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VALIDITY OF PROVISIONS IN AIRLINE RULES TARIFFS

*John T. Plunket**

INTERSTATE common carriers are required by statute to file with the federal agency which regulates their activities tariffs setting forth the rates, fares and charges which the carrier intends to collect from persons using its services and the related rules, regulations and conditions under which those services will be provided. In the case of railroads and pipe lines,¹ motor carriers² and water carriers,³ the agency is the Interstate Commerce Commission, and with regard to radio and telegraph companies,⁴ it is the Federal Communications Commission. Carriers by air must,

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¹ 49 U. S. C. 1946 ed. § 6 (1):

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

² 49 U. S. C. 1946 ed. § 317 (a).

³ 49 U. S. C. 1946 ed. § 906 (a).

⁴ 48 STAT. 1070 (1934), 47 U. S. C. 1946 ed. § 203.

pursuant to Section 403 (a) of the Civil Aeronautics Act,⁵ file tariffs with the Civil Aeronautics Board (CAB).

It has long been held that the "schedules" or "tariffs" so filed become a part of the contract between the carrier and its passengers, shippers or customers and, as such, are binding on both parties to such contract.⁶ Thus the public is assured of uniform treatment by the common carrier, and the evils of favoritism, rebates and "special contracts" are avoided.

Nor is it necessary that the passenger, shipper or customer have actual knowledge of the contents of the carrier's tariffs in order that those provisions be binding upon him. Their filing with the appropriate regulatory agency puts the public upon notice as to the terms under which the carrier will provide services. Thus, in *Western Union Telegraph Co. v. Esteve Bros. & Co.*,⁷ a cable message was filed in Spain with a telegraph company upon a form which did not indicate that the service was in any way subject to defendant's tariff. However, the error in transmission which gave rise to the lawsuit occurred on defendant's lines, and the United States Supreme Court held that defendant's tariffs stated the terms of the contract and governed the company's liability.

⁵ 52 STAT. 992 (1938), 49 U. S. C. 1946 ed. § 483:

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

⁶ *Boston & Maine Railroad v. Hooker*, 233 U. S. 97 (1914); *Kansas City Southern Ry. v. Carl*, 227 U. S. 639 (1913).

⁷ 256 U. S. 566 (1921).

Carriers have long followed the practice of referring on tickets or waybills to these tariffs for a statement of the contract of carriage which they offer the public. *Koontz v. South Suburban Safe-way Lines*⁸ states the reason:

Because of the fact that the tariff regulations filed with the Commission are of an intricate and complex nature, it is manifestly impossible to imprint on tickets all of the rules and regulations of the tariffs. These rules and regulations are nevertheless binding upon the carrier and the passenger. The carrier may not lawfully deviate from its filed tariffs. It cannot obligate itself to deviate from the rates and conditions of the tariffs. To permit a carrier to do so would open the door to discrimination.

So, on the back of the tickets issued by the scheduled air carriers of the United States are certain "Conditions of Transportation" or, as sometimes labeled, a "Contract of Carriage." One of the provisions contained therein is to the effect that the transportation is furnished subject to the provisions of the carrier's tariffs. Similarly, the air waybill under which freight is carried refers the shipper and consignee to the carrier's tariffs for a full statement of the transportation contract.

Each carrier has filed with the Civil Aeronautics Board a passenger tariff and a freight tariff, or is a "participating carrier" in tariffs filed with that agency by an industry association.⁹ Each tariff consists of a "rates tariff" and a "rules tariff." The latter contains rules, regulations and practices under which the carrier will provide transportation at the rates specified in the former. These include provisions dealing with the applicability of fares, rates and charges, the routing and re-routing of passengers, the making and cancelling of reservations, ticketing and the validity of tickets and the handling of baggage, and certain provisions limiting or affecting the liability of the carrier in such matters as

⁸ 332 Ill. App. 14, 73 N. E. 2d 919, 920 (1947).

