Air Carriers--Notice of Claim and Time for Suit Limitations

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a worker who labors on land? This problem is of importance not only to the seaman and the shipowner but to the public at large, because it is the public who ultimately will bear the burden of taxation necessary to finance the large subsidies paid to maintain the shipping industry. It is to be hoped that by focusing attention on the problem, a solution satisfactory to all parties may be reached.

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Introduction

No action may be maintained for injury to, or death of, a passenger, unless notice of claim in writing is presented to the general office of the carrier within ninety days following the occurrence of the event giving rise thereto, and unless the action is actually commenced within one year after such occurrence.

This is a typical clause utilized by many air carriers for the alleged purpose of protecting themselves from fraudulent claims. The thought is that prompt notice to the carrier permits an investigation as to the nature of an injured passenger's claim. The fraudulently disposed passenger—one whose injuries seem to multiply with the passage of time—is thus discouraged from capitalizing on the staleness of his claim.

The bona fide passenger, however, is likewise subject to the provision. His is a helpless plight, for in most instances, he is not even aware of the existence of such a condition to the carrier's liability. He would naturally assume that the pertinent statute of limitations constitutes the only yardstick as to the time within which he may move against the carrier to remedy his hurts.

The manner by which the carrier renders this clause operative is manifestly unfair to passengers. It is the purpose of this note to examine the inequity of this practice with a view of challenging its validity.

The air carrier of passengers is the primary target, although other common carriers must be considered for historical purposes, and by way of analogy. Personal injury claims of passengers will be

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1 See McKay, Airline Tariff Provisions as a Bar to Actions for Personal Injuries, 18 GEO. WASH. L. REV. 160 (1950); 1953 U. S. & CAN. AVIATION REP. 198, 199 (C. A. B. Docket No. 6149) (The Civil Aeronautics Board is investigating the reasonableness and lawfulness of such a provision.).
chiefly treated as opposed to those for property damage. Notice of claim time provisions will be stressed over the time for suit provisions, for the considerations that apply to the former, of necessity, have a similar effect upon the latter.

**Time Provision Expressed in Contract**

**Railroad Carriers**

The notice of claim provision is not of recent vintage. Its validity was proclaimed in 1874 by the United States Supreme Court in *Express Company v. Caldwell*.\(^2\) The common carrier and shipper expressly agreed that in the event of loss or damage to property, the carrier would not be responsible therefor, unless notice of claim be given to the carrier within ninety days after delivery. In a suit by the shipper for the loss of certain parcels, the carrier sought refuge behind the provision. Finding in favor of the carrier, the Court held that the express agreement between the parties was reasonable, and hence not against public policy. It did not tend to relieve the common carrier from its duties, but only served to aid it, in the event of loss or damage, to a prompt ascertainment of the facts.

The oft-cited *Gooch v. Oregon Short Line Railroad*\(^3\) was the first case dealing with notice of claim provisions in personal injury suits to reach the United States Supreme Court. Plaintiff procured a drover's pass to act as caretaker for the cattle that he was shipping. In consideration of the pass, the passenger and carrier expressly stipulated that if any injury befell the former during the journey, the carrier would not be liable unless written notice of claim were presented to it within thirty days after the injury. Plaintiff incurred injuries which led to his maintenance of this suit. The carrier defended on the ground that plaintiff failed to comply with the provision. The plaintiff was nonsuited, and upon the eventual appeal to the Federal Supreme Court, the judgment of nonsuit was affirmed—three Justices dissenting. The Court held that the thirty-day requirement was valid and reasonable as to a personal injury claim, even though Congress had expressly provided as to property damage, that the carrier may not require a notice of claim of less than ninety days.

The highest court of the land has also indicated its approval of a time for suit limitation exacted by a common carrier. Thus, in 1913, where the contract between the carrier and shipper provided that suit for property damage must be commenced within ninety days, the Court upheld the provision by ruling that parties may, by express

\(^2\) 21 Wall. 264 (U. S. 1874).

