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Aviation Report

ROBERT C. OWENS*

PROPOSED INTERNATIONAL AIR TRANSPORTATION COMPETITION ACT OF 1979

On June 7, 1979, Senator Howard Cannon, co-sponsor of legislation resulting in the Airline Deregulation Act of 1978 (ADA),¹ introduced new aviation legislation in the U.S. Senate, namely, the International Air Transportation Competition Act of 1979 (ICA).² Although the ADA changed provisions of the Federal Aviation Act of 1958 regarding international aviation, the bulk of its amendments relate to promotion of free competition in interstate and overseas operations.³ The proposed ICA seeks to expand the promotion of and dependence on free market forces in the area of international aviation.

The ICA proposes to change the policy factors to be considered by the CAB in exercising its duties under the Federal Aviation Act of 1958 (Act).⁴ Except for one caveat, the CAB would now be able to consider ten of the eleven factors enumerated by the ADA as applicable to interstate and overseas transportation which are in the public interest and in accordance with public convenience and necessity. Besides the primary goal of safety, the remaining factors are focused uniformly around the promotion, development, and protection of, and reliance upon a competitive air transportation system where decisions are made by private, informed, and unrestricted decision-makers influenced only by free market forces. The CAB would favor the availability of low-price options, the use of secondary and satellite airports, the entry of new carriers into the industry, and the expansion of existing carriers into additional markets. In placing "maximum reliance upon competitive market forces and on actual and potential competition" to foster the needed air transportation system and

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1. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

2. *Congressional Record*, S. 1300, 96th Cong., 1st Sess., 125 CONG. REC. 7198 (1979).

3. See generally, Aviation Report, 10 LAW. AM. 1030, 1033-37 (1978).

4. ICA §§ 2, 3 amending Act §§ 102(a),(c), 49 U.S.C. §§ 1302(a),(c) (Supp. 1979).

healthy air carriers, the CAB would take into account “[m]aterial differences, if any, which may exist between interstate and overseas air transportation, on the one hand, and foreign air transportation, on the other.”⁵

When issuing certificates of public convenience and necessity to United States air carriers, the ICA instructs the CAB to approve any applications if it finds that the applicant is fit, willing, and able, and that the air transportation sought to be approved is consistent with public convenience and necessity.⁶ The ADA lowered the requirements an applicant must meet in order to receive authority to furnish interstate and overseas air transportation.⁷ Under the ICA amendment, the applicant would no longer have to show that the proposed foreign air transportation is *required* by public convenience and necessity.⁸ Similar changes to the standards for granting certificates for charter⁹ and temporary air transportation are also proposed.¹⁰

The ICA would give the CAB discretionary power to suspend the certificate authority of a United States airline in a foreign air transportation market and to grant such authority to an alternative airline when the CAB finds that the restrictions of the relevant bilateral agreement prevent appointment of an additional airline.¹¹ The applicant must also be qualified and “[p]rovide substantially improved service, substantially lower fare or rates, or a substantially improved combination” thereof.¹² Finally, the CAB must not find that such action would be otherwise inconsistent with public convenience and necessity. The powers of certification and suspension may be exercised in an expeditious manner, unless the incumbent requests, or the CAB finds, that an oral evidentiary hearing is required. However, the CAB may suspend a carrier after notice and receipt of the carrier’s views, without hearing, where the carrier has given ninety days notice of its intent to suspend all service to a foreign point, or the carrier fails to provide any significant service to the point for the ninety days prior to the CAB’s notice.

Requirements for the issuance of a foreign air carrier permit would also be less stringent. This type of permit would be issued if

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5. ICA § 2 amending Act § 102(a)(4), 49 U.S.C. § 1302(a)(4) (Supp. 1979).
 6. ICA § 4 amending Act § 401(d)(1), 49 U.S.C. § 1371(d)(1) (Supp. 1979).
 7. ADA § 8 amending § 401(d)(1), 49 U.S.C. § 137(d)(1) (Supp. 1979).
 8. Act § 401(d)(1)(B), 49 U.S.C. § 1371(d)(1)(B) (Supp. 1979).
 9. ICA § 4 amending Act § 401(d)(3), 49 U.S.C. § 1371(d)(3) (Supp. 1979).
 10. ICA § 4 amending Act § 401(d)(2), 49 U.S.C. § 1371(d)(2) (Supp. 1979).
 11. ICA § 4 amending Act § 401(g), 49 U.S.C. § 1371(g) (Supp. 1979).
 12. *Id.*

the applicant: (1) is fit, willing, and able; (2) is qualified, and has been designated by its government; or (3) the transportation applied for "will be in the public interest."¹³ The ICA also has eliminated the requirement for a public hearing. In a further attempt to ensure free competition, the ICA would grant the CAB the power to summarily suspend or otherwise modify permits of the airlines of a foreign country, subject only to subsequent approval by the President of the United States. This power may be invoked when the CAB finds that:

[the] government, aeronautical authorities, or foreign air carriers of any foreign country have, over the objections of the Government of the United States, impaired, limited, or denied the operating rights of United States air carriers, or engaged in unfair, discriminatory, or restrictive practices with a substantial adverse competitive impact upon the United States carriers, with respect to flight operations to, from, through, or over the territory of such country¹⁴

Presently, agreements affecting foreign air transportation are approved if they are not adverse to the public interest or in violation of the Act. The ICA would limit this traditional test to the approval of those agreements which would not substantially reduce or eliminate competition. If anticompetitive effects are apparent, the agreement, in order to be approved, must be necessary to meet a serious transportation need or to secure important public benefits which cannot be obtained from a reasonably available alternative means having materially less anticompetitive effects. The ICA would further make the filing of such agreements optional.¹⁵

As a reaction to the previous, fragmented approach to negotiations by various agencies, sponsors of the ICA included a permanent, strong, pro-competitive set of policy goals for negotiation of future bilateral air transport agreements.¹⁶ Such policy goals are strikingly similar to those expressed by a recent Presidential statement on this topic.¹⁷ This statutory statement of goals is expressly directed to the Secretaries of State and Transportation and the Civil Aeronautics Board. Each would have to use these goals in developing a negotiating policy that maximizes competition in the context of a well-functioning international air transportation system.¹⁸

13. ICA § 7 amending Act § 402(b), 49 U.S.C. § 1372(b) (1976).

14. *Id.*

15. ICA § 11 amending Act § 412, 49 U.S.C. § 1382 (1976).

16. Comments of Senator Cannon, *supra* note 2, at 7198.

17. 43 Fed. Reg. 22262 (1978). See Aviation Report, *supra* note 3, at 1040-41.

18. ICA § 17 amending Act § 1102, 49 U.S.C. § 1502 (1976).

One ICA goal is to permit carrier freedom in setting fares and rates in response to consumer demand. Closely linked to the result of lower fares is the goal which promotes the maximum use of multiple and permissive authority. New policy goals call for minimization of: (1) restrictions on charters; (2) operational restrictions; and (3) discrimination and unfair competitive practices faced by United States airlines in foreign air transportation. These goals promote integration of domestic and international air transportation, an increase in the number of nonstop United States gateway cities, and increased access to United States points by foreign airlines if exchanged for a similar quantum of benefits for the United States carriers or traveling public. Such access should be permanently linked to the rights received from the foreign country.¹⁹

The ICA does not stop at the mere suggestion of policy goals; it further establishes the International Aviation Advisory Council, which shall advise the Secretaries of State and Transportation and the Civil Aeronautics Board regarding general international aviation negotiating policy and individual negotiations. This Council would be comprised initially of representatives of the President's Domestic Council, the Departments of Commerce and Defense, airport operators, scheduled and charter air carriers, airline labor, consumer interest groups, travel agents, and tour organizers.

