STATE

C. A. B. TRIAL BALLOON FOR FEDERAL AMENDMENT

Civil Aeronautics Board
Washington

July 27, 1942

Mr. Dexter C. Martin, Past President
National Association of State Aviation Officials
Columbia, S. C.

RE: Air Traffic Control

Dear Dexter:

Following this war, and even possibly before the end of the war, the increase in air traffic and the diversity of types of aircraft which will be flown over our airways are likely to create a traffic control situation which might result in an increase in accidents and interfere with maximum efficiency in the utilization of aircraft and aviation facilities unless the problem is attacked and solved before-hand.

The great increase in the network of airways which can be expected will require accurate navigation at all times. Towed gliders, helicopters, and wide variation in the approach and landing speeds of fixed wing aircraft will call for traffic patterns not yet contemplated. The increases in itinerant, as well as scheduled flying, may require distinct airways or levels for the two.

On the other hand, at the end of the war a great number of landing fields and flying strips will be available. Advances in the art of instrument navigation, devices by which aircraft can approximate the position of other aircraft with reference to each other under conditions of very bad visibility, and a very

The problem involves not only air traffic, but city planning, foreign competition, competition with surface transportation, zoning laws, legal jurisdiction, distribution of population and economic considerations. A constitutional amendment nationalizing the air space may be necessary. The problem of States Rights must also be considered.

The Civil Aeronautics Board is interested in this matter from the point of view of preparing regulations. The Civil Aeronautics Administration will also be vitally interested from the point of view of enforcing these regulations and in establishing the necessary procedures to guide airways personnel and pilots.

† Editor's Note—During late July and early August, 1942, the present letter was sent out to various individuals. The Journal editor-in-chief did not receive one, and the extent of the mailing is otherwise unknown to this Journal. Immediately following, we now reproduce the reply of Dexter C. Martin, for many years the highly successful Director of the South Carolina Aeronautics Commission and a Past President of the National Association of State Aviation Officials. The reply of Mr. Martin is in accord with several others this Journal has seen.

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Rather than appoint a committee to study the problem, at this time, this letter is being sent to selected persons and organizations familiar with aviation to obtain opinions on methods of attacking this problem. Your thoughts are earnestly solicited and we would appreciate your response before September 15, if possible.

Sincerely yours,

JEROME LEDERER
Director, Safety Bureau

Columbia, S. C.
September 3, 1942

Mr. Jerome Lederer
Director, Safety Bureau
Civil Aeronautics Board
Washington, D. C.

RE: Air Traffic Control

Dear Jerry:

This will acknowledge receipt of your letter of July 27th, inviting comments on purposed regulation of Air Traffic Control after the war.

In the beginning, considering a matter of this nature at this time appears to me to be entirely out of order and uncalled for. Too many seem to be more concerned about "what will happen after the war" instead of bending every possible effort towards the winning of this war. For after all this war must be won and won as soon as possible or we will not have much to say about anything after the war.

However, I would like to make the following observations.

1st. Federal control of the air is not needed, because the President of the United States already has this power under the defense act.

2nd. There will be a back swing after the war and consequently the budgets of all federal agencies will be reduced. CAA cannot do the job it is supposed to do now, even with civil aviation curtailed as it is, and yet CAA has at the present time the largest budget in its history at its disposal.

3rd. It appears to me that this is nothing more than an attempt by CAA to grab control of aviation under the guise of National Defense in this time of war.

Trusting that I have conveyed my thoughts on the matter to you as requested, with kindest personal regards, I am,

Sincerely yours,

DEXTER C. MARTIN, Director
S. C. Aeronautics Commission
The entrance of the United States into the war has brought a new recognition of the role which air transport is likely to play in the future transportation system. The Axis submarine campaign has stimulated interest in the air supply of our forces and allies abroad; and the withdrawal of ships from regular commercial service, particularly between the United States and the belligerent and neutral nations of Latin America, has made these countries more than ever dependent on air transportation for the rapid movement of passengers and mail to and from the United States and between themselves as well. While, so far as the immediate present is concerned, needs of the armed forces for flight equipment have been such as not only to prevent expansion of the common-carrier activities of the airlines but to require substantial curtailment of operations within the United States, it is now generally conceded that the post-war development of air transportation will dwarf the conceptions previously held even by its most enthusiastic partisans. This gives added importance to the development of the regulation of this industry.

Since almost all air transportation goes beyond state lines, this regulation has been and necessarily will be primarily Federal in character. The activities of the Civil Aeronautics Board had been affected by the national defense program in a very marked way long before December 7, 1941, and developments since that time have been largely conditioned by the war.

1. Certificates of convenience and necessity.

The unavailability of additional transport aircraft and the demands of the United States and others of the United Nations prevented any large expansion of the airline network. No additional transports were delivered to the carriers by aircraft manufacturers after September 15, 1941, whereas between April 1, and December 31, 1941, the industry turned over to the Procurement Division of the United States Treasury Department 25 transport aircraft. Such certificates as were issued by the Board during the year ended June 30, 1942, were almost all based on military or diplomatic rather than on economic considerations, and most of them were limited in duration to the emergency.

