways
33 See Am. Export Airlines, Inc., Temporary Certificate of Public Con-
venience and Necessity, 3 CAB 294 (1941); NAL, Inc., Miami Key West Service,
4 CAB 546 (1944); PAA, U.S.-Africa Service, 3 CAB 47 (1941).
34 However, that the temporary certification provision was meant to serve a
very real purpose as distinguished from permanent certification is evidenced by the
fact that since the Board may issue them if they find that the public interest
would be better served thereby (§401(d) (2)) such is the same as providing
that if a termination date is specified such certificate may be terminated on that
date in the public interest, a power not clearly afforded with respect to the
termination of permanent certificates. What use can be made of the temporary
certification power in the future for purposes of realignment of route patterns,
particularly where termination dates are not specified is yet to be decided.
as used. However, the generally accepted definition is: continuing, lasting, or enduring, as against “temporary”; without fundamental change, but less than absolute perpetuity. The policy of the Board is mainly consistent with this definition, hence with a vital distinction between the amending power and the power of revocation, and between the conditions which must necessarily be found prior to the exertion of each such power.

The Board has stated that although the power to alter, amend, and modify connote a limited power to change an existing certificate, that the power to amend means power “to change without destroying the identity of the thing changed.” It has heretofore been decided in the Caribbean Area Case that under Section 401(h) it had authority, acting upon its own initiative, to compel a carrier on grounds of public convenience to extend its route to territory and points not previously served, and to remove from its routes points previously served, provided the extension or diminution does not bring about a basic transformation of the character of the carrier. In answer to the contention that the diminution of authorization on such grounds — namely, the public interest — may accomplish results identical with those brought about by a partial revocation for “intentional violations of the Act, the CAB replied that the amending power confers on the Board the power to bring about changes in a certificate which might diminish or impair the authority under such certificate by completely eliminating a point or by imposing such conditions as would result in restricting the services that may be rendered; thus denying the claim that such action is a revocation, total or partial,” which could be accomplished only for an intentional failure of the holder to comply with ... (a provision of the Act).

This would seem to be a strict confinement of the Board’s action. However, the situation was confused once more when the CAB stated that it was not deciding whether omission of the word “revoke” from the first clause of Section 401(h) limits the Board, on public convenience and necessity, to changes falling short of a basic transformation of the carrier, or permanent withdrawal of all rights under the certificate. Obviously this was inserted as a safety measure against a possible undesired self-limitation. Nevertheless, it can be well argued that it would be contrary to the apparent policy of the Board and of the Act itself to make basic transformations in the carrier’s certificates under the amending power, or to revoke a certificate for any other than a willful violation of the Act. Though it may ultimately be held that the CAB’s power in revocation cases is restricted to situations of wilful violations, the power to eliminate undesirable route segments and/or to add segments considered to be in the public interest, even if restricted to insubstantial changes, aids the Board, at least partially, in carrying out its function of adapting the air pattern to coincide with changing public needs. The extent of the possible implication of such a

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34 Permanent: “Continuing or enduring in the same status, place, or likeness, without fundamental or marked change.” Webster’s New International Dictionary (2nd Ed., 1945).

35 The word does not always embrace the idea of absolute perpetuity.” Bouvier’s Law Dictionary (Student’s Ed., 1934).

36 Panagra Terminal Investigation, 4 CAB 670 (1941) and cases there cited.

37 Caribbean Area Case, note 20 supra; Panagra Terminal Investigation, note 36 supra.

38 Seemingly, it would have been superfluous to import this self-limitation, in full accord with the definition of “permanent,” if the Board had carried the power to revoke under the same circumstances.
move to NAL dismemberment proceedings in lieu of complete revocation would at best be only conjectural since the Board has apparently left it to a case by case basis, and it is too early to come to any conclusions.\textsuperscript{88}

The consensus of authoritative writers and those charged with the interpretation of the Act at its outset was that all unlimited\textsuperscript{89} certificates, excepting those issued to foreign air carriers,\textsuperscript{40} were to have two important features — (a) permanence and (b) revocation only for a wilful violation of the Act.\textsuperscript{41} These views exemplify the distinctions made in the first sentence of Section 401(h).\textsuperscript{42} Nothing in the sentence gives the implication that there could be a revocation on any finding less than a wilful violation, or that it could be revoked on the basis of a finding that conditions precedent to its issuance no longer exist in whole or in part.

Congress with seeming clarity meant to create two separate and distinct powers based on different and independent conditions precedent, one economic — to amend, modify or suspend in the public interest — the other punitive — to revoke for a wilful violation.\textsuperscript{43} Had Congress meant anything else it easily could have so provided. This is shown by a reading of the Federal Communications Act of 1934\textsuperscript{44} where it was provided that “Any station license may be revoked . . . because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application . . .” This was in addition to a provision for revocation based on a violation of the Act. There is no particular sanctity in the element of “permanence” except when considered in connection with the specified or implied purposes which the particular Act was intended to serve. Returning to the Federal Communications Act, it is clear that the rights thereunder were to be temporary in nature. Certificates are limited to three years duration, revocable at any time in the public interest, and need not be renewed. Clearly it is not the purpose of that Act to protect the continued operation of the licensee but rather to protect the public. In contrast, the policy of the Civil Aeronautics Act is the protection of the licensee as evidenced by the protection of its revenues and the protection afforded against uneconomic competition.\textsuperscript{45} In view of the protection afforded by the certificate it is not

\textsuperscript{38} “While we must find therefore, that there are limits to the scope of the grant of power in section 401(h) the generality of the Statutory language makes it impossible to draw any precise line of demarcation between what is permitted and what is not.” Panagra Terminal Investigation, note 35 supra.

