

6-1-1977

# Aviation

William B. Gamble

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

William B. Gamble, *Aviation*, 9 U. Miami Inter-Am. L. Rev. 434 (2015)

Available at: <http://repository.law.miami.edu/umialr/vol9/iss2/10>

This Report is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## AVIATION

WILLIAM B. GAMBLE\*

### CONGRESSIONAL DEVELOPMENTS

Prompted by President Carter, the proposed deregulation of the airline industry has received considerable attention from the 95th Congress. Of the two bills initially offered, there is an apparent partisan split as to the methods to effect the deregulation. The President is said to approve the outlines of a bill (S. 689) put forward by Democratic Senators Edward Kennedy of Massachusetts and Howard Cannon of Nevada.<sup>1</sup> The Kennedy-Cannon Bill "would allow airlines to cut fares though not below a predetermined direct cost of flying between two points, and it would allow price increases of as much as 10% a year from now to 1979 and 20% afterwards. Within those limits, the airlines could charge prices without approval by the board."<sup>2</sup>

The Kennedy-Cannon Bill has come under criticism by the former Chairman of the C.A.B., John Robson, a Republican. Mr. Robson has said that he prefers the Republican version (S.292) proposed by Senators Baker and Pearson. The Republican bill "would give the Board considerable discretion in directing the process of relaxing regulations."<sup>3</sup>

Deregulation has received a broad basis of support from groups of various political persuasions, with opposition mainly from the airlines and labor unions. The arguments have been succinctly stated in a recent article by Bruce Keplinger where he concludes that "the arguments advanced in the past did not justify the adoption of regulation, and the record of the C.A.B. in controlling the domestic air transport industry does not seem to justify retention."<sup>4</sup>

\*J. D. Candidate, University of Miami School of Law. The assistance of Max Rudmann, J. D. Candidate, University of Miami School of Law is gratefully acknowledged.

<sup>1</sup>Holsendolph, *C.A.B.'s Wings to be Clipped*, N.Y. Times, Mar. 27, 1977 §3 at 7, col. 2.

<sup>2</sup>*Id.* at col. 4.

<sup>3</sup>*Id.* at col. 3.

<sup>4</sup>Keplinger, *An Examination Of Traditional Arguments On Regulation Of Domestic Air Transport*, 42 J. Air. L. & Com. 187 at 212.

Other recent Congressional action concerning aviation includes proposals aimed at terrorism and at a reduction of air fares for certain groups. In the House of Representatives, Congressman Lagomarsino has proposed a bill which would require the President to suspend the air transportation rights of any foreign nation which assists air terrorists (H.R. 457). Additionally, Congressman Rodino has proposed an amendment to Title 18 of the United States Code to provide the death penalty for certain destructive acts to airports, airplanes and related items (H.R. 1227). A group of Congressmen, led by Representative Claude Pepper, have proposed a bill to amend the Federal Aviation Act of 1958 to authorize a reduced rate for certain groups, including the elderly, the handicapped, and the young. The reduced rates would be granted on a space available basis (H.R. 3272).

#### INTERNATIONAL ROUTE AGREEMENTS

The negotiations between Britain and the United States over the 1964 Air Service Agreement (the Bermuda Agreement), as reported in our last issue (9 *Law. Am.* 205) are continuing toward the June 22nd deadline with a number of new developments. At present, Japan and Italy have joined Britain in seeking to renegotiate their bilateral agreements with the United States over air routes between the respective countries. The British Bermuda negotiations are still of primary importance because they should stand as the model for more than 75 bilateral air transport agreements between the United States and other countries.

The major complaint by the British government concerns the fact that its national carrier must presently compete with several American carriers along routes between London and Hong Kong and the United States. In each case the American carriers collectively control the bulk of the market and service routes from most American cities. In addition, the British "want to eliminate the so-called 'fifth freedom' rights of foreign carriers to pick up passengers in, and carry them beyond, the cities of London and Hong Kong, as well as . . . more distant points through London and Hong Kong to the United States."<sup>5</sup>

To date the details of the talks have not been disclosed, but there have been some alterations brought about by the change of American administrations and some preliminary agreements. President Carter has

---

<sup>5</sup>Crittenden, *Storm Warnings Over The Atlantic*, N.Y. Times, Mar. 27, 1977, §3 at 11, col. 1.

appointed Alan Boyd as chief negotiator. Mr. Boyd has achieved success in unifying the position from the previous diverse statements of the Department of State, Department of Transportation, and the Civil Aeronautics Board. Furthermore, the negotiations have yielded a specific agreement for 1977 regarding air charters. Specifically, the British "agreed, with few modifications, to accept the new 'advanced booking charters' (A.B.C.'s) allowing Americans to purchase trips on charter flights in advance without having to belong to any group or to purchase land accommodations."<sup>6</sup>

The United States has made a number of concessions, but it has so far "refused to meet the British demand for some form of capacity controls jointly agreed upon by the two Governments or to grant the British any kind of veto over the flight plans of American carriers."<sup>7</sup> The negotiations are to continue until the June 22nd deadline when the old agreement expires.