The last provision of the ICA seeks to amend the provisions of the International Air Transportation Fair Competitive Practices Act of 1974.²⁰ This amendment provides a responsive remedy against a foreign government, agency, or air carrier which: "(1) engages in unjustifiable or unreasonably discriminatory, predatory, anticompetitive practices against a United States air carrier; or (2) imposes unjustifiable or unreasonable restrictions on access of a United States air carrier to foreign markets" ²¹ If the CAB makes a finding that such activity has occurred, it may suspend or otherwise modify the foreign air carrier's permit or tariff pursuant to its powers under the Act. This provision gives standing to United States airlines and governmental agencies, but not to members of the traveling public.

PROPOSED CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT

In late 1979, a United Nations Conference of Plenipotentiaries will consider adopting the proposed Convention on International

19. *Id.*

20. Pub. L. No. 93-623, 88 Stat. 2103 (1974) (codified in scattered sections of 22, 49 U.S.C.).

21. ICA § 23 amending International Air Transportation Fair Competitive Practices Act of 1974 § 2, 49 U.S.C. § 1159(b) (1976).

Multimodal Transport.²² This Draft Convention has its roots in a draft Convention on International Combined Transport of Goods, prepared at meetings attended by the Economic Commission for Europe and the Inter-Governmental Maritime Consultative Organization in 1970 and 1971.²³ In 1973, the United Nations Conference on Trade and Development created an Intergovernmental Preparatory Group with the duty to create a draft convention covering the multimodal transportation of goods between countries. In its sixth session, during February and March 1979, the Preparatory Group completed the Draft Convention which it recommended for consideration by the U.N. Conference on Plenipotentiaries.

Throughout the decade, the International Civil Aviation Organization (ICAO) has observed and participated in the development of the Draft Convention. The ICAO appointed a group of Rapporteurs to analyze and report upon the Draft Convention and its effects on air transportation.²⁴ These reports, along with the detailed comments of the International Air Transport Association, indicate that there is substantial controversy over whether to include or exclude air transportation as a mode covered by the Convention. Furthermore, there is great concern regarding potential conflict between the Draft Convention, and the Warsaw Convention and its offspring, both adopted and proposed.

The Draft Convention creates four new precepts which determine the applicability of the Convention and the resulting relationship between the parties. The first precept, "international multimodal transport," is defined as the carriage of goods by at least two different modes of transport on the basis of a "multimodal transport contract" from a location in one country, where the goods are controlled by a "multimodal transport operator," to a place of delivery in a different country.²⁵ However, any mode of transport that is used for pickup, delivery, or transshipment incidental to transportation by the primary mode is not to be considered another mode of transport for purposes of this definition. Second, a "multimodal transport operator" is anyone who: (1) concludes a "multimodal transport contract;" (2) acts as a principal and not as agent on behalf of the consignor or participating carrier; and (3) assumes responsibility for performance of the contract.²⁶ Third, a "multimodal transport contract" is a contract under

22. Draft Convention on International Multimodal Transport, Intergovernmental Preparatory Group of United Nations Conference on Trade and Development, TD/B/AC.15/56 (March 9, 1979) [hereinafter referred to as "Draft Convention"].

23. ICAO Document 9271, LC/182 at 15 (May 29, 1979).

24. *Id.* at 16.

25. Draft Convention, art. 1, § 1.

26. *Id.* at § 2.

which a "multimodal transport operator" receives payment for freight charges for performing or procuring performance of "international multimodal transport."²⁷ Finally, a "multimodal transport document" is one which evidences a multimodal transport contract and the acceptance by the multimodal transport operator of responsibility for the goods and their transport under the terms of the contract.²⁸

If the U.N. Conference of Plenipotentiaries in late 1979 approves its content, the Convention will apply to contracts for multimodal transport between two States if one or some combination of events occur. As now written, the Convention will apply to a multimodal transport contract if the contract provides that a multimodal transport operator will take charge of goods in a Contracting State, and/or deliver goods in a Contracting State, and/or the multimodal transport document is issued in a Contracting State.²⁹ The Convention will also apply if the multimodal transport document states that the Convention or its implementing legislation shall do so.³⁰

The most pertinent issue for those parties with air transportation interest is whether the Draft Convention will conflict with any of the existing or proposed treaties concerning air transportation of property. Article 4 of the Draft Convention provides that the Convention "shall not affect, or be incompatible with, the application of any international intergovernmental agreement or national law relating to the regulation and control of transport operations."³¹ In addition, each nation will still have the right to regulate and control multimodal transport operations and operators.³²

However, Article 31 of the Warsaw Convention already contemplates multimodal transportation and provides that, in such cases, the provisions of Warsaw shall and must apply to the air portions of the journey. Furthermore, Article 18(3) of the Warsaw Convention provides that its provisions shall not apply to carriage by land, sea or river outside of an airport, except where such carriage takes place in conjunction with an international journey by air for purposes of loading, delivery, or transshipment. Thus, the provisions of the Warsaw Convention apply to the air portion of multimodal shipments, and to the ground and water portions as well, where there are ancillary or incidental services provided, such as pickup, delivery, or transshipment.

27. *Id.* at § 3.

28. *Id.* at § 4.

29. Draft Convention, art. 2, §§ a-c.

30. *Id.* at § d.

31. Draft Convention, art. 4, § 1.

32. *Id.* at § 2.

Given the mandatory nature of the Warsaw Convention³³ and the apparent subservience in Article 4 of the Draft Convention, there would seem to be little cause for concern. However, the Draft Convention includes a proposed Article 3 which explicitly makes the Convention mandatory when a multimodal transport contract is within the scope defined in Article 2.

As if this was not confusing enough, the third of three governing principles in the Preamble to the Draft Convention is to promote "freedom for shippers to choose between multimodal and segmented transport services." This raises the problem of defining the difference between multimodal and segmented services.

There are two ways to view this problem. One view resolves the question by finding that the Draft Convention creates a new type of contract, contract *sui generis*, between the multimodal transport operator and the shipper or consignor.³⁴ The relationship between the operator, as principal, and the various contracting carriers would continue to be governed by existing unimodal conventions. The second view deems the operator to assume the role of carrier because he undertakes to perform or procure performance over the entire itinerary. If the operator performs the air carriage, the Warsaw Convention would clearly apply. If the operator contracts for the air carriage, it must be the "contracting carrier," as defined by Article 1, paragraph (b) of the Guadalajara Convention of 1961. In the latter case, both the Warsaw Convention and the Draft Convention would apply between the shipper and the operator with respect to the carriage by air.

Preeminent potential for conflict between the Draft Convention and other international agreements dealing with air transportation is anticipated with the Warsaw Convention, which has been ratified or adhered to by 110 States.³⁵ In addition to the potential for conflict with the Warsaw Convention, there is a possibility of conflict with the Hague Protocol of 1955,³⁶ to which ninety-two States are parties, and the Guadalajara Convention of 1961,³⁷ to which fifty-four States are parties. Furthermore, provisions of the Guatemala City Protocol of

33. See Warsaw Convention, arts. 1, 32.

34. ICAO Document, *supra* note 23, at 18.

35. *Id.* at 16.

36. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, AV. L. REP. ¶¶ 27,101-128.

37. International Conference on Private Air Law, August-September, 1961, DOC 8301-LC/49.

1971,³⁸ although not yet in force, may form the basis for future problems.

As written, the Draft Convention will conflict with the Warsaw Convention in at least three major areas.³⁹ First, the Draft Convention requires more information on the multimodal transport document than is required by the Warsaw Convention on the airway bill.⁴⁰ Second, the liability of a multimodal transport operator will likely be less than that provided by the Warsaw Convention.⁴¹ Third, the provision regarding notice of loss, damage, or delay is different.⁴² At this moment, the basis for proving liability under the Draft Convention and the Warsaw Convention are the same—a presumption of fault and a reversed burden of proof. However, if Montreal Protocol No. 4 and its provision for strict liability were to become effective, a significant difference would exist in the burden of proving that the air carrier was at fault.

The solution offered by the International Air Transport Association (IATA) is simple and complete: to exclude air transportation from the Convention on International Multimodal Transport. The IATA asserts that its solution would avoid: (1) conflict between conventions; (2) the litigation that would occur as shippers shopped for the most favorable treaty provisions; and (3) many other burdensome and unnecessary requirements. The IATA reached this conclusion after determining that the Draft Convention was designed to accommodate intermodal connections among surface carriers.⁴³ In contrast to surface carriers, air transportation is characterized by high value, low-weight traveling in non-stackable, low tear weight containers in high cost vehicles of limited size. Thus, other than for pickup and delivery

38. International Conference on Air Law, Guatemala City, February-March, 1971, DOC 9040-LC/167.

39. Report of the Rapporteurs on the Draft Convention on International Multimodal Transport, ICAO Document 9271, LC/182, Part II, Annex B at 47 (May 29, 1979).

40. Compare Draft Convention, art. 8 with Warsaw Convention, art. 8.

41. Article 22 of the Warsaw Convention provides for a limit of liability equivalent to 17 Special Drawing Rights (an independent unit of exchange established by the International Monetary Fund) per kilogram. The Intergovernmental Preparatory Group did not establish the limit of liability for the Draft Convention; instead it left the decision for the Diplomatic Conference. Since the limit of 2.5 Special Drawing Rights per kilogram for transport by sea (United Nations Convention on the Carriage of Goods by Sea (Hamburg, March 31, 1978)) is so far below the limit applicable to transport by air, compromise may be difficult.

42. Compare Draft Convention, art. 24 with Warsaw Convention, art. 26.

43. Surface carriers are those who carry goods by road, rail, inland waterways, and ocean.

services incidental to the primary air transportation, such transportation involves an insignificant amount of intermodal connections with surface carriers.

The IATA specifically objects to the introduction of a new document, the multimodal transport document, which requires more information than the Warsaw Convention. Furthermore, it finds the required negotiable documents of carriage to be unnecessary and costly for shippers. Since air shipments move swiftly, the documents would follow the actual goods. Storage of the goods at the point of destination would therefore be required until the negotiable document could be tendered for delivery. Another problem arising from the inclusion of air transportation in the Draft Convention is that shippers would be subjected to a liability regime designed for the average multimodal shipment, which liability would be considerably lower in value than the average high value air shipment. The result would be an added incentive for litigation to circumvent the Draft Convention.

The remaining difficulty in excluding air transportation and incidental pickup and delivery from the Draft Convention is the possibility that the success of the Draft Convention would be jeopardized by its exclusion. IATA submits, however, that the uniqueness of air cargo shipments and their shippers' needs result in few intermodal connections beyond those necessary for short-range pickup and delivery. On the contrary, inclusion of air transportation would hamper the tailoring of the Draft Convention to suit the needs of the surface modes of transport.

WARSAW CONVENTION⁴⁴

Several recent judicial decisions have aided in the interpretation of sections of the Warsaw Convention dealing with limitation on liability. In *Illinois ex rel. Compagnie Nationale Air France v. Gilberto*,⁴⁵ the Illinois Supreme Court stated that for purposes of determining proper forums for the filing of claims under the Warsaw Convention, the "domicile" of an airline carrier is not any country where the airline carries on its business on a "regular and substantial basis." According to the court, the Convention explicitly defines the place of domicile of an airline as being the place of its incorporation. In addition, the court found that the failure of a carrier to give notice

44. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934).

45. 74 Ill. 2d 90, 383 N.E.2d 977 (1978), *cert. denied*, 99 S.Ct. 2052 (1979).

on its passengers' tickets as to forums with jurisdiction over such claims did not preclude utilization of the limitation of liability provided in the Convention.

The action arose from the hijacking of an Air France airplane during the Athens to Paris leg of a flight routed from Tel Aviv, Israel to Athens, Greece to Paris, France. Eighty-one plaintiffs brought suit on behalf of themselves or their decedents, who as passengers, suffered physical and emotional injuries or death at the hands of hijackers.

Suit was instituted in Cook County, Illinois. Air France moved to dismiss on the ground of lack of subject matter jurisdiction under the Warsaw Convention.⁴⁶

The court rejected the plaintiffs' argument that a country where an airline does a regular and substantial amount of business is a domicile for purposes of jurisdiction under Article 28(1) of the Warsaw Convention.⁴⁷ It did so by determining that Article 28(1) was totally incompatible with plaintiffs' claim, insofar as it explicitly established two places where an action for damages may be brought: (1) the principal place of business of the carrier; and (2) the place of business where the contract of carriage was made. The court held that this provision of the Convention forecloses the creation of any other category for jurisdictional purposes.⁴⁸

The plaintiffs also sought to remove the limitation of liability imposed by the Convention (approximately \$8,300) by claiming that the carrier's failure to give notice as to the limitations of Article 28(1) of the Warsaw Convention was the equivalent of a failure to inform them of a monetary limitation under Article 22, which precludes a carrier from reliance on that limitation.⁴⁹ Distinguishing the cases

46. Article 28(1) of the Warsaw Convention limits jurisdiction for an action for damages to the country of the: (1) domicile of the carrier; (2) its principal place of business; (3) the place of business through which the contract was made; or (4) the place of destination.

47. The text of Article 28(1) states:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business through which the contract has been made, or before the court at the place of destination.

48. The court appeared concerned at the possibility that, in accepting plaintiff's contentions, it might appear to add an amendment to the Convention unilaterally. *Illinois ex rel. Compagnie Nationale*, 74 Ill. 2d at 95, 383 N.E.2d at 981.

49. Article 22 of the Warsaw Convention sets a monetary ceiling on liability at \$16,000, unless death or damages was caused by the defendants' "wilful misconduct." Hague Protocol of 1965, *supra* note 36.

that would eliminate the limitation because of such failure, the court found that "[t]he provisions of Article 28(1) limiting the places where a carrier may be sued are not provisions 'which exclude or limit his liability,' and the latter phrase refers only to the monetary ceiling on damages found in article 22." The court rationalized that the purpose for requiring disclosure to a passenger that the amount of recovery may be limited if he should be killed or injured in an accident is to enable the prospective passenger to take protective measures, such as taking out additional insurance. The court could not, however, perceive any comparable reason why the individual passengers would have cared to know in which Convention country an action for damages must be brought.