⁹ Currently, the principal industry association tariffs are Local and Joint Passenger Rules Tariff No. PR-3, C. A. B. No. 27, and Local and Joint Passenger Fares Tariff No. PF-4, C. A. B. No. 18, both issued by C. C. Hubbard, Agent; Official Airfreight Rules Tariff No. 1, C. A. B. No. 1, and Official Airfreight Rate Tariff No. 2, C. A. B. No. 8, both issued by Emery F. Johnson, Agent.

loss or damage to baggage, failure to operate on schedule, cancellation of flights, failure to transport freight promptly, etc.

The public is protected against improper, unfair, unreasonable or discriminatory rates, fares, rules or regulations by the fact that the regulatory agency may refuse to permit the filing of any rates or rules which it considers improper, and may cancel any which it subsequently finds to be improper and dictate a satisfactory replacement. Thus, Section 1002 (d) of the Civil Aeronautics Act¹⁰ provides that if, following complaint by any person or upon its own initiative, the Board is of the opinion that any rate, fare or charge demanded or collected by a carrier "or any classification, rule, regulation, or practice affecting such rate, fare or charge, or the value of the services thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial" the Board shall prescribe the lawful rate, fare or charge "or the lawful classification, rule, regulation or practice thereafter to be made effective."

Under these circumstances the validity of these rules is naturally an important question in any litigation growing out of transportation furnished by the carrier filing them. Following the doctrine of the *Boston & Maine R. R. v. Hooker*¹¹ and *Western Union Telegraph Co. v. Esteve* cases, the courts have held that, to the extent that they are valid, the rules in air carrier tariffs do become a part of the contract of carriage. It also seems well settled that, under the "primary jurisdiction" doctrine, it is the regulatory agency — presumably expert in such matters — which is to determine the question of the "reasonableness" of such rules, provided the subject matter is within the jurisdiction established by statute for the agency.

Thus, in *Jones v. Northwest Airlines, Inc.*,¹² the Supreme Court of Washington held: "In buying this ticket, appellant bought it subject to the regulations. Respondent could not sell it on any

¹⁰ 52 STAT. 1018 (1938), 49 U. S. C. 1946 ed. § 642 (d).

¹¹ 233 U. S. 97 (1914), cited *supra* note 6.

¹² 22 Wash. 2d 863, 157 P. 2d 728, 729 (1945).

other basis without violating the law, for section 483 of the Civil Aeronautics Act, 49 U. S. C., requires the filing of these rules and regulations and forbids a carrier from departing therefrom." The court then asserted, "If there be a question of this practice being wrongful, it should be settled by the civil aeronautics board, which exists for the very purpose of deciding such a matter."

And in *Lichten v. Eastern Airlines*¹³ the Court of Appeals for the Second Circuit held: "Under these provisions, and similar provisions of other enactments, it is well settled that questions of the reasonableness of rates and practices are to be left to the administrative agency in the first instance, and that under the doctrine of 'primary jurisdiction' the provisions of a tariff properly filed with the Board and within its authority are deemed valid until rejected by it."

Civil Aeronautics Board v. Modern Air Transport,¹⁴ cited in the *Lichten* case as authority for the foregoing quotation, pointed out that the courts will not determine a question which is within the jurisdiction of an administrative tribunal if the question is one which requires the special knowledge and experience of the administrative tribunal, and that this doctrine has been used by the courts as a basis for refusing to decide the "difficult issues of reasonableness of a rate or fairness of a regulation," the agency being said to have "primary jurisdiction" in these matters. But the court pointed out that this doctrine is not applicable where the issue is not the reasonableness of the rate or rule, but whether such rate or rule has been violated.

During the fifteen years since the enactment of the Civil Aeronautics Act, surprisingly few judicial opinions have dealt with the provisions of tariffs filed under Section 403(a). With the growth of the air transport industry, however, they have become more frequent, and recent developments with regard to them are rather confusing.

¹³ 189 F. 2d 939, 941 (1951).

¹⁴ 179 F. 2d 622, 624 (2d Cir. 1950).

A review of the cases which have been decided, grouped in accordance with the rules with which they have been concerned, will be helpful background.