\textsuperscript{39} Those not issued as limited or temporary certificates under §401(d) (2).

\textsuperscript{40} See note 32 supra.

\textsuperscript{41} §402 (g), concerning permits to Foreign Air Carriers, provides: “Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, cancelled, or revoked by the Authority whenever it finds such action to be in the public interest . . .” Note that here, as against §401(h), concerning domestic carriers, the Act specifically provides that the certificates may be revoked in the public interest.

\textsuperscript{42} See note 28, supra, at p. 453; accord, Oswald Ryan, Civil Aeronautics Act, Public Utilities Fortnightly, April 27, 1939, p. 518.

\textsuperscript{43} See note 22 supra. The board apparently considers modification, amendment, and alteration as synonymous with each other; see Pan American Airways, Latin American Service, 4 CAB 540 (1946), where the terms are used interchangeably.

\textsuperscript{44} Caribbean Area Case, note 20, supra, at p. 26.


\textsuperscript{46} See discussion, Keyes, National Policy Toward Commercial Aviation—Some Basic Problems, 16 J. AIR L. & C. 280 (1949); the protectionist policy has been attributed to some extent to the belief that the industry in its early stages would not be able to support itself. See Goodrick, Air Mail Subsidy of Commercial Aviation, 16 J. AIR L. & C. 253 (1949); CAB's Economic Program for 1949 (Feb. 21, 1949).
surprising to find the intent of Congress to impart to certificates an element of permanence and stability by providing also that they could be subject to revocation only as a penalty for wilful violations. To hold otherwise would seem to convert into meaningless words the express language of Section 401(g) which provides that each certificate shall be effective from the date specified therein, and shall remain in effect until revoked as thereinafter provided. It would contribute great uncertainty as to the finality of any right granted.

Since the Civil Aeronautics Act, interpreted literally, provides for a finding of one condition for exertion of the amending power and a different one for revoking, it is significant to note that other preceding acts have provided that only one finding, a wilful violation, is necessary for the exertion of both. It is logical to assume that these other acts were known to and considered by the drafters of the proposed legislation, when it is noted that the majority of the forerunner bills contained amending and revocation powers similar to the other regulatory Acts in requiring the finding of only one condition precedent for their exertion. The Board took note of this difference saying, "The provisions of Section 401(h) allowing the Board to alter, amend and modify, or suspend a certificate, in whole or in part, if the public convenience and necessity so require have no counterpart in the terms of Section 212(a) of the I.C.C. relating to changes in the certificates of motor carriers. Apart from instances of wilful violation, the only authority expressly granted the I.C.C. to effect changes in motor carrier certificate is found in the language which provides that a 'certificate may, upon application of the holder . . . be amended or revoked in whole or in part'." It is logical to assume that the change in the conditions necessary to the exertion of the powers was not without purpose, particularly since the change was made in the amending provision giving the CAB wider discretion in its exertion — namely for good cause and in the public interest, while leaving the revocation power as it stood before, to be exerted only for a wilful violation.

Since the revocation provision of the Civil Aeronautics and the M.C.C. Acts are the same, the construction given the M.C.C. Act may be helpful in interpreting the Aeronautics Act. The opinions of the Motor Carrier

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46 "Certificates, permits, and licenses shall be effective from the date specified therein and shall remain in effect until ended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission be amended, or revoked in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing be suspended, changed, or revoked, in whole or in part for wilful failure to comply with any provision of this chapter, or any lawful order, rule, or regulation of the Commission . . ." INTERSTATE COMMERCE ACT, PART II, MOTOR CARRIERS, 49 Stat. 555 (1935), 49 U.S.C.A. §312(a) : "A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Secretary of the Treasury deems appropriate, if the Secretary finds that the permittee has wilfully violated any of the conditions thereof." FEDERAL ALCOHOLIC ADMIN. ACT, 49 Stat. 978 (1936), 27 U.S.C.A. §204(e).

47 S. 3845, 75th Cong., 3rd Sess. (1938) finally became the Civil Aeronautics Act; see note 11, supra; since there was a hearing on S. 3659, the predecessor to the S. 3845, there was no official hearing reported on S. 3845.

48 For example, see §305(j) of H.R. 5224, 75th Cong., 1st Sess. (1937), which provided that "The Commission . . . may upon complaint or on its own initiative, after notice and hearing, suspend, amend, or revoke a certificate, in whole or in part, for wilful failure to comply . . . (etc.)."

