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Federal Airship Foreign Commerce Bill

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FEDERAL AIRSHIP FOREIGN COMMERCE BILL

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A most interesting Bill (Senate Bill No. 5078) was introduced by Senator McNary on December 3, 1930, dealing with various aspects of liability likely to arise out of the operation of aircraft in international commerce and with other matters. The need for such a bill seems to have been felt first by persons interested in the expected development of Zeppelin routes overseas. The bill, however, applies to *all aircraft in foreign commerce,* whether lighter or heavier than air, and some of its provisions would also apply to certain domestic aircraft.

The power of Congress to legislate is plainly found in the clause of the Constitution (Art. I, sec. 8) giving Congress jurisdiction over foreign commerce. The bill would accordingly apply only to aircraft engaged *in commerce*—that is, carrying mails, goods or passengers for hire. It would not apply to aircraft not engaged in commercial operations. It would presumably apply to aircraft carrying for a single shipper, for hire, as well as for many shippers. In other words, the distinction, familiar in the maritime law of bills of lading and charterparties, between common carriers and private carriers does not seem to find expression in this bill.

The bill strings together a series of the familiar statutes which have been well tried and tested in relation to ocean-borne shipping, suitably rephrased as necessary to apply to aircraft instead of to vessels. These provisions are:

1. A *declaration of national policy* favoring and fostering the development of American air lines in foreign trade, patterned on the opening declaration of the Merchant Marine Act of 1920.

2. A paraphrase of the *Mail Subsidy* provisions of the Jones-White Act of 1928, including provisions, modelled on shipping acts, as to the minimum percentage of *American nationals comprising the crews* of aircraft carrying such mails.

3. The familiar *Precious Goods Act,* exempting the carrier from liability for money, jewelry, etc., etc., unless the nature of the shipment is expressly disclosed. (R. S. 4281.)

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4. The well-known *Fire Statute,* exempting aircraft owners from liability for fire not due to the owner's design or neglect. (R. S. 4282.)

5. The *Limitation of Liability Acts,* providing that the owner of an aircraft may limit his liability to the value of the craft and pending freight substantially as a vessel-owner may do. (R. S. 4283-4287.)

6. The *Harter Act,* providing that bills of lading must be issued, forbidding negligence clauses in the bill of lading, excusing the carrier from liability for negligence of employees in the navigation and management of the aircraft provided *due diligence* has been used to make the aircraft in all respects airworthy, and excusing the carrier also from liability for "dangers of the air," Acts of God, etc. (Act of Feb. 13, 1893.)

7. A declaration that the familiar and ancient maritime system of *General Average* and *Salvage* contribution and adjustment shall apply to similar situations arising on foreign commercial aircraft flights. The language is novel, as General Average in Admiralty rests on ancient maritime custom.

8. Authority to make *traffic agreements,* which would otherwise violate the Anti-Trust Acts, under regulation of the Secretary of Commerce, patterned after similar provisions in the Shipping Act of 1916.

9. An adaptation of the *Ship Mortgage Act* of 1920 providing a system of Federal registration of sales and mortgages of aircraft registered with the Department of Commerce as "Aircraft of the United States."

10. *Employment of military and naval officers* in foreign air commerce services, on assignment and half pay from the Government, similar to the Jones-White Act, sec. 412.

11. *Use of military and naval airport facilities* for foreign commercial flights until civilian airports may be developed. This idea, while not exactly novel, does not seem to be drawn from analogy.

Several different ideas find expression in the various parts of this bill. Briefly, these are:

I. Matters of jurisdiction and liability;
II. Validation of traffic agreements;
III. Financing by mortgages;
IV. Subsidy by mail contracts and military cooperation.

I. As to jurisdiction and liability, the ideas behind the bill are in the main excellent.

American aircraft over the high seas are outside and above any legal or national jurisdiction heretofore known. As soon as they are so high above the water as not to be in the air space in which vessels navigate—in other words, whenever they are higher than the masts of vessels—they are undoubtedly outside and above the traditional maritime and admiralty jurisdiction and in a place where there is no law except such law as the Nation whose flag they fly expressly applies to them. Congress has the power to apply legislation to American aircraft in these lawless air spaces. Congress has not yet expressly applied any statutes to this situation. The Air Commerce Act of 1926 does not cover aviation overseas.

As to the contents of an overseas bill of lading, the Federal Bill of Lading Act of January 1, 1916 (49 U. S. Code 81-124), already provides how bills of lading must be issued in foreign commerce; consequently it is questionable whether the provisions of Sections 1, 4 and 5 of the Harter Act should be substituted. Sections 2 and 3 of the Harter Act are, on the other hand, apt and useful.