\(^3\) 258 U. S. 22 (1922).
contract, provide for a shorter time limitation, provided that the time is not unreasonably short.\textsuperscript{4}

Thus, as to railroad common carriers, the provision, when expressed in the contract, both as to property damage and personal injury suits, had only to be reasonable, and it would have been upheld. However, in 1915, Congress amended the Interstate Commerce Act, as to property damage claims, by altering the "reasonableness" standard, \textit{to wit}, that it would be unlawful for a common carrier to provide by contract or regulation for a shorter period for giving notice of claim than ninety days, for filing of claim than four months, and for the institution of suit than two years.\textsuperscript{5} In 1930, however, the Act was further amended by omitting the provision for notice of claim, and extending the time for filing of claim from four months to nine months—the time for institution of suit being retained at two years.\textsuperscript{6}

\textit{Water Carriers}

It has been said that a steamship ticket is a contract with respect to the voyage in question, the contents of which bind the passenger whether or not he reads it.\textsuperscript{7} Notice of claim provisions with respect to water carriage have been sustained, therefore, if the provision formed, in fact, a part of the contract of carriage. Thus, where it appeared on the face of a steamship ticket that written notice of claim for personal injury must be made within forty days after debarkation, the court held that since the provision was a part of the contract proper, the passenger was bound by it, even though, in fact, he was ignorant of its existence.\textsuperscript{8} Yet, even though the provision may appear on the face of the steamship ticket, it will not bind the passenger unless it be reasonable.\textsuperscript{9} If the provision appears on the back of the ticket, and nothing on its face indicates such fact, then it is not part of the contract, and the passenger is not bound thereby unless it be brought to his knowledge.\textsuperscript{10} Conversely, where it clearly appears on the face of the ticket, that the passenger should read the reverse


\textsuperscript{5}38 Stat. 1197 (1915), Southern Pac. R. Co. of Mexico v. Gonzalez, 48 Ariz. 260, 61 P. 2d 377 (1936) (Thirty-day notice of claim provision was struck down as violative of the federal statute.).


\textsuperscript{7}See Steers v. Liverpool, N. Y. & Phil. S.S. Co., 57 N. Y. 1, 5 (1874).


\textsuperscript{9}See Blackwell v. Alaska S.S. Co., 1 F. 2d 334 (W. D. Wash. 1923) (Ten-day notice of claim provision for personal injury held unreasonable and against public policy.).

\textsuperscript{10}Belloccio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale, 84 F. 2d 975 (2d Cir. 1936); Baer v. North German Lloyd, 69 F. 2d 88 (2d Cir. 1934).
side, in that event, the passenger is bound whether or not he reads it, the provision being deemed a part of the contract. However, where a legend—notice to read reverse side—appears on the face of the ticket, but which itself is not a part of the contract proper, then the provision referred to, is not a part of the contract, and the passenger is not bound thereby.

Where written notice of claim is required, mere oral notice will not suffice. Then again, the fact that the injured passenger is a minor does not excuse him from compliance with the notice of claim clause of the ticket on which he traveled. Where a fifteen-day notice of claim was required, it has been held immaterial that the passenger's injuries were not yet fully ascertained, for a general statement of injuries, as far as known, should have been given.

Time for suit limitations are likewise enforceable if found to have been a part of the contract of carriage. Thus, where the provision appeared on the ticket, it has been held that, even though the decedent was a three-year-old infant traveling on his mother's ticket, the time limitation of one year was binding.

Originally, as to both property damage and personal injury suits, it was required merely that all provisions be "just and reasonable." However, in 1935, a minimum standard, as to personal injury and death actions, was added to the Shipping Act, namely, that it would be unlawful to provide by contract or regulation for a shorter period for giving notice of, or filing claim, than six months, and for the institution of suits on such claims, than one year. Thus it has been held that where a state statute of limitations would otherwise applicable, it must yield to the aforementioned federal statute where interstate transportation is concerned. This is so, even though the state may have a statute which declares void any period less than that state's pertinent statute of limitations.

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12 The Majestic, 166 U. S. 375 (1897); Maibrunn v. Hamburg-American S.S. Co., 77 F. 2d 304 (2d Cir. 1935).
14 The Finland, 35 F. 2d 47 (E. D. N. Y. 1929).
15 The Majestic, 30 F. 2d 822 (S. D. N. Y. 1928).
18 49 STAT. 95.11(4) (1951) (The pertinent Florida statute of limitations for personal injury actions was four years.).
19 FLA. STAT. § 95.03 (1951) (A contract provision which purports to fix
Civil Aeronautics Act

With the commercialization of the airplane as a medium of transportation for both passenger and cargo, the Federal Government found it necessary, in 1938, to enact appropriate legislation. Thus was born the Civil Aeronautics Act. As set forth in its caption, it was enacted “... to promote the development and safety and to provide for the regulation of civil aeronautics.”

As a product of this legislation, the Civil Aeronautics Board came into being to provide the physical agency for the promulgation of the Act’s ends. It is composed of five members who are appointed by the President, by and with the advice and consent of the Senate.

