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Aviation Report

CHARLES R. MORGENSTEIN *

INTERNATIONAL AIR TRANSPORT ASSOCIATION

On November 15, 1978, the International Air Transport Association (IATA) restructured its entire system.¹ The new two-tier system makes participation in tariff coordination activities optional.² At the same time, the "trade association" activities will remain available to member carriers.³ This "deregulation" comes on the heels of a Civil Aeronautics Board (CAB) order to show cause why the CAB should not withdraw its approval of the agreements made at IATA traffic conferences.⁴ While IATA officials insist that "[t]he changes in IATA, initiated a year ago, are not the result of six months of prodding by one regulatory agency . . .,"⁵ it is clear that the show cause order is viewed with concern, even alarm, by these same officials. The Director General of IATA, Knut Hammarskjold, said recently, "I see the CAB Show Cause Order as more than a challenge to the basic trade association cooperation; I see it as a very real threat to the multilateral system as a whole."⁶

Regardless of the reasons behind this restructuring, IATA will be a very different organization. The "trade association," IATA's so-called "invisible part,"⁷ will carry on its functions as

a common voice, a common ear for communicating with governments and international bodies, [a] means for technology and information transfer, [and a] means for achieving the economies of scale; charge[d] . . . to cut down on fastest growing cost item[s], security missions, technical missions for development of long-term airport and other policies, [and] facilitation missions.⁸

By making the participation in tariff coordination activities optional, the real strength behind IATA has been significantly diminished.

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1. 11 IATA NEWS, July 4, 1978.

2. *Id.*

3. 14 IATA REV. 1, 4 (Dec.-Jan., 1978-1979).

4. C.A.B. Order 78-6-78, 43 Fed. Reg. 25,839 (1978); *See* Aviation Report, 10 LAW. AM. 1030 (1978).

5. 14 IATA REV., *supra* note 3, at 1.

6. *Id.* at 2.

7. *Id.* at 17.

8. *Id.* at 1, 4.

The imposition of certain objectionable tariffs for the common good of all carriers could prove impossible now that IATA's "teeth" have been removed.

Certain IATA tariffs have, like the traffic conferences,⁹ become the targets of CAB show cause orders.¹⁰ These tariffs, which would allow airlines to deny carriage to persons based on their age, conduct, mental or physical condition, or status (i.e., pregnancy), are alleged to be discriminatory because these classifications are unnecessarily broad. The Federal Register account of this order to show cause reveals that the CAB believes air carriers should have the right to deny carriage to those persons to whom air travel poses a significant risk, but that pregnancy or age should not constitute good cause for the denial of air transportation if a person is otherwise in good health.

In two recent United States cases, *Viking Travel Inc. v. Air France*,¹¹ and *Caceres Agency, Inc. v. Lufthansa German Airlines*,¹² travel agents alleged that certain travel agents and airlines, licensed by IATA, had violated sections 403 and 404 of the Federal Aviation Act of 1958¹³ by receiving illegal commissions from airlines on which they booked passengers and by charging fares lower than those permitted by tariff. In both of these cases, the courts held that sections 403 and 404 of the Act do not provide for a private right of action for damages resulting from tariff violations.

CIVIL AERONAUTICS BOARD

After nearly five years of investigation and proceedings, the CAB has issued its opinion and order in the *Transatlantic, Transpacific, and Latin American Service Mail Rates Investigation*.¹⁴ This opinion establishes a new formula for compensating air carriers for transporting United States Postal Service and Military Mails. Rates computed using the new formula will replace the temporary rates which have been in effect since 1974.¹⁵ The following provisions represent the more significant elements of the new rate formula:

9. Airline Tariff Publishing Co., Agent, Tariff C.A.B. No. 55, Rules 15(A)(2), 16(F), 16(H); Air Tariffs Corporation, Agent, Tariff C.A.B. No. 55, Rules 15(A)(1)(c), 15(A)(3)(a), 15(E)(5), 15(E)(6). Note 10 *infra*, at 3,533 n.1.

