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UNIFORM RULES FOR AIR PASSENGER LIABILITY

HOWARD WIKOFF*

Mr. Chairman, Ladies and Gentlemen: When I returned from the West Coast last Thursday I was told that I would have to deliver a paper. Well, there are papers—and papers, so I decided that I would not try to sit down and write out a paper, but I would simply take the uniform air ticket, so-called, that has been formulated and that is now used quite universally either in whole or in part among the greater number of large companies in the United States, and show you the reason for the ticket and why the present ticket, as it is being used, was made up, and what we think of it at the present time.

I can best give you the idea of this ticket by taking the various clauses seriatim, but before doing so let me give you a little of the history which prompted the formation of this ticket contract. The American Air Transport Association called a meeting of the Traffic Managers. Most of the Traffic Managers of the larger companies were present. They decided that it was necessary that the whole industry should more or less work on a uniform basis in so far as traffic was concerned, because if they did not they were not going to be able to effect the economies in operation, they were not going to be able to sell air travel to the public, unless they had this uniform method.

A committee was appointed, consisting of J. W. Brennan, of the Transcontinental Air Transport, R. A. Bishop, of the Universal Air Lines, Col. L. H. Brittin, of the Northwest Airways, Winsor Williams, Manager of the American Air Transport Association, and I acted as Counsel for the committee.

We first obtained from all of the air lines all of their tickets. I wish you could have seen them. One company had sixteen or seventeen different tickets, and each time they would print up a new ticket they would add or subtract something from the contract. We had in that particular instance one-way tickets with one contract, round trip tickets with another contract. Some companies attempted to limit their liability by methods of charging a certain

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rate with a maximum liability, and double that rate for another maximum liability, which was higher. Some companies said they were not liable under any conditions, whether there was negligence on the part of the companies, their agents or employees, or in any event.

Practically every company had a clause in its contract which provided that the passenger agreed with the company that the company was a private carrier, although all companies were advertising to carry passengers over a scheduled route at fixed times, with licensed planes and licensed pilots, for a fixed fare.

For some reason this private carrier bugaboo seemed to stick with the carriers. We could not get it out of their heads that they were not private carriers, and that they could as such limit their liability or waive it completely. Some of the carriers went so far as to say that if the ticket contract with the waiver of liability had been signed and a crash had occurred, and they were subsequently sued for loss of life or bodily damages or personal injuries, that the mere fact of the signing of that contract would act as a general release, and they would be absolved from all damages.

Luckily, the executives of the companies kept on paying their liability insurance, and we found out from time to time, as some of these very deplorable accidents happened, that none of these companies wanted to fight the matter out in the courts, but there was the general run of the old army game of passing the buck right over to the insurance companies, and the insurance companies were collecting such large premiums that they could well afford to come down and make the best settlement possible with the injured persons or the personal representatives.

Another thing that prompted the formation of the ticket was the fact that it was practically impossible to have interline tickets sold. For instance, a person leaving Los Angeles, coming to Chicago and continuing on to Detroit, would have to buy different tickets along the line. He could not buy one ticket with various coupons attached which would allow him to go the whole limit of the journey and pay the fare at one time. That was another reason for the ticket.

The main reason, in my opinion, for the ticket was that if each company were using the same ticket, the same contract, that every other company was using, and they were sued in a jurisdiction, and it was carried up to the court of last resort in that state and adjudication was had upon the clauses of that ticket, that that would be a very simple matter then to take that decision and carry

it into other courts. If the contract was wrong, it could then be changed. If it were right, it made it much stronger for the operating companies.

The ticket, as it was submitted to the members of the American Air Transport Association and also to leading lawyers throughout the United States, not only those engaged in the study and research of air law, but railroad counsel and utility counsel and executives of railroads and transportation bodies, is as follows: (I think I will read you the whole ticket, and then take up the clauses and reasons for them).