Tariffs

The Civil Aeronautics Act expressly requires that 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 between points served by it ... and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation.” Thus, since air carriers are expressly required by statute to file these tariffs, its contents—those items required by statute and the Board’s regulations to be included therein—bind the carrier and passenger as a matter of law. And it matters not that the passenger had no actual knowledge of a specific regulation.

a period of time for institution of suit at less than that provided by state statute of limitations is void.}

21 52 STAT. 973 (1938), 49 U. S. C. § 401 et seq. (1946); see HOTCHKISS, THE LAW OF AVIATION 99 et seq. (2d ed. 1938). Its predecessor was the Air Commerce Act of 1926, 44 STAT. 568 (1926); see DAVIS, AERONAUTICAL LAW 74 et seq. (1930); Ballard, Federal Regulation of Aviation, 60 HARV. L. REV. 1235, 1237-1241 (1947).

22 52 STAT. 973 (1938).

23 52 STAT. 980 (1938) (originally known as Civil Aeronautics Authority), as amended, 54 STAT. 1235 (1940), 49 U. S. C. § 421 (1946) (now known as Civil Aeronautics Board).

24 Ibid. Its principal office is in the District of Columbia, but it may conduct hearings elsewhere, when the exigencies of a particular situation render it necessary. Ibid. As a condition to the engagement in air transportation, an air carrier must apply to the Board for a certificate of public convenience and necessity. 52 STAT. 1235 (1940), 49 U. S. C. § 481 (1946).


As stated earlier, notice of claim and time for suit provisions will generally be sustained as valid, where the time is reasonable, and where the parties have expressly contracted with respect to such provisions. This advantage is bestowed upon the carrier so that it can protect itself against stale and fraudulent claims. However, it seems that air carriers are, and have been of late, so distorting the use of such provisions, that in effect, they are not only protecting themselves from tardy claims, but adroitly escaping liability as well. The manner by which they accomplish the latter end is by the insertion of such time provisions in their filed tariffs.

Mere perusal of the Civil Aeronautics Act discloses the fact that there is no explicit requirement nor authority for the inclusion in the tariff of such provisions. However, the contents of a tariff are measured by the regulations of the Civil Aeronautics Board. Section 221.4(g) of the Board’s Economic Regulations provides that a tariff shall contain “[g]eneral 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.” The problem that presents itself is manifest, namely, whether notice of claim and time for suit provisions are rules within the contemplation of the foregoing regulation. If properly considered as such, then their presence in a carrier’s filed tariff will bind the passenger irrespective of his knowledge thereof. Conversely, if such time provisions are not authorized rules, they are not required to be included in a carrier’s tariff, and consequently do not bind the passenger as a matter of law.

It would seem that a time provision is not a rule within the meaning of the Board’s regulations. Brief analysis of the regulations will serve to support this conclusion. Section 221.4(g) of the Board’s Economic Regulations provides, as above mentioned, that the tariff shall contain rules which affect the rates named in the tariff, or the service under such rates. Section 221.1(d) defines a tariff as “... a publication containing rates applicable to the transportation of persons or property, and rules relating to or affecting such rates or transportation ...” Since a time provision clearly and

28 See statute cited, supra note 25.
30 See note 26 supra.
32 See note 29 supra.
indisputably cannot be considered a rule which affects a carrier's rates, it is not a rule that is required by the Board to be included in the carrier's filed tariff. Is a time provision a rule which affects "service under such rates"? The use of transportation in Section 221.1(d), to be deemed logical and consistent, would necessarily be substitutional for service under such rates as used in Section 221.4(g). Further, by virtue of the carrier-passenger relationship alone, the service of a common carrier can connote nothing other than the duties of a carrier toward its passengers with respect to their transportation. Thus, the question may now be phrased: Is a time provision a rule which affects the carrier's transportation of its passengers? A time provision is utilized wholly for the carrier's benefit. It exacts compliance therewith only of the passengers, yet transportation of passengers implies the exercise of duties by the carrier. It would seem, therefore, that a time provision is not a rule which affects the service of a carrier. Thus it is not a rule that is required by the Board to be included in the carrier's tariff.

If the foregoing conclusions be correct—that the Civil Aeronautics Act and the Board's regulations do not require the inclusion of time provisions in the carrier's tariff—it would follow that they do not bind the passenger as a matter of law. The carrier would, therefore, be inserting such provisions in its tariff of its own volition.

