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RECENT DEVELOPMENTS IN AVIATION LAW

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THE TASK of reviewing current developments in the field of aviation law for 1976 in a single article presents a dual challenge; one must not only distinguish significant developments from those of less importance, but one must also limit the substantive areas surveyed to those which will be of interest to the greatest number of readers. In pursuit of the latter goal, judicial decisions have been divided into several categories. Any opinion as to which of the many decisions reported during 1976 merit mention is offered without benefit of the hindsight that only time and judicial interpolation can provide. Nevertheless, these comments should furnish the reader with a brief synopsis of some of the notable developments of the past year.

AVIATION INSURANCE—COVERAGE

Perhaps no area of aviation law is more often the subject of judicial interpretation than the construction of aviation insurance policies. The growing complexity of private and commercial aviation, the number and variety of policy conditions and exclusions, and the frequency of substantial losses are factors related to the volume of aviation insurance litigation. In 1976 pilot clauses were frequently the subject of controversy, and although the courts have continued to follow the traditional practice of construing policy questions against the insurance companies wherever possible, there were a few exceptions.

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In *Ranger Insurance Co. v. Phillips*,[1] the Arizona Court of Appeals upheld coverage for the death of passengers being carried by a student pilot, although the policy limited coverage to pilots "holding proper pilot certificate(s) with appropriate ratings . . ." or to a pilot "who has a valid and effective pilot certificate." The student pilot in control was clearly prohibited by regulations of the Federal Aviation Administration from carrying passengers,[2] and Ranger had argued that since he did not have a passenger-carrying rating, passenger liability was excluded.[3] In that same case, Ranger also argued that coverage was excluded under a provision that the policy would not apply to the aircraft "while in flight, unless its airworthiness certificate is in full force and effect." The aircraft airworthiness certificate restricted its use to one person. The court rejected this circumstance as a basis for exclusion of coverage, stating that although the flight was clearly in violation of the airworthiness certificate, the certificate remained in full force and effect and that the insurer could have expressly provided that coverage would not apply upon violation of the certificate.

In *Glover v. National Insurance Underwriters*,[4] the Texas Supreme Court held that coverage was effective for a flight by a pilot with a license restricted to visual flight rules (VFR) flights, even when the pilot knowingly flew into an instrument flight rules (IFR) area. In that case, the policy pilot clause provided coverage when the aircraft was operated by an insured pilot "while properly rated for the flight and the aircraft," and the majority of the court held that although the VFR-rated pilot, who took off under VFR conditions, flew into IFR conditions and crashed in IFR conditions, the policy language requiring the pilot to be properly rated for the flight for coverage to apply was not specific enough to exclude coverage. The majority held that the VFR conditions at the point where the flight began established the nature of the entire flight as VFR, even though IFR conditions were encountered during as much as

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[1] 25 Ariz. App. 426, 544 P.2d 250 (1976).

[2] 14 C.F.R. § 61.89 (1977).

[3] *Compare* Ranger Ins. Co. v. Culberson, 454 F.2d 857 (5th Cir. 1971) *with* Beguette v. National Aviation Underwriters, Inc., 429 F.2d 896 (9th Cir. 1970).

[4] 545 S.W.2d 755 (Tex. 1977).

two-thirds of the flight. Like the Arizona court in *Phillips*,[5] the Texas court would have required greater specificity, *i.e.*, a provision that coverage was suspended by a violation of FAA regulations. A vigorous dissent argued that the pilot received weather information before beginning the flight which indicated IFR weather was forecasted, that IFR weather was thereafter encountered, and that the pilot negligently failed to return to the point of departure or alternative VFR airports, but flew into an IFR area with full knowledge of the condition. If the entire flight is to be viewed as a whole in determining IFR or VFR character, then the policy language stating "while properly rated for the flight" would require proper rating for all segments of the flight.

The California Supreme Court held in *National Insurance Underwriters v. Carter*[6] that the specific language of the pilot clause limiting coverage to flights piloted by the named insured, followed by the names of the owner-pilot and his wife, overrode general language of the insuring clause providing coverage while the aircraft was flown by permissive users. A lengthy and vigorous dissent argued that the incongruity between the insuring clause and the pilot clause created an ambiguity that should be resolved against the insurer.