Although hearings on a number of important certificate applications were had during the first six months of the year under review, the unavailability of equipment gave most of these hearings a rather unrealistic character, and proceedings in the bulk of these cases were terminated after the entrance of the United States into the war. On December 12, 1941, the Board issued a statement of policy that no further steps would be taken in any certificate cases except where “the Board finds that the national interest may require early

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inauguration of the services involved." Relatively few cases have been found to meet this test. Indeed, as a result of the sale of additional transport aircraft to the Government and the operation of others in special contract service for the armed forces, the domestic airlines have been obliged to make substantial curtailments of schedules and to obtain the permission of the Board for the suspension of service to less essential points.

The decision in American Airlines, Inc. Mexico City Operation, et al., Docket 510, decided April 14, 1942, is of interest in illustrating one phase of the operation of Section 801 of the Civil Aeronautics Act. That section provides that in the case of certificates to engage in air transportation outside the borders of the United States, "the issuance, denial, transfer, amendment, cancelation, suspension or revocation" of a certificate by the Board shall be subject to the approval of the President. The application in question was for a certificate to permit American Airlines to extend its operation from El Paso and Fort Worth—Dallas, Texas, to Mexico City via Monterrey, Mexico. The opinion of the Board dated April 14, 1942, states that a majority of the Board, with the Chairman dissenting, had decided that the application should be denied, that the Board's opinion proposing denial had been submitted to the President on February 20, 1942, but that the Board had been advised by the President that in the interest of war needs favorable consideration should be given to the application. The Board thereupon issued a certificate "to continue in effect until the Board shall determine that the need, in the interest of national defense, for the service has terminated."

2. Mail pay.

(a) Retroactive reductions.

Undoubtedly the most important problems to come before the Board during the past year have been the varied questions of power and policy arising from the proposal of the Board staff that the Board should reduce rates of mail pay as from a date prior to the date of the Board's order.

A brief explanation may clarify the nature of the problem. Under the Civil Aeronautics Act "mail pay" is to be fixed not only under ordinary standards as to fair compensation to the air carrier for services performed in transportation of the mail, but also, as stated in Section 406(b) of the Act, in the light of "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." In other words, the mail rate is to include, in addition to a compensatory payment, such element of subsidy, if any, as may be required to permit the development of an adequate system of air transportation.

Before enactment of the Civil Aeronautics Act of 1938, most of the carriers engaged in domestic air transportation received rates of mail pay which had been fixed by the Interstate Commerce Commission under the Air Mail Act of 1934 (48 Stat. 933), as amended, while the air carriers engaged in overseas and foreign air transportation were paid under the terms of foreign air mail contracts let pursuant to the Foreign Air Mail Act (Act of March 8, 1928, 45 Stat.

3. See Letter from the Chairman, supra note 1, p. 2.
248, as amended by the Act of March 2, 1929), as these had been modified by voluntary agreement from time to time. The Civil Aeronautics Act provided that until the Board fixed new rates of mail pay under Section 406 of the Act, the Postmaster General should continue to make payment to the domestic carriers at the rates set by the Interstate Commerce Commission and that the foreign air mail contracts should be continued in effect. Section 406(a) empowered the Board to make the rates determined by it "effective from such date as it shall determine to be proper."

In several cases decided in 1939 and 1940, the Board had availed itself of this provision of Section 406(a) to order retroactive increases in rates of mail pay where it found that the mail pay fixed by the Interstate Commerce Commission or in the foreign air mail contracts was inadequate to accomplish the ends of the Act. Until the Spring of 1941 there had been no suggestion, however, that this same provision might authorize a retroactive decrease in a case where increased non-rail revenues of a carrier, or decreased expenses, or a combination of the two, had resulted in the carrier's earning substantial profits. The problem became acute when, on June 19, 1941, an examiner's report was issued in American Airlines, Inc. Mail Rate Proceeding, Docket No. 334, recommending a substantial decrease effective as from December 1, 1939, when the proceeding was instituted.

The matter, which was of deep concern to the industry, was argued before the Board by counsel representing substantially all the other air carriers as well as by counsel for the particular carrier involved. The arguments covered the Board's legal power and the serious economic effects of a policy of recapture in some detail. However, in its opinion dated March 12, 1942, 3 C.A.B. 323, the Board, while recognizing the tremendous need for capital with which the air transport industry was likely to be confronted, nevertheless ordered even more drastic recapture than that which the examiner had recommended.

The American decision was felt to be a heavy blow to the industry—a blow all the more serious because of the disruption brought about by the war. When American Airlines filed an application for rehearing, reargument and reconsideration, the Board granted reargument and suspended the portion of its order relating to past rates pending further decision. Arguments were also had before the Board on examiners' reports recommending retroactive reductions of very sizeable amounts for Eastern Air Lines, Inc. and, in the international field, for Pan American Airways, Inc.

While decision on reargument in the American case has not been issued at the date of this survey, a very different point of view on the part of the Board was indicated in the "order to show cause" issued under date of July 7, 1942, in Docket No. 716, subsequently confirmed in an opinion dated July 30, 1942, in connection with the mail pay of Pan American-Grace Airways, Inc., an international carrier.