However, there is still another theory by which the time provisions may be rendered operative upon the passenger. The time provisions are not expressed on the transportation ticket, but the mere legend generally appears thereon: "sold subject to tariff regulations." Should the passenger be contractually bound thereby, even though he may not have knowledge of the specific time provision? Such would seem possible under the theory of incorporation by reference, under which the legend may constitute a sufficient reference to the tariff regulations so as to incorporate the contents of the tariff into the contract of carriage. It would be incumbent on the passenger to heed the legend-notice and examine the pertinent tariff regulations. It would appear, however, that the theory of incorporation by reference, under these peculiar circumstances, should not be applicable. Here, a common carrier is a contracting party. The effect of its contract tends to exempt it from liability for its wrongs to the public. Here, therefore, public policy steps in as an interested party. Public policy will not throttle the carrier's freedom to contract entirely, but will only force it to make a clearer and fairer contract with

35 See note 31 supra.
its passenger. The passenger, therefore, would seem to deserve more enlightening notice than the mere legend—"sold subject to tariff regulations."

Under either theory, whether considered as a proper rule to be filed or as part of the contract by reference, a time provision, rendered operative by virtue of its being inserted in the carrier's tariff, works a gross inequity upon passengers. The following practical considerations may serve to illustrate the manner by which carriers are taking unfair advantage of their passengers.

Few passengers ever read the transportation ticket. Then also, the tickets are taken from their possession too soon. Even if the ticket is scrutinized, "subject to tariff regulations" means nothing to most passengers. The handful that do understand the legend, and do have cognizance of what the Civil Aeronautics Act and the Board's regulations provide, would never expect to find such time provisions included in the tariff. Why? Because the Civil Aeronautics Act and the Board's regulations do not require nor authorize the insertion of such clauses in the filed tariff. It is inconceivable, therefore, that the passenger should nonetheless be bound by any type of provision that the carrier may gratuitously or surreptitiously or even whimsically insert in its tariff. Then again, the extreme minority, who, by some freak of chance, do know of the time clauses, may themselves be so severely injured, or the extent of their injuries may not yet be fully ascertained, that written notice of claim would not be practicable within a short time. The latter argument applies also to a shortened time for suit provision. The unfair advantage thus taken by the carriers may be pointedly summarized: Human nature and its attendant frailties should be considered by the carrier, and not exploited.

In view of the foregoing, it would seem fantastic that a court would enforce such "phantom" provisions against passengers. However, there are some such decisions. Of these, Wilhelmy v. Northwest Airlines appears worthy of extended treatment. That was a

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37 See Railroad Co. v. Fraloff, 100 U. S. 24, 27 (1879); cf. Express Co. v. Caldwell, 21 Wall. 264, 267 (U. S. 1874) (The Court held a ninety-day notice of claim valid and not against public policy. It may be noticed, however, that here the parties expressly agreed to the provision.). See also RICHARDSON, BAIEMENTS AND CARRIERS 95 et seq. (1926).
39 See Belllocchio v. Italia Flotte Riunite Cosulich Line Lloyd Sabaudo Navigazione Generale, 84 F. 2d 975, 976 (2d Cir. 1936); Blackwell v. Alaska S.S. Co., 1 F. 2d 334, 335 (W. D. Wash. 1923).
personal injury suit by a passenger, where the defendant air carrier affirmatively defended on the ground that the passenger failed to comply with a requirement that written notice of claim be presented within thirty days, and that suit be actually commenced within one year. This provision was contained in the air carrier's filed tariff—a mere legend, "sold subject to tariff regulations," appearing on the ticket. The court held that the legend appearing on the ticket was effective to charge plaintiff-passenger with notice of the contents of the filed tariff, and that included the time provisions as to notice of claim, and time for suit.

The rationale for the court's so ruling does not clearly appear in the reported decision. It would seem, however, that it was grounded on the doctrine of incorporation by reference. Thus the reference "sold subject to tariff regulations" may have been considered effective to incorporate into the contract of carriage the contents of the carrier's tariff, which included the time provisions. The passenger would be bound thereby, irrespective of his actual knowledge thereof, for he had contracted with the carrier with reference to such time provisions. Ordinarily, the reference will be held sufficient if it can fairly be said that the passenger will notice it, and if the matter attempted to be incorporated into the contract is properly described and identified. As mentioned earlier, however, the effect of such a contract, if enforced, would tend to relieve a common carrier from liability for its wrongs to the public. Public policy, therefore, jealously scrutinizes such contracts of common carriers. In view of this policy, it cannot be said that the legend "sold subject to tariff regulations" is a sufficient reference to charge the passenger with knowledge of the time provisions included in the carrier's tariff. Thus it would appear that if the court grounded its decision on the theory that the time provisions were incorporated into the contract of carriage by virtue of the reference on the transportation ticket, the strong public policy against such a contract was either ignored or lightly considered.

