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Aviation Report

ROBERT C. OWENS *

CIVIL AERONAUTICS BOARD

Recent years have seen public pressure brought on the United States Congress to enact reform legislation to deregulate the aviation industry. After several years of legislative investigation and debate, Congress enacted the Airlines Deregulation Act of 1978, (ADA)¹ which made significant alterations and additions to the Federal Aviation Act of 1958 (Act).² In the months preceeding the enactment of the Airline Deregulation Act of 1978, the administrative agency charged with approval and disapproval of carrier proposals, the Civil Aeronautics Board (CAB), revamped its policies and embarked on an era of promoting competition in the areas of carrier certification, routes, and fares. The most significant of these innovations was the award of permissive operating authority and the consideration of low fare proposals in the selection of carriers for routes.

While permissive authority was only applied to international markets on a limited basis, due to the restrictive nature of prior bilateral agreements; the negotiating position of the United States in new agreements promised the possibility of multiple authority. The primary focus of the Airline Deregulation Act is the liberalization of certification, route entry and exit, and pricing of services in interstate and overseas air transportation.³ Changes affecting foreign air trans-

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

2. 49 U.S.C. §§ 1301-1648 (1976 & Supp.).

3. Interstate air transportation is the carriage by aircraft of persons or property as a common carrier for compensation or hire between two states within the United States or wholly within a territory of the United States. 49 U.S.C. § 1302(21)(a) (1976) *as amended by* Airline Deregulation Act of 1978 § 2, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

Overseas air transportation relates to carriage between a state and a territory or possession, or between two territories or possessions. 49 U.S.C. § 1301(21)(b) (1976) *as amended by* Airline Deregulation Act of 1978 § 2, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

portation⁴ were not as extensive as those affecting interstate and overseas air transportation but did not reverse the liberalizing trend established by the Board under the pre-existing provisions of the Federal Aviation Act of 1958.

In actions commenced by the airlines before the enactment of the ADA, the CAB indicated its willingness to move away from heavy regulation. In the *Application of Piedmont Aviation, Inc.*⁵ Piedmont sought a certificate amendment to extend its route authority to Boston. In the course of issuing a show cause order, the CAB determined that it would grant authority without a formal oral evidentiary hearing "unless a substantial probability is shown that it will be seriously harmful to the domestic air transportation system." Consequently, neither losses to the shareholders of the applicant carrier, nor diversion of traffic or revenues from incumbent carriers, was found to be harmful to the air transportation system unless such losses or diversion would threaten the carrier's ability to perform its certificate obligations, or would necessarily result in termination of essential services without replacement.⁶ In tentatively granting the new form of "permissive authority," the CAB set forth the test that the applicant need only "make a reasonably plausible showing that the experience *could* be a success" and indicated that such authority would be denied only if it were "clearly and patently impractical from an economic standpoint."⁷ The CAB later granted the certificate amendment and further ratified the expected non-hearing procedure which depends on the market place to determine whether the new service is required for the public convenience and necessity.⁸

In the *Oakland Service Case*,⁹ the CAB instituted a proceeding to determine the need for additional authority at Oakland, California to fifteen designated points. The Board proposed a "novel and experimental procedure" for conducting the case. Instead of a single hearing before an administrative law judge, they proposed an initial hearing to determine the issues of public convenience and necessity

4. Foreign air transportation relates to carriage between "a place in the United States and any place outside thereof . . ." 49 U.S.C. § 1301(21)(c) (1976) *as amended by* Airline Deregulation Act of 1978 § 2, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

5. C.A.B. Order 78-4-69 (Apr. 14, 1978).

6. *Id.* at 8.

7. *Id.* at 6-7.

8. C.A.B. Order 78-8-97 (Aug. 17, 1978).

9. C.A.B. Order 78-4-121 (Apr. 19, 1978).

and a second to determine the fitness of applicants. Whereas previous cases were slow, expensive and complicated due to the issue of competitive carrier selection, the Board decided to award "permissive, subsidy ineligible authority in each market where a need for new authority is shown, to every fit, willing, and able applicant."¹⁰

In an order instituting the *Chicago-Albany/Syracuse-Boston Competitive Service Investigation*,¹¹ the CAB decided that as a matter of general policy, the Board would thereafter consider the offer or failure to offer lower prices. Low fares would be weighed "in determining whether the public convenience and necessity require the award of new or additional authority, and if so, which carrier or carriers should be selected." The Board also "expects the record to be developed to examine the need for and feasibility of various new price/quality options." Price options include "reduced normal fares, promotional fares, and off-peak pricing." Quality options include "reduced on board amenities, higher seating densities, increased load factors, and improved aircraft utilization." The Board further suggested the possibility of making the awards contingent upon the continued price performance of the carrier.¹² Further, the administrative law judge was directed to determine whether any new authority should be permissive, and, if so, whether multiple awards should be made and whether such awards would encourage real price competition.¹³

In *Philadelphia-Bermuda Nonstop Proceeding*,¹⁴ the CAB has instituted an investigation to determine whether the public convenience and necessity requires nonstop service between Philadelphia and Bermuda as authorized by the Bermuda II Agreement.¹⁵ After eliminating the traditional hearing before the administrative law judge, the Board awarded multiple permissive authority to all five applicants at the close of oral arguments to the Board.¹⁶

In *Florida-Mexico City Investigation*,¹⁷ an investigation was instituted by the CAB when Pan American World Airways applied for

10. *Id.* at 3.

