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damages or penalties in lease contracts. For the most part great stress is placed upon each particular fact situation and the opposing equities involved, with the result that the rules of interpretation are frequently utilized or disregarded depending upon the desired result. The modern tendency appears to place less emphasis on the *intent* of the parties, in terms of the *possibility* that the contract *might* have proven to work an inequitable result, and now views liquidated damages provisions with candor, enforcing such provisions within the bounds of reasonableness.

There seems to be no logical reason why courts should not favor or even encourage parties to adjust their damages in advance. This will enable the parties to contract with the knowledge of the result of a breach and will add some stability to lease contracts which are, in their very nature, unstable. This is especially significant in a tourist area such as Florida.

Even more important is the tendency away from litigation which such a view will encourage. Not only will this alleviate in some way, the crowded condition of the courts, but will avoid the harmful effect of litigation on business. Litigation is expensive in terms of money and in terms of time can prove to be disastrous.

JULIUS SER

AIR CARRIERS—TARIFF LIMITATIONS AS A BAR TO PERSONAL INJURY SUITS

INTRODUCTION

Air carriers, like other interstate common carriers, are required to publish tariffs setting forth their rates, fares, charges, and other information pertaining thereto.

Notice of claim and time for suit limitations had, in the past, been included by the air carriers in their filed tariffs,¹ for the alleged purpose of deterring fraudulent claims; the theory being that prompt notice enables the carrier to facilitate timely investigation. The result was that many uninformed passengers, who were not apprised of these conditions, except for a stipulation in the ticket: "sold subject to tariff regulations", were precluded from bringing suit for their injuries.

Realizing that these rules tend to become traps for the unwary, since the traveling public and their lawyers do not think of aviation in terms of special rules of procedure, the Civil Aeronautics Board saw fit to amend its Economic Regulations to the effect that tariff rules limiting or

1. A typical provision of this nature would read as follows:
No action shall be maintained for any injury to or the death of any passenger unless notice of the claim is presented in writing to the general office of the participating carrier alleged to be responsible within ninety days after the alleged occurrence of the events giving rise to the claim and unless the action is commenced within one year after the alleged occurrence.

conditioning the carriers' liability for personal injury or death will not be accepted.²

At first glance it would appear that this is the solution to the problem; an end to much hard-fought litigation that has arisen over this matter. Such, however, is not the case, for the intent of the Board in passing this Amendment was not to make any ruling on the legality of such limitations.³ Rather, the CAB clearly contends that it has statutory authority to accept time limitations by specific requirement.

It is the purpose of this comment to examine many of the cases on this subject, to point up the inconsistencies and weak reasoning in the cases, and to give the author's own views on the problem of whether or not the Civil Aeronautics Board has statutory authority to accept time limitations as a part of the air carriers' tariff.

TARIFF PROVISIONS OF THE ACT

Under Section 403(a) of the Civil Aeronautics Act⁴ every air carrier: . . . shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation . . . and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation.

The Section continues:

Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe;⁵ and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations.

In an attempt to prevent discrimination and assure uniform treatment to all persons dealing with air carriers, Section 403(b)⁶ requires such carriers to abide by their filed tariffs; departure from same being made a criminal offense.⁷

2. Civil Aeronautics Board Economic Regulation No. ER-195, 19 FED. REG. 509 (1954).

3. The Board is presently conducting an investigation to determine the legality of such clauses. Investigation of Tariff Liability Rules, 1953 U.S. Av. R. 198 (C.A.B. Docket No. 6149, 1953).

4. 52 STAT. 992 (1938), 49 U.S.C. § 483(a) (1952).

5. The regulation issued by the Board which specifically pertains to the contents of tariffs filed by air carriers is 14 C.F.R. § 221.4 (Rev. ed. 1952), part (g) of which provides that tariffs shall contain "general rules which govern the tariff, i.e., state conditions which in any way affect the rates named in the tariff, or the service under such rates." By virtue of the aforementioned amendment, see note 2 *supra*, added to the original portion of the statute is the following:

No provision of the Board's Regulations issued under this Part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death.