In *Bianchi v. United Air Lines*,⁵⁰ a Washington state appeals court held that the Warsaw Convention is a sovereign treaty and supreme law of the land, and as such, preempts any local common laws of material deviation from a contract which might avoid any limits to the air carrier's liability found in the contract of carriage. The plaintiff in this case sought air freight shipment of a promissory note from Seattle, Washington, to Matzatlan, Mexico. A United Airlines employee assured the plaintiff that one of United's flights would arrive in Los Angeles in time to connect with a Mexicana airline flight scheduled to arrive in Matzatlan the next day. Four days later, the envelope was transferred from United to Mexicana and delivered in Mexico to the consignee. The plaintiff sued for damages greater than the liability limits set forth in either the applicable tariff schedules or the Warsaw Convention liability limitations of \$9.07 per pound. He contended that he should be allowed to recover a \$10,000 loss which arose from a devaluation of the Mexican peso which had occurred during the four days in which the shipment of the promissory note had been delayed.

The law is well settled that tariffs filed and approved pursuant to a statute constitute the conditions of the contract of carriage between the parties and give rise in force and effect to the law governing any disputes between the parties.⁵¹ The common law doctrine of material deviation has been invoked upon occasion to abrogate the underlying contract. Regardless of the substantial deviation from the bargained-for consideration, as represented by United's express

This Protocol was approved and signed by the President of the United States, but never ratified by the Senate.

50. 22 Wash. App. 81, 587 P.2d 632 (1978).

51. See text accompanying notes 81-85, *infra*.

assurances, the court found that the Warsaw Convention preempts any local law which would act to overcome the Convention's limitations of liability for loss on air freight claims.

In *Julius Young Jewelry Mfg. Co. v. Delta Air Lines, Inc.*,⁵² a New York appellate court held that the liability limitations of the Warsaw Convention extend to protect an air carrier's agent where the agent is "performing functions the carrier could or would . . . otherwise perform itself."⁵³ In this case, the plaintiff checked jewelry sample cases as baggage in international transportation for a two carrier connecting flight. These bags were lost at the connecting point where a third party service company was employed by one of the carrying airlines to transfer inter-line baggage between the connecting flights. The plaintiff sought to avoid the limitation of liability as set forth in the Warsaw Convention by asserting that these protections given to air carriers do not apply to agents of air carriers.⁵⁴

Buttressed by the twin aims of the Warsaw Convention—limitation of liability and uniformity of law—the court determined that the purpose of the Convention would be undermined by permitting unlimited recovery against a party which is part of the airline enterprise itself.⁵⁵ Extending the principle of the recent case of *Reed v. Wiser*,⁵⁶ the court held that the rationale for applying limitations of liability to employees and servants of air carriers should be applied to the agents of such carriers. Thus, whenever a person or company is performing a service in furtherance of the contract of carriage and in place of the carrier itself, it is protected by the limitations of liability contained in the Warsaw Convention.

In *Olshin v. El Al Israel Airlines*,⁵⁷ the court refused to apply the wilful misconduct exception to the Warsaw Convention's limitation of liability for loss of baggage where the carrier had no knowledge that jewelry was in the baggage, and therefore, could not have intentionally failed to warn of the danger of theft. On a trip from New York to Tel Aviv, Israel, the plaintiff carried jewelry valued at \$100,000 enclosed in a jewelry bag inside her suitcase. The plaintiff did not inform the airlines of the high value contents; however, employees of

52. 67 App. Div.2d 148, 414 N.Y.S.2d 528 (1979).

53. 67 App. Div.2d at 150, 414 N.Y.S.2d at 530 (1979).

54. The difference is not insignificant as reflected here where plaintiff's claim for lost baggage would be limited from \$55,000 to \$1,338. *Id.*

55. *Id.*

56. 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

57. 15 Av. L. REP. 17,463 (E.D.N.Y. 1979).

the Israeli Government saw the jewelry during a pre-flight security inspection. Upon arrival in Tel Aviv, the jewelry bag was missing.

Although the plaintiff admitted that the Warsaw Convention governed liability for the loss, she asserted the "wilful misconduct" exception by claiming that the airlines had knowledge of a history of thefts and failed to warn her thereof. The court, however, utilized a four part burden of proof test which makes recovery more difficult, and in fact, impossible in the case of this plaintiff. The test for wilful misconduct is established upon the showing that "defendant: (1) was aware that she had jewelry in her baggage; (2) knew that there was a danger that the jewelry would be stolen; (3) intentionally failed to warn her of this danger; and (4) knew that the failure to warn plaintiff of the danger would probably result in the loss of the jewelry."⁵⁸ Upon determining the defendant's lack of knowledge concerning the jewelry, the court found that it was therefore impossible for the defendant to have intentionally failed to warn the plaintiff.

In *Fridar v. Pan American World Airways, Inc.*,⁵⁹ the court held that upon the complete absence of a factual basis for a charge of wilful misconduct, the defendant is entitled to summary judgment limiting liability for lost baggage to the amount permitted by the Warsaw Convention and the air carriers' filed tariffs.⁶⁰

In *Swiss Bank Corp. v. First National City Bank*,⁶¹ a United States District Court held that the limitations of liability of the Warsaw Convention could not be circumvented by a state law that provides for contribution among joint tortfeasors. In this case, the plaintiff, Swiss Bank Corp., sent a series of nine gold coin shipments from Europe via Swiss Air Transport Co., Ltd., to First National City Bank (now Citibank) in New York. In each case, the consignee, Citibank, was instructed by Swiss Bank to turn over the coins to the ultimate buyer, Metropolitan Rare Coin Exchange, Inc., against payment. The coins, however, were always transferred from Swiss Air through customs agents to Metropolitan, and payment by Metropolitan to the plaintiff's account at Citibank followed thereafter. All went well until the seventh shipment when Metropolitan, subsequent to delivery of the goods, went out of business and failed to pay for the shipment.

58. *Id.* at 17,464.

59. 15 AV. L. REP. 17,559 (N.Y. Civ. Ct. 1978).

60. Tariffs for international transportation of passengers are filed with the Civil Aeronautics Board pursuant to § 403 of the Federal Aviation Act of 1958, 49 U.S.C. § 1373 (1976 & Supp. 1979).

61. 15 AV. L. REP. 17,631 (S.D.N.Y. 1979).

Suit was then instituted by Swiss Bank against Swiss Air and Citibank. Swiss Air settled with plaintiff Swiss Bank for the full amount of its potential liability as limited by Article 22(2) of the Warsaw Convention.⁶² This amount, \$3,355.44 (including interest), was significantly less than even a small portion of the \$637,000 value of the gold coin shipment.⁶³ In an effort to protect itself, Citibank crossclaimed against Swiss Air, claiming that it had a duty to the consignee (Citibank), as well as the consignor (Swiss Bank). Swiss Air's negligence, breach of a contract of carriage—of which Citibank was a third party beneficiary—and breach of its obligations as bailee, violated duties owed to the consignee as well as the consignor. Swiss Air moved for a summary judgment to dismiss Citibank's cross-complaint. The court held that the cross-complaint did not state a claim for contribution or for liability over the Warsaw Convention's aggregate limit of liability for an air carrier with respect to the lost cargo. Any payment above this amount directly to Swiss Bank or indirectly through reimbursement to Citibank was beyond the carrier's legal liability as established by the Warsaw Convention.