As to the other theory upon which the time provision in question may have been sustained as a defense, namely, that it was a rule which was required to be included in the carrier's filed tariff, thus
being capable of binding the passenger as a matter of law, this the court did not consider. It cannot be said, however, that the issue—whether or not a time provision may properly be inserted in a carrier's tariff—was not called to the attention of the court. The plaintiff himself did so, for that was the basis of his contentions. The court, however, dispelled such contention by a ruling that the decision that plaintiff relied upon, Pacific S.S. Co. v. Cackette, was not applicable, because in that case, the ten-day notice of claim requirement was considered unreasonable and invalid. It was at this exact point that the court stumbled, for a perusal of the Cackette decision will disclose the fact that this was erroneously distinguished. That case did not hold what the court in the Wilhelmy case claimed it did. But it did hold what the plaintiff contended, and it certainly was applicable. The Cackette case clearly held that since the carrier's filed tariff contained a provision—ten-day notice of claim—that was not required by statute to be included therein, the provision was not binding upon the passenger so as to charge him with notice thereof. Assuming that the Wilhelmy decision was not grounded solely on the theory of incorporation by reference, had the court taken proper cognizance of the Cackette case, it would then have been forced to decide whether or not a time provision could properly be included in a carrier's filed tariff, and the effect thereof, if permitted to be so filed. In short, this much, at least, may be gleaned from the Wilhelmy case: The court may have enforced the time provision on the ground that it was sufficiently referred to, so as to constitute it a part of the contract of carriage. Irrespective or inclusive of the foregoing, the court may have assumed that a time provision may lawfully be included in a carrier's filed tariff. Its effect then would be to bind the passenger as a matter of law. Yet this deduction is not probable, for the reason that the court did not refute the rule of the Cackette case—it falsely distinguished it. If it had taken proper cognizance of the Cackette decision, and then ruled contrarily to it, then the above assumption might have ripened into a reality. Here, as has been seen, it ruled contrarily to the Cackette case in result, but did not recognize the true holding of that case.

In 1951, two years after the eventful Wilhelmy decision, the court, in Herman v. Capitol Airlines, Inc., followed the former case by ruling, on similar facts, that since the tariff which contained the time provisions was duly filed, it formed a part of the contract of transportation, thus binding the passenger. It may be added, that although this case actually followed the rule of the Wilhelmy decision, it did not mention its name in the course of the reported opinion.

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45 8 F. 2d 259 (9th Cir. 1925), cert. denied, 269 U. S. 586 (1926).
It may be noticed that the Herman case did not consider the issue as to whether time provisions may properly be included in the carrier's tariff. The court may, however, as in the Wilhelmy case, have assumed that it was a proper subject of inclusion in a tariff, and ruled in accordance therewith. It may be said, therefore, that if the theory of incorporation by reference was not the sole basis for the decisions, the cases arouse the implication, at least, that a time provision is a rule which may be properly included in a carrier's filed tariff. In this, however, the Wilhelmy and Herman decisions seem to stand alone.

It is heartening to discover that three cases in 1952,48 on similar facts, contrary to the implications aroused by the Wilhelmy and Herman decisions, lend direct support to the rule established by the Cackette case. The courts recognized and restated the concededly well-settled tenet that all regulations included in the carrier's filed tariff bind the passenger as a matter of law, irrespective of his actual knowledge thereof. However, the three courts, ruling as it were in unison, limited the effect of the rule by the qualification that where a carrier's filed tariff contains a provision which is neither required nor authorized by statute or by the Board's regulations to be so inserted therein, the passenger is not charged with knowledge thereof. The provision referred to, of course, was either a notice of claim or time for suit requirement. The above ruling is reasonable. Were this not so, a carrier might insert any provision it so desires in its tariff, thereby seeking to bind the passenger merely by the effect of its being duly filed with the Civil Aeronautics Board.

Warsaw Convention

In view of the fact that a time provision may be utilized by air carriers engaged in international transportation, it may be well to consider the nature of the Warsaw Convention.