In *Buestad v. Ranger Insurance Co.*,[7] a Washington Court of Appeals rejected the contentions of a student pilot who crashed into two parked aircraft and sought liability protection as omnibus insured under a policy issued to the owners of the aircraft he was operating. In *Buestad*, the policy coverage included, in a section entitled "Purposes and Use," use in student instruction and rental, but under the "Definition of Insured," it specifically excluded liability coverage to renter pilots during rental for remuneration. The court reasoned that the "Purposes and Use" clause referred only to the authorized uses of the aircraft by the named insureds, while it was the purpose of the "Named Insureds" clause to define the persons insured. The court indicated that the named insured was covered for liability arising under the "Purposes and Use" clause, but that this did not extend liability coverage to the

[5] 25 Ariz. App. 426, 544 P.2d 250 (1976).

[6] 131 Cal. Rptr. 42, 551 P.2d 362 (1976).

[7] 15 Wash. App. 754, 551 P.2d 1033 (1976).

renter pilot, as the definition of insured clearly excluded coverage to renter pilots.[8]

Employee exclusion clauses were the subject of a 1976 decision by the Minnesota Supreme Court in *Utica Mutual Insurance Co. v. Emmco Insurance Co.*[9] The court held that where employees of one named insured sought damages against an additional named insured,[10] an exclusion clause barring claims of any employee of "the insured" did not bar coverage. After a detailed discussion of the differing opinions on this issue, the court distinguished two earlier Minnesota cases[11] which had barred employee claims against a non-employer insured, noting that a severability of interests clause was contained in the policy in issue.[12]

In *Schepps Grocer Supply, Inc. v. Ranger Insurance Co.*,[13] a Texas Court of Civil Appeals held that there was no coverage for a loss occurring when a multi-engined aircraft was piloted by a pilot without a multi-engine rating. The policy contained an exclusion for flights by pilots other than those set forth in the pilot clause, and the pilot clause restricted insured pilots to those possessing a multi-engine rating.[14] The court held that coverage

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[8] *But see* Miller v. Ranger Ins. Co., 27 Mich. App. 375, 183 N.W.2d 621 (1970). *See also* Davis, *Aviation Insurance Policy Problems*, SMALL AIRCRAFT ACCIDENT LITIGATION (A.B.A. Press 1974).

[9] 243 N.W.2d 134 (Minn. 1976).

[10] The clause read:

> THIS POLICY DOES NOT APPLY AND NO COVERAGE IS AFFORDED: UNDER COVERAGES A, C, AND D . . .
> (8) to bodily injury to, sickness, disease, or death of any employee of the insured while engaged in the employment of the insured.

243 N.W.2d at 138.

[11] Fuchs v. Cheeley, 285 Minn. 356, 173 N.W.2d 358 (1969); G.C. Kohlmier, Inc. v. Mollenhauer, 273 Minn. 126, 140 N.W.2d 47 (1966).

[12] 4. SEPARATE INSUREDS: The insurance afforded under the coverages set forth above apply *separately* to *each insured* against whom claim is made or suit brought, ...

243 N.W.2d at 140 (emphasis added by the court).

See also Commercial Standard Ins. Co. v. American Gen. Ins. Co., 455 S.W.2d 714, 719 (Tex. 1970) *and* Annot., 48 A.L.R.3d 1 (1970).

[13] 543 S.W.2d 13 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

[14] The pertinent provisions of the policy are:

> 7. Pilot Clause: Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: Lamar Masterson, *providing he obtains a multi-engine rating with at least twenty-five hours dual flight instruction in the insured make and model with a certified flight in-*

was ineffective while the aircraft was being flown by a pilot without the required rating, regardless of whether such violation was a proximate cause of the accident.