In this opinion the Board found that, at least on the particular facts there presented, "a policy of retroactive rate reduction" would "reduce the carrier's

4. Midcontinent Airlines Mail Rates, 1 C.A.A. 45 (1939); Inland Airlines Mail Rates, 1 C.A.A. 155 (1939); National Airlines Mail Rates, 1 C.A.A. 259 (1939); Pan American Airways Co. (Nev.) Transpacific Mail Rates, 1 C.A.A. 385 (1939); Pan American Airways Co. (Del.) New York-Bermuda Mail Rates, 1 C.A.A. 529 (1940); United Airlines Mail Rates, 1 C.A.A. 752 (1940); TWA Mail Rates, 2 C.A.B. 26 (1940).

5. As to this "show cause" procedure, see infra, p. 137.
ability to perform the vitally important public functions imposed upon it by the Civil Aeronautics Act." It stated that:

"A consideration of the obligations which the postwar development will impose upon the air transport industry, especially that part which operates in the international field, also pleads for a policy of precaution to avoid a weakening of our air carriers at a time when they will stand in greatest need of financial strength."

The Board accordingly concluded that "it would be economically unsound to enter an order which would reduce the rate of mail compensation paid to the respondent since August 22, 1939, and require a refund of the excess to the Government." However, the Board stated that it would expect the carrier to refrain from using for dividends the earnings received during the pendency of the proceeding in excess of 10% upon the investment, and that until the company attained "a commercially self-sustaining status," the Board would not regard the carrier "as entitled to earn a return upon that part of its investment which had its source in excessive mail payments."

(b) Theory of rate making.

The Board has also been concerned during the past year with the general theory to be adopted in fixing rates of "mail pay." The problem with which the Board is confronted is exceedingly difficult. A policy of simply permitting all carriers the same fixed return on investment would make no allowance for difference in the risks involved and also would present no financial incentive to a carrier to endeavor to increase commercial revenues or reduce expense. While there is some indication that the Board has attempted to grade carrier managements and reward carriers which it regards as particularly well managed by allowing a somewhat higher rate of return, the difficulty in appraising the relative quality of management in view of the different traffic potentials and operating conditions of the various carriers, and the necessarily subjective character of the judgment, render this method of dealing with the situation somewhat less than satisfactory.

In the Continental Airlines rate case, Docket 332, 2 C.A.B. 683, May 15, 1941, the Board appended to its opinion (p. 697) a note outlining two specific formulas for determining air mail compensation which were designed to meet these objections. The carriers were invited to comment upon these formulas, but the Board's action did not succeed in bringing about any real crystallization of opinion. In view of the great and unpredictable changes which the war has brought, it is probably fortunate that no set formula was adopted.

In the Pan American-Grace Airways case, the Board adopted rate of return upon investment as the controlling element in determining airmail rates for the duration, stating:

"Under these conditions we conclude that during the war, and solely because of the conditions that war creates, the rate of return upon investment, which has heretofore been only one of a number of elements taken into account in determining the net operating income that it has seemed reasonable to anticipate in the "setting of a mail rate for the individual carriers, should now become the primary and controlling element in that determination. We arrive at this conclusion, and give it effect in the present case, with explicit note of our anticipation that upon the conclusion of the
war, or perhaps earlier if the war is prolonged, there should be a return to normal incentives to attract the greatest possible volume of commercial patronage and render the greatest possible commercial service; and in that future period the net earnings of such carriers as are in any degree dependent upon Government support should again be established to reward carriers that display exceptional initiative in increasing the volume of their service and in improving the relation between the volume of service rendered and the amount of capital employed. War time is a time apart, and its abnormal conditions require a departure from normal practices in the administration of section 406 of the Civil Aeronautics Act, as in everything else."

(c) Other "mail pay" problems.

In its annual report for 1941 the Board noted its concern with the problem of advancing costs with which the carriers were confronted and stated "that the problem of measuring and making proper allowance for increasing costs due to a rising price scale is rapidly becoming one of the major problems of the Board in the exercise of its rate-making function." In its opinion in the American Airlines case, the Board made an allowance of a general increase of 2% in all expenses except depreciation to cover these rising costs.

The Board has fixed the mail rates generally in terms of so many cents per mile on designated mail schedules for carrying a specified load. Since costs do not increase proportionately with an increase in miles flown, the designation of additional mail schedules required a downward adjustment of the rate, whereas a curtailment of schedules would have an opposite effect. In Braniff Airways, Inc., et al. Automatic Rate Adjustment, decided April 27, 1942, the Board developed procedures for fixing a rate per mile for a certain average daily mileage with automatic variation in the rate with changes in average mileage. However, the curtailment in the schedules of the domestic operators, which has recently been required as a result of loss of equipment to the armed forces, has been so drastic that the Board has felt it necessary to have new proceedings initiated in respect to these carriers in order to survey the entirely different economic and operating conditions with which they are confronted.