In 1929, an international convention was formulated and adopted to regulate the liability of air carriers engaged in international transportation.49 This treaty numbers among its signatories nearly all

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48 Thomas v. American Airlines, Inc., 104 F. Supp. 650 (E. D. Ark. 1952) (The court cited and followed the Cackette case); Toman v. Mid-Continent Airlines, Inc., 107 F. Supp. 345 (W. D. Mo. 1952) (The court stated that the Wilhelmy decision has not been followed; and expressed a doubt as to whether the C. A. B., unless expressly authorized by statute, even had the right to approve time-provision rules); Shortley v. Northwestern Airlines, 104 F. Supp. 152 (D. D. C. 1952) (The court added that plaintiff may have bound himself contractually by acceptance of ticket which stated that it was subject to the tariff provisions. But the court decided it was a question of fact as to whether the passenger had actual knowledge, or such reasonable notice which was the equivalent of actual knowledge.).

49 See Rhyne, Aviation Accident Law 252, 253 (1947); Note, 13 A. L. R. 2d 337, 344 (1950).
the larger nations of the world, the United States becoming a party in 1934.  

To avail itself of the provisions of the Convention which may exclude or limit its liability, the air carrier must satisfy and fulfill the following requirements: (1) The flight in question must be considered international transportation within the meaning of the treaty; (2) The carrier must deliver a ticket to its passenger; (3) The ticket must contain a statement that the transportation is subject to the rules of the Warsaw Convention. Where the rules of the Convention are rendered operative, the carrier is exempt from all liability if it proves that all necessary measures were taken to avoid the damage, or it was impossible to take such measures. In any event, the carrier's liability for personal injuries is limited to approximately $8,300, unless the damage was caused by its wilful misconduct, in which case, its liability is unlimited.  

Something akin to the typical notice of claim clause may be found in the rules of the Convention, but it is applicable only to damaged baggage or goods. As to baggage damage, the deliveree must complain in writing to the carrier within three days after receipt of it; as to goods, within seven days; yet if there has been a delay as to either baggage or goods, then within fourteen days. Unless the complaint be made within the prescribed times, no action will lie against the carrier. With respect to personal injury suits, there is no notice of claim requirement, but there is a limitation as to time for suit. Unless the action be commenced within two years, the action will be barred.  

Notwithstanding the want of notice of claim provisions in the Convention as to personal injury claims, it seems that they nevertheless are controlling when found to have been implemented as a part of the contract of carriage. Thus, in Sheldon v. Pan American Airways, Inc., a notice of claim provision of thirty days was enforced as to a personal injury action of a passenger. It may be noticed, however, that the provision was expressed in full on the transporta-
tion ticket itself. The flight was subject to the rules of the Warsaw Convention, but the court ruled that there was no inconsistency between a notice of claim requirement of thirty days and the Convention rule that suit must be commenced within two years—the two may operate independently of each other. It may thus be seen, that international air carriers, although the flight be subject to the rules of the Warsaw Convention, may exact notice of claim requirements from their passengers as to personal injury claims, provided that the provision be expressed in full on the transportation ticket. This rule is in keeping with that established in 1922, in Gooch v. Oregon Short Line Railroad. It is, as mentioned earlier, a sound rule, for the passenger has clearly contracted with the carrier with respect to the notice of claim requirement. The fact that the passenger may not have read the ticket, is of no consequence. The provision, being expressed on the ticket, forms a part of the contract of transportation. Contracts would be worth less than the paper upon which they are impressed, if a contracting party were permitted to escape the performance of his duties thereunder by the mere excuse that he did not read any specific term or condition. It is clear, therefore, that it is not objectionable for international air carriers to exact such a requirement, under the foregoing circumstances.

Although an international carrier may be subject to the rules of the Warsaw Convention, it is also required to file tariffs with the Civil Aeronautics Board. A problem, therefore, is presented where the carrier includes in such filed tariff a notice of claim provision, which is not likewise expressed on the transportation ticket. The court, in Glenn v. Compania Cubana De Aviacion, S. A., resolved the foregoing against the carrier. The case concerned itself with a wrongful death action, the air carrier defending on the ground that its filed tariff contained a thirty-day notice of claim requirement, with which the claimant failed to comply. The court, in rejecting the defense, based its ruling on the ground that the provision was not expressed on the ticket itself—thus not meeting the standard established by the Gooch case. In thus holding, therefore, that the tariff provision was not effective to constitute a defense to the carrier, the court apparently assumed that such a tariff provision does not bind the claimant as a matter of law, and based its ruling solely on the carrier’s failure to meet the ordinary contractual test established by the Gooch case. Thus it would seem that if a carrier, engaged in transportation subject to the rules of the Warsaw Convention, seeks to render a notice of claim requirement operative, irrespective of the existence of a tariff provision dealing therewith, it should express such provision in full on the transportation ticket itself. It will thus become a part of the contract of carriage, by which the passenger is

60 258 U. S. 22 (1922).
bound, whether or not he actually reads it, for by his acceptance of the ticket, he contracts with the carrier with respect to such provision.