Construing North Dakota law, a federal court held in *British Aviation Insurance Co. v. Troftgruben*[15] that a showing of proximate cause was not required for the insurer to escape liability when the pilot of the insured aircraft was operating the aircraft while his ability was impaired by alcohol. The policy stated, "This policy does not apply . . . while the aircraft is: (c) operated by a pilot whose ability is impaired by alcohol or a drug." This language, the court wrote, in effect created a condition precedent to coverage, *i.e.*, that the aircraft be operated by a pilot whose ability is not impaired by alcohol or a drug. The court rejected an argument by the plaintiff based upon a North Dakota statute[16] that where a peril is excepted specially by contract of insurance, a showing of proximate cause is required for the insurer to escape liability.

In *Kalamazoo Aviation, Inc. v. Royal Globe Insurance Co.*,[17] an insurer had denied coverage for an aircraft damaged by the pilot in an effort to escape pursuing United States Customs officers. The insurer relied on a policy provision excluding liability for any damage to the aircraft arising from attempted arrest of the pilot by government agents. This argument was rejected by the court, which affirmed the trial court's holding that the damage to the aircraft was covered by the policy, as the damage was caused by the reckless and unlawful flight of the pilot and not by any act of the detaining party.

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structor pilot prior to solo, and providing he obtains at least ten hours solo in the insured make and model prior to carrying passengers; otherwise, commercial multi-engine and instrument-rated pilots having a minimum of fifteen hundred total logged hours including at least two hundred fifty hours in multi-engine aircraft.

545 S.W.2d at 14 (emphasis added by the court).

[15] 14 Av. Cas. 17,426 (D.N.D. 1976).

[16] N.D. CENT. CODE § 26-06-03 (1970) provides: "When a peril is excepted specially in a contract of insurance, a loss which would not have occurred but for such peril thereby is excepted although the immediate cause of the loss was a peril which was not excepted."

[17] 70 Mich. App. 267, 245 N.W.2d 754 (1976).

STATUTE OF LIMITATIONS—DISCOVERY RULE

In *Praznik v. Sport Aero, Inc.*,[18] an Illinois appellate court held that the two-year statute of limitation of the Illinois Wrongful Death Statute did not begin to run until the date that the aircraft wreckage was discovered. The aircraft in question left on a flight to the Bahama Islands and was last heard from on March 23, 1969. It was not until November 1971, two years and eight months later, that the aircraft wreckage was found. The administrator of the estates of two of the passengers filed suit against the aircraft owner, Sport Aero, Inc., on March 29, 1971, and against the pilot, Fey, on May 5, 1972. The court rejected defendant Fey's plea of limitations, reasoning that no legal presumption of the deaths of the aircraft passengers had arisen prior to suit, that no circumstances indicating the cause of deaths were known prior to the discovery of the wreckage, and that no undue advantage would accrue to either the plaintiff or the defendant by application of the discovery rule under the circumstances in this case.

NEGLIGENCE LAW AND DAMAGES

The duties of airport owners and operators were discussed by the United States Court of Appeals for the Third Circuit in *Hunziker v. Scheidemantle*.[19] This case concerned a fatal crash occurring shortly after take-off in a dense fog. The court affirmed a directed verdict in favor of the defendant lessor/municipal authority, which exercised no supervision over airport operation, but reversed a directed verdict in favor of the defendant airport lessee/operator, holding that since the lessee had closed the airport on prior occasions of bad weather, his failure to do so on the date of the crash could be construed as negligence.

The United States Court of Appeals for the Ninth Circuit, in *Felder v. United States*,[20] affirmed a trial court finding of negligence under the Federal Tort Claims Act,[21] based on the failure of the FAA tower personnel to warn the pilot of a Piper Comanche prior

[18] 42 Ill. App. 3d 330, 355 N.E.2d 686 (1976).

[19] 543 F.2d 489 (3d Cir. 1976).

[20] 543 F.2d 657 (9th Cir. 1976). *See also* Neal v. United States, 13 Av. Cas. 18,179 (M.D. Ga. 1975).