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

The CAB is continuously seeking ways to successfully: (1) withdraw approval, under §412 of the Act, of IATA air traffic conference agreements; and (2) discontinue the antitrust immunity awarded under §414 of the Act.⁶⁴ The CAB has significantly altered the original procedure for disposing of this situation.⁶⁵ Response to the CAB Order to Show Cause⁶⁶ was enormous; forty-eight countries and sixty-five airlines, travel agencies, shipping interests, and other organizations filed comments.⁶⁷ If the original procedure had been executed on schedule, the next procedural step would have been a CAB order finalizing or rejecting its tentative findings in the Order to Show Cause. With the significance and complexity of the issues becoming more apparent, however, the CAB found it necessary to conduct additional proceedings.

62. *Id.* at 15,632.

63. *Id.* at 15,631.

64. Agreements adopted by the International Air Transport Association relating to the Traffic Conference, Docket 32851 (Agreement C.A.B. 1175 as amended). *See generally*, Aviation Report, *supra* note 3, at 1037-41.

65. *See* C.A.B. Order 79-5-113, 44 Fed. Reg. 29,509 (1979).

66. C.A.B. Order 78-6-78, 43 Fed. Reg. 25,839 (1978). *See* Aviation Report, *supra* note 3, at 1037-41.

67. C.A.B. Order 79-5-113, 44 Fed. Reg. 29,509, 29,510 (1979).

Since the IATA members agreed to a reorganization of its structure, and the instituting order had addressed only the old IATA structure, the IATA requested that the new traffic conference amendments be considered together.⁶⁸ In the new structure, IATA members would be required to participate in trade association activities, such as technical and medical activities, legal facilitation, clearing house activities, standardization of passenger baggage and cargo handling, and multilateral interline traffic agreements. Membership on the tariff coordinating committees would be optional. Provision was also made for unilateral fare actions, and in certain cases, suspension of the tariff conferences. Given the importance of the changes and the greater future relevance of the restructured IATA, the CAB permitted consolidation for the consideration of the amendments submitted for permanent approval under §412 of the Act.⁶⁹ Pending the CAB's final determination with regard to the amendments, the IATA also sought interim approval of its new structure and antitrust immunity for the Association. Although the CAB did grant interim approval with regard to antitrust immunity, it did not do so as a preliminary indication of its approval of the revised rate conferences. Although it initially appeared that the CAB was testing the revised structure,⁷⁰ it eventually clarified the primary reason for the grant of interim approval.⁷¹ Since the CAB had continued to grant immunity pending decision on the basic IATA agreement, there was no reason to deviate from that approach while considering the amendments. Although not stated specifically, the CAB must have considered the lessened anti-competitive effects resulting from the implementation of some competitive fare innovations and by allowing the IATA to withdraw from rate conferences. Furthermore, the CAB favored antitrust immunity over the confusion and debilitating effect of an antitrust action during this interim period before its final decision.

As a precursor to a probable end result, the CAB hinted that differences in legal and policy considerations would likely require partial approval and partial disapproval.⁷² For example, the CAB observed that air transportation which does not directly affect the United States may be treated differently than air transportation to

68. 44 Fed. Reg. at 24,509-10. *See also* Aviation Report, 11 LAW. AM. 186, 186-87 (1979).

69. 44 Fed. Reg. at 24,510.

70. *Id.* at 25,510-11.

71. C.A.B. Order 79-6-65, 44 Fed. Reg. 33,055 (1979).

72. C.A.B. Order 79-5-113, 44 Fed. Reg. at 29,511.

and from the United States, and that “trade association” activities may be treated differently than rate-setting conferences. Without committing itself to a course of action, the CAB suggested that the parties might wish to address the prospect that it would:

- (a) approve the entire new structure of IATA as it affects air transportation not involving the United States directly;
- (b) approve the “trade association” conferences as they affect the United States; and
- (c) disapprove the tariff conferences to the extent they affect rates to or from the United States.⁷³

The CAB recognized and reaffirmed the primary focus of the initial Show Cause Order and identified over one hundred rate and rate-related IATA resolutions which will be reviewed for possible disapproval.⁷⁴

The CAB narrowed the scope of its proceedings by making a summary determination regarding 112 IATA resolutions which “are not anti-competitive in nature and may result in valuable efficiencies.”⁷⁵ The CAB found that these resolutions are in the nature of facilitation agreements, and under the new IATA structure, would be the responsibility of the “trade association” conferences. Such resolutions “are designed to standardize and thus simplify a variety of interactions between carriers so that the complex network of international aviation can function smoothly and passengers can move easily between the various components of the system.”⁷⁶ Thus, resolutions which deal with the relationship between carriers, or between carriers and passengers—such as those relating to technical specifications on documents and standard definitions of communications—generally do not have competitive implications. For the 112 resolutions that are in this category, the CAB withdrew its tentative finding of disapproval and terminated the investigation announced in the initial Order to Show Cause.

Not all trade association resolutions were found to be free of possible anti-competitive effects. However, the CAB decided to analyze and rule on these resolutions in a separate investigation to be instituted on another docket.⁷⁷ Also, the CAB severed all resolutions

73. *Id.*

74. 44 Fed. Reg. at 29,511, 29,513 (App. C).

75. 44 Fed. Reg. at 29,511, 29,513 (App. B).

76. 44 Fed. Reg. at 29,511.

77. *Id.*

relating to the IATA passenger agency program which provides for multilateral appointment of international ticket agents. Since the issues and the language are similar to the passenger agency program in effect within the United States through the Air Traffic Conference, the CAB found it more efficient to treat the international and the domestic area in a separate proceeding on another docket. Similar concerns in the cargo agency program prompted the CAB to sever cargo agency resolutions and consolidate them for consideration with the passenger agency investigation.⁷⁸

The show cause procedure, by its very nature, seeks to avoid the ordinary procedural steps of exhibits, briefs, and hearings. Despite its original choice of procedural devices and the receipt of voluminous comments, the CAB, in its quest for further analysis of the facts and policy issues, has decided to conduct a "legislative" hearing.⁷⁹ Uncommon to contemporary CAB practice, this hearing will entail testimony, briefs, and oral argument before the Board members. A majority of the Board chose these extended proceedings because of the need for further examination of the positions of those responding to the Order to Show Cause, not because of a newfound legal mandate or the existence of a material and determinative issue of fact yet unresolved.

In the comments responding to the Order to Show Cause, none of the parties asserted that this proceeding is an "on-the-record adjudication" invoking provisions of the Administrative Procedure Act regarding quasi-judicial hearings. Furthermore, no party insisted that hearings to determine approval or disapproval are mandatory or need be adjudicatory in nature. Moreover, the CAB determined that §1006 of the Act, which provides that findings of fact are conclusive on judicial review if supported by substantial evidence, does not require an evidentiary hearing. The CAB distinguished between adjudicative facts, such as those needed to resolve specific controversies between specific parties, and legislative facts, such as perceptions of policy, present and future economics, and relationships in the international arena.⁸⁰

The CAB found that having a hearing before an administrative law judge would unnecessarily delay the proceedings and dilute the

78. *Id.*

79. 44 Fed. Reg. at 29,511-12.