11. C.A.B. Order 77-12-50 (Dec. 9, 1977).

12. *Id.* at 3.

13. *Id.* at 4.

14. C.A.B. Order 78-6-22 (June 1, 1978).

15. United States-Kingdom Air Services Agreement, T.I.A.S. No. 8641 (1978).

16. The Board decision was submitted to the President of the United States on September 19, 1978.

17. C.A.B. Order 78-6-59 (June 8, 1978).

authority to suspend service between Florida and Mexico City, and four United States domestic trunk carriers filed for certificate amendments and interim exemption authority to initiate service. As in numerous recent cases, the CAB solicited low fare proposals indicating that such proposals would be persuasive in determining which carrier would receive the authority.¹⁸ The CAB also recently instituted the *Yucatan Service Case* to consider the issues of new authority between Merida, Cancun, and Cozumel, Mexico.¹⁹

As the CAB moved away from heavy regulation and toward an environment of greater freedom of competition among carriers, Board policy evolved at a rapid pace. Indicative of this pace was the Board's adoption of low fares as a major factor in carrier selection in December of 1977²⁰ and retreat from that position only seven months later. In the *Florida Services Case*,²¹ the Board deemphasized low fare proposals and stated that it would thereafter depend upon competitive market forces to set the optimum service and optimum price levels. These competitive market forces would be assured by grants of "permissive authority" to any applicant carrier that was fit, willing, and able.²² However, it appeared that low fare proposals would continue to be a major factor in cases which were specifically instituted to consider the certification of additional carriers who would initiate low fares in specified markets.²³

AIRLINE DEREGULATION ACT OF 1978

Prior to the enactment of the ADA on October 24, 1978, the Federal Aviation Act of 1958 drew no policy distinctions between interstate, overseas, and foreign air transportation. The ADA provides for different treatment of interstate and overseas air transportation than for foreign air transportation.²⁴ The "Declaration of Policy" set forth in the ADA did not change the factors which, in the perfor-

18. *Id.* at 3-4.

19. C.A.B. Order 78-8-100 (Aug. 17, 1978).

20. See text accompanying note 8 *supra*.

21. C.A.B. Order 78-7-128 (July 25, 1978).

22. *Id.* at 4.

23. *E.g.*, United States-Benelux Low-Fare Proceeding, C.A.B. Order 78-6-97 (June 13, 1978).

24. 49 U.S.C. § 1302 (1976) as amended by Airline Deregulation Act of 1978 § 3, Pub. L. 95-504, 92 Stat. 1705 (1978).

mance of its powers and duties pursuant to the Act, the CAB should consider as being in the public interest and in accord with the public convenience and necessity in foreign air transportation.²⁵ However, the ADA substantially altered and expanded the factors to be considered in interstate and overseas air transportation.²⁶ By such new factors Congress has made clear its intent that the CAB should foster a system of air transportation that places maximum reliance on actual and potential competition.²⁷

Before the passage of the ADA, the CAB awarded a route certificate to an applicant only if the applicant was fit, willing, and able to perform the transportation properly, and if such transportation was "required" by the public convenience and necessity.²⁸ After the ADA was enacted this test was retained for foreign air transportation, but a substantially altered test was adopted for interstate and overseas air transportation.²⁹ With respect to an application for interstate and overseas air transportation, the CAB shall issue the certificate upon finding that it is "consistent" with the public convenience and necessity.³⁰ In addition, the ADA reversed the burden of proof; an opponent of the application now has the burden of showing, by a preponderance of the evidence, that such air transportation is not consistent with the public convenience and necessity.³¹ The criteria for decision-making regarding applications for interstate or overseas air transportation certificates is now more liberal than the criteria applied to applications for foreign air transportation certificates. However, since the ADA did not alter the criteria regarding applications for foreign air transportation certificates, the recent innovations—multiple and/or permissive awards—³² developed by the CAB prior to the enactment of the ADA should still be valid.

The ADA added a new provision which allows for the automatic issuance of route authority to the first fit, willing, and able applicant to a market where an incumbent certificated carrier has not operated

25. *Id.*

26. *Id.*

27. 49 U.S.C. § 1302 (a) (1976) as amended by Airline Deregulation Act of 1978 § 3(a), Pub. L. 95-504, 92 Stat. 1705 (1978).