49 Caribbean Area Case, note 20, supra, at 30-31.

50 "The reports of the Congressional Committee hearings held prior to the enactment of the Civil Aeronautics Act likewise indicate an intent to provide the same general type of regulation for air carriers and that it was desirable to pat-
Commission reveal that where revocation was accomplished the Commission found it necessary to find a wilful violation. The best illustration is the leading Smith Bros. case where revocation of a certificate was sought by the Commission because of alleged cessation of all operations authorized thereunder. The Commission first found it necessary to find a wilful violation to comply with a valid condition of the certificate. Even where involuntary bankruptcy had caused cessation of operation it was found necessary to state that involuntary bankruptcy is within the control of the bankrupt and that he is responsible for the legal consequences that flow therefrom. In other words, although the carrier's cessation of all operations or other failure to comply might be traced to misfortune rather than to negligence, or deliberate wrongful conduct, nevertheless under the authority of the Smith case it will be construed to be a wilful violation or failure.

It remains to be considered whether there is any other manner in which a permanent certificate may come to an end. The only case found where this matter was squarely faced was in the Smith Bros. case arising, however, under the Motor Carrier Act where the similar provisions were in issue. Referring to Section 312(a), which provides that “Certificates . . . shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided,” the Commission held that the word “terminate” referred only to those provisions specifically stated in Section 312(a), namely revocation for a wilful violation, against a strong dissent that “terminated” is broader than “revocation” and must have been meant to include or refer to other methods of termination. But to hold this, said the majority, would be to make the rest of Section 312(a) merely surplusage and, even more important, would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicles required in the public interest and contemplated by the Act.

This argument was conclusive with respect to Motor Carriers and it can strongly be argued that it has as much force, in logic and in policy, when applied to the Civil Aeronautics Act. Indeed it may be argued that it has even more validity under the Aeronautics Act, since, though this case arose after 1938, it appears that Congress appreciated this conflict under the Motor Carrier Act by substituting for the word “terminate” in Section 401(g) (the counterpart provision of the Aeronautics Act) the word “revoked,” making only one alternative, i.e., “or until the Authority shall certify that operation thereunder has ceased,” a provision not specifically expressed in the M.C.A. but treated there as a wilful violation.

tern the Civil Aeronautics Act upon such prior legislation in order to avoid confusion of interpretation, since that legislation was not new or untried, but embraced definite policies built up over a period of years.” Acquisition of Marquette by TWA—Supplemental Opinion, 2 CAB 409, 412 (1940).

51 Smith Bros. Revocation of Certificate, 22 MCC 523 (1939), aff'd 33 MCC 465 (1941); accord, Hudson Bus Transportation Co., Inc., 46 MCC 9 (1945), where the Commission stated that once the certificate is issued such “marks the end of the proceeding and upon the facts before us (the Board having found no willful violation) we are without power to revoke it in whole or in part.”

52 Gregg Cartage and Storage Co., Common Carrier Application, 21 MCC 17 (1938).

53 See note 45, supra.

54 “In our opinion, the language of the foregoing section (relating to §312 (a)) is clear and definite and unmistakingly shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure therein specifically provided. (That) . . . once a certificate, duly and regularly issued, becomes effective, our authority to determine it is expressly marked off and limited.”

55 Compare the first sentence of §401(g) of the Civil Aeronautics Act with the first sentence of §312 of the Motor Carrier Act.
Though the Act may thus preclude a revocation save on the finding of a wilful violation, sight must not be lost of the power of the Board to order suspension of a certificate without a finding of a wilful violation. For all practical purposes, as far as the carrier is concerned, the effect of both may be the same. This poses the issue of the validity of an unlimited suspension of a certificate, particularly a temporary certificate. The economic effect of an unlimited or prolonged suspension of operation may well be to force a carrier into liquidation, thus achieving indirectly the same result as a revocation. Since the practical effects may be the same it may of course be little consolation to carriers to show that those charged with interpreting the act at the outset had understood Section 401(h) to mean that although the effectiveness of a certificate was ended temporarily, the permanent right granted therein could not be impaired by suspension but only by revocation.

**Conclusion**

Since the action contemplated by the first order of the Board looking to the dismemberment of NAL is without precedent in the history of the Act and because of the very meager but important discussion of this problem in the Congressional Committee Hearings on the many bills which led up to the Act of 1938, recourse has by necessity been made in instances to the provisions of other analogous regulatory acts and the interpretations of which we must assume that Congress in some measure was aware. The Board has often relied upon the experienced construction of comparable provisions of the Interstate Commerce Act as a guide in determining the scope of their powers under the Civil Aeronautics Act, and shall most likely continue to do so, giving due regard to substantial differences.

From the foregoing discussion one may conclude that the CAB lacks the legal power to compel route transfers on a finding of public convenience and necessity, or, revoke a certificate on any other than a finding of a wilful violation as set out in Section 401(h). As has been noted, the Section provided for two things: 1st, for amending, modifying, altering, etc. a certificate—an economic power; and 2nd for revocation—a penal provision. This coincides with the broad policy of the Act, for any other construction would put all carrier operations on a day to day basis—a result certainly not in keeping with a stabilized and highly efficient air industry. Rather it would strike at the basic element of permanence of certificates, damaging the industry's stability, and making financial, personnel, and management problems extremely difficult. To find to the contrary would be to read into words what is not there, a practice not in keeping with a "government of laws," nor free from the possibility of running into a constitutional barrier.