CANCELLATION OF FLIGHTS

In *Jones v. Northwest Airlines, Inc., supra*, the flight on which plaintiff was a passenger was cancelled because of weather conditions prior to reaching his destination. His suit was based on the proposition that he had advised the carrier of the limited time available to him for the trip and had been assured that "he would get through all right," that he thereby had a special contract in which his limited time had been provided for, and that accordingly the carrier should have removed passengers from other flights in order to provide him with transportation.

Printed on the passenger's ticket were the words "Sold subject to tariff regulations," and the tariff which the carrier had filed under Section 403(a) reserved to it the right to "cancel any flight . . . at any . . . point . . . at any time it deems such action advisable or necessary." Using the language heretofore quoted, the court held that the carrier was exercising a contractual right in cancelling the flight, and that the passenger could have no "special contract" in view of the existence of the tariff rule.

The facts were similar in *Mack v. Eastern Air Lines*.¹⁵ Plaintiff was a passenger on an airplane bound from Boston to Washington when his flight was cancelled on arrival at New York because of weather conditions in Washington. He based his suit on three asserted causes of action: (1) tort, in that defendant negligently failed to advise him that the flight to Washington might not be completed and negligently failed to carry him beyond New York; (2) tort, in that defendant negligently failed to complete the air passage to Washington; and (3) contract, alleging breach of contract to carry plaintiff to Washington.

¹⁵ 87 F. Supp. 113 (D. Mass. 1949).

The court pointed out that the carrier had filed a tariff under Section 403, and that the tariff itself specified that the rules contained therein "shall constitute the terms and conditions upon which each participating carrier furnishes, or agrees to furnish, transportation at such fares and charges, to the same extent as if such Rules were included as terms and conditions in the contract of carriage and expressly agreed to by the passengers." Quotation from the rules in the tariff revealed that the carrier had provided therein that it should not "be liable for failing to operate any flight according to schedule or for changing the schedule of any flight with or without notice to the passenger" and that it might "refuse to transport, or to remove at any point, any passenger—(1) Whenever such action is necessary to comply with any governmental regulation, or whenever it deems such action necessary or advisable by reason of weather or other conditions beyond its control."

Under these circumstances, the court held that there could "be no question that these Rules were within the authority conferred by the Civil Aeronautics Act of 1938 and became part of the contract between the carrier and the passenger" and that "[i]nasmuch as the Rules 11, 14 and 15 of the Rules Tariff were incorporated in the contract between plaintiff and defendant, there can be no question that plaintiff is bound by the conditions specified therein."¹⁶ As authority the court cited *Jones v. Northwest Airlines, Inc.*, *Boston & Maine Railroad v. Hooker* and *Western Union Telegraph Co. v. Esteve*.¹⁷

¹⁶ *Id.* at 115.

¹⁷ In *Adler v. Chicago & Southern Air Lines*, 41 F. Supp. 366 (E. D. Mo. 1941), the court considered a suit based on cancellation of the flight on which plaintiff passenger held reservations. While making no reference to tariffs, the court ruled that under the "primary jurisdiction" doctrine it had no power to act until administrative remedies were exhausted. "It is apparent that the practice of the defendant of cancelling scheduled flights is a 'practice' within the meaning of the Civil Aeronautics Act . . . It follows that the reasonableness or lawfulness of such practice can only be determined by the Civil Aeronautics Board, and this court is without any jurisdiction to grant any relief to the plaintiff in the absence of a finding by that board that the practice complained of is unlawful or unreasonable, and until the plaintiff is able to allege in a complaint that he has exhausted all of his remedies before that board." *Id.* at 367.

TIME OF DELIVERY OF FREIGHT

The only published opinion dealing with rules published in an air freight tariff seems to be that in *Furrow & Co. v. American Airlines, Inc.*¹⁸ A shipment of flowers was found to be wilted on delivery to the consignee, and plaintiff sought damages for delay in shipment. The court found, however, that the shipment arrived within a reasonable time, and pointed out that the carrier's tariff contained provisions that freight was accepted subject to availability of space, that the carrier reserved the right to decide the priority of shipment and which shipments would move on a particular flight and that the carrier did not agree to transport within any specific time and was not to be held liable for failure to do so. Citing the *Jones* and *Mack* cases, *supra*, the court held: "Such rules are within the authority conferred by the Civil Aeronautics Act, and the tariffs involved became a part of the contract of transportation."¹⁹