28. 49 U.S.C. § 1371 (d)(1) (1976) (amended 1978).

29. 49 U.S.C. 1371(d)(1) (1976) as amended by Airline Deregulation Act of 1978 § 8, Pub. L. 95-504, 92 Stat. 1705 (1978).

30. *Id.*

31. 49 U.S.C. § 1371(d) (1976) as amended by Airline Deregulation Act of 1978 §14, Pub. L. 95-504, 92 Stat. 1705 (1978).

32. See text accompanying notes 14-16 *supra*.

at least five roundtrips per week for thirteen of the previous twenty-six weeks.³³ This “dormant authority” provision only applies to interstate and overseas air transportation, requires that the applicant for such dormant authority inaugurate and maintain a certain minimum service level, and provides for suspension of the incumbent carrier.³⁴

The ADA granted the “fill-up” rights long sought by United States air carriers. If an air carrier holds a certificate to engage in foreign air transportation, it may carry passengers or property in interstate or overseas air transportation on at least one scheduled roundtrip flight per day in each market, unless the CAB authorizes additional flights per day.³⁵ A certificate to engage in foreign charter air transportation shall designate the terminal and intermediate points only so far as the CAB deems practicable. Otherwise, the certificate need only designate the general geographic area within which such services may be provided.³⁶

Before the passage of the ADA, an air carrier had to apply to the CAB for authorization to abandon service or to temporarily suspend service to a city.³⁷ Under the ADA, a carrier may suspend service after giving ninety days notice.³⁸ If the city is within the United States and the suspension or reduction in service will cause the service to the city to fall below a minimum level—“essential air transportation”—the CAB may then require the suspending carrier to maintain subsidized service until a replacement is found.³⁹

The ADA requires that the CAB establish simplified procedures for air carriers to obtain certificates to engage in interstate, overseas, and foreign air transportation and for foreign carriers to obtain permits to engage in foreign air transportation. These simplified procedures need not require a formal, oral, evidentiary hearing.⁴⁰

33. 49 U.S.C. § 1371(d) (1976) *as amended by* Airline Deregulation Act of 1978 § 10, Pub. L. 95-504, 92 Stat. 1705 (1978).

34. *Id.*

35. 49 U.S.C. § 1371(d) (1976) *as amended by* Airline Deregulation Act of 1978 § 11, Pub. L. 95-504, 92 Stat. 1705 (1978).

36. 49 U.S.C. 1371(e) (1976) *as amended by* Airline Deregulation Act of 1978 § 15, Pub. L. 95-504, 92 Stat. 1705 (1978).

37. 49 U.S.C. § 1371(j) (1976) (*amended* 1978).

38. *Id.*, *as amended by* Airline Deregulation Act of 1978 § 19, Pub. L. 95-504, 92 Stat. 1705 (1978).

39. *Id.* See 49 U.S.C. tit. IV (1976) *as amended by* Airline Deregulation Act of 1978 § 33, Pub. L. 95-504, 92 Stat. 1705 (1978).

40. 49 U.S.C. § 1371 (1976) *as amended by* Airline Deregulation Act of 1978 § 21, Pub. L. 95-504, 92 Stat. 1705 (1978).

The CAB's jurisdiction over approval of mergers, acquisitions, and other similar transactions was limited by the passage of the ADA. Congress intended that the CAB evaluate these transactions in the same manner that they are evaluated in an unregulated industry⁴¹ *i.e.*, the approval of a transaction need not be accompanied by a grant of immunity from antitrust prosecution.⁴² Before the ADA was enacted, all agreements or contracts affecting air transportation had to be filed with the CAB which was under an obligation to disapprove those contracts or agreements that were adverse to the public interest.⁴³ Approval of an agreement or contract by the CAB automatically invoked the antitrust immunity provision.⁴⁴ Under the ADA, this mandatory filing requirement is retained only for foreign air transportation.⁴⁵ In addition, the antitrust immunity provision was made discretionary; approval of an agreement or contract by the CAB no longer automatically functions as a shield from antitrust prosecution.⁴⁶

The CAB's power to exempt persons from the requirements of the Act has been liberalized. If the CAB finds that the exemption is "consistent with the public interest," it may exempt a person from a provision of the Act or from a CAB rule or regulation.⁴⁷

The ADA also explicitly set out the reasons for which a CAB decision regarding an international route may be submitted to the President of the United States for review. The President may review and reject, or alter such a decision only for reasons of national security or foreign relations pursuant to his constitutional powers. The President may not reject or alter the CAB's decision for economic reasons or for reasons of carrier selection. If the President takes no

41. 49 U.S.C. § 1378 (1976) *as amended by* Airline Deregulation Act of 1978 § 26, Pub. L. 95-504, 92 Stat. 1705 (1978); 124 CONG. REC. H12655 (daily ed. Oct. 12, 1978) (JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE).