It has been argued that the basic policies of the Act and the responsibilities of the Board in developing an air transportation system adapted to the present and future needs of foreign and domestic commerce cannot be effectuated unless the Act be interpreted as giving the Board this power, emphasis being laid on the greater need for control in air transportation than on land. However this may be, specific provisions of the Act cannot be ignored in the assumption of powers. It has been the consistent policy of the Supreme Court that where there is a conflict between general and spe.

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56 For a brief discussion of some of the alternatives open to the Board, see Wohlstetter, *Re-ordering the National Air Pattern*, 15 J. AIR L. & C. 466 (1948).
cific provisions the specific will govern.\textsuperscript{58} Applied here, it would mean that the methods of carrying out the broader policies are limited to the specific grants of power given in Sections 401(g), 401(h), and 401(i).

That Congress has transferred such power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. Words and phrases efficacious to make such a delegation of power are well understood and have been used, and if Congress had intended to grant such a power to the Board it cannot be doubted that it would have used language open to no misconstruction.

However, the permanence of the certified routes coupled with the cost-plus-support program based on the CAB's current view of Section 406, concerning the authority to fix rates for the transportation of mail,\textsuperscript{59} may well saddle the government with a lasting and burdensome subsidy. It might well be urged that Congress should clarify the question of revocation by considering legislation specifically authorizing such in the public interest wherever original misjudgment may have occurred in the issuance of a certificate, or wherever changed factors may characterize the carrier's operation.\textsuperscript{60}

WILLIAM J. HARBECK*

LIMITATION OF PASSENGER LIABILITY THROUGH AIR TARIFFS

O N January 12, 1948 an Eastern Air Lines passenger plane crashed in Maryland killing or injuring all on board. Several months later the heirs of Lynn Brandt, one of the passengers who died as a result of his injuries, filed a wrongful death action against the carrier. Among the defenses raised by the airline was that the suit was barred because of the failure of the deceased's heirs, executors or next of kin to file written notice of their proposed claim within 90 days after the accident. The motion to strike this defense was denied by a federal court in the Southern District of New York, and the case was remanded to proceed with trial.\textsuperscript{1}

The ruling denying the plaintiff's motion to strike the defense of lack of notice was supported by citing one of the terms of the air passenger

\textsuperscript{58} In 1883 the Supreme Court described this principle as a "well-settled rule," and it is universally accepted today. See Townsend v. Little, 109 U.S. 504, 512 (1883).

\textsuperscript{59} The CAB has committed itself to a program of determining fair and reasonable rates of mail compensation for air carriers in consideration of "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation." Civil Aeronautics Board's Economic Program for 1949, Feb. 21, 1949, p. 5. The CAB is fully aware that this may entail financing certain carriers through subsidies to meet their break even needs. See also Goodrick, Air Mail Subsidy of Commercial Aviation, 16 J. Air L. & C. 253 (1949); Keyes, National Policy Towards Commercial Aviation—Some Basic Problems, 16 J. Air L. & C. 280 (1949).

\textsuperscript{60} No official request before Congress has yet been made. However, in an address before the Chicago Bar Association, Oct. 28, 1948, Joseph O'Connell, Jr., chairman of the CAB, stated that until the other tools which "we possess are found to be inadequate to do the kind of realignment which must be done," he "was not disposed personally to request Congress for power to revoke a certificate other than for cause. But I would not be bashful about requesting the power because of any theory which may exist with respect to the sanctity in perpetuity of a certificate ..." O'Connell, Legal Problems in Revising Air Route Pattern, 15 J. Air L. & C. 397 (1948).

tariffs filed by Eastern in accordance with the requirements of the Civil Aeronautics Act of 1938. The provision on which the carrier relied was Section 17A of the air passenger tariffs which states:

**Personal injury or death—Time limitations.** No action shall be maintained for any injury to or death of any passenger unless notice of the claim is presented in writing to the general office of the participating carrier alleged to be responsible therefor within 90 days after the alleged occurrence of the events giving rise to the claim, and unless the action is commenced within one year after the alleged occurrence.²

The heirs of the deceased passenger were apparently unaware of this or any other tariff provision and learned of its existence and significance for the first time upon receipt of the airline’s defensive pleadings. Nevertheless, their failure, through ignorance or negligence, to inform the carrier in writing within 90 days after the crash that they proposed to bring an action presumably creates a fatal bar to their claim.

The validity and reasonableness of the notice requirements in the air passenger tariffs applicable to all United States domestic carriers has never been passed upon by an appellate tribunal. However, if the airlines persist in enforcing the requirement against injured passengers or the next of kin in wrongful death suits, the question will have to be decided by a more authoritative opinion than a trial court’s ruling on a motion. When the appellate courts receive this problem, an analysis of related carrier cases may reveal that in situations like the *Brandt* case, the requirement of notice is unreasonable, invalid and should not be enforced.