[21] 28 U.S.C. §§ 1346(b) & 2674 (1970).

to take-off of the presence of wake turbulence from a Boeing 707 which had preceded it on the same runway. However, the court then held that the award of damages was so excessive that it amounted to punitive damages against the government. The court's reason was that the effect of federal and state income taxes was not considered in awarding compensation for lost income and support.[22] The court proceeded to reduce the award of damages in an opinion notable for its elaborate speculation as to how much the decedents might have paid in federal and state income taxes had they survived.

In *Udseth v. United States*,[23] the United States Court of Appeals for the Tenth Circuit affirmed a district court holding that liability for a crash would not be imposed on the pilot in command if it were uncertain whether the student or the instructor was piloting the aircraft at the time of the crash. The court also rejected the plaintiff's contention that the doctrine of res ipsa loquitur was applicable, noting that New Mexico law did not allow a presumption that a pilot in command is in exclusive control of an airplane regardless of whether he is flying it.[24]

In *Humphreys v. Tann*,[25] a federal district court chose to follow the precedent of *Kohr v. Allegheny Airlines, Inc.*,[26] and held both that in wrongful death actions arising from a mid-air collision, a uniform federal rule of contribution and indemnity among joint tortfeasors should be applied rather than a particular state law selected by conflict of law principles and that apportionment of damages

[22] The court concluded from the legislative history of the Federal Tort Claims Act that its intent was to provide compensation only and that an award of punitive damages was therefore unauthorized.

[23] 530 F.2d 860 (10th Cir. 1976).

[24] The court quoted language in Hisey v. Cashway Supermarkets, Inc., 77 N.M. 638, 426 P.2d 784 (1967) that:

> The factual basis necessary as a premise for application of res ipsa loquitur requires proof that (1) plaintiff's injury was proximately caused by an agent [sic] or instrumentality under the exclusive control of the defendant . . . .
>
> The absence of any evidence, or reasonable inference to be drawn from evidence that this accident is the kind which ordinarily does not occur in the absence of the negligence of *someone alone* defeats the application of the doctrine . . . .

530 F.2d at 862 (emphasis by the Circuit Court).

[25] 13 Av. Cas. 18,229 (E.D. Mich. 1976).

[26] 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); noted in 41 J. AIR L. & COM. 347 (1975).

among the joint tort feasors should be on a comparative negligence basis. The district court echoed the rationale expressed in *Kohr* that such rules are mandated by the predominate federal interest in regulating the national airways and by the need for uniformity in light of the vague and differing state laws in these areas.

The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, divided sharply over the issues presented in *Miree v. United States*.[27] In *Miree*, the various plaintiffs sued the United States and DeKalb County, among others, for damages arising from the crash of a Lear Jet shortly after take-off from DeKalb-Peachtree airport. The crash allegedly was due to ingestion by the plane's engine of a large number of birds swarming over the airport and the adjacent county garbage dump. The plaintiffs sought to recover damages on theories of negligence, nuisance, and breach of contract between the FAA and DeKalb County, whereby the county agreed to maintain the airport and adjacent areas in a condition which would not interfere with the safe use of the airport. The district court dismissed the claims against the county, holding that the county was immune from suit by virtue of sovereign immunity. On appeal, a three-judge panel of the Fifth Circuit[28] agreed that the county was immune from suits based on negligence and nuisance, but a two-judge majority, with Judge Dyer dissenting, held that the county was vulnerable to suit based on breach of contract and that applying Georgia law, the plaintiffs could sue the county for its failure to maintain the area adjacent to the airport as third-party beneficiaries of the contract between the county and the FAA.

The Fifth Circuit, in a per curiam opinion, agreed that the county was immune from suit in negligence and nuisance, but adopted the dissenting opinion of Judge Dyer, holding that federal common law, rather than Georgia law, controlled the interpretation of the contract between the United States and DeKalb County and that federal common law would not allow recovery under the contract by the public as third-party beneficiaries unless the contract clearly manifested such an intent. Five judges joined in a dissent from the per curiam reversal, stating that the contract

[27] 538 F.2d 643 (5th Cir. 1976).