42. 49 U.S.C. § 1384 (1976) *as amended by* Airline Deregulation Act of 1978 § 30, Pub. L. 95-504, 92 Stat. 1705 (1978).

43. 49 U.S.C. § 1382 (1976) (*amended* 1978).

44. 49 U.S.C. § 1384 (1976) (*amended* 1978).

45. 49 U.S.C. § 1382 (1976) *as amended by* Airline Deregulation Act of 1978 § 28, Pub. L. 95-504, 92 Stat. 1705 (1978).

46. 49 U.S.C. § 1384 (1976) *as amended by* Airline Deregulation Act of 1978 § 30, Pub. L. 95-504, 92 Stat. 1705 (1978).

47. 49 U.S.C. § 1386(b)(1) (1976) *as amended by* Airline Deregulation Act of 1978 § 31, Pub. L. 95-504, 92 Stat. 1705 (1978).

action within sixty days, the decision becomes effective but, as a decision of the CAB, not the President, and as such is subject to judicial review.⁴⁸

The ADA established a "zone of reasonableness" which is to be applied by passenger fares in interstate and overseas air transportation. If a passenger fare falls within the zone, the CAB may not disapprove it on the grounds that it is unjust or unreasonable. By July 1, 1979, the zone will range from seventy percent below the standard industry fare level (normal full fare level) to five percent above such level.⁴⁹

The ADA includes a "sunset provision" which provides for the phased elimination of most of the various regulatory functions of the CAB by January 1, 1985. Those functions of the CAB not phased out will be transferred to other executive departments. On January 1, 1985, all CAB authority over foreign air transportation will be transferred to the Department of Transportation which shall exercise such authority in consultation with the Department of State.⁵⁰

INTERNATIONAL AIR TRANSPORT ASSOCIATION

On June 9, 1978, the Civil Aeronautics Board (CAB) adopted an order to show cause why it should not remove its approval of the agreements that allow the creation and operation of regional traffic conferences by members of the International Air Transport Association (IATA).⁵¹ The regional traffic conferences facilitate the negotiation of prices and terms of service which are provided uniformly by the world's air carriers. Since 1946, the CAB has provided anti-trust immunity for such inter-carrier agreements (resolutions) under sections 412 and 414 of the Federal Aviation Act.⁵²

According to a majority of the Board members, the primary reason for reviewing its approval is that the "[c]ircumstances have changed dramatically since 1946."⁵³ In 1946, the CAB had limited

48. 49 U.S.C. § 1461(a) (1976) *as amended by* Airline Deregulation Act of 1978 § 34, Pub. L. 95-504, 92 Stat. 1705 (1978).

49. 49 U.S.C. 1482(d) (1976 & Supp.) *as amended by* Airline Deregulation Act of 1978 § 37, Pub. L. 95-504, 92 Stat. 1705 (1978).

50. 49 U.S.C. §§ 1301 *et. seq* (1976 & Supp.) *as amended by* Airline Deregulation Act of 1978 § 40 Pub. L. 95-504, 92 Stat. 1705 (1978).

51. C.A.B. Order 78-6-78, 43 Fed. Reg. 25839 (1978).

52. 49 U.S.C. §§ 1382, 1384 (1970).

53. 43 Fed. Reg. 25840.

powers over fares and rates in international air transportation. Because the Federal Aviation Act in 1946 only provided for removal of discrimination under section 1004(f)⁵⁴ and approval or disapproval of agreements under section 1412,⁵⁵ the majority asserted that the Board had approved the agreements as a substitute for the CAB's lack of statutory power to suspend and investigate international fares and rates.⁵⁶ However, in 1972, Congress empowered the Board to investigate, suspend, and cancel unlawful fares and rates in international air transportation.⁵⁷ The majority also noted, as an additional reason for the review, the shift from the post-war dominance of the United States air carriers to an environment in which numerous foreign carriers also have the resources to engage in price competition.⁵⁸

The Board began its analysis by stating the settled principle that "antitrust immunity should be granted only where failure to do so would frustrate the achievement of explicit statutory objectives."⁵⁹ They determined that the standard for approval of anti-competitive arrangements is whether the agreement is required by a serious transportation need, or is necessary to obtain important public benefits.⁶⁰ Although either of these tests would have been met by the circumstances existing in 1946, the Board questioned whether external circumstances had not substantially changed since that time.⁶¹ Further refining the method for review of the IATA agreements, the Board decided to reanalyze the legality of anti-competitive agreements in a two step process. First, the CAB would determine the direct or indirect benefits accruing from the use of agreements vis-a-vis the public interest standards of the Act. They would then determine the necessity of using the agreement to achieve such benefits.⁶²

The Board recognized that not all IATA resolutions were anti-competitive. They concluded:

In order to undertake this review, and in light of the Board's long-established legal standard for approval of air carrier agree-

54. 49 U.S.C. § 1482(f) (1970).

55. 49 U.S.C. § 1382 (1970).