80. 44 Fed. Reg. at 29,512.

impact of face-to-face confrontation between the decisionmakers and the experts. Thus, the majority of the Board decided to forego the benefit of an administrative law judge's consideration and decision. The majority also decided against adversarial cross-examination in favor of free exploration of alternative policy options.⁸¹

After this substantial narrowing of substantive areas and the expansion of procedural steps, the CAB focused upon the two remaining primary issues: (1) whether the IATA structure—old or newly amended—should be approved; and (2) whether the approval of rate and rate-related provisions should be continued.⁸² The CAB placed special emphasis on the generation of detailed economic analysis of the relative costs and benefits of continued approval, total disapproval, or partial disapproval of the IATA. The CAB solicited the same intensive analysis regarding the differing treatment in various regions of the world among participants in air transportation.

As a final and comprehensive briefing of the CAB's expectations concerning the legislative proceedings, the CAB listed suggested topics for comment. The breadth of these topics demonstrate that, despite the CAB's considerable paring of the issues, this proceeding promises to be one of the largest, most complex, and theoretical in aviation history. The ten suggested topics in summarized form are as follows:

- (1) Is multilateral rule-setting necessary, and what are the relative costs and benefits?
- (2) What portion of international travel is to and from the United States by citizens of other countries, and what portion thereof is by United States citizens?
- (3) Without a multilateral rate agreement, are carriers' rates of return, prices, and traffic growth rates in markets higher, lower, or the same as in comparable markets where a multilateral rate agreement is in force?
- (4) Will CAB disapproval of traffic conferences result in lower, economically viable fares which produce increased international travel and benefits to the affected countries?
- (5) Will the impact of disapproval or withdrawal of immunity from traffic conferences be more adverse to certain countries, and if so, is such treatment justified and feasible?

81. *Id.*

82. *Id.*

- (6) What is the extent of a subsidy to internal and external travel by each country's nationals, and what is the proper impact of this factor on the CAB's approval of traffic conferences?
- (7) Has the IATA's "unanimity rule" led to fixed rates at the level of the least efficient carrier, and can a cross-subsidization effect be avoided?
- (8) What would be the effect if all United States carriers opted-out of the traffic conferences affecting the United States?
- (9) In lieu of traffic conferences, could "mutual disapproval" rate articles, "country of origin" rate articles, or bilateral negotiations with "Bermuda I" rate articles function as a substitute?
- (10) Is a method of staged transition toward elimination of traffic conferences feasible and beneficial?⁸³

CIVIL AERONAUTICS BOARD

Legal Effect of Tariffs

Section 403(a) of the Act requires that each United States and foreign air carrier file tariffs with the CAB showing rates, fares, charges, and rules for all air transportation provided by itself, alone, or in conjunction with another air carrier.⁸⁴ Section 403(b) of the Act prohibits air carriers from charging or receiving any amount different than that stated in its tariffs, or received from directly or indirectly refunding or remitting all or any portion of the charges for services rendered.⁸⁵ Over the years, case law has established that "[t]ariffs filed with the Civil Aeronautics Board . . . are conclusive and exclusive, and that the rights and liabilities between airlines and their passengers are governed thereby."⁸⁶ In fact, a lawfully filed tariff obtains a character beyond a mere contractual provision; it rises to the force and effect of a statute if filed under statutory compulsion.⁸⁷

83. 44 Fed. Reg. at 29,512-14.

84. 49 U.S.C. § 1373(a) (1976).

85. 49 U.S.C. § 1373(b) (1976 & Supp. 1979).

86. *Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969). *Accord*, *Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961); *Lichten v. Eastern Air Lines, Inc.*, 189 F.2d 939 (2d Cir. 1951).

87. Circuit Judge Brown of the United States Court of Appeals, Fifth Circuit stated:

Filed as it was under compulsion of § 403(a) of the Civil Aeronautics Act of 1938 [predecessor of the Federal Aviation Act of 1958], the tariff carried the statutory mandate of § 403(b) that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected. In the implementation of this stringent legislative policy, the courts have

Furthermore, case law has established that a customer has constructive notice of the terms and conditions of the contract through tariffs lawfully on file pursuant to a statute.⁸⁸

Through regulatory action subsequent to the enactment of the Airline Deregulation Act of 1978, however, the legal effect of tariffs has been altered. The liberalized powers of the Airline Deregulation Act of 1978⁸⁹ enabled the CAB to exempt the airlines from filing tariffs for air transportation of cargo solely within the United States and its territories.⁹⁰ After an unsuccessful attempt to obtain reinstatement by the courts, the remaining cargo tariffs were cancelled on March 14, 1979. In accord with the competitive aims of the Airline Deregulation Act of 1978,⁹¹ and the deregulation of all-cargo service in 1977,⁹² the CAB seeks to foster free and immediate competitive pricing decisions in response to market forces, avoiding the artificial uniformity of posted tariff prices.⁹³ However, by

been equally emphatic that the basis for the charge or credit must be found in the tariff. If it is not in the tariff, it is not allowable. It is not a mere matter of contract. For "a rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law." *Louisville & N. R. Co. v. Dickerson*, 6 Cir. 1911, 191 F. 705, 709. "Such tariffs, at least those which are factors in determining the carrier's charges, have the force and effect of statutes." *American Ry. Express Co. v. American Trust Co.*, 7 Cir., 1931, 47 F.2d 16, 18. The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises.

United States v. Associated Air Transport, Inc., 275 F.2d 827, 832-33 (5th Cir. 1960) (footnotes omitted). *Accord*, *Crosby & Co., Inc. v. Compagnie Nationale Air France*, 76 Misc. 2d 990 (N.Y. Sup. Ct. 1973); *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972); *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966); *Slick Airways, Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961).

88. *E.g.*, *Crosby & Co., Inc. v. Compagnie Nationale Air France*, 76 Misc. 2d 990, 998 (N.Y. Sup. Ct. 1973); *Sechler v. Trans World Airlines, Inc.*, 12 Av. L. REP. 18,185, 18,186 (Ct. App. Cal.), *cert. denied*, 414 U.S. 1113 (1973); *Mao v. Eastern Air Lines, Inc.*, 310 F. Supp. 844, 846 (S.D.N.Y. 1970); *Tishman & Lipp, Inc. v. Delta Air Lines*, 275 F. Supp. 471, 475 (S.D.N.Y. 1967), *aff'd*, 413 F.2d 1401 (2d Cir. 1969); *Vogelsang v. Delta Air Lines, Inc.*, 302 F.2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962).

89. ADA § 31, *amending* 49 U.S.C. § 1386(b)(1) (1976). Prior to the ADA, the CAB had to find an "undue burden" on a carrier due to the "limited extent" of its operations or "unusual circumstances" affecting a carrier's operations. After the ADA, the CAB need only find that the proposed exemption is consistent with the public interest.

90. § 291.31(a) of the Board's Economic Regulations, promulgated in Regulation ER-1080, 43 Fed. Reg. 53,628 (1978), *to be codified in* 49 C.F.R. § 291.31.