DISCLAIMER OF LIABILITY FOR LOSS OF CERTAIN
TYPES OF BAGGAGE

The highest authority to date on the question of the validity of air carrier tariff provisions is the *Lichten* case, cited above. Here the complaint was that the plaintiff, as a Miami-Philadelphia passenger, had checked two pieces of baggage before boarding the flight, that one of them was not removed from the airplane at Philadelphia but was carried to Newark where it was delivered by mistake to an unknown person, and was subsequently recovered by the carrier and delivered to the passenger. Investigation then revealed that some \$3,000 worth of jewelry was missing from the bag.

The defense was based upon rules contained in a tariff filed under Section 403(a) which provided (1) that jewelry "will be

¹⁸ 102 F. Supp. 808 (W. D. Okla. 1952).

¹⁹ *Id.* at 809.

carried only at the risk of the passenger" and (2) that the carrier should not be liable for the loss of jewelry included in a passenger's baggage. The court noted that "[t]o the extent that these rules are valid, they became a part of the contract under which the appellant and her baggage were carried," citing the *Esteve* and *Mack* cases,²⁰ and then passed to a consideration of the validity of the provisions.

It:

Noting Section 1002 (a), (d) and (g) of the Act,²¹ and that under the "primary jurisdiction" doctrine the provisions of a tariff properly filed with the Board and within its authority are deemed valid until rejected by it, the court commented that if the Act be construed as empowering the Board to approve and accept the tariff provisions in question, then the reasonableness of the rule could be raised in court only after the exhaustion of administrative remedies. Plaintiff, however, took the position that the Act should not be construed to permit the Board to modify the common law rule that a common carrier may not by contract relieve itself of the consequences of its own negligence and that the common law rule invalidated the tariff provisions, regardless of CAB action.

The court did not agree. Referring to the similarity of the Act and the Interstate Commerce Act, the court observed that the latter, in the Carmack Amendment, expressly prohibited exemption from liability for any loss or damage to baggage caused by the carrier, regardless of negligence,²² and reasoned that the "absence of a similar provision in the Civil Aeronautics Act compels the conclusion that such an exemption is not forbidden to air carriers, and that the Board could properly accept the appellee's tariff."²³

Judge Frank, in a lengthy dissenting opinion, agreed that since the tariff involved was filed with the Board, the Board must be

²⁰ 189 F. 2d at 940.

²¹ 52 STAT. 1018 (1938), 49 U. S. C. 1946 ed. § 642 (a), (d), (g).

²² 49 U. S. C. 1946 ed. § 20 (11).

²³ 189 F. 2d at 941.

deemed to have approved the provision in the absence of any showing that it had rejected it. He argued, however, that the Board had no power to approve such a provision, and that the Carmack Amendment, far from creating a new rule of law, merely legislated existing federal common law into a rule which would be binding on state as well as federal courts — in other words, that even prior to the enactment of the Carmack Amendment, such an exemption of the carrier from liability for its own negligence would have been invalid under the federal common law — and that accordingly the inclusion of the Carmack Amendment in the one Act was of no assistance in interpreting the other. He asserted that if the *Erie-Tompkins* doctrine²⁴ were applied, the law of the State of New York would prohibit such a contractual provision, and that, even if it were held that *Erie-Tompkins* did not apply on the theory that Congress, by legislating on the subject, intended that uniform rules should govern interstate air carriage, still “it is inconceivable that Congress intended, merely by remaining silent, to authorize the Board to adopt a policy flatly at odds with the hitherto uniform Federal policy. . . .”²⁵

Judge Frank acknowledged, however, that “[d]efendant, with the Board’s acquiescence, might have provided in its tariff (a) perhaps that it would not carry jewelry at all, or, (b) possibly, that its liability for any and all items contained in passengers’ baggage would be limited to a certain, reasonable amount, unless the passenger gave notice of the presence of valuables in his baggage and paid an additional sum for its transportation.”²⁶

With regard to the “primary jurisdiction” doctrine, he asserted that, since in his view the provision in question was one which the Board had no legal power to approve in the first place, there was no necessity for determination by the administrative agency of the validity of its own action, but that the plaintiff might proceed directly to court.