6. 52 STAT. 992 (1938), 49 U.S.C. § 483(b) (1952).

7. 52 STAT. 1015 (1938), 49 U.S.C. § 662(d) (1952).

It is well established, under statutes providing for the filing of tariff schedules and prohibiting any deviation therefrom, that passengers will be charged with notice of those provisions of the tariff which are filed pursuant to statutory authority,⁸ regardless of actual notice.⁹ Conversely, persons are not chargeable with notice of rates or regulations filed with the commission which are not required to be filed.¹⁰ Hence, the principal question is one of statutory interpretation—whether or not the federal statute or the Civil Aeronautics Board regulations permit the registration of tariffs containing exculpatory provisions.

COURTS' INTERPRETATION

One of the earliest cases considering the validity of time limitations in a tariff filed with the Civil Aeronautics Board appears to have been *Wilhelmy v. Northwest Airlines*,¹¹ decided in 1949 by the Federal District Court for the Western District of Washington. That was an action against the defendant air carrier for alleged negligent injury to plaintiff's ear and throat. Defendant interposed the affirmative defense that the plaintiff-passenger failed to give seasonable notice of claim as required by the air carrier's filed tariff—reference being made thereto by a stipulation in the ticket, "sold subject to tariff regulations." The court held that the legend appearing in the ticket served as sufficient notification of the thirty-day notice of claim requirement and the one-year limit for commencing suit provision, both of which are "reasonable and valid."¹²

The rationale of the court is not clearly discernible from the reported decision. The holding appears to be grounded on the case of *Jones v. Northwest Airlines*.¹³ In this case, a flight was cancelled because of inclement weather and plaintiff sued for damages resulting from this alleged breach of contract. In defense, the air carrier pleaded its filed tariff regulations to the effect that the airline will not be responsible for failure of aircraft to depart or arrive on schedule. In holding against the

8. Cf. *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566 (1921); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine R.R. v. Hooker*, 233 U.S. 97 (1913); *Texas & Pacific Ry. v. Mugg & Dryden*, 202 U.S. 242 (1906).

9. Where reasonable time limitations have been included in the contract of carriage they have been upheld by the courts on a contractual basis—not under the theory of constructive notice. *Gooch v. Oregon Short Line R.R.*, 258 U.S. 22 (1925) (agreement in "drover's pass" requiring notice to railroad within 30 days held valid); *The Finland*, 35 F.2d 47 (E.D.N.Y. 1929) (provision in steamship ticket requiring notice within 30 days held valid); *Indemnity Insurance Co. v. Pan American Airways*, 58 F. Supp. 338 (S.D.N.Y. 1944) (stipulation in transportation contract between airways company and passenger requiring 30 days notice of claim held valid); *Sheldon v. Pan American Airways*, 190 Misc. 537, 74 N.Y.S.2d 578 (Sup. Ct. 1947) (clause in contract of transportation between airways company and passenger requiring written notice of claim within 30 days held valid).

10. *Pacific S.S. Co. v. Cackette*, 8 F.2d 259 (9th Cir. 1925), cert. denied 269 U.S. 586 (1926); *Southern Pacific Co. v. U.S.*, 272 U.S. 445 (1926).

11. 86 F. Supp. 565 (W.D. Wash. 1949).

12. *Id.* at 568.

13. 157 P.2d 728 (Wash. 1945).

plaintiff, the court said, "His ticket was sold subject to tariff regulations with which he was charged with notice."¹⁴

The cancellation of flights pertains directly to the operation of airlines.¹⁵ Hence, statutory authority exists for the filing of such matters with the Board, and the passenger will be charged with notice thereof.¹⁶ Nowhere, however, is it shown that statutory authority exists for the filing of time limitations, therefor it is submitted that the *Jones* case is inapplicable from a factual standpoint.