91. ADA § 3, *supra* note 1, *amending* 49 U.S.C. § 1302 (1976).

92. Pub. L. No. 95-163, 91 Stat. 1281 (1977).

93. 43 Fed. Reg. 58,210 (1978).

exempting carriers from the tariff filing requirement, the CAB altered the legal effect of the carriers' legal relationship with the shippers. Indeed, the CAB openly recognized this difference⁹⁴ when it granted a similar exemption from tariff filing requirements to indirect air carriers for both domestic and international air transportation of cargo.⁹⁵

As a result of the exemptions granted by the CAB, the legal significance of the carriers' contracts for domestic transportation of property does not emanate from the tariffs since they no longer must be filed pursuant to statute. The tariffs are merely terms and conditions of contract subject to the common law of common carriage and the general common law of contracts of the various states. The tariff provisions are thus no longer the equivalent of law. Furthermore, it is unlikely that the shipper can be deemed to have constructive notice of the provisions of a contract which are neither noted nor described on the airway bill itself.

Shortly after the enactment of the Airline Deregulation Act of 1978, the CAB exempted both United States and foreign air carriers from § 403(b) of the Act:

to the extent necessary to enable each carrier to compensate or make monetary adjustments to any passenger who registers a complaint or claim for an expense incurred or for a loss or any other damage sustained as a result of the carrier's or its agent's negligence, misrepresentation, or other act or omission which in the carrier's judgment justifies such payment of compensation or adjustment⁹⁶

According to the CAB, this exemption would remove any statutory prohibition of rebating as long as carriers use them in an attempt to make a monetary settlement of legitimate disputes. The CAB apparently did not intend for carriers to ignore or deviate from their tariffs when the dispute was clearly governed by the tariffs. However, monetary compensation might be used in dealing with problems

94. Regulation ER-1094, 44 Fed. Reg. 6634, 6635-37 (1979).

95. § 296.10(b) of the Board's Regulations promulgated in Regulation ER-1094, 44 Fed. Reg. 6634 (1979), to be codified in 49 C.F.R. § 296.10(b). Indirect air carriers are U.S. citizens who indirectly engage in air transportation of cargo through direct air carriers—airlines engaged in air transportation pursuant to a certificate, regulation, order or permit issued by the CAB. See 49 U.S.C. § 1301(3) (1976); 44 Fed. Reg. 6640 (1979), to be codified in 49 C.F.R. § 296.3(d). The most common indirect air carriers are air freight forwarders and cooperative shippers associations. See 44 Fed. Reg. 6640 (1979), to be codified in 49 C.F.R. § 296.3(a),(b).

96. C.A.B. Order 78-12-49, 43 Fed. Reg. 58,210, 58,211 (1978).

which are "not dealt with or anticipated in the tariffs. . . ." ⁹⁷ Later, the CAB amended the exemption to make it clear that monetary adjustments could be made to any "passenger or shipper who registers a complaint or claim. . . ." ⁹⁸

Although the CAB intends to attack any general use of rebates to routinely discount regular fares or rates, ⁹⁹ it has exempted carriers from the § 403(b) prohibitions on rebating in cases of legitimate disputes. Since most of the cases establishing the legal effect of tariffs depended upon the statutory mandate of § 403(b), which makes tariffs the exclusive terms and conditions of contract, ¹⁰⁰ the legal significance of all passenger tariffs and the remaining international cargo tariffs ¹⁰¹ may be in jeopardy.

Investigation of Baggage Claims

On April 27, 1979, the Civil Aeronautics Board instituted an investigation into airlines practices in handling international baggage claims. ¹⁰² This informal, non-public investigation was prompted by numerous consumer complaints regarding the practices of United States and foreign airlines in settling claims for lost, damaged, or pilfered checked baggage in international air transportation, as defined by the Warsaw Convention. Consumers have complained of settlements in which they collected considerably less than the actual value of their loss, for the complete denial of claims for damage to fragile or perishable items, and for loss of jewelry and other high-value items.

The Warsaw Convention is applicable to airlines serving the United States via the provisions regarding certificates of public convenience and necessity or foreign air carrier permits. The Convention does allow limitation of liability for claims related to checked baggage, but only if the carrier enters the number of pieces and actual weight

97. 43 Fed. Reg. at 58,211.

98. C.A.B. Order 79-2-23, 44 Fed. Reg. 2186 (1979).

99. Section 404(a) requires that carriers "establish, observe, and enforce just and reasonable . . . rates, fares, and charges, and . . . classifications, rules, regulations, and practices relating to such air transportation . . ." 49 U.S.C. §§ 1374(a)(1),(2) (1976). Section 411 prohibits "unfair or deceptive practices or unfair methods of competition." 49 U.S.C. § 1381 (1976).

100. See notes 3-5, *supra*.

101. Since carriers have been exempted from the requirement to file tariffs for air transportation of property within the United States and its territories, the exemption issued in C.A.B. Orders 79-12-49 and 79-2-23 only impact tariffs for cargo in international air transportation. See text accompanying notes 6-11 *supra*.

102. C.A.B. Order 79-4-194, 44 Fed. Reg. 26,136 (1979).

of the checked baggage on the passenger's baggage check.¹⁰³ Otherwise, any attempt at limitation of liability by tariff or contractual provision has no legal effect. In those cases where the carriers have limited or denied liability and no recordation of pieces or weight was made, the Board contemplates that the carrier has engaged in an unfair and deceptive act in violation of § 411 of the Federal Aviation Act of 1958¹⁰⁴ and the terms and conditions of their certificate or permit. Accordingly, the CAB instituted an investigation to determine if a formal enforcement action or other action should be taken.

Suspensions and Terminations of Service

On April 2, 1979, the Civil Aeronautics Board issued an Interim Rule¹⁰⁵ formally implementing and expanding upon the new suspension, termination, and reduction provision of the Airline Deregulation Act of 1978. Section 401(j)(1) of the Federal Aviation Act¹⁰⁶ now provides for ninety days advance notice of a carrier's intent to suspend all service at a point on its certificate or intent to reduce service below the level that the CAB has determined to be Essential Air Transportation for such point. Section 401(j)(2) of the Act provides for sixty days notice of a carrier's suspension of the last certificated nonstop or single-plane service between a pair of points.¹⁰⁷ Regulation PR-200 resolved a number of questions about the application of these § 401 provisions, some of which directly affected service by United States airlines to foreign points. However, Regulation PR-200 was not the first occasion that the CAB addressed and ruled upon the impact of § 104 on international air transportation.

On December 6, 1978, little more than a month after the enactment of the Airline Deregulation Act of 1978, Pan American World Airways, Inc. (Pan Am) made an application for authority to temporarily suspend service at Glasgow, England.¹⁰⁸ Pan Am was providing only all-cargo flights to Glasgow on an eastbound route between the United States and Europe. Pan Am made its application in the manner traditionally appropriate for applications pursuant to § 401(j) of the Federal Aviation Act and Part 205 of the Board's Economic

103. Warsaw Convention, *supra* note 44, at art. 4.

104. 49 U.S.C. § 1381 (1976).

105. Regulation PR-200, 44 Fed. Reg. 20,635 (1979).

106. 49 U.S.C. § 1371(j)(1) (Supp. 1979).

107. 49 U.S.C. § 1371(j)(2) (Supp. 1979).

108. Application of Pan American World Airways, Inc. for Temporary Suspension Authority at Glasgow, Scotland, Docket 34184 (Dec. 6, 1978).

Regulations in effect prior to the enactment of the Deregulation Act. Pan Am requested suspension authority effective February 1, 1979, for an indefinite period.