10. C.A.B. Order 79-1-70, 44 Fed. Reg. 3,533 (1979).

11. 15 AV. L. REP. (CCH) 17,224 (E.D.N.Y. 1978).

12. 15 AV. L. REP. (CCH) 17,238 (S.D.N.Y. 1978).

13. 49 U.S.C. § 1373(b), 1374(b) (1970).

14. C.A.B. Order 78-12-159 (1978).

15. These rates were fixed in C.A.B. Order 75-2-3 for Space Available-Military Mail (SAM), and C.A.B. Order 75-2-87 for Priority Mail and Military Ordinary Mail (MOM). *Id.* at 1 n.2.

(4) [S]pace rather than weight is the proper basis for allocating capacity costs to international mail;

(5) cargo compartment capacity costs on combination aircraft should be assigned by applying a load factor adjustment of 53.1[%] to mail and freight, with the remaining belly capacity costs assigned to passenger service; . . .

(7) the priority weighting for SAM ["space available—military" mail] is .5; . . .

(10) the fair and reasonable rate of return for international mail service is 12 percent; . . .

(14) final rates for future periods will be established prospectively at six-month intervals under show cause procedures, using the most recent Form 41 data modified for anticipated cost increases through the midpoint of the next prospective period.¹⁶

In the *Improved Authority to Wichita Case*,¹⁷ the CAB granted its first multiple route awards since the passage of the Airline Deregulation Act of 1978 (ADA).¹⁸ The CAB pointed out that even before the ADA, CAB policies regarding increased competition were becoming "more liberal."¹⁹ However, in the wake of the ADA, the CAB has opened the doors to vastly increased service to desirable locations. The CAB has asserted that the ADA has solidified the power of the CAB, so that its "authority to adopt a general multiple entry policy" is no longer in question."²⁰ Accordingly, after deciding that "awards need not generally be limited to the number [of carriers] that a market can sustain . . .,"²¹ the CAB awarded the Las Vegas-Dallas/Ft. Worth route to American Airlines, Eastern Airlines, Hughes Airwest, and Western Airlines. Braniff, Texas International Airlines, and Delta Airlines were already servicing this route.²² By so inundating the market with large carriers, the CAB has created a situation in which none of the carriers have a realistic opportunity to achieve their desired load factors. The CAB expressly recognized this result saying:

We are not suggesting, of course, that awards to all the applicants will bring [to] the Las Vegas-Dallas/Ft. Worth market the aggre-

16. C.A.B. Order 78-12-159, *supra* note 14, at 4-5.

17. C.A.B. Order 78-12-106, 43 Fed. Reg. 59,858 (1978).

18. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

19. C.A.B. Order 78-12-106, *supra* note 17, at 59,858.

20. *Id.* at 59,862.

21. *Id.*

22. *Id.* Braniff and Texas International Airlines had been operating on this route since July 21, 1978, under temporary authority. Delta Airlines was the incumbent carrier.

gate of service and other benefits that each applicant has proposed on the assumption that it alone would be selected. That is not the point. There is simply no reason on the facts of this case for the Board to intrude on a decisionmaking process that is better left to the free play of competitive forces. . . .²³

Even though the CAB indicated that it was “not prepared to conclude that a general policy of multiple discretionary entry . . . should be applied universally, [t]here might still be circumstances in which the public interest may be better served by giving only one or less than all qualified applicants immediate authority.”²⁴

The CAB has been unable to find any such circumstances in subsequent cases. In *Northeast Points—Puerto Rico/Virgin Islands Service Investigation*,²⁵ a ruling handed down the same day as *Wichita*, the CAB granted the named route to nine carriers, citing the ADA as authority for multiple permissive entry. Less than one month later, in the *Transcontinental Low-Fare Route Proceeding*,²⁶ four airlines were given authority to provide unrestricted nonstop service from the New York/Washington/Baltimore area to the California coast,²⁷ bringing to six the total number of airlines serving these routes.²⁸ In the same proceeding, the CAB denied the applications of four nonoperating carriers because of the carriers’ inability to demonstrate their fitness.²⁹

The relative ease with which these carriers have been granted route awards is the result of a new test promulgated by the CAB. In the past, the carrier applying for a route award was required to show that such an award was consistent with the public convenience and necessity.³⁰ The new test places the burden on carriers opposing the award of a route to another carrier “to show that the transportation is

23. *Id.* at 59,862-63.