In arriving at its decision, the *Wilhelmy* court also reasons that the terms of the filed tariff are incorporated by reference into the transportation contract by virtue of the legend in the ticket.¹⁷ In so ruling, the court distinguishes the case of *Pacific Steamship Co. v. Cackette*,¹⁸ which *really* held that:

Notice of claims for . . . damages has no perceptible relation to rates and charges for transportation. When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted.¹⁹

Shortly after the momentous *Wilhelmy* decision, two district court cases were decided on similar facts. In *Meredith v. United Air Lines*,²⁰ a passenger instituted a personal injury suit for damages resulting from the carrier's failure to keep the plane adequately pressurized. Defendant's motion for summary judgment was granted. The court—citing the *Wilhelmy* and *Jones* cases as authority—held that notification by plaintiff's physician, although made within 90 days, was not sufficient compliance with the filed tariff, since written notice of the injury was not sent to the carrier's general offices. Suffice to say, it is difficult for the writer to be impressed by the legal reasoning, or lack of same, employed by this court.

Likewise, in *Herman v. Capital Airlines*,²¹ the court summarily held the action barred where it was not brought within the one year limitation contained in the carrier's tariff—irrespective of the fact that plaintiff did not know the full extent of her injuries until shortly before she filed suit. The *Wilhelmy* case is not mentioned in the reported decision, but it perhaps was controlling.

14. *Id.* at 729.

15. See *Crowell v. Eastern Air Lines*, 240 N.C. 20, 28, 81 S.E.2d 178, 185 (1954).

16. See note 8 *supra*.

17. The court cites *Koontz v. South Suburban Safeway Lines*, 332 Ill. App. 14, 73 N.E.2d 919 (1947) as authority for this proposition. The *Koontz* case, though, pertained to the incorporation by reference of *rate schedules* into the transportation contract; *not* notice of claim provisions.

18. 8 F.2d 259 (9th Cir. 1925), *cert denied*, 269 U.S. 586 (1926) (filed notice of claim and time for suit limitations, reference being made thereto by stipulation in ticket, held not valid).

19. *Id.* at 261.

20. 1951 U.S. Av. R. 103 (D. Cal. 1950).

21. 104 F. Supp. 955 (S.D.N.Y. 1951).

It is encouraging to find that since 1952 the courts have been reluctant to follow the *Wilhelmy* decision. Instead, they have rejected notice of claim and time for suit limitations in reliance upon the *Cackette* case. In *Shortley v. Northwestern Airlines*,²² foremost²³ under this new trend of cases, the court said:

Nowhere . . . in the Act of Congress [Civil Aeronautics Act of 1938], or in the regulations promulgated by the Board, is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitation upon notice of claims or upon the time for commencement of actions thereon

Where a tariff provision is gratuitously inserted with respect to a matter other than that contemplated or required by the Act of Congress, or the regulations made pursuant thereto, a passenger or shipper is not chargeable with notice as a matter of law with respect thereto. A tariff is ordinarily understood to be a system of rates and charges. *Pacific SS. Co. v. Cackette*²⁴

In the case of *Thomas v. American Airlines*,²⁵ similarly relying on the *Cackette* case, the District Court for the Eastern District of Arkansas held that "[t]he limitation period[s] for giving notice and bringing suit in the tariffs of a common carrier are binding upon the passengers only if there is statutory authority for filing such tariff"²⁶

And in the District Court for the Western District of Missouri,²⁷ the court said: "While in the case of *Wilhelmy v. Northwest Airlines* . . . [the Court] held that the claim was barred by the provisions of the regulation yet this decision has not been followed, but a contrary ruling was made in the case of *Shortley v. Northwestern Airlines*"²⁸

Two cases²⁹ have since been decided; each apparently followed the *Shortley* decision in holding time limitations invalid for lack of statutory authority.