In spite of the fact that the vast majority of the traveling public is unaware of the existence of the requirement of notice of claims, the airlines have been able to establish and enforce it by including it among the other rules and regulations of the tariffs. The Act of 1938 requires every carrier to file tariff schedules which include both a list of its rates, charges and fares and also a statement of its operating rules, practices and regulations.³ Copies of the tariffs must be kept available for inspection at the airline’s public offices as well as filed with the Civil Aeronautics Board. Departure by the carrier from the provisions of the recorded tariffs has been made a criminal offense,⁴ and the provisions may be altered or abrogated only after notice and subject to the supervision of the CAB.⁵

Every airline ticket contains the words “Subject to Tariff Regulations” stamped on it. This brief phrase purports to inform the purchaser that he has just entered into a contract with the airline into which all of the elaborate terms of the published tariff have been incorporated by reference. Inclusion of the tariff provisions in the contract of carriage has been approved by a substantial number of decisions in many varieties of both surface and air carriage cases.⁶ That most passengers are unaware of the significance of the words stamped on the ticket and that practically none are familiar with specific tariff provisions does not alter the fact that the tariff rules become binding on both passenger and carrier.

As long as nothing in the tariff conflicts with any common law or statutory duty of common carriers, no problem is presented by judicial enforcement of the provisions. But the requirement that all personal injury or wrongful death actions must be preceded by written notice to the carrier

² Local and Joint Tariff No. PR-2, Agent M. F. Redfern’s CAB No. 12.
⁵ 52 Stat. 993, 49 USCA §483(c) (Supp. 1937).
within 90 days has the ultimate effect of limiting the measure of liability of air carriers to their passengers. Direct limitation of liability through express contractual agreement with their passengers has been declared contrary to public policy in two cases in which the airlines insisted that the passenger sign a waiver of liability before issuing him a ticket. While it is true that requiring written notice of claims is not as stringent a restriction of common carrier liability as is a flat waiver, the difference is only one of degree. Judge Cardozo upheld the notice requirement in a water carriage case by labeling it "regulation rather than exoneration." However, the effect of failure to give notice will destroy an injured plaintiff's right of action against a negligent carrier just as effectively as if he had been forced to sign a waiver of liability before being issued his ticket. Labeling one method regulation and the other exoneration does not alter the fact that a common law remedy will be destroyed or abated by judicial approval of either scheme.

The effect of Section 17A is to impose restrictions on injured passengers which would not exist in the absence of the tariffs. The normal period of limitations in personal injury actions is not one year, but two. Furthermore, the added requirement of written notice of claims as a condition precedent to an action against a common carrier is unmatched by the statutory requirements of any jurisdiction. In light of the specific language of Section 1106 of the CAA which declares that:

"nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies,"

the use of this federal regulatory statute as a vehicle by which the air carriers may avoid the full measure of liability imposed by common law is a perversion of the Act. Despite the fact that notice requirements have been upheld in certain types of carrier cases, a comparison of these with the situation in air carrier cases under the CAB tariffs will show that none of them are valid precedent for holding the airline passengers to the requirement.

**Rail Cases**

The field in which the greatest body of law has developed around the validity of notice requirements is in railroad cases, particularly freight shipments. The courts have always been willing to hold shippers to notice requirements, but this fact should constitute no justification for a similar

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7 Conklin v. Canadian-Colonial Airways, Inc., 266 N. Y. 244, 194 N. E. 692 (1935); Curtiss Wright v. Glose, 66 F. 2d 710 (CCA 3d 1933).

8 Murray v. Cunard S. S. Co., 235 N. Y. 162, 165, 139 N. E. 226, 228 (1923) (40 day notice provision upheld as a reasonable effort to protect the carrier against fraudulent claims).


10 Notice as a condition precedent to suits against municipal corporations has been consistently upheld and may rarely be waived under any circumstances: Brockelsby v. Newton, 294 Mass. 41, 200 N. E. 351 (1936); McCarthy v. Chicago, 312 Ill. App. 265, 38 N. E. 2d 519 (1939). Cf. Waco v. Thralls, 172 S. W. 2d 142 (Texas Civ. App. 1943). Where the common carrier is operated by the municipality it should also be entitled to this notice although there have been no reported cases on the problem. Private carriers, however, may not include themselves in the procedural advantages afforded to municipal corporations. 153 ALR 329 (1944) Municipality—notice of injury—waiver.


attitude toward passengers. The common law recognized a distinct difference between freight and passenger carriers, imposing the absolute liability of an insurer upon the carrier of goods, while holding the passenger carrier liable only when proved negligent.\(^\text{13}\) The carrier of passengers was held to the highest degree of care to provide for passenger safety but was not liable unless actually proven to have breached that duty. Freight carriers were liable merely upon proof that damage had occurred in transit. If the carrier of goods is to be held accountable as an insurer, it is reasonable to allow it to protect itself by requiring notice of claims. The inherent difference between freight and human cargo make the chance of fraudulent claims much greater in the case of freight carriers. Goods travel unaccompanied. Passengers are usually in groups and supervised by carrier personnel. Injuries to goods usually occur without knowledge, but rarely is a passenger injured without actual notice to the carrier.