56. 43 Fed. Reg. 25840.

57. 49 U.S.C. § 1482(j) (1976) (*enacted as* § 1002(j) of the Federal Aviation Act).

58. *Id.*

59. 43 Fed. Reg. at 25841.

60. *Id.*; *See* Local Cartage Agreements Case, 15 C.A.B. 850, 853 (1952).

61. 43 Fed. Reg. 25840, 25841.

62. *Id.* at 25841.

ments that may affect competition, the many changed circumstances since the Board's last review of the Traffic Conference Resolution, and the Board's increased reliance on competition as a means of insuring efficient and responsive air transportation, we tentatively find that the Traffic Conference Resolution and related agreements are no longer in the public interest and should no longer be approved by the Board.⁶³

The Board then solicited comments regarding the costs and benefits of disapproval of the system, replacement systems and the probable role of multinational associations (such as the European Civil Aviation Conference and the International Civil Aviation Organization), resulting effect of U.S. antitrust laws, adequacy of the Board's regulatory powers, likelihood of reasonably competitive pricing absent IATA agreements and differing treatment necessary for different regions of the world or different phases of the air transportation business.⁶⁴

Board Member O'Melia concurred in the prospect of review of the rate-fixing role of IATA, but dissented from the procedure chosen by the majority and its apparent tenor.⁶⁵ Given the long history of beneficial service of IATA, he found the Board's action to be "abrupt and ominous, in both tone and format."⁶⁶ Not only did Board Member O'Melia disagree with the tentative findings and conclusions of the majority, he found an "arbitrary and unilateral tone . . . which is unnecessary and certain to cause irritation and resentment among foreign governmental authorities."⁶⁷ He further questioned the sufficiency of the show cause order process for a matter more akin to policy, especially after thirty years of Board approval. Board Member O'Melia felt that not enough knowledge of the alternative systems existed or could be obtained through the show cause order process to justify such extraordinary impact on private interests. He also questioned whether Congress intended the 1972 amendment, which gave the CAB control over rates, to have the effect of the Board relinquishing its control over rates to the Executive Department. This outcome is especially doubtful since the Executive Department may often be motivated by political and bureaucratic considerations and not the free competition and economic considerations which the Board obviously favors.

63. *Id.* at 25842 (footnotes omitted).

64. *Id.*

65. *Id.* at 25842-45.

66. *Id.* at 25843.

67. *Id.*

NEGOTIATING POSITION OF THE UNITED STATES

On May 19, 1978, the United States Secretary of Transportation issued the *Proposed United States Policy for the Conduct of International Air Transportation Negotiations*.⁶⁸ The policy statement was developed by an interagency group composed of the Departments of State, Transportation, Commerce, Defense, and Justice and the Office of Management and Budget, the Council on Wage and Price Stability, the Domestic Policy Staff and the Council of Economic Advisors. Input by the Civil Aeronautics Board and the public also contributed to the formulation of the policy statement. After revision based on comments received at public hearings, the President approved the statement of negotiating policy on August 21, 1978.

The primary goal according to the policy statement is to provide the greatest possible benefit to travelers and shippers by continued development of affordable, convenient, efficient, and environmentally acceptable air services. "Maximum consumer benefits can be best achieved through preservation and extension of competition between airlines in a fair market place," not by further protectionist restrictions. Actual and potential competition should determine the variety, quality, and price of air service.

Since routes, prices, capacity, scheduled and charter rules, and competitive pressure interact to form the spectrum of benefits obtainable from the air transportation industry, the policy establishes a negotiating objective for each factor. First, the United States will emphasize lower prices by promoting greater competition in fares and rates in both scheduled and charter services. The mechanism for setting fares, rates, and prices should be decided by the individual airlines. These decisions should be based, primarily, on competitive considerations of the market place. However, one element added in the revision of the proposed statement indicated that government regulation would not be entirely foreclosed. Government regulation should prevent predatory and discriminatory practices, protect consumers from abuse of monopoly positions, and protect competitors from prices which are artificially low due to government subsidies. Negotiations will press for reduced restrictions on volume, frequency, and regularity of charter flights. As to scheduled service, the United States will seek to expand service by eliminating restrictions on capac-

68. 43 Fed. Reg. 22262 (1978).

ity, frequency, and route and operating rights. The negotiating position also envisions the elimination of unfair or destructive competitive practices, especially those which discriminate in charges for the use of airway and airport facilities. The primary impetus to competition will be multiple airline designations in international markets. Such constructive competition is expected to increase service options and reduce prices. The negotiating stance will also seek to increase the number of non-stop gateways. Finally the United States will promote the full development of cargo services. The policy statement concludes with a requirement of Presidential approval for bilateral agreements that do not meet these "minimum" competitive objectives.