"ONE: (1) That said ticket represents a revocable license and that the company or companies represented herein may, with sufficient cause to it or them, decline to carry me, and in that event the sole responsibility of the company or companies shall be to refund to me, through regular channels, the price paid by me for said ticket; (2) that if I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein shall not be responsible save for its or their own neglect of duty; (3) that after the commencement of the flight, I may be landed and discharged in such manner and in such place or places as the pilot, in his sole discretion, shall see fit, and in that event the only responsibility of the company or companies named herein shall be to refund to me such proportion of the price paid by me for this ticket as the distance between the place of landing and the place of destination bears to the whole length of the flight for which this ticket has been issued.

"TWO: (4) That this ticket is non-transferable and if presented for passage by any person other than myself may be taken up and cancelled without refund. (5) The presentation of this ticket and the use of it by any person other than myself shall be considered a fraud and trespass upon the company or companies.

"THREE: (6) I further agree that the company or companies represented herein shall not be liable for any loss or claim arising out of delay or failure, for any reason, with or without advance notice, of aircraft to depart from any point or arrive at any point according to any schedule, agreement, statement or otherwise, nor for any loss or damage or injury to any person or property, arising out of such condition or otherwise, except negligence upon the part of the company or companies represented herein.

"FOUR: (7) The air transport company is not responsible beyond its own lines and in selling this ticket and checking baggage thereon for transportation beyond its own lines, this company acts as agent for the other transportation agency or agencies. (8) The liability of the air company for loss or damage to baggage and/or personal property is limited to the amount of \$100.00, unless a higher valuation be declared and an additional charge paid therefor."

In addition to that, on the back of the ticket we had the following conditions:

"1. Reservation must be made and space assigned before ticket is good for passage.

"2. Ticket must be used on date shown on face of ticket.

"3. Baggage. Thirty pounds will be carried free on each full fare ticket. Baggage carried in excess of the 30 pounds free limit, but not exceeding a total of 50 pounds, will be charged for such excess at the rate of one-half of one per cent of the air passenger fare, per pound, with a minimum charge of twenty-five cents per pound. Baggage weighing in excess of 50 pounds will be carried only by special arrangement made in advance.

"4. This ticket is sold subject to tariff regulations and rules covering transportation of passengers and baggage of individual carriers."

Taking up the ticket and the various clauses seriatim, the first clause is,

"That said ticket represents a revocable license and that the company or companies represented herein may, with sufficient cause to it or them, decline to carry me, and in that event the sole responsibility of the company or companies shall be to refund to me, through regular channels, the price paid by me for said ticket."

This clause was deemed necessary because of the changing weather conditions and the possibility of an unexpected overload of mail on the lines which carried combined mail and passenger traffic.

The clause was further supposed to give protection to the company in case prospective passengers presented themselves for transportation and their presence in the plane might have been obnoxious. In connection with that we have had several cases at the Municipal Airport where people who had been more or less imbibing in the "flowing bowl" appeared, and their presence on the plane was not deemed quite what the rest of the passengers might like, so they were given their money back.

The next says,

"That if I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein shall not be responsible save for its or their own neglect of duty."

I wanted to put "except" in there, and the traffic men said it sounded too legal, so they said put "save," and I said all right.

That clause has created among the counsel of the air companies quite a bit of furor. As a matter of fact, you can leave it out, but we had such a time in getting the various air companies to consider the contract, and to consider the uniform contract, that we had to hold some sort of bait out and straddle the fence. In my opinion, the clause does not need to be in there at all. In the first place, from a liability standpoint, if it is an act of God clearly

the company is not liable. If it is an inevitable accident, you are not going to get any liability there. If you have an accident from an intervening cause, for instance, like one that happened in California, where an aviator who had been imbibing too freely the night before he started diving over an airport and dove into the pilot cabin of a plane below him, there is no liability there, inasmuch as they had done everything that it was possible to do to keep out of his way.

However, if there is any negligence on the part of the company or companies, there is no doubt but what they are liable, if they have not taken the highest degree of care in the inspection of their planes, if they have not done everything that they can to obtain weather reports, if their equipment is not so good as they can possibly use under the circumstances, and by that I do not mean it is up to them to buy a new plane every month, but that the same is inspected and competent mechanics have gone over it and pronounced it fit; that the pilots are licensed as transport pilots, and that everything has been done that could be done, that an ordinary, well-thinking and prudent man could do under the circumstances if he were going up in that plane himself, and still there is an accident, it might be caused from latent defects and it might be caused from some other intervening cause, then you may have negligence and you may not.