An interesting question, on which the Board divided, arose in Chicago & Southern Airlines, Inc. Mail Rates, 3 C.A.B. 161, Nov. 14, 1941. At the end of 1940 the carrier had been granted a certificate authorizing the transportation of passengers, property and mail on a route between Houston and Memphis. It commenced operating this route March 1, 1941, but the route was not designated by the Postmaster General for airmail service until June 12, 1941—the delay in the designation being due apparently to the Postmaster General's desire to present the matter to Congress to secure the necessary appropriations before designating the schedule. The question was whether the results of this operation should be considered in determining the rate of mail pay on designated mail schedules flown on other routes. The Board had previously decided that while payment could be ordered only for mileage flown on designated mail schedules, the results of the operation of non-mail schedules on existing routes which were required in the interest of the commerce of the United States or the national defense, should be considered in fixing the rate of pay for mail schedules. It was claimed, however, that a distinction existed between these cases and the inauguration of a new service in the face of a statement from the Post Office

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In its mail rate decisions, the Board has, of course, been confronted with the question of depreciation rates, particularly on flight equipment. Because of the large proportion of the investment of the air carriers which is represented by flight equipment and the great importance of the obsolescence factor, this is a problem of the first magnitude. The Board has not instituted any general investigation on the subject of depreciation rates but through a process of decision has tended toward standardizing rates on certain of the types of flight equipment in general use. Thus, in a number of cases the Board has computed depreciation on Douglas DC-3 aircraft on the basis of a five-year life with a residual value of 20% of the cost. Similarly, in several cases the service life of Wright G-202-A engines has been set at 6,000 hours with a residual value of 15%. These service lives somewhat exceed those used in their accounts by most of the carriers involved. Most of the existing equipment is actually obsolete and would already have been replaced but for the war. While it is, of course, impossible under present circumstances to make any accurate predictions as to when existing equipment will actually be replaced, a policy of extreme conservatism in estimating service lives, particularly for units of equipment acquired within the last two years, would seem to be the part of wisdom.

The Board has also had to deal with the treatment to be accorded to capital gains made by the carriers as a result of disposing of flight equipment in the seller's market resulting from the war. The domestic carriers involved in the cases that have thus far come before the Board had accounted for these capital gains by crediting them against depreciation expense. Subsequent contention that the depreciation expense should be restated so as to eliminate this credit has not found favor with the Board, which has considered this capital gain as reducing the carrier's "need." The question whether the Board would reach the same result in a case where the problem had not been obscured by accounting treatment of this character, is technically still open, although the Board's opinions to date indicate that the same result would probably be reached.

(d) Procedure.

The Board has also made an important procedural change in its handling of rate cases. Now that the Board has completed or is in the course of completing the initial cases for each carrier, the carriers' monthly and annual reports to the Board have become the chief evidentiary basis for mail pay decisions. In these circumstances, little purpose is served by an extended hearing with question and answer testimony. Under the Board's new procedure, it prepares a show cause order on the basis of information in its files and such other data as the carrier may choose or be asked to furnish. The carrier is then accorded an

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7. See Pennsylvania-Central Airlines Mail Rates, 1 C.A.A. 435 (1939); TWA Mail Rates, 2 C.A.B. 226 (1940); Chicago & Southern Airlines Mail Rates, 3 C.A.B. 161, 177 (1941); Delta Air Corporation Mail Rates, 3 C.A.B. 261, 277 (1942). In the Pan American-Grace Airways case, supra, the Board utilized the carrier's existing depreciation rates on flight equipment, which were slightly more conservative than those adopted in the case cited, but declined to approve the carrier's proposed rates which would write-off all DC-3s by the end of 1943.


opportunity to present evidence and argument as to why 'the rates set forth in the show cause order should not be made effective. This procedure obviously requires for its success a full and candid statement by the Board in its show cause order as to the data used and the steps followed by the Board in arriving at the conclusion. The orders issued thus far appear to comply fully with this requirement.

3. Rates for the transportation of passenger and property.

In a decision dated January 6, 1942, 3 C.A.B. 242, the Board sustained with certain minor exceptions the so-called Air Travel Plan which permitted a 15% discount on domestic air transportation to business concerns complying with the plan, and also a tariff involving a 15% discount to the Federal Government. As a result of wartime conditions, the 15% discount feature of the Air Travel Plan has been withdrawn by the carriers.

4. Acquisition of control.

The Board has had a number of important cases under Section 408 of the Civil Aeronautics Act with respect to acquisitions of control of air carriers and persons engaged in other phases of aeronautics.

The Board in particular has been concerned with the final proviso of Section 408(b) to the effect that where the applicant is a carrier other than an air carrier, or is a person controlled by a carrier other than an air carrier, the acquisition shall not be approved unless the Board finds "that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." In Pan American Airways Company v. Civil Aeronautics Board and American Export Airlines, 121 F. (2d) 810 (1941), the Court of Appeals for the Second Circuit held that the Board had jurisdiction in a case where a steamship company organized an airline subsidiary that was subsequently awarded a certificate—overruling the contention, which a 2-1 majority of the Board had accepted, that the statute did not apply either at the time of organization, because the subsidiary was not then an "air carrier," or at the time when the subsidiary became an air carrier, because there was then no acquisition.