The proposed new act might well include an appropriate paraphrase of the Death on the High Seas Act of 1920. It might also apply either the Federal Employers' Liability Acts or the Federal Longshoremen's and Harbor Workers' Compensation Act to employees engaged in foreign flights. It might also extend the Suits in Admiralty Act, 1920, and the Public Vessels Act, 1925, to government-owned aircraft, so as to enable parties injured by such aircraft to sue in the courts without the necessity of obtaining special permissive acts from Congress in the case of each accident.

In respect of salvage along the coasts and at sea, there seems no good reason why the provisions of the Salvage Act of 1921 (46 USC 727, 728, 729, 730, 731) should not be applied to aircraft. These embody the international salvage convention of 1910—a useful point. While the Hawaii disaster of 1930 demonstrated that airplanes cannot at present do much towards saving life at sea without risking loss of the plane and gravest period to the crew, the day may not be far off when solid service may be possible with reasonable safety; and of course assistance by radio reports or by flight to a nearby coast may often be feasible. It would be wise to have a declaration by Congress that a deviation from the route in order to report peril of lives and property observed at sea shall not be deemed such a deviation as might displace the terms of the bill of

lading. The two-year time limit for salvage suits would also be useful.

The more ancient salvage provision now found in 46 USC 721, authorizing our Consuls in foreign lands to care for wrecked American vessels and cargo, might usefully be extended to aircraft. But Sec. 723, penalizing salvors who try to take salvaged property from our coasts to foreign ports, is perhaps now out of date; the special provisions of Secs. 722 and 724 aimed at the piratical salvors of the lonely Florida keys are certainly antiquated.

II. The traffic agreement provisions follow the Shipping Acts very closely and will doubtless be as useful for aviation companies as they have proved to be for steamship companies. An arrangement for legalized interchange of traffic between steamships and aircraft might also be worked out and added to the bill. The Jones-White Act already contemplates special subsidies for air services in connection with mail steamers. (Sec. 409.)

III. The sale and mortgage recordation provisions would apply to all "aircraft of the United States" as defined by the Air Commerce Act, 1926, Sec. 3(a). This would include aircraft in domestic as well as in foreign commerce; it would also include non-commercial aircraft voluntarily registered with the Federal Government. There may well be differences of opinion as to the desirability and even the constitutionality of going so far. Foreign air services by zeppelins or super-flying boats can hardly be interested by schemes for recording mortgages of domestic airplanes; the mortgage provisions seem to go considerably beyond the original purposes of the bill. The system would doubtless be very useful. Whether it could wholly supersede the need of recordation under State recording Acts will present a nice question. (See Stewart & Co. v. Rivara 274 U. S. 614.) The similar provisions concerning ships have been held constitutional by lower courts under the commerce clause; the aircraft provisions would doubtless go the same way.

IV. The mail-subsidy and military cooperation provisions will probably attract the greatest public attention. Mail contracts are already well-established as methods of aiding both shipping and aviation and there should be little difficulty in extending the plan of the Jones-White Act to overseas air services. The assignment of military personnel to commercial lines with half-pay utilizes the plan embodied in the Jones-White Act of 1928. The lack of trained commercial personnel, and the equal dearth of military opportunity to practice extended flights are persuasive reasons why this pro-

vision should be acceptable to Congress and the military establishments. Zeppelin services will doubtless need Lakehurst and Langley Field as airports until private airports can be regarded as justified and thereafter established.

The Bill as drawn would apply to all foreign flights, whether to Canada and Mexico, whose boundaries are contiguous to ours, or to Cuba, Bermuda, Central and South America, Europe, and other non-contiguous countries. The subsidy, regulatory and mortgage provisions would be equally useful and applicable in all cases. The liability provisions, however, might be drawn to distinguish between flights to Canada and Mexico and all other flights. For in a flight to Canada and Mexico, aircraft are always over the territory of one country or another, and every tort and contract can be considered in relation to the law of the State beneath. But over the high seas, there is no national or international law, save as imported from the flag. Our ships take our traditional maritime law and our shipping statutes with them. Our aircraft take no traditional air law with them, since there is no such tradition; and they only take such statutes as are phrased to apply outside the columns of air which over-lie our territory. Over the sea it is therefore vital to legislate such rules of liability as are desired. Over land, the need of a federal system is not so clear. It may for the present be assumed that Congress might differentiate in its legislation between commerce with contiguous and non-contiguous countries; there are precedents for at least minor differences of this sort.

Analysis of the Bill must of course take account of physical differences between foreign commerce by rail, ship and air. For example, most sea voyages begin at or near the seaboard, but a foreign air flight may begin anywhere within the country. We are already familiar with interstate and intrastate flights occurring in the same area; it is no more difficult to adjust the mind to the idea of foreign flights passing through the inland air, with different tort and contract laws for each sort of flight. As long as the rules of the road are the same for all, the legal status of each kind of commerce can be worked out by itself, as between carrier, employee, passenger, shipper and the Government.