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6-1-1972

## Aviation

Staff Report

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### Recommended Citation

Staff Report, *Aviation*, 4 U. Miami Inter-Am. L. Rev. 370 (1972)

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## AVIATION

### STAFF REPORT

#### NOTE

The Editor, in presenting this Aviation Report prepared by the Staff, notes with regret the inability of Professor Carl E. B. McKenry of the University of Miami to continue as Aviation Contributing Editor for the *Lawyer*. Professor McKenry's increased responsibilities resulting from his promotion to Vice President for Academic Affairs have a higher priority which the *Lawyer* recognizes. In congratulating Vice President McKenry on his promotion the *Lawyer* extends best wishes for his success and its gratefulness for the cooperation and dedication it received from him commencing with the first issue in February 1969.

#### INTERNATIONAL LITIGATION

On August 30, 1971, India filed in the International Court of Justice a memorial instituting proceedings against Pakistan and appealing from the decision of the Council of the International Civil Aviation Organization that it had jurisdiction to deal with a complaint by Pakistan against India's decision of February 1971 no longer to permit Pakistan aircraft to overfly its territory.

India and Pakistan are parties to the 1944 Convention on *International Civil Aviation and the International Air Services Transit Agreement*. Thus, the aircraft of each country had the right to overfly the territory of the other. This, however, was suspended during hostilities between the two states in August-September 1965 and was never revived. In February 1966, the two nations concluded a special agreement which permitted both states to overfly each other's territory on a provisional basis, on the grounds of reciprocity and subject to the permission of the Government's concerned. In February 1971, after the diversion of an Indian aircraft to Pakistan and its destruction at Lahore airport, the Government of India suspended the overflights of its own aircraft over Pakistan territory and withdrew permission for Pakistan aircraft to overfly the territory of India.

On March 3, 1971, Pakistan submitted the matter to the ICAO Council, which is empowered to deal with disputes concerning the *interpretation or application* of the 1944 Convention and Agreement. India argued that the Council had no jurisdiction in the present dispute, which related to the *termination or suspension* of these two conventions insofar as they concern overflights between two states. On July 29, 1971, the ICAO Council decided that it had jurisdiction.

Indian's appeal to the Court claims that:

1. The ICAO Council has no jurisdiction to handle the matters presented by Pakistan since the 1944 Convention and Agreement have been terminated or suspended between the two states;

2. the ICAO Council has no jurisdiction to consider Pakistan's complaint, since no action has been taken by India under the Agreement. In fact, no action could be taken by India under the Agreement since that Agreement has been terminated or suspended as between the two states;

3. the question of Indian aircraft overflying India is governed by the special regime of 1966 and not by the Convention or the Agreement of 1944. Any dispute between the two states can arise only under the special regime, and the ICAO Council has no jurisdiction to handle any such dispute.

#### RECENT U.S. CASE LAW

*Note: Citations refer to CCH Aviation Law Reporter.*

*Village of Bensenville v. City of Chicago*, 12 Avi. 17,105 (1971)

The Illinois Circuit Court for Cook County held that a municipal airport, absent evidence of improper operation is not a nuisance and cannot be enjoined from continuing present operation and expansion. The court indicated that while the injured parties might recover on the theory of inverse condemnation, the overriding public concern in the air transportation system precluded any finding that an airport operated in compliance with federal statutes constitutes a nuisance.

*Kirk v. United States*, 12 Avi. 17,115 (1971)

The United States Court of Appeals for the 10th Circuit held that while an action could be brought under the Federal Tort Claims Act for property damage caused by government-conducted sonic boom tests, when the action is brought after the two year statute of limitations has run, no recovery can be obtained. The court further held that the Tucker Act,

with its longer period for filing a suit, could not be used as a basis for recovery for the particular damage sustained.

*Smith v. Canadian Pacific Airways, Ltd.*, 12 Avi. 17,143 (1971)

The United States Court of Appeals for the Second Circuit held that in addition to the federal jurisdictional requirements, the jurisdictional requirements of Article 28(1) of the Warsaw Convention must also be met before a United States court can hear a claim based on the Convention. In dismissing the complaint the court held that the Warsaw provision that a suit could be instituted where the carrier had its principle place of business could not be interpreted so as to enable a plaintiff to bring suit in a particular jurisdiction on the grounds that the carrier has a ticket office and agent in the jurisdiction.