²⁴ *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938).

²⁵ 189 F. 2d at 944.

²⁶ *Id.* at 945.

REQUIREMENT OF WRITTEN NOTICE OF CLAIM WITHIN
SPECIFIED PERIOD

This rule seems to have been the subject of more controversy than all of the others in the tariff combined. Typically, the rule provides that no action shall be maintained against the carrier for personal injury, death, or loss of or damage to baggage unless written notice of the claim is given to the carrier within a specified period — varying from 30 to 90 days — after the occurrence of the event giving rise to the claim, and unless suit be filed within a certain period — usually one year — after the same occurrence. The Supreme Court of the United States has held that such a provision in a contract of carriage is valid, but there is a pronounced difference of opinion as to whether including it in a tariff filed with the CAB makes it a part of the contract of carriage.

The Supreme Court case is *Gooch v. Oregon Short Line R. Co.*,²⁷ the opinion having been written by Justice Holmes in 1922. To get a “drover’s pass” — which provided him with transportation to accompany a shipment of cattle — plaintiff agreed that the carrier would have no liability for personal injury unless he gave notice to the railroad within 30 days after the occurrence of the injury. This agreement was “required” by a provision of the tariff which defendant had on file with the Interstate Commerce Commission, but plaintiff actually signed a written stipulation to this effect. Asserting that “actual knowledge on the part of the employees of the company was not an excuse for omitting the notice in writing,” Holmes went on to discuss the contention that a statutory prohibition against requiring notice of claim within less than 90 days after damage to goods had established a public policy which would make the present provision improper:

We are satisfied, however, that in this case the requirement was valid and that the statute referred to should not affect what in our opinion would be the law apart from it. The decisions we have cited

²⁷ 258 U. S. 22.

show that the time would have been sufficient, but for the statute, in respect of damage to goods, and the reasons are stronger to uphold it as adequate for personal injuries. A record is kept of goods, yet even as to them reasonably prompt notice is necessary as a check upon fraud. There is no record of passengers, and the practice of fraud is too common to be ignored. Less time reasonably may be allowed for a notice of claims for personal injuries than is deemed proper for goods, although very probably an exception might be implied if the accident made notice within the time impracticable. . . .²⁸

Similar provisions have also been upheld as reasonable in contracts for carriage by water²⁹ and by air.³⁰

The first case³¹ considering the validity of such a provision in a tariff filed with the CAB seems to have been *Wilhelmy v. Northwest Airlines*,³² decided September 8, 1949, by the Federal District Court for the Western District of Washington. After noting that similar provisions in transportation contracts of both air and surface carriers had been held valid, the court followed the *Jones* case³³ in holding that the language, "Sold subject to tariff regulations," printed on the passenger's ticket, charged the passenger with notice of such regulations including the one in question here. The court did not go into the "primary jurisdiction" question, but announced specifically, "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."³⁴

And in a case decided in June, 1951, *Herman v. Capital Airlines*,³⁵ the Federal Court for the Southern District of New York

²⁸ *Id.* at 24, 25.

²⁹ *The Finland*, 35 F. 2d 47 (E. D. N. Y. 1929).

³⁰ *Indemnity Insurance Co. v. Pan American Airways*, 58 F. Supp. 338 (S. D. N. Y. 1944); *Sheldon v. Pan American Airways*, 190 Misc. 537, 74 N. Y. S. 2d 578 (1947).

³¹ *In State of Maryland v. Eastern Air Lines, Inc.*, 83 F. Supp. 909 (S. D. N. Y. 1948), the court denied a motion to strike a defense plea that plaintiff failed to file the notice of claim within 90 days as required by the carrier's tariff, but the court did not discuss the reasons for its ruling.

³² 86 F. Supp. 565.

³³ Discussed at note 12 *supra*.

³⁴ 86 F. Supp. at 567, 568.