24. *Id.* at 59,860-61.

25. C.A.B. Order 78-12-105 (1978).

26. C.A.B. Order 79-1-75 (1979).

27. American Airlines, Trans World Airlines, and United Airlines were also given authority to operate single-plane service between Ontario, California, and the Northeastern Points. *Id.* at 1.

28. These are American Airlines, United Airlines, Trans World Airlines, Pan American World Airways, Capitol International Airways, and World Airways. *Id.* at 2.

29. Under the ADA, applicants must still demonstrate their “fit, willing, and able” status. Airline Deregulation Act of 1978, *supra* note 18, § 14, at 1719 (amending Federal Aviation Act of 1958, 49 U.S.C. § 1371(d) (1970)).

30. 49 U.S.C. § 1371(d)(1) (1970), *as amended by* Airline Deregulation Act of 1978, *supra* note 18, §§ 8, 14 at 1712, 1719.

not consistent with the public convenience and necessity and the CAB, in turn, can deny the authority only if it finds, by a preponderance of the evidence, that granting it is not consistent with the public convenience and necessity."³¹ In view of the CAB response to the ADA, it seems likely that exceptionally few opposing carriers will be able to meet this burden.

As a defendant in a judicial proceeding, the CAB successfully preserved the integrity of its administrative rulings regarding overseas and foreign air carriage. In *Braniff Airways, Inc. v. Civil Aeronautics Board*,³² former President Gerald Ford inserted a clause in his letter of approval of a CAB foreign route award which allowed for judicial review of his approval. The court upheld the *Waterman* doctrine,³³ finding that the President of the United States may not provide for judicial review of his approval of a foreign route award. Quoting a prior dissenting opinion by Justice Marshall, the court said, "the task of defining the role of the Judiciary is for this Court, and not for the Executive Branch."³⁴

WARSAW CONVENTION

Some of the most stable elements of the Warsaw Convention³⁵ have recently come under judicial scrutiny with surprising results. The Supreme Court of the United States denied *certiorari* in *Benjamins v. British European Airways*,³⁶ a case which overturned over twenty years of precedent by holding that Article 17 creates its own independent cause of action.³⁷ Dealing with a closely related topic, two courts have reached conflicting results regarding the applicability of the Warsaw Convention. In *Finkelstein v. Trans World Airlines, Inc.*,³⁸ a New York court, holding that the Warsaw Convention provided the sole remedy for damages arising from a hijacking, dismissed

31. C.A.B. Order 79-1-75, *supra* note 26, at 9.

32. 581 F.2d 846 (D.C. Cir. 1978).

33. The doctrine is named for the case of *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), in which it was determined that the presidential approval of a CAB foreign or overseas route award is not judicially reviewable.

34. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 725 (1976) (Marshall, J., dissenting), cited in *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, *supra* note 32, at 851.

35. Convention for Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3,000, T.S. No. 876. The United States became a signatory to the Convention as of Oct. 29, 1934.

36. 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 99 S.Ct. 75 (1978).

37. See *Aviation Report*, 10 LAW. AM. 1030 (1978).

38. 15 Av. L. REP. (CCH) 17,379 (N.Y. Sup. Ct. 1978).

the common law negligence action which had been simultaneously filed. However, in *In re Air Crash in Bali, Indonesia*,³⁹ a California federal district court found that because California's wrongful death statute provided a separate cause of action to the heirs and survivors of victims *independent* of any action which might have been brought by the deceased, the Warsaw Convention *did not* provide the exclusive remedy for the claimants.