*Civil Aeronautics Board v. Aeromatic Travel Corp.*, 12 Avi. 17,147 (1971)

The United States District Court for the Eastern District of New York held that federal statutes regulating indirect air carriers may be applicable to travel agencies and can be used to support a CAB cause of action to enjoin such travel agencies from selling charter air transportation.

*United Air Lines v. Porterfield*, 12 Avi. 17,159 (1971)

The Ohio Supreme Court upheld a state excise tax assessed for the privilege of engaging in the business of air transportation within the state. The court held that the tax was not an unconstitutional interference with the carrier's privilege to engage in interstate transportation but rather was a valid tax on the local incidents of the carrier's air transport business.

*Wolfer v. Northeast Airlines*, 12 Avi. 17,186 (1971)

The Small Claims Court in Dade County, Florida held that an air carrier was not liable for damages sustained by the plaintiff due to the carrier's refusal to allow the plaintiff to board a flight. The court found that the carrier acted reasonably in view of the plaintiff's statement allegedly made in jest that he didn't need baggage to hijack the plane.

*Ludecke v. Canadian Pacific Air Lines Ltd.*, 12 Avi. 17,141 (1971)

The Canadian Superior Court sitting in Montreal, Quebec, interpreted the language of Article 3 of the Warsaw Convention to mean that the passenger's ticket need not set forth the Convention's liability limita-

tion in order for the air carrier to avail itself of that limitation in a death action. But the court went on to find that in view of the different language employed in Article 4 of the Convention, the carrier could not avail itself of the limitation of liability for damage or loss of luggage unless the baggage claim check clearly set forth such limitations.

*Air Line Pilots Association v. Civil Aeronautics Board* 12 Avi. 17,203 (1972)

The United States Court of Appeals for the District of Columbia held that the CAB should conduct a hearing to determine whether the statutory requirements for granting an exemption from certification continue to exist when a certificated carrier alleges that the non-certificated carrier has utilized its exemption to substantially take over a route.

*Helfet v. Pan American World Airways, Inc.* 12 Avi. 17,247 (1972)

The New York Supreme Court of Bronx County, in denying plaintiff's motion for summary judgment, held that the fact that plaintiff had her seatbelt fastened only loosely when the seatbelt sign was on could constitute contributory negligence which would bar her action for damages for injuries incurred when the aircraft on which she was a passenger encountered clear air turbulence.

*Village of Willoughby Hills v. Corrigan* 12 Avi. 17,261 (1972)

The Ohio Supreme Court upheld a municipality's adoption of airport zoning regulations. The Court held that the zoning regulations, which restricted certain land uses and established a pattern of graduated height restrictions, was a valid exercise of the police power and did not constitute a compensable taking of property where the restrictions did not affect the present or reasonably foreseeable future use of the affected properties.

## BILATERAL AND MULTILATERAL AGREEMENTS

A substantial number of bilateral air agreements, and the action taken by individual countries with regard to certain aviation multilateral agreements will be found in the INTER-AMERICAN LEGAL DEVELOPMENTS Report in this issue of the *Lawyer*.

## HIJACKING

The Federal Aviation Administration has issued an emergency directive requiring all scheduled airlines in the United States to screen every pas-

senger as a potential hijacker. Since the cost of thoroughly examining each of the 450,000 daily domestic passengers would be prohibitive, most airlines have begun to use a "behavioral profile" in order to limit the group of passengers to be subjected to intensive investigation. The profile was developed by an FAA psychologist after studying the case histories of past hijackers and consists of a list of characteristics exhibited by hijackers in the past. It is estimated that about one passenger in a hundred fits the profile and it is this 1% which can then be more closely observed, questioned, screened by metal detecting devices and possibly searched.

A New York State Supreme Court has held that the strict liability imposed on carriers by the Warsaw Convention applies to hijack situations. The court ruled that while a passenger on board a hijacked domestic flight must show that the carrier had been negligent, an airline whose international flight is hijacked is strictly liable for the provable mental and physical injury sustained by passengers aboard the flight.

### BOMB THREATS

With threats of aircraft bombings on the rise, the Federal Aviation Agency is instituting a test program at the government operated Washington National and Dulles International Airports. Hoping to duplicate the recent successes of the Bureau of Customs and the Army in training dogs to detect drugs and land mines, the FAA is currently training German shepherds to detect explosives hidden in passengers' baggage. The dogs will be used when a bomb threat is made against a given flight. Until now receipt of a bomb threat meant a long delay while luggage was tediously searched by hand. It is anticipated that use of the dogs will considerably shorten the amount of time and expense involved in searching baggage for the presence of explosives.