The ruling rail case supporting the validity of requiring notice from an injured passenger is *Gooch v. Oregon Short Line Ry.*,\(^\text{14}\) where the plaintiff was riding on a drover's pass with a shipment of his cattle. The carrier had issued him the pass gratuitously, and one of the tariff provisions for that type of free pass required notice of injuries to be given within 30 days after they were incurred. Gooch pleaded that such a provision placed an unreasonable hardship on injured passengers, particularly in his case where it was admitted that the defendant railroad had actual notice of the accident and was fully aware that he would file suit against them as soon as he recovered from his injuries. The United States Supreme Court felt that actual notice would not serve as an excuse for noncompliance with the requirement and held for the defendant carrier. On the ground that notice of claims is a reasonable effort by the carrier to protect itself against fraudulent claims, Justice Holmes held that the failure to give the required notice was a bar to the suit. He apparently agreed with the railroad's contention that there was a substantial danger of fraudulent claims from persons who were either not injured, or not even involved in any wrecks.

The *Gooch* case, so often cited in subsequent freight and drover's pass cases, may be contrasted with *Edmonson v. Missouri-Pacific Ry.*,\(^\text{15}\) which has never been cited. The facts were similar. The result, however, was for the plaintiff despite his failure to give the required notice. The court decided to follow the common law version of notice requirements instead of abiding by the strict terms of the tariff. This view assumes that since the purpose of requiring notice is to inform the carrier of the accident, the injury and the proposed claim, the carrier may waive the requirement by any conduct which indicates that it is aware of these facts. As in the *Gooch* case, the defendant admitted that it knew of the pending claim and the court used this admission to justify the plaintiff's failure to comply with the requirement. This result seems much more logical than rigidly abiding by the mandatory provisions of a tariff, where the purpose of the provision has been satisfied.

If carriers are to be allowed to limit their measure of liability at all, it may be argued that liability to free riders should be made to differ from the measure owed to full paying passengers. If the passenger wishes to take advantage of the free carriage, perhaps he should be required to submit to

\(^{13}\) American Jurisprudence, Carriers, §1236. Reasons for this difference seem to be the fact that there are problems of contributory negligence when dealing with passengers, due to the fact that passengers, to a degree, are able to look out for their own welfare, whereas goods are completely subject to the control of the carrier.

\(^{14}\) 258 U.S. 22 (1922).

\(^{15}\) 220 Mo. App. 294, 286 S. W. 439 (1926), affirmed 8 S. W. 2d 103 (1928).
the notice requirement, even where it is unreasonable to enforce it against a full paying rider. Of course such a distinction is not valid if the real purpose of the requirement is to protect the carrier from fraudulent claims. This protection is no less needed from fare paying passengers than from those on a free pass. Regardless, the fact remains that free passengers always have the option to pay the fare and be protected by the duties which the common law imposes on the carrier.

The airline passenger has no such choice. Even if he does pay full fare, he is subject to the notice requirement, a requirement which has never been imposed on fare paying rail passengers. The notice provisions of the Hepburn Act have been held to apply to freight carriers only. The complete absence of any reported cases on the subject indicates that the ICC has never allowed any railroad to force a full paying passenger to give it written notice of claims, such as is required of airline passengers by the CAB tariffs. Railroad freight and free carriage cases are poor precedents for upholding the limitation of liability to airline passengers through the requirement of notice of claims.

WATER CARRIAGE CASES

The problem of requiring notice from injured passengers has been handled rather extensively in many steamship cases. The best known decision, often cited to support the requirement, is The Finland, where the parent of a child injured aboard ship was held to the requirement of giving notice of the claim within 30 days. The cases that follow this view may be compared with others in which notice periods of from 3 to 30 days were held unreasonable. The general trend in the more recent decisions has been to balance the carrier's actual need of warning of pending claims against the hardship resulting from holding injured, incapacitated or uninformed passengers to the terms of the requirement. Quite often the injured passenger has been physically incapacitated during the entire period so as to be unable to comply. In the death cases, a situation where the decedent's executors were not named until after the expiration of the 10 day period caused the court to call the requirement not only unreasonable but impossible.

16 The subject of differentiation between gratuitous and paying passengers is a problem in itself. The usual case involves a carrier's employee who is injured while riding on a free pass. Where the pass is actually a gratuity and not part of the consideration for performing the duties of employment the carriers have been allowed to exempt themselves from all liability caused by their negligence. Montalbano v. N. Y. C. R. R., 47 N. Y. S. 2d 877 (1944); Kroecking v. N. Y., 61 N. Y. S. 2d 475 (1946). It has recently been suggested, however, that there should be no such distinction on the ground that those who ride free are usually of a class least capable of bearing the burden of the injury themselves: Justice Black, dissenting in Francis v. Sou. Pac. R. R., 333 U. S. 445, 461 (1948).