In American Export Airlines, Inc.—Acquisition of Taca, S.A., 3 C.A.B. 216 (1941), the applicant, a subsidiary of American Export Lines, Inc., a steamship company, applied for permission to acquire control of Taca, an airline operating entirely in Central America. The Board held that Taca, although not an "air carrier," was a person engaged in another phase of aeronautics within the meaning of Section 408(a) (3); that the statute applied in spite of the fact that all of Taca's operations were conducted outside the United States; that the final proviso of Section 408(b) was applicable although Taca was not an air carrier; and that since the record was devoid of evidence that the acquisition of a Central American airline would enable a transatlantic steamship company "to use aircraft to public advantage in its operation," the proposed acquisition had not been brought within the exception to the final proviso and must be disapproved.

In American Export Lines, Inc.—Control of American Export Airlines, Inc., decided July 30, 1942, the Board directed that American Export Lines, Inc.,
divest itself of control of American Export Airlines, Inc. on the ground that
the evidence did not bring the case within the exception to the final proviso.
The Board held that "this proviso is extremely restrictive and only those limited
air transport services which are auxiliary and supplemental to other transport
operation, and which are therefore incidental thereto, can meet the conditions
laid down by that proviso." The Board also held, contrary to its earlier decision,
2 C.A.B. 16, that it would give effect to this policy in certificate applications by
surface carriers or their subsidiaries. In view of the apparently extensive plans
of steamship and railroad interests to enter into air transportation, the decision
in this case is of much interest.

5. Judicial review.

An important decision as to the scope of judicial review of orders of the
Board was handed down on July 16, 1941 by the Court of Appeals for the
Second Circuit in *Pan American Airways Company v. Civil Aeronautics Board
and American Export Airlines, Inc.*, 121 F. (2d) 810 (1941). In this case, Pan
American Airways had petitioned for the review of orders granting a certificate
for transatlantic operation to American Export Airlines, Inc. and dismissing for
want of jurisdiction the application of American Export Airlines, Inc. for
approval of its control by American Export Lines, Inc. The Board moved to
dismiss the petition for review for want of jurisdiction, claiming that as to
both orders Pan American lacked the necessary legal interest and that as to the
order granting the certificate, review was precluded because of the provision of
Section 801 of the Act making a certificate to engage in foreign air transpor-
tation subject to approval of the President. The court overruled the contention
based on lack of appropriate status to appeal and also conceded that both the
subjects of the petition fell within the literal meaning of the judicial review
section of the Act. However, it sustained the Board's contention that the order
granting the certificate was not subject to review, for the reason that the order
was in effect that of the President since "his necessary approval or disapproval
makes him, and not the Board, the ultimate arbiter." As previously mentioned,
the court held that the Board had erred in dismissing for want of jurisdiction
the application for approval of acquisition of control, and returned this phase of
the case to the Board for further proceedings. No petitions for *certiorari* were
filed.

6. Other war regulations.

On December 18, 1941, the President created the Office of Defense Trans-
portation with comprehensive control over all domestic transportation, including
transportation by aircraft (6 Fed. Reg. 6725). To date, however, the Office of
Defense Transportation has made relatively little exercise of its powers in con-
nection with air transportation.

Under date of December 13, 1941, the President issued an executive order
directing the Secretary of Commerce "to exercise his control and direction over
civil aviation in accordance with requirements for the successful prosecution of
the war as may be requested by the Secretary of War," and vesting in the
Secretary of War, so far as concerned civil aviation, the power conferred upon
the President by the Act of August 29, 1916, 49 Stat. 645, to take over part or
all of any system of transportation necessary for the successful prosecution of
the war (6 Fed. Reg. 6441). Pursuant to this order, the War Department has set up a comprehensive system of control of priorities for the transportation of passengers and goods on commercial airlines; and the Civil Aeronautics Administration has authorized certain departures from air carrier operating specifications in the interest of the war effort. Arrangements have also been made for the taking over by the War Department of a large number of aircraft formerly engaged in commercial service and for the operation by the airlines of other such aircraft, although this has been done by agreement and without the necessity of resort to the powers conferred by the executive order.

AMERICAN BAR ASSOCIATION REPORTS, 1942:
STANDING COMMITTEE ON AERONAUTICAL LAW
(ANNUAL MEETING, AT DETROIT, AUGUST 20, 1942)

RECOMMENDATIONS

1. That the committee be instructed to continue its study of the subject of civil aviation liability; to cooperate with the Civil Aeronautics Board and all other interested agencies in the development of appropriate legislation thereon, reporting to the Association with its recommendations as to the type and character of legislation which, in its opinion, the Association should sponsor;

2. That the American Bar Association approve Senate Bill 7 now pending in the United States Senate relating to aviation salvage at sea, with an amendment giving the Civil Aeronautics Board the discretionary power to relieve specified aircraft or the owner or operators thereof from obligation of assistance and for such periods of time as may be specified, not exceeding three years;

3. That the American Bar Association indorse the principle of an Act by Congress authorizing suits against the Government with respect to claims for damage or loss caused by aircraft operated by the Government or any of its agencies, or under its control and direction, and that the committee be instructed to continue a study of the subject with a view to formulating a bill incorporating the principles of the federal acts relating to public vessels of the United States (U. S. Code, Title 46, Sections 742, 781-2), and to present the same to the appropriate committees of Congress and urge the passage thereof.