[28] 526 F.2d 679 (5th Cir. 1976).

should be construed according to Georgia law, but that nevertheless, even under federal common law, members of the public should be allowed recovery for breach as third-party beneficiaries. The dissenters argued that the air-traveling public was the only class of persons that could reasonably be expected to benefit from the safe maintenance of the airport and adjacent area.

STRICT LIABILITY

In *Bruce v. Marlin-Marietta Corp. and Ozark Airlines, Inc.*,[29] the United States Court of Appeals for the Tenth Circuit affirmed a summary judgment in favor of a defendant aircraft manufacturer. The plaintiffs contended that the 1952 model aircraft was unreasonably dangerous in two respects; first, the seats and seat fasteners were not designed or manufactured to withstand a crash, and second, the aircraft was not designed so as to minimize the possibility of fire occurring after a crash. The court held that the aircraft in question had met all design and safety regulations of the Civil Aviation Agency in 1952, even though today's consumer might reasonably expect safer designs and conditions.[30]

The New Mexico Supreme Court, in *Langham v. Beech Aircraft Corp.*,[31] considered a question of law certified to it by the United States Court of Appeals for the Tenth Circuit and held that a New Mexico statute,[32] which authorized recovery of damages from the owner of a public conveyance for the wrongful death of a passenger, is not the exclusive remedy for a plaintiff, but that suit may also be brought under the New Mexico Wrongful Death Statute[33] against the aircraft manufacturer for defects in the aircraft.

PRIMARY JURISDICTION OF REGULATORY AGENCIES

In *Nader v. Allegheny Airlines, Inc.*,[34] the United States Supreme Court expanded the remedies available to airline passengers who

[29] 544 F.2d 443 (10th Cir. 1976).

[30] RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965), states: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

[31] 88 N.M. 516, 543 P.2d 484 (1976).

[32] N.M. STAT. ANN. § 22-20-4 (Supp. 1973).

[33] N.M. STAT. ANN. § 22-20-1 (1953).

[34] 426 U.S. 290 (1976).

are "bumped" from flights on which they have confirmed reservations. Ralph Nader brought suit for damages under state common law for fraudulent misrepresentation as well as a statutory action[35] for violation of boarding rules filed by Allegheny with the Civil Aeronautics Board. The district court awarded damages based on both claims,[36] but the Court of Appeals for the District of Columbia Circuit reversed the judgment,[37] remanded for additional fact finding, and stayed proceedings in the district court on Nader's misrepresentation claim, pending rulemaking proceedings by the CAB. The only issue reaching the Supreme Court was the stay of proceedings on the misrepresentation action. The court reversed the stay order of the court of appeals, rejecting the argument that the doctrine of primary jurisdiction requires that the regulation of over-booking practices be left within the exclusive jurisdiction of the appropriate administrative agency and noting that considerations of uniformity in regulation and of technical expertise do not call for prior reference to the CAB in this instance.

The holding of *Nader* was considered by the United States Court of Appeals for the District of Columbia Circuit in *Kappelman v. Delta Airlines*,[38] where the court affirmed a district court refusal to grant an injunction requiring a warning to passengers of the shipment of radioactive materials on passenger flights. The court said that the need for uniformity and a tribune of special competence made the rulemaking procedure a more appropriate means of resolving the problems raised.

AIR CARRIER LIABILITY

Article 17 of the Warsaw Convention[39] underwent judicial

[35] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 & Supp. 1975), *formerly* Civil Aviation Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[36] Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973).

[37] 512 F.2d 527 (D.C. Cir. 1975).

[38] 539 F.2d 165 (D.C. Cir. 1976).

[39] Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft *or in the course of any of the operations of embarking or disembarking* (emphasis added).