**Recent C. A. B. Developments**

After the occurrence of a major airplane accident, suit was brought in the United States District Court of Florida to recover damages for personal injuries from the allegedly responsible carrier. The interposed defense consisted of an uncomplied-with provision contained in the carrier's filed tariff to the effect that notice of claim must be presented to the carrier within thirty days after the accident. The court ruled that the defense was effective to bar the suits if the provision was lawful. Holding, however, that the Civil Aeronautics Board had primary jurisdiction as to the validity of the tariff provision, the court stayed the proceedings until the plaintiffs could obtain a ruling therefrom. The Board, in the proceeding in January, 1953, deliberately avoided the issue as to whether or not the provision in question was properly included in the air carrier's tariff as being required or authorized by the Civil Aeronautics Act and the Board's regulations thereunder. Instead, probably in view of the fact that the foregoing issue was presently under investigation by the Board, it assumed that the provision was properly included in the tariff, and sought to determine whether or not the rule was reasonable. The Board found that, in view of the facts that the provision is not reasonably necessary for the carrier's protection, that it serves as a device to defeat the normal liability of a common carrier, and that it lends itself to discriminatory practices, the provision in question "... is and always has been unjust, unreasonable, unjustly discriminatory and therefore unlawful." It may be noted, that the Board declared the provision void as of its inception, thus permitting the claimants to proceed with their actions before the courts, unhampered by the use of the provision as a defense against them. Then too, it may be added, the finding of the Board affected only the provision of this air carrier's tariff, and had no automatic effect upon similar provisions employed by other air carriers. Upon the rehearing before the Board in May, 1953, the Board again refused to consider the issue as to whether the provision can properly be included in a carrier's tariff. It stated that the claimants, in view of the Board's finding the provision "always void," have obtained adequate relief, since they may now freely pursue their remedies before the courts.

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64 Id. at 476.
Thus, one conclusion at least may be gleaned from the foregoing proceedings. The Board considers a thirty-day notice of claim provision, with respect to personal injury claims, unlawful. However, as to whether the provisions may be properly included in the carriers' tariffs, the problem remains extant.

It appeared from the Board's decision, that at least two issues are being investigated by it: (1) Whether such time provisions—inclusive of time for suit requirements—can properly be included in a carrier's tariff; and (2) Whether a notice of claim provision as to personal injury or death claims, other than the thirty-day clause previously struck down, would be considered reasonable. Specifically, the clause under investigation provides, as to personal injuries or death of a passenger, that written notice of claim be presented to the general office of the carrier within ninety days after the accident, and that the action be commenced within one year.

It has been recently noted that "... six air carriers had voluntarily amended their filed tariffs so as to: (1) eliminate two 'personal injury' rules... (2) lengthen the time periods: 45 days for notice given at any office of the carrier; 2 years for suit...". The foregoing in one aspect appears to be encouraging, namely, that during the critical stage while the problem remains unsettled, the carriers indicate a willingness to compromise.

Besides the aforementioned investigation, the Civil Aeronautics Board has, in July, 1953, proposed that its Economic Regulations be amended so as to indicate clearly that time provisions, with respect to personal injury and death claims, are not required to be included in the carriers' filed tariffs. The Board has not yet taken final action on the proposed amendment. Section 221.4(g) of the Board's Economic Regulations would be amended, by adding thereto: "No provision of the Board's regulations... shall be construed to require... the filing of any tariff rule stating any limitation on, or condition relating to, the carrier's liability for personal injury or death...". This amendment, if passed, would appear to be the solution to the problem.

Conclusion

The air carrier's utilization of notice of claim and time for suit limitations is a necessary evil which must be tolerated. The carrier needs and deserves the protective shield that it provides. Unless the

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66 See note 63 supra at 474.
67 See note 63 supra at 476.
69 See Note, 1952 U. S. & CAN. AVIATION REP. 239.
71 14 CODE FED. REGS. § 221.4(g) (Rev. ed. 1952).
72 See note 70 supra at 5.
claimant is required to notify the carrier within a reasonable time after an accident, as to the nature of the accident and his injuries, the carrier may be unable to adequately defend itself, especially where the staleness of the claim is enhanced by the postponement of the suit. With the passage of time, an investigation by the carrier proportionately becomes of lesser value, as evidence has been disturbed or lost, passengers have dispersed in all directions, and the injuries of fraudulent passengers have mysteriously multiplied. Stale claims and delayed suits, therefore, were it not for the exaction of time provisions, would provide the passenger with dual weapons, which it could wield mercilessly upon the unprotected carrier.