WARSAW CONVENTION⁶⁹

In *Chandler v. Jet Air Freight, Inc.*,⁷⁰ the court held that international transportation as the term is used in article 1,⁷¹ is determined from the place of departure and the place of destination as stated in the contract. Failure to place the goods into transit to the destination which is a High Contracting Party does not prevent application of the Convention.

Two recent cases, *Fulton v. Lufthansa German Airlines*⁷² and *Kohli v. British Airways*,⁷³ addressed the grant of jurisdiction set out in article 28 of the Convention. In *Fulton*, a plaintiff's claim for damage to checked baggage was dismissed for lack of subject matter jurisdiction because the forum state was not within the four forums enumerated in article 28. The article 28 forums were held to be exclusive and mandatory. In *Kohli*, the plaintiff's action for damages for the theft of jewelry from checked baggage was also dismissed because the forum was not within those listed in article 28. The plaintiff had purchased a ticket for himself in London and had purchased tickets for other members of his family in Boston. The Massachusetts court held that jurisdiction under article 28(c) was determined by the place of purchase of the plaintiff's ticket alone.

In *Benjamins v. British European Airways*,⁷⁴ the Court of Appeals for the Second Circuit overruled a pervasive rule that had

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

70. 14 Avi. 18321 (Ill. App. Ct. 1977).

71. 49 Stat. 3000, Chapter 1, Art. 1 (2), T.S. No. 876 (1934).

72. 14 Avi. 18284 (Ill. Cir. Ct. 1977).

73. 14 Avi. 18311 (Mass. Super. Ct. 1977).

74. 572 F.2d 913, 14 Avi. 18369 (2d Cir. 1978).

existed in the United States for over twenty years. Judge Lumbard reversed his apparent position in *Noel v. Linea Aeropostal Venezolana*⁷⁵ and held that article 17 of the Warsaw Convention creates its own cause of action.

In *Upton v. Iran National Airlines Corp.*,⁷⁶ the court granted defendant's motion for partial summary judgment since plaintiffs were not "in the course of any of the operations of embarking" as that phrase is used in article 17. Where the passengers were awaiting flight information concerning a flight delayed by inclement weather, the court held that the passengers were not under the control of the carrier when the roof collapsed over passengers waiting in a public area.

Although *Air Canada v. Smith*⁷⁷ did not involve an issue under the Convention, such an issue may well arise in similar circumstances in the future. In that case the court denied the carrier's liability on the ground that the sovereign government of Canada required the passengers to pass through the area of injury, an area over which the carrier had no control. The court held that the air carrier had no duty to warn or to look for peril. The passengers had deplaned in Montreal from an Air Canada flight from New York and were attempting to connect to another Air Canada flight to Quebec. Upon deplaning in Montreal, plaintiffs were instructed to enter a certain restricted area in order to pass through customs and immigration. While waiting for the luggage, plaintiff tripped over an appendage protruding from a baggage cart.

In *Danziger v. Compagnie Nationale Air France*,⁷⁸ a passenger sought to recover the value of jewelry which was missing from a checked bag on arrival at her destination. The air carrier asserted, as a defense, a tariff rule filed with the Civil Aeronautics Board. That tariff purported to relieve the carrier of all liability for loss or damage to jewelry and other valuables in checked baggage. The federal district court held the tariff invalid because it conflicted with article 23 of the Warsaw Convention, which provides that "[a]ny provision tending to relieve the carrier of liability . . . shall be null and void." The court also refused to grant the carrier's motion for summary judgment

75. 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957).

76. 450 F. Supp. 196, 15 Avi. 17101 (S.D.N.Y. 1978).

77. 357 So. 2d 789, 14 Avi. 17121 (Fla. 1st Dist. Ct. App. 1978).

78. 14 Avi. 18280 (S.D.N.Y. 1977).

when the carrier sought to limit liability under article 22(2). Even though the plaintiff neither alleged nor stated facts which tended to support a finding of "willful misconduct," the court found the carrier's motion was premature and that the plaintiff must "be given the opportunity to develop the record in situations where the salient facts are solely with the defendant."⁷⁹

In *Williams v. Fidelity & Casualty Co.*,⁸⁰ a federal district court refused to strike the defendant's affirmative defense of contributory negligence on the part of plaintiff's decedent. The court first determined that article 17 (personal injuries), article 20(1) (due care) and article 21 (contributory negligence) created a presumption of liability. They then concluded that the elimination by the Montreal Agreement, of the article 20(1) due care defense, served to create absolute liability, but not to eliminate the defense of contributory negligence. The court called the Montreal Agreement a "quasi-legal and largely experimental system of liability that is essentially contractual in nature"⁸¹ and noted that its legal effect is uncertain. The court rejected the defendant's argument that the Agreement's preclusion of recovery for willfully causing damage demonstrated the understanding that the contributory negligence defense had been deleted. The willful injury provision was specifically aimed at intentional terrorist activity and was not meant to alter the contributory negligence defense.