³⁵ 104 F. Supp. 955.

reached the same conclusion largely on the basis of the "primary jurisdiction" doctrine and the authority of the *Lichten* case. The court also rejected the contention of the plaintiff that the notice requirement should not apply because she did not know the full extent of her injuries until shortly before she started the action.

Then in four cases decided in 1952 the same provision was rejected by federal district courts in Florida, Arkansas, the District of Columbia and Missouri. The Florida court⁸⁶ did not indicate the reason for its holding, but the other three relied largely on *Pacific Steamship Co. v. Cackette*.⁸⁷

In the *Cackette* case the tariff, which required notice of claim within ten days after occurrence of the injury, was filed under Section 18 of the Shipping Act, which, said the court, "contains no provision relating to the limitation of time for the presentation of claims." Quoting the *Hooker* case, the court concluded:

The clear purport of the [*Hooker*] decision is that a passenger or shipper is not chargeable with notice of any regulation filed and published which is not contemplated or required by the Interstate Commerce Act or the Amendments thereto A tariff is ordinarily understood to be a system of rates and charges. The public, in dealing with a common carrier, are bound to take notice that it has filed a tariff of rates and charges, and are chargeable with notice of everything that is properly included in or related to such system of rates and charges. Rates for passenger transportation may be, as the court found in the *Hooker* Case, directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage. No provision is found in the Interstate Commerce Act which relates to rights of action against carriers for damage or injuries from negligence or assault. Notice of claims for such damages has no perceptible relation to rates and charges for transportation.⁸⁸

In the *Wilhelmy* case the court considered *Cackette* but took the view that the court's ruling had been based on a finding that the ten-day period was unreasonably short, and the court held spe-

⁸⁶ *Glenn v. Cia. Cubana de Aviación*, 102 F. Supp. 631 (S. D. Fla. 1952).

⁸⁷ 8 F. 2d 259 (9th Cir. 1925).

⁸⁸ *Id.* at 260, 261.

cifically that the thirty-day period involved in its own case was reasonable. In *Thomas v. American Airlines*,³⁹ however, the court cited *Cackette* as authority for the proposition that such limitation periods are binding "only if there is statutory authority for filing such tariff, that is, the statute controlling requires its filing," and then found that the Civil Aeronautics Act did not require or authorize the filing of tariff rules which limit the liability of the carrier for personal injury resulting from its own negligence.

The District of Columbia court⁴⁰ also based its ruling on the *Cackette* case. As it stated the rule: "with respect to rates or matters affecting rates, the character of services to be performed, practices relating to the services to be rendered and matters required by . . . [the Act] or by regulation promulgated by the Civil Aeronautics Board pursuant to said Act, the tariff regulations do as a matter of law control the carrier and the passenger or shipper, and this without any actual notice or knowledge other than the constructive notice afforded by the filing of such tariffs so required," but, "[w]here a tariff provision is gratuitously inserted with respect to a matter other than that contemplated or required by the Act of Congress or the regulations made pursuant thereto, a passenger or shipper is not chargeable with notice as a matter of law with respect thereto."

On the question of whether acceptance of a ticket bearing the quoted provisions constituted an agreement between plaintiff and defendant, the court, while recognizing that such contracts have been upheld — citing the *Gooch* case⁴¹ — took the position that such a provision must "be distinctly declared and deliberately accepted." Pointing out that the provision in the *Gooch* case was set out in a written agreement signed by Gooch, the court decided that a tariff provision is not sufficient.

³⁹ 104 F. Supp. 650 (E. D. Ark. 1952).

⁴⁰ *Shortley v. Northwestern Airlines*, 104 F. Supp. 152, 155 (D. D. C. 1952).

⁴¹ Discussed at note 27 *supra*.

In the Missouri case⁴² the court quoted the language of Sections 403 and 404 of the Civil Aeronautics Act, emphasizing that rules, regulations and practices may be included in tariffs "to the extent required by regulations of the Board," and then asserted that the Board's regulations did not refer to the filing of this provision. The court also questioned whether the Board would have the power to approve such a provision unless specifically authorized by statute.