#### PASSENGER SAFETY IN TERMINALS

In 1929 a dispute, which is still very much alive today, arose at the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention). At present it has come to the attention of four Circuits of the Court of Appeals in cases concerning the senseless attacks of terrorists on airline passengers. The dispute involves the interpretation of Article 17 of the Warsaw Convention which states:

The Carrier shall be liable for damage in the event of the death or wounding of a passenger, or any other bodily injury suffered by a passenger, if the accident took place on board the aircraft or *in the course of any of the operations of embarking and disembarking.* (emphasis supplied)

The original draft of the convention submitted by the Comité Internationale Technique d'Experts Juridique Aériens (CITEJA) would have extended the accident coverage to passengers "from the time when (they) enter the airport of departure until the time they exit from the airport of arrival."<sup>8</sup> This draft was rejected in favor of the present wording.

<sup>6</sup>*Id.* at col. 2.

<sup>7</sup>*Id.* at col. 3.

<sup>8</sup>1925 Warsaw Minutes at 171; *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975).

In 1971 the First Circuit considered Article 17 in the case of *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir., 1971). In that case Mrs. MacDonald was injured by a fall while waiting in the baggage area of the Terminal. The Court held that disembarkation had terminated along with the airline's liability at "the time the passenger has descended from the plane by the use of whatever mechanical means (which) have been supplied and has reached a safe point inside of the terminal."<sup>9</sup> The Court's test has become known as the "strict location test."

However, in August 1973, in Greece, two Palestinian terrorists, using small firearms and hand grenades, attacked a group of passengers who, at the direction of TWA personnel, were standing in line waiting to be searched by Greek police before boarding TWA flight 881. In a suit by the passengers against the airline,<sup>10</sup> the Second Circuit was presented with the problem of interpreting Article 17. In a unanimous decision, the court held that the airline was liable up to the \$75,000 limit imposed by the Warsaw Convention as amended by the Montreal Agreement of 1966. The decision was based on a "tripartite test" which proposed that liability under Article 17 would be determined by the passenger's "activity (what the plaintiffs were doing), control (at whose direction) and location"<sup>11</sup> at the time of the accident. The Court distinguished *MacDonald* by stating that Mrs. MacDonald was not under the direction of the airline and therefore was a free agent roaming at will through the terminal.<sup>12</sup>

The question arose again in the First Circuit in the 1976 case of *Hernandez v. Air France*.<sup>13</sup> In *Hernandez*, the plaintiffs were attacked at Lod Airport near Tel Aviv, Israel, by three Japanese terrorists. The attack occurred while the plaintiffs were waiting for their luggage in the baggage area inside the terminal building. The Court followed its earlier decision in *MacDonald* and adhered to the strict location test. It held that "where the passengers were waiting for their baggage inside the terminal building, had left the aircraft and its immediate vicinity, and were no longer acting at the direction of the carrier, the process of disembarkation had been completed and Article 17 of the Warsaw Convention,

<sup>9</sup>*MacDonald v. Air Canada*, 439 F.2d 1402, 1405 (1st Cir. 1971).

<sup>10</sup>*Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) *cert. denied*, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (Blackmun J., dissenting).

<sup>11</sup>*Id.* at 33.

<sup>12</sup>*Id.* at 34.

<sup>13</sup>45 F.2d 279 (1st Cir. 1976) (McEntee J. concurring) *appeal docketed*, No. 76-1132, S.Ct. Feb. 22, 1977, 45 U.S.L.W. 3574 (U.S. Feb. 22, 1976).

therefore, is not applicable."<sup>14</sup> The opinion discussed the tripartite test of *Day* and determined that the holding of *MacDonald* did not foreclose the adoption of it. The Court stated that although the tripartite test's criteria were certainly relevant, their application would not change the result in the present case. Judge McEntee in a concurring opinion went further and proposed the outright adoption of the tripartite test.

Subsequently, in *Maugnie v. Compagnie Nationale Air France*,<sup>15</sup> the Court of Appeals for the Ninth Circuit was presented with a case where a passenger slipped and fell while proceeding down the only passenger corridor leading from the Air France arrival gate to the main terminal area. The majority of the Court utilized the tripartite test of *Day* and held that the airline was not liable because the activity which the plaintiff was involved in was beyond the airline's control. The concurring opinion by Judge Wallace reached the same result, but by applying the strict location test of *MacDonald*.

Finally, the Third Circuit in the case of *Evangelinos v. Trans World Airlines, Inc.*<sup>16</sup> was also presented with the interpretation of Article 17. The *Evangelinos* case arose out of the same terrorist attack as in *Day*, and the Court sitting *en banc* followed *Day* and utilized the tripartite test. The decision, though, found three of the nine judges dissenting. In a strong dissenting opinion by Chief Judge Seitz, the contentions of the majority were rejected in favor of the *MacDonald* test as the better interpretation of the intent behind Article 17 of the Warsaw Convention.