In the same case, the court took the opportunity to examine the desirability of the limitation of liability imposed by the Warsaw Convention and its progeny. After delineating the history of the Warsaw Convention, the airline industry, and the ADA, the court stated in dicta that "[t]here is now a strong factual basis for the argument that a legal limitation on the amount a plaintiff may recover in the event of an air tragedy is unwarranted."⁴⁰ Should this conclusion gain support in other jurisdictions, it could signal an end to the usefulness of the Warsaw Convention. When coupled with the effect of the ADA, the demise of the Warsaw Convention would even more conclusively end the era of aviation as a "protected industry."

Currently, however, the Warsaw Convention is still legally viable. The Austrian Supreme Court recently clarified the term "compensation or hire" within the meaning of the convention. In *Fischer v. Koller*,⁴¹ the pilot of a light plane agreed to accept payment from two passengers (but not from a third) after the costs of a flight from Austria to Sardinia had been computed. The Austrian Supreme Court found this agreement to be one for international transportation for compensation or hire within the meaning of the Warsaw Convention. However, the limitation of liability was inapplicable because no ticket had been issued.

Other cases have further defined the elements of pleading and proof necessary to recover damages under the Warsaw Convention and the Montreal Agreement.⁴² In *Morris v. The Boeing Co.*,⁴³ the plaintiffs brought an action for damages for ear injuries allegedly caused by cabin depressurization. The court found that the plaintiffs had not made the requisite showing that the depressurization was the

39. 15 AV. L. REP. (CCH) 17,406 (C.D. Cal. 1978).

40. *Id.* at 17,413.

41. 15 AV. L. REP. (CCH) 17,186 (1977).

42. Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, C.A.B. Agreement 18,900 *approved by* Order E-23680, 44 C.A.B. 819 (1966).

43. 15 AV. L. REP. (CCH) 17,241 (S.D.N.Y. 1978).

proximate cause of their injuries.⁴⁴ Thus, even though the carrier admitted that a potentially injurious event had occurred, plaintiffs were denied recovery. In *Dunn v. Trans World Airlines, Inc.*,⁴⁵ the court rejected the airline's position that since the plaintiff had not affirmatively pleaded the increase in recoverable damages allowed by the Montreal Agreement, even though both sides had discussed its existence in open court, the plaintiff should be limited to the damages recoverable under the Warsaw Convention.⁴⁶

FEDERAL TORT CLAIMS ACT

The case of *In re Air Crash Near Silverplume, Colorado*⁴⁷ involved a crash in which the entire basketball team of Wichita State University was killed. The operators of the aircraft on the flight had been under investigation by the local General Aviation District Office (GADO) of the Federal Aviation Administration (FAA) for some time. Plaintiffs alleged that because the FAA investigators knew that the operator had been violating Federal Aviation Regulations, they had been negligent in failing to take action to ensure that those violations did not continue. The court looked to the language of the FAA's internal policy statements and guidelines and found that the FAA investigators had discretion as to the application of administrative sanctions.⁴⁸ These duties, therefore, came within the "discretionary function" exception⁴⁹ to the Federal Tort Claims Act.⁵⁰

In the case of *Martin v. United States*,⁵¹ Federal Air Traffic Controllers were found to have been negligent in giving an erroneous altimeter setting and in waiting to broadcast a significant decrease in the ceiling and visibility (from 300 feet/mile to 0 feet/ $\frac{3}{4}$ mile), which occurred between a missed approach and a second attempt to land. The plaintiff's plane was the only one being handled by the controllers and the controllers knew of the worsened conditions at the time that the pilot was making his second final approach.⁵²

44. *Id.* at 17,242.

45. 15 AV. L. REP. (CCH) 17,418 (9th Cir. 1978).

46. The Montreal Agreement allows damages equal to \$U.S. 75,000 whereas the Warsaw Convention allows only \$U.S. 8,300—a difference of \$66,700. *Id.* at 17,421.