The Civil Aeronautics Board has now considered such a rule in a proceeding brought by plaintiffs who had encountered the "primary jurisdiction" rule in the judicial proceeding which they instituted. While the Board's decision probably accomplishes justice in the particular case, its language raises more questions than it settles.

The case in question is *Continental Charters, Inc. — Complaint of Mary Battista et al.*⁴³ Plaintiff's suit grew out of an accident in which 26 passengers were killed and 14 injured. Defendant carrier moved to dismiss the suit because plaintiff had not complied with a tariff rule requiring notice of claim within 30 days after the event. Under the "primary jurisdiction" doctrine the court postponed further hearings to give plaintiff an opportunity to seek a finding from the Board as to the lawfulness of the rule.

The Board stated that two questions were raised by the proceeding before it: "(1) whether the rule in question was properly included in the Respondent's tariff as required or authorized by section 403 of the Act and the Board's regulations thereunder; and (2) if so, was the rule reasonable." However, since it found the rule to be unreasonable, the Board specifically did not pass on the first question.

⁴² *Toman v. Mid-Continent Airlines*, 107 F. Supp. 345 (W. D. Mo. 1952).

⁴³ C. A. B. Docket No. 5573 (Order Serial No. E-7087), 2 CCH Aviation L. Rep. ¶ 21,562, decided January 16, 1953.

The Board asserted that the rule was not reasonably necessary for the carrier's protection because such rules are not generally found in the tariffs of carriers in other forms of transportation, because it is inconceivable that an air carrier would not know of a major accident to one of its airplanes, because stewardesses on the airplanes are charged with the duty of noting and reporting all injuries, and because passenger lists are maintained by the carriers. The Board also found that the rule had always been unreasonable, and that consequently it was unlawful and ineffective from its inception.

Thus, one court (*Herman v. Capital Airlines*) has held that the Board must pass on the reasonableness of the rule, three others (*Thomas v. American Airlines*, *Shortley v. Northwestern Airlines*,⁴⁴ *Toman v. Mid-Continent Airlines*⁴⁵) have held that there is no statutory basis for filing the rule and hence it is ineffective, one court (*Wilhemly v. Northwest Airlines*) has held that a thirty-day notice period is reasonable, and another (*Glenn v. Cia. Cubana de Aviacion*⁴⁶) apparently held it is not reasonable. The Board, when a plaintiff who had encountered the "primary jurisdiction" doctrine finally took the question to it, by-passed the question of whether the rule was properly included in the tariff, and held that the thirty-day provision is and always has been unreasonable and consequently of no effect.

It is submitted that the Board's decision in the *Continental Charters* case is open to question on two counts. In the first place, the Supreme Court in the *Gooch* case held that a thirty-day notice provision in a railroad passenger transportation contract is reasonable and valid, and that the fact that the carrier's employees had actual knowledge of the injury did not excuse the requirement of notice. If, therefore, the provision in the *Continental Charters* tariff was properly filed and hence did become a part of the trans-

⁴⁴ Discussed at note 40 *supra*.

⁴⁵ Discussed at note 42 *supra*.

⁴⁶ Discussed at note 36 *supra*.

portation contract, the Board's reasons for its holding seem negated by higher authority.

It is true that an air carrier would know of a major accident to one of its airplanes, but it is also true that such carriers are sued because of injuries allegedly incurred on a flight which operated without incident and without the stewardess' or other passengers' having reported or being able to remember anything unusual when asked about claimant's allegations a year or more later.

More troublesome, perhaps, is the effect of such a ruling by the Board upon past events. Judge Frank in the *Lichten* case reasoned:

Perhaps, indeed, the case at bar would not be a proper case for advance administrative determination, even if it involved merely the reasonableness of the Board's action in approving this exculpatory provision. For, unlike the Interstate Commerce Act or the Shipping Act, the Civil Aeronautics Act confers no power on any administrative body to grant reparations for past misconduct of an air carrier. 49 U. S. C. A. § 642, on which my colleagues rely, authorizes a proceeding before the Board which may terminate in an order looking solely to the future, not to past conduct: The Board, under subsection (d), may determine that a classification or practice shall not "thereafter" be effective; it may, under subsection (f), make an order that an air carrier "discontinue" a classification or practice; it may, under subsection (g), "suspend" the operation of a classification or practice. In *Public Utilities Commission v. United Fuel Gas Co.*, 317 U. S. 456, S. Ct. 369, 87 L. Ed. 396, the Court construed a state statute, worded almost the same as § 642, to authorize prospective action only, and to preclude retroactive action. Consequently, were the plaintiff in this case to complain to the Board, it could do no more than to order the defendant to discontinue the use of the exemption provision.⁴⁷