The final outcome of the controversy is, at the present time, facing the Supreme Court. The decision in *Day* was appealed, but certiorari was denied (45 U.S.L.W. 3280) with Justice Blackmun dissenting. However, on February 22, 1977, the decision in *Hernandez* was filed with the Supreme Court (No. 76-1132, 45 U.S.L.W. 3574) and the decision on certiorari is pending.

#### VENUE IN HIJACKING CASES

In *United States v. Busic*, 14 Avi. 17,570 (2d Cir. 1977) the Second Circuit was called upon to interpret the venue provisions of the Air Piracy Act. The act provides that the crime of air piracy can be "pun-

<sup>14</sup>*Id.* at 284.

<sup>15</sup>14 Avi. 17,534 (9th Cir. 1977).

<sup>16</sup>14 Avi. 17,612 (3rd Cir. 1977).

ished in any jurisdiction in which such offense was begun, continued, or completed, in the same manner as if the offense had been actually or wholly committed therein." 49 U.S.C. § 1473 (a). The precise question presented to the court was whether the offense began at the time the defendants seized control of the aircraft or at an earlier point in time.

The appeal arose out of the indictment of Jean Busic and four others for the hijacking of Trans World Airlines Flight 355 on September 10, 1976. The defendants began their preparations in New York by placing a bomb in a locker at Grand Central Station. Later, they purchased tickets and boarded the aircraft at LaGuardia Airport, with a typewritten hijack note and several imitation explosives which had escaped confiscation by security personnel. While the plane was still on the ground, a passenger who attempted to use the lavatory was prevented from doing so by one of the defendants. The passenger was told that there were bombs aboard, and that the plane was being hijacked. However, the actual seizure of the aircraft did not occur until the plane was flying over Buffalo, when Busic handed the pilot the hijack note.

The District Court for the Eastern District of New York accepted the arguments of the defendants that the offense did not begin until the defendants actually exercised control over the aircraft. Since the seizure did not occur until the aircraft was within the airspace of the Western Judicial District of New York, the court reasoned that venue would be proper in that District.

The Second Circuit reversed. It held that, since the defendants' acts which unambiguously confirmed their intention to hijack Flight 355 occurred in the Eastern District, venue was proper in that court. In rejecting the decision of the lower court, the Second Circuit argued that hijacking was a continuous crime, and, as such, it was the intent of Congress that the Government should enjoy the broadest possible choice of venue within constitutional bounds. Therefore, the most convenient locus for prosecution was at the place where the defendants manifested their intentions rather than at some indefinite point during the flight.

#### WARSAW CONVENTION INTERPRETATIONS

##### *United States*

The Warsaw Convention provides four places of jurisdiction over foreign carriers in damage claims: where the carrier has his domicile,

where the carrier has his principle place of business, where the ticket was purchased, and the place of destination. In *Butz v. British Airways*, 14 Avi. 17, 453 (E.D. Pa. 1976), the court had to decide the place of destination when a passenger purchases a round trip ticket.

The passengers in the present action purchased round trip tickets from British Airways in London for a flight from London to New York and return. On the flight to New York they suffered injuries allegedly due to improper cabin pressures during the final descent into Kennedy Airport. The passengers, who were citizens and residents of Pennsylvania, sued British Airways in the district court. They based jurisdiction under the Warsaw Convention on the place of destination, which they contended was New York. The court dismissed the action and held that proper jurisdiction was in London. The court based its findings on the contract between the airline and its passenger. It reasoned that since the carrier was legally obligated to transport the passenger back to the place of origin, the fact that the passenger could forego the return trip was immaterial. The court stated that, under the Warsaw Convention, jurisdiction was predicated on the ultimate destination; according to the contract in the present case, the destination was London. It further buttressed its decision by noting that the other three criteria propounded by the Warsaw Convention had been met.

### *Canada*

The Warsaw Convention provides that before a carrier can avail itself of the liability limitations under Article 22, it must provide the passenger with a statement of the limitations on the ticket. The question as to whether such a statement constitutes notice under the Warsaw Convention, as amended by the Hague Protocol, Article 3, was answered by the Supreme Court of Canada in the recent case of *Montreal Trust Co. v. Canadian Pacific Airlines*, 14 Avi. 17,510 (1976).

Joseph Stampleman died in the crash of a Canadian Pacific airliner flying between Canada and Tokyo. The ticket, which the decedent purchased for the flight, contained a statement in fine print warning the purchaser of the limitations of liability under the Warsaw Convention. The Court held that the statement was insufficient to allow the carrier to avail itself of the protection of Article 22. The Court stated that a statement in such fine print would have been sufficient under the Warsaw Convention. However, under Article 3 of the Hague Protocol, the carrier is required to go beyond a virtually invisible statement, and give the



passenger notice of the limitations in such a way as to attract his attention. The Court concluded that unless the carrier made an effort to make its passengers aware of the limitations, it would be liable for the full measure of damages.