On December 15, 1978, Pan Am filed a motion to dismiss its application and filed a Petition For A Declaratory Order Or Other Relief. The motion for dismissal was based upon the ground that Pan Am already held authority to suspend service from a prior Board Order; thus, the Application for Temporary Suspension Authority was moot.¹⁰⁹ The petition for declaratory or other relief was prompted by an informal communication from the CAB's staff concerning the CAB's determination that the ninety day notice provision of § 401(j)(1) of the Act does apply to international points and that, therefore, Pan Am's application, dated December 6, 1978, for intended suspension on February 1, 1979, did not give the requisite ninety days notice.¹¹⁰ The petition sought an interpretation of § 401(j)(1) which would make the provision inapplicable to international points, or if it did apply, would grant an exemption from the requirement to give a full ninety days notice.

Since the language of § 401(j) is not explicit and the legislative history does not provide adequate discussion, Pan Am resorted to an elaborate analysis of the terminology of the Federal Aviation Act, as newly amended. Subsection (A) of § 401(j)(1) addresses suspension or termination of service to "a point," while subsection (B) addresses reduction of service below the level which the CAB has determined to be Essential Air Transportation to "such point." Section 419 of the Act, which implemented the Deregulation Act's provisions regarding Essential Air Transportation, is limited solely to points in the United States and its territories.¹¹¹ Pan Am reasoned that since the term "point" for purposes of reductions under § 401(j)(1)(B) must be a United States point, and since the phrase "such point" as used in that subsection referred back to the word "point" in § 401(j)(1)(A), then the meaning of "point" in both subsections (A) and (B) must be limited to United States points.

As further proof, Pan Am noted that § 401(j)(1) requires service of the ninety day notice on the CAB, any community affected by the

109. See Motion of Pan American World Airways, Inc. to Dismiss Application, Docket 34184 (Dec. 15, 1978).

110. See Petition of Pan American World Airways, Inc. for Declaratory Order or Other Relief, Docket 34184 (Dec. 15, 1978).

111. 49 U.S.C. § 1389 (1979).

change in service, and "*the State agency of the State in which such community is located*" (emphasis added).¹¹² Since § 401(j)(1) does not provide for service of a foreign country and since the notice provisions of § 401(j)(1) are virtually identical to those in §§ 419(a)(3)(A) and (B), Pan Am found further support for the interpretation that the notice provisions of § 401(j)(1) do not apply to international points.

Before the Deregulation Act, § 401(j)(1) provided that "[t]he Board may, by regulation or otherwise, authorize such temporary suspension of service as may be in the public interest."¹¹³ This provision was retained in § 401(j)(1) as enacted by the Deregulation Act. However, the provision requiring application to the Board before a carrier could abandon service was replaced by the ninety day notice provision. Given the limitation of the notice requirement to United States points, Pan Am argued that the temporary suspension power of the CAB was still applicable to international points.

One day prior to Pan Am's intended suspension at Glasgow, the CAB issued an order which took no action to prohibit the suspension. Without deciding the issue of whether § 401(j)(1) applies to international points, the CAB exempted Pan Am from the ninety day notice provision, to the extent necessary, to permit suspension of service on February 1, 1979.¹¹⁴ The CAB also dismissed the petition for a declaratory order or other relief, deferring ultimate interpretation of the suspension provisions of the new act for the up-coming rulemaking proceeding. The CAB stated that, pending a final decision in the rulemaking, it expected carriers to file notices as if § 401 did apply to foreign operations. Such notice would permit the CAB to consider whether action should be taken to replace the suspended foreign air transportation service. This replacement decision and action, as the CAB noted, would be separate and distinct from the Board's powers under the § 419 Essential Air Transportation provisions, which clearly do not apply to foreign points or to all-cargo operations.

Two months later, the CAB adopted Regulation PR-200, an Interim Rule¹¹⁵ which will remain effective until any final adjustments are made by the CAB, after the submission of comments by interested parties. The CAB reiterated the issues and arguments raised in Pan Am's Glasgow suspension case. Adopting Pan Am's method of

112. 49 U.S.C. § 1371(j)(1) (Supp. 1979).

113. 49 U.S.C. §1371(j) (1976) (amended 1978).

114. C.A.B. Order 79-1-188, Docket 34184 (Jan. 31, 1979).

115. 44 Fed. Reg. 20,635 (1979).

analysis by examining § 419, which clearly applies only to the United States points, and studying the nuances of the wording in § 401(j)(1)(B) service reductions and § 401(j)(1)(A) suspensions and terminations, the CAB concluded that the ninety day notice provision and the temporary suspension provision of § 401(j)(1) do not apply to the discontinuation of service to foreign points.¹¹⁶

Although § 401(j)(2) requires a sixty day notice of a carrier's suspension of termination of the last certificated nonstop or single-plane air transportation between two "points," the CAB concluded that this provision does apply to foreign points,¹¹⁷ and that § 401(j)(2) does not contain an explicit reference to the Essential Air Transportation provisions. Furthermore, no provision is made for service on a State or its officers. To satisfy greater interests in foreign aviation policy and the consumer, the CAB, pursuant to its general rulemaking powers, overstepped the Act's requirements and required notice of *all*, not just the *last*, certificated single-plane service between a United States point and a foreign point. For some unexplained reason, however, the CAB did not expand the notice requirement for nonstop service—a much more significant and beneficial service than single-plane service.

Using the same rationale as it used to limit § 401(j)(1) to United States points, the CAB concluded that § 401(j)(1) does not apply to all-cargo service.¹¹⁸ Since the § 419 Essential Air Transportation provisions apply only to passenger service, § 401(j)(1)(B), as well as § 401(j)(1)(A), could not apply to all-cargo service. Although § 401(j)(2) does not have the same relationship to § 419, the CAB concluded that the sixty day notice provision of § 401(j)(2) does not apply to all-cargo operations because nonstop and single-plane service are significant only to consumers of passenger service. Under its general rulemaking powers, however, the CAB required a sixty day notice of suspension of any all-cargo service to a foreign point. Such notice would give the CAB time to consider applications by other carriers in these markets where entry is more restricted than in domestic United States markets. Also, this would give advance notice to United States communities so that they may take appropriate action in contemplation of the loss of service.

The CAB was sensitive to the differing nature of air transportation in overseas and foreign markets as opposed to that within the

116. *Id.* at 20,637.

117. *Id.*

118. *Id.*

forty-eight contiguous States. Blanket exemptions from the requirement for the sixty day notice of suspension of nonstop or single-plane service wholly within the continental United States were granted in three instances.¹¹⁹ No such notice is required where the service to be suspended is provided in one direction only, is operated less than four days per week, or makes three or more intermediate stops.¹²⁰ Recognizing that such types of service are more often significant in air transportation between the United States mainland and its territories or foreign points, the CAB did not extend the exemptions to such service.

Since the CAB found that the notice provisions of the Deregulation Act have superseded the advance application and prior approval process, it revoked Part 205 of the CAB's Economic Regulations governing temporary suspensions and postponements of inauguration of service.¹²¹ The CAB retained provisions granting themselves temporary suspension powers which may be used in situations such as the interruptions of service beyond a carrier's control.

119. *Id.* at 20,638-40.

120. *Id.* at 20,644, to be codified in 49 C.F.R. § 323.8.

121. Regulation ER-1112, Amendment 6, 44 Fed. Reg. 20,635 (1979).