47. 15 AV. L. REP. (CCH) 17,203, 445 F. Supp. 384 (D. Kan. 1978).

48. *Id.* at 17,217-18.

49. 28 U.S.C. § 2680(a) (1970).

50. 28 U.S.C. § 1346(b) (1970).

51. 15 AV. L. REP. (CCH) 17,400 (8th Cir. 1978).

52. *Id.* at 17,401. It appeared that the controllers were waiting for the rest of the weather information to come in so that they could give a complete report.

FEDERAL AVIATION REGULATIONS

Following the crash in September 1978 of a Boeing 727 and a Cessna 172 in San Diego, California, the FAA proposed a sweeping increase in the amount of controlled airspace.⁵³ In addition to establishing forty-four new Terminal Control Areas (TCAs) and eighty new Terminal Radar Service Areas (TRSAs), the proposed regulation increases the controlled altitude of the TCAs to 10,000 feet above mean sea level (MSL), and 12,000 feet MSL for the area west of the Mississippi River, except for a portion of Southern California.⁵⁴ It also decreases the altitude of the floor of Positive Control Airspace (PCA) from 18,000 feet to 10,000 feet MSL over most of the United States, with certain exceptions.⁵⁵ This proposed regulation has been criticized as being unresponsive to the problem of mid-air collisions and near-misses, and it is feared that the regulation is an attempt by the FAA to transfer many of the traditional responsibilities of the aircraft flight crew to the Air Traffic Controller.⁵⁶

In a move which has received considerably less publicity, the FAA has made substantial additions to Federal Aviation Regulation (FAR) Part 135,⁵⁷ which vastly increase the abilities of air taxi operators. Under the new regulation, if certain maintenance and inspection requirements are met, an air taxi operator may utilize aircraft having as many as thirty passenger seats.⁵⁸ At a time when the airlines are abandoning less profitable routes, this regulation should provide a means for air taxi operators to fulfill the air transport needs of smaller communities.

In an effort to make it less complicated for one operator to provide air service under more than one FAR part, the FAA is in the process of revising operating certificates for individual carriers.⁵⁹ The

53. 44 Fed. Reg. 1,322 (1979).

54. This will eliminate the possibility of uncontrolled Visual Flight Rule (VFR) overflights between the TCA ceiling and the Positive Control Airspace (PCA) floor. *Id.* at 1,323.

55. The 10,000 foot MSL floor applies only to the high-density traffic areas of a portion of southern California and the eastern U.S.; west of the Mississippi River (except for the portion of southern California mentioned above) the PCA floor will be lowered to 12,000 feet MSL. *Id.* at 1,322.

56. *See, e.g.*, FLYING, March 1979, at 27, 30. In the San Diego crash, both aircraft were equipped for operations within TCA's and the air traffic controllers knew of their proximity to one another. It appears that the controllers did not respond to this information quickly enough to prevent the collision.

57. 14 C.F.R. § 135 (1978).

58. 43 Fed. Reg. 46,742 (1978) (to be codified in 14 C.F.R. § 135.2).

59. 43 Fed. Reg. 58,366 (1978).

new certificates will spell out, on one form, the type of operations a carrier is authorized to perform under Parts 121, 135 and 127.⁶⁰

Foreign citizens living in the United States and foreign-owned United States corporations were also dealt with favorably in one of the FAA's proposed rules. In a Notice of Proposed Rulemaking,⁶¹ the FAA has suggested that foreign citizens lawfully admitted to the United States for permanent residency and foreign-owned United States corporations whose principal operations are within the United States, should be permitted to register their aircraft in the United States.

60. FAR Part 121 (14 C.F.R. § 121) applies to air carriers; FAR Part 135 (14 C.F.R. § 135) applies to air taxi operators; and FAR Part 127 (14 C.F.R. § 127) applies to scheduled air carrier helicopter service.

61. 44 Fed. Reg. 63 (1979).