1. REPORT

At the 1941 meeting, the Association adopted a recommendation of the former committee that the committee for the ensuing year be directed to make a special study of civil aviation liability in cooperation with the Civil Aeronautics Board, with a view to appropriate legislation thereon by the Federal Congress. Prior to the adoption of the uniform act on this subject by the Commissioners on Uniform State Laws in 1938, there was a joint committee of this Association, the Conference of Commissioners on Uniform State Laws and of the American Law Institute of which Mr. William A. Schnader of the
Philadelphia bar was chairman, which cooperated in the draft of a uniform act on the subject for submission to the states. The American Bar Association and the American Law Institute withdrew participation in 1938, but the Conference of Commissioners on Uniform State Laws in that year approved an act, which evidences much detailed study and consideration but which has not been promulgated, as result of request made by the Civil Aeronautics Board in order that it might have an opportunity to make its own investigation and recommendations on the subject. Since that time the Civil Aeronautics Board has caused an exhaustive study to be made as disclosed by what is generally referred to as the Sweeney Report, containing comprehensive factual and statistical data pertaining to all phases of aviation liability resulting from the operation of aircraft, commercial and for pleasure. It was anticipated that the Board would formulate and present to Congress its recommendations prior to this time but the advent of the war and other factors operated to delay its action and the Board has recently announced that, as result of the press of matters more directly related to the war effort, consideration of the subject was being indefinitely postponed, the intimation being that postponement would be for the duration of the war. The Government, except in a very restricted way, has grounded all private planes. It has, likewise, commandeered outright certain of the flight equipment owned by the air lines, some of which is being used for military purposes, flown and serviced by military personnel, while in other instances the equipment is being operated by the air lines under contract, with the operational control in the Army Air Forces. The remainder, although operated by the carriers on their regularly certificated routes, is subject to the imposition of a system of priorities which gives precedence to both personnel and material whose transport by air is deemed important to the war effort. These factors make it extremely unlikely that any legislation on the subject could get the attention of Congress at this time. However, this committee has endeavored to give thoughtful study thereto, anticipating that the time will come when there will be a real public demand for legislation of this type, and the American Bar Association should be in position to promptly and effectively assist in the formulation of appropriate legislation, if and when the opportunity arises.

It is the opinion of the committee that there is a distinct need for some type of aviation liability legislation, and that it should be initiated by the Federal Congress, although there are certain aspects which could very properly be left to the states, if not necessarily so. It is a controversial subject, however, and it will be difficult to formulate an act which will meet with the approval of all interests affected. The subject involves three main problems: (1) Procedural rules governing liability; (2) the measure of damages, and (3) the method by which liability may be secured. The question of whether legislation should incorporate the principle of absolute but limited liability with compulsory insurance, or whether ordinary common law principles of negligence should, without compulsory insurance, apply, or whether some standard between the two should be enacted, naturally invites controversy. The fact, however, that these problems are controversial and that there is a variety of opinion thereon should not operate as a barrier to any and all legislation on the subject. While there are those who believe that the law of air flight should be allowed to develop normally through litigation rather than by statutory enactment, if this course is pursued, it will in all probability result in a great variety of law on the subject with the inevitable effect of
confusion and uncertainty which always follows a conflict of laws. In addition, under present law, it often develops as an almost impossible task for the party having a claim to procure the facts necessary in order to assert that claim in law, and this alone is thought by many to afford a basis for applying a different rule of law to aircraft liability from that applied to other transportation agencies. It is the opinion of the committee that the existing situation will not be permitted to continue indefinitely and that following the war some type of legislation may be expected. The committee has not undertaken to arrive at a conclusion on the controversial aspects, preferring to make a further study and to get the views of all concerned before making definite recommendations, but with the thought in mind at all times that the interest of the American Bar Association is the public interest. It is accordingly recommended that the committee be instructed to continue its studies of the subject; to cooperate with the Civil Aeronautics Board, the Conference of Commissioners on Uniform State Laws and all other interested agencies in the development of appropriate legislation thereon, reporting to the Association with recommendations as to the character and type of legislation which in its opinion the Association should sponsor.

2. Aviation Salvage at Sea

At the 1941 meeting the Association approved a recommendation of the Committee on Admiralty and Maritime Law that it be given authority to take such action as deemed advisable to have enacted a law which would extend salvage principles to aircraft, its passengers and cargoes in trouble at sea, as if they were salvage services rendered in relation to a vessel under existing law. A bill has been introduced in the Senate of the United States by Senator McCarran, being S. 7. Its purpose is to enact into law the text of the Brussels Convention of 1938 relating to aviation salvage at sea and to which this country is a signatory. The bill has encountered some opposition from certain operators of trans-oceanic airlines upon the ground that there should be no fixed duty as to what an air pilot at sea should do upon an SOS appeal. A more flexible control would probably eliminate the objection by giving the Civil Aeronautics Board discretionary power to release aircraft on any route, or any specified aircraft or the owner or operator thereof, from the obligation of assistance for certain periods of time not to exceed, say, three years, if warranted by the circumstances and the public interest. It is the opinion of the committee that a proper system of salvage rewards which would encourage those in a position to do so to rescue aviation passengers or property in danger of loss at sea would be to the public interest. The Maritime Law Association of the United States has approved the above bill with the suggested amendment above and this committee recommends that the Association approve Senate Bill 7, with the amendment suggested, and that it be authorized to cooperate with the Civil Aeronautics Board, the Airline Pilots Association, the Air Transport Association, the Maritime Law Association and other interested groups in bringing about passage of the Act as amended.