You gentlemen who have been around crashes know the great difficulty that is to be found in proving why the plane crashed. In my opinion, you have to prove negligence if you are going to hold the air companies. They are not insurers, and as Dr. McNair said in one of his past addresses, if you are going to hold them as insurers, they are not in the true sense of the word insurers because an insurer pays in any event, whether there is negligence, contributory negligence or not.

In this case they would pay only in the case of negligence, so I think the clause could be entirely wiped out of the contract. The ordinary risks of air transportation simply mean the whole aeronautical law is a direct violation of a natural law, namely, gravitation, and you are going to have one working against the other, and you are sure that gravitation is going to come through in the long run, so it just depends on where you are going to sit down if you find yourself in a bad way.

The third clause in the paragraph says,

"that after the commencement of the flight, I may be landed and discharged in such manner and in such place or places as the pilot, in his sole discre-

tion, shall see fit, and in that event the only responsibility of the company or companies named herein shall be to refund to me such proportion of the price paid by me for this ticket as the distance between the place of landing and the place of destination bears to the whole length of the flight for which this ticket has been issued."

Circumstances have come up time after time which rendered it imperative to put something of that sort in. If a pilot started out and ran into a series of storms, making it dangerous, on account of low ceiling, poor visibility or heavy head winds, to continue, it is up to that pilot to protect his passengers. If he sits down out in a corn field or some other place outside of the beaten track, the argument was used by a number of people, "Well, he can put them out there, and they can starve to death and they can't get in. How about the people flying to California? If he puts them out in the desert, he can land out there, and he has to make no attempt to get in."

My only answer to that was that that pilot likes to sleep and eat and have water as well as the passengers, and he is going to do everything in his power to get those passengers along, and himself along with them.

The main thing that we wanted to provide for was that if half of the distance was flown by air, and a forced landing was necessitated by reason of weather conditions or latent defects in the plane, or something of that sort, that that pilot could then put those people on the railroad or busses or automobiles and send them on, and give them the proportionate refund. At the same time, the companies would not be liable for having accepted these people as passengers and not putting them at their destination at the time advertised in their tariff.

The practical working of that clause has been very satisfactory with all of the air companies.

Clause 4, Paragraph Two, says,

"That this ticket is non-transferable and if presented for passage by any person other than myself may be taken up and cancelled without refund."

That is on the basis that every ticket had to be signed. In order to have a good and valid contract, you had to sign the ticket.

The next clause says,

"The presentation of this ticket and the use of it by any person other than myself shall be considered a fraud and trespass upon the company or companies."

I think that whole thing can come out of the present ticket, for this reason, that what the traffic men and the executives of the

air companies want at the present time is people riding their planes, and if John Jones buys a ticket and hands it over to Bill Smith, Bill Smith should be able to get on and ride just as if he were John Jones, because what they want is to fill the seats, and they want revenue.

They figured at the time, also, that if the ticket were stolen there would be some protection for the person who had previously purchased it.

Paragraph Three,

"I further agree that the company or companies represented herein shall not be liable for any loss or claim arising out of delay or failure, for any reason, with or without advance notice, of aircraft to depart from any point or arrive at any point according to any schedule, agreement, statement or otherwise, nor for any loss or damage or injury to any person or property, arising out of such condition or otherwise, except negligence upon the part of the company or companies represented herein."

That clause would have to be considered in relation to the previous clauses. In formulating that clause, we took into consideration the celebrated case of the *Railroad Company v. Lockwood*, 84 U. S. 357, which is one of the leading cases on contract limitations by a common carrier as to liability, not only as to a carrier of goods but of passengers. Public policy will be a great determining factor on the final determination by appellate tribunals on the question of limitation of liability in aviation law. If a contract of carriage is unfair and against public policy, it might not be allowed in evidence in the trial court and it certainly could not be sustained in any supreme court. Any attempt to limit liability of the carrier where it is caused by the carrier's negligence or misfeasance is certainly against public policy and it was the opinion of the committee that it would be held as against public policy and in all probability that you would not be able to get your contract in evidence.