But the Board, in the *Continental Charters* case, found that the rule in question had always been ineffective because it was unlawful, saying: "We are quite satisfied that we do possess the requisite authority to make an administrative finding of past unlawfulness of the tariff rule under consideration."

⁴⁷ 189 F. 2d at 947, 948.

If the Board is correct in its understanding of its powers in this regard, then presumably neither carrier nor customer can be sure as to the terms of the contract of transportation. The Board may, by a ruling such as this, amend the conditions of thousands of contracts already fully performed. On the other hand, if Judge Frank is correct, the question of the reasonableness of a rule already filed would be submitted to the Board only if the complainant expected to be affected by the rule sufficiently often in the future to justify the expense of a proceeding before the Board. Persons in the position of the plaintiffs in these cases would hardly press their complaints before the Board in return for the dubious satisfaction of seeing that no one else was aggrieved by the rule in the future.

With respect to the *Cackette* case, it is suggested that the difference in the language of the Interstate Commerce Act and the Civil Aeronautics Act makes it unsatisfactory authority for the proper contents of an air carrier tariff. As has been pointed out, that case asserted that a tariff is merely a system of rates and charges, and only matters directly related to such rates and charges may be included therein. This would appear to be a correct definition of a railroad tariff, but a comparison of Section 6 (1) of the Interstate Commerce Act — the Section requiring the filing of a “schedule of rates, fares and charges” — with Section 403 (a) of the Civil Aeronautics Act makes it clear that the Congress contemplated something broader with regard to air carriers. The language of the first sentence of the Section of the earlier act is followed in the later, but to that first sentence the provision is added “. . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices and services in connection with such air transportation.”

It has been argued that Section 403 (a) and the Board's Economic Regulations — referring specifically to Section 221.4 — permit a rule to be filed only if it affects rates or services under

such rates.⁴⁸ Had this been the intent of Congress, however, it would hardly have been necessary to add anything to the language of the Interstate Commerce Act, for the *Cackette* case gets the same definition out of the language of the earlier statute. Furthermore, the courts have not applied such a limited definition to air carrier tariffs. It can hardly be argued that the right to cancel flights because of weather affects the fares charged the passengers on those flights; yet that right was upheld as a proper "practice" in the *Jones*, *Mack* and *Adler* cases.

CONCLUSION

The generally accepted rule would seem to be that, with regard to the contents an air carrier's tariff, the courts may determine whether the tariff has been violated and also whether material in the tariff is authorized by statute to be included therein, but that the courts will refer to the Civil Aeronautics Board questions of the reasonableness of the contents. The Board, despite some judicial opinion to the contrary, considers that it may find that the contents of a tariff filed with it have never been reasonable and hence have never been effective.

The language of the Civil Aeronautics Act regarding the filing of tariffs indicates that it was contemplated that air carrier tariffs would be broader in scope than railroad tariffs, but that such increase in scope would be controlled by regulations of the Board. To date the regulations promulgated by the Board do not give a clear indication of just what "classifications, rules, regulations, practices, and services in connection with such air transportation" may properly be included in these tariffs.

It is suggested that the Board could eliminate a great deal of the uncertainty which presently exists by providing adequate regulations under Section 403 (a) of the Act, and that, whether it or

⁴⁸ McKay, *Airline Tariff Provisions as a Bar to Actions for Personal Injuries*, 18 Geo. Wash. L. Rev. 160 (1950).

Judge Frank be right with regard to the retroactive effect of its findings of unreasonableness, it could eliminate much uncertainty on the part of carriers and their customers by determining the reasonableness of tariff provisions when they are filed.

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