### AIR POLLUTION

Eighteen major airlines have agreed to install devices to control smoke emissions on all aircraft powered by JT8D engines servicing New York State airports. Jets now using the JT8D engine include the Boeing 727 and 737, and the McDonnell-Douglas DC-9. The agreement is the end result of a suit instituted in 1970 by the New York Attorney General's office charging the airlines with creating a public nuisance.

The New York requirements, which will go into effect at the end of this year, are more stringent than the federal exhaust emission standards promulgated in 1970.

## NOISE STANDARDS

The U. S. airline industry, through the Air Transport Association of America, has requested the Congress to formulate nationwide noise standards. At a Senate subcommittee hearing, a spokesman for the Association complained that cities are enacting laws using different standards and measuring units, making it nearly impossible for the airlines to comply with the requirements as promulgated.

## EQUIPMENT

The Soviet Union is presently attempting to market a new aircraft in Latin America. The Soviet craft, named YAK-40, seats 39 passengers, can cruise at 400 miles per hour, and can attain an altitude to 24,000 feet. The Soviets are hoping to establish a permanent assembly plant in Barranquilla, Colombia. Failing that, they plan to make arrangements to assemble the aircraft in the United States and for distribution in Latin America. However, prospects do not look optimistic for the success of either plan. The Colombian civilian aeronautical administration indicated that no permanent assembly plant has been authorized and that upon completion of scheduled demonstration flights, the one craft assembled in Colombia would have to leave that country. Given the dominance of American manufactured aircraft in the Latin American market, together with the comparatively small size of the market itself (few but capital cities have paved runways needed by even small jets such as the YAK-40) it is unlikely that any substantial sales will be made in Latin America.

## PERUVIAN AIRLINE

The military government of Peru has announced that it is planning to establish a new international airline to replace financially troubled *Aerolíneas Peruanas, S.A. (APSA)*. It is anticipated that the new airline will be a mixed capital company in which the government of Peru and private investors (both national and foreign) will participate.

## CHARTER FLIGHTS

The U. S. has brought suit in a Los Angeles federal court to crack down on alleged illegal charter-group flights. The suit, on behalf of the CAB, charges that the defendants appeared to be selling air transportation at a fixed price, rather than dividing the total price of the aircraft equally among whatever number of passengers make the trip, as is required for charter travel. The suit was filed to halt the "widespread black-market sale of charter flight transportation in the Los Angeles area," and

is one of a series of enforcement actions under active consideration by the Bureau of Enforcement in its effort to curtail illegal transatlantic charter abuses. The Board asked the court to enjoin the defendants from the alleged illegal activity and to cancel all existing contracts.

#### FINANCE

The Chairman of the Civil Aeronautics Board has suggested various methods for stimulating the sagging aerospace industry. In the past proposals have included institution of a policy of accelerated depreciation rates to encourage investment in new equipment and government-subsidized low interest loans for aerospace manufacturers.

Currently the U.S. Government is drafting a bill which, if enacted by Congress, will establish an aerospace reconstruction finance corporation. The proposed corporation would study all proposals for construction of new aircraft before production is started. If it is determined that the new equipment is both technically feasible and marketable a loan for development of the new equipment will be guaranteed.

#### AEROSPACE LAW INSTITUTE

The Institute of Aerospace Law, School of Law, Southern Methodist University, continues to keep those interested in Aerospace Law abreast of developments in this field of the law. In addition to its extensive academic program in Aerospace Law, the Institute continues its symposia program. Subjects covered in past symposia include the Warsaw Convention, Air Traffic Safety, Air Labor Law, Air Crash Litigation, General Aviation Law in the 70's, and U. S. Federal Practice and Aviation.

Further, the Institute is deeply involved in the subject of weather modification. Aided by a grant from the National Science Foundation, the Institute is investigating societal implications of Weather Modification Activities under a three-year grant which began in November, 1972.

#### AVIATION CONFERENCE

The Ninth Inter-American Law Conference sponsored by the University of Miami School of Law will take place in Panama, July 17-21, 1972. This year the Annual Conference will be co-sponsored by the Latin American Aeronautical Law Association (ALADA) and the University of Panama. Further details are available from the Law Center, University of Miami School of Law, Coral Gables, Florida 33124.