Warsaw Convention, *signed* Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11.

examination by the United States Court of Appeals for the Third Circuit in *Evangelinos v. Trans World Airlines, Inc.*[40] The issue was whether passengers lined up in the airport transit lounge to undergo personal search prior to embarking were "in the operation of embarking" when machine-gunned by terrorists. The court analyzed the issue in light of the carrier's control over the passengers at the time of attack and the inherent risk in existence at that point in time and held that the carrier was liable under the Convention for injuries arising from the attack.[41]

Last year in *Davis v. Northeast Airlines, Inc.*,[42] the New Hampshire Supreme Court held unlawful an exclusion in a tariff for injury to animals being transported, while in *Weiner v. British Overseas Airways Corp.*,[43] a New York Supreme Court rejected a claim against an air carrier arising from an injury allegedly due to a defective rental automobile furnished as a part of a tour package. In light of a comprehensive disclaimer of liability by the air carrier in the tour brochure, the court held that the automobile renter was an independent contractor and that the limitation of liability contained in the tour brochure was a specific disclaimer of any responsibility to plaintiff except while she was a passenger on its aircraft.

Finally, in *Reed v. Wiser*,[44] a federal district court held that the limitation of liability by a carrier by the Warsaw Convention operates only to limit the liability of the carrier itself and does not protect agents or employees of the carrier who are negligent.

TAXATION

Last year saw decisions involving a rigid application of use taxes on aircraft owners.

The Arkansas Supreme Court held in *Skelton v. Federal Express Corp.*[45] that aircraft brought into Arkansas temporarily, for the

[40] 550 F.2d 152 (3d Cir. 1976).

[41] *See also* Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976). The *Evangelinos* opinion may be contrasted to other decisions holding that carriers were not liable for an attack on passengers who had disembarked and had reached the terminal building. MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971). *In Re Tel Aviv*, 405 F. Supp. 154 (D.C.P.R. 1975).

[42] 116 N.H. 429, 362 A.2d 208 (1976).

[43] 14 Av. Cas. 17,489 (N.Y. Sup. Ct. 1976).

[44] 414 F. Supp. 863 (S.D.N.Y. 1976).

[45] 531 S.W.2d 941 (Ark. 1976).

sole purpose of structural modification, were thereby subject to the Arkansas use tax[46] of three percent of their purchase price.[47] In *Sundstrand Corp. v. Department of Revenue*,[48] the Illinois Appellate Court upheld imposition of the Illinois use tax[49] on an aircraft purchased outside Illinois and delivered into Illinois one day for use almost exclusively in interstate flights beginning the next day. The court held that the taxable event occurred between the moment of delivery of the aircraft to the state and the next day, when its use in interstate operations began.

With regard to property taxation, a Texas Court of Civil Appeals held in *Irving Independent School District v. Delta Airlines, Inc.*,[50] that the leasehold interest of an air carrier in a service and maintenance facility at a municipal airport is exempt from local taxation as a public transportation facility.

AIRPORT ZONING AND ENVIRONMENTAL REGULATION

The Illinois Supreme Court[51] last year held unconstitutional a city zoning ordinance restricting access to a privately-owned, publicly-operated airport to aircraft of 60,000 pounds or less, finding that there was no reasonable basis for the restriction. Another Illinois municipal ordinance, upheld by an Illinois Appellate Court,[52] imposed height restrictions on structures in the vicinity of airports. The court rejected arguments that the restrictions were arbitrary and unrelated to the public health, safety, or welfare, and

[46] ARK. STAT. ANN. § 84-3105(a) (1960) provides for a 3% use tax on:

> [A]ny article of tangible personal property, . . . purchased for storage, use, or consumption in this State . . . . This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State.

[47] The Arkansas General Assembly promptly amended the Use Tax to exempt aircraft brought into the state for modification or repair, if removed within sixty days. 1975 Ark. Acts (Extended Sess. 1976), No. 1237, §§ 1-2 (codified as amendment to ARK. STAT. ANN. § 84-3105(a)).

[48] 34 Ill. App. 3d 694, 339 N.E.2d 351 (1975).

[49] ILL. REV. STAT. ch. 120, § 439.3 (1974 & Supp. 1977), Act of July 14, 1955, 1955 Ill. Laws, § 3.

[50] 534 S.W.2d 365 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

[51] County of Cook v. Poiester, 62 Ill. 2d 357, 342 N.E.2d 41 (1976).

[52] La Salle Nat'l Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975).

that the restrictions were equivalent to taking property for public use without compensation.