22. 104 F. Supp. 152 (D.C. 1952).

23. *Glenn v. Compania Cubana De Aviacon*, 102 F. Supp. 631 (S.D. Fla. 1952) was decided two months prior to the *Shortley* case. The court, however, failed to set forth clearly its reasons for invalidating the 30 day notice of claim provision and the one year time for suit limitation which was filed in the air carrier's tariff.

24. 104 F. Supp. 152, 155.

25. 104 F. Supp. 650 (E.D. Ark. 1952).

26. *Ibid.*

27. *Toman v. Mid-Continent Air Lines*, 107 F. Supp. 345 (W.D. Mo. 1952).

28. *Id.* at 346.

29. *Bernard v. U. S. Aircoach*, 117 F. Supp. 134 (S.D. Cal. 1953). Carrier pleaded its filed tariff containing time limitations as a defense to passenger's personal injury suit. The court held that the carrier had waived this "supposed defense" by failing to plead it seasonably. In well-stated dicta the court said on p. 142 that even if this were not so, the defense would not be allowable because "[i]t is clear that there is no statutory mandate or permission for the particular 'snare' or 'trap' contended by the defendant"; *Crowell v. Eastern Air Lines*, 240 N.C. 20, 81 S.E.2d 178 (1954). The court said on p. 184: "It would seem that the Civil Aeronautics Act does not require or authorize in the filed tariff the time limitation as to filing notice of claim and commencement of suit pleaded as a defense by Air Lines in this action and that such a provision is ineffective."

BOARD'S INTERPRETATION

In a recent suit brought in a federal district court³⁰ for injuries resulting from the crash of defendant's plane, the action was stayed so that plaintiffs might obtain a CAB ruling on the validity of the notice requirements in the air carrier's filed tariffs. In proceedings before the Board, it was held that a thirty day notice of claim provision is unreasonable and unlawful.³¹

Although the Civil Aeronautics Board side-stepped the question of whether or not statutory authority exists for the filing of such time limitations,³² it is interesting to notice the reasoning employed in arriving at the decision. The Board found that because of the close carrier-passenger relationship, demonstrated by the registry and attendance practices, "the rule in question is not reasonably necessary for [the carrier's] protection,"³³ especially since it has been used to "defeat the normal liability of a common carrier,"³⁴ and to enable discriminatory practices.

But in amending its Economic Regulations³⁵ so as to exclude time provisions, the Board adopts a contra stand. It specifically claims statutory authority for the inclusion of time provisions within an airline tariff. As stated on p. 510:

The Board is of the opinion that the rules herein dealt with are clearly carrier rules, regulations and practices in connection with air transportation and, as such could be required by the Board to be filed under section 403(a) [of the Civil Aeronautics Act]. Consequently, the Board by specific requirement could give effect to rules of this character, provided they were reasonable and nondiscriminatory.

The above contention is unreasonable. It is unfounded in law, as evidenced by the recent trend in the cases; if permitted to stand, a carrier might virtually insert any provision in its tariff, merely by effectuating a filing with the Board.

Perusal of the Act and regulations pertaining thereto fails to disclose statutory authority for the placing of time limitations in a filed tariff. Part 221.4 of the Economic Regulations³⁶ states that tariffs shall contain *general rules which affect the rates* named in the tariff, or the *service under such rates*.³⁷ Hardly does it seem plausible that the *rates* of air carriers

30. *Battista v. Continental Charters, Inc.*, 1952 U.S. Av. R. 471 (S.D. Fla. 1952).

31. *Continental Charters, Inc.*, Complaint of Battista, 3 PIKE & FISHER AD. LAW (2d ser.) (Decisions) 130 (CAB 1953).

32. This issue is presently before the Board. Investigation of Tariff Liability Rules, 1953 U.S. Av. R. 198 (C.A.B. Docket No. 6149, 1953).