Although the carrier, therefore, needs the protection of such time provisions, it does not follow that it should use them unfairly. As was pointed out earlier, time provisions have long been considered valid, provided, of course, the period of time be reasonable. Originally, however, they were effective only when expressly agreed to by the parties, i.e., the passenger actually knew the nature and extent of the conditions with which he must comply. The theory was logically extended to situations where the provision appeared on the transportation ticket, thus forming a part of the contract of carriage, and effective to bind the passenger irrespective of his actual knowledge thereof. In the foregoing situations, the passenger can be said to have contracted with the carrier with respect to such provisions. Thus, provided the time be reasonable, he cannot complain of the consequences if he fails to comply.

It is sought today, however, to further extend the efficacy of such time provisions. By the carrier’s mere insertion of such provisions in its filed tariff, it seeks to bind the passenger thereby, irrespective of his actual knowledge thereof. The history of the use of time provisions rebels against the very heart of such a proposition. It appears, however, that the time provisions are sought to be sustained under either of two theories or both. (1) Under the doctrine of incorporation by reference, the carrier, by impressing the legend “sold subject to tariff regulations” upon the transportation ticket, purports to incorporate the time provisions into the contract of carriage, thus binding the passenger irrespective of his actual knowledge thereof. As mentioned earlier, the doctrine of incorporation by reference should not be applicable. Public policy demands that common carriers make fair contracts with their passengers. “Sold subject to tariff regulations” on the ticket would not seem to be an effective reference, especially in view of the fact that passengers would not expect to find such time provisions included in the carrier’s filed tariff. (2) The other theory by which the carriers seek to render time provisions operative is by the mere effect of their being included as a rule in their filed tariffs, thus purporting to bind the passengers as a matter of law. This, of course, presupposes that a time provision is a rule which is required to be included in the carrier’s filed tariff.
It would seem, as indicated earlier, that the Civil Aeronautics Act and the regulations of the Board thereunder neither explicitly nor impliedly require or authorize the inclusion of time provisions in the carrier's filed tariff. It would follow that a passenger should not be bound thereby as a matter of law. Were the rule otherwise, the carrier would be a law unto itself. It could freely exact any type of condition it desired, with the effect of binding the passenger thereby, merely by inserting it in the carrier's filed tariff. The effect of filing, however, cannot conceivably be elevated to such a high dignity.

The bar provided by the enforcement of time provisions in personal injury and death actions has proved to have such devastating repercussions, that Congress and the Civil Aeronautics Board could not conceivably have contemplated the manner in which they are used, unless it explicitly required their inclusion in carriers' tariffs. Passengers and their lawyers alike have been trapped, being unable to guard against the consequences of such provisions, because they know not of their existence. As to personal injury and death claims of passengers against water carriers, the Shipping Act expressly permits the use of time provisions. As to property damage claims against railroad carriers, the Interstate Commerce Act expressly provides for the use of time provisions. It would seem, therefore, that if Congress through the Civil Aeronautics Act, or the Board thereunder, through its Economic Regulations, intended that a time provision was a rule which could properly be included in the carrier's filed tariff, it most certainly would have explicitly so provided. Absence of express prohibition cannot be tortured to connote invitation. Rather the rule is, or should be, that unless explicitly provided by statute or the regulations of the administrative board thereunder, a common carrier is powerless to act with respect to the public.

Since, however, the passenger is purportedly bound by such time provisions which are unknown to him, it is plain to see that the effect of including time provisions in its filed tariff enables the carrier to escape liability for its wrongs to the public. It may thus be said that the manner by which these provisions are rendered operative is against public policy, and should not be condoned by the courts.

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76 "The rule [thirty-day notice of claim for personal injury of railroad passenger] is a novel and cunning device to defeat the normal liability of carriers and should not be made a favorite of the courts." Gooch v. Oregon Short Lines R. R., 258 U. S. 22, 32 (1922) (dissenting opinion—three justices). It may be noticed, that in the Gooch case, the provision in question was the subject of express agreement between the parties. A fortiori, the manner by which air carriers render such time provisions operative—by insertion of them in their filed tariffs—should be considered all the more unfair, thus clearly against public policy.