In *Cohen v. Varig Airlines*,⁸² plaintiffs sought damages for loss of baggage and for the resulting physical inconvenience, discomfort, and mental distress. With eighteen days of a multi-stop tour remaining, plaintiffs deplaned in Rio de Janeiro and were bussed with the other passengers to a waiting area in order to board a jet aircraft to continue Varig flight #854 to New York. Plaintiffs continually cautioned Varig employees that they were not continuing to New York, that their baggage had not arrived, that they had eighteen days remaining on their tour with no other clothes than the ones on their backs and that they were due to depart Rio de Janeiro on an early morning flight. After much complaining and some apparent efforts to locate the baggage, Varig personnel refused to unload the flight bound for New York to locate the baggage. Varig employees further stated that

79. *Id.* at 18282.

80. 442 F. Supp. 455, 14 Avi. 18465 (E.D. La. 1977).

81. 442 F. Supp. at 457, 14 Avi. at 18466 (citing L. Kreindler, Aviation Accident Law § 12A.07(1) at 12A-12).

82. 62 App. Div. 324, 405 N.Y.S. 2d 44, 15 Avi. 17112 (1978).

they "would not go to the expense of unloading the plane" and that plaintiffs would receive the baggage on a return flight in two days. Plaintiffs never did receive the baggage and were forced to complete the trip with the same single set of clothes supplemented by those that they found in the local communities after many hours of shopping.

The court found that Varig intentionally omitted "to perform a manifest duty which it owed plaintiffs under the terms of the contract of carriage, with a realization and disregard of probable consequences of its conduct."⁸³ Varig's actions constituted willful misconduct under article 25(1) and, therefore, the liability limit of article 22(a) was inapplicable. While the majority awarded damages for the actual loss of the baggage, they refused to allow recovery for the mental distress and physical inconvenience caused by lost or mishandled baggage. Since the Warsaw Convention governs the nature of injuries, but does not specify the elements of allowable damages,⁸⁴ the carrier's tariff which excluded consequential or special damages, precluded any recovery by the plaintiff for mental distress. Judge Lupiano dissented on the ground that an intentional omission of a manifest duty was not proven. From the facts presented, the Warsaw Convention liability limitation was applicable because the evidence establishing Varig's intent was only circumstantial. Judge Sandler dissented from the majority's exclusion of damages for mental distress.

In *Dalton v. Delta Airlines*,⁸⁵ a plaintiff sought to recover damages for the suffocation death of racing dogs on a flight segment covered by article 1. The trial court granted defendant's motion for summary judgment because plaintiff failed to give written complaint to the carrier within seven days of his discovery of the "damage" to goods as required by article 26. On appeal, the Court of Appeals, Fifth Circuit, reversed and held that "where destruction of goods occurs on an international flight, the shipper-consignee need not give Article 26(3) notice." After discussion of the general doctrine of treaty construction, the court distinguished between total loss or destruction and mere damage or delay. The common factor in lost or destroyed, as opposed to merely damaged, goods is that they are totally without economic value to the shipper/consignee. Therefore, notice of the loss

83. 62 App. Div. at 332-33, 405 N.Y.S. 2d at 48, 15 Avi. at 17115 (1978).

84. See *Rosman v. Trans World Airlines*, 34 N.Y. 2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

85. 570 F.2d 1244, 14 Avi. 18425 (5th Cir. 1978).

to the carrier would serve no useful purpose. The court noted that the carcass of a trained racing dog is, like the pieces of a shattered bottle of rare brandy, a destroyed, and not merely a damaged, good.

Denied Boarding

In *Smith v. Piedmont Aviation, Inc.*,⁸⁶ the Court of Appeals for the Fifth Circuit, affirmed an award of compensatory damages for unjust discrimination based on section 404(b) of the Federal Aviation Act⁸⁷ for Piedmont's failure to follow its own boarding priority. However, since the carrier's tort was not "aggravated by evil motive, actual malice, deliberate violence or oppression,"⁸⁸ the award of punitive damages was reversed.

In *Nader v. Allegheny Airlines, Inc.*,⁸⁹ plaintiff Ralph Nader recovered compensatory and punitive damages for a "denied boarding." On appeal of plaintiff's original action, the United States Supreme Court held that a bumped passenger who is denied boarding need not await a determination by the Civil Aeronautics Board before proceeding on a common law claim for misrepresentation.⁹⁰ Upon remand, the federal district court first awarded compensatory damages for the carrier's failure to follow its boarding priority, a violation of section 404(b) of the Federal Aviation Act.⁹¹ Compensatory damages were also awarded for the common law tort of fraudulent misrepresentation. In reaching its decision to award damages to passenger Nader, the court found that defendant Allegheny had a duty to disclose the existence of its overbooking practice to its passengers; its failure to do so subjected it to liability. Plaintiff Nader was due to speak before the Connecticut Citizens Action Group (CCAG) on the day of the denied boarding and was unable to fulfill his commitments due to his delay. Although Allegheny also failed to inform the director of CCAG of the overbooking practice when he inquired if plaintiff Nader had a "confirmed reservation," the court refused to award damages, holding that:

plaintiff, CCAG, was too remote from the transaction to be owed a duty by defendant . . . and, . . . in the absence of such a duty, a

86. 567 F.2d 290, 14 Avi. 18327 (5th Cir. 1978).