17 34 Stat. 593, 49 USCA §20(11) (1906).
20 Pac. S. S. Co. v. Cackette, 8 F. 2d 259 (CCA 9th 1925), cert. denied 269 U. S. 886 (1925). Blackwell v. Alaska S. S. Co., 1 F. 2d 334 (D. C. Wash. 1922) (ten day notice provision unreasonable and not authorized by anything in the Shipping Board Act which was concerned with rates and fares, not with notice or period for bringing suit).
21 The Europa, 6 F. S. 342 (S. D. N. Y. 1935).
Even if the steamship cases could be molded into a distinct pattern upholding the requirement of notice, the difference between the nature of water and air carriage makes them a doubtful precedent. In both types of transit the passengers scatter at the end of the trip making it difficult to check on the validity of subsequent claims. Resemblance ends there. Air transport is comparatively rapid and in small cabins, so that the airline’s employees are rarely unaware that a passenger has been injured. Accidents aboard ship, on the other hand, often occur out of sight and knowledge of the crew. The distinction between planes and ships has been recognized in the judicial interpretation of the word “vessel” as used in federal statutes. It was held that vessels meant ships and that seaplanes were not vessels within the meaning of the act where owners of a passenger seaplane sought to include themselves within the exemption from liability granted by Congress to owners of merchant ships. Ships and planes are sufficiently dissimilar to justify a distinction in requiring notice of claims from air and water passengers.

**The Warsaw Convention**

Contractual limitation of air carrier liability has been allowed in several cases which arose from international transport under the terms of the Warsaw Convention. The Convention is, in effect, an international tariff for international air transport. Although it does not require written notice of claims, it imposes a ceiling of $8,291.87 on the recovery of any one person for personal injuries or wrongful death. But the imposition of this ceiling was not done without a supporting consideration in favor of the passenger. Carriers operating under the Convention are required to pay the injured passenger’s actual damages up to the maximum limit without proof of negligence. This exchange of what is close to the *res ipsa loquitur* doctrine for a ceiling on recovery may sound like a poor bargain today, but was a substantial concession for the carriers to make in 1929. In addition, the ceiling does not apply where a passenger is able to prove wanton, exceptional negligence.

In the few cases in which injured passengers have attempted to break through the ceiling imposed by the Convention, the limitation has been upheld except where the carrier has been held to have been guilty of “wilful

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misconduct" and thus not entitled to the limitation.\textsuperscript{25a} The plaintiff's usual attack was to charge that the ceiling should be ignored, despite the passenger's assent to it, since it was against public policy to allow a common carrier to limit its liability. However, the public policy of any domestic jurisdiction must bow to the overriding policy of an international agreement. In spite of the carriers' success in limiting their liability on international carriage, the cases under the Convention are inadequate to support a similar modification of common law liability through the CAB tariffs. The Convention contains no disclaimer of interference with the common law liability clause comparable to Section 1106 of the Civil Aeronautics Act. It was the express purpose of the Warsaw Convention to alter the common law duties of air carriers as enforced by many different countries in favor of one uniform standard. The Civil Aeronautics Act, on the other hand, was not concerned with interfering with domestic tort and procedural rules, but was passed in order to assure uniform treatment of all passengers by air carriers, with special concessions for none.\textsuperscript{26}

\textbf{INTERNATIONAL TRANSPORT EXCEPTIONS TO THE WARSAW CONVENTION}

Although the Warsaw Convention requires no written notice of claims, there have been two recent cases of international air transport where failure to give notice was a bar to the actions. Apparently the requirement of 30 days notice had been inserted directly into the contract of carriage, for the tariff period of 90 days would not apply to nondomestic travel. The first case was one of several actions filed against Pan American Airways as a result of the crash of the Yankee Clipper at Lisbon in 1943. In \textit{Indemnity Insurance Co. v. Pan American Airways},\textsuperscript{27} the plaintiff sued as subrogee of the claim of Tamara, a famous woman singer, killed in the crash. The insurance company paid a death benefit to Tamara's beneficiaries and then sued the airline to recover for her wrongful death. They asked for an amount in excess of the $8,291.47 limit of the Convention but were unable to recover even that amount because Tamara's next of kin had failed to give notice to the carrier within 30 days. The court did not decide whether there were any circumstances which would excuse non-compliance but held against the plaintiff on the ground that the rights of the insurer are no greater than those of the insured.

In a personal injury action against the same carrier, the 30 day period was also upheld. In \textit{Sheldon v. Pan American Airways}\textsuperscript{28} the plaintiff sued for injuries incurred in a crash while on a flight from Mexico City to Los Angeles. Instead of attacking the Convention, he relied on it to justify his failure to give notice. Contending that the requirement of notice within 30 days was inconsistent with the terms of the Convention, he asked that the court refuse to enforce it. Furthermore, he claimed that the language of the notice requirement was not definite enough to make it mandatory because it stated no penalty for failure to comply. The New York court refused to accept either allegation and declared that there is nothing inconsistent between

\begin{itemize}
\item \textsuperscript{26} Civil Aeronautics Act of 1938, 52 Stat. 980, 49 USCA §402(c) (Supp. 1947). Declaration of policy: The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.
\item \textsuperscript{27} 58 F. Supp. 338 (S. D. N. Y. 1944).
\item \textsuperscript{28} 74 N. Y. S. 2d 578 (1947), affirmed 74 N. Y. S. 2d 267 (1947).
\end{itemize}
the 30 day requirement and the Convention. The Convention deals with the
time for bringing suits, whereas the notice requirement states a condition
precedent to the action. If the language of the requirement were held to be
merely declaratory, its entire purpose would be defeated.