3. Government Liability for Damage Caused by Aircraft in Government Service

In addition to aircraft transportation taken over and being operated by or for the benefit of the Federal Government, there is being continuously flown
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over the United States large numbers of planes of different types, employed in the Government service or by the armed forces of the United States in training programs and otherwise. Accidents naturally occur from time to time and as the service expands they will no doubt increase. These accidents occasionally result in damage to life and property on the ground and to civilians and others not engaged in the aircraft operation. As the Government is immune from suit, except by its consent, the only relief for the injured party is to appeal to Congress for a special act. A similar situation arose during and after the last World War as result of the greatly augmented merchant and naval vessels of the Government. The burden upon Congress became such that two general acts were passed—one in 1920, providing for suits against the Government for damage or loss sustained, if liability would have existed against the vessel if privately owned, in the district court of the district wherein the suing party resided or the vessel charged was found, and the other in 1925, providing that a libel in personam in admiralty might be brought against the Government, or a petition impleading the United States for damages caused by a public vessel of the United States and for compensation for towage and salvage services rendered public vessels of the United States, the venue being placed in the district court for the district in which the vessel or cargo charged should be found, if within the United States and if not, then in the district court of the district in which the parties suing resided or maintained an office and, if otherwise situated, then in any district court of the United States. (U. S. Code, Title 46, Sec. 742, 781-2.)

While special acts with respect to such claims are ordinarily a congressional prerogative which members of Congress may have a hesitancy in foregoing, affording as it does an opportunity to at times render a rather conspicuous service to a constituent, yet a flood of such requests and the time and attention necessary to give thereto in order to present the claim to the proper committees of Congress may become so burdensome that Congress would gladly be relieved of it. In any event, the public interest would seem to demand a more practical, expedient and accessible means by which a claim may be prosecuted than now exists. The committee feels that the United States district court, conveniently available everywhere, is the proper forum, the cases to be tried without the intervention of a jury. The proposal would seem to fall within the principle of an act now pending in Congress. President Roosevelt, in a message to Congress on January 14, 1942, recommended the enactment of legislation authorizing executive departments and independent establishments to adjust tort claims against the Government up to $1000.00, with review by the Attorney General of awards over $500.00, and that the United States district courts be given jurisdiction over claims of this nature up to $7500.00, with right of appeal to the Court of Claims. In his message the President called attention to the fact that the average number of private claim bills introduced in Congress was about 2000 per Congress and the time and expense involved in consideration of those claims made the wisdom of the present procedure questionable, particularly at a time when matters of great national importance demand an ever increasing attention by Congress and the President. It was stated that it would, likewise, make available a means of dispensing justice simply and effectively to tort claimants against the Government and give to them a day in court which certain other claimants against the Government now enjoy. In response to this message there was introduced
and passed in the Senate a bill carrying out the principles of the President's message—authorizing the administrative adjustment of tort claims up to $1000.00 and suits against the Government on claims not in excess of $10,000.00, but expressly exempting from the provisions of the act relating to suits against the Government all claims arising out of the activities of the military or naval forces or the coast guard during time of war. When the bill reached the House even the administrative adjustment provision regarding claims arising out of the activities of the armed forces was eliminated by the House Judiciary Committee and by a majority vote it recommended the passage of the Senate Bill with certain amendments, one of which was to make the bill in its entirety inapplicable to claims arising out of the activities of the military or naval forces or the coast guard during time of war. So the bill as recommended by the House Judiciary Committee leaves the situation as it exists at present with respect to the vast majority of claims which will arise as result of Government controlled or operated aircraft for the duration of the war. If there be any substantial reason why this distinction should be made between peace time and war time operation the House report does not so indicate. It is the opinion of the committee that there is considerable doubt regarding the passage of the pending legislation in any form. A substantial number of the House Judiciary Committee in a minority report vigorously oppose any legislation changing the existing order. While the present system has been the subject of criticism for many years and many bills have been introduced on the subject, only one has passed both Houses of Congress and that suffered a pocket veto by President Coolidge. The committee feels the more practical way to approach the subject is by separate act applying to aircraft operation alone in a manner similar to admiralty and maritime torts involving merchant vessels operated by the Government as before referred to. It is accordingly recommended that the Association indorse the principle of an act by Congress permitting suits against the Government in such cases, and that the committee be instructed to continue a study of the subject with a view to formulating a bill incorporating the principles of the aforesaid acts relating to public vessels of the United States and that it be authorized to bring the matter to the attention of the proper Committees of Congress and urge the passage thereof.

The committee submits herewith the tentative draft of an Act on the subject in compliance with the By-Laws of the Association but approval of the act in the specific form employed is not being asked. (See Appendix, page 38.)