87. 49 U.S.C. § 1374(b) (1970).

88. 567 F.2d at 292, 14 Avi. 18328 (citing *Nader v. Allegheny Airlines, Inc.*, 167 U.S. App. D.C. 350, 372, 512 F.2d 527, 549, *rev'd on other grounds*, 426 U.S. 290 (1976)).

89. 445 F. Supp. 168, 14 Avi. 18312 (D.D.C. 1978).

90. 426 U.S. 290 (1976).

91. 49 U.S.C. § 1374(b) (1970).

plaintiff may not recover, even if all the elements of the common-law tort of fraudulent misrepresentation have been proved.⁹²

However, the court indicated that it would have awarded damages to this indirect third party if the director of CCAG had identified himself, his organization, or the reason for the call. Such additional information would presumably have given the airline reason to know of the third party's reliance.

The court further awarded punitive damages of \$15,000 to plaintiff Nader, rejecting defendant's arguments that overbooking was a common industry practice and that the CAB had since adopted a rule requiring disclosure. The court did not address the issue of punitive damage awards to third parties, since the CCAG did not recover on the primary cause of action.

In Economic Regulation ER-1050, the CAB issued its final rule regarding priority rules, denied boarding compensation tariffs, and reports of unaccommodated passengers.⁹³ Overbooking, selling more "confirmed reserved" seats than are actually available for sale, is a method employed by most air carriers in an attempt to compensate for "no-shows." A no-show is a passenger who holds a "confirmed reservation" for a seat, fails to show up at flight time and does not notify the carrier of his intent not to use the space. In the fiscal year ending June of 1977, denied boardings on U.S. carriers were approximately 130,000 passengers on domestic flights and 12,000 on international flights, while denied boardings on foreign carriers to and from the United States were estimated to have been 10,000 passengers.

Foreign carriers argued strenuously against continued application of Part 250 to foreign carriers on flights "originating or terminating at, or serving" a United States point. Despite a decline in the rate of denied boardings, the complications of administering a system where the passengers speak several languages and the potential for the conflict of laws of different nations, the CAB retained this jurisdiction over foreign carriers.

The new system allows much carrier flexibility in determining the amount of compensation offered to volunteers for denied boarding, the method and content of the solicitation, and the overbooking formula utilized in the carrier's reservations system. Furthermore,

92. 445 F. Supp. at 176, 14 Avi. 18316.

93. 43 Fed. Reg. 24277 (1978) (to be codified in 14 C.F.R. § 250).

the carrier is free to use advance payment requirements and ticket refund penalties or "conditional reservations" at a reduced price.

Carriers must first seek volunteers to be denied boarding at a compensation to be determined by the judgment of the carriers. If an insufficient number of volunteers come forward, the carrier must then deny boarding to non-volunteers according to its published boarding priorities and then only to those non-volunteers who were informed that they were in danger of being bumped and of the compensation to be received. Denied boarding compensation (DBC) is set at 200% of the passenger's remaining tickets to his first stopover but is limited to a minimum of \$75 and maximum of \$400. If the carrier arranges alternative air transportation to arrive within two hours of the original arrival time in the case of interstate and overseas air transportation (four hours in the case of foreign air transportation), the DBC and the limits are halved. The carrier need not pay DBC if the passenger did not comply with the carrier's procedures for check-in, if substitution of a smaller aircraft is required for safety or operational reasons, or if the passenger is accommodated on the flight but is merely in a different class of service.

UNITED STATES TREATY INFORMATION**

Convention on offenses and certain other acts committed on board aircraft. *Done* at Tokyo, September 14, 1963. Entered into force: December 4, 1969. TIAS 6768. Accession deposited: Peru (with reservations), May 12, 1978.

Protocol relating to an amendment to the convention on international civil aviation (TIAS 1591). *Done* at Vienna, July 7, 1971. Entered into force: December 19, 1974. TIAS 8092. Ratification deposited: Venezuela, February 3, 1978.

Protocol relating to an amendment to the convention on international civil aviation (TIAS 1591). *Done* at Montreal, October 16, 1974. Not in force. Ratifications deposited: Argentina, February 1, 1978; Cuba, November 25, 1977; Venezuela, February 3, 1978.

Protocol on authentic quadrilingual text of the convention on international civil aviation. (Chicago, 1944) (TIAS 1591), with annex. *Done* at Montreal, September 30, 1977. Not in force. Acceptance deposited: Colombia, May 4, 1978.

**Treaty information compiled from 1978 Department of State Bulletins.