Of all the carrier cases examined, the *Indemnity* and *Sheldon* decisions
present the strongest precedent for upholding the validity of the 90 day pro-
vision in the CAB tariffs. In neither case was it alleged that the carrier was
on actual notice of the pendency of the claim, but it is doubtful if the results
would have been different if such an allegation had been proved. In any
event, cases arising under the Warsaw Convention, an international treaty,
may always be distinguished from situations involving the construction of
CAB tariffs under a federal regulatory statute. Section 1106 of the Civil
Aeronautics Act, expressly disclaiming any interference with established
rights, distinguishes domestic air cases from international flights. The
difference between planes and ships renders the water carriage cases unsatis-
factory precedent, and the fact that all of the rail cases in which notice
requirements were upheld dealt either with freight or free carriage, shows
that there is no sound basis in previous common carrier decisions for allow-
ing the airlines to enforce the provisions of Section 17A of the passenger
tariffs.

CONCLUSION

Section 1106 has never been given vitality by judicial construction in any
tort action. However, its concise language conveys the obvious intent of
Congress that established remedies available against common carriers should
not be altered or abridged by use of the tariffs or any other provision of the
Act. Therefore, where carriers have actual notice of pending personal in-
jury or wrongful death actions, the requirement that the injured plaintiff
give formal notice within a fixed time should be ignored. Since the purpose
of the requirement is to inform the carrier, the common law view that where
the carrier does not need to be informed, the requirement is not mandatory,
should be followed.

Often those who are injured are unable to comply with the requirement
even in the unlikely event that they are aware of it. It is even more unre-
asonable to hold the next of kin of a deceased passenger to the strict terms of
a contract to which he was never in privity. Usually the next of kin are
even more ignorant of the existence of the requirements than the deceased.

29 49 Stat. 3007, Article 29: Right to damages extinguished if action is not
brought within two years after estimated time of arrival.
30 It has been considered in several contract actions against airlines for fail-
ure to deliver plaintiff to his destination in time. *Warshak v. Eastern Airlines*, 78
N. Y. S. 2d 143 (1948) (common law forum has jurisdiction over a cause of action
for alleged breach of contract to transport by air). Earlier case of *Jones v. Northwest Airlines*, 22 Wash. 2d 863, 157 P. 2d 728 (1945) held, however, that any
special agreement contradictory to the terms of the tariff would not be binding on
the carrier. See also: *Schwartzman v. United Airlines*, 6 FRD 517 (D. C. Nev.
31 Next of kin have usually fared ill in attempts to challenge the right of the
decedent to release their claim for recovery in wrongful death actions. In *Mellon
v. Goodyear*, 277 U.S. 336 (1927), Justice MacReynolds held that a complete re-
lease given by the decedent to the defendant precluded a recovery by the next of
kin after the death of the injured party. Two recent cases have held that a re-
lease of a railroad from liability to employees riding on free passes barred subse-
quently actions by their next of kin. *Donnelly v. Sou. Pac. R. R.*, 18 Calif. 2d 863,
Any indication that the carrier is on notice of the injury should serve as an excuse for noncompliance with the notice requirement. This fact is not difficult to establish. Any investigation of the accident, attention to the victims or attempts at settlement, either before or after the expiration of the 90 days, should raise a *prima facie* assumption that the carrier needed no formal notice. It is difficult to conceive of any death or serious injury occurring to an air passenger unknown to the airline. Therefore, allowing the carrier to capitalize on the failure of uninformed or incapacitated plaintiffs to give notice is, in light of the explicit language of Section 1106, contrary to the spirit of the CAA, as being violative of established public policy.

R. G. KAHN *

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32 On September 8, 1949, a tariff provision of Northwest Airlines requiring notice of claim for personal injury to be filed within 30 days after injury was upheld by the trial court in the U.S. District Court of the Western District of Washington, in Wilhelmy (now Stinech) v. Northwest Airlines, Inc., 2 Avi 15, 023. "Plaintiff, a passenger on one of defendant's airplanes, brought this action against defendant airplane carrier for alleged negligent injury to plaintiff's inner ear and throat and for other personal injuries alleged to have been caused by defendant's negligence in operating the airplane on which plaintiff was a passenger in such a way as to cause it to descend from a high to a low altitude at a too rapid rate of descent in connection with a scheduled landing of the airplane."

The opinion of the Judge does not indicate whether the defendant had actual notice of plaintiff's alleged injury within the 30 day time limit. The opinion reads, in part, as follows: "This Court is of the opinion that the rule of the Cackette case [cit. note 20, supra] relied upon by plaintiff does not apply here because in that case the ten-day notice of claim requirement was, in accordance with other decided cases, unreasonable and invalid. In expressing the opinion and ruling in the case at bar, I do not say that any contract time limit for giving notice of claim or for commencing suit is to be regarded as valid merely because it is stated in the contract of transportation. The test of reasonableness must be met and is to be given proper consideration upon the facts disclosed by each case. In the case at bar, this Court holds that the thirty-day written notice of claim requirement and the one-year limit for commencing suit provision in the transportation contract here in suit are reasonable and valid."

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