4. United States Permanent American Aeronautical Commission

The committee is pleased to report that the President upon suggestion of the State Department and in line with the recommendations made by this committee and the Section of International and Comparative Law in a joint report approved at the 1941 meeting, has appointed the members of the United States Commission to function with the Permanent American Aeronautical Commission, generally referred to as CAPA (Comisión Americana Permanente de Aviación) set up in accordance with the resolution adopted at the first Inter-American Technical Conference held at Lima, Peru, in 1937. The terms of this convention have now been approved by seven American Republics, including the United States, and each signatory country is to name a commis-
sion to study inter-American aviation problems with a view to the coordination and development of international standards with respect to operational practices in general and the unification and codification of international law on the subject. The committee is advised that several South American countries have appointed their commissions, and is, likewise, advised that the United States' commission has about completed a study of such aspects of inter-American commercial aviation as might be susceptible of simplification and uniform treatment, that a report from the commission may soon be expected and, if approved, steps will be taken toward a realization of the program outlined. This program is regarded as an important phase of the war effort in the Western Hemisphere and the committee has tendered to the Chairman of the United States' Commission, Honorable Thomas M. Burke, Chief of the Division of International Communications, Department of State, its full cooperation and assistance in any matter coming under the jurisdiction of the commission, and it is recommended that this action of the committee be approved.

MITCHELL LONG,
Chairman,

JOSEPH HARRISON,
ARNOLD W. KNAUTH,
H. GRAHAM MORISON, JR.,
WILLIAM ALFRED ROSE.

Appendix

Tentative Draft of Bill Concerning Suits Against the Government for Damage Caused by Government Operated Aircraft

(Caption and Enacting Clause omitted)

1. A suit in personam may be brought against the United States or against any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or a petition may be maintained impleading the United States or such corporation, for damages caused by a public aircraft of the United States, or by any aircraft owned or operated by the United States, or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or by any aircraft being operated under the direction and control of the United States or of such corporation, under circumstances where the United States if a private person would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission made the basis of the cause of action occurred.

2. A libel in personam in admiralty may be brought against the United States or a petition impleading the United States for a towage and salvage services, including contract salvage rendered to a public aircraft of the United States or to any aircraft owned by the United States, or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation, or operated by or for the United States or such corporation, and to any cargo owned or possessed by the United States or such corporation.

3. Such suit shall be brought in the District Court of the United States for the District in which the aircraft or cargo charged with creating the
liability is found within the United States, or in the District Court of the United States for the District in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, then in any District Court of the United States. The practice in all such cases shall be in accordance with the Federal Rules of Civil Procedure.

4. No interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

5. No officer or member of the crew of any public aircraft or vessel of the United States may be subpoenaed in connection with any suit authorized under this Act without the consent of the Secretary of the Department or the head of any independent establishment of the government having control of the aircraft or vessel at the time the cause of action arose, or of the commanding officer or master of such aircraft or vessel at the time of the issuance of such subpoena.

6. Suits shall proceed and shall be heard and determined according to the principles of law obtaining in like cases between private parties, provided that no jury shall be impanelled and every case shall be decided by a District Judge. A decree against the United States or such corporation may include costs of suit, and where the decree is for a money judgment, interest at the rate of four per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the Court. Judgments and decrees shall be subject to appeal and revision as provided in other cases of civil or admiralty and maritime jurisdiction.

7. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation in any proceeding brought hereunder.

8. If a privately owned aircraft not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership or operation of such aircraft by the United States or by such corporation, such aircraft shall be released without bond or stipulation therefor upon the statement by the United States through its Attorney General or other duly authorized law officer that it is interested in such case, desires such release and assumes liability for the satisfaction of any decree obtained by the plaintiff or libelant in such cause and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

9. Suits as herein authorized may be brought only on causes of action arising since (January 1, 1942) provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect, and all other suits hereunder shall be brought within two years after the cause of action arises.

10. No suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the Court in which the suit is brought that said government under similar circumstances allows nationals of the United States to sue in its courts.
11. The Secretary of any Department of the Government of the United States or the governing authority of any corporation created by it or in which the United States or its duly authorized representatives and agents shall own the entire outstanding capital stock, having control of the possession or operation of any aircraft causing loss or damage resulting in claim therefor is authorized and empowered, by and with the consent and approval of the Attorney General of the United States, or his duly authorized Assistant, to arbitrate, compromise or settle any claim in which suit will lie under the provisions of this Act, either before or after suit brought.

12. Any final judgment rendered on any complaint or libel or cross-libel herein authorized and any settlement had and agreed to under the provisions of this Act shall upon presentation of a duly authenticated copy thereof be paid by the proper officer of the United States out of any moneys in the Treasury of the United States appropriated therefor by Congress.

13. The Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States or such corporation and the Secretary of any department of the Government of the United States or of any independent office, and the Board of Directors of any such corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session and in which the time to appeal shall have expired or have been waived.

14. Nothing contained in this Act shall be construed to recognize the existence of or as creating a lien against any public aircraft of the United States.

15. This Act shall take effect on the day of its approval.