33. *Continental Charters, Inc.*, Complaint of Battista, 3 PIKE & FISHER AD. LAW (2d ser.) (Decisions) 130, 132 (C.A.B. 1953).

34. *Ibid.*

35. CAB Economic Regulations No. ER-195, 19 FED REG. 509 (1954).

36. 14 C.F.R. § 221.4 (g) (Rev. ed. 1952).

37. *Ibid.*

are affected by a rule which requires notice of claim and commencement of suit limitations. Consequently, the only possible vindication for this rule is that it affects the *service* under such rates.

"Service" is variously defined as "any work done for the benefit of another; the act of helping another or of promoting his interests in any way."³⁸ And a glance at the Act indicates that this term is used in its ordinary connotation.³⁹ Therefore, it would seem that "service", as used in Part 221.4, implies the performance *by the carrier* of some affirmative duty towards the passenger. But the rule under examination exacts nothing of the carrier; instead it imposes the burden of performance upon the passenger.⁴⁰ Hence, this rule affects neither the rates nor the service of a carrier—and it is not includible in the carrier's tariff.

It is also pertinent to note that the Interstate Commerce Act, which, in many respects served as a model for the Civil Aeronautics Act, made specific provision for notice of claim and time for suit limitations.⁴¹ Likewise, the Shipping Act⁴² and Motor Carrier Act⁴³ expressly provide for the use of time provisions. It is submitted that, in the act under consideration, Congress has deliberately excluded such provisions. A fortiori, the Board or the carrier is powerless to act on this matter—state law on the subject governing.

CONCLUSION

Air carriers are entitled to the protection offered by notice of claim and time for suit limitations. The likelihood of fraudulent claims is proportionate with the passage of time; as evidence pertaining to the accident becomes obscure, injuries tend to become more lucid. Concededly, the unprotected carrier should not be placed at the mercy of those passengers who might be fraudulently disposed.

But as indicated earlier, the evolved method of providing for these limitations—by reference to the filed tariffs—is equally unjust. The bona fide passenger, who very rarely knows the contents of a carrier's tariff⁴⁴

38. FUNK & WAGNALL'S NEW STANDARD DICTIONARY (1954).

39. 52 STAT. 992 (1938), 49 U.S.C. § 483 (b) (1952). No air carrier shall charge a different rate "for air transportation, or for any service in connection therewith," than the rates specified in the filed tariffs. (emphasis supplied).

40. See McKay, *Airline Tariff Provisions as a Bar to Actions for Personal Injuries*, 18 GEO. WASH. L. REV. 160, 163-166 (1950).

41. 46 STAT. 252 (1930), 49 U.S.C. § 20(11) (1952). The Interstate Commerce Act requires written notice of claim within nine months and commencement of suit within two years for any loss or damage to property.

42. 49 STAT. 960 (1935), 46 U.S.C. § 183(b) (1952). The Shipping Act prohibits notice of claim limitations of less than six months and commencement of suit limitations of less than one year for death and injury claims.

43. 49 STAT. 563 (1935), 49 U.S.C. § 319 (1952), now Part II of the ICA. It provides that § 20(11) of the ICA shall apply. See note 41 *supra*.

44. Civil Aeronautics Board Economic Regulation No. ER-195, 19 FED. REG. 509 (1954).

is subject to having his action dismissed for failure to comply with these surreptitious conditions.

The CAB, in attempting to rectify this situation, amended its regulations⁴⁵ so as to exclude time limitations from the filed tariff. However, a reversal of this present position is possible, since the Board contends statutory authority for requiring such limitations. Hence, the present state of affairs is highly uncertain.

Therefore, it is this writer's opinion that the situation beckons for affirmative Congressional legislation. A uniform rule requiring reasonable notice of claim and time for suit limitations would alleviate further hardships by placing appropriate, much-needed limitations clearly before the public's eye.

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45. *Ibid.*