We made no attempt in this contract to force the public to admit that the carriers were private carriers, because this same Lockwood case states that it is not what you say you are, but in reality what you are, that governs the whole situation.

In Paragraph Four of the ticket,

"The air transport company is not responsible beyond its own lines and in selling this ticket and checking baggage thereon for transportation beyond its own lines, this company acts as agent for the other transportation agency or agencies."

As a matter of fact, that is practically what is done by the railroads at the present time. However, if you have three connecting lines and an accident happens at the end of the journey on the third line, and you have a joint ticket, you can go back and sue in the jurisdiction of the original line, bringing them in as party defendants, and your interline agreements, which are now in operation with some companies, would compel the company who was operating at the time of the accident, on which the passenger was traveling, to come in and defend itself and pay any damages that might be given in the verdict. It is simply following the general rule of common carriers that that was put in.

The next clause,

"The liability of the air company for loss or damage to baggage and/or personal property is limited to the amount of \$100.00, unless a higher valuation be declared and an additional charge paid therefor."

The only question that arises in the clause is the value of the baggage, and because of the fact that all railroads have a uniform baggage rate of \$100.00, and if you want additional insurance you pay for it, we decided to put that in.

I know of one case where additional charges were collected because a person declared his baggage. That case happened in California, and I have not made any inquiry for the last six months on it, but up to that time there was only one case where additional charges had been collected.

This ticket is supposed to be read and signed by the passenger. As a matter of fact, at the present time, I doubt if more than twenty per cent of the tickets that are sold in the United States are signed by the passengers. They are supposed to sign them at the time they buy them and pay their money, but they do not. When they get on the plane and the ticket is collected, they are not signed there. They simply go up in the air without them.

I cannot see where it makes any difference. It is certainly a drawback from the standpoint of selling air transportation to the public, because of the fact that the public does not want to be bothered. They want to buy a ticket, step into a plane and hand it over.

They would like to know what their liability is. We would like to be able to tell them. We have not been able to as yet, so if we would take this ticket at the present time we could delete at least fifty per cent of the clauses and I think it would justify the work that we have put on it, and it would fill the bill as ade-

quately as the great number of tickets that were in use at the time we started on the uniform ticket.

In checking up with the American Air Transport Association, I found that several of the companies are using the ticket contract as I have given it to you today; a large number of the companies are using the ticket contract with some additions, and I know of none that have used it with any subtractions. They always put some more clauses in. They do not feel they have enough there for protection.

On next Friday we are having a meeting of the American Air Transport Association, Traffic Division, in which the interline agreements among the various companies are going to be taken up and thrashed out, and in all probability, within the next few months the interline agreements will become universal, and the tickets will be made uniform or as nearly uniform as they can be made, subject to the objection of the various Counsel for the various companies.

As I say, there is so much that we have gone into on the question of air liability, liability of the passenger in the air, that we have tried to get away from it, we have tried to simplify it, and we have tried to make it a common-sense, workable contract, and if we can cut it in half, and then cut it in half again, we will feel that it will at least justify the work that we have put in and will assist in the sale of air traffic to the general public, putting them up in the air. (Applause.)

CHAIRMAN ZOLLMANN: Perhaps we will do best if we defer discussion of the valuable paper just heard until after the other papers have been read.

The next speaker on the program was to have addressed you yesterday afternoon. However, he was unable to be present then, but what you lost yesterday afternoon you gain this morning. Mr. Cuthell was Chairman of the Committee of the American Bar Association on Air Law while that committee still covered both radio and aeronautics. When the division of the committee occurred two years ago, he remained as Chairman of the Aeronautical Committee, and is such Chairman today. In addition, he is Counsel of the Transcontinental Air Transport Company, General Counsel, Curtiss-Wright Company, and the organizer of the National Air Transport Company. In view of his numerous connections with air transportation and air traffic in general, he is in a position to give us a very valuable paper. Therefore it gives me great pleasure to introduce the Honorable Chester W. Cuthell, who will address you on "The Scope of State Aeronautical Legislation." Mr. Cuthell. (Applause.)