Similarly, a federal district court[53] upheld a municipal ordinance forbidding use of a municipal airport between the hours of 11:00 p.m. and 7:00 a.m. by aircraft which exceed a noise level of 75 dba. The court rejected contentions that the ordinance was an unconstitutional burden on interstate commerce, and that the ordinance invaded an area pre-empted by federal law. The holding of the United States Supreme Court in *Burbank v. Lockheed Air Terminal*[54] was distinguished on the grounds that the regulation there was imposed by a non-proprietor municipality and that the federal pre-emption of this area of regulation does not include restrictions on airport use imposed by the proprietors of airports.

STATUTORY AND ADMINISTRATIVE DEVELOPMENTS

A few of the significant statutory and administrative developments of 1976 in the aviation field are summarized below. The list is not intended to be exhaustive, but it represents some of the highlights of the past year.

Federal Rule Making

I. New Traffic Management System

In response to Environmental Protection Agency (EPA) proposals for new aircraft noise abatement operating procedures at airports, the FAA has adopted a new, comprehensive air traffic management program entitled "Local Flow Traffic Management."[55] The new FAA program is designed to reduce low altitude flying time by jet aircraft in terminal areas and incorporates such features as increased use of idle or near-idle thrust descents, metering aircraft into terminal areas consistent with airport acceptance rates, absorbing unavoidable delays at or above 10,000 feet, standardized arrival procedures, and earlier climb-outs for departing aircraft.

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[53] National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976).

[54] 411 U.S. 624 (1973). *Burbank* involved a "curfew" which, in the absence of an emergency, forbade any pure jet aircraft from taking off from privately owned Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m.

[55] 41 Fed. Reg. 52,393-96 (1976).

II. Noise Standards

On October 28, 1976, the FAA published a notice of proposed rule-making regarding recommended noise level standards submitted to it by the EPA.[56] The rule is directed to turbojet-engine powered airplanes and large propeller-driven airplanes.

III. Air Carriage of Hazardous Materials

In 1976 the Department of Transportation's Materials Transportation Bureau made extensive changes in its rules regarding the air carriage of hazardous materials.[57] Changes include the circumstances under which certain materials may be carried by air, as well as special labeling, handling, and containerization requirements for substances defined as hazardous by the rules.

CAB Air Freight Liability and Claims Rules

On March 22, 1976, the CAB issued its decision in the first comprehensive examination of air carrier rules and practices concerning liability for air frieght.[58] In summary, the CAB's decision makes United States carriers strictly liable for freight loss, damages, or delay, without regard to negligence, subject to specified exceptions. The CAB also found that the fifty cent per pound liability coverage limit in effect since 1946 was unreasonably low and ordered a new minimum figure of $9.07 per pound per piece as the amount which United States air carriers must pay for loss, damage, or delay when the shipper chooses not to pay for extra coverage. The CAB decision prescribes many additional new rules and changes with respect to a variety of matters such as liability for special and consequential damages, notice of claims for concealed losses or damage, and charges assessed by carriers for shipments they route.

Airport and Airway Development Act Amendment of 1976 Signed

President Ford signed into law the Airport and Airway Development Act Amendment of 1976,[59] which extended through 1980 the program for improvement of the nation's public airports

[56] FAA Rulemaking Notice, 41 Fed. Reg. 47,378 (1976).

[57] 41 Fed. Reg. 15,972 (1976) (to be codified in 49 C.F.R. §§ 170-75).

[58] The complete text may be found in [1976] 2 Av. L. Rep. (CCH) ¶ 22,204, at 14,764-96.

[59] Pub. L. No. 94-353, 90 Stat. 871 (1976).

and airway facilities. The new law amended both the Airport and Airway Development Act of 1970[60] and the Federal Aviation Act of 1958[61] in a number of significant areas, including funding formulas, grant procedures, and grant eligibility.

[60] 49 U.S.C. § 1701 (1970 & Supp. V 1975).

[61] 49 U.S.C. § 1301 (1970 & Supp. V 1975).